ILPA response to consultation on Simplifying Immigration Law:

Introduction:

1. ILPA is a professional association with around 1,000 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum, through training, disseminating information and providing evidence-based research and opinion. ILPA is represented on numerous government and other stakeholder and advisory groups.

2. This response is provided to the Border and Immigration Agency's *Simplifying Immigration Law: an initial consultation* published in June 2007. In addition to the information contained in that paper, this response has regard to information provided to ILPA at a meeting on 3 August 2007 with two Border and Immigration Agency (BIA) officials currently working on the simplification project ("the 3 August meeting")[1].

3. This response follows the eight questions set out in section 4 of the consultation paper. Some examples are given in relation to certain questions. They are illustrative and are certainly not exhaustive.

Question 1:

Are the simplification principles which are set out in the previous section [section 3] the right ones?

4. No.

5. What is needed is a statement of principles in respect of immigration law, rather than – as appears from the nomenclature ("*simplification principles*") and certain of those listed as principles in section 3 – a

[1] ILPA is grateful for the opportunity provided by those working on the project for the meeting.

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statement of objectives, which are thought to make that law simple or simpler. Establishing such principles ought to provide a means to assess whether any discrete proposal for simplification truly does serve or maintain the key principles behind immigration law.

6. If that approach is not adopted, it is likely that proposals will ultimately fail to promote simplification. For instance, an inflexible immigration rule, which excludes more people from a grant of leave to enter than is necessary to meet the policy aim, is easy to draft. On its face it looks simple and easy to apply. However, the rule and its administration are arbitrary and bureaucratic. This will promote litigation, which leads to piecemeal correction – whether by administrative concession or the development of legal precedent in case law. The result is to build complication upon complication, with no clear delineation of what may be the limits to which the rule extends.

7. Observations on particular objectives listed:

   a. Minimising "*the need for decision-makers to exercise **discretion***" is opaque since it provides no principle against which to assess what degree of discretion is or is not necessary.

   b. There is a similar difficulty with minimising "***gaps***". By reference to what principles will it be judged whether a gap does or does not exist? This Government has introduced four primary pieces of legislation[2] and brought two further Bills[3] this year, which constitutes plenty of gap filling, but without any ultimate success[4]. The reason is not that the BIA – and its predecessor, the Immigration Nationality Directorate (IND) – has generally lacked powers, but that it has consistently failed

[2] The Immigration and Asylum Appeals Act 1999, Nationality, Immigration and Asylum Act 2002, Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 and Immigration, Asylum and Nationality Act 2006
[3] The UK Borders Bill and Criminal Justice and Immigration Bill
[4] At second reading in the House of Lords, Baroness Scotland introduced the UK Borders Bill announcing the Bill to be "*...the last part of a jigsaw and, after it is complete, there will be an opportunity for us to look at the issue of simplification*".

to meet basic standards of good administration. Increasing the very wide powers already available to the BIA is not, therefore, the answer to greater "***efficiency***" or "***public confidence***". Such change is more likely to add to administrative inefficiency, by adding to complexity and reducing familiarity with settled systems. In any event, the objective of minimising gaps runs counter to the pressing objective of minimising "***further legislation***".

c. Maximising "***clarity and predictability***" has merit, but this should not be "*for applicants and sponsors*" to reduce "*the need to rely on advisers to navigate the system*". There will be far less "***transparency***" in BIA's functions if the BIA is to exclude oversight from these experts. Moreover, it is a matter for the individual whether he or she wishes to instruct an adviser; and representation is a fundamental aspect of access to justice, promoting equality of arms between the state and the individual.

8. The overall impression is highly unsatisfactory; and leaves far too much freedom to the BIA – to the exclusion of the interests of actual and potential applicants, sponsors, the wider public and representatives – under the superficially attractive banner of 'simplification'.

9. Immigration law, which encompasses the control of borders and the consequences of such control[5], should meet the UK's international and human rights obligations, provide for equality and avoid discrimination, be proportionate and avoid arbitrariness, ease the lawful entry and stay of those entitled to be in the UK and provide access to justice and judicial remedy. These are key principles, against which any simplification can and should be assessed.

[5] See the BIA's objectives and values as set out at http://www.ind.homeoffice.gov.uk/aboutus/objectivesandvalues

Question 2:

What specific problems would you hope that the Simplification Project can resolve?

10. The primary problem bedevilling immigration law that this project could and should resolve is the need for consolidation. The Immigration Law Handbook[6], which is the closest practitioners have to a consolidated text of immigration law, was first published in 1997. At that time, it extended to 537 numbered pages. Now in its fifth edition, it extends to 1,232 numbered pages. It includes twelve pieces of primary legislation; and – in addition to the Asylum and Immigration Tribunal Procedure Rules[7] ("the procedure rules") and Immigration Rules ("the rules") – thirty statutory instruments.

    However impressive those numbers may be, they fall far short of the complete picture. There are more than six hundred statutory instruments, which have relevance for immigration law[8]. These cover a range of areas including health, education, housing and welfare; and – since much within these areas is devolved – require separate instruments for England, Northern Ireland, Scotland and Wales.

12. There is, therefore, substantial scope for consolidation; and successfully consolidating such an unwieldy mass of legislation is a significant task in itself.

13. However, the scope of the simplification project appears to be even wider and very much at large; as was confirmed at the 3 August meeting. That does not promote confidence in the capacity of the project to succeed in its aims – whatever these may in time transpire to be – or to achieve the consolidation that so many have been demanding for so long. There are any number of changes in immigration law, which ILPA would welcome and would add greater clarity and simplicity; and indeed many of these

[6] Immigration Law Handbook, edited by Margaret Phelan and James Gillespie, OUP

[7] The Asylum and Immigration Tribunal (Procedure) Rules 2005 SI No. 230; there are also the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 SI No. 560

[8] A search on the Ministry of Justice website (www.statutelaw.gov.uk) revealed 693 such statutory instruments.

have been the subject of debate – often repeated – as immigration Bills have made their way through Parliament over the preceding years and decades. It may well be helpful to reconsider and rehearse those debates, but not at the expense of consolidation.

14. The difficulty is that consolidation is not what is being offered. It should be. The project ought, at the very least, to focus on providing a consolidating Bill (or two, see below in relation to nationality law); and doing so prior to any further attempts at simplification. This would constitute a considerable achievement and simplification in its own right; and would provide a useful period and process for review of where and how else simplification in immigration law might be achieved compatibly with the key principles identified in this response. The current indeterminate ambit of the project invites considerable controversy, risking serious delay or indeed the collapse of the project.

15. Moreover, the prospect of making major changes in immigration law at the same time (as opposed to after) an attempt at consolidation, risks importing very considerable complication through the need for transitional arrangements. The transitional arrangements when the AIT was established are referred to below. These provide a good, but not isolated, example of how transition can make for serious complication. Consolidating first would, at least, ease any transitions that were then thought necessary, as it would provide time for reflection and clarification of what transition may be necessary, and what impact this may have.

16. Whereas a truly consolidating Bill could expect a relatively untroubled passage, a simplification Bill might face enormous difficulties. Detailed and lengthy Parliamentary scrutiny would be inevitable, and the Bill's Parliamentary timetable might well be at risk.

Question 3:

What particular issues need to be addressed in reducing reliance on concessions and the exercise of discretion?

7. Whether viewed from the perspective of European Union law, human rights law or UK administrative law, both proportionality and regard to all the relevant circumstances of the individual case are fundamental requirements of a lawful decision[9]. Reducing discretion for decision-makers to be able to meet these requirements will cause their decisions to fail to command public confidence and lead to litigation; this in turn may add complication and further undermine public confidence.

18. The impression given at the 3 August meeting was the BIA considers there to be wide scope for reducing the exercise of discretion and that this is needed to ensure consistency in decision-making and secure public confidence. The BIA is currently undertaking research as to the reasons why public confidence may be low[10]; and this may provide an opportunity to reflect upon the reasons behind the BIA's thinking on discretion.

19. It may be those reasons are grounded in the past; and fail to have regard to significant changes in immigration law over the last five years. In the area of asylum and human rights protection, a wide range of country policies (or concessions) developed under which exceptional leave to enter or remain (ELE/R) was granted[11]. ELE/R was also granted in respect of a range of serious health or human rights matters, which were not otherwise provided for in rules or stated policies. ELE/R was withdrawn from 1 April 2003. Relatively detailed asylum policy instructions on humanitarian protection and discretionary leave have replaced it; and the country policies have gone too.

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[9] See e.g. Case C-413/99 *Baumbast v Secretary of State for the Home Department* [2003] INLR 1; *Alconbury Developments Ltd v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23

[10] This was confirmed at the most recent BIA Corporate Stakeholders meeting on 23 July 2007.

[11] See Hansard HC 8 November 2004: column 2050W

20. The BIA concern, as expressed at the 3 August meeting, therefore appears far less significant than it might once have been. Although ongoing litigation continues to refer back to these policies, this arises from past administrative failings on the part of the IND – delays and past failures to follow policy[12]. This does not provide reason to conclude there is wide scope or pressing urgency for still further reduction of discretion in decision-making.

21 Indeed recent developments indicate the reverse. Changes to the Highly Skilled Migrants Programme (HSMP)[13] sought to reduce or remove discretion from decision-makers in considering whether an applicant met the points-criteria under the rules. This had extended to the absurd position where an applicant, who was unable to meet the requirement of producing a specified document because of theft, would be excluded; whereas an applicant, who could not produce the document because of natural disaster, would be able to proceed with the application. It has also led to the bureaucracy whereby applicants are required to produce letters from Anglophone universities in Anglophone countries confirming their degree was taught in English[14].

22. Other attempts at removing or excluding discretion have caused problems. The changes to the appellate structure, establishing the new Asylum and Immigration Tribunal (AIT) in 2005[15], brought with them complicated transitional provisions. Among these, procedure rule 62(7) sought to restrict the AIT from considering certain grounds for reconsideration, which might previously have been taken on appeal to what was the Immigration Appeal Tribunal. After much confusion and controversy, this problem was eventually resolved by way of litigation, resulting in the

[12] Such litigation includes *Rashid v SSHD* [2005] EWCA Civ 744, *A & Ors v SSHD* [2006] EWHC 526 (Admin) and *SSHD v S* [2007] EWCA Civ 546.
[13] HC 1702 – Statement of Changes in the Immigration Rules
[14] See Highly Skilled Migrants Programme Caseworker Guidance (13 June 2007), especially chapter on English language
[15] See the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, section 26 and Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (Commencement Order No. 5 and Transitional Provisions) Order 2005, SI No. 565

Court of Appeal ruling the procedure rule to be *ultra vires*[16]; necessitating a further enactment[17] to amend this. That same enactment also amended procedure rule 19, which itself had been ruled by the Court of Appeal to be *ultra vires* because it failed to allow any discretion on the part of the AIT to find out why an appellant was not present at his or her appeal before hearing that appeal in the appellant's absence[18].

23 Paragraph 289A of the rules and the accompanying immigration directorate instructions ran into similar difficulties, where caseworkers had understood – and the Secretary of State had in litigation supported – that someone seeking indefinite leave to remain (ILR) under what is commonly known as the domestic violence rule could not meet the criterion of her relationship having broken down due to domestic violence unless she produced evidence of a specific type, regardless of her reasons for not having such evidence and the probity of such other evidence she put forward. The attempt to remove discretion was rejected by the Court of Appeal[19].

24. The Detained Fast Track Process for asylum cases, which operates at Harmondsworth and Yarl's Wood, provides a further example of where the real or perceived absence of discretion resulting in inflexibility over the strict fast track timescale led to litigation. The Court of Appeal ruled the fast track was lawful; but required a transparent policy whereby flexibility could, in appropriate cases, be allowed for[20].

25 What these examples show is how removing or reducing discretion can result in:

a. arbitrary and bureaucratic decision-making (e.g. where decisions under the new HSMP rules have allowed decision-makers to have regard to

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[16] *AM (Serbia) & Ors v SSHD* [2007] EWCA Civ 16
[17] The Asylum and Immigration Tribunal (Procedure) (Amendment) Rules 2007 SI No. 835
[18] *FP (Iran) v SSHD* [2007] EWCA Civ 13
[19] *Ahmed Iram Ishtiaq v SSHD* [2007] EWCA Civ 386
[20] *RLC v SSHD* [2004] EWCA Civ 1481

one reason for having lost a specified document, but not another; or made demands on applicants and institutions to provide evidence despite the individual's English language competence being clear);

b. discrimination (e.g. where a person is precluded from demonstrating her entitlement to ILR because she is required to produce evidence of a certain type, which by reason of her particular cultural background she is significantly less likely to be able to obtain[21]);

c. incompatibility with international and human rights obligations (e.g. where a person is precluded from establishing his or her entitlement to refugee status or humanitarian protection because of inflexibility in the decision-making process, which denies time for him or her to produce relevant evidence in support of an asylum claim); and

d. denial of access to justice (e.g. where inflexibility in the procedure rules precludes a person providing good reasons for being absent at an appeal hearing, and the hearing proceeds in his or her absence).

26. Many other examples might be given. Indeed, the introduction of concessions into immigration law demonstrates how it has been necessary to allow for flexibility in decision-making where the rules or settled policy have not catered for particular circumstances where exclusion would be arbitrary or disproportionate. The long residence concessions have since found their way into the rules[22]; and there may be scope for other concessions (e.g. the seven years concession relating to children) to similarly be brought into the rules.

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[21] In *Ishtiaq op cit*, the Court of Appeal did not decide the question of whether the interpretation of the rule, for which the Secretary of State argued, was unlawful by reason of a discriminatory impact because the court had already decided the interpretation was not correct. However, the immigration judge, who had originally allowed the appeal, had expressly found unlawful discrimination in this interpretation.

[22] Immigration Rules, paragraphs 276A-D were inserted into the rules from 1 April 2003; this being the time when ELE/R was withdrawn.

27. Ultimately, however, BIA decision-makers ought to be provided with sufficient resources (including training, supervision and guidance) to ensure proportionate and fair decisions, in which all can have confidence. Ticking off boxes merely leads to arbitrary decisions, bearing no sensible or defensible relation to the particular circumstances of the individuals – applicants and sponsors – affected. In *Ishtiaq*[23], the Court of Appeal took this position:

> "*...the policy considerations relied on by Miss Richards do not shed any light on the true construction of para 289A(iv). I can readily accept that it is easy for people to make false allegations that they are the victims of domestic violence. But it does not follow that it must have been intended effectively to remove the fact-finding function from the caseworker altogether. Caseworkers are often charged with a difficult fact-finding exercise. That is their daily fare. They frequently have to deal with false allegations in diverse contexts. One way of assisting them with their difficult function is to provide them with proper training. Immigration judges face similar problems. But none of this is a reason for leaning in favour of an interpretation of the Rules which curtails their fact-finding function or otherwise prescribes how it should be conducted...*
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> *...it is obviously highly desirable that caseworkers should be given clear guidance as to how they should perform the difficult tasks that they have to perform. But for the reasons that I have given, I do not consider that they can be given inflexible instructions which have the effect of depriving them of the right to consider what evidence they should require when they consider the question of domestic violence in an individual case.*"[24]

Question 4:

Do you agree with the proposed three tier structure of primary legislation, immigration rules and operational guidance?

28. The three tier structure has a glaring omission. There is no mention of statutory instruments. At the 3 August meeting, it was explained that law

[23] *Op cit*

[24] See paragraphs 36 and 41 of the judgment of Dyson LJ. The policy arguments made for the Secretary of State are set out at length at paragraph 28 of the judgment, and were essentially that the strict interpretation of the rule so as to preclude an applicant relying upon evidence other than that which is specified was necessary to ensure the rule was not open to abuse. Before the court, the Secretary of State conceded that this could result in harshness in individual cases; but argued this could be remedied by resort to general discretion.

contained in statutory instruments would be taken up into primary legislation or down into the rules.

Given the breadth of the subject matter covered by these statutory instruments, it seems highly unlikely that this law could be successfully brought within the rules. Moreover, if it were, this would likely do nothing for simplification in terms of the volume of the rules that would result. In any event, the fact that so much of this law is subject to devolved powers would add considerable complication in terms of how the rules would need to be agreed and then drafted. None of this seems feasible.

The consultation paper, however, only refers to "*over thirty statutory instruments*"; the true figure is more than six hundred. The implication may be that most of this secondary legislation is not considered to be within the scope of the project. The BIA's functions do not involve primary responsibility in areas where much of this law has effect. However, if the implication is correct, the scope of the project ought to be urgently reconsidered since disruption and complication for individuals, government and other bodies (including employers, educational establishments, local authorities, health authorities and representatives) is no less real in the areas of health, education, housing and welfare. For example, this month ILPA has been consulted in connection with advice given by the DfES that student support was not available for someone whose extension of leave to remain application remains outstanding. The relevant regulations are complex and have been subject to successive amendments[25]. Further regulations on closely related matters add to the complexity[26]. The DfES advice was wrong, though happily the department has now accepted that to be so. However, there is no doubt that the complexity in the regulations and their relation to section 3C of the Immigration Act 1971 was behind the confusion.

[25] See the Education (Student Support) Regulations 2007 (SI 2007/176).
[26] See the Education (Fees and Awards) (England) Regulations 2007 (SI 2007/779).

31 Leaving this concern to one side, the consultation paper proposes immigration rules "*which are capable of quick adjustment*" and operational guidance, "*but only where necessary*". The implication appears to be that currently the rules are thought to be slow to adjust, and the operational guidance profligate. Neither – if taken to be broad statements upon immigration law – are correct.

32. The HSMP example, referred to previously, demonstrates how the rules can be changed with little notice. However, it also shows the pitfalls in such adjustments, which can cause particular unfairness where changes are made to the criteria a person must satisfy in order to extend his or her stay. The Joint Committee on Human Rights considered the HSMP changes had breached Article 8 human rights. A person who had made the UK his or her main home in accordance with the HSMP rules could not have foreseen that his or her long term future in the UK would be precluded by radical changes in those rules[27]. The Minister of State for Nationality, Citizenship and Immigration ("the Minister") responded that those who had entered the UK under the HSMP ought to have been clear that the rules may change. In the context of those who had been required to make the UK their main home, and had done so, this response was little more than a claim to the right to rely upon the antithesis of "***clarity and predictability***"[28].

33 The prospect that the rules will be subject to even greater or swifter change in the future is certainly unwelcome and likely to lead to further complication, litigation and general lack of confidence in the rules.

34. As regards operational guidance, there should be reflection upon the wealth of powers that have steadily been, and continue to be, conferred upon the BIA. Many of these are sweeping in nature. Clause 16 of the

[27] See paragraph 48 of the Committee's report – Highly Skilled Migrants: Changes to the Immigration Rules, twentieth report of the session 2006-07, 26 July 2007 HL 173/HC 993

[28] The Minister's response is found in his letter of 18 May 2007 to the Committee, which is Appendix 3 to the report: "*It was foreseeable and predictable that the nature of the test may be subject to change in the future. The Government is entitled to amend the Immigration Rules from time to time in order to carry out its policies...*".

UK Borders Bill[29], for example, would provide power to set reporting and residence restrictions for any person with limited leave to remain. There is no further qualification or limitation provided within the clause, yet the potential group upon whom the power may be imposed is vast, while the stated target group is small[30]. This approach to legislating demands more, not less, by way of operational guidance. If primary legislation was to be drafted so as to place clear and express limitations on the nature and extent of powers, and the purposes for which these may be used, it may be there would be greater scope for "*shorter, sharper operational guidance*". That is not the present position.

35. In the Public Bill Committee considering that same Bill, the Minister informed the committee that:

> "*it is important that* [] *operational guidance is discussed at length with stakeholders in order to get what is often very valuable advice...* [and when drawn up] *is and must be publicly available*"[31].

That commitment is welcome. However, the need for consultation is not limited to this guidance but extends to changes to the rules; and the need will be greater if it is envisaged that these should be subject to even more frequent change.

Question 5:

Are there particular models for simplification, internationally or in other regulatory areas, which have been successful and could provide a model?

36. Generally, a process that consolidates will provide a degree of simplification, by bringing together law that has become dispersed and inaccessible. A process that goes further, but seeks to standardise upwards (thereby improving the position of those affected), rather than downwards,

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[29] HL Bill 100

[30] In debates on this Bill, Ministers have identified foreign national former prisoners and unaccompanied asylum-seeking children as targets: see e.g. Baroness Scotland of Asthal at second reading, Hansard HL 13 June 2007: column 1710.

[31] Record of Proceedings of the UK Borders Bill Public Bill Committee, 6 March 2007 column 152

will be better set to achieve simplification because it will not need to become overwhelmed by transitional arrangements.

Successful examples that might usefully be considered are provided by the European Council Directive 2004/38/EC[32] and the British Overseas Territories Act 2002.

Question 6:

Nationality law is largely separate from immigration law. The gateway from migration processes to citizenship is clearly part of this project. But should the technical details of nationality law be included in the present simplification process, or left alone? Or would it be better to consolidate nationality law separately?

38. There is sense in consolidating nationality law separately. The cornerstone of current British Nationality law is the British Nationality Act 1981. Most amendments to nationality law subsequent to 1981 have been amendments to that Act. Thus, a volume such as the Immigration Law Handbook[33] provides a consolidation of most modern provisions of nationality law. Consolidating nationality law may provide a useful dry run for consolidating immigration law. In any case, as indicated previously, simple consolidation is where this project ought to begin. Simplifying nationality law would be a very different process, given that the most obvious simplification would be along the lines of the British Overseas Territories Act 2002, giving those who hold a form of British nationality other than British citizenship the same status as British citizens.

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[32] Directive of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/368/EEC and 93/96/EEC.

[33] *Op cit*

Question 7:

Can we use the simplification process to help make clearer the distinction between temporary residents in the UK, those seeking settlement, those settled here with no time limit on their stay and those who go on to become British citizens? Can we make clearer their respective obligations and rights, and how these different statuses need to be earned?

39. None of the eleven objectives, listed as principles in the consultation paper, are directed to emphasising these distinctions. The question fails to address why this should be an objective. However, it is noted that the Criminal Justice and Immigration Bill, which awaits its second reading, stands in marked contrast to simplification. It would add significant complication into immigration law by creating an entirely new immigration status by way of eight technical and detailed clauses, which themselves leave wide discretion regarding to whom the new status may be given and how various aspects of that status may in the individual case apply[34].

40. To comment any further on what may be proposed here, requires a good deal more detail and/or transparency as to what is proposed and the reasons for the proposition.

Question 8:

Do you have any other comments on, or suggestions for, the process?

41. At present this project and its aims are too opaque to enable further or more specific comments or suggestions. At the 3 August meeting, it was indicated that a fuller consultation will be offered towards the end of this year. Given the potential vast scope of this project, and how little detail has been given to date, it will be essential that later consultation gives the fullest opportunity for meaningful engagement on the part of stakeholders, such as ILPA, and reflection on the part of the BIA. Clarity as to what is proposed and adequate time for consultation will be essential.

[34] See clauses 115-122 of the Criminal Justice and Immigration Bill (Bill 130), which would not only create a new status with wide discretion as to the power to impose severe conditions upon a person given this status but would also create a new support system, similar but different to the National Asylum Support Service (NASS).

42. In the meantime, ILPA strongly urges that the ambit – certainly of its first stages – of this project should be reconsidered and narrowed so that consolidation is achieved and the project does not topple under its own weight. Any further simplification can then build on, and benefit from, the process of that consolidation.

43. Finally, especially given the current scope of this project, there will be a need for careful impact assessments along the way. Included among these must be assessment of legal aid impact[35].

29 August 2007

[35] At ILPA's 2006 Annual General Meeting, the then Under-Secretary of State for Constitutional Affairs, with responsibility for legal aid, Vera Baird QC, confirmed that other Government departments would be required to ensure such assessments in relation to policy changes – particularly in relation to any proposed legislation.