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generally come to the attention of the police.³¹ A prosecution is likely to result only if someone goes further than the consent endorsed, or serious injury is caused.³² The Commission recommends the decriminalisation of certain assaults to which parties have consented, and which are for the purposes of sexual gratification, but only where the behaviour in question is unlikely to result in serious injury. This is to be determined according to what the reasonable person would judge as being the likely outcome of the practice.³³ I have strong misgivings about this. For example, imagine that A bites B on the breast, strikes B's legs a couple of times with a belt, or ties B's wrists together. At present, each of these activities is an assault, even though no serious injury is caused (or was likely to be caused). Decriminalisation opens the door to pleas that this was done for the accused's (or even for the complainer's) sexual pleasure, and that the complainer consented. The Commission refers to the need to strike a balance "between the protection of a person's physical integrity and the promotion of sexual autonomy".³⁴ No mention is made of the danger of false claims of consent.

D. CONCLUSION

A great deal is expected from this Report, given the strength of feeling among many that the law is in desperate need of reform. It is easy to focus on the parts with which one disagrees. There are many commendable recommendations, and implementation of the Report will improve Scots criminal law in the area of sexual offences.

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Sentencing Guidelines under section 118(7): *Lin v HM Advocate* and *Spence v HM Advocate*

Since 1995, the High Court has had the power to pronounce sentencing guidelines in appropriate cases, under section 118(7) of the Criminal Procedure (Scotland) Act 1995.¹ The main purpose of such guidelines is to promote consistency in sentencing

³¹ See, however, *R v Brown* [1994] 1 AC 212.

³² See e.g. *McDonald v HM Advocate* 2004 SCCR 161.

³³ Recommendation 57.

³⁴ Para 5.23.

¹ Henceforth the 1995 Act. Section 118(7) provides for guidelines in relation to solemn cases. A similar power in relation to summary cases is contained in s 198(7).

across the criminal courts. As such, section 118(7) provides that, when disposing of an appeal against sentence, “the High Court may, without prejudice to any other power in that regard, pronounce an opinion on the sentence or other disposal or order which is appropriate in any similar case”. Section 197 of the 1995 Act states that “a court in passing sentence shall have regard to any relevant opinion under section 118(7)”.

Section 118(7) came into force on 1 April 1996 and has almost never been used. The first – and indeed until recently the *only* – explicit use of section 118(7) was in *Du Plooy v HM Advocate*.² Here the court issued guidance on the level of discount to be applied where an offender has pled guilty, although this extended only as far as stating that the discount “should normally not exceed a third of the sentence which would otherwise have been imposed”.³ To *Du Plooy*, one might add *Ogilvie v HM Advocate*,⁴ where, although no explicit reference was made to section 118(7), the appeal against sentence was remitted to a larger court so that “guidelines” could be given on the appropriate sentence where an offender has downloaded indecent photographs of children from the internet.

By contrast, the body responsible for issuing sentencing guidelines in England and Wales, the Sentencing Guidelines Council (SGC), has been extremely active. In the four years since its inception,⁵ it has issued ten sets of final guidelines, on subjects including sexual offences, domestic violence, robbery, manslaughter and reduction in sentence for a guilty plea. It has also issued draft guidelines in a further four areas, including sentencing in the magistrates courts and offences against the person.⁶

It might be said that this is not a fair comparison, as the process by which guidelines are issued in England and Wales differs from that in Scotland. Most importantly, there is no need for an appropriate case to arise before guidelines can be drawn up – the SGC can itself select areas in which to issue guidance or can respond to suggestions from the Home Secretary or the Sentencing Advisory Panel⁷ – whereas the High Court in Scotland can issue guidelines only as part of an appeal before it. But even prior to the establishment of the SGC, when sentencing guidelines were the responsibility of the Court of Appeal, and thus could only be linked to appeals against sentence, it was far more common for guidelines to be issued by the English courts than the Scottish courts.⁸

2 2005 JC 1.

3 Para 26. For discussion, see F Leverick, “Making sense of sentence discounting: *Du Plooy v HM Advocate*” 2003 SLT (News) 265; F Leverick, “Tensions and balances, costs and rewards: the sentence discount in Scotland” (2004) 8 EdinLR 360.

4 2002 JC 74.

5 It was established by s 170 of the Criminal Justice Act 2003.

6 Guidelines are published on the Council’s website, at www.sentencing-guidelines.gov.uk.

7 The body that provides advice to the SGC.

8 See Sentencing Guidelines Council, *Guidelines Judgments: Case Compendium* (2005), which draws together the sentencing guidelines issued by the Court of Appeal and lists 93 such judgments between 1990 and 2005.

It may be, however, that things are set to change, as in November 2007 the High Court issued two sets of sentencing guidelines under section 118(7) in the space of a week, in *Zhi Pen Lin v HM Advocate*⁹ and *Spence v HM Advocate*.¹⁰

A. *LIN v HM ADVOCATE*

In *Lin*, the section 118(7) power was explicitly used for the first time in respect of a substantive offence. The appellant had pled guilty to an offence under section 4(2)(a) of the Misuse of Drugs Act 1971, the production of a controlled drug. He was an illegal immigrant who had been living and working in a cannabis ‘farm’. The operation was a large scale one, but the court described the appellant as a “gardener”, whose involvement was “minor”.¹¹ The maximum penalty for conviction on indictment for a section 4(2)(a) offence is 14 years imprisonment or an unlimited fine,¹² leaving considerable discretion to sentencing judges.

The appellant had been sentenced to three years and nine months imprisonment (discounted from five years due to his early guilty plea). Leave to appeal against sentence was granted and the case was identified as one in which it might be appropriate for the court to exercise its section 118(7) power, given that there had been “a degree of disparity”¹³ in the sentences pronounced in similar cases in the past.

The guidance the court gave was that the appropriate starting point when sentencing “‘gardeners’ involved in relatively large scale operations” should be “in the range of 4 to 5 years’ imprisonment”.¹⁴ As such, while the sheriff’s starting point for calculating the appellant’s sentence (five years) was “at the upper end of the range” and “on the severe side”, it was not excessive.¹⁵

The choice of four to five years as the appropriate starting point is higher than that in England and Wales, where the equivalent starting point is around three years.¹⁶ The reason given for this was “the need to discourage a new development in this jurisdiction”.¹⁷ If sentence levels do have a deterrent effect,¹⁸ this may well discourage such developments in Scotland only for potential offenders to set up or move their operations to England, thus merely transferring the problem to another jurisdiction.

9 [2007] HCJAC 62, 2008 SCCR 16.

10 [2007] HCJAC 64, 2007 SLT 1218.

11 Para 12.

12 Misuse of Drugs Act 1971 Sch 4.

13 Para 10.

14 Para 13.

15 Para 14.

16 Para 13.

17 Para 13.

18 This has been doubted: see e.g. A von Hirsch, A Bottoms, E Burney and P-O Wilstrom, *Criminal Deterrence and Sentence Severity* (1999).

B. *SPENCE v HM ADVOCATE*

Lin was followed a week later by a second case invoking section 118(7), that of *Spence*.¹⁹ Here, the appeal court fleshed out its earlier guidelines in *Du Plooy* on sentencing after a guilty plea.²⁰ The idea that guilty pleas should attract a discounted sentence is still controversial, but it is not the intention to examine its history or appropriateness here.²¹ Suffice to say that under section 196 of the 1995 Act, sentencers are now required to take account of the fact and timing of a guilty plea in arriving at an appropriate sentence and to give reasons in open court if a discount is not applied.

The specific appeal point in *Spence* was whether it is ever appropriate to discount sentence where an offer to plead guilty to a lesser offence has not been accepted by the Crown, but the accused is ultimately convicted of that lesser offence. In *Spence*, the appellant had been charged with murder and had enquired about pleading guilty to culpable homicide. The Crown indicated this plea would not be acceptable, but when the case went to trial culpable homicide was the verdict returned by the jury.

On this narrow issue, the view of the court was that, contrary to earlier authority,²² a sentence discount might sometimes be appropriate in such cases,²³ but it should only apply to those “tendering the plea and having it recorded at [a] procedural hearing and adhering to that position thereafter”.²⁴ Thus the appellant, who had merely “enquire[d] what would be the Crown’s position in the hypothetical event that a plea of guilty to culpable homicide were advanced”,²⁵ was not entitled to a sentence discount under the terms of section 196. Indeed, his sentence was *increased* from eight to ten years detention,²⁶ an outcome that might be seen as unfair, given that the court would have had no opportunity to do this but for its earlier decision that *Spence*’s appeal was arguable and that leave to appeal should be granted.²⁷

The court went on to deal with the wider issue of the appropriate levels of discount to be granted under section 196. As in *Lin*, guidelines were felt to be necessary because there had been “inconsistencies” in the manner in which section 196 had been applied since *Du Plooy*.²⁸ The specific guidelines issued were that a discount of one third is appropriate for pleas tendered at the earliest possible stage (in solemn proceedings at a hearing arranged under section 76 of the 1995 Act specifically for this purpose); for a plea tendered at the first preliminary hearing (or first diet in the sheriff

19 *Lin* was decided on 2 November 2007; *Spence* on 9 November 2007. For a more detailed discussion of *Spence*, see F Leverick, “Sentence following a guilty plea: *Spence v HM Advocate* and *Leonard v Houston*” 2008 SLT (News) 43.

20 See text accompanying n 3 above.

21 See Leverick, “Tensions and balances” (n 3).

22 *Roberts v HM Advocate* 2005 SCCR 717 at para 10.

23 Para 9.

24 Para 10.

25 Para 10.

26 Para 19.

27 A point made by James Chalmers, in his on-line commentary on *Spence*, at criminalletters.blogspot.com/2007/11/more-sentencing-guidelines-and.html.

28 For evidence of this, see N Orr, “*Du Plooy* deployed” 2007 SLT (News) 143.

courts) a discount of one quarter is appropriate and for a plea tendered at trial diet, any discount awarded should not exceed ten per cent and “in some circumstances may be less than that or nil”.²⁹ Whether intentional or not, the guidance is effectively identical to that issued by the Sentencing Guidelines Council in England and Wales.³⁰

C. DISCUSSION

In 2003, the Scottish Executive established a Sentencing Commission for Scotland, whose remit was to make recommendations on, *inter alia*, “the scope to improve consistency in sentencing”.³¹ In its report, the Commission admitted to being unclear as to why the appeal court issued sentencing guidelines so rarely and recommended that greater use should be made of section 118(7).³² Most of the Commission’s recommendations, which included the creation of an Advisory Panel on Sentencing in Scotland, have yet to be implemented. It may be, though, that *Lin* and *Spence* are a sign that the section 118(7) power *will* now be used more frequently.

One factor that might encourage the appeal court to issue sentencing guidelines is the increased sentencing power of the sheriff court. On 1 May 2004, the maximum sentence of imprisonment that could be imposed by a sheriff in a solemn case was increased from three to five years.³³ Until then, sentences of imprisonment greater than three years could only be imposed by High Court judges, a relatively small and geographically close community who could potentially minimise sentencing disparities through informal discussion. This clearly is not possible in the sheriff courts, of which there are 49 spread throughout Scotland.

It must be said that the increased sentencing power of the sheriff court was not the justification for the guidelines issued in *Lin*, where reference was made to “a degree of [sentencing] disparity ... *in the High Court*”³⁴ in cases of cannabis cultivation. However, given the range of sentences in the cases cited to illustrate this point,³⁵ many future prosecutions of “cannabis gardeners” – or indeed other prosecutions that would previously have taken place in the High Court – are now likely to take place in the sheriff courts. Research undertaken into the impact of the increased sentencing power estimated that around 100 to 150 cases per year would be taken out of the High Court to be prosecuted in the sheriff courts.³⁶ Whether this

29 Para 14. The guidance was issued in the context of solemn proceedings but *Leonard v Houston* 2008 JC 92 suggests that similar levels of discount apply to summary cases. See Leverick (n 19).

30 *Reduction in Sentence for a Guilty Plea: Definitive Guideline* (2007) para 4.3.

31 Sentencing Commission for Scotland, *The Scope to Improve Consistency in Sentencing: Report* (2006) para 1.3. The Commission was disbanded in November 2006, having achieved this (and its other) aims.

32 Para 9.11.

33 1995 Act s 3(3), as amended by s 13 of the Crime and Punishment (Scotland) Act 1997 (which was not brought into force until 2004).

34 Para 10, emphasis added.

35 Which ranged from three years to four years six months.

36 J Chalmers, P Duff, F Leverick and Y Melvin, *An Evaluation of the High Court Reforms Arising from the Criminal Procedure (Amendment) (Scotland) Act 2004* (2007) para 10.9.

means that more extensive use of section 118(7) can be expected in future remains to be seen.

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Delay, Expediency and Judicial Disputes: *Spiers v Ruddy*

The recent decision of the Judicial Committee of the Privy Council in *Spiers v Ruddy*¹ harmonises the position across the UK where the Crown has failed to bring a person accused of a criminal charge to trial within a reasonable time, and this breach of the reasonable time guarantee is established prior to the conclusion of proceedings.

Previously, the legal response to such cases had diverged between Scotland and the rest of the UK.² In *R v HM Advocate*,³ the Judicial Committee had held that there was no alternative to halting the prosecution in such circumstances. Proceeding further, it was said, would be in breach of section 57(2) of the Scotland Act 1998, which bars the Lord Advocate from doing any act incompatible with Convention rights. That decision was reached by a majority, with the three Scottish members of the Judicial Committee – Lords Clyde, Hope of Craighead and Rodger of Earlsferry – prevailing over Lords Steyn and Walker of Gestingthorpe.

Shortly afterwards, the issue arose again, but this time in respect of proceedings in England. Given the split of opinion in *R*, a decision was taken that the issue should go before a nine-judge court, including two of the majority in *R* (Lords Hope and Rodger).⁴ This second case was *Attorney-General's Reference (No 2 of 2001)*,⁵ where seven of the judges declined to adopt the approach of the *R* majority. For those judges, a breach of the reasonable time guarantee was itself a violation of the Convention and required a remedy, but it did not make further proceedings unlawful in terms of section 6(1) of the Human Rights Act 1998. Furthermore, the majority concluded, a stay of proceedings was not the appropriate remedy unless “(a) there [could] no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant”.⁶

1 [2007] UKPC D2, 2008 SLT 39.

2 For discussion, see C Himsworth, “Jurisdictional divergences over the reasonable time guarantee in criminal trials” (2004) 8 EdinLR 255.

3 [2002] UKPC D3, 2003 SC (PC) 21.

4 See Himsworth (n 2) at 256.

5 [2003] UKHL 68, [2004] 2 AC 72.

6 *Attorney-General's Reference* at para 24 per Lord Bingham.