



House of Commons  
Constitutional Affairs  
Committee

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**Government Response  
to the Fourth Report  
on Immigration and  
Asylum: the  
Government's  
proposed changes to  
publicly funded  
immigration and  
asylum work**

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**Second Special Report of Session 2003–04**

*Ordered by The House of Commons  
to be printed 29 January 2004*

**HC 299**  
Published on 9 February 2004  
by authority of the House of Commons  
London: The Stationery Office Limited  
£0.00

## The Constitutional Affairs Committee

The Constitutional Affairs Committee (previously the Committee on the Lord Chancellor's Department) is appointed by the House of Commons to examine the expenditure, administration and policy of the Department for Constitutional Affairs and associated public bodies.

### Current membership

Rt Hon Alan Beith MP (*Liberal Democrat, Berwick-upon-Tweed*) (Chairman)  
Peter Bottomley MP (*Conservative, Worthing West*)  
Mr James Clappison MP (*Conservative, Hertsmere*)  
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Mr Clive Soley MP (*Labour, Ealing, Acton and Shepherd's Bush*)  
Keith Vaz MP (*Labour, Leicester East*)  
Dr Alan Whitehead MP (*Labour, Southampton Test*)

The following Member was a member of the Committee during the inquiry:  
Mr Mark Field MP (*Conservative, Cities of London and Westminster*)

### Powers

The committee is one of the departmental select committees, the powers of which are set out in House of Commons Standing Orders, principally in SO No 152. These are available on the Internet via [www.parliament.uk](http://www.parliament.uk).

### Publications

The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. A list of Reports of the Committee published in the present parliament is at the back of this volume.

All publications of the Committee (including press notices) are on the Internet at: [www.parliament.uk/parliamentary\\_committees/conaffcom.cfm](http://www.parliament.uk/parliamentary_committees/conaffcom.cfm)

### Committee staff

The current staff of the Committee are Roger Phillips (Clerk), Richard Poureshagh (Committee Assistant), Alexander Horne (Legal Specialist) and Julie Storey (Secretary).

### Contacts

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## Second Special Report

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The Constitutional Affairs Committee published its Fourth Report of Session 2002–03 on *Immigration and Asylum: the Government's proposed changes to publicly funded immigration and asylum work*, on 31 October 2003, as HC 1171. The Government response was received on 8 January 2004 in the form of a memorandum to the Committee which is appended below.

## Appendix

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### **Further Memorandum from The Department for Constitutional Affairs to The Constitutional Affairs Committee**

1. This is a memorandum from the Department for Constitutional Affairs (DCA) in response to the Constitutional Affairs Committee's Fourth Report of Session 2002–03 *Immigration and Asylum: the Government's proposed changes to publicly funded immigration and asylum work* (HC1171-I). The Government has now announced the way forward. This memorandum has been agreed with the Legal Services Commission (LSC).

#### **Introduction**

2. On 5 June 2003 this Department issued a consultation paper on proposed changes to publicly funded immigration and asylum work. The consultation period closed, after 12 weeks, on 27 August 2003, during the summer recess. 260 responses were received.

3. At the invitation of the Secretary of State, the Constitutional Affairs Committee decided to conduct a brief inquiry to examine the proposals, concentrating in particular on the proposals to set maximum limits on the amount of public funding available in individual cases.

4. The Committee heard oral evidence at two meetings. At the first, on 14 October, David Lammy MP, Parliamentary Under Secretary of State at DCA and Clare Dodgson, Chief Executive of the LSC, gave evidence. Further evidence was heard on 21 October 2003. On 23 October the Department submitted further information to the Committee in response to questions raised in the oral meeting on 14 October. On 24 October the DCA and the LSC submitted a joint memorandum setting out our revised proposals. The Committee published its report on 31 October 2003. Unfortunately the timing was such that the Committee could not consider all the points raised in the DCA/LSC memorandum.

5. On 27 November 2003 DCA announced the way forward in the light of the Committee's report and the wider consultation.<sup>1</sup> The announcement sets out the original proposals in the consultation paper of 5 June 2003, and the details of the way forward. It also sets out the implementation dates, which start on 1 March 2004.

### **The Committee's report**

6. DCA remains very grateful to the Committee for its careful consideration of the issues, especially considering the relatively short time available. We are also grateful to all the respondents to the consultation paper and to the range of practitioners in the field, and their representative bodies, with whom DCA and the LSC have had discussions during and since the consultation.

7. The Committee's principal concern, which reflected the majority of respondents to the consultation paper, was over the "stringent constraints on time"—as the Committee put it—in the original proposals. We had proposed a cap of 5 hours' work at the initial decision-making stage, and 4 hours' work in preparation for any appeal to the Immigration Appellate Authority. We proposed that there should be exceptions to those caps, and specifically sought responses as to what those exceptions should be. However, where the exceptions did not apply, the cap on the number of hours would be fixed and could not be extended.

### **The Government's announcement on the way forward**

8. As we indicated in our memorandum, we have seen the need for an alternative approach with greater flexibility. As set out in the announcement, our new approach allows a 5 hour threshold for legal advice at the initial stage of an asylum application. We believe that this will be sufficient time in the majority of routine cases, where attendance at interview is not required. However, if the practitioner needs more time in genuine and complex cases, they can apply to the LSC to extend the time they devote to a case. The LSC is of course very experienced in making decisions on the amount of time which suppliers need for individual cases, issuing cost limitations as a matter of course in all Legal Representation cases across all categories of work within the Community Legal Service. In asylum cases, since April 2003, the majority of decisions on funding for judicial reviews have been made in-house by the LSC's Specialist Immigration Team, rather than by suppliers under devolved powers

9. We have concluded that attendance by representatives at interview is not necessary in most cases. As a result, in all but exceptional cases (unaccompanied minors; applicants going through fast-track initial decision processes; those suffering from a recognised and verifiable mental incapacity which makes it impractical to undergo an interview without support) funding for attendance by a representative at the substantive asylum interview will not be authorised. The LSC will introduce rules to ensure that in these exceptional cases where attendance at interview is appropriate, this will be by an experienced advisor or the immigration supervisor and not by an outdoor clerk.

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<sup>1</sup> HC Deb, 27 November 2003, col 37WS

10. On appeals, the LSC will now remove the devolved powers to grant funding for appeals from the majority of suppliers to ensure that only meritorious cases receive public funding. Suppliers will make an initial assessment of the merits of the case before applying to the LSC for funding. Those practitioners with a good record of success at appeal will be given devolved powers to continue to grant funding. Initially devolved powers are likely to be awarded to approximately 40 suppliers that have a better than average success rate at appeals before the adjudicator. The LSC will continue to monitor performance and award devolved powers to further suppliers as appropriate.

11. In this way, we can curb the amount of public funding which is spent on straightforward or hopeless cases, while ensuring that limited resources are targeted where they are most needed, on complex and genuine cases with a real prospect of success.

### Immigration cases

12. Immigration cases cover a wide range of applications which vary greatly in their complexity. We have decided to implement a similar threshold as for asylum cases for the initial decision. This will normally be between 3 and 5 hours. As in asylum cases, the LSC may authorise an extension to the threshold for genuine and complex immigration cases. A similar procedure to asylum appeals will be instituted for immigration appeals, i.e. the LSC will make a decision on whether to grant funding after the practitioner has assessed the merits of an appeal and applied for public funding for this purpose. For those cases that pass the merits test, thresholds will be authorised according to the nature of the individual case and the experience and previous outcomes of the supplier. As with asylum cases, those practitioners with a good record of success at appeal will be given devolved powers to continue to grant funding.

### The merits test and 'complex and genuine cases'

13. The merits test for public funding is set out in the Funding Code, which was approved by Parliament under s. 8 of the Access to Justice Act 1999, and which came into force in April 2000 with the establishment of the Community Legal Service.

14. The test for the initial stage is the "sufficient benefit test". This states (at 5.2.1) that:

"Help may only be provided where there is sufficient benefit to the client, having regard to the circumstances of the matter, including the personal circumstances of the client, to justify work or further work being carried out."

15. The test for whether Legal Representation is granted before the Immigration Appellate Authority is set out at paragraph 13.4 of the Funding Code as follows:

"Prospects of Success

Legal Representation will be refused if the prospects of achieving a successful outcome for the client are:

- i. unclear or borderline, save where the case has a significant wider public interest, is of overwhelming importance to the client or raises significant human rights issues; or

ii. poor.”

16. The ultimate decision of whether a case is genuine is not decided by the LSC and the complexity of a case will depend on the individual circumstances of a client and the particular legal issues raised in that case. However, the LSC will fund cases which appear to have merit on the information available and which are not clearly poor because of, for example, existing precedents and evidence or lack of credibility. A non-exhaustive list of examples of poor cases is set out in the new Immigration Specification of the General Civil Contract and in such cases, the LSC is unlikely to authorise public funding beyond the initial stage. The LSC will publish further guidance with new forms to deal with all applications to extend the financial thresholds.

## Conclusion

17. We believe that this new regime for asylum and immigration cases meets the criticism from the Committee and others of our earlier proposals for fixed caps. These measures will ensure that legal aid is properly targeted on those genuine and complex cases that can demonstrate the need for it by passing the merits test. We therefore do not address further the comments in the Committee’s Report relating to fixed time limits. For example, the Committee’s comments in paragraph 84 about allowing solicitors to charge clients on a private basis, once the maximum cost limits are reached, no longer apply given that the LSC will ensure that appropriate public funding is allowed according to the merits of the case.

## Other proposals

18. Our other proposals, for accreditation of suppliers and the introduction of a Unique File Number, were much more strongly supported. While the focus of debate was therefore inevitably on the proposal for hours, accreditation and the Unique File Number will play a vital role in driving up standards and cutting out abuse and unnecessary duplication. The details of the proposals for accreditation and the Unique File Number are still being finalised in discussion with those involved (notably the Law Society and the Home Office respectively). The current position is as follows.

## Accreditation

19. As reported in our joint memorandum of 24 October,<sup>2</sup> the LSC is working closely with the Law Society and the Office of the Immigration Services Commissioner (OISC) to develop standards for the three levels of accreditation agreed. This work is almost concluded and drafts of the standards have been circulated to all representative bodies (e.g. the Immigration Law Practitioners’ Association (ILPA), the Legal Aid Practitioners’ Group (LAPG), Citizens Advice) for final comment.

20. The Law Society has finalised arrangements for the recruitment of an independent assessment organisation and selection should be complete by early spring 2004. The LSC

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<sup>2</sup> Fourth Report from the Constitutional Affairs Committee, Session 2002–03, *Immigration and Asylum: the Government’s proposed changes to publicly funded immigration and asylum work*, HC 1171, p 38

and Law Society have also further developed robust methods of assessment for each of the levels of accreditation, which will be finalised once the assessment organisation is in place.

21. Guidance on the implementation of the scheme during 2004/05 is currently being drawn up and the LSC is aiming to notify practitioners of the arrangements and the details of the standards as early as possible in the spring. Accreditation will commence from April 2004 and be compulsory from 1 April 2005.

### **Unique File Number**

22. The Home Office Reference Number will be used from 1 April 2004 as the Unique Client Number. It will be used by suppliers when they claim the costs of the work they have carried out from the LSC and also when they apply for funding for appeals. This will help prevent unnecessary changes of supplier that result in duplication of work and costs. The first point at which suppliers can claim costs is following the initial Home Office decision and the Home Office will ensure that decision letters include their reference number. The LSC will continue discussions with the Home Office about ways to implement up front controls to stop clients 'shopping around' for advice.

### **The Committee's other recommendations**

23. The Committee also made specific recommendations on disbursements and conferences with counsel. Our comments on these are as follows.

#### **Disbursements**

24. There is a maximum disbursement limit of £150.00 at the initial stage of a case, primarily to allow for interpreters' costs without the need for an extension, and this is proportionate to the financial threshold allowed for practitioners' work at the same stage. The disbursement limit can be extended in line with the financial threshold, where further work can be justified in a genuine and complex case. There is no maximum disbursement limit at the appeal stage. As stated above, the LSC will allow a threshold according to the nature of the appeal and it is accepted that disbursements such as expert reports may be required for meritorious cases where this is both reasonable and necessary in light of the particular circumstances of the case.

25. In addition, the LSC proposes to consult further on the use of interpreters and expert reports. The cost of expert reports has increased significantly in recent years and research has been undertaken to set maximum rates of payment. Work is also being done to investigate methods of guaranteeing high quality reports, perhaps through ensuring that only properly regulated or accredited experts may provide publicly funded reports. A consultation paper will be published in the spring.

#### **Conference with Counsel**

26. There is now greater flexibility in our approach to introduce financial thresholds for publicly funded work and this will allow for a conference with counsel, where necessary according to the individual nature of the case. Reasonable counsel fees and other

disbursements will be allowed within a higher financial threshold for cases granted public funding to proceed with an appeal. The threshold can be extended by the LSC in genuine and complex cases.

## **Work with the Home Office**

27. The Committee also commented on Home Office decision-making, and separately recommended that the DCA and Home Office make vigorous efforts to ensure a “joined up” approach. The Committee will therefore be interested to learn that officials from the Home Office, Department for Constitutional Affairs and Legal Services Commission are examining the initial decision-making stage of the asylum process, with particular regard to the role that legal aid and publicly funded practitioners play. This work may lead to further changes in the way that legal aid for asylum seekers is delivered beyond those now proposed. In particular, consideration is being given as to whether legal aid is needed at the initial stage in all cases. The Government will make a further announcement on any further changes in due course.

## **Implementation**

28. The implementation dates are set out in the announcement. Given the savings involved, and the urgency with which accreditation and the Unique File Number should be introduced, we will be introducing the new measures as quickly as is practicable. We acknowledge the Committee’s call that there should be no delay in addressing the issue of quality representation, but we cannot agree to the Committee’s call for a moratorium in implementing the time and funding limits. Financial reasons aside, we believe that the new measures we have put in place—with the opportunity for the LSC to examine the merits of individual cases—will ensure that limited resources are targeted where they are most needed, and should be implemented as soon as possible.

## Reports from the Constitutional Affairs Committee

The First, Second and Third Reports were published by the Committee under its previous name, Committee on the Lord Chancellor's Department

### Session 2002–03

First Report	Courts Bill <i>Government response</i>	HC 526 <i>Cm 5889</i>
Second Report	Judicial Appointments: lessons from the Scottish experience <i>No Government response expected</i>	HC 902
Third Report	Children and Family Court Advisory and Support Service (CAFCASS) <i>Government response</i>	HC 614 <i>Cm 6004</i>
Fourth Report	Immigration and Asylum: the Government's proposed changes to publicly funded immigration and asylum work	HC 1171

### Session 2003–04

First Special Report	Protection of a witness – privilege	HC 210
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