Public Law Project

Consultation on Changes to Part 39 of the Civil Procedure Rules

Response by the Public Law Project

About PLP

The Public Law Project ('PLP') is an independent, national legal charity which aims to improve access to public law remedies for those whose access is restricted by poverty, discrimination or other similar barriers. Within this broad remit PLP has adopted three strategic priorities in our plan for 2017-2022:

- Promoting and safeguarding the Rule of Law during a period of significant constitutional change.
- Working to ensure fair and proper systems for the exercise of public powers and duties, whether by state or private actors.
- Improving practical access to public law remedies.

PLP undertakes research, policy initiatives, casework and training across a range of public law remedies.

Interest in the consultation

PLP has a national reputation for its work in public law and access to justice. One of PLP's specific focus areas is digitalisation, and the online court in particular. The introduction of online courts will lead to a transformation of the way millions of people interact with the justice system in the UK. The potential impact on access to justice is huge.

Responses to questionnaire

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

PLP considers that the definition adequately defines hearing, but that the section "a 'hearing' means any proceeding before a judge (including a master or district judge) other than a determination on papers and where there is no oral pronouncement of the determination" could be unclear. For someone unfamiliar with legal procedure, it might not be clear whether the requirement that there is no "oral pronouncement" applies to all proceedings rather than just to determinations on the papers.

However, it is difficult to comment fully on whether the definition is adequate without knowing more about how the plans for the "online" court will be implemented in practice. For example, it is not clear whether the reference to "other means of instantaneous two-way electronic communication" would encompass, for example, the trial in the Tax Chamber of "four

different participants communicating with each other from different locations" (referred to by the Senior President of Tribunals in a speech to ALBA on 16 July 2018).[1]

To give another example, different models for online dispute resolution have been proposed in respect of the social security tribunal, including live 'Skype hearings' and interactions involving submitting written questions and answers. It is not clear at what stage user interfaces such as those proposed by Susan Acland-Hood at the 'Future of Justice' conference held at UCL Faculty of Law in May 2018 would qualify as 'hearings'.[2]

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?

PLP considers these changes appropriate and welcomes the emphasis on open justice and the holding of hearings in public unless an exception applies.

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

In practice, there is no established or obvious means for making hearings such as telephone hearings or online processes visible and open to the public. While the intention behind the proposed change is welcome, the change of the rule alone without consideration of the practical methods to be adopted in relation to hearings conducted other than in a court room may impose on courts a degree of uncertainty as to what they must do, and may give parties, or those with an interest in a specific case, an unclear impression of what is to be expected to accommodate public viewing. Before any increase in the use of online or telephone hearings is implemented, the Ministry of Justice and HMCTS should make clear what steps will be available to ensure such hearings are open to the public.

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

For the reasons set out in Question 3, PLP considers more thought should be given to the practical solutions before this question can best be answered. Clarity as to practical solutions would enable the proposed changes to be made more prescriptive, and thus provide everyone involved with a clearer idea of what is required, or what they can expect. However, the concept of "reasonable steps" is one which has an ordinary meaning which courts are well used to applying and is not difficult to understand.

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

PLP does not consider further definition necessary. Further definition is likely to limit the abilities of courts to be flexible to the unpredictable requirements of the cases that come before them.

However, any decision to hold a hearing in private needs to balance the importance of the public interest in open justice, with the reasons relied on to justify holding of a hearing in private. As has been made clear by the courts, and appears to be the intention behind the proposed rule, a derogation from the principle of open justice is only permitted where and to the extent that it is strictly necessary in the interests of the proper administration of justice

[1] https://www.judiciary.uk/wp-content/uploads/2018/08/spt-speech-alba-lecture-july-2018.pdf Paragraph 17
[2] 'The Future of Justice: Harnessing the Power of Empirical Research' conference webpage is here. The presentation given by Ms Acland-Hood is here.

(see, e.g., *V v T* [2014] EWHC 3432 (Ch.)). PLP is concerned that the proposed drafting of paragraph (4) does not give sufficient prominence to the importance of the principle of open justice (including the associated Convention rights under Articles 6 and 10 ECHR). It might be taken to infer, for example, that in any case involving matters relating to national security it will always be necessary for the effective administration of justice to hold the hearing in private. In fact of course, in some cases, the importance of maintaining confidentiality in matters of national security may be outweighed by the public interest in open justice. Clear reference to the importance of the principle of open justice, and the fact that a decision to hold a hearing in private is a derogation from that principle which must be strictly necessary, would make the position clearer. Further the importance of that principle could be strengthened by including a reference to the need to consider alternatives to holding a hearing in private, such as the making of reporting restrictions, and by stating that a hearing should be held in private "only if" the court is satisfied that it is necessary.

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?

As a legal charity with a core interest in the practical accessibility of the courts to disadvantaged and marginalised groups in society, PLP's experience of requiring privacy is often connected with the vulnerability of individuals. This vulnerability may arise for a variety of reasons: they or their family members may be at risk of persecution in their home country, and court proceedings in this country could alert the relevant authorities, or they may have a serious mental health problem which would be aggravated by public exposure. Consideration should be given to affording such individuals explicit protection in the CPR. Failure to make appropriate levels of privacy available to those whose health and/or safety may be jeopardised may deter individuals from seeking to access the law and thereby undermine the rule of law.

If, as is suggested above, the Rule is amended to include reference to Articles 6 and 10 ECHR then it should also be amended to include reference to the right to respect for private life under Article 8 ECHR, which will often be the right which needs to be balanced against the interests of open justice.

In addition to the Aarhus Convention claims referenced in the *RSPB* case, consideration will need to be given to ensuring appropriate privacy for financial information provided in other judicial review proceedings if or when ss85-86 of the Criminal Justice and Courts Act 2015 are brought into force. Any similar investigation of a party's financial circumstances (for example if the model of cost shifting in judicial review proposed by Jackson LJ in his Supplemental Report[3] is introduced) should ordinarily be held in private with restrictions on disclosure as otherwise it will have a disproportionate chilling effect on access to justice.[4]

[3] See para 3.3 of Chapter 10 in, and Appendix 16 to, the Review of Civil Litigation Costs: Supplemental Report – Fixed Recoverable Costs, July 2017, available at: https://www.judiciary.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-3.pdf

[4] See the concerns expressed by PLP, the Bingham Centre for the Rule of Law and JUSTICE in *Judicial Review and the Rule of Law: An Introduction to the Criminal Justice and Courts Act 2015,* Chapter 2 (available here: http://publiclawproject.org.uk/wp-content/uploads/data/resources/211/Judicial-Review-and-the-Rule-of-Law-FINAL-FOR-WEB-19-Oct-2015.pdf)

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

This provision appears to allow interested parties good opportunities to make representations if they see fit.

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?

If any system of orders being placed on the internet is arranged, PLP considers that it will (for the reasons given below) be essential to allow judges flexibility and control over how that process takes effect. The current wording proposed appears suitably flexible, but consideration should be given to incorporating some of the examples mentioned in the question into the rule itself, so that judges and parties who may only use the procedure very occasionally are readily familiar with some of the options available.

Question 9. Are there any concerns with placing these orders on the internet?

PLP considers that the change proposed, that such orders are placed on the internet, is a very significant change in the way justice is conducted in England and Wales and is worthy of considerably more consultation and review than has been conducted so far. If orders directing that a hearing takes place in private are published on the internet, they will be become instantly far more public than any other proceedings which may take place, in practice, without anyone being aware at all. While this increase in the transparency and accessibility of information about court proceedings would be welcome from an open justice perspective, it could lead to serious negative consequences, including (in examples relevant to PLP's work with vulnerable and marginalised groups), opportunistic attempts by media outlets to gain information on legal proceedings involving unpopular or minority groups. These could include some immigrants, prisoners or ethnic or religious communities. These people might be more likely to find their cases investigated by the press if they sought a private hearing (and thereby had their orders published) than if they chose not to seek a private hearing at all.

Further, PLP notes that many cases involving a degree of anonymity (such as restrictions on the availability of court documents or anonymisation of the parties) may never reach any kind of hearing. Such cases, under the proposals currently set out, would not be available online and the current proposals would create inconsistencies in how cases are treated according to the procedural steps they encounter. PLP considers such a situation confusing and inadequate, and liable to lead to a situation where neither the rights of freedom of expression nor of privacy are protected.

PLP recognises that the movement of more court information online is inevitable and, in many instances, desirable. Appropriate reporting and the ability to make the public aware of important cases is to be welcomed. However, PLP considers that the movement of the most sensitive information online as a first step appears highly inadvisable, and that the publication of court orders online should be the subject of a more extensive and systematic reform, which identifies clear objectives and develops a policy which is consistent and balanced throughout the civil justice system.

The risk of a system which is imbalanced in favour of freedom of expression (which PLP considers the current proposal to be) is that it may deter individuals who have legitimate

need for privacy from bringing cases essential to protect their rights. It is therefore a serious risk.

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?

PLP welcomes the introduction of this Rule which makes clear that parties and their legal representatives should not communicate with the court on matters of substance without informing the other party where there are ongoing proceedings.

However PLP does not consider that the rule as presently formulated strikes the right balance between the ordinary rule that the court should not receive secret representations from one party of which the other party is not aware, and the need in certain exceptional circumstances for a party to be able to communicate with the court without giving another party notice of the content of that communication. In particular, paragraph (3) appears to put the decision as to whether there is a "compelling reason" not to copy another party into a communication in the hands of the party, rather than of the court. This is not appropriate, in the absence of any mechanism for the court to exercise control over parties' reliance on that provision. This could be achieved, for example, by way of a provision requiring that before the court makes any order, or takes any step, in reliance on a communication which has not been copied to another party, it must consider whether there is a compelling reason for not copying in the other party (or parties) and if it does not accept there is such a reason, inform the party concerned of its decision.

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?

Yes. A particular issue arises in the Administrative Court in the context of urgent judicial review proceedings concerning the removal of individuals from the jurisdiction under immigration powers. It is common for the duty judge considering an out of hours application for an injunction to telephone the Home Office's Operational Support and Certification Unit ('OSCU') (see paragraph 16.3.4 of the Administrative Court Guide and *R (SB (Afghanistan)) v SSHD [2018] EWCA Civ 215*, paras 64-65, actively encouraging duty judges to do so). Applicants' representatives are not party to those conversations, which are with civil servants who, unlike the representative making the application,[5] are not legally qualified or subject to professional regulation. There is no procedure in place for applicants' representatives to be party to or informed of the content of those conversations, or given the opportunity to challenge or rebut assertions of fact made by the civil servant.

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

Yes. Where the statement is made by a professional legal representative it should be accepted at face value. Where it is made by a litigant in person, it may be appropriate for the court to ask for evidence that the correspondence has been copied to the other parties, where this is not apparent from the communication (for example, because the other parties are copied into an email).

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?

[5] Only legally represented parties can use the out of hours service to apply for an injunction: see 16.3.7 of the Administrative Court Guide.

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

PLP does not have a view on these questions

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

PLP suggests that the transcription services, which are often very costly and time-consuming, be appropriately resourced to enable impartial, official, and accurate transcripts to be available where necessary.

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

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

PLP has, in a previous consultation response, observed that efforts to move proceedings online do not just have an effect on the way court hearings are conducted, but have an impact on the appearance of justice being done. As such, any reforms must take into account the principle of open justice.[6]

Whilst the emphasis on open justice in the proposed changes is welcomed, as outlined above the practicalities have not been made clear to the public so far. It is not clear how online hearings will be open and accessible to the public, and due regard needs to be had to the impact of the proposed reforms on those with protected characteristics who may find it harder to engage with online proceedings.[7] There is a suggestion that some thought has been given to this in respect of the proposed new CPR 39.2(3), but it is impossible to say that 'due regard' has been given to reforms that to date have not been specified.

PLP expects, however, there to be further consultation engaging with the issue of how the vital principle of open justice is to be applied in online processes.

[6] 'Fit for the future: transforming the Tribunal and Court estate' consultation response, 4th April 2018.
[7] For example, the Office for National Statistics Statistical Bulletin 19th May 2017 showed that in 2017 22% of disabled adults had never used the internet.