



**Response to the Department for Constitutional Affairs
Consultation Paper**

**Judicial Powers to Manage Conflict of Interest &
Capacity Issues in Very High Cost Cases**

October 2006

1. INTRODUCTION

- 1.1 The Fraud Advisory Panel (the “Panel”) is an independent body of volunteers drawn from the public and private sectors. The Panel’s role is to raise awareness of the immense social and economic damage that is caused by fraud and to help both the public and private sectors, at the public at large, to fight back.
- 1.2 Members of the Panel include representatives from the law and accountancy professions, industry associations, financial institutions, government agencies, law enforcement, regulatory authorities and academia. The Panel works to encourage a truly multi-disciplinary perspective on fraud.
- 1.3 The Panel was established in 1998 through a public-spirited initiative by the Institute of Chartered Accountants’ in England and Wales. Today, it is a registered charity and company limited by guarantee. The Panel is funded by subscription, donation and sponsorship.
- 1.4 The Panel welcomes the opportunity to respond to the Department for Constitutional Affairs (DCA) consultation on proposals to create judicial powers to manage conflict of interest and capacity issues in very high cost cases CP17/06. This document sets out the Panel’s observations and views regarding this consultation paper.
- 1.5 This response has been prepared on behalf of the Fraud Advisory Panel by Mohammed Khamisa QC and Richard Jory both of 9-12 Bell Yard.

2. SUMMARY OF FAP’S SUBMISSIONS

- 2.1 Whilst recognising the need for effective case management in every trial, not just very high cost cases, the proposed Regulations would invest in the judge unnecessary powers that appear to trespass on the clear existing obligations and duties of counsel and solicitors. In particular, the power to ‘order withdrawal’ of representatives, and the reliance on a judge’s subjective analysis in doing so, is an excessive power. The proposals will result in difficulties of procedure, delay and ongoing case management where there is challenge to the exercise of such power during the course of proceedings.

3. QUESTION 1: DO YOU AGREE THAT IT IS NECESSARY TO CREATE THESE NEW POWERS IN ORDER TO MORE EFFECTIVELY MANAGE LENGTHY AND COMPLEX TRIALS?

- 3.1 The assumption within the question is that the new powers proposed would lead to more effective management of criminal trials. The material relied upon in support of the proposed new power is limited and anecdotal. We are not persuaded that there is a compelling requirement for legislation to introduce such new powers. We are concerned that an attempt to provide the court, and individual judges, with what amounts to the summary power to dismiss legal representatives may lead to distrust, resentment and a perception of unfairness in the trial process.
- 3.2 We are also concerned by the terminology within the consultation paper, and in particular the word 'capacity'. The word itself directly infers a degree of volume, rather than, for example, 'capability' or 'competency' which appear to be more appropriate terms.
- 3.3 As set out within the consultation paper, an effective case management framework exists within the CPR 2005 and the Protocol. An assigned judge, empowered with a duty to conduct proceedings pro-actively and bearing in mind the need to consider the 'overriding objective', effective case management, and the finite public resources available, should be in a position at least at that stage in proceedings to consider whether, on the face of the evidence, conflict exists or has the potential to arise. There is no reason why the judge should not be equipped to do so¹. If the judge himself, or through a third party, considers that there is or may be a conflict of interest or an issue of what is described as 'capacity', this may be raised at this stage.
- 3.4 But the concern arises as to how, in the absence of knowledge of the instructions of the defendant[s], the judge would be best placed to provide a fully informed ruling on topics such as conflict of interest that, ultimately, are and must be for the professionals instructed to consider, having regard to the clear guidance in the respective Codes issued by the Law Society and the Bar Council. Although issues may be raised and directly addressed at this stage the further power to order withdrawal of representation is a dangerous one.

¹ See Protocol, para 6(ii) – 'The Trial, Judicial Mastery of the Case'

- 3.5 The judge in any event is unable to legislate or make an order concerning perceived difficulties of this type prior to his becoming familiar with the papers, often at or during the Case management hearing. The concern about representation and conduct prior to this stage are therefore not adequately addressed by the proposals.
- 3.6 We remain concerned at how the exercise of the judge's power under the proposals would take effect, and how it might be challenged. We are also concerned as to how any 'defence' to such a court order might be inhibited by the confidential nature of the instructions provided. There is a real issue as to how such proceedings might be litigated to the satisfaction of the client, the professionals instructed and the court in an expeditious, thorough and fair manner.
- 3.7 We do consider that, given the concerns expressed within the paper, the issue of conflict of interest at least may be addressed directly as a discrete subject within the Case management hearing. In those circumstances, and mindful that the issue would inevitably be raised during such a hearing, all parties would be placed on notice. It would also be helpful to make it a particular and mandatory requirement that all legal parties consider the issue of conflict on an ongoing basis, and certainly as a particular topic at the first Case Management hearing.
- 3.8 In terms of sanction where there has been a clear case of negligent conduct by a representative, in failing to identify an obvious conflict of interest, and which results in delay and identifiable costs, there is already in place the threat of or punishment by way of a wasted costs order. This may be implemented in cases where there has been 'any improper, unreasonable or negligent act or omission on the part of any representative or any employee of a representative².'
- 3.9 Although such an order can not of course assist in the case management of a particular case, the knowledge that the issue of conflict will be raised at the Case management hearing, and that such an order will or may be considered by the judge, would undoubtedly focus the minds of those instructed.

² Prosecution of Offences Act 1985, section 19A

3.10 Where in due course such an order is made it may be effective to publicise the fact within the profession, and particularly through the mainstream professional publications that already exist, as a matter of course.

3.11 In conclusion, the CPR and Protocol, if implemented and directed by a judge familiar with the facts, provides an adequate framework regarding case management. Judges have the power to punish miscreant or negligent legal representatives already, and this should be pursued in clear cases. The additional summary power proposed may itself contribute not only to unnecessary disruption but resentment.

4. QUESTION 2: DO YOU AGREE WITH THE PROPOSED TIMETABLE FOR CHOOSING A REPLACEMENT REPRESENTATIVE?

4.1 Given that a period of time would inevitably have to be granted, we do not disagree with any proposal and make no further submissions on this point.

5. QUESTION 3: DO YOU AGREE WITH THE PROCESS OF THE JUDGE INVITING REPRESENTATIONS AT HIS DISCRETION?

5.1 Were these Regulations or something akin to them to be implemented we agree that the judge should invite representations but we consider such invitation should be mandatory rather than discretionary. The failure to seek a response from a party, particularly against whom such an order is to be made, offends the principal of natural justice, and the perception of fairness. Where there is the possibility of not only damage to reputation but disciplinary proceedings instigated by governing bodies, our view is that there must be a mechanism for the making of representations. Inherent in this is the problem mentioned above, that is, the danger of protracted litigation and argument as a distraction to the trial process.