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Written Submission to the UK Parliament's Justice Select Committee Section 28 of the Youth Justice and Criminal Evidence Act 1999

Dear Justice Select Committee,

Thank you for the invitation to submit written evidence on Section 28 (pre-recorded cross examinations for vulnerable and intimidated witnesses) with specific consideration of its availability to adult complainants in rape and serious sexual offences (RASSO) cases.

1. Evaluations of the Impact of Section 28

1.1 Who is right?

At present, there are two evaluations of the impact of Section 28 on conviction rates. One was conducted by Professor Cheryl Thomasⁱ, and the other by the Ministry of Justiceⁱⁱ. They produced conflicting results. Professor Thomas concludes that Section 28 results in dramatically lower rape conviction rates, while the Ministry of Justice finds no statistically significant impact of Section 28 on sexual offences conviction rates.ⁱⁱⁱ It is my view that neither study is capable of adjudicating on the question of the conviction rate impact.

Professor Thomas's dataset is principally capable of addressing the question, but the statistical analysis suffers from various limitations and errors. Some of the limitations are acknowledged, such as a failure to include control variables or to carry out statistical significance testing, and to date, the analysis has not been subjected to academic peer review^{iv}. There are errors in the statistical analyses that are not acknowledged, such as the failure to take the hierarchical nature of the dataset into account with charges clustered in cases, defendants and complainants (Section 28 is applied at the case/complainant level). These errors and limitations render the results unreliable and potentially false. The Ministry of Justice's statistical analysis has no apparent errors, but the decision to use Crown Courts as the unit of analysis (rather than cases) carries significant limitations (acknowledged in the report^v) as it means that this analysis, on its own, does not permit drawing conclusions on the causal impact of Section 28 on conviction rates.

An obvious remedy to the limited and inconclusive evidence base is to make the dataset publicly available. This allows further independent academic researchers, including quantitative social scientists and statisticians, to replicate the Thomas and the Ministry of Justice analyses, and to apply different statistical models and approaches. Prof Thomas states that the data is currently provided to the UCL Jury Project by the Ministry of Justice and HMCTS based on a 2020 Memorandum of Understanding between Professor Thomas, the Secretary of State for Justice and HMCTS.^{vi} Amongst academics, there is a widespread belief that Professor Thomas is the only

academic with access to this data. In fact, much of the data is now publicly available via the Data First programme and the HMCTS data access panel.^{vii} Adding the complete dataset to the HMCTS data access panel and/or Data First with clear signposting would be an effective way to enable the standard scientific process of peer-scrutiny, replication and advancement of analytical and theoretical approaches that over time generate a wide and robust empirical evidence base.

1.2 Both evaluations are missing the point of Section 28

Conviction rates are the wrong measure against which to evaluate the efficacy of Section 28. Section 28 is a Special Measure that, like Special Measures generally, exists to enable vulnerable and intimidated witnesses to give their ‘best evidence’. For some, this means being enabled to give any evidence at all, for others, it requires measures to reduce the stress and potentially traumatic impact of live cross-examinations.^{viii} It is my view that the impact and effectiveness of Section 28 must be evaluated primarily against whether it delivers on its core purpose. Conviction rates and timeliness should be secondary considerations. Evaluating Section 28 against its intended purpose requires a multi-method approach combining case file analyses and complainant surveys or interviews to understand how Section 28 has affected their ability to give evidence, their experience of whether it enabled them to give their evidence as best they could, and how giving evidence has affected them.

1.3 Section 28 as a sticking plaster for the negative impact of the Crown Court backlog on RASSO complainants

Section 28 appears to have been extended to adult RASSO victims partly to alleviate the problems created by the court backlogs. It is now common for RASSO complainants to wait years until their case comes to trial and for trials to be postponed, sometimes multiple times. Long delays and trial postponements can have devastating impacts on complainants' mental health, ability to move forward after sexual violence, willingness to carry on supporting a prosecution, and on complainants' ability to give their best evidence as memory and recall may deteriorate over time.^{ix} The extension of Section 28 to RASSO victims was further portrayed as a measure of boosting conviction rates in the context of the previous governments' Rape Review programme.^x This conflation of the purpose of Section 28 in law and the then governments' framing of it as a sticking plaster to alleviate the impacts of long delays and to increase RASSO conviction rates may have muddled public debate over the purpose of Section 28.

2. The Practical Operation of Section 28

2.1 Some rape complainants experience giving live evidence in court as worse than the sexual violence itself, and some only feel able to participate in criminal justice because of Special Measures, including the pre-recording of the cross-examination. The Ministry of Justice process evaluation as well as data collected by Rape Crisis England and Wales suggest that for some victims, Section 28 is essential.^{xi} Rape Crisis' anecdotal evidence that Section 28 has enabled some complainants to continue to support a prosecution who were about to withdraw because of the prospect of having to wait years until their case goes to trial and the possibility of trial postponements.^{xii} My own research has shown that procedural fairness is at least as important as the case outcome to victim-survivors sense that justice has been done.^{xiii} This is in line with the definition of a fair trial within our justice system. A fair trial is one in which procedures are

correctly followed and the outcome is arrived at via a just process, not whether there is a conviction at the end of it. The availability of Section 28 in and of itself has value to RASSO victims because it improves procedural fairness.^{xiv}

2.2. In my role as the Independent Advisor on Criminal Justice Responses to Sexual Violence, police forces have brought to my attention Section 28 RASSO cases in which repeated rescheduling of the Section 28 pre-recording of the cross-examination has caused significant distress to an already extremely vulnerable or intimidated RASSO victim (the reason they were granted Section 28 in the first place). In some of these cases, officers struggled to keep victim-survivors on board because of these delays. Further, the trials themselves continued to be rescheduled, with some feeling that Section 28 cases were considered of lesser priority in court listings, and as a result, suffered ineffective trials more frequently than non-Section 28 cases. This is anecdotal evidence, and as far as I am aware, there exists at present no data on how Section 28 impacts the number of ineffective trials (the MoJ evaluation only considered the total number of days until the case is completed, not how many 'false starts' it took to get there^{xv}).

2.3 Criminal justice professionals, too, have reported significant operational problems with Section 28, including listing issues, additional work for barristers that is not remunerated, concerns about the quality of pre-recordings and how such recordings are received by jurors^{xvi}. The Criminal Bar Association (CBA) 2025 survey found Section 28 substantially adds to the stressors and strains of the work of RASSO barristers and is the second most prevalent reason for RASSO barristers intending to leave the RASSO.^{xvii} These concerns must be taken seriously, especially since a shortage of RASSO barristers impacts all RASSO cases.

2.4 The practical problems criminal justice professionals experience with Section 28 might be impacting whether Section 28-eligible RASSO complainants are being offered to apply for and then granted their Section 28 application. Claire Waxman OBE, London's Independent Victims' Commissioner, told me that in London there was "reluctance amongst counsel to recommend s.28 and of s.28 applications being granted by the Judiciary. The reasons provided to victims by prosecution counsel are often the perceived negative impact on the victim's chance of securing a conviction." Rape Crisis England and Wales, too, say that their frontline rape crisis practitioners report a marked increase in judges refusing applications for Section 28, or even rescinding approvals.

2.5 It is my view that the strains and stressors of Section 28 experienced by legal professionals (2.3) and victims (2.2.) are not caused by Section 28 per se (certainly not by the principle of offering pre-recorded cross-examinations to RASSO complainants), but manifestations of pre-existing system problems of an under-funded, outdated and overwhelmed criminal justice system. Section 28 results in more touchpoints with court listings and court video technology, and as such, might result in these systemic issues being particularly keenly felt in Section 28 cases by complainants and barristers alike. Further, academic research on the implementation and operational use of Section 28 suggests that the speed of the roll-out may at least in part be responsible for the operational issues reported by legal professionals and victims^{xviii}. In my view, the solution to operational issues is not to do away with the principle of Section 28 for RASSO complainants, but to recognise that Section 28 cannot be a workaround or sticking plaster for systemic issues as it was portrayed by some when it was first extended to RASSO victims (see 1.3). Section 28 must be evaluated against its principal purpose of alleviating the trauma and

barriers to giving live evidence, not against whether it can alleviate the operational issues of a near-defunct criminal justice system.

3. Proposals to Reform Section 28

3.1 Maintain Section 28, but clarify its purpose and use

The availability of Section 28 for adult RASSO complainants is essential for access to justice and procedural fairness. Its existence in itself is of value (see 2.1). As such, it must be kept. However, there needs to be clarity of its purpose, and what Section 28 can help with (i.e., reducing distress and trauma so complainants can give their best evidence, and enabling intimidated witnesses to give evidence at all), and what it cannot help with (e.g. the backlog). Complainants must be put into a position where they can make informed choices about whether Section 28 is right for them, like with all Special Measures. I have heard anecdotal evidence of complainants feeling 'railroaded' into agreeing to specific Special Measures, including Section 28, when they were not right for them. I have also heard of complainants who were not given enough (or any) information about Special Measures (including Section 28) or that the information was provided in a manner that did not empower them to make informed decisions. An Operation Soteria victim-centred approach to how the police and CPS engage with complainants over Section 28 (and other Special Measures) is essential.^{xix}

3.2 Complainant rights on paper vs rights in practice: Operational effectiveness is imperative and requires addressing system issues

There is little use in granting rights on paper if they can't be implemented effectively in practice.^{xx} But rather than taking away rights, the government and the justice system to address the underlying systemic reasons that create Section 28 implementation issues. This includes increasing capacity within the Crown Courts, updating technology and improving working conditions for RASSO barristers. When it comes to the quality of pre-recorded cross-examinations, The Lighthouse in North London delivers this successfully for children and may serve as a best practice template.^{xxi}

3.3 Enable independent research on the impacts of Section 28

I recommend that the Ministry of Justice and HMCTS make publicly available the complete dataset used by Professor Cheryl Thomas and the Ministry of Justice analyst team to enable independent scientific research on the impact of Section 28 on conviction rates and other court-related statistics. There should be clear signposting of this dataset and steps taken to raise awareness of its availability for academic research. Ultimately, evaluating Section 28 against its purpose must include interviews (see 2.1) or surveys of RASSO victims^{xxii}, for example, modelled on the Operation Soteria police experience survey for survivors of rape and sexual assault.^{xxiii}

4. Conclusion

Section 28 is an important Special Measure that enables some RASSO complainants to participate in the criminal justice process and give their best evidence. However, it is not a panacea for the systemic problems facing the criminal justice system. The challenges associated with Section 28 are not inherent to the measure itself but are reflective of pre-existing systemic issues. I caution against "throwing the baby out with the bathwater" by attributing these systemic problems to

Section 28. Instead, I recommend seeking to improve its implementation by addressing these systemic issues. Further, work must be undertaken to ensure that Section 28 is correctly applied and supported by adequate resources. This would require a commitment to fundamental court reform and a substantial uplift in funding for criminal justice and victim support. The principle of Section 28 is right, and its efficacy should be judged on whether it enables access to justice and improves complainant ability to give their best evidence, not on whether it alleviates or exacerbates pre-existing systemic problems within the criminal justice system, including rape conviction rates.

Endnotes

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- ⁱ <https://committees.parliament.uk/writtenevidence/126988/html/>
- ⁱⁱ <https://www.gov.uk/government/publications/impact-evaluation-of-pre-recorded-cross-examination>
- ⁱⁱⁱ The Ministry of Justice data analytics team calculated the effect on sexual offences conviction rates, rather than rape conviction rates specifically because the number of rape cases was deemed to small.
- ^{iv} See endnote i
- ^v See endnote ii
- ^{vi} See Footnote 5 in this submission https://committees.parliament.uk/writtenevidence/126988/html/#_ftn5 and [https://discovery.ucl.ac.uk/id/eprint/10165027/1/2023_CrimLR_Issue_3_Print%20\(Cheryl%20Thomas\).pdf](https://discovery.ucl.ac.uk/id/eprint/10165027/1/2023_CrimLR_Issue_3_Print%20(Cheryl%20Thomas).pdf)
- ^{vii} <https://www.gov.uk/guidance/ministry-of-justice-data-first>
- ^{viii} <https://www.cps.gov.uk/legal-guidance/special-measures>
- ^{ix} <https://cloud-platform-e218f50a4812967ba1215eaccede923f.s3.amazonaws.com/uploads/sites/6/2025/03/OVC-Crown-Court-backlog-report-10.03.25.pdf> and https://rcew.fra1.cdn.digitaloceanspaces.com/media/documents/RCEW_-_Breaking_Point_report_-_March_2023_E4uqKBL.pdf
- ^x <https://www.gov.uk/government/news/pre-recorded-evidence-for-rape-victims-available-nationwide> and <https://victimscommissioner.org.uk/news/the-distressing-truth-is-that-if-you-are-raped-in-britain-today-your-chances-of-seeing-justice-are-slim/>
- ^{xi} <https://assets.publishing.service.gov.uk/media/6426df357de82b00123133cc/process-evaluation-of-section-28-evaluating-the-use-of-pre-recorded-cross-examination-for-intimidated-witnesses.pdf> and <https://committees.parliament.uk/writtenevidence/130334/default/>
- ^{xii} Rape Crisis England & Wales (forthcoming)
- ^{xiii} Hohl and Stanko (2024) Policing Rape: The Way forward, Routledge. See also: Hohl, K., Johnson, K., & Molisso, S. (2022). A procedural justice theory approach to police engagement with victim-survivors of rape and sexual assault: Initial findings of the ‘Project Bluestone’ pilot study. *International Criminology*, 2(3), 253-261. And finally: Hohl, K., Johnson, K., & Molisso, S. (2022). A procedural justice theory approach to police engagement with victim-survivors of rape and sexual assault: Initial findings of the ‘Project Bluestone’ pilot study. *International Criminology*, 2(3), 253-261.
- ^{xiv} See also <https://committees.parliament.uk/writtenevidence/130334/default/>
- ^{xv} See Endnote x
- ^{xvi} <https://www.criminalbar.com/wp-content/uploads/2023/12/CBA-Response-to-JSC-Inquiry-6.12.23.pdf>
- ^{xvii} <https://www.criminalbar.com/resources/news/monday-message-24-03-25/> and also Munro et al (2024) below.
- ^{xviii} Munro, V., Weare, S., O’Doherty, L., Carter, G., Hudspith, L., Sleath, E., Brown, S., Cutland, M., & Perot, C. (2024) It’s the judicial equivalent of robbing Peter to pay Paul: The implementation gap in section 28 Youth Justice and Criminal Evidence Act 1999. *The International Journal of Evidence & Proof*, 29(2), 117-139. <https://doi.org/10.1177/13657127241259800>
- ^{xix} See Hohl and Stanko (2024) above and <https://www.college.police.uk/national-operating-model-rasso>
- ^{xx} <https://victimscommissioner.org.uk/news/victim-rights-vs-victim-realities-what-the-operation-soteria-surveys-tell-us/>
- ^{xxi} <https://www.thelighthouse-london.org.uk/>
- ^{xxii}
- ^{xxiii} <https://openaccess.city.ac.uk/id/eprint/31310/>