Bar Council response to the Civil Justice Council (CJC) Consultation on Procedure for Determining Mental Capacity in Civil Proceedings

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the CJC Consultation on Procedure for Determining Mental Capacity in Civil Proceedings.[1]

2. The Bar Council represents approximately 18,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

4. The Bar Council notes that this consultation focuses on civil proceedings governed by the Civil Procedure Rules, but there are other jurisdictions in which the

[1] https://www.judiciary.uk/wp-content/uploads/2023/12/CJC-Capacity-Consultation.pdf

assessment of mental capacity is just as important and difficult, such as in Employment Tribunals, other tribunals, and in family law proceedings. The Bar Council anticipates that any changes made would be influential if not persuasive in a wider context. By way of example in Jhuti v Royal Mail Group [2018] ICR 1077, EAT it was held that there is no express power in Employment Tribunals Act 1996 or 2013 Employment Tribunal Rules of Procedure to appoint a litigation friend but it is within the Employment Tribunal's power to make a case management order in this regard, and that CPR 21 provided guidance relevant by analogy.

Question 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?

5. Yes, the Bar Council considers that other parties to the litigation do not have a legitimate interest in the outcome of the determination of a party's *current* litigation capacity in the sense described in the consultation i.e., it is not an *inter partes* issue.

6. We draw a necessary distinction between an interest in the specific sense described in the consultation and a general interest in how proceedings are conducted. An obvious example of the latter is where a court determines, wrongly, that an unrepresented party has capacity, and this impacts upon the conduct of a hearing or creates difficulties in communications between the parties such as in correspondence. Further, in the same way that another party may have a legitimate interest in issues about a party's past litigation capacity, it has an interest in the broader sense in the correct outcome being reached in respect of the litigant's current capacity which will govern how future steps in the litigation are managed and handled, and it may affect the costs incurred by the other party in managing the attendant difficulties of a party who does not have capacity continuing to litigate without a litigation friend in place. Plainly, there is a crossover in respect of the issues covered by s.3 Mental Capacity Act 2005 (MCA 2005) which are matters covered in part by the Equal Treatment Bench Guide in respect of the conduct of proceedings. Further, if a person who lacks capacity is treating other parties inappropriately e.g. aggressively, then even if that issue has not been determined by the court, it is a matter which a judge or tribunal must have regard to and address. However, the Bar Council readily accepts that an interest in these sorts of issues is different to an interest in the outcome of a decision as to whether

a litigant meets the test of incapacity set out in ss.2 and 3 Mental Capacity Act 2005 (MCA 2005).

Question 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.

7. The Bar Council strongly agrees that the approach to be taken in determining capacity should be an inquisitorial one and not an adversarial one. Related applications may be adversarial in nature, for example as to whether to adjourn a hearing and there is no basis for applying an inquisitorial approach to anything other than the determination of capacity in this context. The parties and their legal representatives should all, to the extent that they can, assist the court in furthering the overriding objective whether the proceedings are in an inquisitorial or adversarial phase.

Question 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*?

8. Yes. Legal representatives would be assisted by having a single formulation of the precise threshold for raising an issue as to the litigation capacity of their own client. The current situation, where there are different descriptions of the threshold, is apt to lead to confusion and uncertainty about whether a legal representative is under a duty to raise such an issue.

Question 4

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

9. The Bar Council is of the view that the duty should be triggered when the representative has a reasonable belief that their client may lack capacity. This would give clear guidance in ordinary language which is familiar to civil practitioners. It is also an appropriate threshold at which the court should be made aware of a potential issue of capacity. Referring to 'risks', 'doubt', 'reasonable doubt' is unnecessary and potentially confusing, for example 'reasonable doubt' evokes the wording of the criminal standard of proof. Legal representatives would also benefit more generally

from guidance as to what factors to consider when deciding whether the threshold for triggering the duty is met.

Question 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?

10. Yes. As set out above in the answer to Question 1, the other parties to the litigation have a general interest in how the proceedings are conducted and a particular interest in the correct outcome being reached in respect of issue about a litigant's current litigation capacity. This may have an impact on case management and potentially costs, if a party without capacity continues to conduct the litigation without a litigation friend. Although legal representatives have a paramount duty to the court, this may conflict with their own client's interests when considering issues of capacity. It is therefore at least as important for legal representatives to know when they should raise an issue as to the litigation capacity of another party as it is for them to know when to raise an issue about the capacity of their own client.

Question 6

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

11. The Bar Council is of the view that the duty should be triggered when the representative has a reasonable belief that another party may lack capacity. This is similar wording to the Bar Council's proposed threshold for a legal representative to raise an issue of capacity about their own client (see Question 4 above) and it therefore has the benefits of clarity and consistency. Although the legal representative will not have the same level of information about the party in question as they would about their own client on which they might form a 'reasonable belief', it is an appropriate threshold for the court to be made aware of a potential issue of capacity by a legal representative about another party.

Question 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.)?

12. Yes, in all cases. As set out above in the answers to Questions 1 and 5 above, the other parties to the litigation have a general interest in how the proceedings are conducted and a particular interest in the correct outcome being reached in respect of any issue about a litigant's current litigation capacity. A general duty on parties to raise with the court an issue of capacity about another party with assist in the administration of justice, promoting efficient case management and reducing the risk of a party lacking capacity continuing to litigate without a litigation friend.

Question 8

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

13. The Bar Council is of the view that the duty should be triggered when the party has a reasonable belief that another party may lack capacity. This is an appropriate threshold for the court to be made aware of an issue of capacity by a party, just as by a legal representative. Applying the same threshold for parties and legal representatives (see answers to Questions 4 and 6 above) provides certainty and consistency.

Question 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?

14. The Bar Council considers that the overriding objective would be better met by issues around capacity of a party to litigate being raised at the earliest opportunity and as soon as they are identified. This is in line with Kennedy LJ's suggestion in *Masterman-Lister*. Amending Pre-Action Protocols to include consideration of a party or parties' capacity to litigate would enable the court to case manage these issues from the start and would afford greater protection to a party lacking litigation capacity. The Bar Council also considers that this change in approach would provide some protection to other parties who may undertake steps in the proceedings which are later deemed to have no effect as these could be avoided or held off.

Question 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?

15. The Bar Council considers that key court forms should be amended to include questions about whether another party may lack capacity. Making these changes would ensure that the issue is kept under active consideration for the duration of the proceedings. The Bar Council considers this would particularly support unrepresented parties, who may be unfamiliar with litigation capacity issues (and for whom a duty to raise these issues should be imposed, in the Bar Council's view). This approach would emphasise that the question of capacity to litigate is not fixed in time and can change over the life of a case.

Question 11

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

16. The Bar Council does not consider that sanctions for a clear failure by another party to raise the issue would be appropriate. The Bar Council considers that such an approach would risk parties concealing the issue, for fear of being penalised for not having raised it sooner. This risk is greatest with unrepresented parties, who may have limited familiarity with capacity issues and whose duty to flag the issue is not attached to any wider duty under a code of conduct. In circumstances where a party has failed to raise the issue, the court has the power to recognise this in its assessment of costs and to deem costs incurred as a consequence of the issue not being raised as not reasonably incurred. The Bar Council considers this a sufficient penalty without acting as a deterrent to raising the issue.

Question 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)?**

Question 14

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

17. As stated in answer to question 2 above, the Bar Council agrees that the approach to be taken in determining capacity should be inquisitorial. The consequence of this position is that Court must be involved in the investigation of an unrepresented party's litigation capacity.

18. However, the Bar Council accepts the CJC's proposition that to expect a judge to conduct an investigation is unrealistic. Not only do judges and court staff not have the time or resources, but because civil justice in this Country is adversarial to expect the judiciary to undertake an independent inquisitorial investigation would require them to undertake activities alien to their role as arbiter in adversarial proceedings.

19. As such whilst the Court would in all probability need to initiate the investigation of an unrepresented party the investigation ought to be conducted by a third party. As to who that third party should be the Bar Council considers it unrealistic to have other parties to the litigation undertake any substantive role in the investigation of an unrepresented party's litigation capacity because of the obvious potential conflict of interest. There may be greater scope for professional representative of other parties to undertake the investigation, by, for example, commissioning a medical report, as whilst the conflict of interest would remain the solicitor or other professional representative would be an officer of the court, and bound by a code of conduct which ought to blunt the conflict of interest. Such a solution is, however, in the view of the Bar Council suboptimal as a potential conflict of interest would remain, and funding would, or may be, problematic and there appears no compelling reason for requiring another party to fund the investigation. However, if problems of funding could be overcome this may provide the simplest method of the Court obtaining a report into an unrepresented party's litigation capacity.

20. In the Bar Council's view, the better (but not necessarily as pragmatic) option is for the OS (whether by a *Harbin v Masterman* enquiry or on the interim declaration of incapacity) to undertake the investigation. This appears to be exactly the type of situation the OS ought to be able to step in though funding and resource issues cannot be ignored.

21. The real issue, in the Bar Council's view is ensuring sufficient funding to pay for an investigation, which is often likely to mean a medical report.

Question 15

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

Question 16

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

22. In the Bar Council's view, it would be sensible to set out clearly defined, and restricted, powers for disclosure of relevant documents (likely to be restricted to medical and care records) to the Court and those appointed by the Court to undertake the investigation into the unrepresented party's litigation capacity. This will inevitably involve an invasion of the unrepresented party's privacy but is inevitable if an investigation is to occur as to litigation capacity.

23. The Bar Council consider that power to order disclosure should be based upon the Court a) having reason to question a party's litigation capacity b) that party being unrepresented and c) the identification by the Court of a suitable individual (e.g. the OS) undertaking the investigation.

Question 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?

24. Yes. This is the inevitable conclusion if one accepted the proposition, as the Bar Council does, that the Court ought to initiate an investigation into an unrepresented party's litigation capacity.

Question 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?

25. A litigant is not a protected party until a determination of incapacity is made at which point the prohibitions in CPR r.21.3(2)(b) and 21.3(3)[2] apply. As referred to, CPR r.21.3(2) allows the court to give permission for a step or steps taken in the proceedings, nonetheless. Plainly, it is desirable that the ring is held pending determination of capacity where protected party has not yet been afforded but may well be. The Bar Council agrees that in principle the appropriate starting point is that no steps may be taken in the proceedings without the permission of the court save as identified i.e. issuing and serving a claim form or applying for the appointment of a litigation friend, that is to say the provisions that exist apply at the point that a hearing to determine capacity is pending. That would presuppose that the issue of capacity was one genuinely raised for determine. However, there should be a means by which a party can raise with the court that concerns raised as to capacity are manifestly ill founded or based on a misunderstanding or on a cynical or improper purpose to stall proceedings for example.

26. This must also take into account the reality of a congested and stretched civil justice system in which correspondence can take many months to be acknowledged or responded to and hearings are not often arranged in a timely manner due to the pressures in and on the system overall. Further, capacity can fluctuate and so there needs to be a mechanism by which an automatic stay can be lifted in a timely manner if capacity is no longer in issue, even if this is temporally limited. The Bar Council therefore suggests that some thought should be given to whether a dedicated administrative and judicial resolution route should be established to deal with urgent applications of this nature where a party's current capacity is in question.

Question 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?

[2] In Family proceedings these provisions are mirrored in FPR r.15.3.

27. Yes, this is the appropriate starting point in the Bar Council's view subject to the comments above and below.

Question 24

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

28. The Bar Council considers that the Working Group's concern that the staying of existing orders could give rise, in some circumstances, to irremediable prejudice to a party, is a point that is well made and does need to be addressed. It also notes that capacity may exist for some purposes but not others (see paragraph 34 per Munby J in Sheffield CC v E & S [2005] Fam 236 for helpful dicta in this regard). Ultimately, the Bar Council agrees that a test which allows a judge to weigh up relevant factors before determining whether to depart from the ordinary principle that all orders should be stayed pending determination of capacity is a sensible way forward. The balance of harm test adopted in relation to occupation orders in family proceedings is a good starting point but as that test is rightly focused on those types of orders and proceedings under Family Law Act 1996 (FLA 1996), including the context that the interests of the child are paramount, it does require further refinement to render it fit for this purpose. The Bar Council notes that in non-molestation order cases the test is wider and the court is required to have regard to all of the circumstances of the case including the need to secure the health, safety and wellbeing of the applicant and any relevant child (s.42(5) FLA 1996). We consider that a test which allows for all of the relevant circumstances to be taken into account with a focus on the balance of harm would be a helpful one for the court to adopt.

Question 25

What factors should be included in such a test?

29. The Bar Council considers that the factors open to the court to consider must not be closed. The factors which could be relevant are myriad, but the key ones appear to be:

- The likelihood that the determination will be that the litigant lacks capacity having regard to available medical and other relevant evidence;

- The likely time before any such determination is made;
- The gravity and effect of the orders in existence on any party to the proceedings and anyone legitimately affected by them;
- The balance of harm in staying the orders as opposed to upholding them having regard to the health, safety and wellbeing of anyone affected by such orders;
- The availability of interim review mechanisms should the stay / upholding of orders require further consideration due to any material change of circumstances against the context of the likely availability of court resources to address any such application(s) in a timely manner;
- Any other circumstances which the court considers relevant including any rights of parties or affected persons under ECHR.

Question 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.

30. Solicitors would be better placed to answer this question.

Question 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?

31. Yes.

Question 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?

32. In all cases. It is a fundamental access to justice point.

Question 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?

33. No.

Question 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 upfront:

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).

34. Other parties should not be required to fund an assessment, nor should the Court be inviting another party to give an undertaking to fund. Whilst it depends on the nature of the incapacity, the impact on the person of a pursuing party funding a capacity assessment may make their health worse. Historically courts have had the power to order things with public funding picking up the tab – a dock brief for example. Given how fundamental the issue is and given the strong presumption of capacity, the simple answer is that any court should be able to direct an assessment with the funding automatically being picked up by the state.

Bar Council[3]

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[3] Prepared by members of the Law Reform Committee, the Ethics Committee and the Legal Services Committee