Victims Commissioner

Automatic Access to Special Measures Pre-recorded Cross Examination (Section 28)

Courts and Tribunals Bill

The Victims' Commissioner for England and Wales, Claire Waxman OBE, is calling for pre-recorded cross examination (Section 28) to be automatically granted to eligible victims, without the need for judicial approval.

This reform would remove barriers to accessing an important special measure and give victims greater certainty and control over how they give evidence. By ensuring that victims' informed choices about what best supports them are respected, **it would empower victims to participate more confidently in the justice process and help them to give their best evidence.**

Background

Section 28 of The Youth Justice and Criminal Evidence Act 1999 introduces **pre-trial video recorded cross-examination as a special measure. This measure has only been rolled out to the Crown Courts.**

When this measure is used, eligible victims[1] are **cross-examined via a video recording at an earlier date before trial, outside the courtroom setting**. Only the judge, lawyers and defendant are present in the courtroom on the day of the Section 28 hearing. Screens can also be used to prevent the defendant seeing the victim.

If Section 28 is granted, the questions that will be asked during cross-examination are approved by the Judge at the Ground Rules Hearing, so any 'improper' or 'vague' questions are removed.

The recording is then played back on the trial date to the jury. This prevents any need for the victim having to attend trial.

Following a Section 28 hearing, victims are not usually required to give evidence again during the trial process, nor in the event of a hung jury or appeal. However, there are certain circumstances where they may be called back if further questioning is required.

[1] Those eligible for section 28 include:

- All vulnerable witnesses, this includes witnesses aged under 18 (section 16 YJCEA)
- Intimidated witnesses, limited to victims of a sexual offence or modern slavery offence who are victims in proceedings relating to that offence) (section 17(4) YJCEA)

The benefits of section 28

Section 28 supports a more **victim-centred and trauma-informed approach**, recognising that reducing trauma and distress is integral to enabling victims to participate effectively and give their best evidence.

- **Creates safer conditions for victims to give their best evidence.** Giving evidence in a courtroom can be highly distressing and retraumatising. Section 28 allows eligible victims to give evidence in a less intimidating environment, reducing fear and emotional pressure so they can communicate more effectively. **This supports their participation and access to justice.** Lengthy waits for trial can take a significant toll on victims, with prolonged uncertainty and the prospect of giving evidence contributing to some withdrawing from the justice process altogether[2]. By enabling victims to give evidence earlier and in a less intimidating environment, Section 28 can remove important barriers to participation and help victims remain engaged.

- **Reduces the impact of delay on victims and their evidence.** Earlier cross-examination can limit the impact of lengthy waits on victims' recall, while allowing them to complete their evidence sooner and begin focusing on their recovery rather than living with the prospect of cross-examination for months or years.

- **Provides greater certainty and control.** A planned date for giving evidence reduces some of the uncertainty associated with trial listings and adjournments, while giving victims greater confidence in how they will experience the justice process. Respecting victims' needs and preferences can also strengthen their sense that they have been heard and treated with dignity.

Ultimately, a trauma-informed approach is not separate from securing the best evidence. By reducing fear, distress, and uncertainty, Section 28 creates the conditions in which victims are better able to participate and give a full and effective account of their experience.

Barriers to granting Section 28

Even where a victim is eligible for Section 28, access is **not automatic and remains subject to judicial discretion**. The court must determine whether the measure is likely to improve the quality of the witness's evidence, taking account of their individual circumstances and views.

For Section 28, under practice direction 18E judges must also consider whether pre-recording would materially bring forward cross-examination, including the likely timing of the recording and trial and the availability of court facilities and participants. However, **delay should not displace the central question of how the victim can give their best evidence**. The Practice Direction makes clear that even where there are difficulties arranging an earlier

[2] Justice delayed: The impact of the Crown Court backlog on victims, victim services and the criminal justice system - Victims Commissioner

recording, the ultimate test remains whether the measure is likely to maximise the quality of the witness's evidence[3].

In practice, however, factors beyond the victim's needs appear to be influencing access:

- **Concerns about conviction rates can influence access.** Unpublished research led by Professor Cheryl Thomas KC has suggested that juries may be less likely to convict where Section 28 is used and it impacts jury's perception. However, the Ministry of Justice's 2025 independently peer-reviewed impact evaluation, using a different methodology, found no statistically significant impact on conviction rates or timeliness. Despite this, concerns about jury perceptions of pre-recorded evidence continue to influence the information given to victims and judicial approaches to granting Section 28. This can lead to issues with the initial offer of section 28 from police and barristers, where victims are advised against it, as well as judges not granting it, citing that it impacts jury perceptions and preferring other measures. (See examples from victims below)

- **Court delays can work against victims.** Where delays or adjournments bring a Section 28 hearing closer to the potential date of trial, the fact that pre-recording would not substantially bring forward the date of the witness's cross-examination can weigh against its use. Victims can therefore lose access because of delays within the justice system that are entirely outside their control.

- **Section 28 can be granted and later withdrawn.** Victims can prepare to give evidence believing Section 28 is in place, only for the measure to be reconsidered or withdrawn later, causing significant distress and uncertainty. This can happen where delays or adjournments bring the Section 28 hearing closer to trial and judges consider live evidence with or without other special measures appropriate instead. Where Section 28 is withdrawn at a late stage, victims have reported feeling overwhelmed and unable to give their best evidence

- **Eligible victims can face different thresholds for accessing Section 28.** Practice varies in the level of justification required, with some victims asked to provide detailed proof of how giving evidence live would affect them or the quality of their evidence. This can require victims to demonstrate the impact of fear, distress or trauma, creating inconsistent access between courts. This is particularly concerning for children, whose vulnerability is already recognised by virtue of their age, but who may still face a further hurdle in demonstrating why Section 28 is needed. It is clear from victim experience that there is significant variation between judges and courts in what is required before the measure is granted

Together, these factors create uncertainty and inconsistency for victims. Frontline victim services regularly highlight cases where eligible victims have been refused Section 28, but

[3] Special Measures | The Crown Prosecution Service

without national data on applications and refusals, the scale of the problem and reasons for refusal remain unknown[4].

Justice Select Committee evidence

Ahead of the Justice Select Committee's inquiry into Section 28, the former Victims' Commissioner Baroness Newlove sought evidence from frontline victim services to understand victims' experiences of accessing the measure. This provided important insight into access issues that are **not captured in national data on applications, refusals or withdrawals**.

- The Victims' Commissioner received **41 case studies from ISVAs and CHISVAs across England and Wales**. While many demonstrated the significant benefits of Section 28 for victims, they also highlighted barriers to accessing it:
- In **21 cases**, Section 28 was either refused at the outset (11) or initially granted and later withdrawn (10).
- In around **10% of cases, no application was made**, with some victims reportedly told that courts did not like Section 28 or that using it could reduce the likelihood of conviction.
- Access issues were also evident for **child witnesses**. The evidence included children being refused Section 28 or having an earlier grant withdrawn. In one case, a very young witness waited two years to give evidence, with the delay affecting their ability to recall events.

These case studies cannot establish the national prevalence of grants or refusals, but they provide important evidence of problems that national data currently cannot expose or quantify.

Deputy Chief Crown Prosecutor also gave evidence to the Committee on Section 28, and in a written submission stated:

"In my evidence to the Committee, I mentioned the Law Commission's recommendation that victims of sexual offences should be entitled to, rather than eligible for, certain special measures including s28. You heard in the session how judicial approach to s28 can vary; this is something we do see. We think a model of entitlement would support improved consistency which in turn would bring a greater level of assurance to victims and witnesses about the likelihood of the measure being granted. We would therefore support exploration of how a model of entitlement could operate, with a continuing focus on the needs of individual victims and understanding which measures are right for them."

The case for reform in the Courts and Tribunals Bill

Section 28 should be judged by whether it enables victims to remain engaged and give their best evidence, not by conviction rates alone. Where an eligible victim considers it the best way to give evidence, that informed choice should be supported.

[4] Currently HMCTS only track us of s.28 and not applications, grants and refusals -Volume of Section 28 recordings by year - GOV.UK

With lengthy waits for trial, Section 28 can reduce the impact of delay on victims by enabling earlier evidence, supporting recall and recovery. **Victims should have certainty from the outset about how they will give evidence, rather than measures designed to reduce trauma creating further uncertainty.**

The Bill provides an important opportunity to deliver this change. While the Victims' Commissioner supports the aims of clauses 12 to 16 on special measures, the Bill should go further to ensure access is consistent, trauma-informed and centred on victims' needs and informed choices.

The Victims' Commissioner is therefore proposing amendments to:

- provide automatic access to Section 28 for eligible victims, subject to their informed choice.
- As section 27 (evidence in chief) is used alongside section 28, this measure will also need to be automatic for eligible victims.

Beyond legislation

- **Improve guidance and information for victims.** Agencies should receive clear, consistent guidance on how Section 28 works and its benefits, so victims are given accurate information and supported to make an informed choice about how they give evidence. Automatic entitlement should not mean that victims have measures imposed upon them, the decision about whether to utilise a special measure or not, should be based upon a proper exploration with the victim of their needs and the measures available.

- **Strengthen pre-trial support.** Victims considering or using Section 28 should be offered a pre-trial visit, allowing them to understand what giving evidence will involve, see the facilities available and make an informed decision about the measures that best meet their needs.

- **Invest in trauma-informed technology and infrastructure, including remote evidence sites.** Ensure consistent, high-quality section 28 provision, with victims' needs at the heart of court technology and infrastructure.

- **Consider best practice in pre-recorded cross-examination.** This should include Scotland's Evidence on Commission model, which enables vulnerable witnesses to give their evidence in advance of trial in a less formal environment. The defendant is not physically present but can watch by video-link, helping to reduce the stress and intimidation that can be associated with giving evidence in court.

- **Improve data and accountability.** National data should capture Section 28 applications, grants, refusals and withdrawals, including the reasons for decisions, to identify disparities in access and enable effective scrutiny of how the measure is operating.

- **Protect Section 28 cases from avoidable delay.** As per the new listing practice directions, listing practices should ensure that cases are not deprioritised once a victim has completed their Section 28 evidence and that Section 28 hearings themselves are not unnecessarily adjourned. Where delays do occur, victims should not lose access to Section 28 because system pressures have brought the hearing closer to the trial date.

Victims' Voice

Access to Section 28 can help victims to engage in the justice process, and also focus on their recovery earlier:

> "The court process was a lot worse than I actually thought it would be but I am glad that I did the Section 28 when I did, rather than having to do it this month [at the trial] … I just thought it would be a lot better if my part was over before I started college so that I could just focus on that and not be worried about it so much."
> **- Victim-survivor, Suffering for Justice report**

> "Luckily my s.28 [pre-recorded cross-examination] doesn't expire. The s.28 was massively beneficial, and took a lot of stress off me, especially as I was in a different room to him [the perpetrator]. Even being in the same court building was nerve-wracking enough. It [s28] allowed me to give evidence 5 years earlier than if I'd waited to give evidence at trial. If court delays are going to continue, then s.28 is crucial. It's not fair to keep dragging people to court and then postponing it… I do wonder if they are potentially putting my case on the backburner as the most important bit has been done [Laura's cross-examination], but I do think that most of the delays are because of him pushing the boundaries of what he can get away with. His privileges seem to outweigh my rights**"**
> **- Extract from Case study in Rape Crisis' Living in Limbo report**

However, there are a number of examples where victims have not been able to access the measure:

> "It's as scary as it gets, and I said to the officer that, 'I want that Section 28'. And he [police officer] said, 'I can't arrange that now. And it has to be special circumstances for you to get that'. And I thought, 'How special does that get?' … Reasons were, you'd have to get a letter from the doctor to say you couldn't physically go, unless it was that situation."
> **- Victim-survivor, Suffering for Justice report**

> "I've had quite a few Section 28s denied in preference of a live link … If we wanted Section 28 we would have to prove her medical history and go further into that."
> **- ISVA, Suffering for Justice report**

"Initially when she [victim-survivor] had made that request [for a Section 28], the officer had put that to the Crown Prosecution Service, but the Crown Prosecution Service had said, 'No, we're not going to apply for it because she won't qualify'. So, I pushed back and said, 'Well, actually I think you'll find that she fits the criteria for asking for that special measure and it's not for you to decide. It is for the court to decide whether they're going to grant that special measure, so you must put it to the court'."

- CHISVA, Suffering for justice report

"In a recent case the prosecutor stated that judges have started to push back against s.28 applications. The prosecutor wanted [the survivor] to be spoken to about potentially utilising other special measures… when the same client attended court for a Pre-Trial Visit, a witness service volunteer also gave her opinions about s.28 hearings and the possible impact on the Jury. The survivor will now give evidence at trial behind screens".

- Rape Crisis ISVA in the North of England, Living in Limbo report

"Another example involved a Section 28 application being granted but later withdrawn by the Judge during the Ground Rules hearing. There was poor communication with the victim about the withdrawal, and when the witness was eventually informed, it was at the very last minute. They were then told they would now need to give evidence at the trial instead. There have been various other examples and the sudden removal of special measures causing the witnesses to feel overwhelmed and unsafe. The sudden removal of special measures also means that witnesses need multiple breaks as they are not prepared for having to go into the court room, which could lead to further delays in the trial. The sudden loss of these protections disrupts the victim's confidence and trust in the justice system"

- Rape Crisis ISVA in the South of England, Living in Limbo report

Case Study – Extract from Rape Crisis' Living in Limbo report

Rochelle*, reported rape and sexual assault to the police in the summer of 2023, shortly after the incident. Rochelle was 14 years old at the time. The perpetrator, an online acquaintance of Rochelle's, was charged and remanded in custody, during the same Summer. Rochelle opted to have her cross-examination pre-recorded, as she wanted to get this element of the trial out of the way. A section 28 hearing was scheduled for December.

But shortly before the hearing was due to go ahead, Rochelle was told that it was being postponed, as the defendant's mental health and learning ability assessments had not been completed in time. Rochelle's ISVA queried this, as she understood that the purpose of a section 28 hearing was to protect and assist Rochelle, a vulnerable and intimidated child 'witness', to give evidence. Rochelle's ISVA told us: "By the time it was January (2024), we still hadn't heard about a new date for the section 28. **Instead, we were informed by police that a section 28 now wasn't an option, and a floating trial was being set for July 2024**. We asked whether it would be possible for Rochelle to do a section 28 for this trial but this time were told that this **decision had already been made and the police gave Rochelle's mum**

and I the impression that her evidence would be best received in court, especially as it was confirmed that the case would be linked to the case of another minor.

Rochelle said she wasn't against going to trial she just wanted it out of the way. The July 2024 trial date was then also postponed. Rochelle was told that this was because the case that her case was linked to was not ready, and it was unlikely that a court room would have been found with a day's notice. A new trial date was given, in August 2025. Rochelle's ISVA told us**: "Had we known the trial would be adjourned for a further year to August 2025, we would have pushed further for a section 28 so that Rochelle could begin her recovery process".**

Rochelle has been deeply impacted by the delay of the trial. **When she heard that her section 28 hearing had been retracted and trial had been set for 7 months later, she began to really struggle at the Pupil Referral Unit (PRU) she attended.** As the July 2024 trial approached, Rochelle dropped out of her PRU and spent purposeless days awaiting trial. When Rochelle found out that this trial date was to be adjourned for over a year, to August 2025, she expressed to her ISVA fears about living in limbo for another year and making no progress. Rochelle aspires to become a midwife. The trial, if it goes ahead, now falls at the end of Rochelle's GCSE year and she worries about getting the grades she needs to pursue her the career she dreams of, due to the overarching pressure of the trial looming for another year. The location for Rochelle's trial is still undetermined, and it is causing her family a large amount of stress to think that it could be cancelled or pushed back again. Rochelle has learning difficulties and is neurodivergent. Delays aren't easy for anyone but Rochelle's self-protective reaction to disappointment is to disengage from a process. Rochelle is concerned that she might withdraw from the process as the endless waiting is causing her mental health to become unstable.

Supportive Statements

Amelia Handy, Head of Policy and Public Affairs at Rape Crisis England and Wales

"Our research shows that long waits for trial are leaving rape survivors feeling trapped in limbo, unable to move forward with their lives while cases are delayed for months or even years. Section 28 can help reduce that harm by allowing survivors to give their evidence earlier in the process, limiting the period of uncertainty and anxiety they face. Making access to Section 28 automatic for rape survivors would provide greater consistency, spare survivors from unnecessary delay, and help create a justice system that better recognises the realities of trauma and the impact of prolonged court proceedings"

Fay Maxted OBE, Chief Executive of The Survivors Trust, a national membership organisation supporting specialist rape and sexual abuse services in the voluntary sector.

"Section 28 is an important measure which can help survivors to participate in the criminal justice process. It can be particularly helpful for survivors to be able to pre-record their evidence, particularly when we know that many face lengthy waits for trial. Attrition rates are very high amongst rape survivors and being able to give their evidence in this way can help to make the long wait for justice more bearable. Despite the clear benefits of s.28, we hear from our member organisations that access to this measure varies greatly across the country.

Victims Commissioner

Making this measure automatic for eligible victims would provide certainty to survivors and could help them to remain engaged in the system."

Duncan Craig OBE, Chief Executive of We Are Survivors, supporting male survivors of sexual abuse and rape

"We Are Survivors welcomes the Victims Commissioner's call for pre-recorded cross examination (Section 28) to be automatically granted to eligible victims and the removal of the need for judicial approval. It is imperative that we do everything we can to make the process less distressing for the victim and as recent high profile cases have shown, for those victims that reach the stage of court and cross examination, the system has to do its best for the victim"

The Amendment

After section 28 of the Youth Justice and Criminal Evidence Act 1999 insert—

"28A Presumption in favour of video-recorded evidence and pre-recorded cross-examination

(1) This section applies where a witness—

(a) is under the age of 18 at the time of the notification under subsection (2); or

(b) is a complainant in relation to an offence specified in section 17(4).

(2) Where a witness to whom this section applies indicates a wish to give evidence by means of—

(a) a video recording (if available) to be admitted under section 27; or

(b) pre-recorded cross-examination and re-examination under section 28,

the relevant party to the proceedings shall notify the court and the other parties of the measure (or combination of measures) under this section being sought for that witness.

(3) Upon receipt of a notification under subsection (2), the court shall issue a special measures direction granting the measure (or combination of measures) requested, subject to subsection (6).

(4) The court shall issue the special measures direction without the need for a hearing unless the court determines that a hearing would be in the interests of justice.

(5) The requirements in section 19(2) do not apply to granting a special measures direction under subsection (3).

(6) The court may refuse to issue a special measures direction under subsection (3) where it is satisfied that it is in the interests of justice to do so.

(7) Where the court refuses a direction under subsection (6), it shall—

(a) provide reasons for its decision; and

(b) ensure the parties are informed of the reasons as soon as reasonably practicable."