



JUDICIARY OF
ENGLAND AND WALES

**GUIDANCE¹ ON THE USE OF S.28 YOUTH JUSTICE AND CRIMINAL EVIDENCE ACT 1999;
PRE-RECORDING OF CROSS-EXAMINATION AND RE-EXAMINATION FOR WITNESSES
CAPTURED BY S.17(4) YJCEA 1999**

1. When section 28 of the Youth Justice and Criminal Evidence Act 1999 (s.28 YJCEA 1999) is brought into force by Statutory Instrument, under that S.I section 28 will be available for the purpose of proceedings taking place in Leeds, Kingston and Liverpool Crown Courts, where the witness is eligible under section 17(4) of the YJCEA 1999.
2. Section 17(4) provides that the following witnesses are eligible for special measures:
 - i. complainants in respect of a sexual offence; or
 - ii. complainants in respect of an offence under sections 1 or 2 of the Modern Slavery Act 2015,

where the witness is a complainant in proceedings relating to that offence (or to that offence and any other offences), unless the witness has informed the court of the witness' wish not to be so eligible.

3. This process is governed by the Criminal Procedure Rules and careful attention should be paid to the court's case management powers and the obligations on the parties. Criminal Practice Direction V Evidence 18E must be followed where relevant and read in conjunction with this guidance.² This guidance seeks to differentiate how s.28 applications and processes are to be followed for the above cohort of complainants only.
4. The Resident Judge may appoint a judicial lead from among the full-time judges at his or her court centre who will be responsible for the monitoring and supervision of the scheme. The Plea and Trial Preparation Hearing (PTPH) must be conducted by a full-time judge authorised by the Resident Judge to sit on that class of case and who has been authorised to deal with s.28 YJCEA 1999 cases by the Resident Judge.

Before the case reaches court

5. Reference should be made to the joint protocol agreed between the police and the Crown Prosecution Service (CPS).

¹ This guidance is in force whilst this provision is tested for the above cohort of complainants only. In the event that this is further rolled-out the Lord Chief Justice will issue a practice direction.

² References in this guidance to paragraphs which must be followed relate to the *Criminal Practice Directions 2015 Amendment No. 5 [2017] EWCA Crim 1076* handed down by the Lord Chief Justice on 26th July 2017, effective from 2nd October.

6. Complainants who are eligible for special measures under s.28 YJCEA 1999 should be identified by the police. The police and CPS should discuss with the complainant the special measures that are available and the complainant's needs, such that the most appropriate package of special measures can be identified. The complainant is entitled to a full explanation of the suite of special measures that are available and the potential benefits and risks they each bring. They are entitled to a court visit to assess the special measures to enable them to make an informed choice. The complainant's choice is to be kept under review by the police and CPS. If the complainant changes their mind in advance of any hearing, that information is to be communicated to the court as soon as is practicable.
7. For a complainant to have access to the special measures under s.28 YJCEA 1999, their interview must be recorded in accordance with the Achieving Best Evidence ('ABE') guidance which is available on the Ministry of Justice website.
8. It is imperative that for the future timetabling of the case, the investigators and prosecutor commence the disclosure process at the start of the investigation. The *Judicial Protocol on the disclosure of unused material in criminal proceedings (December 2013)* must be followed.

The first hearing in the magistrates' court

9. Paragraphs 18E.8-18E.12 are to be followed. 18E.13 is not relevant.

Before the PTPH hearing in the Crown Court

10. Paragraphs 18E.14-18E.16 are to be followed.

Plea and Trial Preparation Hearing

11. Paragraphs 18E.17-18E.18 are to be followed.

The application

12. The judge may hear submissions from the advocates and will rule on the application. If the application is refused, this guidance will cease to apply.
13. If the application is granted, the judge should proceed to make orders and give directions for preparation for the recorded cross-examination and re-examination hearing and advance preparation for the trial, including for disclosure of unused material. The correct and timely application of the Criminal Procedure and Investigations Act 1996 ('CPIA 1996') will be vital and close attention should be paid to the *Judicial Protocol on the disclosure of unused material in criminal proceedings (December 2013)*.
14. Consideration should be given to making orders, including:
 - i. Service of the prosecution evidence within 50 days of sending;
 - ii. Directions for service of defence witness requirements;
 - iii. Service of initial disclosure; under the CPIA 1996, this must take place as soon as reasonably practical; in the context of these cases, this should be interpreted as being at the same time as service of the prosecution evidence, i.e. within 50 days of sending for both bail and custody cases. This will be within 3 weeks of the PTPH;

- iv. Any necessary orders regarding disclosure material held by a third party or evidence which requires mobile phone or computer analysis, particularly in relation to social media accounts;
- v. Service of the defence statement; under the CPIA 1996, this must be served within 28 days of the prosecutor serving or purporting to serve initial disclosure;
- vi. Fixing a date for a directions and/or ground rules hearing, about one week prior to the recorded cross-examination and re-examination hearing;
- vii. Service of the Ground Rules Hearing form by the defence advocate;
- viii. Making arrangements for the witness to refresh his or her memory by viewing the recorded examination-in-chief ('ABE interview'), see CPD Evidence 18C: Visually recorded interviews: memory refreshing and watching at a different time from the jury;
- ix. Making arrangements for the recorded cross-examination and re-examination hearing under s.28, including fixing a date, time and location;
- x. Other special measures;
- xi. Directions for a further direction hearing to take place which may be at the conclusion of the recorded cross-examination and re-examination hearing;
- xii. Fixing a date for trial.

15. The timetable should ensure that the prosecution evidence and initial disclosure are served swiftly. The ground rules hearing will usually take place soon as possible after the deadline for service of the defence statement, with the recorded cross-examination and re-examination hearing taking place about one week later. However, there must be time afforded for any further disclosure of unused material following service of the defence statement and for the determination of any application under section 8 of the CPIA 1996. Subject to judicial discretion, applications for extensions of time for service of disclosure by either party should generally be refused.

16. Where the defendant may be unfit to plead, a timetable for s.28 should usually still be set, taking into account the extra time needed for the obtaining of medical reports, save in cases where it is indicated that it is unlikely that there would be a trial if the defendant is found fit.

17. The needs of other witnesses should not be neglected. Witness availability dates should be available for the PTPH.

Prior to ground rules hearing and hearing under section 28

18. It is imperative parties abide by orders made at the PTPH, including the completion and service of the Ground Rules Form by the defence advocate. Delays or failures must be reported to the court as soon as they arise; this is the responsibility of each legal representative. If ordered, the lead lawyer for the prosecution and defence must provide a weekly update to the Court Progression Officer, copied to the judge and other party, detailing the progress and any difficulties or delays in complying with orders. The court may order a further case management hearing if necessary.

19. Any applications under section 100 of the Criminal Justice Act 2003 ('CJA 2003') (non-defendant's bad character) or under section 41 of the YJCEA 1999 (evidence or cross-examination about the sexual behaviour of a complainant of a sexual offence) or any

other application that may affect the conduct of the cross-examination must be made promptly, and responses submitted in time for the judge to rule on the application at the ground rules hearing. Parts 21 and 22 of the Rules apply to applications under section 100 and section 41 respectively.

20. When the court has deemed that the case is suitable for the complainant to give evidence from a remote site then a familiarisation visit should take place at that site.
21. The complainant's court familiarisation visit must take place, including an opportunity to practise on the live link/recording facilities, see the Code of Practice for Victims of Crime, October 2013, Chapter 3, paragraph 1.22. The complainant must be given the opportunity to view his or her ABE interview to refresh his or her memory. It may or may not be appropriate for this to take place on the day of the court visit: CPD Evidence 18C must be followed.
22. Applications to vary or discharge a special measures declaration are governed by Rule 18.11. Although the need for prompt action will make case preparation tight.

Ground rules hearing

23. The restrictions imposed by 18E.32-18E.36 do not apply.
24. It is anticipated that the defendant should attend the ground rules hearing. If the defendant has been remanded in custody until the trial then he or she will need to be present for the hearing, either over the video-link or produced at court.
25. At the ground rules hearing, the judge should:
 - i. rule on any application under section 100 of the CJA 2003 or section 41 of the YJCEA 1999, and on any other application that may affect the conduct of the cross-examination;
 - ii. decide how the complainant may view exhibits or documents;
 - iii. review progress in complying with orders made at the PTPH and make any necessary orders.
26. The cross-examination hearing will be conducted in the same manner as had the complaint been appearing in the "live trial". It will be subject to the usual judicial control of questioning that should be exercised in a non-s.28 case.

Recording of cross-examination and re-examination: hearing under s.28

27. At the hearing, the witness will be cross-examined and re-examined, if required, via the live link from the court room to the witness suite and the examination will be recorded. It is the responsibility of the designated court clerk to ensure in advance that all of the equipment is in working order and to contact the provider's Service Desk if support is required. Any other special measures must also be in place and any intermediary and/or interpreter should sit in the live link room with the witness. The interpreter's and/or intermediary's role is transparent and therefore must be visible and audible to the judge and advocates at the time of cross-examination and in the subsequent replaying.
28. The judge, advocates and parties, including the defendant, will usually assemble in the court room for the hearing. The defendant should be able to communicate with his or her representatives and should be able to hear the complainant via the live link and see the proceedings: s.28 (2). Whether the complainant is screened or not will depend on

the other special measures ordered, for example screens may have been ordered under s.23 YJCEA 1999.

29. 18E.41-18E.44 are to be followed.

After the recording

30. 18E.45-18E.46 are to be followed.

Preparation for trial

31. 18E.47-18E.48 are to be followed.

32. The recorded cross-examinations and re-examinations will be stored securely by the service provider so as to be accessible to the advocates and the court. It will usually be necessary to obtain a transcript of the recorded cross-examination due to the likely length and nuances of the cross-examination. Judges conducting the hearing will not be expected to take a contemporaneous note of proceedings.

33. 18E.50-18E.54 are to be followed.

Trial

34. 18E.55-18E.57 are to be followed.

After conclusion of trial

35. Immediately after the trial, the ABE interview/examination-in-chief and the recorded cross-examination and re-examination should be stored securely on the cloud.

Listing and allocation

36. **Advocates:** It is the responsibility of the defence advocate, on accepting the brief, to ensure that he or she is available for both the ground rules hearing and the hearing under s.28; continuity at trial is obligatory except in exceptional circumstances. The judge and list office will make whatever reasonable arrangements are possible in order to achieve this, assisted by the Resident Judge where necessary.

37. When the timetable for the case is being set, advocates must have their up to date availability with them (in so far as is possible). When an advocate who is part-heard in another trial at a different Crown Court centre finds themselves in difficulties in attending either the ground rules hearing, the s.28 hearing itself or the trial where s.28 has been utilised, they must inform the Resident Judges of both courts as soon as practicable. The Resident Judges must resolve any conflict with the advocate's availability. The starting point should be that the case involving the s.28 hearing takes priority. However, due consideration should also be given to custody time limits, other issues which make either case particularly complex or sensitive, high profile cases and anything else that the judges should take into consideration in the interests of justice.

38. **Judicial:** All PTPHs must be listed before judges who have been authorised to deal with s.28 cases by the Resident Judge at the relevant court centre. The case should then be allocated by the judicial lead (if one has been appointed) in consultation with the Resident Judge to one of the judges within the relevant court centre identified to hear such cases after the PTPH. All hearings should thereafter be heard before, and all directions made by, the allocated judge, if at all practicable. In the absence of the allocated judge, the judicial lead may make directions in the case.

39. It is essential that the ground rules hearing and the s.28 hearing are before the allocated judge. Once the s.28 hearing has taken place, any judge, in accordance with CPD XIII Listing E, including recorders, can deal with the trial in the absence of the allocated judge.
40. Local Implementation Teams (LITs) should be established with all relevant agencies represented by someone of sufficient seniority. Their task will be to monitor the operation of the scheme and compliance with this guidance and other relevant protocols.
41. **Listing:** Due to the limited availability of recording facilities, the Crown Court centres will have to determine their own best practice for the suitable timing for the cross-examination hearings themselves, taking into account available court time, the availability of the judge and the advocates and the needs of the complainant.

Public, including media access, and reporting restrictions

42. 18E.65-18E.67 are to be followed.

Annex

43. The Annex is not relevant.

Guidance issued by the Rt. Hon. The Lord Thomas

Lord Chief Justice of England and Wales

27th September 2017