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# Consultation Response

## Simplifying the Immigration Rules

April 2019



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

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Our Immigration and Asylum sub-committee welcomes the opportunity to consider and respond to the Law Commission's consultation: Simplifying the Immigration Rules. We have the following comments to put forward for consideration.

## General comments - clarity and certainty

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The current rules for non-EU nationals have been described as containing "a degree of complexity which even the Byzantine emperors would have envied",<sup>1</sup> and this is reflected by refusal rates in a number of visa categories.

One central aspect of the rule of law is that the law should be easily accessible and clearly expressed. One of the major challenges with immigration law changing so frequently is that the primary legislation is now scattered around Acts of Parliament from, 1971<sup>2</sup>, 1981<sup>3</sup>, 1988<sup>4</sup>, 1993<sup>5</sup> 1996<sup>6</sup>, 1997<sup>7</sup>, 1999<sup>8</sup>, 2002<sup>9</sup>, 2004<sup>10</sup>, 2006<sup>11</sup>, 2007<sup>12</sup>, 2008<sup>13</sup>, 2009<sup>14</sup>, 2013<sup>15</sup>, 2014<sup>16</sup> and 2016<sup>17</sup>. Each Act not only sets out free-standing

<sup>1</sup> Jackson LJ at paragraph 4 of *Pokhriyal v Secretary of State for the Home Department* [2013] EWCA Civ 1568

<sup>2</sup> Immigration Act 1971

<sup>3</sup> British Nationality Act 1981

<sup>4</sup> Immigration Act 1988

<sup>5</sup> Asylum and Immigration Appeals Act 1993

<sup>6</sup> Asylum and Immigration Act 1996

<sup>7</sup> Special Immigration Appeals Commission Act 1997

<sup>8</sup> Immigration and Asylum Act 1999

<sup>9</sup> Nationality, Immigration and Asylum Act 2002

<sup>10</sup> Asylum and Immigration (Treatment of Claimants, etc) Act 2004

<sup>11</sup> Immigration, Asylum and Nationality Act 2006

provisions but also amends or repeals previous legislation<sup>18</sup>. The consequential effect of these constant changes to the law is there is no single reliable source, freely available to the public, where the current and previous legislation is consolidated. The impenetrability of a considerable number of immigration rules and policy guidance documents also create significant issues for practitioners, courts and the general public. In 1994, the Immigration Rules comprised a total of around 80 pages<sup>19</sup>. The same document comprising the changes in the Immigration Rules is now over 1,000 pages.

The complexity of UK immigration law has also been previously discussed in the House of Lords. Lord Justice Ryder (Senior President of Tribunals), in his evidence to the House of Lords' Constitution Committee in 2016, said<sup>20</sup>:

"We have had eight immigration Acts in 12 years, three EU directives and approximately – my apologies for being approximate – 30 statutory instruments. The Immigration Rules themselves have been amended 97 times over the same period, which is approximately eight times a year, and are four times larger, and in a smaller typeface, than they were 10 years ago.

The Immigration Rules no longer contain all or indeed most of the policy that is to be implemented, which is of course their primary purpose. The policy is separately provided in – if I may say so – rather dense and unconsolidated guidance that one can access through the Home Office website, but that generally does not show you the previously existing guidance on the same topic, or how the guidance has changed. If you are an unwitting litigant...your chances of accessing any of that material and putting it together in a coherent way are negligible."

It is telling when senior judges of the some of the highest courts in the UK admit difficulties in interpreting and applying the relevant legislation. That does not leave much hope for those without any formal legal training, including migrants (whose first language might not always be English).

The Immigration Rules are passed by negative resolution and whilst this creates benefits for the administration, it is not necessarily conducive to ensuring that changes are scrutinised in as much detail by Parliament as they might be in an alternative format.

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<sup>12</sup> UK Borders Act 2007

<sup>13</sup> Criminal Justice and Immigration Act 2008

<sup>14</sup> Borders, Citizenship and Immigration Act 2009

<sup>15</sup> Crime and Courts Act 2013

<sup>16</sup> Immigration Act 2014

<sup>17</sup> Immigration Act 2016

<sup>18</sup> *Ibid*

<sup>19</sup> *Statement of Changes in Immigration Rules* (Her Majesty's Stationery Office) (23<sup>rd</sup> May 1994)

<sup>20</sup> Select Committee on the Constitution (House of Lords), *Corrected Oral Evidence: The Legislative Process*, 16 November 2016 at [Q42]

Piecemeal restructuring of 45 years of legislation is probably not a wise (or feasible) option. Fire-fighting is not the way to produce a rational or consistent set of rules<sup>21</sup>. The current system has become so unworkable that it is almost unfit for purpose.

The practical effect of, for example, missing out mandatory documents in applications is underplayed. As we previously noted in earlier consultation responses<sup>22</sup>, the result of an invalid application by an applicant can be profound insofar as it can lead to a loss of an applicant's right to work; right to claim benefits; and perhaps most importantly, loss of continuity of residence for the purposes of an application made under the long residence provisions<sup>23</sup>.

Our response to the consultation questions should be viewed against this background.

## Consultation questions

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### **Question 1: Do consultees agree that there is a need for an overhaul of the Immigration Rules?**

Yes. Simplification of the rules is clearly required.

### **Question 2: Do consultees agree with the principles we have identified to underpin the drafting of the Immigration Rules?**

Yes.

### **Question 3: We provisionally consider that the Immigration Rules should be drafted so as to be accessible to a non-expert user. Do consultees agree?**

Yes. With ever-increasing fees, it is more important than ever before that applicants have the ability to interpret and apply the Immigration Rules without the need for legal assistance. In reality, legal advice and representation is more a necessity than a choice at present. However, simplification cannot be at the

<sup>21</sup> *Iqbal, Mirza & Ehsan v The Secretary of State for the Home Department* [2015] EWCA Civ 838 per Elias LJ at paragraph [49]

<sup>22</sup> Law Society of Scotland 'Destitution, Asylum and Insecure Immigration Status in Scotland' (Consultation Response) (Scottish Parliament (Equalities and Human Rights Committee) (2017)

<sup>23</sup> Paragraph 276B(1)(v) (Part 7, Immigration Rules)



expense of certainty within the rules, and simpler rules accompanied by very detailed and complex guidance would be unsatisfactory.

**Question 4: To what extent do consultees think that complexity in the Immigration Rules increases the number of mistakes made by applicants?**

It would follow that the more complex the Immigration Rules are, the higher the chance is for applicants (and practitioners) to make mistakes. We cannot emphasise enough that the drafting of the Immigration Rules in their current format are so complex, that even specialist practitioners and judges have difficulty in unpicking them. That is very unsatisfactory.

**Question 5: This consultation paper is published with a draft impact assessment which sets out projected savings for the Home Office, applicants and the judicial system in the event that the Immigration Rules are simplified. Do consultees think that the projected savings are accurate?**

This is not something we are able to comment upon.

**Question 6: Do consultees agree that the unique status of the Immigration Rules does not cause difficulties to applicants in practice?**

Yes.

**Question 7: To what extent is guidance helpfully published, presented and updated?**

There is a disparity in this respect. Some guidance is helpfully published and updated on a very regular basis. Some have yet to be archived despite being completely unfit for purpose and out of date.

In respect of presentation, guidance is frequently laid out in a format which is easy to read, text searchable and hyperlinked.

### **Question 8: Are there any instances where the guidance contradicts the Immigration Rules and any aspects of the guidance which cause particular problems in practice?**

There are many such examples. One very common situation is the financial requirements contained within Appendix FM. Financial requirements must be evidenced by producing 'specified evidence'. The list of specified evidence is contained within Appendix FM-SE (approximately 23 pages long). However, the discussion around how the specified evidence is to be produced, in what format, and over what period, is fully detailed and reasoned in the Immigration Directorate Instruction (IDI) (Appendix FM 1.7) which is 79 pages long. In a significant amount of cases, practitioners therefore seek to rely on the IDI to fully explain what specified evidence is produced rather than relying on Appendix FM-SE, simply because the Appendix is silent on the majority of complex situations and how they can be resolved.

The difficulties caused due to the current myriad of conflicting rules, guidance, and forms is well demonstrated by the case of *Russell Felber & Another v Secretary of State for the Home Department*<sup>24</sup> which involved an application for leave to remain as an entrepreneur. The court notes at paragraph 42 that:

"The application forms before Version 04/2016 did not fully and accurately reflect the employment condition in the rules. If they were the only sources consulted, it is not difficult to see why an applicant might conclude that the jobs required to exist for 12 months during the whole period of leave, rather than for 12 months during each of the initial period of leave and the extension period... That they should reflect quite so imperfectly the requirements of the rules is unsatisfactory, particularly as the respondent requires that applications be made on particular forms (the rules, paragraph 34 - formerly paragraph A34)."

The disparity between the requirements of the immigration rules and the information in the Home Office's forms and guidance in this case led to confusion and resulted in the application being refused. This refusal was not overturned following judicial review as inaccurate statements within the Home Office's guidance and forms cannot override the requirements of the rules.

### **Question 9: To what extent are application forms accessible? Could the process of application be improved?**

The online application process has been a significant improvement. There are still issues. Common examples include times when exact dates cannot be given and therefore default dates have to be entered to bypass parts of the online application system. The online forms also generate a list of documents required to be submitted with the application, but there have been occasions where this list is not reflective of the Immigration Rules and guidance. This creates further uncertainty for applicants.

<sup>24</sup> [2017] CSOH 130

There is also a disconnect between the Home Office application form and the subsequent appointment booking and document uploading system by Sopria Steria. The latter is clunky, slow, and cannot be accessed independently but users have to instead log back into their applications to go to the Sopria Steria website. In addition, it is the experience of committee members that at the time that biometrics are enrolled by applicants, some of the customer service agents are instructed to insist on signed declarations which were never available for download at the time of making the online application. Neither are there any points of contact for contacting caseworkers to provide subsequent documentation or to clarify aspects of an application.

**Question 10: We seek views on the correctness of the analysis set out in this chapter of recent causes of increased length and complexity in the Immigration Rules.**

We agree with the analysis.

**Question 11: We seek views on whether our example of successive changes in the detail of evidentiary requirements in paragraph 10 of Appendix FM-SE is illustrative of the way in which prescription can generate complexity.**

We agree. Appendix FM-SE is a particularly apt example.

**Question 12: We seek views on whether there are other examples of Immigration Rules where the underlying immigration objective has stayed the same, but evidentiary details have changed often.**

A further example of this is Paragraph 45(c) of Appendix A to the Rules, relating to Entrepreneur visa extensions. Paragraph 45(c)(ii) suggests that investment by government bodies must be made on behalf of the applicant, which was historically the test in relation to third party funding. Paragraph 45C(iii) confirms that the test for third party funding is now that the investment is made to due to the applicant's activity. This seemingly small inconsistency has practical implications for the evidence to be submitted with the application. A member of our committee sought clarification from the Home Office regarding this point and was told that the test is the same for sub paragraphs (ii) and (iii) despite the difference in language.

**Question 13: Do consultees consider that the discretionary elements within Appendix EU and Appendix V (Visitors) have worked well in practice?**

No. In respect of applications under Appendix EU, it is a too early to tell. In respect of applications under Appendix V, there is a complete lack of consistency. It seems the discretionary elements in these applications have had the opposite effect of giving caseworkers too much free reign which results in high numbers of refusals in visitor visa applications, with little in the way of recourse against decisions.

**Question 14: We seek views as to whether the length of the Immigration Rules is a worthwhile price to pay for the benefits of transparency and clarity.**

We agree broadly with the analysis. Though, brevity is important when dealing with non-expert users, especially those whose first language may not be English.

**Question 15: We seek consultees' views on the respective advantages and disadvantages of a prescriptive approach to the drafting of the Immigration Rules.**

We agree with the analysis.

**Question 16: We seek views on whether the Immigration Rules should be less prescriptive as to evidential requirements (assuming that there is no policy that only specific evidence or a specific document will suffice).**

We agree with the analysis. This approach is likely to make the application process far less bureaucratic and is likely to mean applications can be processed more efficiently and faster by caseworkers.

**Question 17: We seek views on what areas of the Immigration Rules might benefit from being less prescriptive, having regard to the likelihood that less prescription means more uncertainty.**

We agree but emphasise that an appropriate balance must be struck.



**Question 18: Our analysis suggests that, in deciding whether a particular provision in the Immigration Rules should be less prescriptive, the Home Office should consider:**

- (1) the nature and frequency of changes made to that provision for a reason other than a change in the underlying policy;**
- (2) whether the provision relates to a matter best left to the judgement of officials, whether on their own or assisted by extrinsic guidance or other materials.**

**Do consultees agree?**

We agree.

**Question 19: We seek views on whether consultees see any difficulties with the form of words used in the New Zealand operation manual that a requirement should be demonstrated “to the satisfaction of the decision-maker”?**

The risk of a loss of certainty, consistency, transparency and efficiency is well-founded by the Commission and is of paramount concern. The cost for submission of applications is now so high that many applicants simply cannot afford a refusal. Litigation is prohibitively expensive for some applicants, particularly in refusals which do not attract a right of appeal and where administrative review and subsequently Judicial Review may be necessary. It is not useful for residual discretion to be given to a decision maker without setting out the bounds and limits of that discretion and setting out clear guidance about how it is to be exercised.

**Question 20: Do consultees agree with the proposed division of subject-matter? If not, what alternative systems of organisation would be preferable?**

We agree.

**Question 21: Do consultees agree that an audit of overlapping provisions should be undertaken with a view to identifying inconsistencies and deciding whether any difference of effect is desired?**

We agree.

**Question 22: Do consultees agree with our analysis of the possible approaches to the presentation of the Immigration Rules on paper and online set out at options 1 - 3? Which option do consultees prefer and why?**

Option 3 - the booklet approach.

Whilst such an approach is likely to lead to repetition and increase the length of the Rules, such an approach is likely to be of much more assistance to applicants when they are able to see all the criteria for satisfying a particular category in one section rather than attempting to cross reference rules.

**Question 23: Are there any advantages and disadvantages of the booklet approach which we have not identified?**

No.

**Question 24: Are there any advantages and disadvantages of the common provisions approach which we have not identified?**

No.

**Question 25: Do consultees agree with our proposal that any departure from a common provision within any particular application route should be highlighted in guidance and the reason for it explained?**

Yes.

**Question 26: We provisionally propose that:**

- (1) definitions should be grouped into a definitions section, either in a single set of Immigration Rules or in a series of booklets, in which defined terms are presented in alphabetical order;**
- (2) terms defined in the definitions provision should be identified as such by a symbol, such as # when they appear elsewhere in the text of the Immigration Rules.**

**Do consultees agree?**

Yes.

**Question 27: We provisionally propose that the following principles should be applied to titles and subheadings in the Immigration Rules:**

- (1) there should be one title, not a title and a subtitle;**
- (2) the titles given in the Index and the Rules should be consistent;**
- (3) titles and subheadings should give as full an explanation of the contents as possible, consistently with keeping them reasonably short;**
- (4) titles and subheadings should not run into a second line unless necessary;  
and**
- (5) titles and subheadings should avoid initials and acronyms.**

**Do consultees agree?**

Yes.

**Question 28: We invite consultees' views as to whether less use should be made of subheadings? Should subheadings be used within Rules?**

Subheadings should be used within Rules.

**Question 29: Do consultees consider that tables of contents or overviews at the beginning of Parts of the Immigration Rules would aid accessibility? If so, would it be worthwhile to include a statement that the overview is not an aid to interpretation?**

Yes.

**Question 30: Do consultees have a preference between overviews and tables of contents at the beginning of Parts?**

It would be useful to have both an overview and tables of contents at the beginning of Parts.

**Question 31: We provisionally propose the following numbering system for the Immigration Rules:**

- (1) paragraphs should be numbered in a numerical sequence;**
- (2) the numbering should re-start in each Part;**
- (3) it should be possible to identify from the numbering system the Part within which a paragraph falls, the use of multilevel numbering commencing with the Part number;**
- (4) the numbering system should descend to three levels (1.1.1 and so on) with the middle number identifying a section within a Part; and**
- (5) letters should be used for sub-paragraphs and lower case Roman numerals for sub-sub-paragraphs.**

**Do consultees agree?**

Yes - but Roman numerals should not be used.



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- (5) letters should be used for sub-paragraphs and lower case Roman numerals for sub-sub-paragraphs.**

**Do consultees agree?**

Yes - but Roman numerals should not be used.

**Question 32: We provisionally propose that Appendices to the Immigration Rules are numbered in a numerical sequence. Do consultees agree?**

Yes.

**Question 33: We provisionally propose that text inserted in the Immigration Rules should be numbered in accordance with the following system:**

- (1) new whole paragraphs at the beginning of a Part should have a number preceded by a letter, starting with "A" (A1, B1, C1 and so on). A rule inserted before "A1" should be "ZA1";**
- (2) new lettered sub-paragraphs, inserted before a sub-paragraph (a) should be (za), (zb) and so on, and paragraphs inserted before (za) should be (zza), (zzb) and so on;**
- (3) where text is added to the end of existing text at the same level, the numbering should continue in sequence;**
- (4) new whole paragraphs inserted between existing paragraphs should be numbered as follows:**
  - a. new paragraphs inserted between 1 and 2 should be 1A, 1B, 1C and so on;**
  - b. new paragraphs inserted between 1A and 1B should be 1AA, 1AB, 1AC and so on;**
  - c. new paragraphs inserted between 1 and 1A should be 1ZA, 1ZB, 1ZC and so on (and not 1AA and so on); and**
  - d. new provisions inserted between 1A and 1AA should be 1AZA, 1AZB, 1AZC and so on;**
- (5) a lower level identifier should not be added unless necessary; and**
- (6) after Z or z, the sequence Z1, Z2, Z3 and so on or z1, z2, z3 and so on should be used.**

**Do consultees agree?**

Yes.

**Question 34: Should the current Immigration Rules be renumbered as an interim measure?**

No. This interim measure is likely to add unnecessary complexity and confusion if they are to be changed again.

**Question 35: In future, should parts of the Immigration Rules be renumbered in a purely numerical sequence where they have come to contain a substantial quantity of inserted numbering?**

Yes.

**Question 36: We provisionally propose that definitions should not be used in the Immigration Rules as a vehicle for importing requirements. Do consultees agree?**

Yes. The imposition of substantive requirements through definitions in Appendix EU requires extensive cross referencing and adds complexity to a seemingly simple requirement.

**Question 37: We provisionally propose that, where possible, paragraphs of the Immigration Rules:**

- (1) should be self-standing, avoiding cross-reference to other paragraphs unless strictly necessary; and**
- (2) should state directly what they intend to achieve.**

**Do consultees agree?**

Yes.

**Question 38: We provisionally consider that:**

- (1) appropriate signposting to other portions of the Rules and relevant legislation is desirable in the Immigration Rules;**
- (2) where the other portion of the Rules or the legislation in question already applies to the case, the signposting should be phrased so as to draw attention to the other material and should avoid language that purports to make the other material applicable where it already is;**
- (3) where portions of the Rules use signposting, they should do so consistently.**

**Do consultees agree?**

Yes.

**Question 39: We seek consultees' views on whether repetition within portions of the Immigration Rules should be eliminated as far as possible, or whether repetition is beneficial so that applicants do not need to cross-refer.**

Repetition is beneficial to avoid the need to cross-reference, especially within a booklet system of rules as envisaged by the Commission.

**Question 40: Do consultees agree with our proposed drafting guide? If not, what should be changed? Are consultees aware of sources or studies which could inform an optimal drafting style guide?**

We agree - subject to the comments we have made.

**Question 41: Is the general approach to drafting followed in the specimen redrafts at appendices 3 and 4 to this consultation paper successful?**

Yes.

**Question 42: Which aspects of our redrafts of Part 9 (Grounds for refusal) and of a section of Appendix FM (Family members) to the Immigration Rules work well, and what can be improved?**

The general layout and numbering of each provision works particularly well.

**Question 43: We seek views on whether and where the current Immigration Rules have benefitted from informal consultation and, if so, why.**

Yes - see our initial comments above.

**Question 44: We seek views on whether informal consultation or review of the drafting of the Immigration Rules would help reduce complexity.**

Yes - see our general comments above.



**Question 45: How can the effect of statements of changes to the Immigration Rules be made easier to assimilate and understand? Would a Keeling schedule assist? Should explanatory memoranda contain more detail as to the changes being made than they do currently, even if as a result they become less readable?**

A keeling schedule would be particularly useful as would be a search tool where particular parts of the Rules can be compared to see what amendments have been made at any given time.

**Question 46: How can the temporal application of statements of changes to the Immigration Rules be made easier to ascertain and understand?**

As above, it may be useful for a tool to be created where applicants are able to input their date of application and be advised what set of Immigration Rules applied to the consideration of their application.

**Question 47: Is the current method of archiving sufficient? Would it become sufficient if dates of commencement were contained in the Immigration Rules themselves, or is a more sophisticated archiving system required?**

As above, there is no facility to compare the different sets of historic rules - this has to be done manually at present.

**Question 48: Do consultees agree that Appendix F (Archived Immigration Rules) and paragraphs 276DI to 276AI in Part 7 (Other categories) can be omitted from any redrafted Immigration Rules?**

Yes.

**Question 49: What issues arise as a result of the frequency of changes to the Immigration Rules, and how might these be addressed?**

Frequent changes make it difficult for practitioners and caseworkers alike to keep up to date with developments. It may be useful for the Home Office to give practical examples of any major changes in practice in the form of case studies like those contained within IDI Appendix FM 1.7.

**Question 50: Do consultees agree that there should be, at most, two major changes to the Immigration Rules per year, unless there is an urgent need for additional changes? Should these follow the common commencement dates (April and October), or be issued according to a different cycle?**

Two 'major' changes per year is still a significant amount of changes overall. One annual change may be more realistic to allow practitioners and caseworkers time to see how changes actually work in practice.

**Question 51: Could a common provisions approach to the presentation of the Immigration Rules function as effectively as the booklet approach through the use of hyperlinks?**

Yes.

**Question 52: We seek views on whether and how guidance can more clearly be linked to the relevant Immigration Rules.**

It may be useful to add as appendices to the various sections, any relevant guidance and a brief overview of the purpose of the guidance.

**Question 53: In what ways is the online application process and in-person appointment system as developed to date an improvement on a paper application system? Are there any areas where it is problematic?**

We refer to our submission to the Scottish Parliament in 2017, titled '*Destitution, Asylum and Insecure Immigration Status in Scotland*'.

**Question 54: Do consultees agree with the areas we have identified as the principal ways in which modern technology could be used to help simplify the Immigration Rules? Are there other possible approaches which we have not considered?**

Yes - subject to our comments about tools to compare historic sets of Immigration Rules.

**For further information, please contact:**

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