CIVIL JUSTICE COUNCIL

Procedure for Determining Mental Capacity in Civil Proceedings Working Group

Consultation Paper – December 2023

Contents

INTRODUCTION

About the Civil Justice Council

1. The Civil Justice Council is an advisory public body, established under the Civil Procedure Act 1997. Its statutory duties include keeping the civil justice system under review; considering how to make the civil justice system more accessible, fair, and efficient; and making proposals for research. In carrying out its statutory functions, the Civil Justice Council makes recommendations to the Lord Chancellor, the judiciary and the Civil Procedure Rules Committee on the development of the civil justice system.

About the Working Group

2. In July 2022 the Civil Justice Council agreed to set up a working group to consider the Procedure for Determining Mental Capacity in Civil Proceedings. This followed an approach to the CJC by Daniel Clarke, a practicing barrister, following the publication of his article in the Legal Action Magazine which identified shortcomings in the rules in relation to the procedure for determining capacity to conduct proceedings (**"litigation capacity"**) in the civil courts.[1]
3. A working group was set up to consider the issues. The members of the working group are set out at Appendix 1. The working group's terms of reference were:
    - to consider how the Civil Courts approach mental capacity, with regard to the procedure and common practice used to determine whether a party lacks capacity to conduct proceedings (i.e. is a protected party within the meaning of Part 21 CPR), and
    - to make recommendations to improve rules, practice directions or other matters, with particular consideration of the following areas:
        - How an issue relating to a party's mental capacity is identified and brought before the court.
        - The procedure for investigating the issue.
        - The procedure for determining the issue.
        - The position of the substantive litigation pending determination of the issue.
        - The particular issues arising as regards:
            - Litigants in person

[1] Daniel Clarke, 'Mental Capacity: Focus', *Legal Action*, December 2021/January 2022 pp23-25.

- Parties who do not engage with the process of assessment of capacity.

4. Following a period of provisional discussions within the working group, the group has decided to proceed by way of a public consultation on the issues identified.
5. This Consultation Paper briefly summarises the discussions of the working group, the main issues identified and some provisional proposals for change. Not all of the proposals were agreed by the whole working group and all will be revisited in light of the consultation responses. It is anticipated that the consultation phase will last for three months and will include a seminar for public debate about the issues raised.
6. The CJC wishes to hear from a wide range of consultees, not only from people with significant experience of issues of mental incapacity and/or the civil justice system but also from those with more limited experience of specific issues or procedures. Given the range of sources of information and guidance, relating to both mental incapacity and the civil justice system, we have included a summary of key definitions and existing provisions to assist in summarising the current situation. This is at Appendix 2.
7. The CJC wishes to thank each of the working group members for their invaluable work in identifying the key issues and framing this consultation document.

The problem: Lack of provision in CPR

8. Part 21 of the Civil Procedure Rules (CPR) sets out the procedure in relation to 'protected parties'. A protected party is defined in CPR 21.1(1) as 'a party who lacks capacity within the meaning of the Mental Capacity Act 2005 (MCA) to conduct the proceedings'. CPR 21 provides that:
    a. A protected party must have a litigation friend to conduct proceedings on their behalf;
    b. Any settlement of a claim made in relation to a protected party must be approved by the court;
    c. If during proceedings a party lacks capacity to continue to conduct the proceedings no party may take any further step in the proceedings without the court's permission until the protected party has a litigation friend; and
    d. Any step taken before a protected party has a litigation friend has no effect unless the court orders otherwise.
9. CPR 21 also sets out the procedure for the appointment of a litigation friend, both by way of the filing of a certificate of suitability by the litigation friend, and by application to the court.

10. All of these provisions are predicated on it being established that a party lacks capacity and is therefore a protected party. The CPR makes no provision for cases in which a party's capacity is in doubt: how the issue is to be identified, investigated or resolved. The provisions regarding the appointment of a litigation friend also assume that there is a person suitable, able and willing to undertake the role.
11. The issue was identified more than 20 years ago in *Masterman-Lister v Brutton*[2] ("*Masterman-Lister*") when Kennedy LJ observed that neither CPR 21 (nor the preceding provision, RSC Order 80) made any provision for "a judicial determination of the question whether or not capacity exists". Kennedy LJ recommended that the Rules Committee consider the issue, but held that meanwhile: "courts should always, as a matter of practice, at the first convenient opportunity, investigate the question of capacity whenever there is any reason to suspect that it may be absent …"[3]

Specific themes considered

12. The discussions of the working group to date have been divided into various themes, which also provide the structure of the present consultation paper, as follows:
    - Nature of the issue and role of the court
    - Identification of the issue
    - Investigation of the issue
    - Determination of the issue
    - Substantive proceedings pending determination
    - Funding
13. The working group has not considered specific issues arising at the stage of enforcement. Also, the working group has not considered issues regarding the availability and duties of litigation friends.

[2] [2002] EWCA Civ 1889, at [18].

[3] This is reflected in the Equal Treatment Bench Book which states: "Courts should always investigate the question of capacity at any stage of the proceedings when there is any reason to suspect it may be absent." [Chapter 5, para 42]. The Equal Treatment Bench Book offers guidance to judges on issues of diversity and equality. See https://www.judiciary.uk/about-the-judiciary/diversity/equal-treatment-bench-book.

The broader context

14. The context in which the working group has considered these issues is one in which the civil court system is operating with reduced personnel (both judicial and administrative) and in which cuts to legal aid have resulted in more unrepresented litigants appearing before the courts.[4]
15. The working group recognises that properly protecting these important rights and interests will require both funding and changes to the organisation and culture of the civil courts. But the working group is hopeful that in the meantime more limited improvements can be made and welcomes views on both short term and limited measures, as well as more long term, substantial changes.
16. As was recently observed by the Court of Appeal in Northern Ireland: [5]

> *the affordability of justice, the availability of legal representation and the provision of support measures such as a litigation friend are closely related subjects, all of them inextricably linked to every litigant's fundamental rights of access to a court and to a fair hearing. An assessment in any given case that a litigant is entitled to the support of a litigation friend is a matter of enormous importance to the person concerned. Its value must not be underestimated. The need for a simple, accessible, expeditious and cheap framework to give effect to the assessment that any litigant should have the benefit of a litigation friend is incontestable. In the absence of this - coupled with the necessary related public funding … our legal system will find itself paying mere lip service to the hallowed common law right to a fair hearing.*

[4] See e.g. Gabrielle Garton Grimwood, 'Litigants in person: the rise of the self- represented litigant in civil and family cases' (Briefing Paper Number 07113, 14 January 2016, House of Commons Library); House of Commons Justice Committee, 'Court Capacity: Sixth Report of Session 2021–22' (HC 69, 27 April 2022) at pp11-12, which reported a reduction of permanent HMCTS staff of almost 30% between 2010/11 and 2020/21.

[5] *Galo v Bombardier Aerospace UK* [2023] NICA 50 at [59].

THE NATURE OF THE ISSUE AND ROLE OF THE COURT

The nature of the issue

17. Before proceeding to consider the other specific themes, it is necessary to consider the nature of the issue as to a party's litigation capacity and the role of the court in determining it, as these will affect the issues that arise in relation to those other themes.

18. It has previously been held that the issue of a party's *current* litigation capacity (i.e. whether a litigation friend should be appointed to conduct the litigation on their behalf) is one with which other parties to the proceedings will not generally have any legitimate interest and should not seek to become involved;[6] in other words that it is not an "*inter partes* issue". On the other hand, other parties may have a legitimate interest in issues about a party's *past* litigation capacity (and so the validity of steps taken by them and/or the court in the period before a litigation friend was appointed).[7] Clearly, other parties may also have a legitimate interest in issues about the party's capacity in relation to other matters which form the subject matter of the underlying proceedings, e.g. whether a contract between the parties (made in the past) is invalid on grounds of incapacity or whether the party has capacity to comply with any injunction (in the future).

19. Equally clearly, the party whose litigation capacity is in issue *does* have an interest in the issue, and must have proper opportunity to dispute any suggestion that they lack capacity.[8] However, by definition, this will occur at a stage when it is unclear whether the party is able properly to engage in the proceedings.

20. Any legal representative instructed by the party will also have an interest, in the sense that the issue will determine whether they can accept instructions from their client, however, (a) this is not the same sort of interest as parties have in adversarial proceedings and (b) until the issue of capacity is determined, there is some uncertainty as to whether their client is able to give instructions on which they can act. Therefore, the legal representatives' role would appear to be limited to that of assisting the court.

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[6] *Folks v Faizey* [2006] EWCA Civ 381, [2006] CP Rep 30.
[7] *Evesham and Pershore Housing Association Ltd v Werrett* [2015] EWHC 1060 (QB).
[8] See *Folks v Faizey*, Keene LJ at [25].

The role of the court

21. In these circumstances, the working group were in agreement that the usual adversarial model — of parties to a determination choosing what evidence and submissions to advance and the court adjudicating on these — is not an appropriate one in relation to the issue of a party's litigation capacity. Instead, the role of the court must be a quasi-inquisitorial one, in which the court takes responsibility for ensuring that, insofar as possible, it has the necessary evidence before it. This is already reflected to some extent in the authorities[9] and the Equal Treatment Bench Book, at least in relation to unrepresented parties.[10]
22. It may be possible for some or all of the work in this regard to be carried out by third parties (most obviously, the party's legal representatives, where applicable; and see further see below), but it is important to recognise that they do so on behalf of the court in its quasi-inquisitorial role, given that this represents a departure from the usual adversarial approach to litigation.
23. While it can be stated simply that it is the duty of the court to investigate and determine whether or not a party has capacity, significant issues arise: the role of the court, and its powers; the professional duties of any legal representatives; the role of any legal representatives in a determination hearing; if the court requires the assistance of a third party, the most appropriate type of assistance; and, how this might be funded.
24. These are difficult issues, but there can be no doubt about the importance of the court's task. The determination of a party's mental capacity raises fundamental issues about that person's civil rights, rights safeguarded by the European Convention on Human Rights. A party who lacks the capacity to conduct their own litigation must have their interests protected, but this must be balanced against a party's right to conduct litigation, if they have the capacity to do so. As stated by the Court of Appeal in the case of *RP v Nottingham City Council*:[11]

> *… the question of litigation capacity is one of considerable importance. When a person is treated as a protected person (previously a patient), he or she is thereby deprived of civil rights, in particular his right to sue or defend in his or her own name. These are important rights, long cherished by*

[9] See *Masterman-Lister*, above ("…the court should … investigate the question of capacity…").
[10] Chapter 5, para 53: "Where a party is not represented, it is for the judge to investigate or consider if that person has capacity to conduct that litigation, as a matter of priority…".
[11] [2008] EWCA Civ 462, [2008] 2 FLR 1516, Wall LJ at [115]. The passage also refers to the judgment of Kennedy LJ in *Masterman-Lister* at paras [17] and [27].

English law and now safeguarded by ECHR. Thus the basic right of people to manage their property and affairs for themselves is one with which no lawyer and no court should rush to interfere

Consultation questions

1) **Do you agree that other parties to the litigation do not generally have any legitimate interest in the outcome of the determination of a party's current litigation capacity?**
2) **Do you agree that the approach to the issue should be inquisitorial, with the court ultimately responsible for deciding what evidence it needs to determine the issue?**

IDENTIFICATION OF THE ISSUE

25. The first issue is how a party's potential lack of litigation capacity is to be identified and brought to the court's attention.
26. The experience of members of the working group is that the issue is not consistently identified or raised at an early stage of proceedings, often due to misplaced reliance on the "presumption of capacity".[12] In fact, the authorities and guidance are clear that, while the presumption is important, where there is good reason for cause for concern and legitimate doubt as to capacity to litigate, it cannot be used to avoid taking responsibility for assessing and determining capacity.[13] Further, the late identification of the issue — even after final orders have been made — causes significant additional procedural difficulty and cost, as well as potential substantive injustice.

Represented parties

27. Where the party has legal representation, in most cases the legal representatives will both identify and investigate the issue.
28. It is well-established that, once a legal representative has doubts about their own client's litigation capacity, they have a professional duty to resolve the issue as quickly as possible,[14] by investigating the issue for themselves[15] and, where necessary (in particular, where the client disputes the suggestion of incapacity), raising the issue with the court.[16]
29. While it is easy to state that such a professional duty exists, and what steps *should* be taken, practical problems may arise if the party disputes that they lack capacity. The approach set out in *Masterman-Lister* also presumes that funding is available for a medical opinion and that a suitable litigation friend is available and willing to act.

[12] Mental Capacity Act 2005 section 1(2): "A person must be assumed to have capacity unless it is established that he lacks capacity."
[13] *Royal Bank of Scotland PLC v ABI* UKEAT/0266/18; Equal Treatment Bench Book, Chapter 5 para 43.
[14] *RP v Nottingham CC* [2008] EWCA Civ 462, [2008] 2 FLR 1516, Wall LJ at [47].
[15] See e.g. *Masterman-Lister,* Kennedy LJ at [30]: "A responsible solicitor acting for a claimant or defendant has doubts about the capacity of his client, and seeks a medical opinion. If the opinion suggests that the client lacks the necessary capacity then the solicitor arranges for the appointment of a litigation friend".
[16] See e.g. *McFaddens (A Firm) v Platford* [2009] EWHC 126 (TCC), [2009] PNLR 26.

30. Further, the exact threshold for triggering the duty is described in various ways: the representative "form[ing] the view that … [the client] might not be able to give them proper instructions", that there is a "real risk" that this is the case, having "doubts" or "reasonable doubt" that the client has capacity, or "reasonably suspecting" that the client "is" or "may be" a protected party etc.
31. It must also be recognised that in practice it can be difficult to distinguish between a client merely giving unwise instructions, being 'difficult' or failing to engage, and a client being unable to understand, retain and weigh the relevant information as a result of an impairment. Additionally, there are likely to be practical implications of raising the issue of capacity with the court against a client's wishes. These may include the impact on the progress of the proceedings, costs (including where these should fall where a legal representative raises the issue and the court determines the client to have capacity) and the working relationship between the representative and the client.
32. In light of these issues, some members of the working group considered that clearer guidance is needed, in relation to the professional obligations of legal representatives, and the threshold for triggering the duty to draw to the court's attention a potential lack of capacity in a client.

Unrepresented parties

33. Identifying the issue is more likely to be problematic if a party is unrepresented. In *Masterman-Lister*, Kennedy LJ went on to say that: "Sometimes the doubts may arise in relation to an opponent acting in person, and then it *may* be appropriate to bring the issue of capacity before the court".[17]
34. The duty on legal representatives to raise the issue in relation to their *own* client arises, at least in part, from their paramount duty to the court in the administration of justice. This being the case, the working group considers that there must similarly be a *duty* to raise with the court any reasonable doubts about the litigation capacity of another party acting in person — even where this might conflict with the representative's own client's interests (e.g. by resulting in delay to the proceedings). However, the guidance from the relevant professional ethical bodies does not contain any clear statement to this effect and the working group considered that this would be helpful.
35. There is also a question as to the extent to which other parties themselves (as opposed to their legal representatives, and whether or not represented) should be under a duty to consider and draw to the court's attention any information they are aware of which might suggest an issue as to another party's litigation capacity. There is currently a limited duty on social landlords to consider this before issuing a

[17] At [30], *emphasis added*.

claim for possession[18] and a duty may arguably be implied by CPR Part 1 and Practice Direction 1A (see Appendix 2). In *Masterman-Lister*, Kennedy LJ suggested that amendments to pre-action protocols and court forms regarding any potential lack of mental capacity of another party, may help to ensure the issue is identified at an early stage. [19] The working group agreed that such amendments would be of assistance.[20]

36. As in relation to represented parties, it is necessary to consider the precise nature and threshold for the duties and what guidance is necessary.

Consultation questions

3) Is clearer guidance needed as to the duty on *legal representatives* to raise with the court an issue as to the litigation capacity of their *own client*?

4) What level of belief or evidence should trigger such a duty?

5) Is clearer guidance needed as to the duty on *legal representatives* to raise with the court an issue as to the litigation capacity of *another party* to the proceedings who is unrepresented?

6) What level of belief or evidence should trigger such a duty?

7) Should *other parties* to proceedings have a general duty to raise with the court an issue as to the litigation capacity of a party to the proceedings who is unrepresented:

- **a. In all cases?**
- **b. In some cases (e.g. where the other party is a public body, insurer etc.)?**

8) If so, what level of belief or evidence should trigger such a duty?

9) Should the Pre-Action Protocols be amended to require parties to identify issues of potential lack of litigation capacity at the pre-action stage?

10) Should key court forms (claim forms, acknowledgments of service and defence forms) be amended to include questions about whether another party may lack litigation capacity?

11) Should there be any particular sanction(s) for a clear failure by another party to raise the issue?

[18] Pre-Action Protocol for Possession Claims by Social Landlords, para 1.5(b)(i).
[19] At [30].
[20] Following the introduction of PD1A in April 2021 (Participation of Vulnerable Parties and Witnesses), the N1 claim form has been amended to include a question on the vulnerability of parties and witnesses, however, while this may overlap with incapacity, they are separate issues.

12) Do you have any examples of issues you have faced in practice when you have had to decide whether a client or another party was being 'difficult' or whether they might lack litigation capacity? If so, can you explain how these were dealt with.

INVESTIGATION OF THE ISSUE

The evidence necessary

37. In order to determine whether or not a party lacks litigation capacity, the court will need to determine (1) whether they are unable to understand, retain, use and/or weigh the relevant information, or communicate their decisions, and (2) if so, whether that inability is caused by an impairment or disturbance in the functioning of their mind or brain.

38. In light of the second part of the test, the courts have generally tended to require some form of medical evidence in order to determine the issue of capacity,[21] although this is not always necessary.[22] But in any event it is important to note that the commissioning of a new expert assessment of capacity may not be possible (e.g. because the party refuses to engage with an assessment and/or funding is not available). In such a case, the court may instead have to proceed on the basis of any existing medical records that might be available, together with any relevant witness evidence from family, friends and professionals involved with the party, as well as hearing from the party themselves.[23]

39. Further, the nature of the investigation and evidence required will depend in part on the nature and complexity of the issues and must be proportionate to the matters at stake in the proceedings.[24]

Who should investigate?

The party's representatives (represented party)

40. The working group considered that (as is already standard practice) where a party is represented, their legal representatives will be in the best position to gather evidence and, where necessary, obtain an expert opinion as to the party's capacity.[25] Practical difficulties may arise in relation to such an

[21] See e.g. *Masterman-Lister*, Kennedy LJ at [17]; *Baker Tilly (A Firm) v Makar* [2013] EWHC 759 (QB), [2013] COPLR 245, Sir Raymond Jack at [8].
[22] See: *Hinduja v Hinduja* [2020] EWHC 1533 (Ch), [2020] 4 WLR 93, at para 38.
[23] For a helpful discussion on this point, in the family law context, see *Z v Kent CC* [2018] EWFC B65, [2019] COPLR 79, HHJ Lazarus at [40].
[24] See *Galo* at [59], above.
[25] See *Masterman-Lister*, above at [30], above at para xx. The reflected in the ETBB – chapter 5, para 5.

investigation, e.g. where the client refuses to engage with the process or there is no funding available: see further below. However, this does not change the fact that the legal representatives will be best placed to conduct the investigation.

41. Where the party is unrepresented, however, the issue is more difficult and the working group considered a number of potential options, as follows.

The party

42. As noted above ('The nature of the issue'), given that, by definition, the investigation of a party's litigation capacity will occur at a stage when it is unclear whether the party is able properly to engage in the proceedings, and may be refusing to engage with an assessment of their capacity, the court is unlikely to be able to rely on the party themselves to investigate the issue.

The court

43. The Equal Treatment Bench Book suggests that:[26]

> *If [the relevant] evidence cannot be obtained by other means … this may well entail the judge writing to the person's clinician setting out what matters need to be considered and addressed by the clinician. The judge should provide the clinician with copies of any court orders. When any medical evidence is received, this must be considered by the judge at a hearing. If the evidence satisfies the judge that the party does not have capacity, that finding should be recorded, and a litigation friend should be appointed. Again, if the party is not represented, the judge will have to identify a suitable person to appoint. That person has to agree to act. The judge will need to explain what a litigation friend's obligations to the party would be, and the possible costs 'risks' if the party is a claimant and the claimant was to lose. There are particular forms that need to be completed for the court file by any appointed litigation friend.*

44. The working group agreed that to expect a judge to conduct an investigation in this manner, and to identify a suitable person to act as litigation friend, is unrealistic: judges and court staff do not have the time or resources to obtain and evaluate medical evidence. Furthermore, the legal basis on which the court and its staff could embark on such an exercise is unclear.
45. Therefore, in all but perhaps the most straightforward cases, it is likely to be necessary for the court to enlist the assistance of a third party to conduct any investigation on its behalf.
46. The experience of the working group was that in many cases judges rely on the unpaid work of law centres and other charities (such as Shelter), as well as local authorities (who may be party to the proceedings) to assist in both supporting the party and obtaining the necessary evidence. Reliance on

[26] Chapter 5, para 55.

the voluntary efforts of agencies that are only present in some areas is clearly insufficient and unsustainable. The general lack of support for vulnerable individuals in the community was highlighted by the experience within the working group of cases in which judges have adjourned possession hearings to enable a party to obtain a GP report or letter, only for the person to return to court having been unable to obtain such evidence, or, failing to return for the adjourned hearing.[27]

Other parties and their legal representatives

47. The Equal Treatment Bench Book suggests that, where another party to the proceedings has legal representation, it is appropriate to seek their assistance to investigate the issue of litigation capacity.[28]
48. The working group considered that:
    a. Other parties (particularly public body litigants) may hold records and/or be able to give evidence relevant to the issue of a party's litigation capacity.
    b. It may also be appropriate for them or their representatives to provide some, limited, administrative support to the court in seeking records from third parties.
    c. However, it would generally be inappropriate for them or their representatives to take on any more substantive role in receiving, considering and/or presenting evidence as to the party's litigation capacity given that it will involve them receiving confidential information relating to the party and/or the role may give rise to conflicts with their own interests in the underlying proceedings.

The Official Solicitor ('*Harbin v Masterman*' enquiries)

49. In addition to the Official Solicitor ("OS")'s role a as litigation friend of last resort, she may be invited by the court to conduct enquiries into any matter, including a party's litigation capacity. These are known as '*Harbin v Masterman*' enquiries.[29]

[27] This was thought to be a particular issue in rural areas where the party's journey to the court is more likely to be long and expensive.
[28] Chapter 5, para 54.
[29] After the case of *Harbin v Masterman (No. 2)* [1896] 1 Ch 351. See the witness statement of the late Official Solicitor, Alistair Pitblado, annexed to the judgment in *RP v Nottingham CC* [2008] EWCA Civ 462, [2008] 2 FLR 1516 at paras 8, 43 & 57.

50. However, the OS is not obliged to accept any invitation to act and has very limited resources, which are already stretched. Therefore, without significant additional allocation of funding, it seems unlikely that the OS could fulfil such a role at any significant scale.

Litigation friend (interim declaration of incapacity)

51. In one family law case the court, faced with a litigant who appeared potentially to lack capacity but who had failed to engage with the investigation of capacity, held that it "should on the available evidence make an interim declaration of lack of capacity thereby enabling for the Official Solicitor to be appointed as the mother's litigation friend and legal aid secured. Once that has happened it would then be possible and appropriate for the Official Solicitor, with the benefit of legal aid, to investigate for final determination the mother's capacity to conduct these proceedings".[30] It should be noted that such a declaration would only be effective in ordinary civil proceedings if the type of claim was within the 'scope' of legal aid, and the party was eligible on financial grounds, or if other sources of funding were available.
52. There is an equivalent power to make interim declarations under the CPR.[31] However, there is limited guidance on the threshold for exercising the power. It may be desirable for the court to have an express power to make interim declarations of incapacity — as in the Court of Protection[32] — for the limited purpose of allowing a litigation friend (who need not be the OS, unless there is no other appropriate person to act) to investigate and present evidence for a final determination on the issue of the party's capacity.[33]

Other potential sources of third-party assistance

53. The Working Group also discussed other potential sources of third-party assistance in investigating capacity, and considered the following existing schemes in other contexts: Approved Legal Representatives in the Court of Protection, Qualified Legal Representatives in domestic abuse cases and Assessors in Equality Act 2010 cases [see Appendix 2].

[30] *CS v FB* [2020] EWHC 1474 (Fam), [2020] COPLR 762, Mostyn J at para 16.
[31] r.25.1(1)(b).
[32] Section 48(a) Mental Capacity Act 2005.
[33] It would, however, be necessary to ensure that — unlike following the final appointment of a LF, who has sole authority to decide how a protected party's case should be conducted — the party was not prevented from putting forward any other evidence or submissions that they might wish, in order to dispute the suggestion that they lack capacity.

The court's powers

54. The working group agreed that, while in practice the courts do order disclosure of medical and other records in the investigation of litigation capacity,[34] the power(s) under which they can — and circumstances in which they should — do so are insufficiently defined, such disclosure not falling clearly within the scope of the usual powers for non-party disclosure.[35]
55. The working group also discussed whether the civil courts should have powers similar to those of the Court of Protection[36] to call for a report on the party's litigation capacity from the Public Guardian, a Court of Protection Visitor, a local authority and/or an NHS body. However, the working group is keenly aware of the pressures those bodies already face, and the limited funding available to them. Additional resources would need to be made available if the civil courts were to have such powers.
56. The working group considered that great care would be needed in relation to the exercise of all of the above powers since ordering a report or disclosure of records from a treating clinician or other professional would raise professional ethical issues for that professional, and could also cause irreparable harm to a vital relationship between the party and the professionals involved in their treatment and care.

Consultation questions

13) Do you think any of the following should be involved in the investigation of an unrepresented party's litigation capacity:

- **a. The court?**
- **b. Other parties and/or their legal representatives?**
- **c. The Official Solicitor (*Harbin v Masterman* enquiry)?**
- **d. Litigation friend (interim declaration of incapacity)?**
- **e. Other (please specify)?**

14) Do you have any comments to make in relation to your answers to the previous question?

[34] See e.g. Bradbury v Paterson [2014] EWHC 3992 (QB), [2015] COPLR 425, Foskett J at [50].
[35] The test being whether disclosure is "likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings" (CPR r.31.17), which is not suited to the non-adversarial issue of litigation capacity.
[36] Section 49 Mental Capacity Act 2005.

15) **Should the civil courts have more clearly defined powers to order disclosure of relevant documents for the purpose of investigating litigation capacity?**

16) **If so, in what circumstances should such powers be exercised?**

17) **Should the civil courts have powers to call for reports, similar to those of the Court of Protection, for the purpose of investigating and determining issues of litigation capacity?**

DETERMINATION OF THE ISSUE

57. Unless the issue of a party's possible lack of litigation capacity is uncontested this must ultimately be determined by the court. As the Equal Treatment Bench Book states:[37]

> *It may be necessary to determine the issue of capacity at a separate hearing. … In legal proceedings, a judge makes the determination, not as medical expert but as a lay person and on the basis of evidence not only from doctors but also from those who know the individual.'*

58. How hearings to determine capacity should be conducted was the most difficult issue the working group considered, raising a number of issues as set out below.

The interests of other parties to the proceedings

59. As noted above,[38] a distinction must be made between a party's current litigation capacity and a party's past litigation capacity, or their mental capacity in relation to other matters. The working group agreed that other parties will generally have no legitimate interest in an assessment of *current* litigation capacity. However, in exceptional cases other parties may have a legitimate reason to make representations or bring evidence before the court, e.g. when they have compelling evidence that the party whose capacity is at issue is seeking to mislead the court for tactical reasons.
60. For this reason, the working group agreed that it is important that consideration of these issues by the court are kept separate, with any determination of current litigation capacity being strictly limited to this issue.
61. Further, the working group was concerned that — even if they did not participate — the attendance of other parties (and non-parties) at any public hearing to determine a party's litigation capacity would involve disclosure of confidential information and could be prejudicial, at a point in proceedings when the party's interests cannot properly be protected. The group was broadly in agreement that other parties (and non-parties) could, and should, be excluded from attendance at the hearing where this is necessary to protect the interests of the party whose capacity is in issue. The group also discussed whether anonymity orders and reporting restrictions would need to apply. However, it was also

[37] Chapter 5, para 11.
[38] See 'The nature of the issue'.

mindful of the importance of open justice, reflected in recent moves towards greater transparency in both the Court of Protection and the Family Courts.

62. Ultimately, the group was not able to agree on whether there should be a general rule or presumption in relation to these issues, or whether they should be assessed on a case-by-case basis and, if so, what approach should be taken.

The role of the party's own legal representatives

63. Where a party is legally represented and the issue of capacity is to be determined by the court, the most likely scenario is that the legal representatives believe their client lacks capacity but the party does not agree.[39] In such cases, the working group agreed that the role of the party's legal representatives was to assist the court, rather than to pursue a particular line of argument. It was also agreed that professional guidance clarifying the role of the party's legal representatives would assist.

Rights of appeal/review

64. The working group agreed that the party themselves must have a right to challenge a determination of the court as to their capacity. The issue is likely to arise only when the court determines that the party lacks capacity but the party disputes this. Given that a party challenging a finding that they lack litigation capacity is likely to be acting in person, and that their ability to conduct litigation may be impaired to some degree, any right of appeal or review would need to be by way of a simplified procedure.
65. The working group agreed that because the party's legal representatives would have no independent interest in the outcome of the capacity determination, they would have no standing to appeal any determination. However, some members of the group considered that there may be some merit in the existence of an exceptional procedure whereby, if the representatives considered that a determination was obviously and seriously flawed, they could refer the matter for review by a different judge in order to prevent an injustice.

[39] If there is no dispute between the representatives and the party (or those supporting the party) a litigation friend can be appointed without a court order, by the filing of a Certificate of Suitability by the litigation friend, see Appendix 2.

Consultation questions

18) Should there be a rule or presumption that other parties to the proceedings (and/or non-parties) cannot attend a hearing to determine a party's litigation capacity?

19) Should the party be granted anonymity and/or should reporting restrictions be imposed in relation to the hearing?

20) What form should a party's right to challenge a determination that they lack capacity take, to ensure they are able to exercise that right effectively?

21) Should a party's legal representatives be able to refer for review a determination on capacity which they consider to be obviously and seriously flawed?

SUBSTANTIVE PROCEEDINGS PENDING DETERMINATION

66. CPR 21.3(2) provides that a person may not, without the court's permission, make an application against or take any step in proceedings (other than issuing and serving a claim form or applying for the appointment of a litigation friend) against a protected party until they have a litigation friend.
67. The working group considered that the starting point in relation to the proceedings pending a determination of a party's capacity should be the same: that no steps be taken pending the determination and appointment of a litigation friend without the court's permission.
68. Similarly, the group considered that there was an argument for any existing orders — and in particular, any orders which might result in irremediable prejudice to the party before the issue of their litigation capacity is determined (e.g. an injunction with a power of arrest) — to be stayed pending the determination.
69. However, any decision by the court prohibiting further steps pending a determination, including the imposition of a stay to the enforcement of existing orders, must take into account the interests of other parties to the proceedings. It was agreed that a 'balance of harm' test should be applied by the court in such situations (similar to that found in section 33(7) of the Family Law Act 1996 in relation to occupation orders).

Consultation questions

22) Do you agree that pending a hearing to determine a party's litigation capacity, the starting point should be that no steps may be taken in the proceedings without the permission of the court?

23) Do you agree that pending a hearing to determine a party's litigation capacity, the starting point should be that any existing orders in the proceedings should be stayed?

24) If so, do you think those starting points should be subject to a 'balance of harm' test?

25) What factors should be included in such a test?

FUNDING AND COSTS

70. The working group is aware that additional funding will be needed to enable the courts to do justice to the parties when one party may lack litigation capacity. This could include funding to increase the capacity of the courts in terms of judicial and administrative staff and time; increasing the funding for the Official Solicitor's office; funding alternative third-party assistance for the courts; or creating a distinct form of legal aid funding to pay the costs of obtaining expert evidence and the support of lawyers for the discrete task of determining a party's litigation capacity. The Northern Ireland Court of Appeal recently observed:

> "*the affordability of justice, the availability of legal representation and the provision of support measures such as a litigation friend are closely related subjects, all of them inextricably linked to every litigant's fundamental rights of access to a court and to a fair hearing. An assessment in any given case that a litigant is entitled to the support of a litigation friend is a matter of enormous importance to the person concerned. Its value must not be underestimated. The need for a simple, accessible, expeditious and cheap framework to give effect to the assessment that any litigant should have the benefit of a litigation friend is incontestable. In the absence of this - coupled with the necessary related public funding* – […] *our legal system will find itself paying mere lip service to the hallowed common law right to a fair hearing*." [40]

71. The working group welcomes any proposals as to the most effective, and efficient, ways of funding what is needed to ensure that vulnerable parties who may lack litigation capacity, have access to justice. It is likely that in the final report more detailed proposals will be made as to the best ways of funding the measures that are needed.

Payment of up-front costs of investigation and determination

72. Where the court decides that an issue as to a party's litigation capacity needs to be determined there is an issue as to who will pay the various costs arising: both the costs of the party's legal representative

[40] *Galo v Bombardier Aerospace UK* [2023] NICA 50 at paragraph 59.

(or some other third party) to conduct the investigation and represent their interests at any hearing; and the costs of obtaining relevant evidence, most significantly the fees for any expert report.

Legal aid issues

73. Where the party has the benefit of a legal aid certificate, the funding position is relatively straightforward: the Legal Aid Agency will fund the party's representative to carry out the steps necessary for the issue of litigation capacity to be determined, including investigating the issue, obtaining disclosure and an expert report where necessary, and attending any relevant hearings. However, the working group is aware of a number of problems experienced in relation to legal aid.
74. First, to obtain a legal aid certificate the client must sign the application forms and provide evidence of means. If a client appearing to lack capacity seeks advice and representation from a solicitor (whether by themselves or with the assistance of a third party) the following issues arise: whether the client has the capacity to make the application; and the steps to be taken if the client appears unable or unwilling to comply with requests for financial information so that eligibility for legal aid can be assessed.
75. The working group agreed that a relatively simple measure could be taken to remedy this problem: permitting solicitors to sign application forms on the client's behalf, where they have reasonable grounds for believing the client may lack litigation capacity and is financially eligible for legal aid. Such a provision would be akin to the system in operation in relation to applications to the Mental Health Tribunal.[41] It could be limited to those legal aid providers who have 'delegated functions' enabling them to grant emergency certificates.
76. Secondly, under the current legal aid arrangements legal aid will only be available for a party who is financially eligible and where the claim is one that is within the 'scope' of legal aid.

[41] Regulation 5(1)(f) of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 provides:

> *The following forms of civil legal services may be provided without a determination in respect of an individual's financial resources—*
>
> *…*
>
> *(f) legal help in contemplated proceedings or legal representation in proceedings or contemplated proceedings in relation to any matter described in paragraph 5(1)(a) or (b) (mental health and repatriation of prisoners) of Part 1 of Schedule 1 to the Act to the extent that the individual's case or application to the relevant tribunal under the Mental Health Act 1983 or paragraph 5(2) of the Schedule to the Repatriation of Prisoners Act 1984 is, or is to be, the subject of proceedings before the relevant tribunal;*
>
> *…*

77. The working group considered the non-means tested legal aid that is available for those detained under the Mental Health Act 1983 and for matters concerning Deprivation of Liberty issues under the MCA 2005,[42] and whether a form of non-means tested legal aid might be made available for the discrete issue of determining the capacity of a party to civil proceedings. The working group agreed that there was a strong case for non-means tested legal aid being made available to enable a determination of capacity to be made, given the fundamental nature of the rights at issue.

Party's insurance or other third-party funding

78. Where the party has legal expenses insurance (or another source of third-party funding e.g. from a trade union), and the proceedings fall within the scope of that insurance, it may be that such funding could be made available to cover some of the expenses of an investigation and determination of capacity. However, the experience of the working group was that such funding was usually very restrictive and there remains the issue of who would make arrangements for such funding to be made available.

Party's own funds

79. Where neither legal aid nor some other source of funding such as insurance is available difficulties are likely to arise, in circumstances where the party does not accept that there is an issue as to their capacity and so is unwilling to pay the costs of investigation and determination of the issue. In addition, there is the question as to whether the legal representative has proper legal authority to apply the client's own funds for such purpose where they appear to lack capacity. [43]
80. In these circumstances, unless authority to use a client's own funds is obtained from the Court of Protection, it may be necessary for some other source of funding to be identified.

[42] It should be noted that non-means tested legal aid is only available in the Court of Protection for Deprivation of Liberty applications and not for applications made under s.16 of the MCA 2005.
[43] See Solicitors Regulation Authority, 'Accepting instructions from vulnerable clients or third parties acting on their behalf', 30 June 2022.

Other parties

81. In some cases, another party with sufficient resources may be willing to pay the upfront costs of the investigation and determination. However, this is only likely to be the case where that party is the claimant and so has an interest in the litigation proceedings.
82. In the case of *Bradbury v Paterson*[44] the Court held that it could use its general case management powers and/or its inherent jurisdiction to direct other parties to the proceedings to pay the upfront costs of the Official Solicitor acting as a litigation friend (for a party already established to lack capacity), "the initial outlay to be recoverable as part of the costs of the litigation in due course".[45] However, again, this will only be feasible where those parties have sufficient resources and may in any event be strongly objected to by them.

Central fund

83. In cases where none of the above options are feasible the working group agreed that it may be necessary for a central fund of last resort to be created, to fund the investigation and determination of capacity to ensure compliance with Article 6 ECHR and the common law right of access to justice.

Recovery between the parties

84. If the court determines that the party lacks litigation capacity and arrangements must be made to appoint a litigation friend, it is likely that the costs of the investigation and determination of the issue will be part of the 'costs in the case'. However, the position is less clear if the court decides that the party does have litigation capacity. Where the application for a determination was made by legal representatives of either the party themselves, or of other parties, the court is unlikely to order that the party bears the costs of the application and hearing. But an order that the legal representatives (who made the application) pay the costs, or that there be no order for costs, would provide a strong disincentive for legal representatives to seek such a determination.[46] The issue highlights some of the difficulties of giving the court (and the parties) an essentially inquisitorial role in what remains an adversarial system. The members of the working group were in agreement that to enable the court to

[44] [2014] EWHC 3992 (QB).
[45] [2014] EWHC 3992 (QB), [2015] COPLR 425, Foskett J at [46].
[46] See *McFaddens (A Firm) v Platford* [2009] EWHC 126. The application for a court determination was made by the party's legal representatives. The court found the party to have litigation capacity but that the lawyers were not negligent in making the application. It is unclear how the issue of costs was dealt with.

properly discharge its functions, funding must be made available to ensure that, where necessary, a party's possible lack of litigation capacity can be investigated and the issue determined by the court.

Consultation questions

26) Have you experienced problems securing legal aid for clients who appear to lack litigation capacity? If so, please summarise the nature of the problem.

27) Should legal aid regulations be amended to enable a solicitor who has reasonable grounds to believe a client to be financially eligible to sign legal aid application forms and obtain a legal aid certificate, limited to obtaining an expert report?

28) Should non-means tested legal aid be available for the limited purpose of investigating and determining the litigation capacity of a party to civil proceedings?

- **a. In all cases?**
- **b. In cases within the scope of civil legal aid, as set out in the Legal Aid Sentencing and Punishment of Offenders Act 2012?**

29) Do you have any experience of issues arising in relation to payment of costs of investigating and determining litigation capacity by the party's insurers or other third-party funding?

30) Where it is necessary to investigate and determine a party's litigation capacity and the party does not have the benefit of legal aid (or other funding) to pay these costs, should the court have the power to require another party to the proceedings with sufficient resources to pay these costs up-front:

- **a) In all cases;**
- **b) When the other party is the Claimant;**
- **c) When the other party is a public authority;**
- **d) When the other party has a source of third-party funding;**

Or,

- **e) Should the rules remain as they are (with the court able to order/invite such an undertaking in appropriate cases).**

31) Should a central fund of last resort be created, to fund the investigation and determination of litigation capacity issues where there is no other feasible source of funding?

32) On what principles should the costs of a determination be decided?

OTHER QUESTIONS

33) Do you have experience of issues relating to the procedure for determination of litigation capacity in the civil courts not referred to above?

34) Do you have any other suggestions for changes that would improve the way the civil courts deal with parties who lack capacity?

CONSOLIDATED LIST OF CONSULTATION QUESTIONS

NATURE OF THE ISSUE AND THE ROLE OF THE COURT

1) Do you agree that other parties to the litigation do not generally have any legitimate interest in the outcome of the determination of a party's current litigation capacity?

2) Do you agree that the approach to the issue should be inquisitorial, with the court ultimately responsible for deciding what evidence it needs to determine the issue?

IDENTIFICATION OF THE ISSUE

3) Is clearer guidance needed as to the duty on *legal representatives* to raise with the court an issue as to the litigation capacity of their *own client*?

4) What level of belief or evidence should trigger such a duty?

5) Is clearer guidance needed as to the duty on *legal representatives* to raise with the court an issue as to the litigation capacity of *another party* to the proceedings who is unrepresented?

6) What level of belief or evidence should trigger such a duty?

7) Should *other parties* to proceedings have a general duty to raise with the court an issue as to the litigation capacity of a party to the proceedings who is unrepresented:

- **a. In all cases?**
- **b. In some cases (e.g. where the other party is a public body, insurer etc.)?**

8) If so, what level of belief or evidence should trigger such a duty?

9) Should the Pre-Action Protocols be amended to require parties to identify issues of potential lack of litigation capacity at the pre-action stage?

10) Should key court forms (claim forms, acknowledgments of service and defence forms) be amended to include questions about whether another party may lack litigation capacity?

11) Should there be any particular sanction(s) for a clear failure by another party to raise the issue?

12) Do you have any examples of issues you have faced in practice when you have had to decide whether a client or another party was being 'difficult' or whether they might lack litigation capacity? If so, can you explain how these were dealt with.

INVESTIGATION OF THE ISSUE

13) Do you think any of the following should be involved in the investigation of an unrepresented party's litigation capacity:

- **a. The court?**
- **b. Other parties and/or their legal representatives?**
- **c. The Official Solicitor (*Harbin v Masterman* enquiry)?**
- **d. Litigation friend (interim declaration of incapacity)?**
- **e. Other (please specify)?**

14) Do you have any comments to make in relation to your answers to the previous question?

15) Should the civil courts have more clearly defined powers to order disclosure of relevant documents for the purpose of investigating litigation capacity?

16) If so, in what circumstances should such powers be exercised?

17) Should the civil courts have powers to call for reports, similar to those of the Court of Protection, for purpose of investigating and determining issues of litigation capacity?

DETERMINATION OF THE ISSUE

18) Should there be a rule or presumption that other parties to the proceedings (and/or non-parties) cannot attend a hearing to determine a party's litigation capacity?

19) Should the party be granted anonymity and/or should reporting restrictions be imposed in relation to the hearing?

20) What form should a party's right to challenge a determination that they lack capacity take, to ensure they are able to exercise that right effectively?

21) Should a party's legal representatives be able to refer for review a determination on capacity which they consider to be obviously and seriously flawed?

SUBSTANTIVE PROCEEDINGS PENDING DETERMINATION

22) Do you agree that pending a hearing to determine a party's litigation capacity, the starting point should be that no steps may be taken in the proceedings without the permission of the court?

23) Do you agree that pending a hearing to determine a party's litigation capacity, the starting point should be that any existing orders in the proceedings should be stayed?

24) If so, do you think those starting points should be subject to a 'balance of harm' test?

25) What factors should be included in such a test?

FUNDING AND COSTS

26) Have you experienced problems securing legal aid for clients who appear to lack litigation capacity? If so, please summarise the nature of the problem.

27) Should legal aid regulations be amended to enable a solicitor who has reasonable grounds to believe a client to be financially eligible to sign legal aid application forms and obtain a legal aid certificate, limited to obtaining an expert report?

28) Should non-means tested legal aid be available for the limited purpose of investigating and determining the litigation capacity of a party to civil proceedings?

- **a. In all cases?**
- **b. In cases within the scope of civil legal aid, as set out in the Legal Aid Sentencing and Punishment of Offenders Act 2012?**

29) Do you have any experience of issues arising in relation to payment of costs of investigating and determining litigation capacity by the party's insurers or other third-party funding?

30) Where it is necessary to investigate and determine a party's litigation capacity and the party does not have the benefit of legal aid (or other funding) to pay these costs, should the court have the power to require another party to the proceedings with sufficient resources to pay these costs up-front:

- **a) In all cases;**
- **b) When the other party is the Claimant;**
- **c) When the other party is a public authority;**
- **d) When the other party has a source of third-party funding;**

Or,

- **e) Should the rules remain as they are (with the court able to order/invite such an undertaking in appropriate cases).**

31) **Should a central fund of last resort be created, to fund the investigation and determination of litigation capacity issues where there is no other feasible source of funding?**

32) **On what principles should the costs of a determination be decided?**

OTHER QUESTIONS

33) **Do you have experience of issues relating to the procedure for determination of litigation capacity in the civil courts not referred to above?**

34) **Do you have any other suggestions for changes that would improve the way the civil courts deal with parties who lack capacity?**

APPENDIX 1: MEMBERS OF THE WORKING GROUP

1. Co-Chair Diane Astin – Housing member of Civil Justice Council
2. Co-Chair Daniel Clarke – Barrister, Doughty Street Chambers
3. Alex Ruck-Keene KC – Barrister with specialist practice
4. Susan Hardie – Senior Lawyer, Civil Litigation, Office of the Official Solicitor and Public Trustee
5. Sophy Miles – Barrister and former solicitor with specialist practice
6. Catherine Morley – Lead Solicitor with Shelter/Catherine Hose – Lead Solicitor with Shelter
7. DJ Michelle Temple – District Judge and Regional Lead Judge for the Court of Protection
8. Rebecca Scott – Director of Legal Services and Senior Solicitor with RCJ Advice
9. HHJ Karen Walden-Smith – Circuit Judge member of Civil Justice Council

APPENDIX 2: SUMMARY OF EXISTING PROVISIONS

This Appendix is for reference and seeks to summarise the existing position in relation to the following:

(1) Capacity and vulnerability – Practice Direction 1A
(2) Litigation Capacity - the Mental Capacity Act and caselaw
(3) The provisions of CPR 21 (parties who lack capacity)
    a. The procedure for the appointment of Litigation Friends
    b. The procedure for the approval of settlements
(4) The role of the Official Solicitor
(5) The provisions of CPR Part 39 – relating to hearings in private and anonymity
(6) Existing schemes for court appointed lawyers/experts to assist with discrete functions
(7) The powers of the Court of Protection to obtain information and reports (Mental Capacity Act 2005 sections 47-49)

Capacity and Vulnerability – Practice Direction 1A

1. Practice Direction 1A – Participation of Vulnerable Parties or Witness, came into force in May 2022, following the CJC report on Vulnerable Parties and Witnesses.[47] PD1A re-iterates that the overriding objective requires that, to deal with cases justly, the court should ensure, so far as practicable, that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence; and that the parties are required to help the court to further the overriding objective at all stages of civil proceedings. If PD1A is followed, a party who may lack capacity should be identified as a vulnerable party.
2. Under PD1A, the court is required to take all proportionate measures to address issues of vulnerability. A range of factors which may cause vulnerability are set out, including 'physical disability or impairment, or health condition' and 'mental health condition or significant impairment of any aspect of their intelligence or social functioning (including learning difficulties).' Clearly, the severity of any such an impairment may be at a level that means the party lacks litigation capacity. PD1A, para 6 provides: '[t]he court, with the assistance of the parties, should try to identify vulnerability of parties or witnesses at the earliest possible

[47] https://www.judiciary.uk/wp-content/uploads/2022/07/VulnerableWitnessesandPartiesFINALFeb2020-1-1.pdf.

stage of proceedings and to consider whether a party's participation in the proceedings, or the quality of evidence given by a party or witness, is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make directions as a result.'

3. If an early identification of vulnerability does take place, this is likely to identify parties who may lack capacity which may require further investigation and evidence.
4. The working group considers that the court will be required to adopt a more inquisitorial role to ensure that a potential lack of capacity is promptly addressed and resolved. Further, legal representatives, as officers of the court, will be required to assist in the process.

Litigation Capacity

5. In relation to court proceedings, the focus is on 'litigation capacity'. Having litigation capacity means being capable of understanding, with the assistance of explanations from legal advisers and other experts, the issues on which a person's consent or decision is likely to be necessary in the course of the proceedings.[48] The test for whether a person has capacity to conduct proceedings is set out in the MCA 2005 (CPR 21.1(2)(c)).
6. For the purposes of the MCA 2005, a person lacks capacity to make a decision if:
    a. They cannot understand, retain, use and weigh the information relevant to the decision or communicate their decision; and
    b. That inability is caused by an impairment or disturbance in the functioning of their mind or brain [MCA 2005, ss.2-3].
7. Sections 3(2) and (3) provides that a person is not to be regarded as unable to understand the information relevant to a decision if they are able to understand an explanation of it given in a way that is appropriate to their circumstances (using simple language, visual aids or any other means). And the fact that a person is able to retain the information relevant to a decision for a short period only does not prevent them from being regarded as able to make the decision.
8. Section 1 sets out five statutory principles, of which the most relevant for present purposes are:
    c. That a person must be assumed to have capacity unless it is established that they lack capacity;
    d. A person is not to be treated as unable to make a decision unless all practicable steps to help them to do so have been taken without success; and that

[48] *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889, Chadwick LJ at [75].

e. A person is not to be treated as unable to make a decision merely because they make an unwise decision.

9. Under the MCA, capacity is 'decision-specific' so that a person may have the capacity to conduct their own litigation but not to administer a large award of compensation. This decision-specificity also applies to different types of litigation, so a person may have the capacity to conduct a very straightforward case, but not a more complex one. On the other hand, a party must have capacity to make decisions about all issues that are likely to arise over the lifetime of the particular case, and this is to be judged by reference to the case they actually have as opposed to the case formulated by their lawyers.[49]

Part 21 Civil Procedure Rules

10. Part 21 of the CPR deals with the procedure in the civil court and was amended in April 2023. The amendments did not change the substantive position but incorporated the Practice Direction into the Rules. CPR 21 makes provision for 'protected parties', which (as set out above) mean those who lack capacity within the meaning of the MCA 2005. CPR 21 provides that:

    a. A protected party must have a litigation friend to conduct proceedings on their behalf (r.21.2(1)).

    b. A person may not, without the court's permission, make an application against or take any step in proceedings (other than issuing and serving a claim form or applying for the appointment of a litigation friend) against a protected party until they have a litigation friend (r21.3(2)).

    c. If, during proceedings, a party lacks capacity to continue to conduct proceedings, no party may take any further steps without the court's permission until the protected party has a litigation friend (r21.3(3)).

    d. Any step taken before a protected party has a litigation friend has no effect unless the court orders otherwise (r21.3(4)).

Litigation friends

11. A person willing to act as a litigation friend may be appointed by way of the following procedure:

Appointment without court order

12. The person wishing to act as litigation friend must file a 'certificate of suitability' with the court (r.21.5). The certificate of suitability (form N235) includes a statement confirming that the litigation friend consents

[49] *Dunhill v Burgin* [2014] UKSC 18: So, a party who lacked the capacity to understand that her lawyers had grossly undervalued her claim, was held not to have had the capacity to agree to a settlement.

to act, that they are able to conduct proceedings on behalf of the protected party competently and fairly and have no interest adverse to those of the protected party. The certificate requires confirmation that they know or believe the person lacks capacity, stating the grounds for the knowledge or belief. If those grounds are based on expert opinion, a copy of the opinion must be attached.

13. The certificate of suitability (and expert evidence, if relied upon) must be served on one of the following: an attorney under a registered enduring power of attorney; the donee of a lasting power of attorney; a deputy appointed by the Court of Protection, or, if there is no such person, an adult with whom the protected party resides or in whose care they are (r.21.5(5)).

Appointment by court order

14. An application for the appointment of a litigation friend by the court may be made by either the person wishing to be the litigation friend, or a party to the proceedings (r.21.6(2)). It must be supported by the same evidence as that for appointment without a court order: evidence that the proposed litigation friend agrees to act; that the applicant knows or believes the person to lack capacity, stating the grounds for the knowledge or belief, and with a copy of any expert opinion that is based on (r.21.6(3)-(4)).
15. An application for an order appointing a litigation friend must be served on the same persons as the certificate of suitability (r.21.8(1)) *and* on the protected party (unless the court orders otherwise) (r.21.8(2)).

Settlement of a claim

16. Any settlement, compromise or payment made by or on behalf of a protected party must be approved by the court (r.21.10).
17. Where money is recovered on behalf of a protected party, a litigation friend is entitled to recover from that money reasonable costs or expenses incurred on behalf of the protected party (r.21.12).
18. Where the proposed litigation friend is the Official Solicitor, the court order must make provision for the payment of any charges, expenses or disbursements (r. 21.6(6)).
19. CPR r.21.7 sets out the court's power to change a litigation friend and to prevent a person from acting as a litigation friend.

The Official Solicitor

20. The Official Solicitor (OS) to the Senior Courts is an independent statutory officer holder appointed under the Senior Courts Act 1981. The office derives from the long-established duty of the state to protect the

interests of people who lack capacity to protect themselves. The duties and responsibilities derive from statute, rules of court, direction of the Lord Chancellor, common law, or established practice.

21. The role and method of appointment is set out in a Practice Note on the Appointment of the Official Solicitor in Family Proceedings and Proceedings under the Inherent Jurisdiction in Relation to Adults (Jan 2017, updated May 2023)[50]

The OS as litigation friend

22. The OS is often described as being the litigation friend of last resort. This means that the OS will not accept appointment if there is another person who is suitable and willing to act as litigation friend.
23. However, this does not mean that the OS can act in every case where there is no other person suitable and willing to act as litigation friend. The OS will only consent to act if there is satisfactory security for the costs of her securing legal representation for the protected party.[51] In some cases the OS will also wish to be sure that there is security for any adverse costs orders which may be made against the protected party. Satisfactory sources of such security may be:

    a. The Legal Aid Agency where the protected party is eligible for legal aid;

    b. The protected party's own funds (provided they have the necessary ability to manage this aspect of their affairs or the Court of Protection has given authority for the recovery of costs from the party's own funds);

    c. An undertaking from another party to pay the OS's costs.

The OS' role in investigating potential lack of capacity – 'Harbin v Masterman' enquiries

24. '*Harbin v Masterman*' enquiries refer to the court's power to request the assistance of the OS to conduct enquiries on the court's behalf in relation to any issue, including whether a party has litigation capacity.
25. The January 2017 OS Practice Note makes clear that where a public body is seeking the assistance of the court but is unwilling to carry out the necessary enquiries, the OS may seek an undertaking from that public body to indemnify the OS in respect of the costs incurred by the OS in undertaking the enquiries.
26. The OS does not currently have the resources or funding to carry out *Harbin v Masterman* enquiries save in exceptional circumstances and the Equal Treatment Bench Book provides [Ch. 5, para 49]:

[50] https://www.gov.uk/government/publications/appointment-of-official-solicitor-in-family-proceedings-practice-note.

[51] The OS does not charge for her services acting as litigation friend, as she is funded to do so by central Government.

Where there are practical difficulties in obtaining medical evidence, the Official Solicitor may be contacted, although doing so should be a measure of last resort and all other options should be explored as the Official Solicitor is over-burdened and has limited resources. Because of this, involving the Official Solicitor will also result in delay to the process.

Examples of third parties appointed to assist the court in different contexts

Qualified Legal Representatives (QLRs)

27. QLRs are court appointed legal representatives whose role is limited to conducting cross examination. The Domestic Abuse Act 2021 amended s.65 of the Matrimonial and Family Proceedings Act 1984, so that in certain circumstances there is a prohibition on perpetrators/alleged perpetrators cross examining victims/alleged victims, and the reverse (victims having to cross examine perpetrators/alleged perpetrators). The scheme only applies to cases commencing on or after 21 July 2022. Guidance issued by the Lord Chancellor[52] sets out the role of QLRs, their appointment and remuneration. The following points should be noted:
    - The role is limited to conducting cross-examination 'in the interests of' a party. The QLR is not responsible to the party and there is no 'lawyer-client relationship';
    - QLRs must undertake training and have the necessary skills and expertise in cross examining vulnerable witnesses;
    - Local courts maintain lists of QLRs suitable for appointment;
    - Remuneration is on a 'fixed fee' basis. It is not part of the legal aid system but payments are administered by the Legal Aid Agency.
28. There is evidence that the current QLR system is not working well: insufficient numbers of applications by lawyers to be QLRs means there is a shortage of QLRs in some areas, leading to delays in hearings.

[52] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1101848/final-statutory-guidance-role-of-the-qualified-legal-representative.pdf.

Accredited Legal Representatives in the Court of Protection (ALRs)

29. This scheme also consists of accredited legal representatives (ALRs) appointed by the court. A judge in the Court of Protection has several options to ensure that a party can participate effectively in the proceedings, which includes such an appointment.[53] An ALR combines the role of litigation friend and legal representative, and therefore decides themselves what steps to take in the proceedings in the best interests of the person they are acting for.
30. The ALR scheme is now relatively widely used in the Court of Protection, but remains reliant upon there being a sufficient number of ALRs available to be appointed in a timely fashion in individual cases. There is no discrete funding for the ALR scheme so an ALR will be paid either though legal aid or by way of the private funds of the person assisted.

Assessors (including under the Equality Act 2010)

31. Both the County Court and the High Court may appoint suitably qualified 'assessors' to assist in the determination of the issues in a case.[54] CPR r35.15 provides that such an assessor will 'assist the court in dealing with a matter in which the assessor has skill and experience'. The remuneration of the assessor is determined by the court and forms part of the costs of the proceedings and a party may be ordered to deposit in the court office a specified sum for the assessor's fees.
32. The Equality Act s.114 sets out the jurisdiction of the County Court to hear Equality Act claims and provides that in such cases, the court *must* exercise its power to appoint an assessor unless the judge is satisfied there are good reasons not to do so. Assessors appointed in such cases will have skill and experience in the field of discrimination.

Hearings and anonymity – CPR Part 39

Hearings

33. CPR Part 39 deals with hearings and provides (r.39.2(1)):

> *The general rule is that a hearing is to be in public. A hearing may not be held in private, irrespective of the parties' consent, unless and to the extent that the court decides that it must be held in private …*

[53] See: https://www.lawsociety.org.uk/topics/advocacy/accredited-legal-representatives-in-the-court-of-protection.
[54] s63 of the County Courts Act 1984 and s70 of the Senior Courts Act 1981.

34. The criteria for a decision that a hearing, or any party of it, be held in private are that it is necessary to sit in private to secure the administration of justice *and* that the court is satisfied of one or more of the matters listed in CPR 39.2(3). These include that: (c) it involves confidential information … and publicity would damage that confidentiality; (d) a private hearing is necessary to protect the interests of any child or protected party; (g) the court for any other reason considers this to be necessary to secure the proper administration of justice.[55]

Anonymity

35. CPR 39(4) provides that 'The court must order that the identity of any person shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that person.'
36. CPR 39 also provides that (unless the court directs otherwise) where the hearing is in private and/or where the court has ordered that the identity of any person shall not be disclosed, a copy of the court's order to that effect shall be published on the website of the Judiciary of England and Wales and that any person who is not a party to the proceedings may apply to attend the hearing and make submissions, or apply to set aside or vary the order.

Powers of the Court of Protection to make interim determinations of capacity and obtain reports/information

The Mental Capacity Act 2005

37. Section 48 of the MCA provides that the Court of Protection may make an order or give directions where there is "reason to believe that" a person ("P") lacks capacity in relation to a matter in which the Court of Protection has jurisdiction where it is in P's best interest to make the order, and give the directions, without delay. This means that there is a clear basis upon which the court can investigate

[55] The other specified matters in CPR 39(3) are: (a) publicity would defeat the object of the hearing; (b) it involves matters relating to national security; … (e) it is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing; (f) it involves uncontentious matters arising in the administration of trusts or in the administration of a deceased person's estate.

the question of whether the person has or lacks the material decision-making capacity. There is no such equivalent statutory provision governing proceedings before the civil courts.

38. Section 49 MCA enables the court to exercise its inquisitorial jurisdiction as regards the person's capacity (and best interests). It provides that where the court is considering a question relating to P, the Court of Protection may require a report to be made by the Public Guardian or a Court of Protection Visitor, a local authority or an NHS body on such matters as the court may direct and provides that the Public Guardian or a Court of Protection Visitor preparing a report at the request of the court may, 'at all reasonable times', examine and take copies of any health record, or records held by social services authorities or other registered health and social care bodies. The Court of Protection can direct the attendance of a Special Visitor, i.e. a registered medical practitioner, to provide a report upon (amongst other matters) the person's capacity to make relevant decisions.
39. Where a report is prepared under section 49, the costs of so doing are either met out of central Government funds (in respect of Visitors, who are administered, and in some cases employed, by the Office of the Public Guardian) or the local authority or NHS body which has provided the report.

TABLE OF ABBREVIATIONS AND ACRONYMS

Abbreviation or acronym	Meaning
ALR	Accredited Legal Representative
CJC	Civil Justice Council
CPR	Civil Procedure Rules
MCA	Mental Capacity Act
NHS	National Health Service
PD	Practice Direction
QLR	Qualified Legal Representative