Online Grooming Offences and ‘Paedophile Hunters’

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Focussing on:

i)Assessment of harm in absence of sexual activity taking place – R v Privett [2020] & R v Woolner [2020];

i)Undercover operatives and vigilantes:- Entrapment? Fairness? Consistent with ECHR?

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Online Sex Offences and ‘Paedophile Hunters’

Offences – SOA 2003:

- Sexual activity with a child - s9
- Causing or inciting a child to engage in sexual activity - s10 (s8 if child under 13)
- Engaging in sexual activity in the presence of a child - s11
- Causing a child to watch a sexual act - s12
- Child sex offences committed by children or young persons - s13 (makes it an offence for child or young person to commit offence in section 9 - 12)
- Arranging a child sex offence - s14 (involves arranging offences in sections 9 to 13 of SOA)
- Meeting a child following sexual grooming - s15
- Sexual communication with a child - s15A

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Charging – when is it an attempt?

- S14 – Preparatory offence. Complete when arrangements made regardless of whether or not real victim.
- Privett [2020] - ‘not, therefore, dependent on the completed offence happening or even being possible’.
- Not to say s14 or s10 with no sexual activity taking place (e.g. Baker) can also never be an attempt:
- - Robson [2008] EWCA Crim 619
- - Liddiard [2019] EWCA Crim 1819

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Sentence: Categorising harm

s9 - Sexual activity

s10 - Causing or inciting

s14 - Arranging or facilitating

S14 – Guideline says refer to the substantive offence which D was intending to arrange/facilitate (very often s9 or s10)

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Sentence: Categorising Harm

- Sections 9 and 10 Guideline

Harm	
Category 1	• Penetration of vagina or anus (using body or object) • Penile penetration of mouth In either case by, or of, the victim
Category 2	Touching of naked genitalia or naked breasts by, or of, the victim
Category 3	Other sexual activity

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Sentence: Categorising Harm

- Makes MASSIVE difference:

	A	B
Category 1	**Starting point** 5 years' custody	**Starting point** 1 year's custody
	Category range 4 – 10 years' custody	**Category range** High level community order – 2 years' custody
Category 2	**Starting point** 3 years' custody	**Starting point** 26 weeks' custody
	Category range 2 – 6 years' custody	**Category range** High level community order – 1 year's custody
Category 3	**Starting point** 26 weeks' custody	**Starting point** Medium level community order
	Category range High level community order – 3 years' custody	**Category range** Low level community order – High level community order

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Sentence: Categorising Harm

- <u>The Problem</u>

- Absence of real victim does not reduce culpability, but what about level of harm?

- Conflicting lines of authority on Q of harm where sexual activity not taken place or was not even possible.

p45 of Sexual Offences Guideline regarding s14:

"The starting points and ranges in this guideline are also applicable to offences of arranging or facilitating the commission of a child offence. In such cases, the level of harm should be determined by reference to the type of activity arranged or facilitated. Sentences commensurate with the applicable starting point and range will ordinarily be appropriate. …"

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Sentence: Categorising Harm

- **R v Privett [2020] EWCA Crim 557**

Privett - convicted s14 (s9 substantive)– undercover officer posing as mother of 6 year old. Intended penetrative sexual activity, made arrangements to meet, travelled with condoms/vibrator etc. Sentencing Judge said Cat 1A. Dangerous. 5 years 4 months after full credit (so 8 years SP) and extended licence 2 years.

West – convicted s14 (s9 substantive) – undercover officer posing as mother of 10 year old. Intended penetrative sexual activity, made arragements to meet, travelled 180 miles with condoms etc. Not dangerous. Cat 1A. Reduced sentence of 6 years to 5 'on basis that appellant could not have put his plans into effect.'

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R v Privett [2020] EWCA Crim 557

Defence: should fall within cat 3 as child fictional

Supported by number of authorities:

- **Baker [2014] EWCA Crim 2752** - real child - incitement (s10) of activity which never took place. Cat 3.
- **Buchanan [2015] EWCA Crim 172** - real child. Incitement (s10), no activity - Cat 3A.
- **Stillwell [2016] EWCA Crim 1375** - s14 case, fictional child under 13 - determined to be a 3A case but said 'absence of actual harm is not the sole criterion by which harm is assessed. Intended harm is something to which the sentencing court must have regard.'
- **Solanki [2017] EWCA Crim 1282** - inciting real victim to engage in sexual activity (s10) and attempting to meet real victim with intention to commit penetrative sexual assault following grooming (s15). No actual sexual activity described in categories 1 and 2 took place, therefore cat 3.
- **Gustafsson [2017] EWCA Crim 1078** - involved attempting to incite a child to engage in sexual activity (attempt s10) - fictional child. Court took starting point in cat 3 not 1.
- **Cook [2018] EWCA Crim 530** involved attempting to incite a child to engage in sexual activity (attempt s10) - fictional child. Cat 3.
- **Allington [2019] EWCA Crim 1430** - S14 fictional child. Cat 3.

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R v Privett [2020] EWCA Crim 557

- **R v Liddiard [2019] EWCA Crim 1819**
- attempted s14 offences (incl s9) - total 3 years
- were attempts ‘but much more importantly there was no child on the other end of these electronic communications.’
- Scathing of counsel and court. Referring to R v Gustaffson and Cook CoA said ‘it was a serious failing in the court below that neither counsel nor the judge was aware of this line of authority. Accordingly, a man who is deeply vulnerable, who has a very limited IQ and many psychiatric and mental problems has been in custody since November [2018].
- Should have been cat 3a. 1 year instead of 3.

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R v Privett [2020] EWCA Crim 557

Prosecution argued:

- ‘pre-categorising’ such cases without considering the individual facts wrong;
- referred to **s.143(1) CJA ’03**: *Determining the seriousness of an offence: (1) In considering the seriousness of any offence, the court must consider the offender’s culpability ... and any harm which the offence caused, was intended to cause or might foreseeably have caused.*

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R v Privett [2020] EWCA Crim 557

Authorities in favour of categorising harm by reference to harm intended:

- **Bayliss [2012] EWCA Crim 269,** s14 offence with fictional victim, Openshaw J - 'the absence of a victim and with it the absence of actual harm does require that some reduction be made from the starting point.'
- **Collins [2015] EWCA Crim 915** - s14 case, fictional parent and child, s9 substantive offence - 1a
- **Lewis [2016] EWCA Crim 304** - s14 case, involved fictional 15 year old. Considered cat 1 harm 'as penetration of the vagina was intended.'

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R v Privett [2020] EWCA Crim 557

Privett approach – para 67:

i) Identify the category of harm the defendant intended (by reference to the type of activity “arranged or facilitated”)

ii) ‘Adjust’ the sentence in order to ensure it is commensurate with or proportionate to the applicable starting point and range if no sexual activity had occurred.

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R v Privett [2020] EWCA Crim 557

68. This approach was applied in Bayliss, the first of the cases reviewed above ([34] et seq.), albeit it was decided before the present sentencing Guideline came into force. That appeal concerned a section 14 offence involving a fictional child, and, as already rehearsed, the court decided that although all of the usual considerations on sentence apply, the absence of actual harm requires some reduction from the starting point (reduced in that case from 4 years to 3 years).

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Privett: what does it mean?

- Staring point - harm categorised by ref to harm intended;
- adjustment akin to a reduction from the appropriate sentence for a substantive offence to that which is appropriate for an attempt?
- likely to increase sentences for these sorts of offences

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Privett: what does it mean?

Para 72

‘This may lead to the result that a defendant who arranges the rape of a fictional 6-year-old is punished more severely than a defendant who facilitates a comparatively minor sexual assault on a real 15-year-old. In our view, there is nothing necessarily wrong in principle with that result. The sentence should be commensurate with the applicable starting point and range, and in cases where the child is a fiction this will usually involve some reduction (as in *Bayliss*) to reflect the lack of harm.’

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Saga continued…

Cases since Privett:

- Manning [2020] – CoA didn't circulate the memo

- Russell [2020] – again, memo absent

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Are we there yet?

R v Woolner [2020] EWCA Crim 1245

- D made contact with undercover officer posing as 13 year old boy
- Made arrangement to meets and drove there
- Charged as *attempt* s14 (incorrect)
- Other offences
- Total sentence 12 months, 6 months related to s14

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R v Woolner

Woolner clear:

- Bayliss and Privett are correct, Manning and Russell are wrong.
- Woolner's sentence was unduly lenient.
- 2 years, not 6 months for the s10. 30 months overall, not 12.

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Is that the end of the saga?

- Yes.

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Entrapment and ECHR

- Arguments that internet vigilante groups amount to covert intelligence sourced and therefore should be regulated by the Regulation of Investigatory Powers Act 2000 have failed (R v Walters; R v Ali, Newcastle Crown Court 6th April 2017 unreported)

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Entrapment and ECHR

Leading authority on entrapment:

Looseley [2001] UKHL 53, Lord Nicholls

- *…[A] useful guide is to consider whether the police did no more than present the defendant with an unexceptional opportunity to commit a crime…whether the police conduct preceding the commission of the offence was no more than might have been expected from others in the circumstances. Police conduct of this nature is not to be regarded as inciting or instigating crime…the overall consideration is always whether the conduct of the police or other law enforcement agency was so seriously improper as to bring the administration of justice into disrepute…'*

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Entrapment and ECHR

R v TL [2018] EWCA Crim 1821:

‘[T]he power to stay cases of entrapment as abuse of process was to ensure rule of law upheld and ‘to refuse to sanction the prosecution of state-created crime’ para 19.

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Entrapment and ECHR

- **Council for the Regulation of Health Care Professionals v The General Medical Council and Saluja [2006] EWHC 2784 (Admin)** – undercover journalist entrapping doctor into giving fake sicknote

- High Court did not agree that proceedings should be stayed as abuse

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Entrapment and ECHR

BUT:

•*Golding J (para 81) - the authorities leave open the possibility of a successful application of a stay on the basis of entrapment by non-state agents….given sufficiently gross misconduct by the non-state agent, it would be an abuse of the court's process (and a breach of Art 6) for the state to seek to rely on the resulting evidence. In other words, so serious would the conduct of the non-state agent have to be that reliance upon it in the court's proceedings would compromise the court's integrity.*

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Entrapment and ECHR

What about s78?

- *R v Shannon [2001] 1 WLR 51* Potter LJ - if there is good reason to question the credibility of an agent provocateur or to doubt their evidence (e.g. because of manipulation or selective editing of any recorded evidence), that evidence can be excluded. Approved in *Looseley*, Hutton LJ (at paras 42-44)

- Voir dire - avoid trial
- If trial - benefit of XX about integrity of evidence
- Paedophile hunters… ulterior motive/agenda, publicity, following on social media, money, level of persistence

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Finally…

Sutherland v Her Majesty's Advocate (Respondent) (Scotland) [2020] UKSC 32

- Paedophile hunters do not violate human rights (surprise surprise)

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Sutherland [2020] (Scotland)

- Appellant's sexual communications with child (albeit fictional child) were not worthy of respect under art 8 - they were criminal in nature.

- He could not have had a reasonable expectation of privacy in relation to them

- Had Art 8 even been engaged, Art 8 was not incompatible with using the evidence obtained to investigate and prosecute the crimes.

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Virtual Hearings
The Past, The Present and The Future…

Alistair Haggerty

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TOPICS

- The Past: gradual increase in remote hearings pre-COVID-19. The rationale and the circumstances.
- The Present: the ‘new normal’ in the age of COVID-19, rules, tips and best practice.
- The Future: what happens next? Are remote hearings here to stay? Might they go further? What are the dangers?

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THE PAST
Gradual Introduction of Remote Attendance

Statutes made provision for some parties to attend remotely:

- Defendants in pre-trial, confiscation and sentencing hearings: sections 57A – F of the Crime and Disorder Act 1998
- Vulnerable witnesses (s.24) and vulnerable defendants (s.33A): Youth Justice and Criminal Evidence Act 1999
- Any witness to ensure the efficient administration of justice: section 51 of the Criminal Justice Act 2003.

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THE PAST
Gradual Introduction of Remote Attendance

The inherent jurisdiction of the court allowed the use of video links in other circumstances.

- Rules 3.2(4) and (5) of the Criminal Procedure Rules allow for the use of video links for pre-trial hearings. These rules enable a defendant on bail to attend by video link, and allow for an advocate to attend a hearing via an audio or video link.

- The test is whether the defendant can effectively participate in proceedings.

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THE PAST
Impact Assessment: 2017

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/620655/impact-assessment-virtual-hearings.pdf

- Commissioned by the Ministry of Justice in February 2017.
- Objective of expanding the use of video technology with a view to saving money and making court hearings more efficient.
- This report proposed wholly virtual hearings, remote sentencing hearings and even remote trials.

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THE PAST
Situation pre-COVID-19

- Clear presumption in favour of attendance in person.

- Remote attendance introduced cautiously and incrementally and, generally, where there was a need which went beyond mere convenience (i.e. youth, vulnerability).

- Traditional model of courtroom advocacy, holding cases for other advocates, local firms, local Bar.

- However, there was a growing desire for courts to fully embrace virtual hearings. Some academics also argued in favour of online courts – Richard Susskind's book *'Online Courts and the Future of Justice'* was published in 2019.

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THE PRESENT
COVID-19 – The Game Changer

- Remote hearings became a necessity due to COVID-19.
- Given the increasing use of technology in other fields before COVID-19 struck, this may have been inevitable in any event.
- Crown Courts have since allowed all hearings, except trials, to be conducted remotely.
- After initial teething problems, remote hearings have become routine.

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THE PRESENT
The Coronavirus Act 2020

- Schedules 23 – 26 of the Coronavirus Act 2020 provide amendments to s.51 of the Criminal Justice Act 2003. Under the provisions of sch.23, the court can now permit any person, except a member of a jury, to participate in any criminal proceedings through a live video link. This includes judges, advocates, defendants and witnesses.

- Schedule 24 outlines the rules in relation to specific types of criminal hearing.

- The test for whether a video link should be permitted is the interests of justice.

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THE PRESENT
The Coronavirus Act 2020

- Schedule 26 provides some niche, but significant, rules in relation to appeals against requirements or restrictions imposed on a potentially infectious person. These are hearings which take place in the magistrates court.

- In these circumstances, the proceedings are to be conducted wholly by video unless the court directs otherwise.

- The Coronavirus Act has a two-year time limit, which may be shortened or lengthened by six months at ministerial discreation.

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THE PRESENT
Rules on the conduct of hearings

In March, the Court of Appeal issued some brief initial guidance for remote criminal hearings (at this stage the Cloud Video Platform (CVP) had not been introduced:

i. Business attire should be worn.

ii. The backdrop needs to be neutral and appropriate for a court hearing.

iii. Advocates need not rise when the court assembles.

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THE PRESENT
Rules on the conduct of hearings

- There is a civil hearings protocol – no equivalent as yet for criminal hearings.

- Detailed guidance was issued for defence practitioners in June (this envisages all virtual hearings taking place via CVP).

  https://www.gov.uk/guidance/video-enabled-criminal-hearings-guidance-for-defence-practitioners

- The guidance covers the hearing itself, but also matters such as speaking with clients in advance and consulting with the prosecution.

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THE PRESENT
Advantages of virtual hearings

I. Safer (at least in the short term, but probably beyond!)

II. More precise scheduling of hearings

III. Saves travel time

IV. Allows for better time management more broadly

V. Greater flexibility (can attend hearings in different courts on the same day)

VI. Prison conferences are easier (albeit not necessarily more effective)

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THE PRESENT
Disadvantages of virtual hearings

I. Technology can be unpredictable!

II. Practical limitations (e.g. having conferences with the client before and after the hearing, discussing the case with your opponent, using an interpreter).

III. Difficulties in identifying specific client needs (e.g. mental health, learning disability, drug and alcohol problems)

IV. Inconsistent approach taken by different courts.

V. Risk of undermining open justice? Or could it be improved?

VI. Risk of proceedings being illegally recorded?

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THE PRESENT
Emerging best practice

I. Speak to others in advance (instructing solicitor, advocate, client, opponent). Make sure that you have clear instructions and anticipate the issues which are likely to arise during the hearing.

II. Prepare a written note in advance and upload this onto DCS whenever appropriate.

III. Keep submissions succinct and precise.

IV. Make good practical arrangements (private room, quiet, non-distracting background, good internet connection, have papers to hand, use a microphone if necessary).

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THE PRESENT
Potential pitfalls

I. Speaking slowly is even more important than usual – the sound quality can be poor in court, there can be feedback, and the signal can fluctuate.

II. As always, it is important to establish a rapport with your client. This can be challenging over a video link.

III. Have a plan for situations in which you would typically obtain written instructions.

IV. Make sure the link is working before the hearing.

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THE FUTURE
Where do we go from here?

- Recent events have required a pragmatic approach.
- Those with reservations about remote hearings have put these aside to ensure that cases can be heard.
- However, there is historical precedent for emergency measures becoming permanent. There seems little doubt that virtual hearings are here to stay.
- But, which hearings should be virtual and which ones should be in person? Where is the line drawn?

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THE FUTURE
A slippery slope…?

Expediency vs quality of justice

- Limited evidence on the impact of remote hearings. However, a 2010 government study found that defendants who appeared on a video link were more likely to get a higher prison sentence and less likely to receive a non-custodial sentence.

- Risk of losing sight of the individual at the heart of the case.

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THE FUTURE
A slippery slope…?

Computer screen advocacy vs courtroom advocacy

- More difficult to communicate in an impactive way?
- Potential to undermine the value of advocacy?
- Compromises the ability to connect with one another – less fairness, empathy and understanding.
- However, could hearings be broadcast? Might this improve advocacy?

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THE FUTURE
A slippery slope…?

Outsourcing vs circuit model

- If the parties can dial in from anywhere in the country (or beyond) what impact will this have on the way cases are handled?
- Prospect of undermining the presumption of instructing local solicitors and barristers?
- Risk of a race to the bottom?

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