



**JUDGE ADVOCATE GENERAL'S PRACTICE MEMORANDUM 12**  
**PRE-TRIAL CROSS EXAMINATION IN ACCORDANCE WITH SECTION 28 YJCEA 1999 AND**  
**CRIMINAL EVIDENCE ACT 1999**

**Introduction**

1. This protocol applies to the Service Courts and is designed to ensure a consistent approach to the use of pre-trial cross-examination under section 28 YJCEA 1999. Nothing expressed in this protocol is intended or may be taken to contradict any relevant Court Martial or Criminal Procedure Rule or Practice Direction.
2. All suitably authorised Judge Advocates are eligible to hear Ground Rules Hearings ('GRH'), pre-recorded cross examination and re-examination under section 28 and trials involving the use of pre-recorded evidence. However, until such time as the Judge Advocate General directs otherwise, all hearings in cases involving s.28 evidence will be listed before the Resident Judge at Catterick.
3. This Practice Memorandum deals with the procedure which is to be followed at PTPH; GRH; s.28 hearings and trial. It will be updated as required in light of current practice, legislation and experience. Practitioners and Judges are encouraged therefore to revisit this protocol prior to conducting any s.28 or ancillary hearings.

**Before the case reaches the Court Martial**

4. A special measures direction may include a direction in accordance with s.28 YJCEA 1999 where the witness is eligible by virtue of s.16 (witnesses eligible for assistance on grounds of age or incapacity); s.17(1) (a witness whose evidence is likely to be diminished by reason of fear or distress) or s.17(4) (a complainant in respect of a sexual offence, a modern slavery offence or any other offence where it is alleged that the behaviour of the accused amounted to domestic abuse within the meaning of the Domestic Abuse Act 2021 YJCEA 1999).
5. Witnesses who are eligible for special measures under s.28 YJCEA 1999 should be identified by the service police. In order to ensure that the most appropriate package of special measures can be identified, a representative of the SPA should ideally provide advice to the service police before any discussion about special measures with the witness or witness' parent or carer.
6. A special measures direction in accordance with s.28 YJCEA 1999 can only be made if the special measures direction also provides for an Achieving Best Evidence (ABE) video recording to be admitted under s.27 YJCEA 1999 as evidence in chief of the witness. An ABE can be taken after a s.9 statement has been provided by the witness. However this may cause unnecessary delay and should be avoided where possible.

7. It is imperative for the future timetabling of the case that the investigators and prosecutor commence the disclosure process at the start of the investigation and continue to carry out their disclosure duties promptly, efficiently and effectively.

### **Before PTPH**

8. Initial details of the prosecution case must be served in advance of the PTPH and in accordance with the Judge Advocate General's Practice Memorandum [Better Case Management in the Court Martial 2024](#).<sup>1</sup>
9. If the Service Prosecution Authority ('SPA') wish to apply for a s.28 special measures direction, they must do so in writing, preferably at or before PTPH but, in any case, no later than 10 days after PTPH. The application should be served on both the Court and the defence. The report of the registered intermediary, if any, must be served with the above application together with that intermediary's availability.
10. Where an eligible witness is aged under 18 years at the time the application is made, the SPA must ensure that their date of birth is recorded within the application.
11. A transcript of the ABE must be served on the Court and defence at least 5 working days prior to PTPH.
12. If the defence wish to make representations about the application for special measures pursuant to s.28, this must be served on both the Court and the SPA within ten working days of the application being made.

### **PTPH**

13. The PTPH should be listed within 42 calendar days of the MCS receiving notification of direction from the SPA<sup>2</sup>, with a time estimate of no less than 45 minutes. Subject to paragraph 2 above, the PTPH must be conducted by a suitably authorised Judge Advocate who may hear submissions from the advocates, will rule upon any application for special measures and enter their rulings on the PTPH form which will have been uploaded onto Case Centre.
14. In making such a ruling, the Judge Advocate will need to consider:
  - whether any of the available special measures or a combination of them would be likely to improve the quality of the witness' evidence and, if so
  - which of the special measures or a combination of them would be likely to maximise, so far as is practicable, the quality of evidence given by a witness;
  - whether a s.28 direction will materially advance the date for the cross-examination. This may also involve consideration of when the s.28 recording and trial are likely to occur; the length of any s.28 hearing, the availability of the judge, advocates and the witness and whether there has been any previous delay.
15. The Judge Advocate should bear in mind all the circumstances of the case, including any views expressed by the witness and whether the measure or measures sought might inhibit such evidence being effectively tested.

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<sup>1</sup> Currently that which came into force on 1<sup>st</sup> June 2023 (see paragraph 3.1)

<sup>2</sup> See para 6.4 JAG BCM PD dated 1.6.23

16. If the application is granted, the Judge Advocate should make orders and give directions for the preparation for the s.28 hearing, including any outstanding disclosure of unused material.

17. At PTPH the defendant will be arraigned, the Judge Advocate will clarify the issues in the trial, give standard stage directions and fix dates. However, at a s.28 PTPH, further directions may include:

- further disclosure (including orders for the disclosure of material held by third parties);
- witness requirements;
- service of the defence case statement ('DCS');
- the date, time and location for the s.28 hearing. This will ordinarily post-date stage 3, in order to allow disclosure to be completed after service of the DCS;
- editing of the ABE. This will usually take place after the s.28 hearing;
- whether a GRH is necessary in a particular case. A GRH may not be necessary in the case of an adult witness unless they are vulnerable;
- the date, time, location and time-estimate for the GRH;
- who will be present for the GRH. Both the defendant and any intermediary should attend. It may also be helpful for the investigating officer to attend. The Judge Advocate must also decide if the GRH can be conducted by live link/medio.
- whether the defence advocate must set out their questions for cross-examination of the witness in full, by way of headings/topics or not at all;<sup>3</sup>
- where there is an intermediary, a timetable allowing for the questions to be sent to the intermediary for their comments and/or approval ensuring that the judge receives a final copy of the proposed questions (highlighting those questions that are not agreed) at least one working day before the GRH;
- service of a GRH form by the defence advocate. The judge must give directions as to which questions in the GRH form are to be completed by the defence advocate;<sup>4</sup>
- arrangements for the witness to visit the court and refresh his or her memory by viewing the ABE. This should ideally be the working day before the s.28 hearing;
- fix a date for the s.28 hearing, ideally 7 days after the GRH;
- fix a date for a mention at least 14 days thereafter for both advocates parties to confirm that the sound and visual quality is good, and to resolve any editing dispute or concerns; the unedited recording having been uploaded onto Case Centre shortly after the s.28 hearing.
- directions for any FCMH;
- any other special measure orders;
- Board composition;
- fixing a date for trial.

18. The GRH, if ordered, will usually take place as soon as is practicable after stage 3. Time must be afforded for any further disclosure of unused material following service of the DCS and for any determination of any application made under paragraph 14 of The Criminal Procedure and Investigations Act 1996 (Application to the Armed Forces) Order 2009.

19. Subject to judicial discretion, applications for extensions of time for service of disclosure by either party should generally be refused.

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<sup>3</sup> See Annex A

<sup>4</sup> Advocates should follow the guidance set out within the relevant advocates gateways and authorities

20. Where the defendant may be unfit to plead, a timetable for a s.28 hearing should usually still be set, taking into account the extra time needed to obtain any medical reports.
21. Witness and intermediary availability should be communicated to the Court at PTPH.
22. The above should be recorded on the PTPH form and uploaded onto Case Centre as soon as practicable following the PTPH.

#### **Prior to GRH and s.28 hearings**

23. It is imperative that all parties comply with the orders made at the PTPH including the completion and service of the GRH form by the defence advocate. Any delays or failures must be reported to the Resident Judge (Catterick) as soon as they arise; this is the responsibility of each legal representative.
24. Both the Judge and advocates must watch the ABE (or at least have read the transcript) before the GRH in order to assist on any ruling that may be required regarding proposed questions and to determine what is/is not contentious.
25. Any applications under s.100 CJA 2003 or s.41 YJCEA 1999 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 Advocate to rule on the application at the GRH hearing or, where necessary, on the day of the s.28 cross-examination if there is no GRH.
26. The witness' court familiarisation visit should take place, including an opportunity to view and practise on the live link/recording facilities. The witness must also be given the opportunity to view their ABE in order to refresh their memory either on the day of the court visit or at a later point. Ideally this should take place one working day prior to the s.28 hearing.<sup>5</sup>
27. If the Court decides that the witness can give evidence from a remote site such as a hospital, care home, private residence or operational base abroad, then the judge should also determine whether a familiarisation visit is required at that site. In such a situation, MCS will deploy to that location with the necessary equipment so as to ensure that the evidence is transmitted live into the Court.
28. It is unnecessary for the Judge Advocate to be present or to meet the witness when the witness attends for their familiarisation visit.
29. Applications to vary or discharge a special measures direction must be made as soon as reasonably practicable after the relevant party becoming aware of the grounds for doing so.

#### **GRH**

30. All advocates should master the toolkits available through the Advocate's Gateway. These provide guidance on questioning a witness who is eligible under s.16/17 YJCEA.<sup>6</sup>

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<sup>5</sup> For this reason, it may be best not to list a s.28 hearing on a Monday

<sup>6</sup> See Annex A

31. Any appointed registered intermediary must attend the GRH.
32. It is neither necessary nor desirable for the witness to attend the GRH.
33. Unless the Judge Advocate directs otherwise, GRHs will be conducted remotely. Attendance by both the defendant and advocates at GRHs (be that in person or via a live link) shall be a point of discussion at PTPH.
34. The defence advocate who appeared at the GRH is to conduct the s.28 cross-examination unless the interests of justice dictate otherwise.
35. The topics for discussion and agreement at the GRH will depend upon the individual needs of the witness. The intermediary may be able to provide assistance in this regard. Topics that will need discussion in every case will include:
- the overall length of the cross-examination;
  - whether the defence advocate is required to reduce questions into writing and, if so, whether those questions should be set out in full or foreshadowed by topic/heading only;
  - whether cross-examination should be undertaken by a single defence advocate in a multi-handed case;
  - whether there should be any restrictions on an advocate's usual duty to put their client's case.
  - how any limitations on questioning will be explained to the Board.<sup>7</sup>
36. It is likely that where a GRH takes place the Judge Advocate will go through the GRH form and:
- rule on any application under s.100 CJA or s.41 YJCEA or any other application that may affect the conduct of the cross-examination;
  - decide how witnesses may view exhibits or documents including body diagrams;
  - review compliance with orders made at PTPH and make any necessary further orders;
  - rule on the nature of the questioning and the questions that may be asked in cross-examination by the defence advocate with the assistance of a registered intermediary, if there is one.
  - rule on any additional questions to be asked by the prosecution in chief;
  - give directions for a final approved list of questions to be uploaded to Case Centre by the defence advocate;
  - rule upon whether wigs and/or gowns and/or uniforms are to be worn in cases involving child witnesses;
  - decide how the advocates and judge, and any intermediary are going to interact with the witness, and with each other, including how each will be addressed;
  - decide who will be in the room with the witness;
  - the length of time after which break/breaks should be taken;
  - determine the role of the intermediary, if there is one;<sup>8</sup>
  - upload to Case Centre a written and widely shared note of the above.

### **s.28 hearing**

37. Both prosecution and defence advocates must attend the s.28 hearing in person.

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<sup>7</sup> See **PMH** [2018] EWCA Crim 2452

<sup>8</sup> *R v Grant Murray* (2017) EWCA Crim 1228

38. Ideally there should be one working week between the GRH the s28 hearing.
39. The defendant must attend the s.28 hearing in person.
40. The trial judge and advocates may meet the witness prior to the hearing taking place. This may be in person or by live link and is at the discretion of the trial judge.
41. At the hearing, the witness will be cross-examined and re-examined, if appropriate, via a live link within the court building or from any other location as directed by the Court and the examination will be recorded.
42. It is the responsibility of the MCS to ensure in advance that all of the equipment is in working order.
43. Any other special measures including, but not limited to, screens must also be in place and any intermediary or supporter should sit in the live link room with the witness. The intermediary's role is transparent and where possible they should be visible and audible to the judge and advocate at all times. A member of MCS will also be in the room at all times to ensure the smooth recording and transmission of the evidence. No other person may be in the recording room whilst the witness is giving evidence without the permission of the trial judge.
44. The judge, advocates and defendant will usually assemble in the court room for the hearing. In some cases, the judge and advocates may be in the recording room with the witness, for example when questioning a very young child or a person with communication needs. The Judge Advocate will determine whether this is appropriate on a case-by-case basis. It is important to ensure that the defendant is able to communicate with his or her representative(s) and both hear and see the witness give evidence.
45. At the conclusion of the hearing the Judge Advocate will issue further orders, such as for the editing of the cross-examination and may set a timetable for progress.
46. Under s.28(4) YJCEA the Judge Advocate, on application by any party or on the Court's own motion, may direct that the recorded examination of the witness (or part thereof) is not to be admitted into evidence, despite any previous direction. Any such direction must be given promptly, preferably immediately after the conclusion of the examination.
47. If an unexpected answer is given so that the cross-examiner needs to divert from the agreed questions, the cross-examination should be stopped. The Court room and video suite will then be muted and the cameras turned off whilst the matter is raised in the absence of the witness. The advocate must then write out any extra questions they propose to put to the witness and, once again, these will need to be shared with both the prosecution and intermediary before being approved by the judge.
48. Without exception, any editing of either the ABE or recorded cross-examination is precluded without an order from the Judge Advocate.

#### **Preparation for trial**

49. The parties must notify the court promptly if any difficulties arise or any orders have not been

complied with. The court may order a further case management hearing if necessary.

50. The Service Justice System is equipped to record simultaneously from the relevant court room and witness suite. Recordings must be stored in a secure data centre with backup and resiliency. Only those fully authorised may access recordings.
51. No further cross-examination or re-examination of the witness may take place unless the criteria in s.28(6) are satisfied and the Judge Advocate makes a further special measures direction under s.28(5). Any such further examination must also be recorded as above.
52. Any application under s.28(5) must be in writing and served on the court and all parties at least 28 days before the date of trial.
53. All parties should respond to a s.28(5) application in writing within 7 days of the application being made. The Judge Advocate may determine the application on paper or order a hearing. The above timescales may be amended by the Judge Advocate.
54. There will be a further mention (or mentions if needed) listed by the Judge Advocate at least 14 days after the s.28 hearing for the advocates to check the recording for quality purposes and, if necessary, to notify the judge of any editing disputes or concerns so that he or she can deal with the same.

#### **Trial**

55. In accordance with the Judge Advocate's directions, the ABE and the s.28 cross examination, edited as directed, should be played to the Board at the appropriate time within the trial.
56. The Board should not usually receive transcripts of the recordings but, if they are so provided, they should be removed from the Board as soon as the recording(s) have been played.
57. If not addressed at GRH, the Judge Advocate should discuss with the advocates how any limitations on questioning should be explained to the Board either before the evidence is played to the Board or before summing up (or both).

#### **After trial**

58. Immediately after the trial, the ABE and s.28 cross-examination should be stored securely.

#### **Listing and allocation**

59. Depending on the circumstances of the case, the Judge Advocate may order that the defence advocate who appeared at the GRH must conduct the s.28 cross-examination. When such an order is made, the MCS together with the judge will make reasonable arrangements to achieve this. Continuity of representation is to be encouraged and the default position is that the advocate who conducted the s.28 hearing will represent the defendant at trial. However, the Judge Advocate may permit separate representation in the interests of justice.
60. When the timetable for a s.28 case is being considered, both advocates must have their up-to-date availability immediately to hand.
61. It is envisaged that the GRH and s.28 hearings will be listed before the same Judge Advocate and

until further directed, before the Resident Judge at Catterick. However, once the s.28 hearing has taken place any judge, provided that they are suitably authorised, can deal with the trial itself.

62. GRH and s.28 hearings will be listed at a time and date to be determined by the Judge Advocate in conjunction with the court officer. The judge and court officer will take into account the circumstances of the witness and also do their best to accommodate availability of Counsel. This may lead to hearing being held either earlier or later in the day to accommodate the same and avoid disruption to other trials.
63. The judge should also consider whether to make an order excluding the public from the s.28 hearing and/or restricting reporting.<sup>9</sup>

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<sup>9</sup> Rules 152/3 AF (CM) Rules 09; s.37/39 CYP A; s.25/46 YJCEA; s.1 SO(A) A

## **Annex A**

### **Relevant Material when considering pre-recorded cross examination of young and vulnerable witnesses**

1. *Sections 16 to 28 and 31 to 33 YJCEA 1999.*
2. *CPR/CPD 18* for the required procedure concerning special measures generally and *CPD 18 E 1-67* and a detailed Annexe for the required procedure under section 28, which replaced the original judicial Protocol (dated September 2014) on the implementation of section 28 YJCEA.
3. Crown Court Compendium Part 1 – 10-5 Evidence of children and vulnerable witnesses’.
4. *20 Principles of Questioning – a guide to the cross-examination of vulnerable witnesses – 2018* – produced by the Inns of Court College of Advocacy <https://static-documents.easygenerator.com/c9ac3583-bba3-456c-9b46-9b3f17fbee73.pdf>
5. *The Advocates Gateway Toolkits*  
<https://www.theadvocatesgateway.org/toolkits>
6. *Ground Rules Hearings:*  
<https://www.theadvocatesgateway.org/images/toolkits/1-ground-rules-hearings-and-the-fair-treatment-of-vulnerable-people-in-court-2019.pdf>
7. *Identifying Vulnerability and Making Adjustments:*  
<https://www.theadvocatesgateway.org/images/toolkits/10-identifying-vulnerability-in-witnesses-and-parties-and-making-adjustments-2017.pdf>
8. *Intermediaries:*  
<https://www.theadvocatesgateway.org/images/toolkits/16-intermediaries-step-by-step-2019.pdf>
9. *The Advocates Gateway: – Toolkit 6 – Planning to Question a Child or Young Person*
10. *The Equal Treatment Bench Book Chapter 2; vulnerability and competence in adults and children:*  
<https://www.judiciary.uk/wp-content/uploads/2018/02/ETBB-February-2018-amended-March-2020.pdf>

### **CACD authorities which relate to the limitation on cross-examination and section 28 matters**

- *R v Wills [2011] EWCA Crim 1938*
- *Lubemba and Pooley [2014] EWCA Crim 2064;*
- *Jonas [2015] EWCA Crim 562*
- *RL [2015] EWCA Crim 1215*
- *R v Grant Murray (2017) EWCA Crim 1228 re role of intermediary.*
- *RK (Knight) [2018] EWCA Crim 603*
- *YGM [2018] EWCA Crim 2458*
- *Dinc [2017] EWCA Crim 1206 (re judge requiring written questions)*
- *PMH (Hampson) [2018] EWCA Crim 2452*
- *Mark Le Brocq v Liverpool CC [2019] EWCA Crim 1398*
- *RT & Stuchfield [2020] EWCA Crim 155 (advocates to abide by ruling on questions)*