CBA Response to

The Justice Committee Inquiry into the use of pre-recorded cross-examination, under Section 28 of the Youth Justice and Criminal Evidence Act (YJCEA) 1999

6th December 2023

<u>In Summary, our view is that:</u>

i. **Achieving the best evidence of an individual witness and helping the witness to participate fully is the aim;**

ii. **Equally, helping the jury to make the best assessment of the witnesses' truthfulness and reliability is essential to the fairness of the proceedings;**

iii. **S.28 has an important role to play where suitable witnesses will benefit from its use;**

iv. **A *bespoke* approach should be taken to the application of S.28. It should not be used routinely, and should not be *assumed* for those above the age of 13, without something more than age to support its use. S.28 should be the exception rather than the rule.**

<u>The following matters need to be addressed as a matter of urgency:</u>

v. **A full review of Special Measures procedure and practice as a whole, which must be done in consultation with the CBA;**

vi. **A protocol for every stage of the s.28 process should put in place, reflected in the Criminal Procedure rules, so as to provide a consistency of approach. This should include guidance on significant tasks that arise uniquely from a s.28 hearing, for example, the need for trial counsel and the trial judge to be available for s.28 hearings, the checking and editing of recordings, and preparation of transcripts of cross-examination. The CBA should be involved in drafting this;**

vii. **Provision should be put in place, at least on a trial basis, where Courts across each circuit set aside 2 days a month to Ground Rules and s.28 hearings;**

viii. Consideration should also be given to proceedings involving s.28 hearings being listed and dealt with on a regional basis, rather than being tied to a particular Court centre. These two proposals (vii and viii) are advanced in an attempt to facilitate the timely listing of these sensitive and important trials by making it easier for suitably qualified counsel on both sides to conduct them.

ix. There should be early engagement in the s.28 process, informed and well-founded s.28 applications, and a proactive approach to witnesses to whom the procedure applies;

x. Further education of specialist RASSO counsel, prosecution and defence, and the judiciary is needed — clarifying procedure, manner of engagement with witnesses, and the extent to which challenge can be made in cross-examination;

xi. A review of the fee structure for s.28 hearings is required, providing for the additional extraordinary tasks demanded as a result of the s.28 procedure being adopted;

xii. Prosecution fees must be brought in line with those of the defence.

Introduction

1. The CBA represents the views and interests of practising members of the criminal Bar in England and Wales.

2. The CBA's role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.

3. The CBA is the largest specialist Bar association and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.

JSC Consultation Response

4. The CBA has been asked to provide a written response to the Justice Committee's inquiry into the use of pre-recorded cross-examination, under Section 28 of the Youth Justice and Criminal Evidence Act (YJCEA) 1999, and specifically to address the 11 topics posed in the terms of reference. Each of these is addressed in turn below.

5. By way of introduction, it should be clear that the CBA has been considering the viability of the s.28 procedure as it currently stands for some time, and has sought the views of a number of specialist RASSO[1] practitioners at varying levels of call,

[1] Rape and Serious Sexual Offence

who regularly deal with cases involving rape and sexual offending involving children and adults as victims and defendants. We have also consulted with those who have deployed s.28 in the context of non-sexual cases, such as serious violence, modern slavery and murder trials, again often involving children and vulnerable adults. Between us there are decades of experience both defending and prosecuting in cases to which s.28 applies.

6. Our experience goes back to the time before the introduction of Special Measures under Part II of the Youth Justice and Criminal Evidence Act 1999 (the Act), now 24 years ago, and the development of s28 (prerecording of a complainant, or qualifying witness's cross-examination), and its use alongside other measures available (such as pre-recorded ABE[2]'s as a witness's evidence in chief) has been carefully observed. As such, we are collectively, and possibly uniquely, able to appraise how Special Measures have developed in law and application across that time.

7. In practise, very little has changed in terms of the way in which the Special Measures principles are applied: despite significant developments in social, cultural and practice related attitudes. This is a problem. We have found that entrenched and outdated views about the conduct of RASSO cases as a whole remain, from all parties involved in the investigative and trial process. This is exacerbated by a decline in public confidence in the conduct of such cases, and the practice of cross-examination, which we have watched become increasingly portrayed as a '*dark art*' of advocacy, or even outright bullying, rather than the difficult skill that professional and accomplished barristers develop over the course of lengthy careers, learning from experience, continued education, and even mistakes. Cross-examination is <u>central</u> to the trial process, and our experience is that juries appreciate it when it is done well. Proper cross-examination does not involve routinely bullying and / or demeaning a witness. In these very serious cases, where juries carry a significant burden in the decision they ultimately have

[2] Achieving Best Evidence video interview, conducted by police on an allegation being made

to make, they want to see the evidence *tested* and the case *proved*. Invariably, this is what gives them the collective confidence to convict: for example in cases where a sexual complaint may be uncorroborated, and the defence is denial, or consent - notwithstanding the burden and standard of proof.

8. It follows that in our view s.28, and the measures associated with it, should never be considered as the panacea for boosting conviction rates, nor as a cure to the backlog of cases within the Criminal Justice System.

9. Our concerns are significant, and they are wider than this response, and the issues that we have been asked to address here. **We wish to foreshadow that we consider that there is a strong case for a review of Special Measures as a whole, and how they are applied in the modern era. We consider there is a real need for very close revision of this system, that has largely been untouched for the past 24 years, and of the s.28 provisions which have been pasted onto it, with good intention, but without the infrastructure to make it workable in practice.**

General Comments on s.28 YJCEA '99

10. In our view s.28 may be an extremely useful tool in some cases, however in practice it is being used far too widely, and offered or simply applied for as a matter of course, and without proper consideration, discussion with the witness concerned, or real consultation with prosecution counsel. Its extension to all vulnerable witnesses (eg. those to whom s16 and s17 of the Act applies[3]) has compounded this issue, and is highly problematic.

11. As a matter of general principle our position is that all witnesses, no matter their ages may, when assisted by experienced counsel, be capable of giving evidence in criminal proceeding in the best way possible, in person before the jury, from behind a screen, or on a TV link. That is the ideal. In our view this should only be departed from where necessary, when it is genuinely in the best interests of a witness who is vulnerable through age, impairment, fear or trauma, or where

[3] See Annex 1

specific circumstances arise – for example where the pace at which a witness may need to give their evidence makes s28 ideal as breaks can be edited out, so as not disrupt the flow of the account that the jury see in a trial. Further, that s.28 should only be undertaken with the full involvement of the witness concerned, as is implied from s16 and s17 YJCEA '99.

12. A fundamental problem with the s.28 procedure and implementation is that it was originally designed for use in other jurisdictions, where there are a much smaller numbers of cases. The procedures have not been properly adapted to our systems in England and Wales, rather those in place elsewhere have simply been scaled up in an attempt to make them fit our capacity, and our system, without sufficient thought to practicalities and impact on areas such as: the need for additional criminal procedure directions, court listings, allocation of work, judicial continuity, counsels' other professional commitments, and fee structure. The 'up-scaling' has not really worked effectively, and as a result, the processes have not been able to properly adapt.

<u>Process of how s28 is applied</u>

13. It is routine for all complainants, children and adults, in RASSO cases to undergo an Achieving Best Evidence (ABE) interview conducted by the police. This interview is recorded, and in due course will usually serve as the witnesses's evidence-in-chief at trial. It is however, also an investigative tool, and as such there are competing interests at play when it is conducted, with questions being asked by a police officer, rather than by counsel. There is no CPS nor prosecution counsel involvement in this crucial piece of evidence gathering and presentation. Clearly this part of the evidence does not feature the complainant being in-person before the court. We consider there to be significant issues with this method of presenting what may be the Crown's only or principal witness's evidence

14. Following the ABE interview, the decision to use or apply for a s28 procedure may be made at the investigation stage by the police or by the CPS after charging. It

sometimes is made by enquiry of the court at the first case management hearing, the Plea and trial Preparation Hearing (the PTPH).

15. Thereafter, an application is made to a Crown Court Judge in a prescribed form. Following which a time table is set for a Ground Rules Hearing (GRH) then a date is set for a s28 hearing at which the witness is questioned by both counsel.

16. There are different rules of court for child witnesses (those under 18), or those with communication difficulties where the services of an Intermediary may be deployed to assist with the construction of questions.

17. The ABE interview and the s28 recording are later played to the jury during the trial. Thus the jury may determine the facts, and defendant's guilt or innocence without ever seeing the witness in person.

18. A witness may not be best served by it being *assumed* that a s.28 process is in their best interests. The interaction of a witness with the jury *face to face* is an integral part of the communication interplay between witness and jury, giving best effect to the witness's testimony, affording the witness an opportunity to fully engage in the trial process, and to see and communicate directly with those who will make the decision on guilt of innocence. The powerful effect of a jury hearing and seeing, in-person, the principal witness for the Crown cannot be over-emphasised.

19. It is worth remembering that it is exceptional for a defendant who gives evidence <u>not</u> to go into the witness box and be questioned in a conventional way before the jury. If we are correct to infer that juries find this helpful, and potentially persuasive, then it may follow that to discourage or deprive a prosecution witnesses capable of giving live evidence *might* confer an unintended advantage to the defence.

20. Our experience is that witnesses are often encouraged to take express a preference for the s.28 procedure, and that it is sometimes offered up to parents as an *inducement* to allowing their child to give evidence, the implicit suggestion being that it will make it easier, and that there will be less challenge. However, the

process is often ill-explained, with the benefits and advantages rarely spelled out sufficiently clearly so as to give the witness a proper basis on which to make an informed choice-if indeed they are asked at all, as often s.28 is assumed. By way of example, in a recent case reported to us, a s.28 application was made in respect of a youth, without consultation with prosecution counsel. When the teenage witness attended court, they were clear that a) they had never been asked their views, and b) they did not wish to give evidence by way of s.28, but wanted to participate fully in the trial. Further, a 'defensive', 'automatic' or 'wrong' s 28 decision is not a neutral litigation step without consequence - it adds considerable unnecessary burden to the case, and by extension to the workload of the court and stakeholders overall.

<u>The 11 Topics on which we are invited to comment, from the Terms of Reference</u>

I. **Every aspect of the practical operation of section 28, including the role of the police, the Crown Prosecution Service, legal representatives and the judiciary;**

21. This is a "catch-all" question – to be informed/answered by responses to individual questions below. We set out hereunder the immediate problems with s28 in practice and provide comments and or solutions in italics.

22. In terms of practicalities, the police and CPS often fail to identify whether a case is one in which they are seeking to engage s.28 at a sufficiently early stage. Applications are sometimes lodged weeks post PTPH. This results in delays, which s.28 was designed to avoid, and difficulties in finding suitable listing dates, convenient to the court, judge, and trial counsel.

23. Intermediary reports for witnesses and defendants are often not available at an early enough stage. This gives rise to two further issues:

    i. The Registered Intermediary [RI] at the ABE (if one is used) should be the same as at the s28 if at all possible. However, the RI's

available for use at an ABE must be those on NCA list of approved providers so the stream of availability is narrowed.

ii. In any event all of the RI providers are themselves struggling to provide sufficient numbers of RIs at the current fee rates. There has been a marked dilution in the quality of RIs over recent years as demand outstrips availability.

24. Similarly, where a defendant may have psychiatric issues, including potentially recourse to a partial defence of diminished responsibility, there is very little point trying to expedite s28 hearings before psychiatric reports are received. This is because until those reports are received, the issue(s) in the case will not be known to the defence - who cannot begin to commit themselves to a line of cross-examination or confirm witness requirements.

25. Evidential bundles are not always ready in time, or need further amendment post s.28 hearings. For example, many cases these days rely significantly on telephone evidence, which can be complex, arising from multiple telephone handsets and call data, which needs to be analysed and reduced to an explanatory graphics so as to explain it to the jury. These graphics can run to hundreds of A3 pages of detailed material which needs to be available and assimilated for cross-examination of the relevant witnesses.

26. We have encountered a number of cases where disclosure issues have arisen post s.28 pre-recorded cross examination, which then presents issues at trial. This often is to the Crown's disadvantage because a matter then has to be dealt with in agreed facts, which is not a satisfactory solution, and is potentially unfair to a witness who may have been able to deal with the questions in evidence.

27. There are also a number of practical and professional problems, and unintended consequences of the s.28 procedure which have not been properly thought through:

a. <u>s28 transcripts</u>

When an ABE interview is completed, a transcript is ordered by the police/CPS and provided to the CPS and the defence as part of the case documents. This makes the understanding of the ABE recording easier and facilitates any editing of the ABE if necessary. The transcript is lent to a jury to read when and only when the quality of an ABE recording is poor. **There is no similar provision for a transcript to be made of the s28 cross-examination recording**[4].

b. W*ho is responsible for transcribing s28 recordings?* There is no funding for a transcript of a s28 recording. Clearly there must be a transcript made of the s28 recording. Judges are increasingly asking counsel to "make" a transcript of the cross-examination and re-examination. *This is unacceptable across a number of levels and must stop. Judges should, at the outset, make it clear that they will order a transcript of the s28 cross-examination, and funding for this purpose must be provided*[5]. The practice, of requiring counsel to compile transcripts, unpaid, is one of the reasons why counsel are refusing to undertake s28 hearings. At this stage of proceedings, counsel have significant other work to do for the trial, and adding this burden takes them away from the valuable preparation needed in other areas.

c. <u>Different types of s28</u>

i. When s28 is used for s16 witnesses, children, and especially young children or those with clear communication or learning difficulties, it is understandable that specific and well-crafted questions are

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[4] The introduction of s28 failed to take account of many practical or resourced effects which mean there is a cobbled together series of irregular practices across the country.

[5] In any event, legal transcription is a highly skilled resource which is simply outside of our professional obligations. This has been the subject of some recent research albeit in the context of ROTIs, but ROVIs are touched upon.
Please see:
Richardson, E., Hamann, M., Tompkinson, J., Haworth, K., & Deamer, F. (2023). Understanding the role of transcription in evidential consistency of police interview records in England and Wales. *Language in Society,* 1-32. doi:10.1017/S004740452300060X

proposed by both the prosecution (as additional questions 'in chief,' i.e questions further to those asked by the police in the ABE interview) and by the defence (cross-examination). This process is undertaken in a Ground Rules Hearing, at some stage prior to the child giving evidence, and it can be a useful exercise[6].

ii. Compiling cross-examination questioning in this way is very disconcerting, very complex and time consuming, and often comes at a time when not all the evidence has been served. Away from rest of the trial-preparation, this way of preparing for cross-examination is disjointed and difficult.

iii. However, in each case, the particular needs of the witness should be considered. *Not every case should require the defence to provide chapter and verse of their cross-examination to the court and the prosecution. In some cases, particularly where a child is 13 or older, topics may suffice, as experienced counsel should be expected to know the toolkit, and how to properly question a young witness.*

iv. When the witness is a s17 witness or an adult, who for all other purposes is capable, save they are *nervous* about giving evidence, which is often couched in terms of fear and distress, there is little need for compelling counsel to provide questions in cross-examination in advance of the s28 hearing.

v. All too often s28 is being used for inappropriately identified witnesses; the concept of their being a choice for witnesses in how they give their evidence has been eroded, and it has become less of

[6] However, note that here there is an odd dichotomy. When an ABE interview is undertaken, the police questioning of the witness are not subject to any judicial or communication expert intervention or assistance. Yet when expert counsel questions a witness in cross examination there is? This may demonstrate that distrust has grown up, and an assumption that counsel will not abide by the rules of cross-examination, or the Advocate's toolkit.

a choice and more of a prosecutorial steer with significant unintended consequences.

d. Loss of Jury contact and consequent potential effect on verdicts

We are convinced that there is a highly negative effect on Juries and Judges when where a prosecution case relies on the evidence of a principal witness, the complainant, and that witness is not before the jury in person at all.

In order for the fact finders, the jury in the Crown Court and the DJ in the Youth Court (and to some extent also the Judge in the Crown Court), to assess a witness on a connective level, seeing a witness in person is an important part of the assessment as to truth telling in the trial process. An ABE recording and a s28 recording removes the witness from the jury's personal engagement.

While Juries well understand the fact of a child or young child being on a recording, we believe they may be less likely to understand this in the case of an older child, or adult who appears not to have any deficiency in communication or understanding.

We are concerned that the methods of engaging with witnesses at an early stage in the preparation cycle of a case are poor. Witnesses' real choices are not well explained, the conditions of use of a s28 cross-examination and the use of the recording thereafter are not well settled or explained, nor are the potential consequences, especially to older children and adults, who are able to understand the issues. We question the level of real engagement with complainants on this issue and their understanding of how s28 may impinge on their evidence giving, and engagement with the trial.

e. <u>s28 and re trials</u>

One of the most compelling arguments in favour of s.28 recorded cross-examination is the fact that the cross-examination is caught early, and should not need to be repeated in the event of the trial collapsing through illness, or a hung jury. *There are currently no bespoke rules of court in place to deal with the use of s.28's in a re-trial, and it is presumed that application would need to be made through the hearsay provisions, which are not a good fit.*

However, little consideration has been given to the common situation where a trial involving s28 recordings may result in mixed verdicts. Thus, there may be a re trial, but with fewer defendants, where both the prosecution and defence need to tailor their approach accordingly. How is the original s28 recording, which included elements of evidence now not before the re trial jury, and potentially inadmissible, to be dealt with? Who is responsible for editing in those circumstances? What is the procedure where the verdicts result in there being a need for either side to ask additional questions of the witness, or to alter their approach to the evidence?

There are currently no rules of court to deal with this complex situation. It is an illustration of why a proper transcript should be ordered at the outset.

f. Various procedural questions arise*:*

i. is the complainant properly engaged and informed in the process of choosing a s.28 cross-examination?

ii. how and by whom is the original s28 recording of cross-examination to be made and edited?

iii. In the event of poor audibility, what rules apply to the jury having a transcript for the play back of the s.28 recording?

iv. It is undoubtedly the case that a re-trial may be a very different case to the original. Time will have moved on, there may be new material available that needs exploration with a witness, what should be done in those circumstances?

v. When is a further s28 hearing necessary, and is it possible at all given the passage of time?

vi. What if the witness is no longer a child by the time of the re-trial, and there is no longer any bar to their giving evidence in the usual way?

*vii.*can a mixture of s28 and other evidential presentation be used at the re trial for the same witness?

g. Unintended Disclosure

i. We are increasingly finding that judges are requiring s28 applications to be backed by detailed evidence of the need for any s28 process to be adopted: eg re a witness' particular vulnerabilities. *[This seems to be a historic lay over from the procedures that used to be used for other Special Measures application*s]. That application, with the evidential detail, is then made available to the defence and to the defendant. That risks having the undesired, possibly unintended, and possibly unlawful consequence of giving sensitive disclosure to the defence via the s28 procedure which they might not be entitled to receive under the standard CPIA regime, but thereafter may be able to seek to deploy in cross-examination of an already vulnerable witness.

II. The level of use of section 28 before and since its roll-out, and the extent of up-take for cases which are eligible.

28. It should be noted that s28 was rolled out nationally before there was any empirical data on the impact of the s28 regime in England and Wales: for instance, on juries' perceptions of pre-recorded evidence both in chief and in XX; on the perceptions of eligible witnesses; on counsel's engagement and continued preparedness to undertake RASSO work; on listing delays after the s28 recording and before the balance of the trial process; on conviction rates. With hindsight, the roll out of section 28 was to some degree untimely - the lockdown may have made the British public more familiar with video conferencing, but a good proportion of them were wearied by it.

29. We consider that s.28 is too widely applied. There is generally a lack of proper consultation with witnesses to whom s.28 could apply, but who need to understand all the options, the potential impact, and what their experience of the trial process will be as a result of giving their evidence in that way. It often appears s.28 is the default rather than as a properly considered application, and prosecution counsel are rarely, if ever, asked to express an opinion as to whether the case is one in which s.28 should be sought, bearing in mind the different and competing issues in any given trial.

30. Although the CPS is getting better in some areas, there is room for significant improvement: the police need to be more pro-active in identifying cases which might be suited for or which might require s28 and seeking witnesses' views at an early stage; reviewing lawyers need to be more astute to the need for and details of any s28 application at an early stage; and the courts need to grip s28 issues as an essential part of their case management functions from PTPH or even before.

III. The quality of technology used to operate section 28, and how this could be improved;

31. Generally, our collective experience is that the technology to support s28 recordings is extremely poor.

32. The present Vodafone technology – taken up for commercial reasons rather than for reasons of practical use and the interests of justice – is not fit for purpose, and counsel report endless issues with Vodaphone, playback and editing. The position is exacerbated by the fact that Courts do not have a uniform system, or protocol as to how such hearings are conducted, how the resulting recordings should be edited, and how transcripts of the witnesses' cross-examination is produced, often leaving it to counsel to try and resolve all these matters.

33. A few selected examples follow:

    a. it is impossible to book a shorter appointment than half a day even when it is obvious that only a short recording session will be needed;

    b. it is impossible to pause a recording once started – eg for legal discussion;

    c. access to recording playback is clumsy and often [still] doesn't work smoothly. This again makes professional life very challenging.

    d. there is no automatic provision of transcripts, so that while some judges will order transcripts, that is very few, and the decision to do so tends to be for reasons to do with the technology, rather than to assist the parties;

    e. we have also been told of court centres where new improved court audio-visual systems have been installed, but is so sensitive that the noise of typing drowns witnesses' voices on the recording. Again, this gives rise to issues over the compilation of a transcript, which many judges expect counsel to type up and agree as part of their [unpaid] exercise of checking the recording, This also gives rise to further questions, for example, what happens when there is a dispute about what the witness said.

34. All of the above problems could be improved, but there needs to be adequate *investment* in a product that has been produced with considerable thought and consultation, and the court process and facilities in mind.

35. It is understood that the Vodafone platform is soon to be phased out, and replaced by a more flexible and nimbler platform (but note that the contract has been extended somewhat – so unclear whether the new system is ready).

36. It is to be hoped that the new system will permit pauses in the recording process, and the automatic generation of accurate transcripts.

37. We would never wish to see young and vulnerable witnesses kept waiting at court for longer than necessary, so there will always be limits on the number of s28 hearings her courtroom per day, but it is also to be hoped that any new system will allow more than two sessions in any given day.

IV. The process used to decide whether to use section 28 in a particular case;

38. Addressed in comments above.

V. The effect of the use of section 28 on the experience of vulnerable and intimidated witnesses, victims, defendants and juries;

39. As far as we are aware, there is no empirical information yet available from hearings in England and Wales. Although the recent Law Commission consultation on evidence in RASSO trials drew on anecdote and analysis from other jurisdictions, our recent response to that consultation was rightly critical of the Law Commission's assumptions based on that approach.

40. As noted above, a period of gathering and reflection on data from this jurisdiction would have been desirable before the government chose to roll out s28 nationally.

41. Our impression from our own experiences, and from that reported by counsel, is that using the s28 procedure to pre-record cross examination when it is not "necessary" in the sense of being the best / most effective way of presenting the

case to the jury, often causes jurors to disengage / lose interest ["*this is just like watching two TV programmes, not just one*"] and thus leads to a drop in conviction rates.

42. Anecdotally, counsel report that the effect on witnesses varies. For those witnesses who are very young [13 and below], unwell, or who lack capacity for some other reason, it can work well. However, many older witnesses feel dehumanised by their evidence only being presented in a pre-recorded form, and there is a real sense that juries are less impacted by such evidence.

43. It should also be noted that trial judges are themselves not always well equipped to deal with the pre-hearing "*meet and greet*" sessions with the witnesses. Although intended to put the witness at ease, many judges still appear in their judicial robes, and struggle to converse with the witness in a natural and age-appropriate way. This can sometimes leave the witness bemused, or even more nervous about what is to come.

44. Courts are already struggling to have sufficient judicial capacity for their case loads, let alone enough properly trained judges to deal with these specialist hearings. As a result, Courts often prioritise trials with live witnesses, meaning s.28 cases can be delayed as Judges consider '*the evidence already in the can*'.

45. There is a very wide, and in our experience true, perception that court listing offices, and thus judges, since listing is a judicial function, take the view that s28 solves problems of delays in a backlogged CJS by enabling alleged victims to get their part in the trial process over with sooner than might otherwise be the case. That is false reasoning. For instance: while alleged victims' cross examination might be pre-recorded, other young witnesses [the school friends to whom the alleged victim makes first disclosure; a young witness's parent who is also a required witness] are not always offered the same measure; the disclosure process is not always complete by the time the s28 recording takes place [an increasingly common problem now s28 is nationwide and resources are even further stretched] – leading to difficult decisions as to how to deal with late disclosure, with potential

disadvantage to one or both parties; and of course victims and defendants still have the case as a whole hanging over them until the final verdict.

46. This final point is compounded when – as is often the case, and as is mentioned above – listing officers/judges take the "opportunity" to delay the balance of the trial process even longer than might already be the case in order to make room in the lists for "*more serious*" cases, or those where a defendant is remanded in custody with a custody time limit running.

VI. The effect of the use of section 28 on the number of cases brought to trial, and on the outcome of cases;

47. **As to the number of cases brought to trial**: we doubt that the s28 process has any discernible effect. A complainant will either be supportive of prosecution or not, and we often find that even s28 recordings do not take place as soon as they ought to, for instance because of difficulty accommodating them in counsel or the court's already overloaded diaries, at a time when disclosure is complete, trial bundles ready to be used in cross-examination, all parties ready in a position to ask their questions, and in a landscape where the number of RASSO-qualified counsel is shrinking.

48. **As to the effect of s28 on outcomes**: we make it clear that in our view there is no such thing as an "*ideal*" conviction rate. Further, and as outlined above, we do not consider that s.28 is a "*cure all*" to poor conviction rates. Rather, our experience is that while it has limited impact on cases where there is significant additional evidence of the crime to be called live, where the case relies on one party's word against the other, and a complainant gives evidence by pre-recorded ABE, and s.28 cross-examination and so never appear live, juries are tending to acquit more frequently.

VII. What effect the use of section 28 has had on listing, capacity and delays in the Crown Court;

49. All negative, because s28 is not applied with sensible forethought as an integral part of the CJS but is rather treated as an unwieldy bolt-on. As a result, the listing of the s28 hearings, the Ground Rules Hearing, and the recording of cross–examination and re-examination is invariably chaotic and deeply problematic.

50. In effect both of these hearings are mini trials, and require significant time, and preparation. They are substantial intrusions into the overloaded Court diaries and both prosecution and defence counsel, at a stage when they may for good reason not yet be "*trial ready*".

51. Most RASSO counsel are engaged in back-to-back RASSO trials or close to it. Courts are now booking cases into 2026. The addition of this vast increase of important hearings has become untenable.

52. We also note that there has quickly been a collapse of judicial commitment to the principle of continuity of judge for these hearings. This was an early indication that the ideals of section 28 make demands that the CJS cannot deliver in practice. We have moved very swiftly away from an expectation of continuity of judge and counsel to just being grateful that someone was available to cover the hearing.

53. Both hearings must be listed. Ground Rules Hearings vary depending on the type and involvement of all the parties. The s28 recording hearing rarely takes less that half a day, and as indicated above, the Vodaphone booking is never for less than half a day.

54. In certain s28 procedures the questions to be asked in further cross–examination have to be submitted in advance by the defence to the court and Prosecution for examination and agreement at the GRH. This is a highly specialised skill taking time and effort, and is currently unfunded. There may be need for legal argument, and written submissions around the manner of questioning proposed.

55. The disposal of s28 trials is not necessarily quicker because of it. List officers under pressure to "*get cases on*" and concerned about the huge backlog may see s28 as an easy route to the capture of the most important part of the case, meaning that the rest of the case can be put off to a much later date in the future. Once the s.28 recording is done, custody cases are given priority, and will be listed before the whole trial involving s28.

56. Trial judges in other trials, including other RASSO trials, are faced with the potential for considerable delays in order to accommodate s28 and GRHs in another case. This causes timing friction. There have been suggestions of dealing with s28's at the very start or end of the trial day, early and late, and outside of normal sitting hours in order to accommodate them, together with other unacceptable alternatives. We oppose such crammed listing, and the unacceptable pressure it would bring to bear on counsel. Without a doubt, it would lead to further loss in those willing to undertake this work.

57. Listing imperatives often mean that instructed or trial counsel cannot conduct the each of the relevant hearings: GRH, s28, and trial. Returning these hearings ((i.e passing them to other suitably qualified counsel) is difficult, and the process becomes a listing nightmare, and causes serious issues with counsel's other professional commitments. The availability of experienced counsel with knowledge or conduct of the case is increasingly not a consideration of listing. We are thus losing expertise, experience, and causing repeated wasted preparation and re preparation (all unfunded). Many counsel are now refusing to be instructed in these cases.

58. It should be noted that "Original" Section 28 cases used to be the sort of case reserved to silks or very senior juniors because they were highly sensitive cases often with a complex factual background. The extension of s28 to s.17 witnesses has compounded the problems, and stretched judicial and counsel capacity far beyond any reasonable limit.

59. **In summary therefore –**

   a. **Listing:** the knock on effect on trials delayed while courts / counsel deal with s.28 cross examination is huge.

   b. **Capacity:** the courts are already overloaded. See also the comments above about Registered Intermediaries and the Vodaphone system. The s.28 process, when used unwisely, compounds the problem. It should not be seen as a cure for listing problems, and a device by which to shunt these often serious cases back to later dates. It should be remembered that even if a witness's cross-examination is recorded, the proceedings hang over them, and over the defendant, until the trial concludes.

   c. **Delays:** see above.

VIII. The availability of barristers to act in cases where section 28 is used;

60. This is a huge and increasing problem, and is dealt with to some extent above. The RASSO bar is shrinking rapidly: there were 668 RASSO-accredited counsel on the panel in 2018, and since then an unknown but large number have left through death, retirement, appointment, or simply because they have been driven out of the work by emotional burn-out, low fees and a listing process which often ignores their diary needs and other commitments. We know many colleagues who will not accept instructions in s.28 cases because of the impact on their professional diaries and personal lives. Those we have seen abandon RASSO work were not simply complaining about the funding (although they were right to do so) it was a workload and a diary that had become unsustainable. They resented it and voted with the feet.

61. The lack of parity of fees between prosecution and defence further exacerbates this. By way of tangible example, one of our colleagues has recently reported defending in a drugs case and being paid the equivalent of 5 Rape trials, but with a significantly less work, and less pressure/stress. And that is defending.

Prosecuting, where the fees are less, and the pressures greater, has led many counsel to question why they would undertake these cases?

62. The CPS expectations of what qualifications and experience are required to be RASSO counsel should be considered. This is *not* very junior work and requires a track record of established advocacy skills before stepping up to it. The rule of thumb used to be that cases involving serious sexual abuse should not be accepted until at least 7 years of call, with a few junior briefs in such matters under your belt. Anecdotally, some have sensibly observed that in reality this is work for practitioners of at least 10 years standing.

63. The CJS needs to recognise and respect the real skill and experience that these cases require. There will be no quick fix to the workforce problem unless anyone who has left can somehow be attracted back, or new counsel encouraged to join. In theory, section 28 should mean that RASSSO counsel have *fewer* of these cases in the diary, so that they can do them properly – in reality, they are swamped juggling active trials, with these critical hearings in other often factually complex cases, and the system of returns is reaching breaking-point. We have all seen clear examples of where this is placing unbearable demands on counsel's mental health, on their clerks, who face criticism for being unable to magic self-employed RASSO counsel out of thin air when trial counsel cannot be released from another case.

64. Take the example of listing, which is also discussed above. A s28 case injects two new dates into the diary of a trial: ground rules and the s28 itself. All trial counsel and the trial judge [and the registered intermediary or intermediaries, where they are involved] need to be available for those dates and for the rest of the trial: the more recent suggestion that counsel or judge can change during the process, and someone else can simply pick up the case and deal with those hearings is the wrong solution to the obvious problem, and is wrong in principle. It simply leads to further difficulties, such as the difficulty in finding new counsel, free willing and able to take on the huge amount of work required, questions as to who then should conduct the trial – counsel originally instructed, who will have advised and

done considerable work on the case, or counsel who picks it up and does the essential work of cross-examining a key witness? It leads to disputes over fees, etc., and real questions over the impression left with jury, and complainant when counsel and / or judge chop and change.

65. In respect of the question of fees, the GRH and s28 fees are inadequate to entice any sensible counsel to take on another's GRH or s.28 hearing, with all the difficulties that brings. And the decision of not raising prosecution fees at the same time as defence fees were raised is both unfathomable, inequitable, and frankly idiotic, and has simply providing further incentive for counsel to leave the RASSO bar.

66. The results of all these issues include that far too often even the s28 hearing is delayed beyond the ideal date – a particular problem with very young or vulnerable witnesses, whose memories fade even more quickly than others' – and the proper interests of justice in a trial which is fair to both sides are far from served.

IX. How to improve the data available on the use of section 28;

67. At present there is little reliable data available. Steps should be taken to get some.

68. While it is appreciated that it is unlawful to ask jurors why they reached a particular verdict, it ought to be fairly simple to collate the numbers of cases in which s28 is used, and to compare matters such as rates of witness attrition, conviction rates after trial, and the overall length of the trial process from PTPH to verdict as between s28 trials and those in which s28 was not used. The length of time taken for a s.28 process (ie before presented to the jury) should be included in trial length calculation.

69. As outlined above, at present the decision of which cases should involve the use of s.28 procedures feels indiscriminate, and we suggest that there should be far greater thought given to which witnesses will actually benefit from using s.28,

rather than it being applied for as a matter of course. Counsel should be involved in this exercise.

X. How the operation of section 28 could be improved and reformed;

70. Increase the number of RASSO-ticketed judges, available courtrooms, and available s.28 hearing dates. The CJS needs adequate investment and a political will to do more than chase headlines.

71. We suggest that provision should be put in place, at least on a trial basis, where Courts across each circuit set aside 2 days a month to Ground Rules and s.28 hearings. Consideration should also be given to proceedings involving s.28 hearings being listed and dealt with on a regional basis, rather than being tied to a particular Court centre. These two proposals are advanced in an attempt to facilitate the timely listing of these sensitive and important trials by making it easier for suitably-qualified counsel on both sides to conduct them.

72. As outlined above, it is a sad fact that there are fewer counsel willing to undertake this work. This is for a variety of reasons: RASSO cases bring with them a number of additional responsibilities and burdens on counsel. The work is hard, stressful, undervalued, and underpaid. There is an imbalance between the increase in Defence fees, and Prosecution fees. But more significant than fees, the personal pressure on counsel in a case involving s.28's is immense. It has been reported to us that the sheer volume of the cases and pressures to get them done makes counsel specialising in RASSO work feel like they are drowning rather than providing a quality service. A professional diet of solely RASSO cases with no professional support , or recourse to therapy has led to burn out for some, and compassion fatigue for virtually all at some point. It is an unsustainable model of working. As a result, those with the experience and skill to conduct such cases are being driven away from prosecuting them. This needs to be addressed as a matter of urgency.

73. It is axiomatic that RASSO-qualified counsel need to be encouraged to return to this important work, and additional counsel to apply; this is a more difficult task, but one which would be improved by sensible increases in fees for RASSO work [a small amount in the overall budget of an already small-spending government department] and more sensible accommodation given to instructed counsel's availability. For example, we know many colleagues who will not accept instructions in s.28 cases because of the impact on their professional diaries.

74. The lack of *parity* of fees between prosecution and defence further exacerbates this.

75. The problem referred to above, and elsewhere in this response, would be significantly reduced if each circuit dedicated one or two days a month to ground rules hearings and s28 recordings across all courts. That might add slightly to the length of some long trials in other areas of crime; but not much overall. It would certainly be a step in the right direction of treating RASSO cases and counsel with the respect they need, and it should, alongside other obviously needed reforms, enable s28 to operate more efficiently and in the interests of justice for all stakeholders and participants.

76. In addition to the above, we consider that there is an urgent need to review the education provided to counsel instructed in such cases, and to the judiciary entrusted to try them. For example — prosecution counsel need to understand that it is both desirable and appropriate for them to speak to a witness before they give evidence, and to explain the issues to them — this is not coaching[7]; defence counsel still express confusion over the extent to which they are entitled to challenge a s.28 witnesses account in cross-examination. Counsel are increasingly having to guide judges through every step of the process, including how to deal with the "*meet and greet*" with young witnesses in advance of a s.28 recording.

[7] Though there is an issue here when the first time prosecution counsel meets the witness is after their ABE and before their s.28 – thus they are technically "in the middle of their evidence" and if they had been called in the usual 'live' way, leave would be required to speak to them. This is something that needs to be resolved through further consideration of the protocol to s.28 hearings, and potentially consideration given to counsel being more involved in the evidence gathering stage.

XI. Whether changes should be made to the Criminal Procedure Rules and Criminal Practice Directions relating to the operation of section 28.

77. As should be clear from what has been written above, we take the view that there should be far greater consideration of which cases, and which witnesses will actually benefit from using s.28. Counsel should be involved in this exercise. At the moment the approach appears to be utterly indiscriminate.

78. It is our view that s.28 procedures should only be a matter of course in cases where the child witness concerned is "*under the age of 13*" — this is a familiar distinction, and adopts the language of the Sexual Offences Act 2003. But even here, there should be flexibility allowed, so that those 12 and under who can and wish to be be cross-examined live may be so. As far as those witnesses aged 13 and above - i.e teenagers and adults - we suggest that these be dealt with on a case-by-case basis, with something *more* being required than simply age, for example: trauma as a result of the incident, a mental health issue, or learning difficulty.

79. To the extent that changes are needed and made to the operation of s28, then the rules and directions will obviously need consequential amendment.

80. *We suggest that there needs to be a full set of* ***agreed*** *rules of court between the criminal bar and judiciary which properly reflect responsibility and work allocation. The current haphazard overload onto counsel is no longer tenable or acceptable. The making of rules without consultation or costing in terms or resource or fees is no longer an option. S28 is not being used as it was intended and we believe this is to the detriment of witnesses, defendants, the trial process, and the Criminal Justice System as a whole.*

APPENDIX

s.16 and 17 Youth Justice and Criminal Evidence Act 1999

s16 - 1) For the purposes of this Chapter a witness in criminal proceedings (other than the accused) is eligible for assistance by virtue of this section—

(a) if under the age of **[**18**]** at the time of the hearing; or

(b) If the court considers that the quality of evidence given by the witness is likely to be diminished by reason of any circumstances falling within subsection (2).

(2) The circumstances falling within this subsection are—

(a) that the witness—

(i) suffers from mental disorder within the meaning of the Mental Health Act 1983, or

(ii) otherwise has a significant impairment of intelligence and social functioning;

(b) that the witness has a physical disability or is suffering from a physical disorder.

(3) In subsection (1)(a) "the time of the hearing," in relation to a witness, means the time when it falls to the court to make a determination for the purposes of section 19(2) in relation to the witness.

(4) In determining whether a witness falls within subsection (1)(b) the court must consider any views expressed by the witness.

s17 - **Witnesses eligible for assistance on grounds of fear or distress about testifying.**

(1) For the purposes of this Chapter a witness in criminal proceedings (other than the accused) is eligible for assistance by virtue of this subsection if the court is satisfied that the quality of evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying in the proceedings.

(2) In determining whether a witness falls within subsection (1) the court must take into account, in particular—

(a) the nature and alleged circumstances of the offence to which the proceedings relate;

(b) the age of the witness;

(c) such of the following matters as appear to the court to be relevant, namely—

(i) the social and cultural background and ethnic origins of the witness,

(ii) the domestic and employment circumstances of the witness, and

(iii) any religious beliefs or political opinions of the witness;

(d) any behaviour towards the witness on the part of—

(i) the accused,

(ii) members of the family or associates of the accused, or

(iii) any other person who is likely to be an accused or a witness in the proceedings.

(3) In determining that question the court must in addition consider any views expressed by the witness.

(4) Where the complainant in respect of a sexual offence or an offence under section 1 or 2 of the Modern Slavery Act 2015 an offence listed in subsection (4A) is a witness in proceedings relating to that offence (or to that offence and any other offences), the witness is eligible for assistance in relation to those proceedings by virtue of this subsection unless the witness has informed the court of the witness' wish not to be so eligible by virtue of this subsection.