

Response ID ANON-8YVV-F6DG-4

Submitted to **Law Commission consultation on simplifying the Immigration Rules**

Submitted on **2019-04-24 13:06:57**

About you

What is your name?

Name:

Lisa Payne

What is the name of your organisation?

Enter the name of your organisation:

Islington Law Centre - on behalf of the Immigration Team, and two hosted projects within the Centre: the Migrants' Law Project, and the Migrant and Refugee Children's Legal Unit (MiCLU)

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Response on behalf of organisation

If other, please state::

What is your email address?

Email:

[REDACTED]

What is your telephone number?

Telephone number:

[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Explain to us why you regard the information as confidential:

Consultation Questions

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

Yes

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

Yes

Please expand on your answer::

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

Please expand on your answer::

We agree in principle but we believe that requires a shared understanding of who that 'non-expert user' might be.

The consultation paper asserts the Rules should be accessible 'to those who are affected by them' (para 1.34). However, both the government and the Law Commission need to recognise that redrafting Rules, Guidance and Forms in plain English may not be enough to make complex material accessible to asylum-seekers and vulnerable migrants who struggle with filling in forms in English, and have a range and multiplicity of vulnerabilities with which to cope including mental health problems and the effects of trauma. In addition, many of our clients are unaccompanied or separated children under the age of 18.

By definition, the cases we deal with are non-straightforward. We do not believe it would be fair to our clients for the government to assume that asylum and immigration applicants will be able to navigate the system on their own once a consolidation of the Immigration Rules (and policy Guidance and Forms) has taken place. There are applicants who will always need the additional, expert advice and support provided by specialists, including immigration solicitors. Even a simpler set of Rules and more streamlined application system will not bypass that need in every case: for example, we find the current online application system

not fit for purpose and in need of considerable flexibility to be built in (further details on this point can be found in our responses to Questions 53 & 54.

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::

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?

Not Answered

Please expand on your answer::

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

Not Answered

Please expand on your answer::

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

Please share your views::

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::

There are particular issues where an application is made outside the Rules and the information needed to support such an application is not always to be found in a specific volume of policy Guidance.

An example of this would be refugee family reunion outside the Rules where, in the absence of policy Guidance, legal practitioners are dependent on the SSHD guidance/instructions to caseworkers. This has more detailed information but is not readily accessible to laypersons, who are very unlikely to be aware that it exists.

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

Please share your views::

The streamlined system needs to link the relevant Rule(s), which needs to link to the relevant Form, which needs to link to the relevant policy Guidance and published instructions to Home Office caseworkers.

Confusing language is also an issue. Currently, the online Forms link to online guidance on completing the Form but do not link to the guidance to the policy. Although very different in content and purpose, both are called 'guidance' which could make a layperson who has been told that guidance exists simply refer to the guidance available on the form.

The constant updating and replacement of the Forms makes it harder for applicants to be confident that they are using the correct version of the form, thus limiting accessibility. Unless litigation requires otherwise, we recommend that Forms be updated once a year, either in April or October.

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::

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::

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::

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

Not Answered

Please expand on your answer::

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::

We agree that the Rules are too long, but in our experience the primary problems are those of constant change, and poor navigation not only within the Rules themselves, but the linkages between Forms, policy Guidance and Rules.

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::

We would prefer less prescription, and permission within the Home Office for staff to exercise the discretion associated with less prescription.

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::

To illustrate the point made in Question 15, staff in the new UK Visa and Citizenship Application Service (UKVCAS) centres provide a scanning service but do not always scan documents brought by the applicant which the applicant considers relevant but the staff have been advised may be irrelevant. They do not provide the client with a list of which documents they have scanned, and that can place the client and/or their solicitor at a disadvantage if they are asked for further information/documentation without knowing what has already been scanned (and therefore regarded as acceptable documentation). Also, the check box requirements on the application forms do not always tally with what documentation is expected.

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::

Consultation Question 18

Yes

Please expand on your answer::

Yes, there is a risk that less prescription leads to inconsistencies in decision-making. If caseworkers are to be given greater discretion, in order to avoid potential inconsistencies, we would expect to see the relevant volume(s) of policy Guidance include examples of the different outcomes that can result from the decisions made.

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::

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

Not Answered

Please expand on your answer::

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

Please expand on your answer::

We do not anticipate that the Home Office should do this on its own. We recommend that the exercise be undertaken with a range of applicants including those seeking asylum or humanitarian protection, independent input from legal experts, NGOs which work with vulnerable asylum and immigration applicants, and the ICIBI.

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?

Yes

Option 1

Please expand on your answer::

Overall, we prefer a single set of Rules, though admittedly that may be because that is what we are used to using.

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

Please share your views::

We see the attractions of the booklet approach but successful use of this would depend on the applicant being able to identify the most appropriate type of application which, in complex cases like those we work on, is not always clear.

For example, in one of our cases, before approaching us for help, an 18 year old had discovered he had immigration problems when advised that he was not entitled to Student Finance and so could not do his degree at university. However, because he had spent his childhood in the UK he believed himself to be British and was unable to engage with the fact that his legal status was not the same as his self-identity. This led to him futilely applying and re-applying for a British passport until we were brought in to investigate and intervene, ensuring that the correct type of application was made on his behalf.

The other potential disadvantage of the booklet approach ties into the nature and frequency of the changes to the Rules, Forms and policy Guidance. If each booklet is to include common sections which may themselves be subject to change, we have concerns about whether the Home Office will ensure that every relevant booklet section is updated using equivalent wording at the same time.

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

Please share your views::

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?

Not Answered

Please expand on your answer::

Consultation Question 26:

Yes

Please expand on your answer::

We would recommend that the Home Office consult on the terms that should be included.

Consultation Question 27:

Not Answered

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: :

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?

Not Answered

Please expand on your answer::

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

Not Answered

Please expand on your answer: :

Consultation Question 31:

Not Answered

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?

Other

Please expand on your answer: :

In relation to point 12 on page 144 with reference to the appendices, it would be better if the appendices were incorporated within the Rules, but they should at least be highlighted and, ideally, hyperlinked (for example, Appendix FM in the context of the current Part 8 of the Rules).

Consultation Question 33:

Other

Please expand on your answer: :

We found the section on numbering (page 143, point 11) confusing.

We would prefer that paragraphs are renumbered sequentially when they are changed, and that they include a link to the previous version. Although not ideal, we believe this would aid navigation of the Rules; otherwise we may end up with a version similar to that we have now with strings of letters and numbers to identify paragraphs, subparagraphs, etc, given the regularity with which the Rules are changed.

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

Not Answered

Please expand on your answer: :

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?

Not Answered

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

Please expand on your answer::

Consultation Question 37:

Yes

Please expand on your answer::

In relation to point 15 on page 145, if provision is made for a common provision to apply across the board, this needs to be clear on the face of each Rule (cf. for example, it being marked at the beginning of the Rules or in the definition with no reference to it in the relevant specific Rule).

On balance, we agree that hyperlinks are necessary but note that they are also risky since any changes made to a website, or where the document may sit in the site, renders them unusable.

It is good to make it clear at point 16 on page 145, that any hyperlink needs to open as a new tab in a browser to prevent people losing where they are in the Rules as it seems likely there may be a number of tabs open at once as someone seeks to navigate across the Rules, Definitions, Guidance and Forms.

Consultation Question 38:

Yes

Please expand on your answer::

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::

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

Please expand on your answer::

We agree that the overall approach seems quite sensible and would certainly be an improvement on what we have at present.

It is important that people are able to identify when any changes were made – either by there being a hyperlink to the date of change and the nature of change or something similar. The date when the Rules are changed can have a very real impact on our clients if, when they applied, the requirements were X and, by the time their application is considered, the requirements had changed to Y. It is very important people can identify the date and nature of change(s).

At point 18 on page 146, it is acknowledged that not everyone will have access to the online version of the Rules and we have real concerns that, with the government promoting transferring to a fully online system, clients like ours who are especially vulnerable are at risk of being left behind and suffering further

disadvantage. There is a significant risk that, if the Rules are only available online and therefore only updated online, any other versions will quickly be out of date – a situation that would not be clear to all applicants.

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

Not Answered

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 :

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::

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 :

Although we note that the consultation paper states that changes to the Rules undergo some form of informal and ad hoc stakeholder consultation, the Law Centres working with particularly vulnerable asylum and immigration applicants do not appear to take part. If the consultation process is to remain ad hoc, we strongly recommend that the Law Centres Network be added to the consultation list in order to circulate any questions or invitations to 'test run' revised/new Rules or Forms to those Law Centres which offer immigration advice.

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::

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::

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?

Not Answered

Please expand on your answer::

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?

Not Answered

Please expand on your answer::

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::

We face the constant challenge of knowing what is current, and where to find them. The constant changing of the rules results in grave injustices and there is also considerable inflexibility in transitional provisions

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?

Other

Please expand on your answer::

For clarity's sake and in order to enable us to help our clients navigate a vastly complex system, we recommend that changes be made twice a year – in April and October, with some flexibility available in circumstances in which unavoidable changes must be made outside the normal publication schedule due to litigation. Currently, we are obliged to check every aspect of the client's case whilst pulling together the application, and then again just before submitting it – in case we inadvertently neglect to recognise a change in the Rules, Form or policy Guidance. A more regular and predictable timetable would help prevent this.

We recommend that agreed principles for transitional provision under the Rules be put in place: ie, when a Rule is changed, the transitional provision would protect an applicant who submitted their application before the date the Rule changed. In general, we recommend that the application should be considered under the Rules in force at the date when the application was made. However, in cases where the original application would be refused under the old Rule, it should be considered under the new Rule in order to avoid the necessity of having to resubmit, which adds to caseworker workload, and leads to further delay in the decision.

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?

Not Answered

Please expand on your answer::

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::

Hyperlinks between Rules, Forms and policy Guidance - with the caveat outlined above making it clear that any changes to the links must themselves be updated in all of this documentation.

We also recommend that new/updated volumes of policy Guidance are issued in line with changes in the Rules in April and October.

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::

Currently, we can neither print off nor download the Forms, which gives us no opportunity to share and discuss them with the client before we have to start filling them in. In our experience, this is likely to increase the amount of time we have to spend with clients to complete the form. We strongly recommend that changes. Other government online systems, including HMRC's tax forms and guidance, provide both downloadable versions of the relevant forms as well as the option to complete the form online, allowing people time to prepare their online response before having to fill it in.

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?

Other

Please expand on your answer::

We would resist a shift to a wholly online system. Many of our clients have very limited or no access to computers and some come into our office in order to be able to fill in their forms. Suggesting applicants can use public computers in local libraries or other public buildings is not an adequate response. Where library computers are available, they are subject to a booking system often limiting that person's access to an hour at a time. On average, we have found that filling in an online form can take between 3 and 6 hours. Asking vulnerable people to fill in personal forms in a public space may also give rise to security risks.

Additional comments

Additional comments

Please use the space below if you have any additional comments::