The consultation closes on **17 March 2024 at 23:59**.

Consultees do not need to answer all questions if only some are of interest or relevance.

Answers should be submitted by PDF or word document to **CJCCapacityConsultation@judiciary.uk**. If you have any questions about the consultation or submission process, please contact **CJC@judiciary.uk**.

Please name your submission as follows: ‘name/organisation - CJC Capacity Consultation’

As part of the consultation process, there will be a seminar in early 2024. Please fill in the following form to register your interest: [**https://forms.office.com/e/QK04WXLwZG**](https://forms.office.com/e/QK04WXLwZG).

**You must fill in the following before submitting your response:**

|  |  |
| --- | --- |
| Your response is (public/anonymous/confidential): |  |
| First name: |  |
| Last name: |  |
| Location: |  |
| Role: |  |
| Job title: |  |
| Organisation: |  |
| Are you responding on behalf of your organisation? |  |
| Your email address: |  |

**Information provided to the Civil Justice Council:**

We aim to be transparent and to explain the basis on which conclusions have been reached. We may publish or disclose information you provide in response to Civil Justice Council papers, including personal information. For example, we may publish an extract of your response in Civil Justice Council publications, or publish the response itself. Additionally, we may be required to disclose the information, such as in accordance with the Freedom of Information Act 2000. We will process your personal data in accordance with the General Data Protection Regulation.

Consultation responses are most effective where we are able to report which consultees responded to us, and what they said. If you consider that it is necessary for all or some of the information that you provide to be treated as confidential and so neither published nor disclosed, please contact us before sending it. Please limit the confidential material to the minimum, clearly identify it and explain why you want it to be confidential. We cannot guarantee that confidentiality can be maintained in all circumstances and an automatic disclaimer generated by your IT system will not be regarded as binding on the Civil Justice Council.

Alternatively, you may want your response to be anonymous. That means that we may refer to what you say in your response, but will not reveal that the information came from you. You might want your response to be anonymous because it contains sensitive information about you or your organisation, or because you are worried about other people knowing what you have said to us.

We list who responded to our consultations in our reports. If you provide a confidential response your name will appear in that list. If your response is anonymous, we will not include your name in the list unless you have given us permission to do so. Please let us know if you wish your response to be anonymous or confidential.

**The full list of consultation questions is copied below for ease:**

### 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?**

1. **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

1. **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*?**
2. **What level of belief or evidence should trigger such a duty?**
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 *another party* to the proceedings who is unrepresented?**
4. **What level of belief or evidence should trigger such a duty?**
5. **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:**
	1. **In all cases?**
	2. **In some cases (e.g. where the other party is a public body, insurer etc.)?**
6. **If so, what level of belief or evidence should trigger such a duty?**
7. **Should the Pre-Action Protocols be amended to require parties to identify issues of potential lack of litigation capacity at the pre-action stage?**
8. **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?**
9. **Should there be any particular sanction(s) for a clear failure by another party to raise the issue?**
10. **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

1. **Do you think any of the following should be involved in the investigation of an unrepresented party’s litigation capacity:**
	1. **The court?**
	2. **Other parties and/or their legal representatives?**
	3. **The Official Solicitor (*Harbin v Masterman* enquiry)?**
	4. **Litigation friend (interim declaration of incapacity)?**
	5. **Other (please specify)?**
2. **Do you have any comments to make in relation to your answers to the previous question?**
3. **Should the civil courts have more clearly defined powers to order disclosure of relevant documents for the purpose of investigating litigation capacity?**
4. **If so, in what circumstances should such powers be exercised?**
5. **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

1. **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?**
2. **Should the party be granted anonymity and/or should reporting restrictions be imposed in relation to the hearing?**
3. **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?**
4. **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

1. **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?**
2. **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?**
3. **If so, do you think those starting points should be subject to a ‘balance of harm’ test?**
4. **What factors should be included in such a test?**

### FUNDING AND COSTS

1. **Have you experienced problems securing legal aid for clients who appear to lack litigation capacity? If so, please summarise the nature of the problem.**
2. **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?**
3. **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?**
	1. **In all cases?**
	2. **In cases within the scope of civil legal aid, as set out in the Legal Aid Sentencing and Punishment of Offenders Act 2012?**
4. **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?**
5. **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:**
6. **In all cases;**
7. **When the other party is the Claimant;**
8. **When the other party is a public authority;**
9. **When the other party has a source of third-party funding;**

**Or,**

1. **Should the rules remain as they are (with the court able to order/invite such an undertaking in appropriate cases).**
2. **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?**
3. **On what principles should the costs of a determination be decided?**

### OTHER QUESTIONS

1. **Do you have experience of issues relating to the procedure for determination of litigation capacity in the civil courts not referred to above?**
2. **Do you have any other suggestions for changes that would improve the way the civil courts deal with parties who lack capacity?**