



Bar Council response to the Part 39 Civil Procedure Rules - Open Justice consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Ministry of Justice consultation paper entitled “Part 39 Civil Procedure Rules: proposed changes – Open justice”.¹
2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar’s high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Consultation questions

Question 1: Is this new definition of ‘hearing’ sufficiently clear to capture all possible arrangement used by courts to accommodate hearings?

4. The upgraded definition of a ‘hearing’ appears to accommodate non-traditional hearings via video-link, telephone or some other form of two-way communication (though arguably, so does the current definition which simply states that a hearing

¹ [Ministry of Justice \(2018\) ‘Part 39 Civil Procedure Rules: proposed changes - open justice.’](#)² Prepared for the Bar Council by the Law Reform Committee.

includes a reference to a trial). The additional clarity of the definition is welcomed, though the definition of a determination on the papers could be clearer.

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

5. The current draft of 39.2(1) and (2) make clear that as a general rule, hearings should be in public. Though the new definition re-emphasises that the decision to hold a hearing in private is that of the court, rather than the parties, it is unclear how the new 39.2(2) will correspond with the new 39.2(4). Our concern is that there is the potential for confusion as to the correct test for determining whether a hearing should be in private.

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

6. Removing reference to members of the public in the new 39.2(3) does not make clear that the court is obligated to make arrangements to ensure that hearings are open to the public. In the interest of clarity, it may be better to state that the court shall take reasonable steps to ensure all hearings are open to the public.

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

7. The use of the phrase 'reasonable' is sufficiently clear.

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

8. The term "secure the proper administration of justice" has been fully defined in case law.

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?

9. Other reasons for holding a hearing in private are set out in other reasons for holding a hearing in private are set out in CRP 39.2(3):

1. A claim by a mortgagee against one or more individuals for an order for possession of land

2. A claim by a landlord against one or more tenants or former tenants for the repossession of a dwelling house based on the non-payment of rent
3. An application to suspend a warrant of control or a warrant of possession or to stay execution where the court is being invited to consider the ability of a party to make payments to another party
4. A redetermination under rule 14.13 or an application to vary or suspend the payment of a judgment debt by instalments
5. An application for a charging order (including an application to enforce a charging order), third party debt order, attachment of earnings order, administration order, or the appointment of a receiver
6. An order to attend court for questioning
7. The determination of a liability of an LSC funded client under regulations 9 and 10 of the Community Legal Service (Costs) Regulations 2000, or of an assisted person's liability for costs under regulation 127 of the Civil Legal Aid (General) Regulations 1989
8. An application for security for costs to be provided by a claimant who is a company or a limited liability partnership in the circumstances set out in rule 25.13(2)(c)
9. Proceedings under the Consumer Credit Act 1974, the Inheritance (Provision for Family and Dependents) Act 1975 or the Protection from Harassment Act 1977
10. An application by a trustee or personal representative for directions as to bringing or defending legal proceedings.

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

10. The proposed provisions should allow interested parties to make representations.

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?

11. Yes.

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

12. We would expect that orders placed on the internet will only be on the website for specified period of time and only for such a period as is appropriate to achieve the purpose of publication.

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?

13. The proposed provisions appear to address substantive communications without imposing unnecessary limitations on run-of-the-mill correspondence with the Court. However, we query whether instances of representing parties failing to notify unrepresented parties are as prevalent as suggested in this paper. We would expect that such provisions are more likely to negatively impact litigants in person, who are likely to be unfamiliar with Civil Procedure Rules and therefore communicate with the court without notifying represented parties.

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?

14. Addressing the issue raised below, these provisions should be brought to parties' attention early in proceedings.

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

15. We would consider a statement in correspondence is more than sufficient.

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?

16. The current draft of the provision suggests that the requirement to assist in the preparation of a note will be only if directed by the judge. This seems appropriate. Depending on its content, the sharing of a note of proceedings or liaising with the opposing party as to the content of the note could minimise disputes going forward and ultimately result in proceedings running more smoothly.

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

17. Presumably, an agreed note will have a similar status as a statement of agreed facts.

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

18. We are aware that the cost discourages unrepresented parties from obtaining transcripts of proceedings. Aside from providing a scheme to supplement the cost of

obtaining transcripts, other parties should be encouraged to share transcripts they have obtained or share the cost of obtaining a transcript.

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

19. Many of the changes appear to reflect the current practice in the High Court and County Court. However, the more prescriptive nature of these changes may reduce instances of confusion as to procedures.

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

20. The Bar Council has no further comments.

Bar Council²
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