



**Ministry of Justice Part 39 Civil Procedure Rules: proposed changes
Open Justice consultation**

JUSTICE consultation response

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Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists.
2. JUSTICE submits this response to the Ministry of Justice's ('MOJ's') consultation on proposed changes to Rule 39 of the Civil Procedure Rules ('CPR'), the rule that sets out open justice requirements.
3. As a starting point, JUSTICE welcomes the commitment to the foundational principle of open justice and the intention to clarify the operation of this principle through amendments to the CPR.
4. Open justice is one of the fundamental principles of English & Welsh law, and it is important that the circumstances in which there can be derogation from this principle are clearly and narrowly circumscribed.
5. While JUSTICE does not propose drafting changes to the proposed amendments, we, as lawyers, had difficulty understanding the intended meaning of some of the proposed changes. We would therefore urge the MOJ to give careful consideration to the drafting, having sufficient regard to the fact that litigants in person (LIPs) will have to interpret and follow the amended rules without legal representation.

Question 1: Is this new definition of a 'hearing' sufficiently clear to capture all possible arrangements used by courts to accommodate hearings?

6. JUSTICE welcomes the expansion of the definition of 'hearing' with the intention to capture all possible types of hearings. However, JUSTICE is concerned that any definition of 'hearing' and the associated approach to the guarantee of 'open justice' needs to bear in mind the expansion of online justice services in England & Wales and needs to be sufficiently flexible to be 'future proofed'.
7. In particular, defining 'hearing' as a proceeding before a judge may not be sufficiently flexible to accommodate the role of 'Authorised court and tribunal staff' in decision-making. The Courts and Tribunals (Judiciary and Functions of Staff) Bill 2017-19 proposes allowing for 'Authorised court and tribunal staff' to 'exercise

judicial functions where procedure rules so provide'.¹

8. Whilst it is JUSTICE's view that the functions of 'authorised staff' should be strictly constrained to non-contentious issues, the precise judicial functions 'authorised staff' might exercise is currently unresolved, pending the Bill coming into force. It is therefore possible that limiting the definition of hearings to proceedings before a judge may in the future exclude certain types of proceedings from the definition.

Question 2: Are 39.2 (1) and (2) clear that hearings are to be in public, and that it is the court that decides the issue?

9. JUSTICE welcomes the amendments to 39.2(1), which make clear that the default position is that hearings are to be held in public. We are pleased to see that the rule makes explicit that the parties to litigation cannot agree for the hearing to be held in private of their own account. To allow otherwise would undermine one of the key rationales for open justice - the maintenance of public confidence in the administration of justice.
10. JUSTICE also supports the inclusion of rule 39.2(2). We agree that is important to emphasise at the outset a court's obligations to act in accordance with the right to freedom of expression.

Question 3: Is this rule sufficiently clear in setting out the court's obligation to members of the public?

11. JUSTICE supports the change requiring the court to take reasonable steps to ensure that all hearings are of an open and public character. However, in order to ensure that this change has a practical effect, it should be supported by a Practice Direction which sets out in practical terms how the public will be able to access the full range of hearings anticipated by HMCTS' Reform Programme. This should cover both how the public will be able to 'attend' all types of hearings and how the public will be made aware of those hearings and the outcomes. For example, will court listings be made available online and will virtual hearings be live streamed to a web link accessible to all members of the public, or will they be streamed to screens located in brick and mortar court estate (or both)?
12. JUSTICE understands the term "open and public character" to mean more than

¹ Courts and Tribunals (Judiciary and Functions of Staff) Bill 2017-19 s3(1)(b).

just facilitating the public's attendance at hearings, whether physically or virtually. We understand that term to also mean ensuring that both observers of, and participants in hearings understand what happens during proceedings. JUSTICE has convened a Working Party which is investigating ways to improve the participation and understanding of court users in proceedings. The Working Party aims to publish its report in November and it will make recommendations for ways to improve the participation of lay court users in their own proceedings, in particular with regard to the information that users receive about the process. We would like to see any Practice Direction accompanying this rule change take account of those recommendations.

Question 4: Is the understanding of 'reasonable' sufficiently clear or should the rule be more prescriptive?

13. We do not think that the rule itself needs to be any more prescriptive. The term 'reasonable' is one which is well understood by the courts and which they can be trusted to apply. However, what is considered 'reasonable' in the context of this rule will depend on what is understood by the term "open and public character".
14. JUSTICE believes that this term should be given the broad meaning explained above and that what is 'reasonable' should be read in light of a Practice Direction setting out in practical terms what this rule will entail.
15. Given that what is considered 'reasonable' is context specific, much will depend on HMCTS' Reform Programme providing the necessary infrastructure to allow public access to new forms of hearings. The duty to take 'reasonable steps' to ensure that hearings are open and public will be meaningless without the technological infrastructure to facilitate public access.

Question 5: Is it necessary to further define what is meant by the term "secure the proper administration of justice"?

16. JUSTICE takes the view that the expression "the proper administration of justice" is sufficiently well understood by the legal profession to not require further definition in CPR 39. Normative or aspirational definitions are better located in the overriding objective of the CPR.
17. However JUSTICE is concerned that terms such as this that may be well understood by the legal profession are not easily understood by LIPs. This

problem is not specific to rule 39 but is pervasive throughout the CPR. JUSTICE believes that there is a strong argument for the CPR being made more easily accessible and explicable to non-lawyers. For example, an online interactive version of the CPRs for LIPs could include pop-up bubbles explaining, in plain English, what particular legal terms mean.

Question 6: Apart from applications for judicial review under the Aarhus provisions (see-The Royal Society for the Protection of Birds vs the Secretary of State for Justice), are there any other reasons why a hearing should be held in private and what are they?

18. In respect of hearings where the court is required to examine personal financial information of parties to, or other individuals funding, non-Aarhus judicial review claims, it is JUSTICE's view that the default position that such hearings are to be held in public should be reversed. Such hearings may arise in the context of costs capping orders under sections 88 to 89 of the Criminal Justice and Courts Act and financial disclosure requirements under sections 85 to 86 of the Criminal Justice and Courts Act, if they are brought into force.
19. Rule 39.2(4)(c) envisages that a hearing will be held in private where it involves "confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality" and where it is necessary to secure the proper administration of justice. This would in theory cover the circumstances in which judicial review parties' personal financial information is examined, however the default position remains that such hearings will be public.
20. We believe that a reversal of the default position is warranted in the limited circumstances identified. This is because the requirement to disclose personal financial information in order to secure access to the court has a potential chilling effect on the willingness of claimants to bring judicial review proceedings, as it is so invasive of their privacy. This chilling effect has been expressly recognised by the Court of Appeal² and we believe that it is enhanced in circumstances where the onus is on an individual to take steps to avoid public disclosure of their personal financial information by applying to the court to have the hearing held in private. A reversal of this position would therefore help to mitigate the chilling effect.³

² *R (Garner) v Elmbridge Borough Council and another* [2010] EWCA Civ 1006.

³ For further detail in relation to such concerns see Public Law Project, the Bingham Centre for the Rule of Law and JUSTICE *Judicial Review and the Rule of Law: An Introduction to the Criminal Justice and Courts Act 2015* (2015), Chapter 2, available at: <https://justice.org.uk/judicial-review-and-the-rule-of-law-an-introduction-to-the-criminal-justice-and-courts-act-2015-part-4/>

21. Further, there does not appear to be a logical reason as to why parties to an Aarhus judicial review claim should be entitled to greater protection of their privacy than claimants in other judicial review claims.
22. A provision for hearings investigating judicial review parties' personal finances to be held in private should also cover any future changes to the judicial review costs rules, such as those suggested by Jackson LJ in his original report Civil Litigation Costs, or his Supplemental Report.
23. We envisage that such a rule would be confined to hearings where individuals', as opposed to companies' or charities', finances are under consideration. It would also be subject to the requirement that such hearings must be held in public where it is necessary to do so to secure the proper administration of justice, or where it is in the interests of justice to do so.

Question 7: Do you think this provision is sufficient to allow interested parties of the order the opportunity to make representations?

24. JUSTICE submits that rather than the starting position being disclosure of the orders of sensitive matters through CPR 39, a better approach would be to consider the prospect of the publication of all court orders online.
25. The MOJ ought to take a calibrated and considered approach to the publication of court orders online generally, bearing in mind a range of factors, including privacy, the importance of open and transparent justice, resourcing considerations, the public importance of certain decisions and the extent to which technology could make the uploading of court orders seamless.
26. More specifically, the proposed amendments to CPR 39.6 only allow an interested party to make representations with respect to a matter caught under the provisions of 39.2(4) and 39.2(5) after an order has been made.
27. A better approach, one that aligns with the principle of open justice, and would prevent disproportionate use of court resources through 'back-end' applications to set aside an order, would be to adopt a starting point of public notification of an intention to conduct a hearing in private, with deadlines for interested parties to make representations as to why the matter ought to be held in private.

28. Derogation from that starting point could be taken where, for instance, some of the imperatives that inform the operation of CPR 23.4(2) (circumstances where an application need not be served) arise.
29. For example, where there is an exceptional urgency to hold the private hearing, it may be necessary to go ahead with the hearing without public notification of the intention to conduct it in private.

Question 8: Is it right that a judge may direct that the court's order should: a) not be placed on the website, b) or not until service on the other party, or c) not without redactions to protect anonymity etc?

30. JUSTICE believes that it is important that judges have discretion to; (a) refuse to publish orders on the internet; (b) delay the publication; or (c) allow publication only with redactions, where it is the interests of justice to do so. As described above, the circumstances in which orders would not normally be published online should also mirror those in which an application without notice may be made.
31. Rule 39.2(5) provides that the court must order that the identity of a party not be disclosed where necessary to secure the proper administration of justice and in order to protect the interests of that party. If rule 39.2(5) applies, it would be completely self-defeating to then publish an order that a hearing be held in private which included the parties' names. The efficacy of rule 39.2(5) therefore requires a judge to have the ability to publish an order with redactions to maintain party anonymity.

Question 9: Are there any concerns with placing these orders on the Internet?

32. JUSTICE supports the move toward greater accessibility of court documents and believes that the starting point should be that all court orders should be made accessible online, not just those relating to the holding of hearings in private.
33. In comparison to displaying orders in court buildings, publishing court orders online will exponentially increase the audience for those orders and therefore increases concerns in relation to the privacy of those named in the orders and the misuse of the orders or information contained within them.
34. In respect of the privacy concerns, we believe that these can be allayed by the judicial discretion to not publish the orders where it is not appropriate to do so, or

to publish them with appropriate redactions as described in Question 8 above.

35. In relation to the potential for misuse of information, HMCTS should ensure that the technology used to upload the orders onto the internet helps prevent any potential misuse by publication in a format that cannot be downloaded and/or edited.

Question 10: Are these provisions sufficiently robust to stop the trend of one side making substantive representations to the court without copying in the other side?

36. JUSTICE supports the intention behind these changes to promote a collaborative approach to litigation and to ensure that the other party to proceedings is kept abreast of developments in the litigation.

37. However, in implementing a prospective CPR 39.8, a granular approach to sanction for non-compliance needs to be taken, which takes into account whether a party is represented or not. Too vigorous enforcement of the sanctions in 39.8(5) and (6) may often be disproportionate in the case of LIPs, who are less likely to be aware of all of the CPR rules. The court should therefore exercise common sense in assessing whether to return correspondence to the sender without consideration.

38. We therefore also suggest that methods to ensure that LIPs are aware of these (and other CPRs) are considered. This could be facilitated through a user-friendly and interactive CPR as suggested at paragraph 17, or the availability of a Personal Support Unit ('PSU') at court, who can explain aspects of procedural rules to a putative LIP.

Question 11: Are there any other measures that should be introduced to ensure that parties routinely copy in the other side when communicating with the court?

39. JUSTICE takes the view that the proposed insertion of CPR 39.8 supported by the court's ability to utilise its sanctions and other case management powers under Part 3 (as provided for in CPR 39.8(6)) is sufficient to promote higher standards of communication between parties to litigation. Where LIPs are involved in proceedings, steps to explain the need to copy the other party into communication with the court should be taken, as we suggest in paragraph 38.

Question 12: Is a statement confirming a party has copied in the other side sufficient?

40. JUSTICE believes that a statement confirming a party has been copied along with the sanction of returning the communication without consideration under Rule 39.8(5) is sufficient. JUSTICE is of the view that the term “statement” should not be narrowly interpreted or require a particular form of words or any further formalities in order to satisfy the requirements of rule 39.8(4). To do so would turn the requirement into too great and time consuming a burden on the parties, in particular for LIPs
41. As suggested in response to Question 10, a common sense application of judicial discretion of CPR 39.8(5) and meaningful access to the PSU for procedural advice for LIPs in general should not prevent CPR 39.8 becoming a potential road-block for non-represented parties.

Question 13: Does the requirement to assist in the preparation of a note, agreed with judge or otherwise, place too much of a burden on the represented party?

42. JUSTICE supports the intention of rule 39.9(6) to assist, in particular, unrepresented parties, in better understanding the court proceedings. However, it will not in all circumstances be appropriate or reasonable to direct that a party assists in the preparation of a note.
43. Although as currently drafted, rule 39.9(6) provides the judge with discretion to direct the compilation or sharing of a note of the proceedings, this should be clarified so that: (a) the direction to make or share the note must be made at the outset of the hearing; and (b) such discretion may only be used where it is practicable in the circumstances for a party to make and/or share such a note.
44. Circumstances in which we can envisage that it would not be practicable to make and/or share a note would be, for example, where the represented party has only one legal representative who would not be able to adequately represent their client whilst simultaneously making a neutral note of the proceedings. In comparison, where a party has a large legal team with a trainee or other junior lawyer present whose role it is to make a note of the proceedings, it would be reasonable to direct that such a note is shared with the other, unrepresented, party.

Question 14: What status, in respect of any Appellant’s Notice, should an agreed note have?

45. Any note should be an informal record of proceedings which may be annexed to the Appellant's Notice.

Question 15: Is there any other way an unrepresented party can be assisted to obtain an accurate note of the hearing?

46. JUSTICE welcomes the new rule 39.9(1) which provides for the recording of all proceedings, unless the judge directs otherwise. Making transcripts of the recording easily accessible and free would help LIPs obtain an accurate record of the hearing.

47. Rule 39.9(2) allows for any party or person to obtain a transcript of the recording on payment of specified fees. However, we note that the current transcript fees are prohibitively expensive for many LIPs. Although individuals can currently apply for a free transcript, we suggest that transcripts of the hearing should automatically be made available for free to LIPs if they wish to receive them. The EX105 form that must currently be completed to request a fee waiver of the transcript requires individuals to fill in a large volume of personal financial information which is likely to put people off from using it.

48. Software that converts audio into text is already available,⁴ and as the accuracy of voice recognition software improves, the provision of free transcripts will become a quick and cost effective way of ensuring that litigants in person have an accurate record of the proceedings, without creating any great financial imposition on the courts.

Question 16: How will the proposed changes affect your work in the legal sector?

49. As a law reform organisation, the proposed changes will not impact our day to day work.

Question 17: Do you have any evidence or information concerning equalities that you think we should consider?

50. In implementing any online aspects envisaged by these rule changes, the MoJ and

⁴ For example, Dragon https://www.nuance.com/en-gb/dragon.html#standardpage-mainpar_multicolumn and Trint <https://trint.com/>

HMCTS should ensure that they take steps to prevent digital exclusion including those recommended in JUSTICE's recent report on Preventing Digital Exclusion.⁵ For example, HMCTS will no doubt be aware that, the publication of any court order online needs to be accessible for individuals who are visually impaired.

51. As a more general remark, courts ought to be made aware of any learning disabilities or difficulties that an LIP may experience and be willing to facilitate assistance for them to make the process more explicable.

JUSTICE

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⁵ JUSTICE "*Preventing Digital Exclusion from Online Justice*" (2018) available at: <https://justice.org.uk/our-work/areas-of-work/assisted-digital/>