

Road testing findings s15A Sexual communication with a child

Introduction

The current sexual offences guidelines were published in 2013 and came into force in 2014. The 2020 Court of Appeal case of *Privett* provided the courts with guidance about how to approach the assessment of harm in cases where sexual activity was incited but ultimately did not take place. This often occurs in the context of undercover ‘sting’ operations where there is no child, though could also include cases where there is a child but no sexual activity took place. These cases have tended to be placed automatically in the lowest category of harm. However, the Council has proposed amendments to the guidelines in line with the *Privett* ruling, with directions that judges should determine harm on the basis of what an offender intended, even if no sexual activity ultimately takes place (including situations where there is no real child victim), before making a downward adjustment to reflect the fact that no activity took place.

The Council has also developed a draft guideline for the offences of sexual communication with a child. There is no current guideline for this offence. The same principle applies for determining harm where there is no real child.

Qualitative research was required to understand how the draft guidelines would be used in practice. The s15A Sexual communication with a child guideline was tested with Crown Court judges, district judges and magistrates, with the aim of understanding how sentencers use the guideline, whether they find it clear and usable, and the severity of sentence imposed and when sentencers would consider suspending. The Council also wanted to understand how sentencers interpret the guidance for determining harm where no sexual activity has taken place and what sort of reduction sentencers will give in practice for these cases.

Methodology

A random sample of judges, district judges and magistrates was taken from the research pool¹ and invited to take part in qualitative research interviews. For the new s15A guideline, sentencers were first asked to sentence the case as if it were before them in court today, and then to sentence the case using the draft guideline. Participants were sent the draft guidelines and scenarios one week in advance, to allow time to read through them before the interview.

Table 1: Number of participants sentencing each scenario

Scenario	Guideline	Crown Court judges	District judges	Magistrates	Total
D	s15A	8	3	3	14
E	s15A	8	3	3	14

¹ The database of sentencers who have agreed to be approached by the Sentencing Council to take part in research from time to time.

Key findings

- In scenario D, 12 out of 14 sentencers placed the offender in category B1, and all 14 sentencers had a starting point of 1 year. Two Crown Court judges and two district judges made downward adjustments of three months to reflect the fact that the child victim did not exist. Final sentences ranged from a community order to 9 months custody. Two sentencers gave immediate custody, all others gave a community order or suspended sentence. Of the four sentencers who had made an adjustment on the basis of no child victim, all arrived at a final sentence of 6 months, three of which were suspended.
- In scenario E, all sentencers placed the offender in category B2, and 12 out of 14 gave a starting point of 6 months. One Crown Court judge and one district judge made downward adjustments of two months to reflect the fact that the child victim did not exist. Final sentences ranged from a medium level community order to 10 months custody. One Crown Court judge gave immediate custody, all others gave a community order or suspended sentence.
- There was consistency in both scenarios in sentencers' assessments of culpability and harm, as well as starting points. The range in final sentences appeared to relate to the variation in weight given to the mitigating factors.
- Some sentencers said they struggled to assess the harm in the s15A scenarios where there was no child victim, because they were unable to assess whether harm or distress was caused to a victim in the level 1 factors.
- Most sentencers did not make a downward adjustment to reflect the fact that the child victim did not exist, or seem to take the narrative in the guideline into account.

Scenario D (s15A sexual communications)

Offender is aged 30 and lives with his partner. He met the apparent victim (in fact a member of a vigilante group) on a dating app. Her profile claimed she was 18, but soon after they started communicating she revealed that she was in fact 13. He asked her to keep quiet and make sure she did not tell her parents. The conversation soon moved from the dating app on to another messenger service. He asked whether he could be her boyfriend, whether she wanted to kiss him and whether they could meet for a drink. He then turned to discussing the size of her breasts, her experience of puberty, and what underwear she owned. He sent two explicit images of a vagina. They discussed having sex and the risks of getting pregnant. There was some vague discussion of meeting up. These exchanges continued for about two weeks until he was arrested, at which point he admitted everything.

The offender has old and irrelevant convictions for which a community order was given and complied with. The Pre-sentence Report suggests he is minimising responsibility for the offending. A psychological report says he had a difficult childhood and has a very low IQ ("intellectually impaired or suffering from a learning difficulty") which means he has a support worker. The psychologist says this – alongside his other difficulties – was linked with the offending. Psychologist concludes that he will be vulnerable in custody and going to prison is likely to increase chances of reoffending.

Scenario D was tested with eight Crown Court judges, three district judges and three magistrates. It was based on the case of *Hale* for which a 3 year community order was handed down. In road testing, final sentences ranged from a community order to 9 months custody.

In assessing harm, 12 out of 14 sentencers placed the offender in harm category 1 on the basis of images sent. One district judge and one magistrate, having acknowledged the images sent, each placed the offender in category 2 on the basis that there was no impact or harm caused to a victim.

In assessing culpability, 13 out of 14 sentencers placed the offender in culpability category B, on the basis that there were no category A factors. One district judge placed the offender in category A though did not identify any factors that led to this assessment. This sentencer had also put harm in level 2. All sentencers gave a starting point of 1 year.

Two district judges made an adjustment on the basis that the child victim did not exist and reduced their sentences by three months down to 9 months. No Crown Court judges or magistrates made adjustments at this stage, though two Crown Court judges brought their sentences down by three months at mitigation stage to reflect the fact that the child victim did not exist.

Most sentencers did not make an adjustment or seem to take the narrative from the guideline into account. One Crown Court judge noted after giving a final sentence that they had not accounted for the fact that it was an attempt but said this would not alter their final sentence of a high level community order.

Three sentencers brought their sentences down due to mitigating factors, and a further two, as described above, brought sentences down at this stage on the basis there was no real harm caused. One district judge raised the sentence from 9 months to 10 months due to the aggravating factors.

Sentences prior to guilty plea reduction ranged from a high level community order to 1 year custody, and final sentences ranged from a community order to 9 months custody. None of the Crown Court judges sentenced to immediate custody: three gave community orders, two gave suspended sentences of 6 months, and three gave suspended sentences of 8 months. District judges all arrived at a final sentence of 6 months, two of which were suspended. Magistrates arrived at final sentences of 6 months and 1 year (both suspended) and 9 months immediate custody.

Of the four sentencers who had made an adjustment on the basis of no child victim, all arrived at a final sentence of 6 months, three of which were suspended.

Sentencers were also asked to sentence this scenario as they would now, without a guideline in place. Most arrived at very similar final sentences, though one Crown Court judge said they would give a custodial sentence, with a starting point of 18 months to 2 years custody, without the guideline, and came to 8 months, suspended, when using the guideline. They stated that they were happy with the final suspended sentence order they came to, though would have been happy with a custodial sentence too. They concluded that the guideline's approach makes a suspended sentence order more reasoned and justifiable.

In weighing up whether to suspend the sentence, sentencers said they would consider whether there was sufficient prospect of rehabilitation, and the fact that the offender had no previous convictions. One said it would never be appropriate for him to be sent to custody, and gave a community order. Of the two sentencers who gave immediate custodial sentences, one magistrate said they would send the case to the Crown Court and expect it to be suspended. The other, a district judge, said they would consider suspension, and would be balancing the offender's vulnerability against "serious, persistent, harmful behaviour that is very concerning."

Most said they would probably attach rehabilitation activity requirement (RAR) days so that the offender could have one-to-one support rather than the Sexual Offender Treatment Programme (SOTP), due to his low IQ. Five said they would include unpaid work as a punitive element.

Scenario E (s15A sexual communications)

This offending consists of five counts, all attempted sexual communication with a child. These were decoys set up by vigilante groups. The offender is aged 28, and has no previous convictions. The apparent victims were aged 13 and 14. Each of the cases lasted from a few days, up to at most a month and the whole course of offending takes place over about 10 weeks. There was a series of persistent communications to each of the victims. He asked what they were wearing, whether they were wearing a school uniform, whether he could kiss them, whether he could be their boyfriend, and he asked them suggestive questions about their experience, and what they had done with female relatives.

The vigilante group posted the conversation on Facebook and called the police. He made immediate admissions of guilt and put in a guilty plea at the earliest opportunity. The Police found (legal) photographs of young women in school uniform on his phone. His employer dismissed him and he subsequently made a call to the police suggesting he was going to kill himself. He has a history of self-harm and since his arrest he has been getting treatment for mental health issues. He has learning difficulties, is isolated, and lives with his mother. However, he is now in an age-appropriate relationship. The Pre-Sentence Report noted that he recognises that what he did was wrong and that he needs help.

Scenario E was tested with eight Crown Court judges, three district judges and three magistrates. It was based on the case of *Burton*, for which a 3 year community order was handed down, as with the previous scenario. In road testing, final sentences ranged from a medium level community order to 10 months custody.

All sentencers placed the offender in harm level 2, on the basis there were no level 1 factors, and in culpability category B, on the basis there were no category A factors.

For the starting points, 12 out of 14 sentencers gave 6 months custody. Two Crown Court judges gave a starting point of 1 year, to take into account the five counts. One Crown Court judge and one district judge made adjustments on the basis of no child victim, reducing their sentences by two months, to 10 months and 4 months respectively.

Despite identifying a considerable number of mitigating factors across the group, only three sentencers (two Crown Court judges and one district judge) reduced their sentences from the starting point based on mitigation. One Crown Court judge increased the sentence from 6 months to 15 months to account for the five counts. Two district judges also increased their sentences on the basis of aggravation. Other sentencers made no adjustment on the balance of aggravation and mitigation, and sentences prior to the guilty plea reduction ranged from 3 months to 15 months custody. Following the guilty plea reduction, sentences ranged from a medium level community order to 10 months custody.

Six out of eight Crown Court judges gave a final sentence of a medium or high level community order, one gave 6 months custody, suspended, and one gave 10 months immediate custody. Two

district judges gave a high level community order and one gave 6 months custody, suspended. One magistrate gave a high level community order and two gave 4 months custody, suspended.

The Crown Court judge who gave ten months custody stated, when asked, that they had included an adjustment in their final sentence, though had not highlighted this during the sentencing process. They stated the reduction would be fairly small, and noted that they had not been able to take distress caused into account, which would stop the sentence going higher.

Reasons for suspending or giving a community order included: the offender's mental health and learning difficulties, the prospect of rehabilitation, first offence and the assessment that he is unlikely to reoffend. One Crown Court judge said that longer orders are better for this type of offending, to allow time to complete programmes that will address offending behaviour.

Again, most sentencers indicated they would attach RAR days rather than the SOTP requirement, given the vulnerability of the offender, and would attach an unpaid work requirement if he were able to do this.

Some sentencers said they struggled to assess the harm where there was no real victim, because they were unable to assess whether harm or distress was caused to the victim. One questioned whether they should be assessing the harm they would expect to be caused to a victim.

Other comments on the guideline

One sentencer thought that the guideline was "pitched too high," noting that all the starting points are custodial sentences even though the maximum sentence is just two years.

One judge questioned why location and timing of offence are included in the aggravating factors but not in other guidelines.

Opinions were split on the conspicuousness of the narrative about the adjustment. When asked, most sentencers said they had found it clear, though not all had applied it. Some said they liked the fact that it stood out in a blue box, while another said it needed to be highlighted so that sentencers would read it.

One magistrate said the guideline was "quite clear you should be considering it as, if the defendant thinks the victim is real, then you should be considering them as a real person." This sentencer was able to assess the harm appropriately though did not apply a subsequent adjustment on the basis there was no real child.

One district judge questioned why cases where images have been sent or received should be the most harmful type of case. A Crown Court judge thought this would be better placed in aggravating factors to avoid every sexual image case being placed in category 1A.

Scenario D – s15A Sexual communication with a child: Crown Court judges, district judges and magistrates

	Harm	Factors	Culpability	Factors	SP	After adjustment	Reduction for no victim	Aggravating factors	Mitigating factors	Pre-GP sentence	Final sentence
Crown Court judges											
1	1	<ul style="list-style-type: none"> • Images sent 	B	<ul style="list-style-type: none"> • No Cat A factors 	1 year						CO or SSO
2	1	<ul style="list-style-type: none"> • Images sent 	B	<ul style="list-style-type: none"> • No Cat A factors 	1 year			<ul style="list-style-type: none"> • Sustained communication 	<ul style="list-style-type: none"> • Mental disorder/ learning disability • <i>Vulnerable in custody</i> 	1 year	High level community order
3	1	<ul style="list-style-type: none"> • Images sent 	B	<ul style="list-style-type: none"> • No Cat A factors 	1 year			<ul style="list-style-type: none"> • Steps to prevent reporting 	<ul style="list-style-type: none"> • No relevant convictions • Mental disorder/ learning disability • <i>Vulnerable in custody</i> 	High level community order	High level community order
4	1	<ul style="list-style-type: none"> • Images sent 	B	<ul style="list-style-type: none"> • No Cat A factors 	1 year		3 months	<ul style="list-style-type: none"> • Steps to prevent reporting • Sustained communication 	<ul style="list-style-type: none"> • Good character • Mental disorder/ learning disability 	9 months	6 months, suspended for two years
5	1	<ul style="list-style-type: none"> • Images sent 	B	<ul style="list-style-type: none"> • No Cat A factors 	1 year		3 months			9 months	6 months, suspended
6	1	<ul style="list-style-type: none"> • Images sent 	B	<ul style="list-style-type: none"> • No Cat A factors 	1 year			<ul style="list-style-type: none"> • Disparity in age • Attempt to conceal • Sustained communication 	<ul style="list-style-type: none"> • Good character • Mental disorder/ learning disability 	1 year	8 months, suspended
7	1	<ul style="list-style-type: none"> • Images sent 	B	<ul style="list-style-type: none"> • No Cat A factors 	1 year					1 year	8 months, suspended
8	1	<ul style="list-style-type: none"> • Images sent 	B		1 year				<ul style="list-style-type: none"> • No relevant convictions • Remorse • Mental disorder/ learning disability 	1 year	8 months, suspended for 2 years
District judges											

9	1	<ul style="list-style-type: none"> • Images sent 	B	<ul style="list-style-type: none"> • No Cat A factors 	1 year	9 months	3 months	<ul style="list-style-type: none"> • Steps to prevent reporting • Sustained communication 	<ul style="list-style-type: none"> • No relevant convictions • Mental disorder/ learning disability • <i>Isolated offence</i> • <i>Vulnerable in custody</i> 	6 months	6 months, suspended
10	2	<ul style="list-style-type: none"> • Images sent • <i>No impact on victim</i> 	A		1 year			<ul style="list-style-type: none"> • Sending images • Unpleasant discussion 	<ul style="list-style-type: none"> • No relevant convictions • Mental disorder/ learning disability 	6 months	6 months, suspended
11	1	<ul style="list-style-type: none"> • Images sent 	B	<ul style="list-style-type: none"> • No Cat A factors 	1 year	9 months	3 months	<ul style="list-style-type: none"> • Steps to prevent reporting • Attempt to conceal evidence • Sustained communication 	<ul style="list-style-type: none"> • Mental disorder/ learning disability • <i>Difficult childhood</i> 	10 months	6 months
Magistrates											
12	1	<ul style="list-style-type: none"> • Images sent 	B	<ul style="list-style-type: none"> • No Cat A factors 	1 year			<ul style="list-style-type: none"> • Steps to prevent reporting 	<ul style="list-style-type: none"> • No relevant convictions • Mental disorder/ learning disability 	1 year	9 months
13	2	<ul style="list-style-type: none"> • Images sent • <i>No harm to victim</i> 	B	<ul style="list-style-type: none"> • No Cat A factors 	1 year			<ul style="list-style-type: none"> • Attempt to conceal evidence 	<ul style="list-style-type: none"> • No relevant convictions • Mental disorder/ learning disability 	6 months, suspended	[credit is keeping the case in the magistrates' court]
14	1	<ul style="list-style-type: none"> • Images sent 	B	<ul style="list-style-type: none"> • No Cat A factors 	1 year			<ul style="list-style-type: none"> • Steps to prevent reporting • <i>Minimising responsibility</i> 	<ul style="list-style-type: none"> • Mental disorder/ learning disability • <i>Isolated offence</i> • <i>Vulnerable in custody</i> 	1 year	1 year, suspended

Scenario E – s15A Sexual communication with a child: Crown Court judges, district judges and magistrates

	Harm	Factors	Culpability	Factors	SP	After adjustment	Reduction for no victim	Aggravating factors	Mitigating factors	Pre-GP sentence	Final sentence
Crown Court judges											
1	2	<ul style="list-style-type: none"> No level 1 factors 	B (x5)		1 year	10 months	2 months		<ul style="list-style-type: none"> Good character 	9 months	6 months, suspended for 18 months
2	2	<ul style="list-style-type: none"> No level 1 factors 	B	<ul style="list-style-type: none"> No cat A factors 	6 months			<ul style="list-style-type: none"> Sustained communication 	<ul style="list-style-type: none"> No previous convictions Remorse Mental disorder/ learning disability Age/lack of maturity 		Medium level community order
3	2	<ul style="list-style-type: none"> No level 1 factors 	B	<ul style="list-style-type: none"> No cat A factors 	1 year (for 5)				<ul style="list-style-type: none"> Good character Remorse Mental disorder/ learning disability 	10 months	3 year community order
4	2	<ul style="list-style-type: none"> No level 1 factors 	B		6 months				<ul style="list-style-type: none"> <i>Immediate admissions</i> <i>Social isolation</i> <i>Self-harm</i> 		2 year community order
5	2	<ul style="list-style-type: none"> No level 1 factors 	B	<ul style="list-style-type: none"> No cat A factors 	6 months for single offence				<ul style="list-style-type: none"> Mental disorder/ learning disability <i>Immediate admissions</i> <i>Self-harm</i> <i>Age-appropriate relationship</i> 	15 months (for 5)	10 months
6	2	<ul style="list-style-type: none"> No level 1 factors 	B	<ul style="list-style-type: none"> No cat A factors 	6 months			<ul style="list-style-type: none"> <i>Number of victims</i> 	<ul style="list-style-type: none"> No previous convictions Remorse Good character Lack of maturity Mental disorder/ learning disability 		High level community order
7	2	<ul style="list-style-type: none"> No level 1 factors 	B	<ul style="list-style-type: none"> No cat A factors 	6 months				<ul style="list-style-type: none"> Mental disorder/ learning disability <i>Age-appropriate relationship</i> <i>Isolated offence</i> 		Medium level community order

8	2	<ul style="list-style-type: none"> No level 1 factors 	B	<ul style="list-style-type: none"> No cat A factors 	6 months				<ul style="list-style-type: none"> No previous convictions Remorse Lack of maturity <i>Lost job</i> 	6 months	High level community order
District judges											
9	2	<ul style="list-style-type: none"> No level 1 factors 	B	<ul style="list-style-type: none"> No cat A factors 	6 months			<ul style="list-style-type: none"> Sustained communication 	<ul style="list-style-type: none"> No previous convictions Remorse Mental disorder/ learning disability <i>Self-harm</i> <i>Steps to obtain treatment</i> 	9 months	6 months, suspended (x5 concurrent)
10	2	<ul style="list-style-type: none"> No level 1 factors 	B	<ul style="list-style-type: none"> No cat A factors 	6 months			<ul style="list-style-type: none"> Sustained communication <i>Images on phone</i> 	<ul style="list-style-type: none"> Good character Mental disorder/ learning disability 	6 months	High level community order
11	2	<ul style="list-style-type: none"> No level 1 factors 	B	<ul style="list-style-type: none"> No cat A factors 	6 months	4 months	2 months	<ul style="list-style-type: none"> Sustained communication 	<ul style="list-style-type: none"> Good character Mental disorder/ learning disability <i>Immediate admissions</i> <i>Socially isolation</i> 	3 months	8 weeks (for single offence) For all 5: High level community order
Magistrates											
12	2	<ul style="list-style-type: none"> No level 1 factors 	B	<ul style="list-style-type: none"> No cat A factors 	6 months				<ul style="list-style-type: none"> Remorse Mental disorder/ learning disability 	6 months	4 months, suspended
13	2	<ul style="list-style-type: none"> No level 1 factors 	B (x5)	<ul style="list-style-type: none"> No cat A factors 	6 months			<ul style="list-style-type: none"> Sustained communication 	<ul style="list-style-type: none"> No previous convictions Mental disorder/ learning disability 	6 months	4 months, suspended
14	2	<ul style="list-style-type: none"> No level 1 factors 	B	<ul style="list-style-type: none"> No cat A factors 	6 months			<ul style="list-style-type: none"> Sustained communication 	<ul style="list-style-type: none"> No previous convictions Mental disorder/ learning disability <i>Age-appropriate relationship</i> 	6 months	High level community order

Blank page