

# LAW COMMISSION CONSULTATION ON SIMPLIFYING THE IMMIGRATION RULES: RESPONSE FORM

## **Topic of this consultation**

This consultation paper reviews the Immigration Rules in order to identify the underlying causes of their complexity, and to identify principles under which they can be redrafted to make them simpler and more accessible. It makes a number of preliminary proposals to pave the way for the introduction and maintenance of clear, comprehensible and logically organised Rules, and asks whether consultees agree. It also seeks the views of consultees on more open questions.

The paper also includes specimen redrafting of some of the Rules.

The review does not consider substantive immigration policy.

For more information about this project, please visit <https://www.lawcom.gov.uk/project/simplifying-the-immigration-Rules/>.

## **How to respond to this consultation**

We are aware that our consultation paper is lengthy, and that the response form asks a lot of questions. Please do not feel that you must answer every question. If you are only interested in one part of our consultation, or even if you wish to answer only one question, you can respond to just that part or question.

While it is very useful to us if you can respond to the specific questions which we ask, we have also provided a box at the end of the response form for any additional comments you may wish to share with us.

We invite responses from 21 January to 26 April 2019.

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MR MICHAEL CLEMENTS, PRESIDENT OF THE FIRST-TIER TRIBUNAL  
(IMMIGRATION AND ASYLUM CHAMBER)

**What is the name of your organisation?**

FIRST-TIER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)

**Are you responding to this consultation in a personal capacity or on behalf of your organisation? (Please select only one item)**

- Personal response
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explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

## CONSULTATION QUESTIONS

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

Yes

No

### *Paragraph 1.43*

The First-tier Tribunal Judiciary agrees that the rules as they are currently drafted are overly complex and difficult to navigate. It is not considered that their length is a problem in itself but each rule should contain a stand-alone list of the requirements needed without the necessity for any cross referencing. While Judges and lawyers have no difficulty in navigating the Immigration Rules, unrepresented applicants are likely to find them impenetrable.

A fresh division of material is needed, with the rules grouped by category of application. Overall, we consider that a single set of rules is preferable to a series of booklets. A single set might present difficulties in navigation but online presentation may overcome these. For example, the rules might be “filtered” online into a subset containing only those rules applicable to a particular category.

The use of hyperlinks might ease navigation but it will be essential to ensure use of the material offline and a functioning export facility. Any hyperlink should take the applicant to a specific and relevant location, rather than simply to a document which then needs to be searched to find the relevant part.

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

Yes

No

Other

Please expand on your answer:

*Paragraph 1.44*

There is a danger that “Other categories” (currently Part 7 of the rules) might become too easy a location for new rules or categories. We would rather see paragraph 276ADE, the private life rule, grouped with others that engage with Article 8 of the Human Rights Convention. We suggest that the deportation rules be renamed “criminal deportation” rules, as the media and public often use deportation synonymously with removal from the United Kingdom, although different considerations will usually come into play.

**Consultation 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  
 No  
 Other

Please expand on your answer:

*Paragraph 1.45*

Applicants who are not experts should be able to identify the application that applies to their circumstances. We suggest that a simple (if possible) flowchart should appear at the beginning of each category, to assist an applicant to see the requirements to be met and to show, more broadly, where a grant of leave might lead in terms of settlement.

We suggest that support be made available in the form of “FAQs” and a live help line to assist applicants.

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

Please share your views:

To a great extent. The lack of clarity, illogical and non-sequential numbering and requirements for cross referencing make the Rules very difficult to follow for non-professionals.

It is appropriate here to suggest that an “effective from” date in specific sections of the rules is very important to identify. Transitional provisions are often complex and difficult to understand and there may be some benefit in setting out general principles that apply (such as that in general, changes to rules will not have retrospective effect).

The current archiving method is felt by some to be better than earlier methods but the very large PDFs in use are difficult to navigate. Online presentation should enable a proper timeline and tracked changes to feature. The FCA handbook website has a model that might be copied, with a “point in time” search facility that brings up the version of the code in force on the date searched for.

We suggest that the version of the rules applied should be made clear in decision letters (“This decision was made applying the rules in version XXXX, which came in to effect on ....”)

**Consultation 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?**

- Yes  
 No  
 Other

Please expand on your answer:

*Paragraph 1.47*

It is difficult to envisage how re-drafting the Rules can result in savings, save by avoiding the cost to applicants of making repeat applications to correct mistakes.

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

- Yes  
 No  
 Other

Please expand on your answer:

*Paragraph 3.22*

Agreed. It is the complexity of the rules that causes difficulty rather than their status as statements of policy governing who qualifies for leave to enter or remain in the UK.

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

Please share your views:

*Paragraph 4.29*

If the Rules are clear and complete there should be no necessity for guidance save where there is discretion to be exercised. Where definitions are required these should be at the beginning of each relevant Rule for example meaning of “partner” or “parental relationship”.

There can be no doubt that guidance has increased in detail and complexity and can be difficult to locate. We suggest that it should be placed alongside the relevant rule or that there should be a hyperlink to take an applicant or adviser to the relevant material. There should be a clear explanation of the purpose and status of guidance, compared with the rules themselves.

As with the rules, some care is needed in relation to archiving guidance, so that the version in effect when a decision was made can be found easily.

**Consultation 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?**

Please share your views:

*Paragraph 4.30*

Currently the Home Office guidance contradicts Paragraph 276 ADE and EX.1. The Home Office view is that guidance only applies if a child will leave the UK or have to leave. This is not consistent with the Rules. Any inconsistency may lead decision-makers to make mistakes. If the Home Office has concerns over the way a rule is drafted an amendment should be proposed and consulted on.

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

Please share your views:

*Paragraph 4.46*

Accessibility would be improved if application forms were available on the internet, so long as a clear title is provided in addition to a form number.

**Consultation 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.**

Please share your views:

*Paragraph 5.53*

The Rules have become lengthier and more complex by frequent additions and alterations with lettering and numbering that does not follow sequentially.

**Consultation 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.**

Please share your views:

Paragraphs 5.54

As a matter of broad principle, there is no problem with prescription provided the requirements are clear. See, however, our response to question 15 below.

**Consultation 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.**

Please share your views:

*Paragraph 5.55*

We have no examples we wish to highlight.

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



- Yes
- No
- Other

Please expand on your answer:

Paragraph 6.72

As appeals are rare in these categories we have nothing to add. Any words that carry a discretion should be clearly defined. There should be a clear right where the rule is discretionary to allow an applicant to address concerns or submit further evidence before a decision is made. The “minded to” approach to decision making considered in *Balajigari and Others* [2019] EWCA Civ 673 might be an appropriate model.

**Consultation 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.**

Please share your views:

Paragraph 6.91

Yes, as indicated at 1. Length is not a problem; complexity is. An encyclopaedia is easy to navigate despite its length because it is set out in a logical manner.

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

Please share your views:

*Paragraph 6.92*

Prescriptive rules mean clarity for an applicant. Discretion for a decision maker might lead to inconsistency and a lack of clarity for an applicant.

So far as evidential matters are concerned, however, we can see the benefit in adopting a less prescriptive approach.

An example might be the evidential requirements contained in Appendix FM-SE. Taking evidence of wages, outside the rules employers have been required to provide “real time information” to employees and others since 2013. In relation to the rules, applicants ought to be able to ask online for current earnings and the duration of employment, with this information available (with consent) to the decision maker or the Tribunal. There should be no impediment to documents being photographed on laptops or mobile devices and used as evidence. This would result in great savings in time and other resources by applicants, the parties and the Tribunal.

HMRC has introduced quarterly electronic submission of accounting information by self-employed persons. A less prescriptive approach to specified evidence might allow evidence in this form to be relied upon. Some employees now receive e-payslips and bank online and reliance on printed documents should be discouraged where the decision maker or the Tribunal can receive the evidence.

We suggest that a less prescriptive approach could be achieved by means of indicative lists of items of evidence required to support an application, with examples to guide an application.

The rules should not contain different human rights considerations than those mandated by statute. For example, paragraph 399(b)(i) sets out a requirement not found in s 117C (5) of the 2002 Act. Less prescription might also avoid the tension between the suitability requirements set out before EX.1 is available and s 117B (6).

**Consultation 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).**

Please share your views:

*Paragraph 6.93*

See our response to question 15.

**Consultation 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.**

Please share your views:

*Paragraph 6.94*

See our response to question 15.

### **Consultation 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?**

- Yes  
 No  
 Other

Please expand on your answer:

*Paragraph 6.95*

See our response to question 15.

**Consultation 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”?**

Please share your views:

*Paragraph 6.96*

See response to questions 15.

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

- Yes
- No
- Other

Please expand on your answer:

Agreed (and see our response to question 2)

**Consultation 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?**

- Yes
- No
- Other

Please expand on your answer:

**Consultation 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?**

Please select only one item:

- Yes
- No
- Other

Please select all that apply:

- Option 1
- Option 2
- Option 3

Please expand on your answer:

*Paragraph 8.36*

Either booklet or rules would be appropriate providing each is complete and each Rule contains all of the requirements in one place.

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

Please share your views:

No.

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

Please share your views:

*Paragraph 8.37*

A set of common provisions would require cross referencing to the specific rule, with a risk that complexity would reappear. Putting all the requirements in the rule itself might add length but increase clarity

**Consultation 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
- No
- Other

Please expand on your answer:

*Paragraph 8.38*

Separate provision will add to complexity but where it cannot be avoided, there should be highlighting and explanatory guidance.

**Consultation 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
- No
- Other

Please expand on your answer:

*Paragraph 8.50*

This would be acceptable although cross referencing might be required. We suggest that the definitions section might also refer to transitional provisions and identify the broad principles of application.

**Consultation 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
- No
- Other

Please expand on your answer:

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

Please share your views:

*Paragraph 9.15*

Sub headings are useful.

**Consultation 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  
 No  
 Other

Please expand on your answer:

*Paragraph 9.23*

Providing the Rules are clearly headed and worded, there should be no need for overviews. A table of contents is very helpful to signpost the user to the appropriate rule.

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

- Yes  
 No  
 Other

Please expand on your answer:

*Paragraph 9.24*

Tables of contents signpost the user to the correct rule.

**Consultation 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

No

Other

Please expand on your answer:

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

Yes

No

Other

Please expand on your answer:

**Consultation 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

No

Other

Please expand on your answer:

Paragraph 9.41

We agree.

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

Yes

No

Other

Please expand on your answer:

*Paragraph 9.42*

Now that the existing numbering has been in use for a significant time re-numbering now would only serve to cause confusion. Professionals know their way around the rules. Any re-numbering should be done only in a complete rewriting of the Rules.

**Consultation 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
- No
- Other

Please expand on your answer:

**Consultation 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
- No
- Other

Please expand on your answer:

**Consultation 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
- No
- Other

Please expand on your answer:

*Paragraph 10.26*

Yes, this is essential.

**Consultation 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  
 No  
 Other

Please expand on your answer:

*Paragraph 10.36*

Yes, although each Rule should contain all the provisions relevant to it to avoid cross referencing whenever possible.

**Consultation 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.**

Please share your views:

*Paragraph 10.44*

Repetition and thus added length may be acceptable if it avoids the need for cross referencing.

**Consultation 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?**

- Yes  
 No  
 Other

Please expand on your answer:

Paragraph 10.55

Please see our responses to previous questions. The use of plain English and avoiding acronyms would be welcome. Easily identifiable rules which have cumulative requirements should have 'and' at the end of each part and alternative ones should have 'or' at the end of each part. We do not support cross referencing. Each rule should be self-contained. Hyperlinks will prove unhelpful to unrepresented applicants or appellants unless they take the person directly to the relevant material, rather than merely to a document in which the relevant material appears.

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

- Yes
- No
- Other

Please expand on your answer:

**Consultation 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?**

Please share your views:

*Paragraph 11.27*

The proposed redraft at 1.8 suggest that a polygamous marriage is acceptable! There should be a clear inclusion of the requirement that any previous marriage has been dissolved. Generally, however, the re-drafts are clearer than the current rules.

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

Please share your views:

Paragraph 12.24

If the Government is assisted by informal consultation, there is no reason why it should not continue. There might be merit in reviewing the rules from time to time with assistance from the Law Commission and user groups.

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

Please share your views:

*Paragraph 13.12*

A Keeling Schedule would assist. Explanatory memoranda are crucial but as with the rules, it should be in plain English.

**Consultation 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?**

Please share your views:

*Paragraph 13.12*

Very detailed explanations should not be necessary if the re-drafted rule is clearly expressed. A 'Keeling schedule' might be helpful, although of more importance is to be able to see the current Rules, online, in their amended form.

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

Please share your views:

*Paragraph 13.41*

The current system of identifying dates of changes should be maintained. There should be a publicly available up to date Tracked Changes version of the Rules in the same place as the current version, with a "point in time" search facility to identify the rules in force at particular dates. Please see our response to question 4.

**Consultation 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?**

- Yes
- No
- Other

Please expand on your answer:

*Paragraph 13.50*

See our responses to questions 4 and 46.

**Consultation 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
- No
- Other

Please expand on your answer:

*Paragraph 13.52*

See our responses to questions 4 and 46.

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

Please share your views:

See our responses to questions 4 and 46.

**Consultation 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?**

- Yes
- No
- Other

Please expand on your answer:

*Paragraph 13.58*

That is a matter for the Government to decide.

**Consultation 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
- No
- Other

Please expand on your answer:

*Paragraph 14.7*

We think hyperlinks may be useful so long as they take an applicant to the relevant material and not merely to a document in which such material appears.

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

Please share your views:

*Paragraph 14.10*

The guidance should be available in the same place as the Rules with archives of previous guidance also available. See our response to question 4.

**Consultation 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?**

Please share your views:

Paragraph 14.15

This is not a question that the Judiciary are equipped to answer. Online applications would require assistance to be made available to some applicants. It would be of assistance if missing information is flagged up and requested before a decision is reached. A “minded to” approach to decision making, in which an applicant is given an opportunity to provide missing evidence, might assist.

**Consultation 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
- No
- Other

Please expand on your answer:

*Paragraph 14.23*

A sequential application online with drop down boxes guiding the applicant through all necessary steps would be beneficial although again assistance may be needed for some. This might be provided at overseas posts for out of country applicants.

**Additional comments**

Please use the space below if you have any additional comments