ILPA Memorandum to the Joint Committee on Human Rights following the publication of the Government's response to the Committee's Tenth Report of session 2006-07, *The Treatment of Asylum Seekers*

The following observations are generally restricted to either: (i) matters arising out of the Government response to the Committee's recommendations in its Tenth Report of session 2006-07, *The Treatment of Asylum Seekers*; or (ii) new information since the publication of the Committee's report.

2. References in this memorandum to Committee recommendations are to the recommendations, findings and concerns, to which the Government responded under cover of letter of 14 June 2007 from Liam Byrne MP, Minister of State. The numbering of recommendations is taken from the Government response; as published in the Committee's Seventeenth Report.

3. Items appended are referenced where applicable within the body of this memorandum.

Access to Financial Support and Accommodation:

4. On 25 June 2007, the Government belatedly published a remarkably brief summary of the evaluation of the section 9 pilots. That is available at: http://www.ind.homeoffice.gov.uk/6353/aboutus/familyasylum. Two points arise from this publication:

   a. Generally, the evaluation concluded – as a variety of stakeholders had anticipated – that section 9 had not been a success. Paragraph 4.2 of the summary stated that "*...section 9 did not significantly influence behaviour in favour of co-operating with removal.*" On the other hand, the evidence indicated that a significant number of families had absconded – thereby entailing serious welfare and destitution risks to the family, including children – because of concerns related to section 9 (see paragraph 2.2 of

the summary). The conclusions of the Committee at recommendation 6 were, therefore, borne out by the published summary. ILPA unreservedly agrees with the Committee's conclusion that section 9 should be repealed. Our position is founded upon the incompatibility with principles of common humanity and human rights, to which the Committee referred in its conclusion. However, it is extraordinary that the Government has committed itself to continuing with section 9 despite the failure of the pilot – e.g. see Lord Bassam in Grand Committee (on the UK Borders Bill) *Hansard* HL 12 Jul 2007 : Column GC287; and 18 Jul 2007 : Column GC65-8.

b. In addition, the experience of the section 9 evaluation calls into question the Government's response to recommendation 1. Whereas the Governments states that it agrees that asylum policy should be founded upon an evidence-based approach, and that evidence should ordinarily be made publicly available, the section 9 evaluation met neither of these two aims. Firstly, it had been stated that results of the pilot were expected to be available to Ministers as early as the end of February 2006 – see Baroness Ashton *Hansard* HL, 17 Jan 2006 : Column GC248. In the end, about 16 further months passed before the summary was published. Secondly, the summary is remarkably brief, generally revealing neither the substance nor the source of the evidence on which the evaluation is reached. Thirdly, the evaluation makes clear that the evidence showed section 9 had not been successful. Nevertheless, section 9 is to continue to be available to case owners handling asylum claims within the new asylum model. None of this is consistent with the Government's response to the Committee accepting the need to develop policy on the basis of evidence and the propriety of being transparent with evidence on which policy is developed.

5. The Government response to the Committee's recommendation 10 reflects the consistent position, which the Government maintains in relation to the question of support for those asylum seekers who have received a final and negative decision on their asylum claim (variously referred to as refused

asylum seekers, end of line and appeals rights exhausted). ILPA remains of the view, consistent with that of the Committee,„that the use of destitution as a policy tool is abhorrent and inhumane. However, there is a fundamental flaw in the Government position even when considered on the Government's own terms:

a. The Government position is that refused asylum seekers can, in practice, safely return to their countries of origin; and hence do not need to receive welfare or housing support in the UK.

b. However, the announcement of a 400-450 thousand legacy backlog by the Home Secretary in July last year[1] indicated plainly an asylum system that had fundamentally broken down. Although ILPA accepts generally that a large number of the case records will transpire to be incorrect (in the sense that the record wrongly remains open; or indeed ought never to have been opened), we understand the Border and Immigration Agency (BIA) estimate to be that around 280-300 thousand of these records will relate to live cases.

c The starting point must be that individuals, who have passed through a system that in anyone's terms has broken down, can have little if any confidence in the safety or propriety of the outcome of that process.

d. Moreover, such a general lack of confidence, has been leant firm support by fundamental failings on the part of earlier Home Office decision-makers. The BIA regularly points to the new asylum model as now providing a system that will work. It remains to be seen whether that assessment is well-founded, but like the Committee (recommendation 4) we welcome the opportunity this model may provide to significantly improve the treatment of new asylum seekers. However, for those cases in the legacy backlog, fundamental failings by the Home Office have in the past extended to losing files, providing plainly irrelevant or erroneous

[1] *Hansard* HC 19 July 2006 : Column 324

reasons for refusing asylum and ignoring, or not being aware of, relevant asylum and country policies.

e. Cases such as *Rashid v SSHD* [2005] EWCA Civ 744, *A & Ors v SSHD* [2006] EWHC 526 (Admin) and *SSHD v S* [2007] EWCA Civ 546 (concerning failures to apply policies in respect of Iraq and Afghanistan) are clear examples, affecting large numbers of cases, of failure by the Home Office to grant status to asylum seekers as was required under policies, which either the individual decision-maker ignored or of which he or she was unaware. Such fundamental failure also undermines any confidence that the right of appeal (formerly to the Immigration Appellate Authority (IAA), now to the Asylum and Immigration Tribunal (AIT) can be expected to provide individuals in the outcome of their cases. As these cases demonstrate, some appeal decisions have been similarly incorrect because the Home Office had generally failed to ensure that individuals, their representatives and the AIT were aware of relevant policies.

f. These general reasons why the Government approach is fundamentally flawed are compounded by other factors. The inconsistent quality of representation received by some individuals under legal aid is plainly an important factor. In part, the Government response to Committee recommendation 8 highlights this concern by seeking to explain the dramatic reduction in legal aid suppliers as significantly due to LSC removing poor suppliers. However, there are other reasons for that reduction in legal aid suppliers; and many good suppliers have withdrawn or reduced their commitment to legal aid. This too has resulted in some individuals unable to access adequate advice and representation, especially when dispersed outside of London to areas where legal aid supply was less developed or non-existent. Another important factor has been the impact of delay generally. Cases such as *Shala v SSHD* [2003] INLR 349, CA and *Akaeke v SSHD* [2005] INLR 575, CA show how delays have, in some cases, led to circumstances in which the expectation that an individual should return to his or her country of origin is no longer reasonable. Moreover, decisions in the higher courts and the AIT show how country

conditions can over time change – and, perhaps more significantly in terms of lack of confidence in the system, judicial understanding of country conditions can change. The decision of the AIT in October 2005 concerning the risk of any removals to Zimbabwe is a case in point[2]. For other individuals, there is the added factor that they are aware of others who arrived at the same or a similar time, with apparently similar claims, and have received a grant of status.

g. It is simply unrealistic to expect – given this general background – that many individuals within the legacy backlog can have any real confidence in the asylum system, through which they have passed. Very many do not have such confidence; and often for good reason.

h. Refugee Action concluded, as is rehearsed at paragraph 100 of the Committee's report, that up to 70% of the end of line cases they looked at merited further consideration. This comes as no surprise to us. However, Refugee Action's conclusion confirms our view that it is unrealistic to expect many individuals within the legacy backlog to have confidence in the decision they have received through the asylum system; and that it is irresponsible to disregard that the system had broken down and that some decisions are not safe.

The BIA has informed ILPA that around one-third of the cases within the legacy backlog concern individuals from Afghanistan, China, Iran, Iraq and Somalia. These are countries with well-documented serious human rights abuses. Of course, there are other countries – e.g. Democratic Republic of Congo, Eritrea and Zimbabwe – with similarly serious records[3]. In the context described, ILPA considers there to be deep-seated

---

[2] [2005] UKAIT 00144 CG (and see fn. 3)

[3] In the case of two of these countries – Democratic Republic of Congo and Zimbabwe – removals have been and remain suspended following litigation in the Administrative Court. On 23 August 2007, the Secretary of State accepted following the oral judgment of Collins J in CO/7088/2007 that removals ought to be suspended pending the consideration by the AIT of recent evidence of risk on returns to the Democratic Republic of Congo. A similar undertaking was given in similar circumstances on 27 July 2005 in respect of Zimbabwe, in respect of which the Secretary of State had previously suspended removals between January 2002 and 16 November 2004 – see paragraphs 2-9 of the determination in *AA (Zimbabwe) v SSHD* [2005] UKAIT 00144 CG.

reasons why many individuals who have passed through the asylum process in the UK do not have confidence that they can safely return to countries such as these. The Government's response to the Committee simply fails to address these reasons.

6. In relation to the Government's response to the Committee's recommendation 8 concerning the shortage of competent immigration advice and representation, we note that it remains the case that the Legal Services Commission (LSC) has not been able to make an assessment of what is needed in terms of legal aid supply for the legacy backlog cases. The geographical distribution of these cases cannot be equated with the geographical distribution of cases within the asylum process under the new asylum model. The prospect that individuals within this backlog cannot find local specialist advisers is, therefore, all the more acute.

7. In the meantime, the BIA has confirmed by letter to ILPA that individuals, who are within the legacy backlog, are not guaranteed to receive a questionnaire from the case resolution directorate or consideration by the directorate (which has been established in order to clear the backlog) [see Appendix 1 – exchange of letters between ILPA and the BIA.]. The BIA generally advise that individuals need not provide any update about reasons why they ought to be allowed to remain in the UK unless and until contacted by the BIA[4]. If a questionnaire is sent, this will provide an opportunity for the individual to supply reasons – and the individual will ordinarily have 21 working days to return the questionnaire, in which time legal advice may be sought. However, some individuals may simply be detained by BIA enforcement for removal within a matter of 3 days – only 2 of which may be working days – under general policy arrangements (see chapter 44 of the Operational Enforcement Manual).

8. The need for legal aid for those in this backlog is, therefore, urgent because it cannot be predicted whether the individual will be one of the relatively few

[4] See BIA website: http://www.ind.homeoffice.gov.uk/applying/asylum/caseresolutionprogammefaqs/

who faces immediate removal without consideration by the case resolution directorate. Nevertheless, lawyers are limited in the number of cases they can take on by the number of 'matter starts' allocated to them by the LSC. 'Matter starts' constitute an allocation of the number of new cases that can be taken on. What constitutes a new case depends upon complex coding systems operated by the LSC. Because changes to the system of legal aid were envisaged, including exclusive contracts for, for example, detention work, lawyers were allocated only six-months worth of matter starts at the beginning of the current year. Although, now, the exclusive contracts will not come in during the current year, still there has been no confirmation that allocations of matter starts for the second six months will be the same as the first and indeed some members have reported an understanding that the allocation will be a percentage of matter starts actually used. Thus, overall, capacity would reduce. ILPA has also seen members, seeking to offer new training contracts to young lawyers, needing to persuade the LSC that there is a need for extra capacity in London.

9. ILPA receives a significant number of enquiries every week from individuals seeking advice and representation despite the fact that the Association does not provide these services. We receive such enquiries by post, fax, email and telephone; and through our developing relationships with various refugee community organisations and NGOs supporting these organisations. We also receive information from our members about the enquiries directed toward them. The numbers of enquiries has substantially increased in recent months. It is clear from the nature of the enquiries that the key reason for this stems from the legacy announcement made by the previous Home Secretary in July 2006.

10. On the basis of this information and given the history of this legacy, it is highly likely that a disproportionate number of legacy cases will concern individuals resident in London. We refer the Committee to the GLA's current (July 2007) consultation *London Enriched: The Mayor's Draft Strategy for Refugee Integration in London.* This sets out plans to map the numbers of people seeking asylum and refugees in London and presents a working

'guesstimate' of 250,000 people seeking asylum or people whose claims for asylum have failed, all of whom are likely to need legal advice, in the London area. The projected timescale for clearing this legacy is within five years of the announcement. However, BIA has pretty much lost the first of those five years since it is only very recently that the agency has been in a position to process sizeable numbers of these cases. Given the number of cases, recent case law developments (especially concerning failures by the Home Office to follow previous policies and delays), changes in country conditions and the wide variety of circumstances in which individuals within legacy will find themselves (including awaiting a decision on their asylum claim, seeking an extension of existing leave and pursuing fresh claims), it is clear that there will be very large numbers of individuals within this legacy requiring advice and representation over the next four years.

11. In the circumstances, quite apart from wider concerns as to the availability of adequate immigration legal aid provision, and concerns that the new funding regime may reduce supply still further, ILPA is concerned that BIA's legacy (recently renamed case resolution) casework is a particular area for which there is insufficient legal aid provision, perhaps particularly in London, and this concern seems likely to grow as BIA increases its active legacy casework.

Treatment of children:

12. The Government's position in respect of section 9 (see discussion at paragraph 4 of this memorandum), perhaps, throws light on the response to recommendation 26 concerning the UK's reservation to the UN Convention on the Rights of the Child. ILPA strongly supports the withdrawal of that reservation. Section 9 provides a good example of where the best interests of the child are not respected as a primary consideration (whether in the context of family welfare or the prospect of separation). However, as the Committee's recommendations (particularly recommendation 6) and Government's evaluation (particularly paragraphs 2.2, 3.1 and 4.2; and see paragraph 4 of this memorandum) show, section 9 is neither humane, nor generally human-rights compliant, nor useful, nor successful in meeting its policy aims. Had the UK not entered its reservation, it may be that the Government would not

have brought in section 9 at all and avoided harm to children in those families affected. Yet the evaluation indicates no basis for thinking immigration control would have been compromised since it shows section 9 did not significantly increase co-operation with removals.

13. Similar points may be made in relation to the Committee's recommendation 28, and the Government response, relating to section 11 of the Children Act 2004. Nevertheless, the Government intends to introduce a code of practice to address children's safety and welfare (see paragraph 11 below). On the face of it, the Government position seems inconsistent: either the code imposes upon the BIA an obligation to have regard to safeguarding children and promoting their welfare, in which case section 11 might sensibly be adopted; or it does not, in which case we question what value the code can provide. In addition, the Government's stated concern that the section 11 duty is restricted to England on its face appears disingenuous since there are similar duties in devolved regions – see section 17 of the Children (Scotland) Act 1995; section 26 of the Children (Northern Ireland) Order 1995 SI 1995/755 (NI 2); and section 28 of the Children Act 2004 in respect of Scotland, Northern Ireland and Wales respectively.

14. We note that the Government has amended the UK Borders Bill, in Grand Committee, to make provision for a code of practice on safeguarding children (see clause 21 of the UK Borders Bill, HL Bill 100 06-07). However, there are several concerns with this approach, chief among which are:

    a. There is a fundamental gap concerning the welfare of children, which section 11 and each of its counterparts for devolved regions address. There has been some commitment towards including welfare provisions within the code of practice that is produced. Whereas ILPA welcomes a code of practice including safeguarding and welfare aims, we remain convinced that this ought to be firmly situated within a legislative framework that incorporated the functions of the BIA within the section 11 duty. Continued exclusion of BIA functions from this ambit merely serves to highlight a fundamental policy failure to treat all children equally as

children and ensure every child does indeed matter – a failure which was starkly highlighted in 2005 when what was then the DfES published detailed guidance on section 11, the preface to which stated:

> *"Safeguarding children is everyone's responsibility. This guidance deals with the duty to have regard to the need to safeguard and promote the welfare of children in the Children Act 2004. It will play an important role in embedding this responsibility in the work of key agencies which have contact with children and young people."*

Yet either safeguarding was not everyone's responsibility or not all children were fully included since the immigration service and what was the Immigration and Nationality Directorate were not included within the scope of section 11 or therefore the guidance. That position remains[5].

b. We understand the proposed code will not encompass the actions and responsibilities of private contractors, who are increasingly responsible for carrying out BIA functions. Similarly, the activities of the BIA and contractors at juxtaposed controls are, we understand, to be excluded. Such exclusions would comprise fundamental gaps in any code and generally in child protection measures. We note that we have similar concerns regarding the proposed extension of powers of the Independent Police Complaints Commission to investigate serious complaints against BIA staff. These proposals are set out in the current consultation at: http://www.ind.homeoffice.gov.uk/6353/6356/17715/consultation_document_v05.pdf; and see particularly paragraphs 2.3 and 2.14 of the consultation document.

15. In response to the Committee's recommendation 26 regarding the UK's reservation to the UN Convention on the Rights of the Child, the Government broadly rejected the merits of considering other States' practice. However, many EC States do not have reservations comparable to the UK's reservation

[5] We have previously referred the Committee to ILPA's publications: *Working with children and young people subject to immigration control: Guidelines for Best Practice* and *Child first, migrant second: Ensuring that every child matters* – see paragraph 17 of our written evidence to the Committee (Ev 417).

relation to immigration matters[6]. The Government's response is extraordinary, since it must surely accept that its immigration control interests are fundamentally similar in nature to those of its EC partners. Again, the response the Government has offered the Committee seems to reflect a general unwillingness to meet – what it ostensible agrees to – within the Committee's recommendation 1: that is to develop policy on the basis of evidence. As the Committee is well aware, the UK's reservation has been condemned as unlawful both by the UN Committee on the Rights of the Child and by the Committee itself. The UN Committee on the Rights of the Child said in considering the UK's initial report under Article 44 of the Convention in 1995:

> *"7. The Committee is concerned about the broad nature of the reservations made to the Convention by the State party which raise concern as to their compatibility with the object and purpose of the Convention. In particular, the reservation relating to the application of the Nationality and Immigration Act does not appear to be compatible with the principles and provisions of the Convention, including those of its articles 2, 3, 9 and 10."*[7]

16. In 2002 the Committee expressed itself in stronger terms:

> *"...the Committee remains concerned that the State party does not intend to withdraw its wide-ranging reservation on immigration and citizenship, which is against the object and purpose of the Convention."*[8]

The words *"against the object and purpose of the Convention"* are drawn from Article 51(2): they are the description of a reservation that is not permitted. This is the formulation of a principle more generally accepted in international law. The UN Vienna Convention on the Law of Treaties 1969[9], which sets out general principles for reservations, states:

---

[6] Declarations and reservations are listed at: http://www.unhchr.ch/html/menu3/b/treaty15_asp.htm

[7] CRC/C/15/Add.34 15 February 1995 *Concluding observations of the Committee on the Rights of the Child : United Kingdom of Great Britain and Northern Ireland.*

[8] CRC/C/15/Add.188 9 October 2002 Concluding observations of the Committee on the Rights of the Child : United Kingdom of Great Britain and Northern Ireland.

[9] Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, p. 331

> *"Article 19 Formulation of reservations*
> *A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:*
> *(a) the reservation is prohibited by the treaty;*
> *(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or*
> *(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty."*

The JCHR has made clear that it shares this view.[10]

7. The UN Committee summarised the UK government's stance in its 2002 recommendation:

> *"The Committee also recommends that the State party reconsider its reservation to article 22 with a view to withdrawing it. given the State party's observation that this reservation is formally unnecessary because the State party's law is in accordance with article 22 of the Convention."*[11]

18. The JCHR has previously summarised the UK government's evidence on the point thus:

> *"The Government justifies this reservation as necessary in the interests of effective immigration control, but states that the reservation does not prevent the UK from having regard to the Convention in its care and treatment of children. It states that, in practice "the interests of asylum seeking children and young people are fully respected" in particular under the Human Rights Act 1998 and that "notwithstanding the Reservation, there are sufficient social and legal mechanisms in place to ensure that children receive a generous level of protection and care whilst they are in the UK".* (notes omitted)"[12]

19. The Immigration and Nationality Department's Asylum Policy Instruction on children summarises the position thus:

---

[10] Joint Committee on Human Rights 17th report of session 2004-2005 23 March 2005 *Review of international human rights instruments,* HL 99/HC 264. See also the Committee's Tenth Report of 2002-03, HL Paper 117, HC 81, para. 49. See and Seventeenth Report of Session 2001-02, *Nationality, Immigration and Asylum Bill,* HL Paper 132, HC 961.

[11] *Op. cit.*. The UK website http://www.everychildmatters.gov.uk/strategy/uncrc/process/ is a useful portal from which to access the relevant reports.

[12] HL 99/HC 265, *op. cit.* note 4 *supra.* at paragraph 47.

> *"It is, however, IND's policy to seek to adhere to the principles contained in the Convention where possible, subject to the need to maintain an effective immigration control. In particular caseworkers should bear in mind the core principles of best interests, the right to participation and non-discrimination."*[13]

The following is a typical exchange

> *"**Lord Inglewood:** ...I was left unclear on whether the Government intended to implement their legal obligations under the Convention on the Rights of the Child. Will the Minister give an unequivocal commitment that it is the Government's intention to do so?*
> *"**Baroness Scotland of Asthal:** My Lords, I know that the noble Lord will be aware that we currently have a reservation against the Convention on the Rights of the Child. That issue has not yet been resolved, but the House will appreciate that this Government have an exemplary record on taking children's interests properly into account and seeking to protect them."*[14]

We await with interest the UN Committee on the Rights of the Child's comments on the UK's third periodic report.

20. The casual way in which the merits of considering other States' practice is disregarded is somewhat similar to the causal way in which the focus of section 11 upon England is put forward as an argument to reject the Committee's recommendations. Neither approach is compatible with an approach to policy development that gives serious and considered regard to the value of evidence and reasons before implementation. In response to recommendation 1, the Government had suggested that the urgency of developing policy to deal with what are said to be abuses militated against careful consideration of evidence. In reality, however, the issues (real or perceived) raised by the Government regarding section 9, section 11 and the UK reservation are not new or sudden.

21. The Committee will be aware of the publication in May 2007 of ILPA research relating to age assessment – *When is a child not a child? Asylum age*

---

[13] APIs see See section 4 of Children API at:
http://www.ind.homeoffice.gov.uk/documents/asylumpolicyinstructions/apis/children.pdf?view=Binary
[14] *Hansard* HL 24 Oct 2006 : Column 1079

disputes and the process of age assessment. We merely note here the continued failure by the Government to point to specific evidence in support of its general assertion in the February 2007 consultation paper *Planning Better Outcomes and Support for Unaccompanied Asylum Seeking Children* that x-ray techniques provide an improved means towards age assessment that has been the case in the past[15]. This again appears to provide example of the Government's failure to develop policy on the basis of evidence, still less evidence that is made publicly available.

Detention and Removal:

22. As the Committee rehearsed at paragraph 225 of its report, ILPA is convinced that legal aid representation must be available throughout the course of the detained fast track process, including the appeal stage, regardless of the current merits test. Our position is confirmed by the September 2007 publication of BID research *Refusal factory: Women's experiences of the Detained Fast Track asylum process at Yarl's Wood Immigration Removal Centre*. The report is available at: http://www.biduk.org/pdf/Fast%20track/BID_RefusalFactory_07.pdf.

23. BID launched its report on 6th September 2007, at which event former detainees, lawyers, befrienders and supporters spoke; and their individual experiences plainly provided support for the BID findings. The Government in response to Committee recommendation 36 is simply wrong in asserting that the detained fast track process is not arbitrary. Selection for the process is by reference to criteria set out in the BIA *Suitability for Detained Fast Track (DFT) and Non-Suspensive Appeal (NSA) processes* (amended in July 2007). However, initial screening provides no sensible opportunity for assessing the key criteria – "*where* [the claim] *appears, after screening, to be one that may be decided quickly*". Nor does it provide any adequate opportunity for assessment of whether there are grounds for exclusion from the process (e.g. because the individual has been tortured, or there are serious medical concerns).

---

[15] That consultation document referred to "*recent research*" at paragraph 27 but no reference was given to any such research: see http://www.ind.homeoffice.gov.uk/6353/6356/17715/uasc.pdf.

24. The cases considered by BID show the inadequacy of screening in this regard; but moreover indicate – once a case is transferred into the detained fast track – an institutionalised response that regards such cases as inherently poor. ILPA believes that this is the only rational explanation behind the determination on the part of some BIA case owners and immigration judges – as evidenced in the BID report – to pursue cases through the detained fast track process and timetable in the face of plainly, meritorious applications to adjourn or remove cases from the process.

25. In *RLC v SSHD* [2004] EWCA Civ 1481, the Court of Appeal agreed that there was tension between the need for flexibility in individual cases and the tight timetable set for the detained fast track. However, the Court considered that the detained fast track was not inherently unfair or unlawful provided it was operated flexibly to allow for enlargement of the standard timetable as and when circumstances in individual cases demanded. Our members – consistent with the BID report – indicate that in practice, the timetable is frequently operated inflexibly. Some BIA case owners and immigration judges support this by such means as questioning the value that delay to obtain a medical report can bring or ignoring Medical Foundation and other medico-legal referrals (even where torture allegations have been made); or questioning why experts cannot be identified, instructed and their reports received within a couple of days.

26. ILPA has received a legal opinion from Michael Fordham QC and Naina Patel of Blackstone chambers regarding the merits test (and the related performance indicator) in relation to appeals within the detained fast track process. The opinion [reproduced as Appendix 2; please note that ILPA and the authors are content that this opinion may be made public] concludes that the operation of the merits test may, in principle and practice, be unlawful and disproportionate. The opinion, which has previously been made available to the Committee, concludes: "*...the provision of the basic safeguard of legal representation (on both sides not just that of Government) is surely a fair price to pay if the State is to exercise the option of processing asylum-seekers*

using detention and in this highly accelerated way". That the process is, in general, disproportionate is further confirmed by the fact – as the BID report reveals – that so many individuals pass through this highly accelerated process for considering (and overwhelmingly rejecting) their claims, yet remain languishing in detention for weeks and months beyond this. The inevitable conclusion must be that – even on the Government's own terms – there is no need for these cases to be processed at such inordinate speed, which plainly poses insuperable problems for the general provision of adequate legal advice and representation; or for making any satisfactory assessment as to the merits of individual cases.

27. In response to recommendation 44, the Government has drawn attention to the use of video link by the AIT in bail applications. Our members have reported significant problems with this, which we have in turn reported to the AIT. [Appendix 3 – two letters from ILPA to the AIT concerning the use of video link for bail hearings.] These include that representatives do not have sufficient opportunity to prepare for bail hearings because current practice is for the BIA to provide its reasons for detention (by way of bail summary) only the afternoon before the hearing. This is a longstanding practice, and no doubt had been designed to allow the Home Office sufficient time to respond to a bail application while avoiding delay in the application being heard (which possibly may unnecessarily extend the time the applicant spends in detention). However, these arrangements were designed at a time when applicants were habitually produced at the hearing, which enabled representatives to take instructions in person before the hearing commenced. Limited time (currently about 15 minutes) now available by video-link before the hearing begins is inadequate. Having regard to the fact that in asylum cases (at least those in the new asylum model) there is now a dedicated case owner responsible for all aspects of the case, we have recommended to the AIT that current practice be reconsidered so that the BIA is expected to disclose their reasons for detention much earlier; and arrangements can be made for representatives to take instructions (if necessary, travelling to an immigration removal centre) before the day of the bail hearing.

28. In response to Committee recommendation 49, the Government refers to "*delay and frustration* [of] *immigration and asylum processes, including removal*". This is a familiar and longstanding refrain on the part of the Government. However, we would draw the Committee's attention to the change in the BIA and Administrative Court procedures in relation to judicial reviews and removal, which were introduced in March 2007[16]. These changes were precipitated by the BIA specifically to address concern on its part regarding what it said were problems with unnecessary delays to removals by unmeritorious judicial reviews. The position of the BIA has been significantly strengthened by these changes; and assertions of this type by the Government or the BIA can no longer be sustained by reference to policies and practices operating prior to March 2007.

29. As regards the Government response to Committee recommendation 50, we note the BID report (see paragraph 15 of this memorandum) indicated a general absence of bail applications in respect of those in the detained fast track, despite the average length of women detainees (the report focused on Yarl's Wood, which is used solely for women) in that process being 5.3 months. The legal aid funding system, which the Government describes, is plainly failing those in the detained fast track. ILPA is also concerned at the withdrawal from the AIT website of what was the IAA's bail guidance notes for adjudicators, for which no replacement has yet been made available.

30. We note that the Committee's recommendation 52 reflects similar concerns and recommendations made by Robert Whalley in his July 2007 *Report of the Investigation into the disturbances at Harmondsworth and Campsfield House Immigration Removal Centres* – particularly at parts 9 & 10 (see paragraphs 288-293, and recommendations C9.88-89 & 94; paragraphs 311, 321 & 337 *et seq*)[17]. Robert Whalley's findings and recommendations, in this regard,

---

[16] The new procedures are: Operational Enforcement Manual, chapter 28 at: http://www.ind.homeoffice.gov.uk/documents/oemsectiond/chapter44judicialreview?view=Binary; and paragraph 18 of practice direction 54 to Part 54 of the Civil Procedure Rules at: http://www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part54.htm#IDABMIGF

[17] The Robert Whalley report is available at: http://www.ind.homeoffice.gov.uk/6353/aboutus/campsfieldreportjuly2007.pdf

support the Committee's stated concerns and indicate the inadequacy of the response the Committee has received on this recommendation.

31. As regards the Government response to recommendation 57, one of our members (who is one of the largest suppliers of legal aid in the field) has pointed out to us that most complaints of excessive force relate to private contractors who are employed by the BIA as escorts. The Government response does not address the role of these contractors; and we would again refer the Committee to our concern (see paragraph 11 of this memorandum) at the proposed restriction upon the powers of the IPCC to investigate complaints.

Immigration Law Practitioners' Association
11 September 2007