Part 39 Civil Procedure Rules: Proposed Changes on Open justice

A Response by

The Chartered Institute of Legal Executives (CILEx)

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1. Introduction

1.1. The Chartered Institute of Legal Executives (CILEx) is the professional association and governing body for Chartered Legal Executive lawyers, other legal practitioners and paralegals. CILEx represents around 20,000 members, which includes approximately 7,500 fully qualified Chartered Legal Executive lawyers, and more than 11,000 specialising in civil litigation.

1.2. CILEx continually engages in the process of policy and law reform. At the heart of this engagement is public interest, as well as that of the profession. Given the unique role played by Chartered Legal Executives, CILEx considers itself uniquely placed to inform policy and law reform.

1.3. As it contributes to policy and law reform, CILEx endeavours to ensure relevant regard is given to equality and human rights, and the need to ensure justice is accessible for those who seek it.

1.4. This response includes contributions from some of CILEx's civil practitioners and court users. CILEx liaised with members through its Civil Practitioners Specialist Reference Group, and its Court Users Specialist Reference Group, and conducted a survey of members into their experience of open justice, one-sided court communications and protections for litigants in persons within the Civil Procedure Rules (CPR). These are expanded in more detail below.

2. Summary of recommendations

Open Justice

2.1. CILEx advocates the principle of open justice as integral in upholding the rule of law. Any decision to hold a hearing in private or anonymise parties should not be taken lightly. (Paragraph 3.1-3)

2.2. The decision to hold hearings in private is not an individual right that can be exercised by parties to a proceeding without due consideration to wider public rights and interests. (Paragraph 4.3-5)

2.2.1. These may include matters of a sensitive nature such as harassment matters, where serious threats of violence risk injuring the party/parties or their legal representatives, or where to do so would jeopardise parallel proceedings. (Paragraph 4.10-11)

2.3. We support the introduction of a new strict necessity test which places the *proper administration of justice* at the core of whether hearings should be held in private. (Paragraph 3.3)

2.4. We recognise the need for the definition of a hearing to be widened to take account of technological advancements. (Paragraph 4.1)

2.5. Consideration of 'freedom of expression' is essential, but if intended to embed section 12 of the Human Rights Act 1998 it should be worded in reference to that specific mechanism. Otherwise it risks misinterpretation or introducing a hierarchy of rights when deciding to hold hearings in private. (Paragraph 4.6)

2.6. CILEx pays due consideration to the number of workstreams currently being undertaken by Her Majesty's Courts and Tribunals Service and would hope that the Civil Procedure Rules Committee be mindful of how these projects may dovetail into stated reforms.

Communications with the Court

2.7. CILEx has not seen substantive evidence of a 'trend' of one party not copying in the other side in relevant communications with the court. New provisions making this duty clearer may not resolve the issue of unrepresented parties failing to share communications, as they are likely to be less familiar with the Civil Procedure Rules. (Paragraph 4.20)

Sharing of informal notes of a hearing

2.8. CILEx is not yet fully persuaded as to the merits of judge-directed informal notes made by represented parties to unrepresented parties. It is not clear how reliable unrepresented parties will find these notes to be, both because of their informal nature and because they come from a partial source. (Paragraph 4.28-29)

2.9. In addition, CILEx is hesitant that these notes may not be capable of providing an accurate and complete record of proceedings, as they shall always be open to interpretation.

2.10. 40% of CILEx members surveyed, voiced concerns that the changes would exacerbate delays and contribute towards unnecessary workloads and higher unrecoverable costs. (Paragraph 4.36)

3. General Points

3.1. CILEx advocates the principle of open justice as integral in upholding the rule of law. The default position for hearings to be held publicly, and in a way that they are open to scrutiny, safeguards that the law and legal processes remain transparent and accountable. This is integral for a legal system that is consistent, reliable and accessible.

3.2. With just outcomes as the primary aim of any legal system, CILEx recognises that exceptions to this default position may be necessary in situations where publicity would impede upon the ability of courts to secure the proper administration of justice. As such, CILEx supports the notion that open justice does not serve as both the ends and the means, but rather that it embodies a general rule which like all general rules, may be open to exception.

3.3. In balancing these two positions, CILEx supports the introduction of a new strict necessity test which places the *proper administration of justice* at the core of whether hearings should be held in private.[1] The two-step test supplements current exceptions to the open justice principle, emphasising that a substantive assessment of what this requires should be made in each individual case.

4. Responses to Specific Questions

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

4.1. CILEx recognises the need for the definition of a hearing to be widened to take account of technological advancements.[2] This is especially noted against the backdrop of the ongoing court reform programme which will lead to more remote access to court proceedings.[3]

4.2. 65.22% of survey respondents agreed that the new definition is sufficiently clear to encompass all possible arrangements used in civil case hearings and trials. CILEx

[1] 75% of survey respondents agreed/strongly agreed that in the exceptions provided for under Part 39, hearings held in private should only be permitted where necessary to secure the proper administration of justice.

[2] 73.91% of survey respondents agreed that the definition should be widened to include situations where remote access is used. The remainder of responses were impartial, with nobody in disagreement.

[3] Her Majesty's Court and Tribunals Service, *Fit For the Future: Transforming the Court and Tribunal Estate,* https://consult.justice.gov.uk/digital-communications/transforming-court-tribunal-estate/?utm_medium=email&utm_source=

thereby welcomes the scope of the new definition, and the practical approach taken by the Civil Procedure Rules Committee (CPRC) in utilising plain English and providing flexibility to accommodate for any changes that future arrangements may bring.

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?

4.3. CILEx supports the default position for all hearings to take place in public, in recognition of the principle of open justice. As stated above, the principle is fundamental in maintaining the integrity of the common law system of England and Wales.

4.4. CILEx agrees that the decision to hold hearings in private is not an individual right that can be exercised by parties to a proceeding without due consideration to wider public rights and interests. Accordingly, CILEx welcomes the CPRC's recommendations for the rewording of Part 39.2(1), clarifying that the decision of whether a hearing is to be held in private takes place '*irrespective of the parties' consent*'.[4]

4.4.1. CILEx would like to emphasise the role that alternative dispute resolution mechanisms (ADRs) can play for those who wish to conduct their legal affairs in private. There were no reasons found via our survey for situations in which ADR mechanisms may be inappropriate in such instances.

4.5. CILEx further welcomes the CPRC's recommendation under Part 39.2(4) (as referenced in Part 39.2(1)), to interchange the word '*may'* with '*must*'[5]; imposing an obligation on the court to hold hearings in private where the new two-step strict necessity test has been met. This new obligation rightly reiterates that deviating from the open justice principle is not a matter of discretion but of doing what is necessary to secure the proper administration of justice.

4.6. CILEx is concerned however that the introduction of Part 39.2(2) which establishes a specific obligation on the courts to consider the right to freedom of expression, is worded without reference to the statutory duty it is enforcing. In doing so it may unwittingly establish a hierarchy of importance amongst human rights and the court's duties therein. Under the Human Rights Act 1998 (HRA), it is already well established that the courts owe an obligation to act in compatibility with *all* Convention rights, and that to emphasise one right (freedom of expression) over the others may have unintended consequences.[6]

4.6.1. It is further noted that the current wording of the provision is ambiguous as to whether it refers to Article 10 of the HRA (which references the overarching Convention right), or Section 12 of the HRA (which has a much narrower scope relating to relief granted by the Court).

4.6.2. It is CILEx's understanding that the CPRC's intention here is with regards to Section 12 of the HRA.[7] Should this be the case, it is suggested that this be more clearly signposted in the wording of the provision 39.2(2), so that the scope of the court's new obligations is not unduly widened.

[4] Consultation paper, page 9.
[5] Consultation paper, page 10.
[6] Human Rights Act 1998, s6(1).
[7] Consultation paper, page 9.

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

4.7. CILEx welcomes the recommendations of the CPRC to deviate from the current rules and require courts to take reasonable steps to ensure hearings are open and public in character. Given the role that open justice plays in ensuring judicial accountability and upholding the integrity of our courts, it logically follows that court procedures and practices ought to be in line with this aim.[8]

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

4.8. CILEx is of the opinion that the understanding of 'reasonable' is sufficiently clear as a principle integral to law. A more prescriptive approach would risk that the obligations on courts become unduly onerous, or indeed even impractical, where the current court reform programmes are considered. Maintaining this principle-based position shall provide the flexibility necessary to ensure that the provision is still suitable for the new court structures of the future.

4.8.1. That being said, CILEx welcomes examples of what would constitute *reasonable steps* for these purposes. This may facilitate implementation by providing useful guidance on the scope of the new responsibilities in and amongst court changes.

4.8.2. CILEx recognises the concerns raised by the Civil Procedure Rules Subcommittee where cases raising acute local controversy are tried in a very small court.[9] The CPRC may wish to be mindful of the potential for such scenarios to become more pervasive as ongoing court reforms advocate more efficient usage of space[10] and use of virtual communications.[11]

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

4.9. CILEx welcomes that the term "*secure the proper administration of justice"* is not overly prescriptive, allowing for the individual facts of each case to determine the scope of meaning, although we acknowledge that for the benefit of litigants in person the term may benefit from inclusion in the Civil Procedure Rules glossary.[12]

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

[8] 47.82% of survey respondents indicated that they agreed/strongly agreed that courts owe an obligation to make hearings open and public in character, (30% neither agreed nor disagreed).

[9] https://www.litigationfutures.com/news/end-private-hearing-deals-unilateral-emails-court-cprc-strengthen-open-justice

[10] See footnote 3.

[11] Joshua Rozenberg, *The Online Court: Will IT Work?* https://long-reads.thelegaleducationfoundation.org/wider-lessons-from-north-america/

[12] http://www.justice.gov.uk/courts/procedure-rules/civil/glossary

Justice), are there any other reasons why a hearing should be held in private and what are they?

4.10. Survey respondents provided the following additional circumstances where it may be suitable for a hearing to be held in private:

- Matters of a sensitive nature such as harassment matters.
- Hearings where serious threats of violence risk injuring the party/parties or their legal representatives.

4.11. Survey respondents further provided additional circumstances where it may not be suitable for the identity of any party or witness to a hearing to be disclosed. These were as follows:

- Where the party/witness is a journalist's confidential source.
- Where the party/witness is an intervenor in proceedings whereby publicity of their identity could jeopardise parallel proceedings.

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

4.12. As stated above, the role of open justice is in part to ensure judicial accountability. Therein CILEx agrees that court orders for a hearing to be held in private should still be visible to the extent necessary that they remain open to challenge.

4.13. That being said, CILEx foresees that the new provisions may give rise to rather peculiar outcomes, especially in instances where the identities of both parties to a private hearing remain anonymous. Redactions made to protect these interests may well negate the opportunity for interested parties to make representations due to the limited information publishable as a result. With this in mind, CILEx has reservations about the effectiveness of the new provision in practice.

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?

4.14. The decision for a hearing to be held in private shall largely depend on the substantive facts of each case. CILEx appreciates that it is for this reason that the new two-step strict necessity test has been proposed; emphasising that whilst there are exceptions to the open justice principle, a 'one size fits all approach' is not suitable in determining what is necessary to secure the proper administration of justice. CILEx is of the opinion that the same logic applies in the publication of a court order, whereby some judicial discretion should still be maintained.

4.15. CILEx thereby agrees that a judge ought to have discretion over a). whether the order is published on the website,[13] and b). whether it must first be served to the other party.[14] An approach that is too prescriptive in these instances could otherwise call for the publication of a court order in a manner that impedes the proper administration of justice.

4.16. Regarding redactions to protect anonymity, CILEx is of the view that this should always be required prior to the publication of an order. The protections afforded under Part 39 for the identity of parties and witnesses would elsewise be undermined.[15]

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

4.17. Please see paragraph 4.13.

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?

4.18. CILEx understands that the findings of the Civil Procedure Rules Subcommittee, as to the existence of this trend, stems from anecdotal evidence obtained from the judiciary. We would in ordinary circumstances recommend for policy decisions such as this to have a more robust evidential base, albeit we recognise the principle that both sides should be copied into relevant communications, particularly when unrepresented parties are involved.

4.19. CILEx sought evidence from its own members on whether such a trend was present. Members responding to CILEx's survey evidenced a near split divide between the percentage of respondents with exposure to the trend (39%), and those with no experience of it (33%). The remaining 27% were either impartial or unable to answer. Conclusively CILEx recognises that the nature of this trend is likely to be highly contextual.

4.20. The consultation asserts that *"[this] concern is particularly acute where a represented party communicates with the court, without notifying the unrepresented opposing party."*[16] CILEx members have indicated that in their experience the problem is more likely to be the other way around, and made more acute in the context of unrepresented parties (also referred to as 'Litigants in Person') who do not possess the same level of awareness or understanding of the practice rules as compared with regulated legal representatives.

4.20.1. Therein, CILEx would caution against sole reliance on the new provision as sufficiently robust to stop this trend. Although unrepresented parties have a duty

[13] 75% of survey respondents agreed/strongly agreed that judges should have discretion over whether the order is published on the website.

[14] 77.27% of survey respondents agreed/strongly agreed that judges should have discretion over whether the order must first be served to the other party prior to publication.

[15] Members on the whole commented along the lines that: "*If the identity of any party is to be protected, then it should remain redacted."*

[16] Consultation Paper, Page 11.

to abide by the CPR[17], supplementary materials may still be necessary to raise awareness around the new provision and the obligations that it imposes upon them.

4.20.2. CILEx would hope that in exercising its discretion to impose sanctions or evoke any of its case management powers, the court provides some degree of leeway for 'first time offenders' (particularly unrepresented parties), who may need clearer signposting towards the obligations imposed under the new rule.

4.21. Additional information may be further warranted to clarify potential areas of ambiguity around the obligations imposed. Whilst respondents had a consensus in support of the proposed provisions[18], a majority of respondents agreed/strongly agreed that clarity would still be welcome in a). differentiating between "procedural" and "administrative" communications[19], and b). determining what constitutes "compelling reason/s" for non-disclosure[20].

4.21.1. CILEx cautions that the outcome of this ambiguity may well result in parties copying all communications with the court to the other side, in the hope of minimising the risk of non-compliance. Resultantly, notwithstanding exceptions provided, communications which are purely routine, uncontentious and administrative may still be disclosed in practice. This, coupled with concerns raised in our survey as to duplication of correspondence, could result in increased workload, time and costs for both parties, and the court.

4.21.2. Significantly, CILEx is wary that where the proper interpretation of "compelling reason/s" is left ambiguous, unrepresented parties and legal representatives may find that they are more susceptible to disclosing certain sensitive information for fear of sanction.

4.21.3. As mentioned above, problems of ambiguity would be intensified in the context of unrepresented parties, who are less familiar with court practices and may therefore find it more difficult to deduce what these distinctions are.

4.21.4. CILEx hopes that the CPRC be mindful of the above ambiguities, which risk leaving all parties more susceptible to further dispute, or indeed further litigation, leading to lengthier and more costly engagements with hearings and court processes.

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?

4.22. As rightly acknowledged by the consultation paper, the duty of disclosure is a fundamental rule in the administration of justice.[21] As outlined in paragraph 4.20, should these measures come into play, CILEx would recommend that to maximise compliance, clearer signposting could be implemented to impress upon both parties their obligations under the new rule.

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[17] *Barton v Wright Hassall LLP* [2018] UKSC 12.

[18] Survey results demonstrated that an average of 71.86% of respondents agreed/strongly agreed with each subsection of the proposed new provision.

[19] 87.09% of survey respondents indicated they agreed/strongly agreed that further clarification was needed here.

[20] 87.10% of survey respondents indicated they agreed/strongly agreed that further clarification was needed here.

[21] Consultation Paper, page 11.

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

4.23. Survey responses evidenced a 70.97% majority who felt that a statement confirming the other side have been copied in is sufficient. This was in recognition of our members' pre-existing duty to the court in accordance with the CILEx Code of Conduct.[22]

4.23.1. Members in agreement also identified the increasing use of email as a platform for communication, and the functionality therein which should allow courts to clearly confirm that the other side has been copied in.

4.24. CILEx is aware of certain practices in which parties do not accept communications sent in certain formats (e.g. via email). In such situations, CILEx would welcome that there is an assumption in place that the other party would accept service (whether in paper or electronic format), until communicated otherwise. This may help to alleviate contentions surrounding what constitutes adequate disclosure.

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?

4.25. CILEx is not yet fully persuaded as to the merits of this new obligation. Our survey findings indicate a discord of agreement with the introduction of judge directed note-sharing. 39.29% of respondents agreed/strongly agreed with the new provision, whilst 42.86% disagreed/strongly disagreed and 17.86% remained impartial.

4.26. Bearing all of the following points in mind, CILEx welcomes additional information on whether informal notes would be expected to a). form part of the court documents, b). be treated as evidence in the event of any appeal, c). form a complete accurate record of proceedings.

Accuracy

4.27. CILEx recognises that the new rule may aid an unrepresented party in the understanding of proceedings, supplementing transcripts and potentially expediting court processes. However, CILEx maintains reservations about whether these notes would be reliable enough to be used as a basis for any decisions.

4.28. Survey respondents voiced apprehension about the practical difficulties of creating an accurate record, given the likelihood of inaccuracies where: a). a genuine error leads to information being missed off a note, and/or b). misinterpretations are made in good faith.

4.28.1. With this in mind, CILEx stresses that the nature of these notes as 'informal' should be impressed upon to prevent an unrepresented party from placing too high an emphasis on their contents. This may also help to alleviate the burden placed on the represented party creating the note.

4.29. To strengthen accuracy, CPRC may wish to consider consistency in the format and timelines of informal notes. This shall assist both parties to better understand the role that notes play within proceedings, and the level of liability associated with them.

4.29.1. CILEx therefore welcomes additional clarity on whether notes would be exchanged during/at the end of proceedings or at a later date. The manner of communication shall impact upon the time allocated for parties to clarify the information provided.

Trustworthiness

4.30. So that unrepresented parties are fully aware of its status, it is important to make the origins of informal notes clear from the outset. However even where notes are accurate, CILEx is wary that the partial nature of legal representatives, runs the risk that an unrepresented party feels unable to trust the note as a reliable source of information.

4.30.1. This may be resolved by all informal notes being agreed upon by the judge, as an impartial source, before they are relayed to the other side.

4.30.1.1. Of course, CILEx is sensitive to the extra responsibilities this would place upon judges, as well as the time delays that might be caused, and the extra cost burden on the represented party when judges request edits or clarifications.

4.30.1.2. It may also mean that what are intended as informal notes will in effect be interpreted as formal, judge-approved, documents.

4.31. CILEx is wary that should the status of these notes be left ambiguous, this may give rise to further disputes of litigation over the rights and obligations attached to them. In turn this could lead to notes becoming less detailed over time, undermining their overall intention and trustworthiness.

Cost burden

4.32. Survey respondents were wary that the new rule might shift additional costs onto the represented party, as their legal representative becomes duty-bound in providing a service to the other side. This would in effect render that Party X ends up paying for a service received by Party Y.[23]

4.32.1. While the likely increase may be relatively small, the costs will still be passed on to consumers. This could further dissuade litigants from seeking representation, and ultimately lead to an increase in unrepresented parties.

Information disclosure

4.33. Another concern for respondents is how to balance this new obligation with the existing duty to protect certain privileged and confidential information in the interests of represented clients. The likelihood that notes are heavily caveated to omit sensitive information, exacerbates concerns voiced in Paragraph 4.27 that notes may not be capable of providing a complete and accurate record of proceedings.

[23] It is acknowledged that in some cases the use of a third-party short hand writer may be employed for the creation of notes. In these instances, the cost burden placed on the represented party's side would be further exacerbated.

4.33.1. CILEx hopes that CPRC are mindful of the limitations that these conflicting interests may have on the ability of informal notes to provide useful information.

4.34. As a final point, CILEx would like to respectfully alert the CPRC to potential misinterpretations caused by the wording of the new provision which refers to both 'records' and 'recordings.' It is our understanding that the new provision calls for the introduction of supplementary written records only, and not the distribution of informal audio recordings.

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

4.35. CILEx recognises the practical issues that lengthy waiting times for transcripts can cause, particularly with regards to the large volumes of extensions sought from the Court of Appeal awaiting preparation of an Appellant's Notice.

4.36. That being said, CILEx strongly believes that an informal note under the new provision cannot be used as a substitute for official transcripts, nor should they be relied heavily upon for formal processes or applications for appeal. To do so, would be to: a). Place an unduly onerous level of responsibility upon the party creating the note, and b). Risk that the party at the receiving end, places too much emphasis on an ostensibly informal note that has been created by a partial source.

4.36.1. As commented above, the likelihood that these notes are highly caveated for the protection of client confidentiality or concerns over liability may practically undermine their use as formal documents.

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

4.37. CILEx recommends that under Practice Direction 52C Paragraph 6(2), applications for obtaining transcripts at public expense, which have been made by unrepresented parties (particularly those who are fee-exempt), should no longer have to be submitted within the Appellant's Notice. This would have the effect of expediting the process, enabling unrepresented parties to access official transcripts ahead of any decision to appeal.

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

4.38. 40% of survey respondents voiced concerns that the changes would exacerbate delays and contribute towards unnecessary workloads and higher unrecoverable costs.

4.39. Concerns were also raised that the new rules may cause difficulties with the General Data Protection Regulation and safeguarding both client confidentiality and privileged information.

4.40. However, improved disclosure (regarding communications with the courts) was welcomed in its ability to assist in civil litigation. As mentioned above, this is provided

that further clarity is given on the types of communication to be disclosed and what would qualify as ‘compelling reason/s.’

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

4.41. Survey respondents voiced concerns that the new rules may impact more heavily upon parties with limited means who are represented in hearings where the opposite party is unrepresented.

For further details

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