

To: **Chief Crown Prosecutors; London Sector Directors; HQ Directors and HODs; Director of Casework; Casework Directorate HODs**

From: **Neil Masters, Policy Directorate**

Copy: **Director of Public Prosecutions; Area Business Managers**

Action Required: **Distribute to all lawyers and caseworkers**

Action date: **Immediate**

Standard Subject: **CRIMINAL CASEWORK**

Summary: The Lord Chief Justice sitting in the Court of Appeal (Criminal) Division has handed down judgement in the case of R –v- Goodyear the result of which is the introduction of a formalised procedure of advance sentence indication.

**ADVANCE SENTENCE INDICATION  
R –v- GOODYEAR CCA 20 APRIL 2005**

1. The Lord Chief Justice sitting in the Court of Appeal (Criminal) Division in considering an appeal against sentence in R –v- Goodyear issued guidelines that amount to the introduction of a formalised procedure of advance sentence indication. The principles of the judgment modify the rule of practice adopted by courts following the decision in R –v- Turner 1970 2 QB 321.
2. This minute seeks to condense the Judgment and provides interim guidance on the application of the guidelines and highlights the role of the prosecutor in the process. A copy of the full judgement of the Court is attached.
3. The objective of the guidelines is to put in place a common process that will enable a defendant to make a better informed decision as to whether to plead guilty or not. In doing so the guidelines provide continued safeguards against the creation or appearance of judicial pressure on a defendant.
4. It is anticipated that in formalising the procedure there will be a number of practical advantages including:
  - an increase in the number of early guilty pleas;
  - a reduction in the number of cracked trials;
  - a consequent reduction in the number of victims and witnesses required to attend court; and
  - a reduced number of sentences referred to the Court of Appeal under section 36 of the CJA 1988 as Unduly Lenient Sentence.

## **PROCEDURE**

### **Scope**

5. The Advance Sentence Indication procedure is only applicable to cases before the Crown Court. Cases before the Magistrates Court will be confined to the statutory arrangements in Schedule 3 of the Criminal Justice Act 2003 that has yet to be implemented.

### **Acceptable plea**

6. The Advance Sentence Indication is **only** available to the defence where there is an acceptable plea the basis of which has been committed to writing. Prosecutors are reminded that they must ensure that Section 6 of the Farquharson Guidelines as to The Role of and Responsibilities of the Prosecution Advocate are followed and that the necessary consultation takes place both with victims or victim's family and in the case of an independent prosecution advocate, with the CPS.
7. The guidelines make clear that an indication should not be sought on a basis of hypothetical facts. Where there is a dispute about a particular fact and the defence believes the point to be effectively immaterial to the sentencing decision, the difference should be recorded so that the judge may decide.
8. The guidelines are emphatic that a Judge should not be invited to give an indication on what would be, or what would appear to be a "plea bargain". This is expanded upon in paragraph 67 of the judgment.

### **Request for an indication**

9. As the request for indication comes from the defence, the prosecutor is obliged to react, rather than initiate the process.
10. On the basis of an acceptable plea, the defence may request an advance indication of sentence at any stage of the proceedings, including in trial. However, the guidelines recommend that ordinarily the procedure will take place at the Plea and Case Management Hearing. This is usually the first opportunity for the defendant to plead guilty and take advantage of the maximum sentence discount applying the guidance set down by the Sentencing Guideline Council.
11. Whilst the Judge may remind a defendant that he may wish to take advantage of the procedure he may not insist that an indication takes place. A Judge may also decline to give an indication or decide to defer giving an indication to later in the trial process.
12. Where there are issues in the case that are considered "complicated or difficult", the defence are required to give proper notice in writing to the prosecution and the court of their intention to seek an advance sentence indication. In such cases no less than 7 days notice in writing of an intention to seek an indication should normally be given. If an application is made without notice when it should have

been given, any adjournment that may flow as a consequence could result in the defendants discount for an early plea being reduced.

13. Whilst the guidelines are silent as to what defines “ complicated or difficult” it is clear from the guidelines that any issues between the prosecution and defence must be resolved before the Judge will accede to a request for an indication. Prosecutors will need to be alive to the need to ensure that the court are made aware of any unresolved issues and that such hearings should not take place in such circumstances.
14. Paragraph 69 of the Judgment provides guidance as to the procedure where a defendant is unrepresented.

### **The Hearing**

15. The hearing should be conducted in open court with a full recording of the proceedings, with both sides represented and in the presence of the defendant.
16. Reporting restrictions will apply in order to safeguard a situation where the indication is not accepted and the matter moves to trial.
17. It is anticipated that the process should not take up a disproportionate amount of court time, as the procedure does not require an opening by the prosecution or a mitigation plea by the defence.
18. The role of the prosecutor described in paragraph 70 of the Judgment is reproduced in full:
  1. We must expressly identify a number of specific matters for which the advocate for the prosecution is responsible.
    - (a) If there is no final agreement about the plea to the indictment, or the basis of plea, and the defence nevertheless proceeds to seek an indication, which the judge appears minded to give, prosecuting counsel should remind him of this guidance, that normally speaking an indication of sentence should not be given until the basis of the plea has been agreed, or the judge has concluded that he can properly deal with the case without the need for a Newton hearing.
    - (b) If an indication is sought, the prosecution should normally enquire whether the judge is in possession of or has had access to all the evidence relied on by the prosecution, including any personal impact statement from the victim of the crime, as well as any information of relevant previous convictions recorded against the defendant.
    - (c) If the process has been properly followed, it should not normally be necessary for counsel for the prosecution, before the judge gives any indication, to do more than, first, draw the judge’s attention to any minimum or mandatory statutory sentencing requirements, and where he would be expected to offer the judge assistance with relevant guideline cases, or the views of the Sentencing Guidelines Council, to invite the judge to allow him

to do so, and second, where it applies, to remind the judge that the position of the Attorney General to refer any eventual sentencing decision as unduly lenient is not affected.

**(d) In any event, counsel should not say anything which may create the impression that the sentence indication has the support or approval of the Crown.**

19. **In giving an indication the judge will normally be confined to the maximum sentence if a plea of guilty were tendered at the stage at which the indication is sought.**
20. The court rejected the suggestion that as part of the procedure the Judge should indicate the maximum level of sentence following a conviction by a jury. The rationale for adopting this approach is described at paragraph 54 of the Judgement.
21. Once an indication is given it is binding and remains binding on the judge who has given it. It also binds any other judge who may become responsible for the case.
22. It is envisaged that where a defendant accepts the indication, the court will proceed to take the plea and at that stage lift reporting restrictions. However, the guidelines allow a defendant “a reasonable opportunity” to consider his/her position but provides no indication as to what would amount to “reasonable” although this is likely to be considered on a case-by-case basis.
23. If after a “reasonable opportunity” the defendant does not plead guilty, the indication will cease to have effect.
24. Paragraph 57 of the Judgement expands upon the approach where a Judge declines to give an indication.

### **Section 36 CJA 1988 – Unduly Lenient Sentences**

25. The guidelines are clear that where the prosecutor has addressed their responsibilities in accordance with paragraph 70 of the Judgment, the discretion of the Attorney General to refer a sentence would be wholly unaffected by the Advance Sentence Indication process.
26. Where the guidelines are breached by the prosecutor with regard to an action that may indicate or convey support for or approval of the sentence indication, then in seeking leave by the Attorney to apply under the Act the court will examine each case in the light of the action taken by the prosecutor.
27. In cases where there is a fundamental breach as envisaged above, Chief Crown Prosecutors should inform the Director without delay.

## **SUPPLEMENTARY MATTERS**

### **Local Issues – Promulgation of new guidelines**

28. Whilst it is envisaged that the Bar Council, Law Society and legal media will give coverage to the new procedure it will be important to ensure that independent advocates instructed in the Crown Court are aware of the procedure and their obligations under the guidelines.
29. In due course the Advocate Information Package will be amended to reflect the change however, in the meantime Areas may wish to consider providing a copy of this minute and or the full judgment when delivering instructions.

### **National picture**

30. Policy Directorate is currently working with the Office of the Attorney General in the development of new guidelines that will encompass this new procedure and may result in complementary or supplementary guidance. Areas will be kept advised as to the progress of this work.
31. If recipients have any matters or issues that cannot be resolved through discussion with line managers, enquires should be directed to the author of this minute.

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