

SUMMARY OF ADVICE TO CBA EXECUTIVE OFFICERS

RE: AMENDMENT OF THE CRIMINAL LEGAL AID (REMUNERATION) REGULATIONS 2013 (SI 2013 / 435) TO INCREASE FEES PAYABLE ON EXISTING REPRESENTATION ORDERS

1. The Executive Officers of the CBA have taken advice from Thomas de la Mare QC, Tom Hickman QC, and Faisal Sadiq on whether the Lord Chancellor can lawfully increase fees payable to barristers under the Advocates' Graduated Fee Scheme ("**AGFS**") for work that is: (i) yet to be done; but (ii) in respect of existing representation orders ("**Future Retained Work**").

2. Their advice, in summary, is as follows:
 - (1) The Lord Chancellor can increase the fees payable to barristers under the AGFS for Future Retained Work. Increasing fees in this way is within the scope of the Lord Chancellor's powers under s.2(3) and s.41(1) to (3) Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("**LASPO**"). Doing so would not be ultra vires.

 - (2) Furthermore, the AGFS does not create a contractual relationship between barristers and the LAA. A barrister's entitlement to fees is a statutory debt which arises under a legislative scheme contained in the Criminal Legal Aid (Remuneration) Regulations 2013 (SI 2013/435) ("**2013 Regulations**"). This statutory debt only arises as and when the work in question is done. Until that point there is no debt. Accordingly, in so far as "*...Treasury rules around the spending of public funds do not permit changes to contractual payment terms retrospectively...*" those rules are not engaged by increasing the fees payable to barristers under the AGFS for Future Retained Work (i.e. where no statutory debt exists) even if there is a representation order in place.

 - (3) The Ministry of Justice itself imposed a retrospective 30% *reduction* of fees payable under the 2013 Regulations for work that was to be done by barristers on existing Very High Cost Cases contracts ("**VHCC**") by the Criminal Legal Aid (Remuneration) (Amendment) Regulations 2013 (SI 2013/2803). This reduction was made using the same statutory powers.