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Northern Ireland Court Service  
**Consultation Document**  
Very High Cost Criminal Cases

June 2008

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## Contents

Introduction	Page 3
How to respond	Page 3
Closing date	Page 4
Miscellaneous	Page 4
Confidentiality and complaints	Page 4
Very high cost case contracts	Page 6
Contracting overview	Page 6
Rates of remuneration and case categorisation	Page 7
The way forward	Page 8
Consultation questions on VHCC contracts	Page 9
Transitional arrangements	Page 10
Introduction	Page 10
Rates of remuneration	Page 10
VHCC certification and revocation	Page 10
Consultation questions on transitional arrangements	Page 10
Appeals Authority	Page 12
Questions on Appeals Authority	Page 12
Purpose of consultation	Page 13
Summary of consultation questions	Page 14
Annex A – Consultation Criteria	Page 16
Annex B – Draft Solicitor’s contract	
Annex C – Draft Advocate’s contract	
Annex D – Impact Assessment	

## **1.0 Introduction**

- 1.1 The Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 (the 2005 Rules) provide for solicitors and barristers of legally aided defendants at the Crown Court to be remunerated through a system of standard fees, except where cases are certified by the Northern Ireland Legal Services Commission (NILSC) as being 'very high cost'. Where this occurs, solicitors and barristers become entitled to special hourly rates and responsibility for assessing the fees payable to them transfers to the Supreme Court Taxing Master. Certification by the NILSC is on the basis that if the case "proceeds to trial that trial would be likely to exceed 25 days".
- 1.2 The purpose of this document is to obtain the views of consultees on a number of proposed changes to the way in which members of the legal profession are remunerated for their work in very high cost cases at the Crown Court. The proposed changes are set out in sections 3, 4 and 5 below.

## **2.0 How to respond**

- 2.1 When responding to this consultation document, please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear whom the organisation represents and, where appropriate, how the views of the members were assembled.
- 2.2 Please submit your response to this consultation by post, fax or email to:

Cathy Scollan  
Consultation Co-ordinator  
Northern Ireland Court Service  
Windsor House  
9-15 Bedford Street  
BELFAST  
BT2 7LT  
Fax: 028 9041 2390  
Email: [cathyscollan@courtsni.gov.uk](mailto:cathyscollan@courtsni.gov.uk)

## **Closing date**

- 2.3 Responses must be received by 6 October 2008. We have extended the normal 12 week period to 14 weeks to allow for the summer holiday period.

## **Miscellaneous**

- 2.4 Additional copies of this consultation document may be made without seeking permission from the Court Service. Printed copies may be obtained by post by contacting the Consultation Co-ordinator. An electronic version is available on the Court Service's website at [www.courtsni.gov.uk](http://www.courtsni.gov.uk). This document will also be made available in a wide range of alternative formats. Requests for alternative formats should again be made to the Consultation Co-ordinator.
- 2.5 Please tell us if you know of others who would be interested in receiving this consultation document.

## **Confidentiality and complaints**

- 2.6 Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the information access legislation (that is, the Freedom of Information Act 2000 [FOI] and the Data Protection Act 1998 [DPA]). If you want information that you provide to be treated as confidential, it would be helpful if you would explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information, we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system, or included as a general statement in your fax cover sheet will not, of itself, be regarded as binding on the Court Service and will be taken to apply, therefore, only to information in your response for which confidentiality has been requested.
- 2.7 The Court Service will process your personal data in accordance with the DPA and, in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

2.8 If you have comments or complaints about the way this consultation has been conducted, these should be sent to the Head of Communications Group at:

E-mail [communicationsgroup@courtsni.gov.uk](mailto:communicationsgroup@courtsni.gov.uk)

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2.9 A copy of the consultation criteria being used in this consultation is set out in Annex A of this document.

## 3.0 Very High Cost Case contracts

### Contracting overview

- 3.1 When the 2005 Rules were enacted it was made clear that the ex post facto assessment of fees in VHCCs by the Taxing Master was an interim measure and that this would be replaced, in due course, by alternative arrangements. This consultation document proposes that the alternative arrangements should be a system of contracts entered into by solicitors and advocates with the NILSC. Under contracts, it is proposed that the defence team would be required to seek agreement to the work to be undertaken in a very high cost case (VHCC) with the NILSC in advance of undertaking that work. This would be done by the defence team preparing and lodging a case plan, stage plan(s) and task list(s) with the NILSC and, where appropriate, attending a meeting(s) with a NILSC contract manager to discuss and, where possible, agree the task list(s). These actions would be undertaken in accordance with the VHCC Contracting Process Timetable set out in Annex 3 to the solicitor's contract and Annex 1 to the advocate's contract.
- 3.2 The Court Service recognises that obtaining agreement on the tasks to be undertaken in a VHCC, including the time required to undertake those tasks and the level of fee earner appropriate to the tasks, will not always be possible. Indeed, the Court Service accepts that negotiations may, at times, become intense. In these circumstances, the contract provides an appeal mechanism, to enable certain decisions made by NILSC contract managers to be appealed, and incorporates a complaints procedure that can be activated by either party. The proposed appeal mechanism and complaints procedure are set out in Annexes 11 and 12 to the solicitor's contract and Annexes 8 and 9 to the advocate's contract, respectively.
- 3.3 In developing the contract, the Court Service has taken account of the fact that there will be occasions where it will be necessary to amend the terms and conditions of the contract or, indeed, to terminate the contract. Termination may be by virtue of a serious breach of the terms of the contract by the solicitor/advocate involved, or simply because a solicitor or advocate decides to come off record or chooses to accept a standard fee. The terms relating to amendments, breaches and terminations are set out in clauses 21-25 in the

solicitor's contract and clauses 19-22 in the advocate's contract. The Court Service has also included a Best Value Protocol as part of the proposed contracts. This is set out in Annex 5 to the solicitor's contract and Annex 3 to the advocate's contract. The purpose of this Protocol is to assist in ensuring that key principles and good working practices are followed in the conduct of a VHCC.

### **Rates of remuneration and case categorisation**

- 3.4 Currently, the rates of remuneration being paid in Northern Ireland are generally higher than the rates in England and Wales. The Court Service can see no justification for this, given that the work is broadly similar in both jurisdictions. To introduce the England and Wales rates in this jurisdiction, it would be necessary to move from the sliding scales of rates contained in Tables 1, 2 and 3 of Schedule 2 to the 2005 Rules and replace them with the range of fixed rates for preparation, non-preparatory work and advocacy used in England and Wales. Moreover, the fixed rates in England and Wales for preparation are divided into four categories based on the likely complexity/difficulty of the case and the actual rate paid in an individual case is determined by categorising the case according to certain criteria.
- 3.5 The criteria set down in England and Wales for categorising cases make a differentiation between fraud and non-fraud cases and there are specific criteria for each. This does not translate easily to the Northern Ireland situation. It is considered that few, if any, cases in this jurisdiction would meet the international dimension, the higher specialist knowledge requirement or, indeed, the value of the higher category of cases in England and Wales. The Court Service has, therefore, developed criteria which are more applicable to this jurisdiction but which, nevertheless, give a similar result in payment terms to the criteria used in England and Wales.
- 3.6 In Northern Ireland, it is proposed that cases would be classified initially according to the class of the case as set out in Schedule 3 to the 2005 Rules. For example murder, which is a Class A case in the 2005 Rules, would be classified as a Category 2 case, whereas burglary, which is a Class E case, would be classified as a Category 4 case.

- 3.7 Class A cases associated with terrorism and meeting a relevant criterion in that respect would be uplifted to Category 1 if other specific additional criteria are met in relation to the amount of served documentation and the overall projected cost of disposing of the case. The criteria proposed are the minimum figures used as criteria in England and Wales. If both of these additional criteria are met the case would be uplifted to Category 1. Evidence suggests that the figures used are more appropriate to the Northern Ireland jurisdiction.
- 3.8 For Class G cases, again the minimum figures used as criteria in England and Wales for served documentation and the projected cost of disposing of the case, are proposed. In addition, the value of fraud as a criterion has been reduced to the lower of the two figures in the England and Wales contract. The lower figure has been applied as there are fewer of these types of cases in Northern Ireland. It is proposed that any class G cases that meet three of the four criteria would be uplifted to Category 1.
- 3.9 The proposed criteria in respect of case categorisation and the rates of remuneration are set out in Annexes 4 and 6 to the solicitor's contract respectively and Annexes 2 and 4 of the advocate's contract respectively.

### **The way forward**

- 3.10 When the 2005 Rules were made it was anticipated that relatively few cases would receive certification annually. For instance, if the figures in Northern Ireland replicated the position in England and Wales, it is considered that the number of certifications would be in the region of 15 to 20 annually. Currently, the numbers in Northern Ireland are running at some 60 certifications annually. Whilst it is not possible to provide an accurate figure of the costs associated with these certifications, as relatively few cases have been concluded and their costs assessed, it is clear that VHCCs have the potential to impact significantly on the legal aid fund to the detriment of other areas of legal aid. Given this situation, the NILSC has recently introduced a new application form to regularise the supporting information provided to it and enable staff to make reasoned judgements on whether certification should be granted.
- 3.11 It is apparent also that the ex post facto assessment of fees is problematical in that it provides no certainty on remuneration levels for the legal profession

and has been a contributory factor in creating delays in the payment of fees. In a contractual environment where the necessary items of work, the hours required to complete the work and remuneration rates would be agreed in advance, this uncertainty would be removed. The proposed contractual environment would also allow regular payment of fees to be made throughout the lifetime of a case and assist the NILSC with budgetary forecasting.

3.12 In all the circumstances, the Court Service considers it is now an appropriate time to introduce a system of contracts for VHCCs and to establish a Very High Cost Case Unit (VHCCU) within the NILSC to manage those contracts. In consulting on these arrangements, the Court Service is building on well established arrangements in England and Wales and is currently working with the Legal Services Commission in England and Wales to ensure a fully functional VHCCU will be in place to support the introduction of contracts.

#### **Consultation questions on VHCC contracts**

1. Do you consider that the deadlines contained within the VHCC Contracting Process Timetable are reasonable and likely to be operable in all the circumstances?
2. Are you content with the complaints procedure?
3. What are your views relating to the proposed provisions regarding amendments, breaches and terminations of the contract? Are there any eventualities in terms of case handling that are not adequately covered by these clauses?
4. What are your views on the Best Value Protocol?
5. What are your views on the proposed case Category Criteria and the proposal to move to 4 classes of fees for remunerating case preparation work?
6. What are your views on the proposed changes to the rates of remuneration for VHCCs?
7. What are your views on the operation of contracts, generally?

## **4.0 Transitional arrangements**

### **Introduction**

- 4.1 In addition to introducing the system of contracts, the Court Service believes it is appropriate to introduce some other modifications to the 2005 Rules relating to VHCCs. The Court Service proposes to deal with changes to the VHCC provisions through this consultation exercise rather than through the review of the 2005 Rules. Those changes are mentioned below.

### **Rates of remuneration**

- 4.2 As mentioned previously, it is the Court Service's view that there is no justifiable argument for paying higher rates of remuneration for VHCC work in Northern Ireland as compared to England and Wales. In these circumstances, the Court Service proposes to introduce the new rates for all VHCCs certified from October 2008 onwards whether this is done by means of the contracts and their annexes or through amending the 2005 Rules.
- 4.3 For cases certified as very high cost before October 2008, the Court Service considers that it would be appropriate for the legal profession to continue to be remunerated at the current rates. The Court Service believes, however, that responsibility for the ex post facto assessment of fees should be transferred from the Taxing Master to the NILSC, as this may assist to speed the throughput of cases. The Taxing Master would, of course, retain his appellate function.

### **VHCC certification and revocation**

- 4.4 Currently, under the 2005 Rules an application to have a case certified as very high cost is made by the solicitor on behalf of himself and the advocate(s). Where certification is granted it applies to all members of the defence team and, equally, where it is revoked it also applies to all the team. This has caused some difficulties under the current scheme and would not be a viable option in a contractual environment where both solicitors and advocates would be required to enter into separate contracts with the NILSC. It is the Court Service's view, therefore, that the 2005 Rules must be amended to require separate applications for certification to be made by solicitors and advocates.

- 4.5 The effect of this proposed change will be to enable the NILSC to revoke a certificate (and, in a contractual environment, terminate a contract) without disadvantaging the other representatives in the case. It should be noted, that revoking a certificate and terminating a contract has no effect on the grant of legal aid by the court. Rather, it simply alters the means of remunerating the lawyer whose certificate has been revoked.

**Consultation questions on other modifications and transitional arrangements**

1. What are your views on the NILSC taking over the ex post facto assessment of fees in VHCCs?
2. What are your views on the proposed separate applications for VHCC certification?

## **5.0 Appeals Authority**

- 5.1 Currently, Annex 11 to the proposed solicitor's contract and Annex 8 to the proposed advocate's contract are silent on the composition of the Appeals Authority. In England and Wales, the appeal function is undertaken by a committee of three criminal lawyers drawn from a panel of solicitors and barristers maintained for that purpose by the Legal Services Commission (LSC). In allocating individual appeals to committees, the LSC uses the geographical size of England and Wales to assist in obtaining fair decisions and prevent conflicts of interest from occurring. For example, an appeal originating in Liverpool could be referred to a committee in London for a determination.
- 5.2 The ability to ensure that appeal decisions are fair to both sides, and to be able to demonstrate this, is an essential element of the contracting process. In these circumstances, the Court Service is keen to hear the views of consultees on the most appropriate composition of the Appeals Authority to achieve this aim. Following a decision in this respect, Annex 11 to the solicitor's contract and Annex 8 to the advocate's contract will be amended accordingly.

### **Questions on Appeals Authority**

1. What are your views on the composition of the proposed Appeals Authority?  
Are you content with the VHCC Appeals Authority mechanism?

## **6.0 Purpose of consultation**

- 6.1 This consultation document seeks views on the proposed draft solicitor contract and its annexes, the proposed draft advocate contract and its annexes and the Impact Assessment, which are set out in Annexes B, C and D respectively to this document. This document also seeks views on the other proposed transitional arrangements relating to VHCCs. As such, the consultation document seeks views on matters surrounding the operation of the contract, the transitional arrangements and, in particular, the questions set out in section 7 below.

## **7.0 Summary of consultation questions**

7.1 A summary of the consultation questions is set out below.

### **Consultation questions on VHCC contracts**

1. Do you consider that the deadlines contained within the VHCC Contracting Process Timetable are reasonable and likely to be operable in all the circumstances?
2. Are you content with the complaints procedure?
3. What are your views relating to the proposed provisions regarding amendments, breaches and terminations of the contract? Are there any eventualities in terms of case handling that are not adequately covered by these clauses?
4. What are your views on the Best Value Protocol?
5. What are your views on the proposed case Category Criteria and the proposal to move to 4 classes of fees for remunerating case preparation work?
6. What are your views on the proposed changes to the rates of remuneration for VHCCs?
7. What are your views on the operation of contracts, generally?

### **Consultation questions on the transitional arrangements**

1. What are your views on the NILSC taking over the ex post facto assessment of fees in VHCCs?
2. What are your views on the proposed separate applications for VHCC certification?

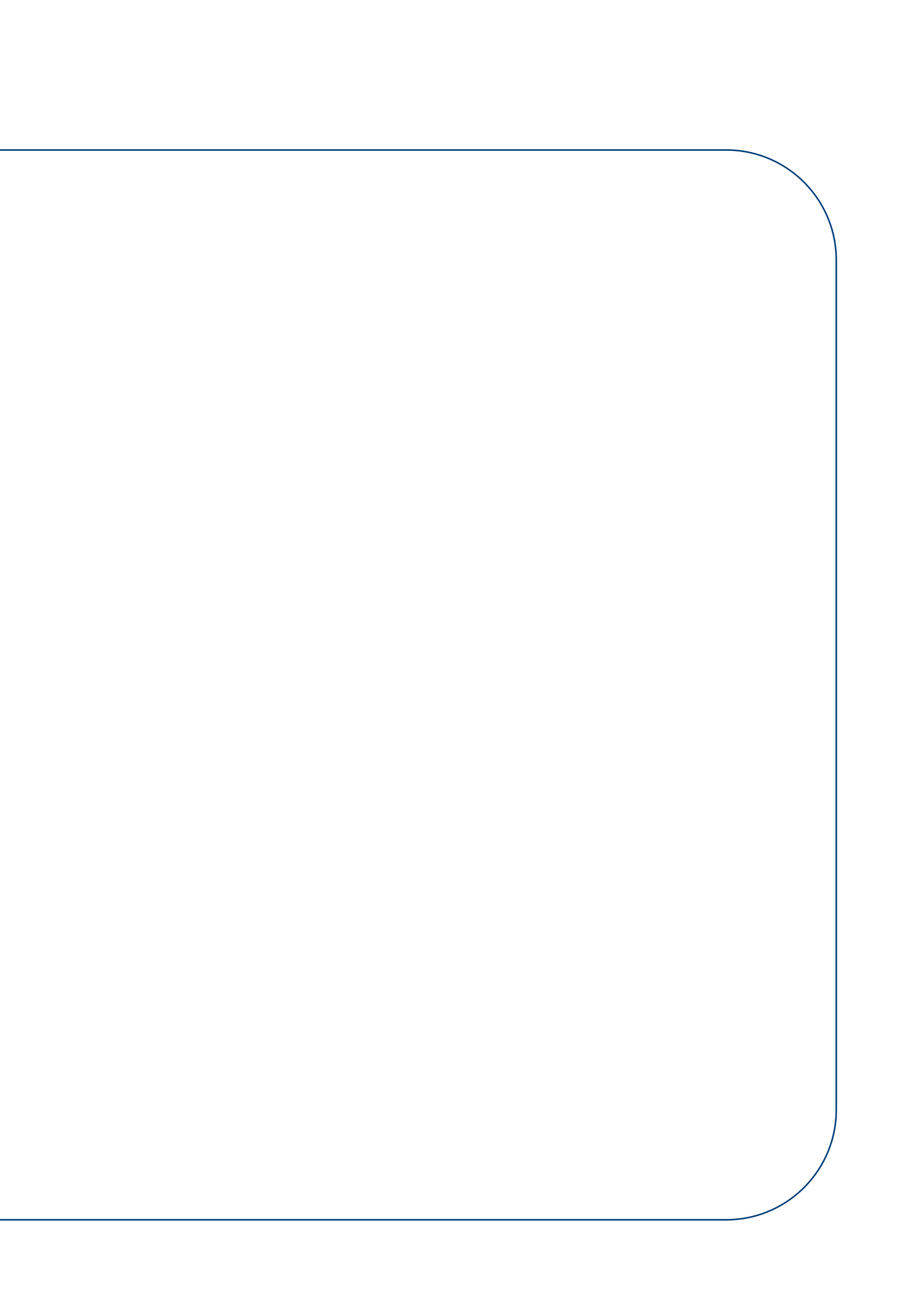
### **Questions on Appeals Authority**

1. What are your views on the composition of the Appeals Authority? Are you content with the VHCC Appeals Authority mechanism?
  
- 7.2 All comments in relation to the proposed introduction of a system of contracts, other modifications and transitional arrangements for VHCCs and the draft Impact Assessment are most welcome.

## **Consultation Criteria**

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what proposals are, who may be affected, what questions are being asked and the timescale for responses.
3. Ensure your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.







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