

S 28 YJCEA 1999: CHECKLIST FOR REGISTERED INTERMEDIARIES (22.08.17¹)

Pre-recorded cross-examination (national rollout at Crown Court)

I. Aims, eligibility and RI appointment

1. The s 28 special measure aims to improve the quality of evidence by reducing the time to cross-examination (helping aid recall) and by improving the witness's experience²
2. The same vulnerable witnesses are eligible for the s 28 special measure and for s 29 RI assistance i.e. children under 18 and adults with a mental or physical disorder or disability, or a significant impairment of intelligence and social functioning (s 16 YJCEA 1999)³
3. A video recorded interview (VRI, or ABE) as evidence in chief is a prerequisite of s 28 (CPD 18E.6⁴). Where an elderly witness had made a VRI and the case was adjourned on the day of trial, her cross-examination was recorded as all parties were present. This was played at trial; the witness had died in the interim. Where a written statement is made without RI involvement, on occasion the CPS has requested appointment of an RI and the making of a VRI. In this situation, s 28 could be invoked
4. RI appointment before the VRI is preferable. Post VRI, appointment should be requested early enough for the RI's report to be filed with the special measures application at least 7 days before the PTPH (CPD 18E.15)
5. Availability dates of an RI already appointed should be provided to the PTPH (CPD 18E.26). The RI should ask for the date of the PTPH and ensure the information provided is up to date
6. Post PTPH, the RI should accept appointment only if available for the dates fixed for the GRH and s 28 hearing (CPD 18E Annex para 15)

II. RI assessment and the court familiarisation visit

7. The police/ CPS are expected to discuss with the witness/ carer 'special measures available and the witness' needs, such that the most appropriate package of special measures may be identified', including use of an RI (CPD 18E.5). Where the court orders that the VRI be used as evidence in chief (s 21(3)(a) YJCEA 1999) of a young witness in a sex or assault case (a child in need of 'special protection' s 21(1)(b)), then s 28 must also

¹ Developed by Joyce Plotnikoff (jplotnikoff@lexiconlimited.co.uk) using information provided by RIs Rosemary Wyatt (who collated information about RIs' experiences during the s 28 pilot stage), Lucy Conn, Alison Cousins, Jan Jones, Nicola Lewis, Ruth Marchant, Fiona Simpson and Sue Thurman. Comments were provided by HHJ Peter Collier, Recorder of Leeds; Alan Catlin, Head of CJ Partnership and Reform, Metropolitan Police; Kama Melly QC; Laura Nelson, court clerk, Liverpool Crown Court; Kevin Smith, National Vulnerable Witness Adviser, National Crime Agency; and Daren Streeter, Senior District Crown Prosecutor, CPS. ***Please send suggestions for updates.

² J. Baverstock (2016) *Process evaluation of s 28 pre-recorded cross-examination* MoJ, page 1.

³ The three s 28 pilot courts will test extension to complainants of sexual or modern slavery offences (s 17(4)). Any further extension of s 28 to intimidated witnesses will be determined at a later stage.

⁴ CPD 18E (an amendment to CPD V, Evidence) comes into force on 2 October 2017.

be used (s 21(6)). However, this does not apply if the young witness informs the court that (s)he does not want that special measure (s 21(7)(b)). Because s 28 is often regarded as the automatic default for vulnerable witnesses, the 'processes and aims' are not always fully explained.⁵ For children or adults, the RI should be alert to circumstances where s 28 may be inappropriate⁶ e.g. those preferring to give evidence by remote link.⁷ However, screening the defendant's view of the witness on the live link is an option at a s 28 hearing (CPD 18E.39; s 23 YJCEA 1999): discuss how this can best be achieved

8. Confirm whether the witness wishes RI assistance at the s 28 hearing (see 24(b) below)
9. If the witness has a soft voice or may whisper, consider asking to repeat all responses verbatim (see 39 below)
10. Where the witness has difficulty listening carefully, consider asking to be allowed to repeat a question verbatim, if the witness may not have understood. This ground rule was agreed in a s 28 case to help the witness to focus
11. Where appropriate, incorporate non-evidential challenges into the RI assessment, so as to advise the court about forms of challenge likely to be understood – or not (see 31 below)
12. Consider the presence of a named, neutral supporter chosen by the witness to be present during the witness's evidence (s 102 Coroners and Justice Act 2009; CPD 18B.1, 2)
13. Practising on the live link is a s 28 requirement (CPD 18E.29; see also Victims Code 2013, ch 3 para 1.22). As part of the RI assessment, consider:
 - a) suitability of layout. Is there room for a wheelchair? Is child-size furniture appropriate? One s 28 hearing was done with the young child, RI and advocate sitting on the floor
 - b) whether 'best' evidence is more likely if questioning is face to face in the live link room (the judge may go also). 'This has proved to be successful when questioning a very young child or where the witness has a particular communication need' (CPD 18E.39)
 - c) what needs to be seen and heard on the s 28 recording. If using a table for communication aids, avoid distancing the witness from the camera. Can pre-set camera angles be adjusted if the usual seating will alter, or e.g. to capture witness gestures? Lapel microphones cannot be used in s 28 recordings: check the best position for the free-standing microphone
 - d) distance to toilets and the parent/ supporter in the waiting room. If not nearby but proximity is important for this witness, can alternative facilities be identified? A carer has been seated outside the s 28 room; a witness concerned about soiling was reassured that a shower in adjacent judicial chambers could be used if necessary

⁵ J. Baverstock (2016) op cit, page 5.

⁶ E.g. a witness not wishing cross-examination to be filmed; a highly traumatised witness benefitting from delay; or one who would find waiting for a trial outcome difficult.

⁷ For s 28 using a remote link, see CPD 18E.29, 39. Formal s 28 remote link technology is not yet in place, but police officers have used mobile equipment to film a witness cross-examined by remote link in her care home. This film was made as a s 28 hearing for Liverpool Crown Court in August 2017. 2

III. Timetabling

14. The PTPH should fix the dates of the s 28 hearing and the GRH about a week earlier (CPD 18E.21(vii)). GRHs may be held at any time, including towards the end of the court day, to accommodate advocates and the RI (CPD 18E.64)
 - a) if RI overnight travel might be involved, draw this provision, and the potential to save costs, to the attention of the CPS
 - b) GRHs may be conducted by phone or video link 'in the interests of justice' (CPD 3N.1). If this is proposed but the RI considers that a virtual GRH is not 'in the interests of justice' (e.g. because of a need to discuss draft questions out of court), explain why
15. If justified by specific witness needs, the RI may suggest scheduling the familiarisation visit and introduction of counsel/ judge just before the GRH. (Defendants attend GRHs so procedures will be needed to avoid encounters with the witness.) Meeting the witness and observing the live link practice session before the GRH has helped the judge and counsel gain insights into a witness's complex communication needs. (See also *Speaking to Witnesses at Court* CPS 2016)
16. The PTPH should address memory refreshing (CPD 18E.21(ix); CPD 18C):
 - a) refreshing is a s 28 requirement and may, but need not, take place at the familiarisation visit (CPD 18E.29). Someone (usually the OIC) will be present and report to the court anything said by the witness (CPD 18C.3(ii)). If the VRI is edited, this should be explained to the witness
 - b) the RI should advise the court if the witness needs to see the VRI more than once for the purpose of refreshing (CPD 18C.3(iii)) or if may find watching the DVD difficult or distressing. Agreed modifications include the witness watching only the disclosure elements of the VRI; the officer reading out a summary of events disclosed by the witness; and reading the transcript to the witness. In one such instance, this was done for a witness who could not lip read from the DVD; sections of the DVD where she used gestures were played to her and she was reminded of what she pointed to when using communication aids
17. Timetabling may help avoid RIs being sent questions for review at the last minute:
 - a) request that the timetable address review of questions (see section V below) and allow time to create communication aids to support specific questions if required. Judicial practice differs but some judges review first to narrow the issues and rule out irrelevant, repetitive or 'comment' questions: the number is often reduced significantly before the RI's review. The judge then reviews the RI's proposed changes
 - b) in multi-handed cases, request that the timetable accommodate liaison between advocates to draft questions (see 23(b) below)
18. Explain if it is not in the witness's interests to have an early start to the s 28 hearing. For vulnerable witnesses, especially young children, these are expected to be listed first in the morning, usually to conclude before lunchtime (CPD 18E.24, 64)

19. For the GRH and s 28 hearing, continuity of defence counsel is 'obligatory' (CPD 18E.59) and 'essential' for the judge (CPD 18E.62, though the same judge need not conduct the trial). If the judge or defence advocate changes after the GRH, the RI should seek a further GRH if necessary
20. After the s 28 recording, any further cross-examination or re-examination – a very rare occurrence – must also be recorded via live link (CPD 18E.51)
21. Parties must notify the court promptly if any difficulties arise or any orders of the court are not complied with (CPD18E.47). RIs should also alert the CPS/ court to problems

IV. Ground rules hearing (CPD 3E must be followed)

22. The RI must be present at the GRH (CPD 18E.33; CPD 3E.2) but need not take the oath (CPD 3E.2)
23. Topics for discussion and agreement depend on the witness's individual needs. The RI 'may provide advance indications' (CPD 18E.35). However, topics that *must* be discussed in each s 28 case include:
 - a) 'timing and duration' of recorded cross-examination, taking account of the witness's needs (CPD 18E.24 and 35(i)), including breaks
 - b) Cross-examination 'by a single advocate' in multi-handed cases (CPD 18E.35(ii)). Some judges designate a lead examiner dealing with general issues, followed by other short cross-examinations as necessary (CPD 3E.5)
 - c) any restrictions on the usual duty to put the defence case (CPD 35(iii); see 30 below)
 - d) how the witness will view any exhibits or documents (CPD 18E.37(ii)). Clarify what is expected of the RI
 - e) appropriate adaptations for this witness justified by the requirement that the court take 'every reasonable step⁸ to facilitate participation' including directions for appropriate treatment and questioning (CPR 3.9(3)(b), 3.9.(6) and CPD 18E Annex para 7)
24. The GRH *may* also consider:
 - a) how any limits on questioning will be explained to the jury (CPD 18E.36). The RI may offer to assist in drafting an explanation of the RI's role where communication needs may not be readily understood (e.g. where a witness had aphasia). Discuss whether communication aids should be explained/ demonstrated by the RI in the witness's absence at the start of the s 28 recording, for the benefit of the jury. The explanation can be edited out if the aids are unused. The RI's pictures of aids can be included in the jury bundle
 - b) whether the RI's presence at the s 28 hearing is essential. Some judges do not treat the RI's presence during questioning as automatic so RIs should be prepared to explain their contribution to 'best' evidence from this witness

⁸ See 'Examples of a more flexible approach': www.lexiconlimited.co.uk.

- c) how the witness is to be brought into/ leave the court building to avoid confrontation
 - d) how the judge, witness, RI, counsel and police officer(s) should be addressed
 - e) where the RI make the declaration (it is usually preferable to do this in the absence of the witness)
 - f) if 'in room' or other breaks are taken, whether filming will continue
25. The judge will state which ground rules will apply. Advocates must comply with them (CPD 18E Annex para 12). A practice note of boundaries (RI recommendations annotated with the judge's rulings) may be used by the judge 'in ensuring that the agreed ground rules are complied with' (CPD 3E.3)

V. Review of questions

26. 'In appropriate cases and in particular where the witness is of very young years or suffers from a disability or disorder' advocates should prepare their cross-examination 'in writing for consideration by the court' (CPD 18E Annex para 4). The RI should ask the CPS or defence advocate for the completed s 28 GRH form, which 'outlines questions to the witness' (CPD 18E.49) and includes the defence's request for directions about whether it is appropriate to 'put the case' in full
27. The RI may review questions while alone with defence counsel. On occasion, counsel has informed the judge that the RI accepts questions which the RI in fact thinks are inappropriate. In this situation, the RI must tell the judge that (s)he disagrees
28. RIs must not share questions with both counsel, unless explicitly agreed between counsel or directed by the judge, and must never disclose them to the witness
29. Advocates are expected to 'master' toolkits on www.theadvocatesgateway.org (CPD 18E.32; see attached Annex and CPD 3D.6, 7). However, based on the assessment, the RI may suggest approaches to wording and questioning that differ from general guidance
30. The judge will decide how and whether the defence advocate will 'put his case' to a young or vulnerable witness. The jury can be made aware of the defence case and of significant inconsistencies 'without intimidation or distressing a witness' (CPD 18E Annex para 17, citing *R v Lubemba and Pooley* [2014] EWCA Crim 2064)
31. If the defence offers to forego 'putting the case' altogether (see 23(c) above), the RI should advise the judge whether this witness *is* capable of dealing with simple, direct questions testing the evidence, giving examples appropriate to this witness's level of understanding and ability to cope. Experience suggests that it is almost always possible to formulate simple questions permitting the defence to put its case
32. Sometimes defence advocates send RIs long, complex lists of questions, many more than the witness seemed likely to cope with. Rather than reframing every question, especially if some may be ruled out by the judge, some RIs respond quickly with examples of appropriately rephrased questions, reiterating the principles to be applied and requesting

that counsel revise the list and send them again. RIs have copied the original questions and their response to the judge

33. Suggest that the defence prepare alternative lines of questioning depending on key witness answers, as questions asked 'off script' often become more complex
34. Give the judge and counsel a summary of recommendations for reference during questioning. This is useful even where questions are 'agreed'
35. Request a copy of 'final' questions. On occasion, these require further discussion. Confirm that the judge has signed off on the final version of questions before questioning starts
36. 'Agreed' questions are not 'pre-approved'. Explain that intervention may still be necessary if the witness seems not to understand, or if anything else occurs that may impede communication
37. In advance, request a break after cross-examination if the prosecution wishes to re-examine, to allow the RI to review the prosecutor's questions

VI. The s 28 recording (points for consideration at the familiarisation visit and GRH)

38. The RI and any supporter will be in the live link room with the witness; the RI role is transparent and 'must be visible and audible to the judge and advocates at the time of cross-examination and in the subsequent replaying' (CPD 18E.38)
39. The s 28 recording, along with the witness's VRI, constitutes the whole of the witness's evidence. The RI has a key role in helping the court ensure that the jury can see and hear the evidence in the s 28 recording. In some instances, key answers have been inaudible but not repeated, or it was unclear how a communication aid was used:
 - a) what can be clearly seen and heard over the live link should be tested before s 28 filming starts. Guidance will be available on setting up the court to ensure audibility
 - b) if the RI is not repeating all witness responses but the witness's voice level may fluctuate, ask the judge/ counsel to indicate immediately if a witness answer is not audible/ intelligible in the courtroom, so that the RI can check the answer and repeat it
 - c) if the witness uses aids or communicates non-verbally, the RI should describe what is happening or hold up the aid to the camera. This has a 'close up' facility which must be operated in the live link room by an usher familiar with its use. However, close ups are rarely used. Ask the judge ahead of time for permission to alert the usher if a close up may be appropriate or ask the judge to indicate immediately if the view on the screen showing what is being recorded is not sufficiently clear
40. S 28 hearings are very short. Where there is a possibility of miscommunication, RI interventions should be immediate and oral (some s 28 judges have missed some non-verbal interventions). The RI may seek a further discussion of ground rules if communication breaks down. The judge may rule that interventions be edited out.