

**Howard League for Penal Reform's response to the Ministry of Justice's consultation on
Part 39 Civil Procedure Rules: proposed changes
Open justice**

August 2018

Summary

1. The Howard League for Penal Reform's response to this consultation will focus on Civil Procedure Rule 39.2(4) as it is this clause that is of relevance to our legal team's experience as public law lawyers for children in custody.
2. There is a real risk that the proposed revision of Rule 39.2(4) will adversely affect children and vulnerable claimants and witnesses in judicial review proceedings and have a chilling effect.
3. The proposed revision is contrary to the welfare principle.
4. The concerns raised in this response could be easily dealt with by making a small revision to the proposed clause.

1. About the Howard League for Penal Reform

- 1.1 Founded in 1866, the Howard League is the oldest penal reform charity in the world. The Howard League has some 13,000 members, including prisoners and their families, lawyers, criminal justice professionals and academics. The Howard League has consultative status with both the United Nations and the Council of Europe. It is an independent charity and accepts no grant funding from the UK government.
- 1.2 The Howard League works for less crime, safer communities and fewer people in prison. We achieve these objectives through conducting and commissioning research and investigations aimed at revealing underlying problems and discovering new solutions to issues of public concern. The Howard League's objectives and principles underlie and inform the charity's parliamentary work, research, legal and participation work as well as its projects.
- 1.3 Our legal team works directly with children in custody and undertakes judicial reviews on their behalf (Howard League, 2017).¹
- 1.4 The Howard League would be happy to discuss the issues raised in this response.

2. Focus of this response: identification of vulnerable claimants and witnesses

- 2.1 This response deals with the proposed change to CPR 39.2 (4) which currently states:

"The court may order that the identity of any party or witness must not be disclosed if it considers non disclosure necessary in order to protect the interests of that party or witness".
- 2.2 It is proposed that this clause be amended to become CPR 39.2 (5) and to read as follows:

"The identity of any party or witness shall not be disclosed if it considers non disclosure necessary to secure the proper administration of justice and in order to protect the interests of that party or witness"
- 2.3 This is the provision of the CPR that allows claimants or witnesses not to be identified in the course of judicial review proceedings or any other proceedings governed by the CPR. In the Howard League's experience, it is regularly the case that children, vulnerable young adults or the litigation friends representing them in such proceedings are fearful of being named and regularly make use of this provision.
- 2.4 In the case of children at least, it is the Howard League's experience that the current practice of the administrative court is to grant applications for claimants not to be identified. This is in light of legal framework for children that requires a different welfare based approach be taken in all decisions affecting children (s44 Children and Young Persons Act 1933, Articles 3, 12 and 16 UN Convention on the Rights of the Child).
- 2.5 In the Howard League's experience, evidence from those responsible for caring for children and vulnerable people can often be crucial in judicial review matters. It is sometimes the case that witnesses who work for organisations that care for a number of

¹ Justice for Young People: 15 years of successful legal work The Howard League for Penal Reform, 2017
<https://howardleague.org/publications/justice-for-young-people-2/>

young people are properly concerned about the impact of being named in proceedings on the other people they care for and often seek assurances that they will not be identified.

3. Representations

- 3.1 The Howard League is concerned that the new provision may have unintended or unforeseen consequences. In the absence of the word 'or' between 'administration of justice' and 'in order to protect the interests' the current single stage test may be construed as having been converted to a two stage test that may be significantly harder to pass.
- 3.2 At present, restrictions on identification can be imposed where it is in the interests of the party or witness. In the case of children that test may presently be passed by virtue of the welfare principle.
- 3.3 Under the new proposed test as presently worded, it appears that in order to impose restrictions it would be necessary to show that both the proper administration of justice and the interests of the person concerned required it.
- 3.4 It is possible to envisage a situation where naming a child claimant would clearly not be in his or her best interests but it would be hard to see how an order preventing identification would be necessary for the proper administration of justice (in the absence of guidance as to how welfare concerns might affect the proper administration of justice). For example, judicial reviews may concern very young children or incapacitated people for whom it might be clearly not in their interests to be named but for whom it might be very difficult to argue that the proper administration of justice would be affected by being named. In such circumstances, where children are involved, the welfare principle will be undermined.
- 3.5 Conversely, there may be cases where the proper administration of justice may be affected but the interests of the claimant or witness are not affected. For example, naming a witness might affect other ongoing legal proceedings where the person is also a witness but he or she is not personally affected.
- 3.6 The Howard League is concerned that this change could have a chilling effect, preventing important cases from being brought or that cases will be brought where children or vulnerable people are named contrary to the welfare principle and their best interests.

4. Conclusion

- 4.1 Access to justice is a constitutional right. Any provision that either has a chilling effect on children or results in adverse consequences for children as a result of bringing proceedings should be subject to anxious scrutiny.
- 4.2 The concerns outlined in this response could be easily dealt with by substituting the word "and" for "or" so that the clause reads as follows:

"The identity of any party or witness shall not be disclosed if it considers non disclosure necessary to secure the proper administration of justice **or** in order to protect the interests of that party or witness."

23 August 2018