CBA's Response to the invitation to comment upon the VHCC Sub-group Proposals

(pursuant to Peter Lewis' letter to Max Hill of 18/4/12)

As to the essence

1. The CBA approves of both the aims behind, and almost all of, the proposals. We make comment therefore only upon those parts of the proposals which in our view could be improved or modified.

2. We do, however, feel obliged to observe that there is an element of unreality about these proposals. The experience of those counsel, at the coal face, actually prosecuting VHCC's at the moment is that, even before one gets the additional layer of bureaucracy proposed here by the setting up of management panels, there is a real resource problem: counsel's advice is rejected due to lack of resource, counsel are not given sufficient hours to do the work necessary to hit court-ordered deadlines, reviewing lawyers are only allowed to authorise a limited amount of hours, they do not have time to take the request for more hours to the appropriate person and so on and so forth.

3. These issues are not just gripes about fees. They are one of the root causes of real problems, real delays, real inefficiency and ultimately therefore real cost increases. We of course hope that these proposals will do the opposite but do wonder whether this sort of quite cumbersome structure should really be broadened to include cases that are technically VHCCs, but which do not represent the more serious and high profile end of the spectrum, and therefore are already, to an extent, straitjacketed by resource limitations. We tend to think not.

4. We do, however, take the view that whatever proposals are adopted they should be applicable across the board to all prosecuting agencies (i.e. to include FSA, SFO, OFT etc.)

As to the form / presentation

5. We think the final version / pdf of the Guide to Best Practice in VHCC's ("the Guide") should be broken up into a more digestible format than a list of bullets. It will also aid clarity to be able to identify the rule / principle being relied upon.

As to the substance

6. We suggest that a more delineated four-stage pre-charge prosecution process could be identified into which the detailed proposals set out in the Guide would fall.

   (i) Stage 1: Report of crime. Strategy. Team. Investigation. Restraint. Suspect assistance. etc.

   (ii) Stage 2: Presentation of results of investigation to arrested suspects in interview, following full and timely disclosure. The key to interviews, as we identify below, is to identify the essential elements that the prosecution will concentrate on from the outset and to limit itself to proving the essential core of the case as identified.

   (iii) Stage 3:
   (a) if nothing arises from interviews – go straight to Stage 4;
   (b) investigate results of interviews / defence disclosure, then re-interview (repeat process if necessary) – go to Stage 4;

   (iv) Stage 4: charging decision.

7. We think there are two absolutely essential keys to securing the intended aims.

   (i) What / Who / When: It is essential that the prosecutor should concentrate at all times on what is the crime, who committed the crime and when he/she committed the crime. In fraud cases a conspiracy to defraud tends to be used as cover to indict a multitude of identifiable offences. The prosecutor must isolate the moment, isolate the people, isolate the activity and then attack that. Lack of focus and evidential greed are at the root of most of the problems with which these proposals are designed to deal.

   (ii) A complete, chronological investigation / prosecution log ("the case log") must be kept. This must not just be a log of documents collected, or actions completed, or decisions taken, but all of the above, in chronological order, in one document. Everything. A shortened / edited version of that should be served on the court and the parties. This will usually provide a complete answer to the most time consuming elements of VHCC's pre-trial issues – abuse and disclosure (the two are usually inextricably linked).

We believe this log should be kept and updated every day by an administrative assistant (probably employed by the police and who may well be performing this function on more than one investigation) who can chase the relevant officers to report back as to what it is that they have done in the day and to log it. This document can then form the basis of the case management panel's review process.
There will then be a readily available comprehensive resource in one place to which one could refer to deal with all issues as to the investigation and prosecution process.

As to the particulars

8. Principle 1:
   (i) Accountability: we have previously responded to a government consultation paper (on costs in criminal proceedings) that the default position should be that in the event of an acquittal the defence costs should be borne by the relevant prosecuting authority. We remain of that view;
   (ii) Advocate selection and fees: we should like to emphasise the importance of this, and instructing counsel early often assists in the identification of the essential issues as defined;
   (iii) Overseas issues: the disclosure consequences of such issues in terms of time and cost need to be carefully considered;
   (iv) Most effective approach: we note the current government consultation paper on deferred prosecution agreements. DPA's may need to be added to the menu of options;
   (v) Arrest / interview plan: see paragraph 3 above. Documents relied upon in interview but not served in advance serve seriously to slow down and frankly frustrate the investigation process, prolix interviews that do not concentrate on the essential elements lead to increased costs and inflation of evidence, with tangential and marginally relevant matters being regarded as important;
   (vi) Disclosure: a disclosure officer must, at least at the moment of his/her selection, be available for the life time of a case. This really should not in any circumstances be the investigating officer. Counsel, appointed early to assist in overseeing this process, may also be able to provide continuity in this regard;
   (vii) Selection of charges: see paragraph 4(i) above. This is the key. Narrow, precise, focused. What, who, when. 'A result' is 'the best result'.

9. Principle 2: No comment.

10. Principle 3:

(i) See paragraph 4 (ii) above. The prosecution must draft and serve the DMD;
(ii) The contents of a 'disclosure log' should be found within the case log.

11. Principle 4: We approve of timetables. We do not approve of guillotines. If the charge is narrow and the issue is narrow and the advocate is doing his/her job and the judge is doing his/her job a guillotine is simply otiose and if used will frustrate the interests of justice. If the advocate is not doing his/her job, the judge can ensure that he/she does it, if necessary by way of a guillotine, but only in those (hopefully) exceptional circumstances.

12. Principle 5: We approve the Appendix A proposal of a case by case analysis as to whether an abuse hearing should include oral evidence. It is not entirely clear whether this proposal extends to whether it should include oral argument - we agree with the suggestion that in the ordinary course such argument should not exceed one day, but that there may be exceptions that can be determined on a case by case basis.

13. Principle 6: We caution against overestimating the 'value added' to a jury of EPPE, as opposed to engaging with the relevant documents. We also caution against over reliance upon its time saving potential. Of course, lawyer -> lawyer -> judge emails save time. Of course, electronic service of evidence saves time (but these must be properly hyperlinked and/or legibly copied in order to gain these advantages and on a common platform used by all prosecuting agencies). But EPPE? Again a jury's understanding is best enhanced and time best saved by relying on the few documents that matter (best remembered by a jury when marked by them, tagged by them and engaged with by them in a core hard copy jury bundle – paper, post-it note, highlighter and pen, not EPPE).

14. There is a danger that EPPE allows lazy prosecution – 'I don't need to identify in advance which documents I am going to rely upon because they will be available at the press of a button.' This makes the pre-trial narrowing down process very difficult. It is equally difficult to know what has been shown to the jury and what has not. It is equally difficult for the jury to retrieve something it has been shown but has not been able to mark. There is no substitute for a core bundle that can be handled. In those cases in which EPPE is to be utilised trial judges should nevertheless be astute to direct the prosecution to identify those documents that are going to be shown to the jury at trial in advance of the trial.

15. Principle 7: We think the simplest way to reduce the cost of confiscation proceedings is to amend the law so that the concept of benefit is more closely linked to reality.

16. Principle 8: We caution against assuming that the fact that an exhibit is not deployed means its service was superfluous. It is equally likely that its service made it unnecessary to deploy.

17. Annexes A and B – No comments.

As to additional suggestions

18. Judicial time: The CBA is firmly of the view that the judges who are going to try, nay police, these cases need to be given real and sufficient reading time to be able to take a grip of them at the very start. The problem cases have arisen where the judge has been forced (due to lack of time to read into the case in advance) to rely upon the prosecution's assertion that it needs this bit of evidence and that bit of evidence when in fact it does not. An uninformed Judge, through lack of reading time, in our experience is reticent to, or will not, deploy the existing case management tools that exist at an early stage in the proceedings and this often leads to further costs, among which are the listing of longer time estimated trials with more defendants and more live issues than are necessary.

19. Sensible use of resource: The early instruction of counsel, including leading counsel, enables those responsible for presenting the evidence to advise on the obtaining of evidence and consequent steps in a focused and directed way. We are aware of cases in which much of the available resource has been spent on steps that, upon careful reflection, were unnecessary, e.g. the wide-scale redaction of details that were already available to the defendants.

20. Speedy allocation of resource: (see paragraph 2 above). There must be a swift and efficient process for the authorisation of hours that can be worked and appeals of such decisions on both sides of the case. Those responsible for administering the authorisation process must themselves have adequate time to be able to administer it promptly and efficiently.

For and on behalf of the
CBA VHCC SUB-GROUP

15.6.12