THE FRAUD
LAWYERS ASSOCIATION

1. On the 9 April 2013 the Ministry of Justice ("MOJ") published a consultation document entitled "Transforming Legal Aid: delivering a more credible and efficient system". Responses to this paper were required by the 4 June 2013.

2. This response is filed by the Fraud Lawyers Association, an organisation established in 2012 to educate and train its members in all matters relating to their practice as fraud lawyers. Its membership consists of 320 solicitors and barristers who practise mainly in the area of criminal fraud. Consequently the proposals in the consultation paper, if implemented, will have a direct impact on these practitioners. This paper, therefore, deals with the MOJ proposals from their perspective. It does not purport to be a comprehensive response. No doubt the Law Society, Bar Council and the Criminal Bar Association will comment in detail on all the proposals.

3. Before turning to comment on the individual proposals, the Association believes that it is important to highlight two preliminary points which are not considered in any detail in the MOJ document.

4. In the first place fraud cases tend to be more document heavy and complex than the run of the mill criminal cases. As a result they are much more labour intensive, both at the Advocates Graduated Fee Scheme level and under the Very High Cost Cases regime. They require a considerable degree of expertise in order for a defendant to be advised and defended properly, and the proper issues to emerge in a trial. Typically the time taken for the necessary preparation of these cases is much longer than in, say, a rape, robbery or assault case.

5. Secondly the necessity for this preparation is driven by factors beyond the control of the defence advocate or litigator. The consultation paper, in our view, fails to highlight a number of important factors which have a direct influence on the cost of criminal legal aid in fraud cases. They are:

a) The number of fraud prosecutions instituted by the Crown Prosecution Service in any given year;

b) The complexity of these cases, which is likely to be reflected in the amount of material served as part of the prosecution case and retained as unused material;

c) The number of witnesses relied on by the prosecution. In fraud cases these may include expert accountancy and forensic witnesses whose reports have to be understood and analysed, in many cases before realistic advice on plea can be tendered;

d) The number of defendants the prosecution choose to include in any one trial.

In addition typically in a major fraud prosecution, (especially those conducted by the Serious Fraud Office ("SFO"), the case will have been under investigation for months, if not years. Prosecution advocates may well have been involved in advising on, and shaping the case, in that period. By the time a defendant is charged, in many serious cases, the prosecution advocate will be thoroughly familiar with the case, and the evidence. By way of contrast the defence advocate and litigator will have to start from scratch. Their preparation time will be directly affected by the volume of material they have to deal with.

6. These factors are important because they put in perspective the cost of criminal legal aid in fraud cases. Further they also highlight a major problem with the current proposals in relation to price competitive tendering ("PCT"). Because fraud cases are far more complex, and require more preparation time than the average case, they are likely to be uneconomic for the proposed new service provider. The Association is aware that even under the current schemes, particularly in relation to AGFS fraud cases, the level of fees are too low to be sustainable bearing in mind the additional point that time spent on considering unused material is not remunerated at all. Fraud cases, above all other categories of case, regularly generate vast quantities of such material. The defence cannot simply ignore that material and conduct a trial without considering it. Under the existing scheme the hours spent in case preparation are simply not reflected in the fee paid.

7. The point is linked to a further consideration; In the MOJ consultation paper, in Annex F, the spend on criminal legal aid in the financial year 2011/12 was stated as being £1.08 billion. Of that £703 million related to Crown Court and Higher Court costs. Included in the £703 million was a figure of £92 million in relation to Very High Cost Cases ('VHCC'). The MOJ proposals are predicted to make savings of £220 million by the year 2018/19.

8. However it seems to the Association that the 2011/12 figures will not include the impact of the legal aid cuts made in April 2010 and October 2011. These affected fraud cases in two particular ways:-

   a) The AGFS scheme was extended to include cases lasting 40 – 60 days; the effect of this was to reduce the number of VHCC cases. In addition the daily rate of such cases was set lower than for cases falling within the 1 – 40 day category. Consequently fraud cases, which by their nature are more likely to fall within the 40 – 60 day category, were subject to a reduction in fees.

   b) In October 2011 fees for high value fraud cases (category G) were reduced to those for low value fraud (category F).

   Because of the length of time it takes for cases to work through the Court system, the figures relied on by the MOJ for 2011/12 will not reflect these cuts. Prior to important decisions being made on legal aid the Association considers it important to assess the impact of these latest cuts on the legal aid spend before making decisions that may be irretrievable.

9. Whilst the MOJ paper appears to suggest that criminal legal aid costs are spiralling out of control, this is not the case. The Association notes that in its report of 27 November 2009 "The Procurement of Criminal Legal Aid in England and Wales by the Legal Services Commission" the National Audit Office calculated the criminal legal aid spend for 2008/09 as being £1.18 billion, of which £112 million related to VHCC cases. In paragraph 1.3 of their report they remarked:-

> "Criminal legal aid expenditure increased in real terms by 10 per cent between 2000-1 and 2008-9 while civil expenditure fell by nine per cent in the same period. However, as figure 2 shows, since 2003-4 criminal legal aid expenditure has fallen by 12 per cent in real terms and civil legal aid expenditure by 15 per cent".

Indeed their table shows that in 2000-2001 criminal legal aid expenditure was in excess of £2 billion. The significance of the National Audit Office report is the fact that it reflects the already downward trend in criminal legal aid expenditure before the cuts made in 2010 and 2011 are factored in. Consequently the figures relied on in the consultation paper for 2011/12 are likely to be inaccurate and further reduced in future years.

10. There is no doubt in the Associations mind that the proposed price competitive tendering set at a ceiling of 17.5% below current rates will lead to the effective destruction of most solicitors criminal legal aid practises. In the same National Audit Office Report, cited earlier, a survey was carried out by the Office on solicitors firms criminal legal aid profits. Their findings are set out in paragraph 1.13:

> "Our survey included self-reporting questions on firms criminal legal aid profit. Profit is understood as meaning before notional salaries, interest on partner capital and notional rent are excluded. On average, firms reported that criminal legal aid accounted for almost 60 per cent of turnover. Firms reported on average profit margins of 18.4% per cent in the last financial year, a fall from 21.6 per cent three years ago. They reported a wide range of profits from criminal legal aid, with 16 per cent of firms reporting no profit in the last financial year, and 37 per cent reporting profits above 20 per cent (figure 8). Almost 80 per cent of firms which also conducted private legal aid work reported that criminal legal aid was less profitable".

When the profit figure of above 20 per cent was analysed however:-

> "The stated profitability of criminal legal aid work was lowest among larger firms; sole practitioners cited a 29 per cent profit level on average, compared to an 11 per cent profit average cited by medium sized firms [13 – 40 solicitors]. This pattern remained the same over the three years [subject to the survey]."

The figure accompanying this statement (Figure 27) illustrated a downward trend in profit margins regardless of practice, as well as the differences in profit experienced by different sized firms. Firms of 41+ solicitors reported a profit of only 7%. These profit levels were similar across all types of criminal legal aid cases, with no significant differences in the average profit level for VHCC's compared to those for Police station, Magistrates Court or Crown Court instructions.

11. The significance of this survey in the context of the current proposals is clear. In the first place the survey was based on remuneration levels fixed before the cuts in fees in 2010 and 2011; secondly the major entities making a profit in excess of 20% were sole practitioners, who will of course cease to exist under the current proposals. So called "economies of scale" do not appear to have been achieved by the largest firms surveyed.

12. It is hardly surprising, therefore, to read the conclusion in the Law Society's Memorandum to the Public Accounts committee of the House of Commons (who considered the National Audit Office report in December 2009), which stated:-

> "The criminal legal aid supply base is in an extremely fragile state. Independent evidence now shows that the incomes of both employed solicitors and partners in legal aid firms are frequently at, or below medium incomes in this country and far removed from the sort of level a professional should be entitled to expect and could earn in other fields of law. It is clear that a substantial element of the supply base is not economically sustainable. Profitability will be further eroded if further costs proposed by the MOJ to Crown Court advocacy fees and representation at the police station are implemented. This would further threaten the viability of legal aid providers. The ageing profile of criminal legal aid

practitioners and the risks posed by Best Value Tendering are also factors which will inevitably lead to a reduction in providers in the short to medium term".

13. The way in which criminal legal aid firms keep going can be explained by the fact that many firms do other types of work which effectively subsidizes criminal legal aid. This option will not be open if the current proposals are put into effect. Indeed we note that the MOJ provide no evidence at all to support the notion that a minimum bid price 17.5% below current rates will be economically viable, even allowing for the alleged economies of scale.

14. Having made these preliminary observations, we now propose to comment on individual proposals within the consultation paper.

IMPOSING A FINANCIAL ELIGIBILITY THRESHOLD IN THE CROWN COURT

15. The basis for this proposal is the view that ".....in principle the taxpayer should no longer routinely fund legal aid costs for people who can afford to pay for their own defence". The suggested threshold is a disposable household income of £37,500 or more, justified on the grounds that:-

> "We consider that a defendant with this level of disposable income should generally be able to afford to pay for legal services in the Crown Court on a private basis. In some cases private rates will be the same as, or similar to legal aid rates. The average defence cost of a legally aided cases in the Crown Court is approximately £5000, based on 2011/12 LSC data. The proposed threshold is 7.5 times that average figure, which is approximately the same as the multiplier between the average defence costs and the upper disposable income threshold in the magistrates court scheme, providing a degree of consistency between the schemes. The proposed threshold is also approximately twice the national average annual disposable income of £18,000, which supports our view that the proposed threshold is not an unreasonable level at which to expect people to pay for their own defence".

16. We question the assumptions underlying this proposal. Legal aid fees are set at a rate considerably below the true market rate for private work. As a result the average figure of £5000 is no guide to the cost of a privately funded case. In addition the average figure will include a large percentage of guilty pleas; once a defendant embarks on a trial, very different figures will emerge. In complete contrast to the statement that private rates will be the same as, or similar to, legal aid rates the paper (para 5.30) expressly states "we acknowledge that private rates vary and that in many cases they will be higher than legal aid rates". It then gives two examples of costs allowed from central funds in contested trials, neither of which relate to fraud cases.

17. Whilst there is clearly a spectrum of fraud cases heard in the Crown Court, ranging from straightforward to extremely complex, the costs associated with fraud cases are likely to be far higher than the figures quoted in paragraph 3-30. Indeed, even on the recently reduced VHCC rates, the scale of costs in the most serious cases is apparent. In paragraph 5.29 the MOJ sets out the cost of three recent and "typical" VHCC cases:-

- Cost of defending two defendants in a 16 week fraud trial (with two other defendants) category 3 with no QC - £997,607
- Cost of defending one defendant in a 18 week fraud trial (with five other defendants) category 2 with no QC - £505,032
- Cost of defending one defendant in a 15 week VAT fraud trial (with five other defendants) category 2 with a QC - £572,040

The difficulty we foresee is that in "white collar crime" potential defendants may well have a disposable income, taking into account a partners income, above the proposed threshold. However they are unlikely to be able to afford privately paid rates for their case. The real danger is that this will lead to a rise in the number of unrepresented defendants in the Crown Court. As the National Audit Office noted in their 2009 report "Trials of defendants without proper representation typically take longer and may be more costly". Fraud cases are just the type of case in which proper legal advice and

representation can make a major difference to the length of a trial as well as ensuring that the trial itself is fair.

18. The MOJ propose a "hardship" exception to ensure that applicants above the threshold who cannot in fact afford to pay the costs of their case privately are able to access legal aid. Under this exception a defendant would be required to supply detailed financial information which would show that they could not afford to pay the estimated full costs of their defence privately. One problem with this is that it will often not be possible in fraud cases to estimate the likely defence costs before the papers are served and considered. There is therefore a real possibility of delay in the Crown Court whilst sufficient information is obtained to judge whether or not the exception applies.

19. We further note that the proposals in respect of the use of restrained funds to pay for legal costs will apply only to defendants who are in receipt of legal aid. We can see no logic in this proposal. Either all defendants should benefit from this proposal, or none. Discriminating against privately funded litigants is illogical. The protection for the alleged victims of offences would be the fact that no restrained funds could be used to be paid towards legal costs without the approval of a judge.

20. In paragraph 3.37 of the Consultation a further restriction is placed on privately funded defendants who are acquitted:

> "3.37 We propose to reimburse at legal aid rates the private defence costs of those who had applied for criminal legal aid and been refused as a result of this proposal. As now, we would not reimburse defendants who simply chose to pay privately. Capping the amount reimbursed at legal aid rates would prevent high net worth individuals receiving significant sums from the public purse and ensure that the impact on the savings expected from the 2012 reforms was minimised."

21. This new restriction is fundamentally unfair. It seems to imply that in every case an application has to be made, and refused, even if the applicant knows that on the new proposals his disposable income is above £37,500; if he does not apply because he

considers that the application will fail, then on this proposal he would receive no costs at all from central funds in the event of an acquittal. In the view of the Association there is no justification for a situation in which the state prosecutes one of its citizens, who is then acquitted, and is left considerably out of pocket as a result of the actions of the state. Despite being innocent he or she will have sustained a significant financial penalty solely because the state chose to prosecute. This is utterly inequitable.

22. On balance we would favour retaining the current system of legal aid being granted to all in the Crown Court but ensuring contributions and down payments are collected effectively. We believe the £37,500 threshold level is likely to be too low and will lead to a significant increase in unrepresented defendants in the Crown Court.

CHAPTER 4 – INTRODUCING COMPETITION IN THE CRIMINAL LEGAL AID MARKET

23. This proposal, which we understand from paragraph 4.5 of the MOJ paper is to be introduced regardless of the views of the profession, will have a direct and seriously adverse effect on Crown Court fraud trials (excluding VHCC's).

24. Under the current system a number of solicitors firms have developed particular skills and expertise in criminal fraud cases which they can offer to clients who choose to use their services. Under the new proposal such firms will be unable to continue and that expertise will be lost to the criminally legal aided client.

25. It seems to the Association that because all litigation services (save for VHCC's) in the Crown Court will be subject to this Price Competitive Tender ("PCT"), only large organisations, who will be unlikely to have any previous legal experience, will be in a position to make bids for the new contracts. When that is combined with the requirement that bids are to have a ceiling of 17.5% below the current rates, we foresee that fraud trials, which as we have remarked previously, tend to be the most labour intensive of criminal cases, will be hopelessly uneconomic for the new provider unless a minimal

amount of time is spent preparing them. This is obviously not in the interests of the client.

26. As the MOJ recognise, there is no room for client choice in the present proposals. Currently a client can choose a particular firm because of its experience and reputation in defending criminal fraud cases, ie "horses for courses". Under the PCT system he will have no guarantee at all that whoever deals with his or her case will have the necessary skills and experience to prepare the case properly. There will also be a perverse financial incentive to ensure so far as is possible a guilty plea is entered so as to protect the organisations profit margin on these new contracts. This is entirely contrary to the interests of justice.

27. In turn this will have a severe impact on an independent criminal bar. In its report "The procurement of legal aid in England and Wales by the Legal Services Commission" (9th report of session 2009-10) the House of Commons committee of Public Accounts concluded that:-

> "4. The Committee is concerned that the increasing use of solicitors to conduct work in the Crown Court is threatening the long term future of the junior criminal bar and may be affecting the quality of advocacy provided in the Crown Court".

28. In a further paper the House of Commons Justice Committee considered the Governments then (later superseded) Legal Aid proposals and the cost "drivers" in the Crown Court (see Justice Committee document on Government's proposed reform of legal aid prepared 30 March 2011):

> "16. The Ministry of Justice attributed the shift in the distribution of costs of defence services from lower to higher costs that has characterised spending on criminal legal aid to changes in the volume of cases received at Crown Court relative to the Magistrates Court since 2006. Over this period, there was a 26% increase in cases received for trial at the Crown Court, stemming from 33% more triable either way cases and 14% more indictable only cases and a 13% reduction

in the number of defendants proceeded in the Magistrates Courts. A 35% increase in Crown Court cases resulting in a guilty plea has further exacerbated the rise in Crown Court cases. Extraneous factors affecting costs per case include advances in digital technology fuelling an increase in the volume of evidence in criminal cases; in Crown Court trials the average page count has increased by 65% in the last six years.

17. Other drivers of the high cost of criminal cases include the greater complexity of legal work, for example, as a result of changes to criminal justice legislation which have increased the time that cases take to pass through the court system and created additional avenues of appeal. Many new criminal offences have been created in recent years. Furthermore, additional legal mechanisms require more time to be spent on individual cases, for example, those relating to bad character applications and applications for the use of hearsay evidence".

29. These cost drivers will continue to apply whoever does the work. As stated earlier the only mechanism that a PCT bidder will have to make a profit on the reduced fees available will be to do as much advocacy 'in house' as is possible, and spending the minimum amount of time on the preparation of cases. The result is likely to be that only "uneconomic" trials will be left to the independent bar, often poorly prepared. Combined with the proposed fee cuts for Crown Court, the Association believes that these proposals will be the death knell for an independent criminal bar. This is likely to be to the detriment of the whole criminal justice system.

30. An important product of the current criminal legal aid system with the client being able to choose the lawyer he wishes to represent him is competition. This can drive quality, hence the old saying "you are only as good as your last case". Firms are conscious that they face competition for clients and so have every incentive to offer a better service than a competitor. However under the new proposals this market driven element of the system will be lost. Once granted a contract a bidder will face no competition because they are guaranteed a share of the work over the period of the contract, which is proposed as three

years, with an option for the government to extend the contract by a further two years. In these circumstances we can see no real pressure on a provider to maintain quality of service over the lifetime of the contract, nor how the quality of the service can be meaningfully measured. There is an obvious danger that a successful bidder will have a dominant market position when the contract expires, and a new bidder will simply not have had the benefit of running the system in practice. We question whether there will in these circumstances be effective competition.

31. Our considered view is that the PCT scheme will not only work against the interests of the clients, but will destroy much of the skill, expertise and local knowledge brought to bear by small and medium sized firms of solicitors. Once that collective experience goes we doubt that it will ever be regained. This will be particularly damaging in relation to fraud cases. Giving the clients no choice will inevitably lead to a lowering of confidence in their legal representatives.

32. Whilst various proposals are made in the paper as to the areas to be covered by these new contracts, and how much work is to be allocated, they do not address the fundamental objections to the whole basis of the PCT.

CHAPTER 5: REFORMING FEES IN CRIMINAL LEGAL AID

33. It seems that these proposals are again based on the legal aid spend in 2011/12. This showed higher crime costs of £703 million, of which Crown Court advocacy was £241 million. However these figures do not reflect the reductions made to the advocates graduated fee scheme in October 2011 and April 2012. This is glossed over in the consultation paper in paragraph 5:5:

> "We accept that these proposals are in addition to the series of fee reductions implemented between April 2010 and April 2012 but we need to continue to bear down on the cost of criminal legal aid to deliver further savings, including in Crown Court advocacy and VHCC's".

In April 2013 the new Legal Aid Agency published its business plan for 2013/14. This anticipated a total spend on criminal legal aid of £941 million (£1.08 billion in 2011/12). Its predecessor, the Legal Services Commission, published budgets for 2011/12 and 2012/13. The figures for "crime higher" were respectively £721 million and £602 million – the latter a figure £100 million less than the higher crime costs for 2011/12 set out in the consultation paper. Whilst the 2012/13 figure was a projection, by the time the Government responds to the consultation the actual spend figures should be available. These figures again show that criminal legal aid costs are not spiralling out of control, which is an impression fostered by the MOJ. Given the radical changes proposed we believe that they should be seen against the latest available figures, not figures which are out of date and fail to reflect cuts already made.

34. It is apparent that the sole criterion that the MOJ is working to is to reduce expenditure irrespective of its impact. To put the costs in perspective the proposed savings of £221 million is roughly the equivalent of four Chinook Mark 6 helicopters (see National Audit Office Report on MOD Major Projects Report 2012, figure 9, cost per aircraft £60.4 million). We find it hard to believe that savings of £221 million cannot be made by cutting out waste in other government departments.

35. We have no doubt that the impact of what is proposed in relation to Advocates Graduated Fees will be severe. There are three elements to the proposals in relation to the Advocates Graduated fee scheme:-

(a) The introduction of a single harmonised fee payable in all cases (other than those that attract a fixed fee) based on the current basic fee for a cracked trial;

(b) The reduction of the initial daily attendance for trials by between approximately 20 and 30%;

(c) Taper rates so that a decreased fee would be payable for every additional day of trial

The rationale for these amendments to the current scheme is set out in paragraphs 5:7 and 5:8 as follows:-

> "5.7 Following the 2010 consultation, we did not alter the general fee structure for Crown Court cases, which provides for a trial to attract a higher fee than a cracked trial, which in turn pays more than an early guilty plea. Where cases are contested the current system of daily attendance fees does little to encourage early resolution.
>
> 5.8 We accept that decisions on the question of plea are ultimately for the individual defendant, and that the length of the trial is not dependent on the defence alone. While the existing graduated fee scheme provides some incentive for advocates to achieve efficiencies, we remain concerned that it still does not sufficiently support the aim of efficient justice and may discourage the defence team from giving early consideration of the question of plea or working towards the earliest possible resolution of contested matters"

36. We find this reasoning not only utterly objectionable, but it also displays a staggering ignorance of the way cases are dealt with in the Crown Court. Every advocate, whether solicitor or barrister, has to address the question of whether a client is to plead guilty or not guilty at the earliest stage of a case because of the guidelines issued by the Sentencing Guidelines Council in relation to discounts for guilty pleas. To achieve the maximum discount (up to 33%) a plea has to be entered at the earliest stages in the proceedings, particularly where the 'Early Guilty Plea Scheme' is being piloted. Every plea and case management form has a box in it requiring the advocate to confirm that he or she has advised the client as to the effect on sentence of a guilty plea. The idea that advocates are discouraged from giving early advice on plea because of the supposed attractions of graduated fees is absurd.

37. The effect of these proposals, in the Associations view, will be to create a clear conflict of interest between advocates and their clients. The advocate is, in effect, to be punished financially if the client pleads not guilty. Consequently it is in his financial interests for a guilty plea to be entered, or a trial to be as short as possible. Giving impartial advice to a

client will be more difficult, and the client himself may perceive that advice given to him is based on the advocates own self interests rather than his. This is utterly undesirable.

38. The extension of the graduated fee scheme to cover trials of over 40 days, but under 60 means that many complex fraud trials will fall within these proposals. Anecdotal evidence from members of the Association suggests that the fees paid under the current system for such cases are already set at a level where it is barely economic to do such cases. The consequence of these proposals will be to render them utterly uneconomic if they are to be prepared properly.

39. Complex fraud trials require a greater degree of preparation than many other categories of case simply because of their size and complexity. They are frequently prosecuted by Queens Counsel and require at the very least senior junior barristers to defend. Consequently the impact of the reduction in fees will fall more heavily on senior members of the profession, as opposed to those who are just starting out. The "harmonisation" of the basic fee, reduction in daily attendance and the tapering of rates will have the perverse effect of substantially decreasing fees in cases which require the most work and are the most demanding. In October 2011 fees for what were then high value fraud cases (category G) were reduced to those of low value fraud (category F). These further proposed cuts will make it likely that experienced criminal practitioners will think twice about taking on such cases. If less experienced practitioners take on such cases the potential for delay, ineffective trials and more appeals, is greater than might otherwise be the case.

40. No evidence appears to be offered in support of the contentions advanced in the consultation paper, other than generalised assertions. The fact is that some cases take longer than the original trial estimate because of matters completely outside the control of defending advocates. Typically in fraud trials days are lost through juror illness or medical appointments; the fact that the trial judge has to take days out to deal with other cases; prosecution witnesses being unable to appear when booked; and late service of prosecution evidence necessitating an adjournment for it to be considered. The

unpleasant implication of the MOJ paper is that the defence "string out" trials to earn a greater fee. It is not clear to us how the current graduated fee scheme structure can "inadvertently lead to delay or potentially discourage the defence team from giving consideration to plea with the defendant early in the proceedings....." (paragraph 5.18 of the Consultation paper).

41. The effect of these proposals will fall disproportionately on trial advocates, who we anticipate will be likely to be members of the Bar. We doubt very much whether an independent criminal bar can survive these proposals, especially given the new structure that is being proposed for PCT. Already the criminal bar is cutting back on the number of funded criminal pupillage because of existing financial constraints. Within a fairly short time frame we can foresee the financial viability of criminal sets of chambers being called into question. These proposals are incompatible with the existence of an independent criminal bar.

REDUCING LITIGATOR AND ADVOCATE FEES IN VERY HIGH COST CASES (CRIME)

42. Paragraphs 5:21 to 5.33 of the MOJ paper cover the proposals for VHCC cases, but the introduction in chapter 2 sets the tone:-

> "2:11 We also considered whether to include Very High Cost Cases (Crime) within the ambit of the competition model. There are a small number of long-running cases which attract a disproportionately high level of spend, £90 m in 2011/12, currently paying rates of up to £150 per hour for preparation and £500 per day for advocacy. On balance our view is that these costs are so high that they would skew any price based competition model, and therefore, subject to consultation responses, we do not propose to include them in the scope of competition. Instead we propose to impose a straight reduction of 30% on all litigation and advocacy fees paid in these cases".

43. VHCC rates for preparation are governed by the category into which they are assigned to, which range from category 1 to category 4. The rates quoted in the introductory

paragraph do not represent a typical VHCC case, since they relate to category 1 cases. No statistical information is given as to the breakdown of VHCC cases between the various categories. In our experience very few fraud cases make it into category one.

44. Once again we question whether the figure of £90 million is an accurate reflection of the continuing cost of VHCC's. This is because in July 2010 the rates for VHCC's were cut by 5%, and 40-60 day cases transferred into the graduated fee scheme. It is unlikely that these cuts will have been reflected in the £90 million figure.

45. In fact VHCC costs have been falling, in 2007-8 they were £125 million; for 2008-9 they stood at £112 million (see figures in the National Audit Office Report on the Procurement of Criminal Legal Aid in England and Wales by the Legal Services Commission, November 2009); they have already fallen to £90 million, and as contracts under the old rates are concluded, the newer rate cuts will take effect.

46. Although the Consultation paper claims these costs are disproportionately high, they simply reflect the amount of preparation required in this most complex category of fraud cases. The length and complexity of these cases is largely dictated by the evidence served by the prosecution and the number of witnesses they propose to call and the number of defendants indicted. They are extremely labour intensive and frequently require two advocates for the defence because of the volumes of served evidence and unused material. In addition the defence do not have a blank cheque. The hours they are allocated for a piece of work have to be approved in advance by a case manager at the LSC (now LAA). If the hours proposed are unreasonable, then they will not be allowed. This is plainly recognised within Annex F of the consultation paper (see paragraph iii on page 126).

47. Bearing these factors in mind we do not agree that the costs are "disproportionately" high. They compare very unfavourably with commercial "market" rates. A fee cut across the board of 30% will once again fall heavily on the more senior members of the

bar who are engaged to carry out these cases, and the specialist firms of solicitors who enter into such contracts.

48. There is a further factor to consider. The new proposed rates will open up a marked disparity between prosecution scheme VHCC rates and defence legal aid rates (for ease of reference see table that is annexed to this report). Equality of arms will no longer exist. This will be a significant reversal of the trend in previous years when defence fees tended to be higher, or more or less equal to prosecution fees.

49. The Association recognises that the VHCC scheme is, however, administratively burdensome and costly to run because of the management time expended on it. We would certainly consider a revised graduated fee scheme which did not have the effect of unfairly penalising financially the more experienced members of the Bar and specialised solicitors who take on such work.

50. One such revised scheme might be to exclude all VHCC cases from PCT contracts. This would have the advantage of allowing non-PCT fraud firms to continue in existence and offer a degree of choice to clients. Fees, both litigators and advocates, would then be based on a revised graduated fee scheme which would take into account such factors as the estimated length of the case, the pages of prosecution material (both used and unused), the number of witnesses and defendants, and also the stage at which a guilty plea is tendered, or a case listed for trial is cracked. Savings would result because there would no longer be needed contract managers approval for work and an appeals system. Whilst this model might be a crude one we consider that it is a better alternative to the proposed across the board cuts of 30%. However much work would need to be done to investigate and confirm the viability of such a scheme.

51. The further proposal to apply the 30% reduction to existing contracts is completely unacceptable. Many counsel and solicitors would not have taken up theses cases had the new rates applied. They will, in many cases, simply withdraw from the case if this proposal is implemented. This will inevitably lead to increased expense and delay

because the approved work will have to be redone. In any event this is likely to involve a breach of contract by the LSC/LAA. This is more likely to destroy credibility in the system than its current cost.

REDUCING THE USE OF MULTIPLE ADVOCATES

52. We do not agree with the proposal made in paragraph 5.45 of the paper that the criteria for the instruction of multiple advocates should be tightened. It is the experience of members of the Association that judges are already astute to apply the existing criteria and only grant two advocates certificates where it is absolutely necessary. No proper evidence has been submitted to support the expressed concern that the use of multiple counsel is being permitted in cases where it is not absolutely necessary. The fact that specialist Court Centres, such as the Old Bailey, account for a significant proportion of two counsel certificates is hardly surprising, since they tend to deal with the most serious and complex cases.

53. Fraud cases, as we have already remarked, tend to generate the largest volume of exhibits, witness statements and unused material. Two counsel are justified because the various tasks can be split between the advocates, leading to greater speed in the preparation of cases than would be the case with one advocate only instructed.

54. The suggested solution of greater litigation support is, frankly, unrealistic in a world where existing rates are to be cut by 17.5% under new PCT contracts, and also where rates in VHCC cases are to be cut by 30%. Nor is it likely under the new PCT system that those employed will be sufficiently experienced to know how to deal with such cases.

55. The person best placed to assess whether two counsel are needed is the trial judge, or a resident judge in a Court Centre. We cannot see why the interposition of the Presiding Judge is either necessary or will lead to the reduction in the number of certificates that are granted. No clarification of the "prosecution condition" is necessary – the fact that the prosecution have two counsel does not automatically mean that the defence will get two

counsel. It is hard to resist the inference that this expressed concern is simply a cloak to justify yet more cuts.

CHAPTER 7 – EXPERT FEES IN CRIMINAL CASES

56. As mentioned earlier in serious fraud cases, especially those involving allegations of fraudulent trading, the prosecution frequently make use of forensic accountants to reconstruct the indebtedness of the company concerned. For these allegations to be effectively countered the defence will frequently need the service of an independent forensic accountant to advise whether or not the evidence given by the prosecution accountant is well founded.

57. In paragraph 7.10 of the MOJ consultation it is proposed:-

> "7.10....to reduce the current specified standard fees for all experts by 20%. As at present, it would be feasible for these rates to be exceeded in exceptional circumstances.
>
> 7.11 This would ensure that legal aid rates better represent value for money, capitalising on the efficiencies of reforms in the justice system, and ensuring that they were more closely aligned with those paid elsewhere for comparable services".

In Annex J there is a table setting out the existing rates for accountants and the proposed rates, divided between "non-London" and "London":

	NON-LONDON CURRENT	PROPOSED	LONDON CURRENT	PROPOSED
ACCOUNTANT	£50 - £144	£40 - £115.20	£50 - £144	£40 - £115.20

58. The Association is concerned that it is already difficult enough to find forensic accountants of sufficient skill and experience to advise defendants at the current rates of remuneration. The same applies to the prosecution. We fear that this additional cut will

reduce even further the pool of accountants prepared to work at such rates; potentially this could lead to inequality of arms as between prosecution and defence and so to injustice.

59. It is worth remembering that one of the reasons the SFO prosecution of the Tchenguiz brothers ended in disaster was the failure, for budgetary reasons, to engage independent forensic accountants to advise them on the overall state of lending between Kaupthing and the various entities associated with the Tchenguiz brothers.

60. In *R C Rawlinson & Hunter Trustees & others v (1) Central Criminal Court (2) Director of the Serious Fraud Office* [2012] EWHC 2254 (Admin) in a postscript to his judgment the President of the Queens Bench Division remarked:-

> "293. In our view there is an important lesson to be learned which in fairness to the then director of the SFO we must make clear. The investigation and prosecution of serious fraud requires proper resources, both human and financial. It is quite clear that the SFO did not have such resources in the present case:
>
> (i)- (ii).....
>
> (iii) Although many investigations are reliant in the first instance on the provision of information by those who have an interest in the transactions such as administrators or lawyers or accountants involved in disputes, it is essential that those charged with investigation and prosecution can scrutinise the information provided with the same level of skill. The SFO should have scrutinised what it was told by Grant Thornton through the use of at least equivalent experience. The SFO should not have been compelled to rely on Grant Thornton who owed duties to their own clients which rightly took precedence over the interests of justice"

Everything said in this context, in the Association's view, applies equally to those who have to represent those charged with serious fraud offences.

CONCLUSIONS

61. Given the radical new proposals set out in the consultation paper and their potential far reaching consequences the Association was surprised to see a deadline for responses set for Tuesday 4 June 2013, which allows just eight weeks to assimilate and respond to the proposals. In that time it has not been possible for the Association to consult on and propose alternative methods which might help reduce the Legal Aid Budget, yet retain the current system in an improved form.

62. Since the data used in the consultation paper does not appear to reflect the cuts already made from 2010 onwards, the Association believes that once more reliable figures are available it would be opportune to sit down with the Ministry of Justice to explore areas of savings that might help retain the current system. We are concerned that fundamental, and irreversible changes, will otherwise be made to the Legal Aid System based on inadequate consultation and information. "Efficiency" is not the same as justice.

63. In his forward Mr Grayling asserts that "in the past decade the system has lost much of its credibility with the public. Taxpayers money has been used to pay for frivolous claims, to foot the legal bills of wealthy criminals, and to cover cases which run on and on racking up large fees for a small number of lawyers, far in excess of what senior public servants are paid".

64. We reject those assertions, which are made without any specific evidence to support them. Insofar as fraud cases are concerned, the first point of criticism ("frivolous claims") does not apply; The second (wealthy defendants having legal aid) is a direct product of Parliamentary intervention in the form of section 41 of the Proceeds of Crime Act 2002, which provided that where a restraint order was made, it may be made subject to exceptions, but in sub-section 4 specifically enacted that:-

> "(4) But an exception to a restraint order must not make provision for any legal expenses which –
>
> (a) Relate to an offence which falls within sub-section 5 and

(b) Are incurred by the defendant or a recipient of a tainted gift"

Sub-section (5) covers both the situation where a criminal investigation has been started with regard to an offence or where proceedings have been started and in both cases there is reasonable cause to believe that the defendant has benefited from his criminal conduct.

65. Consequently this is a self-inflicted wound on the Legal Aid system, and nothing to do with those who defend under it. Parliament chose to promote the interests of state confiscation over the legal aid budget. It cannot therefore lay the blame at the door of the system as Mr Grayling seeks to do for wealthy defendants being in receipt of legal aid.

66. His final point ("a small number of cases running on and on racking up large fees for a small number of lawyers, far in excess of what senior public servants are paid") is, with respect, misleading. In many cases these fees relate to work carried out over two or more years, whereas civil servants have a fixed annual salary. Secondly, as we submitted in this paper, the amount of work required to be done by the defence is invariably a reaction to the way in which the prosecution case is deployed. It is unfair not to look at this factor when alleging trials drag "on and on ". Thirdly these trials that do "drag on" tend to involve multi defendants and be at the top end of the spectrum in terms of complexity. Simply cutting costs further, so that the only people prepared to carry out such trials are inexperienced courts disaster, and may not lead to any long term savings in costs.

67. We fear that the net effect of these proposals will be to create a two tier justice system which will work to the disadvantage of those in receipt of legal aid in the future. It will also almost inevitably lead to the demise of many firms of criminal solicitors and an independent criminal bar. The impact will be felt at all levels in the justice system, but in particular in future recruitment of the judiciary. There will no longer be a skilled and experienced pool of talent to draw on. In turn these proposals will also impact on wider legal services provision in the UK, certainly so far as fraud expertise is concerned. Traditionally one of Britains strengths has been regarded as its legal system. These proposals will considerably weaken that system in the eyes of the world.

68. Accordingly for all of the reasons set out above we do not agree with the proposals set out within questions 1 to 36 within the consultation paper.

69. The Association has commented on the parts of the consultation paper that are most relevant to its membership. The fact that we have not commented on any other particular proposal within the paper should not be read as an acceptance or agreement to the same.

3rd June 2013