Procedure for Determining Mental Capacity in Civil Proceedings Working Group
Civil Justice Council

CJCCapacityConsultation@judiciary.uk

16 March 2024

Dear Sir/Madam,

The Association of Consumer Support Organisations (ACSO) welcomes the opportunity to respond to the Civil Justice Council (CJC) consultation on the procedure for determining mental capacity in civil proceedings working group. This letter constitutes our response.

ACSO represents the interests of consumers in the civil justice system and the reputable, diverse range of organisations who are united in providing the highest standards of service in support of those consumers. The ability to access justice is fundamental to uphold the rule of law; and the assessment of a party's mental capacity to partake in civil proceedings is fundamental to the provision of the best evidence put before His Majesty's Courts and Tribunals Service (HMCTS) in civil proceedings and, therefore, to access to justice for all involved. This consultation is therefore important to our work.

The identification of people who lack the capacity to engage in proceedings without assistance, which the Mental Capacity Act 2005 defines as: "*a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain,*"[1] is vital to ensuring the structure of the civil justice process is appropriate in the modern age. To date, as identified in the consultation, the Civil Procedure Rules (CPR) have lacked any proper procedure for determining mental capacity. We believe the introduction of such a provision in the rules or in a new practice direction would lead to better and earlier awareness of such a crucial issue to ensuring a party can give their best evidence and participate fully in proceedings.

The introduction of CPR Practice Direction 1A – Participation of vulnerable parties or witnesses was universally welcomed, providing much greater detail on the factors which could cause vulnerability, how a court can assess which of these indicate vulnerability and which to consider before providing 'ground rules' and the types of special measures that could be implemented. However, it does not provide any process for the simple but structured determination of vulnerability, and makes no specific comment on those who lack capacity in accordance with the Mental Capacity Act. We are pleased the working group is taking steps to correct this.

We shall take each question in turn.

[1] Mental Capacity Act 2005; Part 1: Sec7on 2

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?

Procedurally speaking, yes. However, and as identified by the working group, there are certain situations where a financial and procedural interest is held by one party over the determination of the capacity of the other. The outcome should therefore be shared between the parties prior to any final hearing.

The most obvious example of this is the settlement of a case. Where a party lack the capacity to litigate and this hasn't been dealt with then any settlement of the matter isn't binding, as per *Dunhill v Burgin* (Nos 1 & 2) [2014] UKSC 18. As a result, all parties to the settlement would have an interest in ensuring that, where there are potential issues regarding litigation capacity, these are addressed under CPR Part 21 before settlement.

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?

Where intervention is required and the capacity issue either hasn't been dealt with by medical experts or derives from a pre-accident condition, possibly. Such an approach should utilise the specialism and expertise of an independent party (medical expert) in order to legitimise the process and prevent regular challenges to the outcome, the mitigation of which should be considered a measure of success for any new procedure.

However, where the party is represented, and unilaterally or bilaterally instructed medical evidence will cover the issue of litigation capacity - as is very often the case - court intervention is likely to increase costs and time delays unnecessarily. In addition, medical evidence already adduced on behalf of the claimant in proceedings will also usually cover the issue of their capacity to manage finances. There is potential for the claimant's evidence and the court's evidence to conflict, which may increase the number of matters in issue and the complexity of litigation. This could also impact the ability of Deputies, and their costs, to manage a fund.

Where one is required, the independent party will require access to the party, their documentary information such as medical records, and with sufficient resource to be able to conduct their role thoroughly (i.e. medical expertise).

In personal injury, the financial interest between the parties that rests on whether or not the claimant has mental capacity through the proceedings in some of the cases that will follow any new procedure should not be underestimated. In serious and catastrophic injury claims, an assessment that the claimant does not have capacity and is therefore a 'Protected Party' will result in the need for any settlement to be approved by the court.

We add the above context to help bring attention to the need for the new process to produce an outcome which is robust and, most often, final.

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?

ACSO members are very aware of their duty to identify, investigate and raise with the courts any concerns regarding the litigation capacity of their own client, particularly in the most complex/high-value matters in which capacity is more commonly an issue.

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

Representatives already have regulatory duties to act in the best interests of their clients, to 'know their clients' and to assess, at the agreement of their retainer and on an ongoing basis, their client's capacity to conduct financial matters and litigation. They similarly have very clear duties to the court and will receive regular training on these duties as provided by their compliance/training teams and provide an annual competency declaration for renewal of practising certificates. It is then incumbent on the representative to raise the issue with a medical expert, if one is instructed, for consideration at the assessment.

When there is a risk that their client meets the criteria set out on the Mental Capacity Act 2005 as a person who lack capacity, it should be clear to the representative that there is a need to raise these issues with the court. The point at which it is raised will depend on whether capacity changes during the course of the proceedings.

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?

In personal injury cases, it would be very rare for an unrepresented party to be a party to proceedings, and rarer still for them to have capacity concerns. That is not to say it is not possible.

It is worth noting that the case of *Dunhill* places the issue of a claimant's litigation capacity in their own interest as it is crucial to the validity of any settlement. The extent to which they require guidance is outside of our knowledge.

We can see the benefits of further guidance in non-personal injury cases, such as in contract claim and other types of consumer claims, and would therefore be in support of it in those circumstances.

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

As above, a representative will be aware of their duty to the court, and where there is a real risk the unrepresented party in proceedings may lack capacity, we would expect it to be raised. Guidance should be focused on how and when such an issue should be raised with the court, particularly when provided alongside any new CPR provision for assessment of mental capacity.

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? – Yes

b. In some cases (e.g. where the other party is a public body, insurer etc.)? – N/A

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

Please note our answer above.

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?

We don't believe this would be required in personal injury claims as these follow a well-trodden path and so we don't see the benefit in such a provision. There are already numerous milestones at which a representative is directly or indirectly required to assess their client's capacity, including when

agreeing their retainer and funding arrangements, when preparing their initial pre-action letter of claim, when preparing their case for arguments related to allocation to track, when deciding whether court proceedings will need to follow a paper trail or the digital process, when commencing proceedings and considering the need for a litigation friend to certify the accuracy of the court proceedings and so on.

However, we do consider there may be benefit in such a provision in other types of civil litigation.

We note that while the CJC has published the overarching response to the consultation regarding Pre-action Protocols, the specific responses for each protocol remain awaited. For non-personal injury cases, a provision for capacity should be considered for implementation.

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?

Our overarching answer is yes, though it is relevant that the Directions Questionnaire has included questions regarding vulnerability for some time and these were recently expanded upon, while the N1 Claim Form now also asks for the same information.

The predominant benefit would be in cases where the party whose capacity is in question is unrepresented. Where all parties are represented, those representatives will need to comply with the CPR in any event, and additional questions in this way would be unnecessary.

Mental capacity assessments should run alongside vulnerability assessments, though we would have no problem with the questions being expanded to include information regarding litigation capacity specifically for cases involving unrepresented parties.

For County Court damages claims, the Damages Claims Portal states, on the eligibility page, that the claimant must not be a protected party as defined in CPR 21.12(2)(d). Representatives will therefore need to assess again at this point if their client meets the criteria set out in CPR 21, if they haven't already been identified as doing so, and which route to court proceedings is applicable in their case.

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

No. The court's discretion to use general sanctions are sufficient, we would suggest.

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.

n/a

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

a. The court? – Yes, the court should act in an inquisitorial capacity in such cases

b. Other parties and/or their legal representatives? – Yes, but only to raise such issues with the court

c. The Official Solicitor (*Harbin v Masterman* enquiry)? -

d. Litigation friend (interim declaration of incapacity)? – No, only in that they may be able to assist the court with contact and the arrangements of assessments of the party.

e. Other (please specify)? – We would be open to suggestions on who might be involved in these proceedings, and how.

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

No

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

In personal injury cases, directions already provide for all medical records and the exchange of medical expert evidence.

However, in cases outside of personal injury and where medical evidence is not ordinarily filed and served, it may be necessary for the court to require the filing of medical records and similar disclosure in order for any assessment on capacity to be carried out properly. However, this should not become routine and the records should be kept confidential where possible. Any ability for the opposing party to trigger a standard process whereby such evidence is filed and served may be at risk of abuse of process behaviours, increased litigation costs, a greater use of court time and a detrimental effect on all court users.

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

As above.

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?

In personal injury cases, this can be handled at the directions hearing, with specific directions added for relevant medical reports should the reports already served or directed to be served not sufficiently cover off mental capacity.

It should be noted, though, that a represented party's capacity will already have been considered by their representative when proceedings are issued in order to comply with CPR Part 21.

In addition, unless a party objects to having a litigation friend, then as long as here are reasonable grounds to have a litigation friend then they are able to sign the Certificate of Suitability. Beyond this, it is not the concern of other parties.

The cases which should be targeted are those where there is no Litigation Friend and the party is unrepresented, but there appears to be issues with capacity.

In non-personal injury cases, having the power to call for such reports may be vital in allowing the courts to assess properly a party's mental capacity for litigation, though clear guidelines should be set on when this would be appropriate, and on what basis and to ensure the process is not undertaken for.

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?

Yes.

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

Yes, where there is an identified and obvious risk to the consumer.

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?

A right to challenge such a determination has to be provided. However, there need to be clear grounds on which a determination can be challenged, and possibly a triaging process whereby the courts can consider a challenge and choose to approve or decline to take it further with reasons given. Routine challenges without sufficient justification need to be prevented.

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?

Yes, in the event a new process is established. As things stand, if a party's legal representative has obtained evidence to suggest their client lacked capacity then there are avenues of testing that evidence, such as by getting a second opinion or asking further questions of an expert via the mechanisms already provided for in the CPR.

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?

While ACSO generally understands why this suggestion has been made, we are concerned, particularly as a result of the significant delays being experienced by court users across the board, that effectively placing progress of the matter on hold until capacity has been determined would result in significantly slowed justice.

Where a new process is established, the court should instead consider the use of a litigation friend in the intervening period, as is provided for in the current rules, such that progress is not stalled unnecessarily and avoiding increased costs and delayed justice.

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?

Not applicable, please see our answer to question 22.

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

Not applicable, please see our answer to question 22.

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

Not applicable, please see our answer to question 22.

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.

Legal Aid is not presently available in personal injury cases. For non-personal injury civil justice cases, our members advise they do not encounter any additional difficulties.

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?

Yes, in circumstances where delay may prejudice the client's position.

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?

ACSO's members who handle clinical negligence cases have advised they do not believe non-means tested legal aid is needed to be made available for determining capacity. This is because in both Conditional Fee Agreement (CFA) claims and Legal Aid Agency (LAA)-funded cases, a capacity determination should fall within the scope of the proceedings and be covered by the usual rules on costs.

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

See above.

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?

It is our view that these are often an area of contention for the paying party. If the rules could be more robustly set out around the recoverability of such costs as a necessary expense, it would be welcomed by ACSO's members.

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; - Yes – but we comment as follows: in personal injury cases, the Defendant should pay the costs of determining the Claimant's capacity, including additionally of any assessment needed of the Defendant's capacity. In matters not subject to Qualified One-Way Costs Shifting, the costs for the determination should follow the ordinary flow of costs for that type of case (i.e. 'costs in the case').

We consider it particularly unlikely that a determination will be requested by the representative of a party where it is largely unnecessary, which will only work to slow proceedings and increase costs unnecessarily. If a determination is made that the party does have capacity, this does not mean requesting the determination was unjustified or the determination has not benefited the parties. We believe costs should still flow in the same direction as an ordinary determination for that case of 'costs in the case' and there should be a presumption that such costs have been reasonably incurred unless demonstrated otherwise.

b) When the other party is the Claimant; - As above

c) When the other party is a public authority; - As above

d) When the other party has a source of third-party funding; - As above

Or,

e) Should the rules remain as they are (with the court able to order/invite such an undertaking in appropriate cases). Please see the above suggestions which would require rule changes.

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?

Yes, there needs to be a safeguard to ensure those without financial means to fund a determination themselves have this paid for by a funder of last resort.

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

Not applicable, please see our answer to question 30e.

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

n/a

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

The issue of who acts as a litigation friend should also be considered by the Civil Justice Council. A great deal of the need for the above is negated in practice by a sensible litigation friend acting on behalf of the consumer. Where there is no obvious and willing family member or friend then it is our understanding that there can be great difficulty, especially where a party may not agree they lack capacity, to identify who will be a litigation friend. In some cases a professional litigation friend will be required (usually where liability is not an issue and there are the available funds to do so, as they often require payment).

In liability disputed cases, sometimes the Official Solicitor can be persuaded to act but not always, and when they do agree to act response times and availability can be limited. Further exploratory work on how the system of litigation friends can be improved would be welcomed.

We hope this submission assists you to finalise the proposals, but if you require any further detail on any of the points raised above, or require any further information, please do not hesitate to get in touch.

Yours faithfully,

Matthew J Maxwell Scott
Executive Director
The Association of Consumer Support Organisations

[redacted]

Civil Justice Council

Procedure for Determining Mental Capacity in Civil Proceedings Consultation Paper

Response of the Association of His Majesty's District Judges ("ADJ")

Nature of the Issue and the Role of the Court

1. In general, yes, for the reasons identified by the Court of Appeal in Folks v Faizey [2006] EWCA Civ 381.

2. The determination of capacity is clearly not suited to the adversarial process. The ADJ would wish to stress the difficulties involved in investigating and determining the vital issue of capacity to conduct litigation in the current situation in the courts. The ADJ endorses the concerns expressed at paragraphs 14 to 16 of the consultation document, in particular the impact of the increase in litigants in person and the reduction of administrative and judicial resources.

Identification of the Issue

3. No. The ADJ considers that, while practical problems may certainly arise, the current guidance in decided cases and professional codes is sufficiently clear, and that legal representatives are generally sufficiently aware of their professional obligations to raise issues as to litigation capacity of their own client.

4. See 3.

5. Yes. The ADJ agrees with the statement at paragraph 34 of the consultation document.

6. While the circumstances will of course be different, there is no reason to distinguish between the level of belief or evidence required to raise an issue as to litigation capacity of a legal representative's own client, and another unrepresented party.

7. to 12.

The ADJ agrees that a duty imposed on other parties in certain proceedings, for example where that party is a public body, would assist the court to identify an issue as to litigation capacity at an early stage. This could be best achieved through amendment of the Pre-Action Protocols and key court forms, as in the case of vulnerability.

Investigation of the Issue

13. a. While it is of course the role of the court to determine litigation capacity, and this requires decisions to be made as to the nature and extent of the evidence required to do so, for both legal and resource reasons the civil court process is presently wholly unsuited to carry out the investigation exercise envisaged by the Equal Treatment Bench Book, as recognised at paragraph 44 of the consultation document.

b. The ADJ agrees that it may be appropriate for other parties to the litigation (particularly if public bodies) to disclose information from their own records, and/or to provide limited administrative support to the court in seeking documents from third parties. It is not, however, appropriate for other parties or their legal representatives to take a more substantive role.

c. In the experience of the ADJ, the involvement of the Official Solicitor in civil litigation is very limited indeed, no doubt for the resource reasons identified at paragraph 50 of the consultation document. While the ADJ would welcome a greater role for the Official Solicitor in the investigation of capacity, this is likely to require additional resources.

d. An express power to make an interim declaration of lack of capacity, as exists in the Court of Protection, would be a useful mechanism, with appropriate safeguards, to facilitate a more effective procedure for the investigation of the issue.

e. As has been shown by the Qualified Legal Representatives ("QLR") scheme under the Domestic Abuse Act 2021, third-party assistance requires adequate funding to be effective.

14 to 17.

Proper funding is essential to any proposed changes, particularly those which place additional judicial or administrative responsibilities on the civil court system. While the ADJ understands the CJC's concerns about the pressures on the public bodes identified, and the limited funding available to them, at present the consequences are that the civil courts are required to investigate and determine issues of capacity on an *ad hoc* basis with inadequate processes and evidence. The ADJ would welcome introduction in the civil courts of the power to call for reports, similar to those of the Court of Protection, provided adequate resources were made available to obtain such reports.

Determination of the Issue

18. No. Such a rule (or presumption) would offend against the principles of open justice and transparency. There is an important distinction between a party having no legitimate interest in an assessment of current litigation capacity, and being excluded, as a matter of course, from any hearing at which the issue is determined.

19. Not as a matter of course (see the previous answer). Anonymity and/or reporting restrictions should be considered on a case-by-case basis.

20. The ADJ does not consider that there is a need for an additional or simplified process to enable a party who has been found to lack capacity to challenge that determination.

21. Similarly, the ADJ does not consider that there is a need for an additional "review" process as suggested in paragraph 65 of the consultation paper.

Substantive Proceedings Pending Determination

22. Yes. This is the approach generally taken in civil proceedings where issues of litigation capacity are raised on grounds which appear to the court to be substantial.

23. To 25. Yes. The ADJ sees that there may be merit in a "balance of harm" test as proposed, although it may be difficult to apply where there are serious concerns about litigation capacity.

Funding and Costs

26 to 34

The ADJ does not wish to express a view on the issues raised in this section of the consultation paper.

March 2024

CJC Procedure for Determining Mental Capacity in Civil Proceedings
Consultation December 2023 - March 2024
Cover sheet

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**.

You must fill in the following before submitting your response:

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

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?**

   Answer. I disagree. Folks V Faizey is NOT authority for the position that other parties do not have a legitimate interest in the outcome of the determination. A separate issue arises before the determination procedure is begun, namely that other parties ought to be able to bring the issue that a party " may be a protected party" to the Court's attention and have legitimate interest, indeed Solicitors duty to the Courts trump their duty to their client and they MUST bring any issues to the Courts attention.

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?**

   Answer Yes. However, the Court should have guidance and not unfettered discretion.

Judges Barristers and Solicitors would rarely have specialist understanding of the nuances of determining capacity in specific contexts and giving adequate instructions for appropriate assessments and subsequent reports. Requests for reports can be tailored to specific outcomes which is contrary to an inquisitorial approach and in the interests of justice.

The content of assessments/ reports themselves ought to be formalised covering specific questions pertinent to decision making and understanding needed to conduct litigation.

For example:

Guidance/questions about **subject matter capacity** and how that relates to capacity to litigate ought to be given.

Sheffield CC v E and R [2004] EWHC 2808 (Fam): at [49]:

"Whilst it is not difficult to think of situations where someone has subject-matter capacity whilst lacking litigation capacity, and such cases may not be that rare, I suspect that cases where someone has litigation capacity whilst lacking subject-matter capacity are likely to be very much more infrequent, indeed pretty rare. Indeed, I would go so far as to say that only in unusual circumstances will it be possible to conclude that someone who lacks subject-matter capacity can nonetheless have litigation capacity."

Similarly, guidance/questions about **executive dysfunction** and capacity to litigate.

In TB v KB and LH (Capacity to Conduct Proceedings) [2019] EWCOP 14, the court found that P was unable to conduct the proceedings because the deficits in his executive function meant that he was unable to retain information (as he had short-term memory issues) or to use and weigh the information as part of making the decision; the court also found that while there were some compensatory strategies that could be deployed to assist P, they could not compensate for the deficits in his executive functioning. In TB & KH, the court had before it evidences of "glaringly obvious occasions when [P] has not been able to bring to mind information that it is important to know in the moment to make the relevant decision."

Guidance should also cover how common conditions like **dementia** impacts how the mind retrieves and weighs different information. A Local Authority in Yorkshire v SF [2020] EWCOP 15 (Cobb J)

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*?

Answer. Yes. A client may present as having capacity, however damage to executive functioning may not be evident.

The NICE Guidance defines 'executive dysfunction': "The completion of tasks that involve several steps or decisions normally involves the operation of mental processes known as 'executive functions'. If these executive functions do not develop normally, or are damaged by brain injury or illness, this can cause something called 'executive dysfunction'. This involves a range of difficulties in everyday planning and decision-making, which can be sometimes hard to detect using standard clinical tests and assessments".

Planning and decision making are clearly essential components to having capacity to litigate.

What level of belief or evidence should trigger such a duty? It should mirror the Equal Treatment Bench Book, "always investigate the question of capacity at any stage of the proceedings when there is any reason to suspect that it may be absent ".

Reasons could be numerous including age and context.

A Solicitor may not have any prior knowledge of a client's health or capacity, for example they may be unaware that a client has already been referred for a memory assessment as part of a formal diagnosis of dementia. Clients can present as having capacity and indeed resent any inquiry into this, however it is industry standard or a condition precedent in many situations to have a formal assessment and report before entering into various contracts, e.g. investments, if say a potential investor was of a certain age. Questions exploring this could be included in standard exercise carried out for ID/money laundering purposes with an obligation on the Solicitor to record their findings.

The “golden rule” of having an independent opinion when making a will seems to be adopted as one potential safeguard for ensuring validity. It ought to be commonplace in certain scenarios where age/mental deterioration or other potential issues of vulnerability/ safeguarding arise.

Susceptibility to pressure from others would also be an example. These scenarios must be fairly commonplace in private client practices.

In Masterman-Lister v Brutton & Co [4] Kennedy LJ said:

"31 … in the context of litigation rules as to capacity are designed so that Plaintiffs and Defendants who would otherwise be at a disadvantage are properly protected, and in some cases that parties to litigation are not pestered by other parties who should be to some extent restrained …" (see also Chadwick LJ at [65]).

Solicitors ought to be under a duty to investigate the issue correctly. Solicitors are NOT equipped to make an assessments as to capacity in many cases. The nature of the contract between a Solicitor and a client would mean that any retainer entered into could be voided if a client is found not to have capacity when they entered into the retainer. As such clear guidance/codes of conduct identified in steps would act as a protection to the legal representative.

4) 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?

Answer YES and NOT simply to limited to cases where one party is unrepresented. A legal representative cannot alas rely on the infallibility or complete integrity of the other parties’ legal representatives. Areas such as Private Client are invariably conducted from a small pool of legal representatives where they may be reluctant to call out unethical behaviour. My experience is that all legal representatives knew there was an issue about capacity and “tactics” and “ strategies” were employed and/or ignored, all of which seemed wholly unethical but perhaps commonplace in their adversarial lucrative practices.

Their first duty is to the Court and this trumps their duty to their clients and indeed should trump politesse shown towards members of their own profession and assumptions that the other party’s representatives, would have got it right or are “straight”. This duty should be set out in clear guidance/PD and perhaps in the White Book and footnotes used to explain any reference to parties who ought to be protected. The family courts refer to parties that “ may be “ protected. This should be replicated in the CPR. The duty would therefore be explicit in the CPR rules and run through the entire conduct of proceedings.

5) What level of belief or evidence should trigger such a duty? Mirror the Equal treatment Bench Book for Judges and the obligation must be to

“Always investigate the question of capacity at any stage of the proceedings when **there is any reason to suspect that it may be absent** “

Their own client may have prior knowledge of the other party’s capacity, an affidavit along with usual statements of truth etc could be given and any available evidence could be attached, such as prior MRI tests, diagnosis of dementia etc showing that there is a reasonable belief that there may be issues around capacity to litigate.

6) **Should *<u>other parties</u>* 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?** **<u>Yes,</u>** but not limited to where the other party is unrepresented. Alas the other party may not be competent or honest to follow guidelines and codes of conduct.

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

7) **If so, what level of belief or evidence should trigger such a duty? Answer Mirror** the Equal treatment Bench Book and the obligation must be to

"Always investigate the question of capacity at any stage of the proceedings when there is <u>any reason to suspect that it may be absent "</u>

The other party's legal representatives will rarely know or be able to see or converse with the opponent, dealing only with their legal representative and will rarely have access to existing medical evidence or be able to gather such evidence. They may be prompted about the situation by their own client who had a familial or close relationship or knowledge of the other party. The adversarial nature of e.g. private client proceedings means that the opponents' legal representatives will not necessarily cooperate to establish the facts around litigation capacity.

8) **Should the Pre-Action Protocols be amended to require parties to identify issues of potential lack of litigation capacity at the pre-action stage? Answer <u>Yes.</u>** However are these binding? or there may not be a Protocol covering a particular area, they are not brought before the Court necessarily, or may only be disclosed when litigation has run for many months.

9) **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? Answer <u>Yes</u>** It should be phrased as " may be a protected party" to mirror the family Courts procedural rules. . There should then be a duty set out in CPR that this issue MUST be raised at any/all hearings to avoid scenario where a Master or Judge does not address the issue and appeal or set aside consequences ought to be clearly set out. A corollary should be that there is a procedural requirement on Master/Judge to acknowledge whether there is an issue and steps taken to address it or not address it. The fact that this box may not be ticked correctly is not a reason not to include this. I imagine all steps taken act as safety sieves.

10) **Should there be any particular sanction(s) for a clear failure by another party to raise the issue? Answer YES.** Professional Conduct codes should emphasis it is a serious conduct issue. There ought to be costs sanctions and the legal representatives should be at risk of fees being unrecoverable or repayable including from their own client. The forms for Costs Assessments have a box which asks whether there is a capacity issue so presumably Costs Judges have been using this information to some end? Enquiries from costs judges may give some more information.

11) **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.**

Answer The Claimant/case was difficult by virtue of the claimant's frailty and memory and getting instructions from him. They maintained this did not raise any capacity to litigate issues.

He was then 87 in a wheelchair, suffering from advanced apraxia as a result of brain damage, diagnosed as having significant cognitive impairment , dementia and delirium by an MRI scan in 2019, with macular degeneration resulting in inability to read and totally dependent upon others for care, locked down in isolation in Cumbria during Covid. He was prevailed upon to take out a litigation loan of **£900 k at 24% i**nterest having exhausted his liquid assets to pay his legal fees. By the end of the trial his fees were over £1.5 million despite being told 18 months earlier that it would cost £200k.

My constant refrain was that "it was like taking candy floss from a baby" and he did not have capacity to litigate. This was based on personal knowledge of his executive dysfunction having lived with him and acting as his Attorney for Health and Property and Financial Affairs.

His lawyers admitted over a year before the trial that he understood very little for a short amount of time and would not be able to participate fully in a mediation and accepted he would not be able to give evidence at a trial. Despite this they maintained the charade until two days before trial they said he had taken a drastic turn for the worse and would not be able to give evidence. My solicitors knew this was a tactic.

It is simply scandalous that this was allowed to happen without a proper investigation into his capacity to litigate.

Despite the clear history of cognitive impairment the party's legal representatives maintained that there was no issue as to capacity and rebutted any questions as tactics or a " phishing expedition". The party lacked subject matter capacity as he could not remember any salient facts which formed the basis and context of the proceedings. His witness statement stated that he could not remember the facts litigated. No capacity to litigate assessment was ever disclosed or presented to the Court and his Solicitor maintained that she was in a better position to determine capacity to give evidence than a suitable medical opinion. My own representatives said they could not question that position. The Party's solicitors spoke of

challenges of getting instructions and partial medical reports as to frailty and the effect of giving evidence were produced which gave details which should have raised a suspicion as to capacity, but Justice Trower did not investigate the issues or facts. Ultimately the party did not appear as a witness and was not cross examined. Both sets of solicitors knew this was inevitable over a year before trial.

Several witnesses, including an ex Court of Appeal Judge Sir Jeremy Sullivan raised the issue of the party's capacity to litigate based on personal knowledge of the party, yet Justice Trower failed to investigate the potential lack of capacity despite an obligation upon the Court to do so and the Equal Treatment Bench Book's precept:

"42. Courts **should always** investigate the question of capacity at any stage of the proceedings **when there is any reason** to suspect that it may be absent. This is important because, if lack of capacity is not recognised, any proceedings may be of no effect."

The Equal Treatment Bench Book continues:

44. Solicitors acting for a party may have little experience of such matters and may make false assumptions of capacity on the basis of factors that do not relate to the individual's actual understanding. **Even where the issue does not seem to be contentious,** a judge who is responsible for case management may require the assistance of an expert's report.

INVESTIGATION OF THE ISSUE

12) 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)?**

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

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

Answer YES

15) **If so, in what circumstances should such powers be exercised?** Where a party is wilfully resisting existence and /or disclosure of relevant documents.

If a party does not appear in Court, the reasons should be investigated which may disclose a capacity to litigate issue. For example, non appearance due to e.g. frailty or inability to remember. In criminal proceedings this could impact on their ability to plead and being "unfit to plead" with procedural consequences. In Civil cases it may be necessary to have an exit route whereby the case is dismissed/withdrawn if there are found to be capacity issues and no willing suitable litigation friend, or the Official Solicitor cannot act rather than having a case stayed with no means of dismissing it or resurrecting it.

16) **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?**

Answer Yes Where the ambit or content of a report cannot be agreed between the parties within specified timescales. Note that a report is separate from an assessment. There may need to be guidance as to what correct assessments should cover.

DETERMINATION OF THE ISSUE

17) **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?**

Answer No

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

Answer No

19) **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?**

20) **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?**

Answer Yes.

SUBSTANTIVE PROCEEDINGS PENDING DETERMINATION

21) **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?**

Answer YES

22) 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?

Answer Yes

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

Answer No. It would be a waste of court time money fees etc if a party is found to lack capacity and all steps would have to be reversed.

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

OTHER QUESTIONS

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

What happens if a Judge simply ignores the imperative to investigate if there is any reason to suspect capacity issues?

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

There should be some mechanism whereby cases can be withdrawn/dismissed not simply Stayed if a person lacks capacity and there is no litigation friend/the Official Solicitor cannot act.

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]

16 March 2024

[redacted]

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

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. 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**.

You must fill in the following before submitting your response:

Your response is (public/anonymous/confidential):	Public
First name:	Hugh
Last name:	Wilkinson
Location:	Coventry
Role:	Solicitor
Job title:	Head of Housing
Organisation:	Central England Law Centre
Are you responding on behalf of your organisation?	Yes
Your email address:	[redacted]

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?

Yes. This should remain an independent decision for the court, informed as necessary by expert evidence. Generally there is no legitimate interest in the outcome of such a determination for other parties, certainly in the context we deal with (i.e. cases between landlord and tenant). By way of example, a finding that a tenant lacks capacity does not affect his or her obligations (for example to pay rent and not to cause nuisance) under a tenancy, nor does it affect the landlord's equivalent obligations (for example to keep the property in repair) .

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?

It is agreed that it should be an inquisitorial approach. The court is best equipped to evaluate evidence presented on the matter and reach a decision, whether with or without expert evidence.

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*?

Clearer guidance would further assist in navigating the process when capacity issues arise. It would also help if practice were consistent. We are aware of examples where courts have insisted that capacity issues be raised only by way of formal application, which we think is unlikely to be the correct approach. Clear guidance as to how such concerns should best be raised will help parties and the courts deal with these issues effectively.

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

"Reasonable belief" bearing in mind the legal representative's own judgment. Medical evidence will often be helpful, but should not be a prerequisite to the matter being considered by the court. There may be cases where medical evidence is neither necessary nor appropriate (see for example *Hinduja v Hinduja* [2020] EWHC 1533 (Ch))

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?

Being in an adversarial position makes this difficult and there is a potential conflict with the obligations under the SRA Code of Conduct to act in the client's (in this case the other party rather than the person whose capacity is in doubt) best interest, and it may be in the client's best interest to resolve the case more quickly, whereas capacity issues, are, realistically, likely to lead to delay to proceedings. Therefore, clear guidance would be particularly helpful.

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

"Reasonable belief", as mentioned above, but again there should be clearer guidance available on what type of evidence or belief would be necessary. We suggest that the level of belief/evidence triggering an obligation on another party's legal representative to raise the issue with the court should be the same as that on the party's representative, though we acknowledge that the party's representative would usually be in a better position to identify the issue.

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.)?**

We think there should be such a duty in all cases, although it will need to be recognised that when, for example, both parties are unrepresented, the court may need to take an active role as well. The reason for suggesting that this apply to all proceedings is that it seems unlikely that it could be fair that parties are only obliged to raise issues of capacity in some types of proceedings.

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

Reasonable belief. As mentioned above, medical evidence may assist but should not be required.

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?

In the housing context, the Pre-action Protocol for Possession Claims by Social Landlords has such a provision at paragraph 1.5(b) but the Mortgage Possession Pre-Action Protocol does not. There should be such provisions in all pre-action protocols in possession claims given the potential power imbalance. If a Pre-Action Protocol is introduced for possession claims by private landlords and/or for applications for injunctions under Part 1 of the Anti-social Behaviour, Crime and Policing Act 2014, we

would suggest similar provisions are included. Such protocols have been suggested. In ASB injunction cases this proposal has been made by the Civil Justice Council, and we would note that it is far from uncommon for such injunctions to be sought against persons with significant mental health difficulties, which raise issues of capacity.

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?

Yes; it is useful for parties to be prompted to review such issues at the stage of issuing proceedings/exchange of statements of case and address them earlier, rather than later, in the court process.

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

Yes. This could be in relation to costs. There is of course also the potential for professional consequences for legal representatives in the event of a clear failure to raise such 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.

Yes. This is not uncommon in our work bearing in mind that clients with mental health difficulties and/or learning disabilities in particular may struggle to give clear instructions on their cases and it is sometimes difficult to work out what the root of these diificulties is, i.e. is it due to an inability to process information, or to a desire to avoid difficult discussions, and what support can be put in place in this regard. Sometimes there will be little or no medical history (as in one case where a client was able to discuss certain matters coherently but quickly became verbally abusive when allegations of anti-social made against them were touched on). An expert assessment is usually arranged with the consent of the client. Decisions in this regard are not taken lightly and the reasons for requesting the assessment are explained clearly to the client. Where applicable, an application is made to stay or adjourn proceedings until the outcome of the report is received.

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?**

   Yes. The court is ultimately responsible for ensuring proceedings are fair and comply with Article 6 and, despite sometimes limited resources, should be in a position to take the lead in such investigations if necessary.

b. **Other parties and/or their legal representatives?**

   Yes, given the duty referred to above, but care, in any such investigations, should be taken to safeguard the unrepresented party's interests.

c. **The Official Solicitor (*Harbin v Masterman* enquiry)?**

   If necessary, i.e. if no other party is in a position to assist (e.g. if all parties are unrepresented and not in a position to assist the court effectively).

d. **Litigation friend (interim declaration of incapacity)?**

   Yes, if a litigation friend can be identified at that point who is provisionally prepared to act.

e. **Other (please specify)?**

   Not applicable.

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

In terms of the role of the other party's legal representative, it is important to have safeguards in place to prevent their becoming privy to personal information to which they would not otherwise be entitled, e.g. the unrepresented party's medical records.

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

Yes. Powers to make an order for disclosure against other parties on the court's own motion could help ensure a fairer process and resolve issues where it had become difficult to resolve capacity issues due to a lack of relevant evidence.

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

We would suggest that they should be exercised where requests for relevant documents, for example medical records, have been made to the party whose capacity is in doubt, and/or their treating teams, without success, and the court is satisfied that it is unable to reach a determination of capacity without such evidence. They should not be exercised routinely, but should be available to the court where necessary.

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?

Yes. This would appear to be a mechanism to avoid delay and reduce costs for parties in appropriate situations.

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?

Yes. There should be a rule or presumption to this effect since a hearing in relation to the determination of capacity is likely to involve confidential medical information being revealed which is not relevant to the case. The presence of other/non-parties is also likely to deter the party whose capacity is being determined from engaging fully with the process and could also give rise to perceptions of unfairness by the party whose capacity is being assessed. As to the position where the other party wishes to attend/be heard, it is, in our experience, not uncommon when capacity issues are raised for other parties to express doubts based on their own experience of the party and without systematic analysis of the test for capacity from the MCA 2005 (e.g. a housing officer will often say, in a case involving a tenant with severe mental health problems, that the tenant seemed to understand what was happening when they last spoke to them). It is acknowledged that there could be (rare) cases where another party had compelling evidence of attempts to mislead the court but we would suggest in such circumstances the other party should be required to apply for permission to attend the hearing with such evidence to be disclosed with the application.

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

We think that in general the party should be granted anonymity and reporting restrictions be imposed on the hearing, given the sensitive medical information under consideration and the client's difficulty in protecting their interests at that point.

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?

We agree with a simplified form for such a determination given that it is almost invariably going to be the case that a party wishing to challenge such a determination will be a vulnerable person with

significant mental health difficulties and/or a learning disability. An informal oral review before a different Judge might be an appropriate method.

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?

We think there could be merits in an exceptional procedure to allow this to happen, although there could be practical/procedural difficulties. Would this be distinct from the party's right to appeal a decision that was wrong in law, and how easily could the party's legal representatives' lack of standing be dealt with in framing such a procedure? We would suggest more consideration of how such a procedure would operate.

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?

Yes – this is fair and protects the party's position at a time when they, effectively, cannot take any steps themselves.

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?

Yes. This is fair and is likely to be particularly important where orders such as injunctions (which might have been made due to allegations which are linked to the party's health conditions) have been made and might carry draconian consequences (including arrest pursuant to a power of arrest and committal for contempt of court). A stay would prevent irreparable consequences for the party arising before his or her capacity is determined.

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

This seems to be a fair approach; unless the harm in imposing a stay is at least as great as that in not doing so, the existing orders should be stayed.

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

These might include:

- The consequences to each party of staying or not staying the orders.
- The interests of third parties, including those providing support to the party whose capacity is disputed.

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.

Yes. Such clients often struggle to engage with the process of applying for legal aid which, at least in the case of applications for legal aid certificates, involve answering extensive questions regarding the client's capital, income, home circumstances and access to insurance, and require the client to sign extensive declarations in relation to their obligations to report matters to the Legal Aid Agency. Making the nature and consequences of the application clear to clients who may lack capacity to conduct litigation can be very difficult, even if they appear to have capacity to complete the application for legal aid.

Clients who suffer from serious mental health difficulties or learning disabilities, will sometimes refuse to give full financial disclosure (one client providing bank statements which redacted details of everything, including balance and account number, apart from benefit payments) or struggle to understand which documents are required. Also, clients with these difficulties will often struggle to engage with services including attending pre-arranged appointments, or answering telephone calls.

While it could be possible for clients in such situations to have a prospective litigation friend sign these applications, if there is no family member or friend able to do (which is not uncommon) the litigation friend of last resort is the Official Solicitor. The Official Solicitor's practice is not to act without a legal aid certificate or costs undertaking in place.

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?

Yes, definitely

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?

We agree that it should be, certainly in all cases within the scope of civil legal aid, i.e. (b). In principle, its availability in all cases, i.e. (a) is supported given the fundamental rights at stake significant benefits for access to justice but there are potential difficulties with what happens after capacity has been investigated/determined – if legal aid is not available beyond that point then there is a risk that the court will determine that a person lacks capacity, appoint a litigation friend, and then leave that person with no legal representation, potentially meaning that the benefit of the non-means tested legal aid is minimal.

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?

No

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).

There should be a power to require such payment up-front, in all cases but especially where the other party is the Claimant. The other party would of course be entitled to object to an order made under this power if there was good reason to do so.

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?

Yes – as a last resort.

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

We think that the costs of a determination of capacity should be, absent very unusual circumstances, costs in the case, irrespective of the outcome of the determination. There should not be any disincentive for either party's representatives to put the issue of capacity before the court.

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?

We have had experience of Judges ordering disclosure of documents (in particular expert reports including the certificate of capacity) to the other party pending a determination of capacity by the court, and have experienced pressure from opposing parties to disclose such documents prior to the completion of the determination of capacity of our client. The position in this regard seems to be unclear and the fact that in such proceedings there may be a stage where no instructions can be taken from a client, due to his or her incapacity, puts the potentially incapacitous party's solicitors in a difficult position in ensuring that they comply with both duties as officers of the court and in respect of confidentiality.

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

Clearer provision in the rules, potentially involving reinstatement of previous provisions of Practice Direction 21, would probably assist.

Cover sheet

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**.

You must fill in the following before submitting your response:

Your response is (public/anonymous/confidential):	Public
First name:	Simon
Last name:	Garrod
Location:	
Role:	Director of Policy & Public Affairs
Job title:	Director of Policy & Public Affairs
Organisation:	CILEX
Are you responding on behalf of your organisation?	Yes
Your email address:	[redacted]

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?

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?

Civil Justice Council
Working Group on Procedure for Determining
Mental Capacity in Civil Proceedings
Via Email Only

15th March 2024

To whom it may concern,

Re: Procedure for Determining Mental Capacity in Civil Proceedings Consultation

CILEX would like to take the opportunity to respond to the CJC's consultation in relation to the procedure for determining mental capacity in civil proceedings. CILEX represents a substantial number of civil practitioners within the civil justice sector.

The Chartered Institute of Legal Executives (CILEX) is the professional association and governing body for Chartered Legal Executive lawyers (commonly known as 'CILEX Lawyers'), other legal practitioners and paralegals. Under the Legal Services Act 2007, CILEX acts as the Approved Regulator (AR) and delegates these regulatory powers to the independent regulator, CILEx Regulation Ltd (CRL).

CILEX represents over 17,500 members of which 77% of the membership are female, 16% of members are from an ethnic minority background, 4% are LGBT and 6% have a disability. Additionally, in terms of social mobility, 77% of CILEX members attended a state-run or state-funded school and 41% have an undergraduate university degree (of which 63% of those members were the first to attend university).

In lieu of a full consultation response, CILEX believes that it would be more valuable to the CJC to receive specific thoughts from CILEX as there are some questions which CILEX (owing to its remit) would not be able to respond to fully.

<u>Practitioners and their client (Questions 3, 4 & 12)</u>
CILEX does not consider that the rules concerning mental capacity are sufficient, especially for practitioners concerning their own client's capacity. CILEX does consider there to be a need for clearer guidance. CILEX is aware that various organisations have provided different forms of best practice guidance, but CILEX encourages the CJC to provide definitive guidance, and for this to become amendments to the Civil Procedure Rules.

The duty should be triggered based on a reasonable belief that the client lacks litigation capacity. Specific levels of belief or evidence should be similar to those used within the mental health tribunal.

CILEX is aware of some difficulties in practitioners distinguishing between clients being perceived as 'difficult' versus lacking litigation capacity. Some CILEX practitioners have identified that from experience, an expert assessment should be utilised where a practitioner is in doubt. CILEX would also recommend the use of peer-review, where another practitioner would need to agree (where dispute is raised) that the practitioner is acting appropriately and has raised litigation capacity as an issue rather than merely trying to override client wishes for a difficult client.

The Other Party (Questions 5, 6, 7 and 8)

As outlined above, clearer guidance is also needed for legal representatives to raise with the court issues around litigation capacity of another party to the proceedings who is unrepresented, as well as for those who are represented. In addition to this, CILEX believes that there should be a general duty in relation to raising capacity with the court in all cases. Anything less than this will create a grey area leading to individuals continuing to fall through the cracks.

For the reasons outlined in the section above, CILEX believe that the trigger for the duty to raise issues of mental capacity is the same for a practitioner with another party as it with their own client.

Court Forms (Question 10)

In order for mental capacity to be at the forefront of both practitioners' and the court's minds, key court forms – e.g. claim forms, acknowledgements of service, defence forms, as well as Particulars of claim, should be amended to include questions concerning capacity. This will have the benefit of ensuring that all legal representatives are mindful of this at core stages of the proceedings.

Sanctions (Question 11)

Sanctions should depend on the severity of the failure, the stage at which the failure was identified, and whether the issue can be easily remedied (i.e. minimal court time wasted and the proceedings can continue unimpeded).

CILEX however does not comment on particular sanctions and believes this is a matter for frontline regulators and the court.

Other Relevant Organisations (Questions 13 & 14)

Where an individual is unrepresented, there are a number of individuals or groups who could be involved in the investigation of an unrepresented party's litigation capacity. The court should be involved; however, it is vital that they can remain in the role of arbitrator (albeit an active, inquisitorial one). A judge's primary consideration, before reviewing the overall nature of the mental capacity arguments, should be whether any mental capacity issues should be dealt with ex parte or on notice to the other side. This will allow the court to consider the unique circumstances of each case and to rule whether the other party should be involved in the mental capacity proceedings, or whether they should be excluded – as needed.

Other parties and/or legal representatives should be involved in arranging for any investigative work to be done where an individual is unrepresented – however the

results should be sent only to the court where the mental capacity consideration is being dealt with ex parte in or to protect the confidentiality of the individual concerned in the mental capacity consideration.

CILEX is aware that the Official Solicitor has astoundingly high costs when required to intervene in matters and requires an undertaking from a party for their full costs and disbursements. CILEX considers this a naturally prohibitive barrier to justice, and instead believes that another organisation such as the LAA should be involved in meeting the costs of the official solicitor. This would allow individuals with mental capacity considerations to still be reviewed where both parties are Litigants-in-person, or where one represented party does not have substantial funds to make available for the other party's investigatory work.

Lastly, CILEX considers the use of litigation friend a last-resort option, albeit one which has grown in number since the restriction of civil legal aid. Litigation friends are reasonable in circumstances such as where the individual is a child, being cared for by a parent or guardian, or in a circumstances where the individual is adult but without mental capacity and so is in long-term care of an organisation who can also take on responsibility for the legal case. However, there is a large group of individuals who may require assistance as they are lacking mental capacity, but do not have a designated individual close to them who could act as a litigation friend. As a result, CILEX is aware of mental capacity proceedings being repeatedly delayed as no litigation friend can be identified and made available. CILEX therefore considers that litigation friends should be used sparingly and only where necessary, not merely where it is convenient.

Appeal (Question 21)

It is imperative that any determinations on capacity which are obviously and seriously flawed, should be reviewable and potentially appealable. Not only should the determination be reviewable, but also the decision made as to whether the court's consideration is made ex parte. As this area of law develops, it is likely that various factors will need to be considered and amended, and therefore a review/appeal system, should be built into the process.

Funding (Questions 26, 27, and 28)

In order to answer question 26, CILEX reached out to a number of practitioners – none of whom have experienced problems securing legal aid for clients who appear to lack litigation capacity. However, CILEX is aware that there may be issues with funding and therefore believes this should be investigated further by the CJC.

Legal aid regulations should 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. CILEX considers this vital, much like its use in other areas of the law and believes that with sufficient safeguards and narrowly confined remits, this will ensure practitioners can act appropriately and be remunerated fairly for work undertaken.

Further to the above, non-means tested legal aid should be available for the limited purpose of investigating and determining litigation capacity. This ensures that legal

representatives can act and gather the relevant information in relation to capacity, without having to wait for other individuals/organisations to become involved. If it was to be means tested, then the amount of time to gather evidence, and then to gather the income for practitioners, may be excessive and hamper access to justice.

Yours Sincerely,

Simon Garrod
Director of Policy & Public Affairs

CILEX (The Chartered Institute of Legal Executives)
Registered Address: Manor Drive, Kempston, Bedford, MK42 7AB
+44 (0)1234 841000
cilex.org.uk

CLYDE&CO

Procedure for Determining Mental Capacity in Civil Proceedings

A Civil Justice Council consultation

Response of Clyde & Co, March 2024

Introduction

1. Clyde & Co is instructed by major insurers to defend road traffic, employment and public liability injury claims. Those which concern significant brain and psychiatric injuries often involve issues of capacity.

2. Accordingly, Clyde & Co is limiting its response to the current consultation to these claims alone, leaving others with appropriate experience to address the position in other types of civil proceedings, save for emphasising an overarching concern that should any procedural changes[1] flow from the consultation, rule makers should take great care to minimise as far as possible the prospects of increased delay, legal costs, satellite litigation or any other unintended consequences.

The context of the consultation, issues raised and existing approaches

3. We appreciate that some of the momentum driving the consultation comes from areas of civil practice, notably housing claims and probate disputes, where it appears that the proportion of litigants in person (LiPs) is likely to be greater than the proportion of LiPs in personal injuries and clinical negligence work. In the overwhelming majority of the cases we deal with, the claimant is represented by a solicitor (acting under a conditional fee agreement CFA) and at least junior counsel, and any costs not recovered on an inter partes basis may be indemnified by BTE or ATE insurance.

4. Our starting point of principle is that matters of capacity should be addressed by the claimant's legal representative in accordance with their professional obligations to determine if they can act on instructions and who, if necessary, will make arrangements to appoint a litigation friend where capacity is absent. A Deputy may also be appointed to manage the incapacitous claimant's property and financial affairs. In some cases, if no one suitable to act as a litigation friend can be identified, the Official Solicitor will be approached. These steps will fall to the legal representative, but we accept there is a gap where the claimant is an LiP and we therefore understand the rationale behind the consultation, suggesting some role for the court and/or other parties to the claim.

5. Having said this, Clyde & Co considers that our clients do have a legitimate interest in the determination of capacity when it is genuinely in doubt. The issue is relevant to them because the costs associated with the appointment of a Deputy will form a head of loss which will increase their liability[2] in both damages and inter partes costs. The issue is also relevant to them if they seek to challenge an alleged lack of capacity by, for example (a) disputing that a brain injury was sustained on the facts or (b) submitting that a claimant is fundamentally dishonest.

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[1] This should not be understood as us advocating procedural changes.
[2] Assuming that the underlying claim succeeds.

6. Although (a) and (b) above represent a small proportion of claims, we suggest that it would be beneficial in such cases for defendants to have a means of raising their concerns about capacity with the court. We note the suggestion in the consultation paper that determination of capacity by the court may be better suited to an inquisitorial process rather than an adversarial one. Accepting that gives rise to problems such as the following.

    - How might a defendant with concerns engage with the court either to initiate the inquiry or to engage with it in a meaningful way?
    - How the costs of the inquiry and any relevant disbursements – necessary expert evidence, for example – are to be funded?
    - Should there be standardised instructions to experts involved?
    - Are the costs of the inquiry to be treated as 'costs in the cause'[3]?
    - How to proceed in claims where the claimant genuinely but mistakenly believes that he or she has capacity?
    - What happens to the progress of the underlying claim once the capacity inquiry is triggered?

7. We are unable to answer these questions, other than to say in respect of the last that taking a conventional and pragmatic approach points strongly to the conclusion that the claim cannot progress until the inquiry concludes - giving rise to a risk of delay and prejudice that must be carefully managed.

8. Given the very diverse range of claim types across civil practice as a whole, we appreciate that there are no easy, quick, or 'one size fits all' answers here.

9. Our overarching concern is the risk that addressing these issues might, inadvertently, contribute to satellite litigation, delays in resolving claims, and - to put it robustly - costs-building exercises that have little to do with the progression of claims and that offend against the overriding objective.

10. The pre-action protocol provides a framework within which the parties gather and exchange documents, witness statements and expert evidence on this and the other issues of dispute in furtherance of the overriding objective.

11. If/when proceedings are issued, Case Management of these matters is provided by the court at an early stage with input from the parties via the obligation to file and exchange Directions Questionnaires.

12. When damages are agreed, CPR 21 stipulates where the claimant lacks capacity, settlement is not binding on the parties unless and until approval has been

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[3] At the conference on 1 March there appeared to be broad support 'in the room' for no order to costs being made for these matters.

provided by the Court. All parties are allowed to attend the approval hearings. These approaches therefore provide protection to those who proceed as litigants in person.

13. The consequences of failing to secure this are illustrated by the case of *Dunhill v Burgin* [2014] UKSC 18 and are strong motivating factors for defendants to proceed carefully where capacity is in doubt.

14. In recognising capacity is time and issue specific, we note that the High Court has the power to exercise its inherent jurisdiction to approve settlement in cases where neither party asserts the claimant lacked it when the agreement was reached, as per the recent Judgment in *CTQ v King's College Hospital NHS Foundation Trust* [2023] EWHC 2975. We note that concerns emerged at the consultation conference on 1 March 2024 over whether the county court, being a creation of statute, has the necessary vires to act in similar fashion to the High Court's inherent jurisdiction. We submit that these concerns should be addressed urgently.

Concluding points

15. In summary, Clyde & Co considers the current processes generally work well and as such, **significant reforms may not be required**.

16. We do however accept that in a modest proportion of the claims we see and in other, very different areas of civil work, there are arguments in favour of bringing forward targeted and proportionate measures that would address the key questions we have set out above.

17. In addition, we would suggest it may be appropriate to adopt a 'pilot scheme' approach should appropriate changes be introduced, so that due account can be taken of practical experience before any final measures were implemented. We note that this approach is far from uncommon in the recent phases of civil procedure reform.

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490

Partners

2,400

Lawyers

5,500

Total staff

3,200

Legal professionals

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*includes associated offices

Civil Justice Council's Procedure for Determining Mental Capacity in Civil Proceedings Working Group - Consultation Paper

Response from the Employment Lawyers Association

21 March 2024

Civil Justice Council's Procedure for Determining Mental Capacity in Civil Proceedings Working Group - Consultation Paper

Response from the Employment Lawyers Association

21 March 2024

INTRODUCTION

1. The Employment Lawyers Association ("ELA") is an unaffiliated and non-political group of specialists in the field of employment law. We are made up of about 6,000 lawyers who practice in the field of employment law. We include those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals and who advise both employees and employers. ELA's role is not to comment on the political merits or otherwise of proposed legislation or calls for evidence. We make observations from a legal standpoint. ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation and regulation or calls for evidence.

2. Ivor Adair and Jennifer Sole, members of the Legislative and Policy Committee of ELA have considered and respond to the Civil Justice Council's consultation on the procedure for determining mental capacity in civil proceedings.

3. References in this paper to the views of ELA are intended to be inclusive of the views of the minority as well as the majority of ELA members. Whilst not exhaustive of every possible viewpoint of every ELA member on the matters dealt with in this paper, the members of the Working Party have striven to reflect in a proportionate manner the diverse views of the ELA membership.

SUMMARY

4. While we agree that there is a lacuna in rules/guidance for litigants, judges and the legal representatives regarding investigating the issues that may arise prior to the provisions of Civil Procedure Rules (CPR) 21 being applied (which presuppose that a party lacks litigation capacity), this is such a sensitive issue that we would urge caution and discretion when considering change to the system.

NATURE OF THE ISSUE AND THE ROLE OF THE COURT

Q1 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. All parties (claimants, defendants, funders, legal advisors, the Court and the general public) have legitimate interests in whether a party to legal proceedings has litigation capacity given that a party's incapacity could render an outcome to a case

unsound/open to challenge appeal if, for example, such incapacity meant that a party was unable to make financial decisions by themselves.

Q2 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?

6. Under the CPR the Court has wide case management powers which can already be used to ensure that a dispute is resolved efficiently and in accordance with the Overriding Objective of enabling the Court to dispose of case justly and at proportionate cost and to ensure that parties are on an equal footing and can participate fully in proceedings. The Court could give effect to the Overriding Objective by way of use of these powers without changing the approach to inquisitorial, such change we perceive could have unforeseen negative consequences. In particular the boundary as to what is a permissible inquisitorial approach and what is a legal requirement could introduce complexity and uncertainty.

IDENTIFICATION OF THE ISSUE

Q3 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*?

7. The Solicitors Regulation Authority, Law Society, Bar Standards Board and Bar Council have already produced guidance as regards dealing with vulnerable clients and those who may lack capacity. However, some of it is conflicting in terms of the other guidance and also in terms of a Solicitors' professional duties to the Court and to clients' best interests and the administration of justice; much emphasis is placed on legal representatives essentially trusting their gut instincts, suggesting "techniques" for assessments which legal representatives are not strictly speaking qualified to make (given the question of capacity is ultimately a medical one). As such, clearer guidance, where appropriate with examples, would be welcome.

Q4 What level of belief or evidence should trigger such a duty?

8. We believe that this is a question of policy and so we are not in a position to answer the same.

Q5 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?

9. Guidance for all parties would be useful/welcome.

Q6 What level of belief or evidence should trigger such a duty?

10. We believe that this is a question of policy and so we are not in a position to answer the same.

Q7 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.)?

11. While we can understand the Court and legal representatives having a duty to consider parties' litigation capacity, we suggest a general duty would be difficult to manage and could lead to abuse of process by litigants in person.

12. Further, in employment cases, advisers are sometimes from trade unions. Accordingly, if the rules were changed to put this additional responsibility on lawyers, then consideration would need to be given as to whether it should also apply to trade union officials, who may not have quite the same training in exercise of balancing interests, as solicitors and barristers.

Q8 If so, what level of belief or evidence should trigger such a duty?

13. We believe that this is a question of policy and so we are not in a position to answer the same.

Q9 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. If the Court's approach were to be more inquisitorial, we can see that it could assist parties, their representatives, and judges if amendment(s) were made to the Protocols, to assist the Court to direct what evidence of capacity might be required at an early stage in the proceedings and even stay proceedings while capacity is evaluated.

Q10 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. We have concerns that this approach risks reducing the important and complex question of capacity to a "tick box" exercise.

Q11 Should there be any particular sanction(s) for a clear failure by another party to raise the issue?

16. As can be seen from this response, there is a lack of clear guidance for representatives to draw on when considering whether to raise the issue of legal capacity in proceedings. Until such time as such guidance is provided, we would not be minded to suggest that sanctions should be imposed on representatives for not raising this issue with the Court/Tribunal.

Q12 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

Q13 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)?

17. We have no firm views on this question – but would note that any approach would require appropriate funding/resources.

Q14 Do you have any comments to make in relation to your answers to the previous question?

17. If the system is to be changed, then additional funding is likely to need to be found for: case management; additional disclosure burdens; expert evidence; litigation friends/the official solicitor; stays to ensure the effective administration of justice.

Q15 Should the civil courts have more clearly defined powers to order disclosure of relevant documents for the purpose of investigating litigation capacity?

18. We consider that the Court has effective powers within the CPR (and Tribunal rules). Guidance for parties/their representatives may be helpful.

Q16 If so, in what circumstances should such powers be exercised?

19. N/A.

Q17 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?

20. It may be helpful for the courts to have this power, but could risk additional costs for litigants.

DETERMINATION OF THE ISSUE

Q18 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?

21. A rule may be problematic as a derogation from the principle of open justice. Consideration of rights under Articles 8 (right to respect for private life) and Article 6 (right to a fair trial) may be required, Given that all parties (claimants, defendants, funders, legal advisors, the Court and the general public) have legitimate interests in whether a party to legal proceedings has litigation capacity, such a presumption may be problematic and an approach where the departure from open justice is considered in context and competing interests are weighed in the balance is more likely to be just and appropriate.

Q19 Should the party be granted anonymity and/or should reporting restrictions be imposed in relation to the hearing?

22. In the Employment Tribunal context, it is possible to obtain an anonymity order or a restricted reporting order in a wide range of circumstances, for example that a hearing shall be conducted, wholly or partly in private, or that identities of specified parties should not be made public, either during the course of any hearing or otherwise on documents forming part of the public record. However, given clear and cogent evidence to establish a basis for derogating from the public interest in full publication, this may be difficult to achieve in a given set of circumstances and a special statutory framework may need to be considered for such a hearing.

Q20 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?

23. In the same way that the Court of Protection's decisions are challenged, parties must have the right of appeal. This could be by way of reconsideration in the first instance, rather than the Court of Appeal, to save time/costs.

Q21 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?

24. As above, 20.

SUBSTANTIVE PROCEEDINGS PENDING DETERMINATION

Q22 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. Yes.

Q23 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?

26. Yes.

Q24 If so, do you think those starting points should be subject to a 'balance of harm' test?

27. Yes.

Q25 What factors should be included in such a test?

FUNDING AND COSTS

Q26 Have you experienced problems securing legal aid for clients who appear to lack litigation capacity? If so, please summarise the nature of the problem.

28. Legal aid is not available for employment law matters, so ELA is unable to provide an answer to this question.

Q27 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?

29. Legal aid is not available for employment law matters, so ELA is unable to provide an answer to this question.

Q28 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?

30. Legal aid is not available for employment law matters, so ELA is unable to provide an answer to this question.

Q29 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?

Q30 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 part 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. This is a policy question which we are unable to comment on.

Q31 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. This is a policy question which we are unable to comment on.

Q32 On what principles should the costs of a determination be decided?

33. This is a policy question which we are unable to comment on.

Q33 Do you have experience of issues relating to the procedure for determination of litigation capacity in the civil courts not referred to above?

Q34 Do you have any other suggestions for changes that would improve the way the civil courts deal with parties who lack capacity?

34. ELA suggests that the CJC might want to consider if the Civil Courts may in some circumstances be obliged to commission advice on capacity, at public expense.

35. In the Employment Tribunal context, the rules of procedure could expressly include a relaxation of tests that apply to time limits, or inadequately pleaded claims so as to permit the claim to proceed, where capacity is a real issue.

36. Conduct including challenging capacity or seeking information regarding capacity as a means of gathering information generally in support of a case or undermine a Claimant's case to be a matter the Court should have regard to when determining costs.

On behalf of ELA's Legislative and Policy Committee

Ivor Adair Fox and Partners
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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**.

You must fill in the following before submitting your response:

Your response is (public/anonymous/confidential):	Public
First name:	ON BEHALF OF THE FAMILY DIVISION OF THE HIGH COURT AND TIER 3 OF THE COURT OF PROTECTION
Last name:	
Location:	ROYAL COURTS OF JUSTICE
Role:	JUDICIARY
Job title:	JUDGES OF THE FAMILY DIVISION AND SITTING AT TIER 3 OF THE COURT OF PROTECTION
Organisation:	THE FAMILY DIVISION OF THE HIGH COURT AND TIER 3 OF THE COURT OF PROTECTION
Are you responding on behalf of your organisation?	YES
Your email address:	[redacted]

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.

OVERVIEW

The judiciary of the Family Division of the High Court, which includes those sitting as a Nominated Tier 3 Judge of the Court of Protection (hereafter referred to as the "Family Division"), welcome the proposal by the Civil Justice Council to clarify the procedure for determining the mental capacity of parties to litigate civil proceedings. The over-arching submission made is to seek consistency of procedure across the various jurisdictions.

The Family Division judiciary comprise: (i) the President of the Family Division; (ii) puisne judges of the Family Division of the High Court; and (iii) judges of High Court level. The judges sit in both the High Court and in the Family Court subject to the statutory scheme and the Family Procedure Rules ("FPR") as explained in "*President's Guidance – Jurisdiction of the Family Court: Allocation of Cases Within The Family Court to High Court Judge Level And Transfer of Cases From the Family Court To The High Court*" dated 24 May 2021. Their experience therefore encompasses the different but inter-related aspects of family justice.

The Family Division, when sitting in their family law jurisdiction, apply a comprehensive code as set out in the rules found at FPR Part 15 and Practice Directions ("PD") 15A and 15B which set out the rules for the representation of protected parties. The FPR Part 15 rules are similar to the Civil Procedure Rules (hereafter "CPR") and mirror the CPR requirement that if a party lacks capacity during proceedings, no step in the proceedings may be taken without the court's permission unless a litigation friend has been appointed. Further, any step taken by a party who lacks litigation capacity and in circumstances where no litigation friend has been appointed, is of no effect, unless the court orders otherwise.

The Civil Justice Council may wish to consider, FPR PD 15B which specifically considers the situation: "What the court will do where an adult **may** be a protected party". Attention is drawn to the Family Justice Council's April 2018 report entitled: "*Capacity to Litigate in*

Proceedings Involving Children" for a helpful background to the law and procedure of litigation capacity in public and private children cases. Attention is also drawn to the comprehensive analysis of King LJ in *Re D (Children)* [2015] EWCA Civ 749 generally and in particular her Ladyship's observations at paragraph 56:

> "The rules providing for the identification of a person, who lacks capacity, reflect society's proper understanding of the impact on both parent and child of the making of an order which will separate them permanently. It is therefore essential that the evidence which informs the issue of capacity complies with the test found in the MCA 2005 and that any conflict of evidence is brought to the attention of the court and resolved prior to the case progressing further. It is in order to avoid this course causing delay that the PLO anticipates issues of capacity being raised and dealt with in the early stages of the proceedings."

In the Court of Protection, questions of capacity are at the forefront of the issues the court is required to determine. At Tier 3, the judiciary deal with all types of cases but most commonly hear and determine issues of serious medical treatment, often in situations of urgency. As a lack of capacity, or a finding or interim declaration that there is a reason to believe P lacks capacity, provides the court with its jurisdiction pursuant to section 48 of the Mental Capacity Act 2005 (hereafter "the MCA") to consider making best interests orders on behalf of the P, the court is often faced from the outset with issues of capacity which require determination.

Part 17 of the Court of Protection Rules ("COPR") set out the procedure for the necessity of, and appointment of, litigation friends. Pursuant to Rule 17.2 a distinction is drawn between "protected parties who require a litigation friend" (a party other than P, the subject of the litigation) and P. P is defined in COPR Rule 2.1 as: "*(a) any person (other than a protected party) who lacks or, so far as consistent with the context, is alleged to lack capacity to make a decision or decisions in relation to any matter that is the subject of an application to the court; and (b) a relevant person as defined by paragraph 7 of Schedule A1 to the Act."* Whereas a protected party is defined as: "*.. a party or an intended party (other than P or a child) who lacks capacity to conduct the proceedings*"

COPR Rule 1.2 sets out the duty on the court to ensure P adequately participates in the proceedings, the rule anticipates, and provides for, circumstances where it is not necessary for P to be joined as a party. This includes a range of options from joinder as a party; to the appointment of an accredited legal representative; to providing P the opportunity to address the court. If P is joined as a party and unless s/he has capacity to conduct the proceedings, their joinder shall take effect on the appointment of a litigation friend on the appointment of an accredited legal representative (see COPR Rule 1.2 (4)).

A litigation friend for P (as opposed to a protected party) can only be appointed by the court and not by filing a certificate of suitability (COPR rule 17.3 (1)). The court, pursuant to COPR Rule 17.4 (2) and (5), of its own initiative, may, at any stage of the proceedings, give directions for the appointment of a litigation friend for P.

The procedure for the appointment of a litigation friend for a protected party in the Court of Protection, is similar to the CPR and the FPR. A protected party, if a party to the litigation,

must have a litigation friend (COPR Rule 17.2 (2)). This reflects the different status of P, to other parties who may lack capacity, and gives effect to the focus on the court's role in determining Ps' best interests in respect of welfare (including deprivation of liberty) and/or property issues. A litigation friend can be appointed for a protected party by way of filing and serving a certificate of suitability as a litigation friend, see COPR Rule 17.3 (3) or by way of court order or by authorisation to act as litigation friend in an order appointing a deputy (which most commonly takes place in property and affairs matters).

It is common practice in the Court of Protection for the court to declare in the interim, or make an interim finding, that there is reason to believe P lacks capacity to conduct the proceedings. This often leads to the appointment of a litigation friend at the outset of the proceedings, or at an early stage, whilst matters are further investigated. In medical treatment cases the Official Solicitor does not require that her appointment as litigation should be as a last resort, reflecting the often urgent work of the court at Tier 3. She does, however, require in all cases: '*there should be evidence or reason to believe that P lacks capacity to conduct the legal proceedings'* (see the published Practice Notes dated 3 February 2021).

As an overview, it is suggested that the experience of the Family Division provides a useful experience as to how civil judges may approach the task of identifying and determining the procedure to deal with a lack of capacity, or a belief in a lack of capacity, and the consequences of the same. Court of Protection judges are experienced in determining questions of P's (and other parties') capacity; whilst family judges also have relevant experience of dealing, often in private law children cases, with circumstances where parties are unrepresented and the court must take on a quasi-inquisitorial role to determine issues of a party's litigation capacity.

The Family Division would welcome a consistency of approach to the procedure for determining capacity to conduct the proceedings drawn from the procedure and test as applied by the Family Courts and by the Court of Protection.

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?

In general, the Family Division would agree. However, it is clear there are cases where the inter-relationship between litigation capacity and subject matter capacity, results in the other parties to the litigation having an interest in the outcome of the determination. This most frequently arises in the Court of Protection and less so in the Family Division or Family Court, where the parties' litigation capacity is less obviously an issue relevant to the determination of the underlying issues.

It is suggested the starting point for the civil courts is that establishing litigation capacity one way or the other, is in all parties' interests, to ensure fair proceedings. Further, the court should consider the extent to which parties may have an interest in litigation capacity because of its inter-relationship with the subject matter of the proceedings, being alive to the risk that some parties may seek to inappropriately gain a strategic advantage in the proceedings, or thereby, seek to obtain, for example, private and confidential information, to which they are not entitled.

The civil courts should have a range of options, from determining the matter of litigation capacity in circumstances where the other parties have no interest (beyond the fairness of the proceedings) to having a substantial interest because of the interaction between litigation capacity and the subject matter of the proceedings, being alive to the risks of strategic advantage and/or access to private and/or confidential material. The procedure adopted should be accommodated to justly determine the range of options.

The inter-relationship between litigation capacity and subject matter capacity has been considered by Tier 3 judges of the Court of Protection. See for example the decision of Mostyn J in *An NHS Trust v P* [2021] EWCOP 27 at paragraph 33:

> "I would go further and say that it is virtually impossible to conceive of circumstances where someone lacks capacity to make a decision about medical treatment, but yet has capacity to make decisions about the manifold steps or stances needed to be addressed in litigation about that very same subject matter. It seems to me to be completely illogical to say that someone is incapable of making a decision about medical treatment but is capable of making a decision about what to submit to a judge who is making that very determination."

This is contrasted with the decision of Hayden J in *Lancashire and South Cumbria NHS Foundation Trust v Q* [2022] EWCOP 6, where it was held at paragraph 24:

> "The essence of those judgments is to confirm, unambiguously, that capacity to litigate is addressed by asking whether a party to proceedings is capable of instructing a legal advisor *"with sufficient clarity to enable P to understand the problem and to advise her appropriately"* and can *"understand and make decisions based upon, or otherwise give effect to, such advice as she may receive".* It follows that the issue of litigation will always fall to be determined in the context of the particular proceedings: *Sheffield City Council v E [2005] Fam 236.*"

Therefore, it may be the case that litigation capacity is relevant to issues within the subject of the proceedings. It may be the case that establishing a party has litigation capacity to conduct the proceedings may impact on their earlier capacity to, for example (i) enter into a contract; or (ii) make a will.

Therefore, experience from the Court of Protection suggests that litigation capacity can be relevant – factually and evidentially – to decisions within the proceedings.

Within the Family law context this is less apparent, but again depends on the context. In children proceedings the ability to care for a child is not likely to be directly relevant to litigation capacity, but in the context of the Financial Remedies Court, it could be relevant to capacity to enter into a pre-nuptial agreement. Another example is whether issues around litigation capacity may impact on the court's assessment of parental consent to a child's accommodation pursuant to section 20 Children Act 1989 (see *Coventry City Council v C and Others* [2012] EWFC 2190 (Fam) in particular at paragraph 46).

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?

Yes, this should be the starting point. But for reasons explained above the inter-relationship between litigation capacity and the subject of the proceedings may require the court to consider the position of the other parties and to hear from them to justly determine the issue of how litigation capacity should be determined; what evidence will be necessary to do so and how any evidence or information required within the proceedings should be managed having regard to over-riding objective style principles of proportionality and cost but also the confidential and private nature of information that may be required to determine the issues.

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*?

This issue is, for obvious reasons, at the forefront of Court of Protection proceedings and it follows that the parties' legal representatives should fully consider whether the party who is the subject of the proceedings lacks capacity to conduct the proceedings and evidence the same. That being said, experience suggests that even within Court of Protection proceedings, especially in cases involving urgent medical treatment, there is not always direct evidence before the court from an appropriately qualified witness as to the parties' lack of litigation capacity or reasonable belief in the same, particularly in cases involving urgency.

In Family proceedings, these issues are sought to be dealt with within Part 15 of the FPR. Practice Direction 15B states at paragraph 1.1:

> "The court will investigate as soon as possible any issue as to whether an adult party or intended party to family proceedings lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct the proceedings. An adult who lacks capacity to conduct the proceedings is a protected party and must have a litigation friend to conduct the proceedings on his or her behalf. The expectation of the Official Solicitor is that the Official Solicitor will only be invited to act for the protected party as litigation friend if there is no other person suitable or willing to act."

The Practice Direction notes at paragraph 1.2:

> "Any issue as to the capacity of an adult to conduct the proceedings must be determined before the court gives any directions relevant to that adult's role in the proceedings. Where a party has a solicitor, it is the solicitor who is likely to first identify that the party may lack litigation capacity."

The on-going duty is noted at paragraph 1.3 of the PD:

> "If at any time during the proceedings there is reason to believe that a party may lack capacity to conduct the proceedings, then the court must be notified and directions sought to ensure that this issue is investigated without delay."

The Family Division would recommend a similar rules and practice direction based approach to the Civil Justice Council.

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

In *RP v Nottingham CC And Another* [2008] EWCA Civ 462, Wall LJ held at paragraph 47:

> "Both the relevant rules of court and the leading case of ***Masterman-Lister*** make it clear that once either counsel or SC had formed the view that RP might not be able to give them proper instructions, and might be a person under a disability, it was their professional duty to have the question resolved as quickly as possible. This point will become more apparent when I consider the case of ***Masterman-Lister*** later in this judgment (see in particular paragraphs 111 to 127 below). For present purposes, it is sufficient to state that in my judgment it would have been a serious breach of her professional and ethical code were SC to have continued to take instructions from a person whom she had reason to believe did not have the capacity to instruct her. She was, accordingly, duty bound to seek a professional opinion on RP's capacity to do so."

Section 48 MCA states that:

> "The court may, pending the determination of an application to it in relation to a person ("P"), make an order or give directions in respect of any matter if—
> (a) there is reason to believe that P lacks capacity in relation to the matter,
> (b) the matter is one to which its powers under this Act extend, and
> (c) it is in P's best interests to make the order, or give the directions, without delay.

The Family Division suggests there is a strong case for ensuring there is a consistency of approach from the Court of Protection which applies the MCA most frequently, to civil cases and it is logical that the "reason to believe" test is an appropriate one. The court must be alive to the robustness of any 'belief' without formal evidence in the circumstances of the proceedings.

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?

There are obvious reasons why legal representatives in carrying out their duty to the court should be cognisant of the litigation capacity of other parties. They may have more interaction, for example negotiating an order outside of court, than the court may have with a party. Clearer guidance is likely to be useful.

Reference is made to FPR Practice Direction 3AA as a helpful illustration as to how issues of 'vulnerability' should be raised within Family Proceedings. Paragraph 1.1 of the Practice Direction states:

> "Rule 3A.4 FPR places a duty on the court to consider whether a party's participation in the proceedings is likely to be diminished by reason of vulnerability and, if so whether it is necessary to make one or more participation directions (as defined in rule 3A.1 FPR). Rule 3A.4 FPR does not apply to a child or to a party who is a protected party, or to those who fall within the assumption at rule 3A.2A FPR."

Paragraph 1.3 states:

> "It is the duty of the court (under rules 1.1(2); 1.2 & 1.4 and Part 3A FPR) and of all parties to the proceedings (rule 1.3 FPR) to identify any party or witness who is a vulnerable person at the earliest possible stage of any family proceedings."

Vulnerability is defined at Paragraph 3.1:

> "Rule 3A.3 FPR requires the court to have regard in particular to the matters set out in paragraphs (a) to (j) and (m) of rule 3A.7 FPR when considering the vulnerability of a party or witness other than a protected party or victim of domestic abuse. The court should require the assistance of relevant parties in the case when considering whether these factors or any of them may mean that the participation of any party or witness in the case is likely to be diminished by reason of vulnerability. When addressing this question, the court should consider the ability of the party or witness to-
>
> a) understand the proceedings, and their role in them, when in court;
> b) put their views to the court;
> c) instruct their representative/s before, during and after the hearing; and
> d) attend the hearing without significant distress."

The purpose of Practice Direction 3AA is not to determine whether a party lacks capacity to conduct proceedings, but it is focused on the court's duty to determine whether to make participation directions (which for example can apply to a witness rather than a party). The Family Justice Council's April 2018 report references (at paragraph 9) the role of PD 3AA in the context of its guidance on litigation capacity.

The duty on the court and the parties to consider the vulnerability of a party and in particular to their understanding of the proceedings and their ability to instruct their representatives provides a basis upon which issues of vulnerability which may lead to consideration of whether the party has capacity to conduct the proceedings. It requires the court and the party to be alert to this issue "at the earliest possible stage of any family proceedings" (PD paragraph 1.3) albeit it is clear it is not for the purposes of determining capacity, rather, to repeat, to determine the necessity of participation directions.

It serves, however, as a useful example of how rules and practice directions can place obligations on the court and parties to consider issues relevant to the fairness of the proceedings.

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

As set out above, the MCA section 48 and FPR Rule "reason to believe" test is a helpful trigger and a consistent approach across jurisdictions is recommended. The types of issues identified by PD 3AA help clarify the types of issues legal representatives should be alive to.

It is often the case that at the interim stage of considering whether there is reason to believe a party lacks litigation capacity, the evidence to support this may not necessarily come from a clinician, but may, for example, be from a social worker or concerned family members. The situation in the context of deprivation of liberty, involving as it does Article 5 ECHR is somewhat more complex.

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.)?

Reference is made to the approach set out in FPR PD 3AA.
The Family Division would agree that public bodies in particular should be directed to have these issues under consideration during and before civil litigation.

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

Reference is made to the approach set out in FPR PD 3AA. Consideration should also be given the relatively low level 'belief' test set out in section 48 MCA as a trigger.

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?

Yes.

However, attention is drawn to the Family Justice Council April 2018 report at paragraph 23 on the potential impact of pre-action action correspondence on parents who may lack capacity and the concern that mental health difficulties may be exacerbated. The context of course must be considered and civil disputes are largely different.

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?

Yes.

In children public law cases Form C110A states: "Are there factors affecting litigation capacity?" which requires a Yes/NO answer. Section 4 states: "Factors affecting ability to participate in proceedings" which invites a summary of issues/evidence in litigation capacity if relevant.

In private law children matters Form C100 required the applicant to respond YES/No to the question: "Is this a case with an international element or factors affecting litigation capacity?" This leads to section 7 which states: "Factors affecting ability to participate in proceedings" and requires information about: "any factors affecting litigation capacity".

In the Court of Protection, issues of capacity must be raised for obvious reasons and are normally evidenced in Form COP 3.

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

Yes.

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)?

In children public law proceedings funding is available to the (core) parties. Applying the Public Law Outline at day 2 of proceedings (FPR PD 12A) directions will be given which can include the appointment of a litigation friend. Where there is a dispute an expert is often instructed to report, if the Part 25 FPR test of necessity is met.

In private law children proceedings, the court is often faced with litigants in person. The court often is required, therefore, to take a more pro-active stance in its inquisitorial role to determine any potential issue of litigation capacity. The Family Division recommend to the Civil Justice Council the steps identified at paragraphs 75-90 of the Family Justice Council's April 2018 report, which provide comprehensive guidance which may be of assistance, but is not herein repeated.

Harbin v Masterman enquiries undertaken by the Official Solicitor are a most helpful tool for judges sitting in the Family Division. It is understood the Official Solicitor requires funding to be in place to cover the cost of both the case worker's time and the instruction of the expert or person asked to carry out the enquiry on behalf of the Official Solicitor. There are obvious limitations to this process being used regularly to carry out assessments of litigation capacity.

In the Court of Protection, the court will often make an interim declaration or finding that P lacks capacity to conduct the proceedings and direct the instruction of an expert to report to the court on this issue (and most often the underlying subject matter issues at the same time). There remains something of a debate in respect of the Court of Protection's powers to make interim declarations of a lack of capacity: see for example *DP v London Borough of Hillingdon* [2020] 45 EWCOP at paragraph 40 (where it was noted (in the context of deprivation of liberty) section 48 MCA does not provide for a power to make interim declarations and a finding was made instead) and *Barnet Enfield and Haringey Mental Health NHS Trust v K and Others* [2023] EWCOP 35 at paragraphs 94-104 (where the court relied in sections 47 and 48 MCA). Irrespective of this debate it is common practice for the court to proceed to determine interim best interests matters (for welfare and property). There is little direct experience of what happens in practice when a protected party lacks or is alleged to lack capacity to conduct the proceedings.

The consultation paper references the case of *CS v FB* [2020] EWHC 1474 (Fam) where the court made an interim declaration of capacity at paragraph 19 and the Official Solicitor was appointed to act as litigation friend and to investigate the issue of litigation capacity. In *Re D (Children)* [2015] EWCA Civ 749 the Court of Appeal emphasised the importance of the early identification of the issue of litigation capacity and the need for urgent resolution of any dispute. The court validated the proceedings retrospectively. It is noted that it is <u>not</u> routine for the Family Courts to make interim declarations in respect of a party's lack of litigation capacity. There is a distinction between parties' rights in family litigation and the need for there to be certainty about their ability to fairly participate in

the proceedings and advance their case; and the position of P in the Court of Protection, where the court relies on interim declaratory powers in respect of capacity to make decisions in P's own best interests.

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?

Yes.

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?

Consideration should be given to this issue although it comes with obvious resource implications and reference is made to the published letter by the then Vice President of the Court of Protection (Hayden J) on the subject of section 49 MCA reports, dated 16 December 2022, which re-iterated the need to comply with COP Rule Practice Direction 14E, and the impression that too many section 49 MCA report directions were being sought by the parties and made by the court against NHS bodies.

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?

Consideration should be given as to whether this should be a case management decision without presumptions, applying the over-riding objective with a focus on the need to balance justice and the person's Article 8 ECHR/common law rights to privacy and confidentiality. As stated above, the inter-relationship between litigation capacity and subject matter capacity does not make it easy to identify a presumption, other parties have no right to contest litigation capacity and by extension, therefore, attend such a hearing.

There is no such presumption contained either the FPR or the COP Rules. Common practice in both jurisdictions is for the other parties to be present at such hearings.

Paragraph 86 of the Family Justice Council's April 2018 report emphasises the need for care in private law proceedings when hearings take place to resolve disputed litigation capacity but does not suggest the exclusion of other parties.

Of course, under both the FPR and the COP Rules, the court retains a power to exclude parties from all of or part of a hearing. Experience suggests such a power is rarely and carefully used.

The extent to which other parties would seek to obtain a strategic litigation advantage or other improper (business) advantage is beyond the scope of this submission and is plainly an issue to be carefully considered. The Family Division note that contested issues of litigation capacity take place at *inter partes* hearings before public and private children cases in the Family Court and before the Court of Protection. Such hearings are fair, just and have appropriate regard to the party's rights to privacy and confidentiality.

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

Consideration should be given to this as a case management decision which balances the potential protected party's Article 8 rights as against Article 10 rights, see for example the Court of Appeal in *Hinduja v Hinduja* [2022] EWCA Civ 1492 for a helpful summary of Court of Protection practice. Open justice is a fundamentally important principle, but here will often be very little or no public interest in reporting of private medical information which will inform the assessment of litigation capacity. The Family Court's transparency initiative has provided for much great reporting and adopts a similar (but not identical) approach to reporting restriction as the Court of Protection.

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?

See answer to Question 21.

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?

Any decision made that a party lacks litigation capacity and the appointment of a litigation friend or determination or finding that the statutory presumption of capacity has not been rebutted should be capable of being subject of an appeal and treated as an appeal as against any other case management decision. Consideration may have to be given to directions to deal with any such appeal in an expedited manner and/or a stay and the interim position.

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?

This is the position in the Family Court, as set out in FPR Part 15. Different considerations apply from the perspective of P in the Court of Protection given the jurisdiction granted to the court by section 48 MCA.

The need to avoid delay in all family cases is important, particularly so in cases involving children's welfare. The court's permission should provide for case management decisions to be made and any interim "holding the ring" injunctive relief pending determination of

the final issues, until a party's litigation capacity has been resolved, however, the context of the civil proceedings must be considered.

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?

The experience of the Court of Protection and the Family Court applies different considerations as they deal with vulnerable parties' welfare. The FPR and COPR each apply an over-riding objective which takes into account – amongst other considerations (such as justice) – the welfare position the court is considering.

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

The respective FPR and COPR over-riding objective tests have proven to be reliable guides to the procedural and substantive issues of such case management decisions. Both seek to incorporate a form of 'balance of harm' test.

FPR Rule 1.1 states: "*These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved.*" The interim harm to a child, for example, would therefore likely be considered as well as the rights of others which may include a protected party.

COPR Rule 1.1 states: "*These Rules have the overriding objective of enabling the court to deal with a case justly and at proportionate cost, having regard to the principles contained in the Act*." Application of sections 1, 4 and 48 MCA principles would likely consider harm to P of any such case management decision. Again, the rights of others, including a protected party, are likely to be considered in an interim best interests analysis.

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?

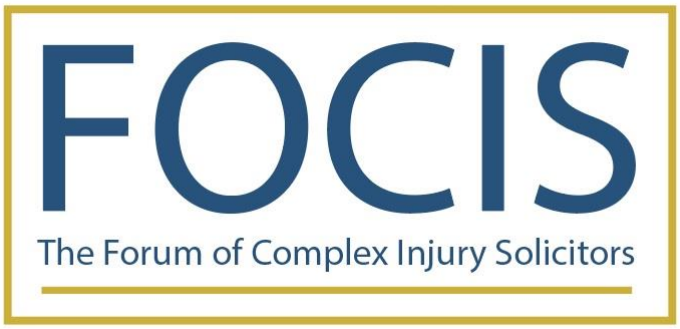
32) On what principles should the costs of a determination be decided?

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?

The Civil Courts may also wish to consider the possibility of more than one party lacking capacity to conduct the proceedings, a situation which takes place with some frequency before the Family Courts and the Court of Protection.



The Forum of Complex Injury Solicitors (FOCIS)

Response to

Civil Justice Council's Consultation Paper: "Procedure for Determining Mental Capacity in Civil Proceedings"

About Us

FOCIS members act for seriously injured claimants with complex personal injury and clinical negligence claims, including group actions. Some of our members also act as Deputies principally for those who lack capacity to manage their own finances and affairs. The objectives of FOCIS are to:-

1. Promote high standards of representation of claimant personal injury and medical negligence clients,
2. Share knowledge and information among members of the Forum,
3. Further better understanding in the wider community of issues which arise for those who suffer serious injury,
4. Use members' expertise to promote improvements to the legal process and to inform debate,
5. Develop fellowship among members.

See further www.focis.org.uk.

Membership of FOCIS is intended to be at the most senior level of the profession, currently standing at 24 members. The only formal requirement for membership of FOCIS is that members should have achieved a pre-eminence in their personal injury field. Eight of the past presidents of APIL are members or Emeritus members of FOCIS. Firms represented by FOCIS members include:

Anthony Gold	Hugh James
Atherton Godfrey	Irwin Mitchell
Ashtons	Jones Maidment Wilson
Balfour Manson	Kingsley Napley
Bolt Burdon Kemp	Leigh Day
Dean Wilson	Moore Barlow
Digby Brown	Osbornes
Fieldfisher	Prince Evans
Fletchers	Serious Law
Freeths	Slater & Gordon Lawyers
Hodge Jones & Allen	Stewarts
	Thompsons NI

FOCIS has been the name since 2007 of the organisation formerly known as the Richard Grand Society (founded in 1997 based on the concept of the American 'Inner Circle of Advocates' which had been formed in 1972 by Arizona and San Francisco Attorney Richard Grand).

FOCIS members act for seriously injured claimants with complex personal injury and clinical negligence claims. In line with the remit of our organisation, we restrict our responses relating to our members' experience, practices and procedures. We will defer to others to respond on the impact relating to other classes of case.

Reply

FOCIS welcomes the opportunity to respond to the Civil Justice Council's consultation paper.

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?

Yes notwithstanding that the Defendant may have a significant financial interest in the outcome.

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?

Yes although the inquisition should be by an independent party. The success of the inquisition will depend on (1) the quality of the person/s appointed to conduct the inquisition (2) the quality of the information provided (3) their resources. We are keen to avoid decisions being delayed and/or challenged potentially leading to an adversarial battle with further delays.

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?

No not in the limited context of specialist Claimant firms pursuing complex compensation claims almost invariably with medical expert opinion or at least medical records as to the Claimant's likely litigation capacity. Capacity can fluctuate and so sometimes it will be appropriate for our Members to raise with the court the need for a capacity review usually with proposals

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

In the very large majority of such cases FOCIS Members assess a Claimant's litigation capacity prior to issuing court proceedings. As a consequence, the duty to raise the issue of capacity with the court rarely arises and almost invariably where post issuing there is fresh evidence as to the Claimant's litigation capacity which persuades our Member to reassess and the reassessment is disputed by the Claimant or his family. The reassessment might follow Part 35 expert evidence for example from a neuropsychologist or Neuropsychiatrist or other evidence for example irrational and inconsistent instructions from the Claimant. The reassessment might be either for finding capacity where before it was considered capacity was absent or alternatively

(and in practice more frequently) for finding capacity was lacking. Our Members' assessments of capacity are based on all available evidence and seek to balance the proper assumption of capacity against the need for the Claimant to have safeguards particularly those within CPR 21. Our Members are likely to adopt a cautious approach and so appoint a Litigation Friend where the balance of evidence identifies at least a real risk of incapacity. This cautious approach probably reflects the considerable prejudice to the Claimant if ultimately litigation capacity is wrongly assumed. It may also reflect the potential financial risk to our Members if they act for 3 or 4 or more years under a CFA with the Claimant and which ultimately is invalidated.

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?

No there is very rarely an unrepresented Party to proceedings in the context of our Members' claims. We anticipate that the existing guidance for legal representatives reflects the primary duty to the court and that the issue should be raised whenever on the balance of all credible evidence there is a real risk that the unrepresented party lacks litigation capacity.

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

Where in the considered opinion of the legal representative the balance of credible evidence indicates there is a real risk that the unrepresented party lacks litigation capacity.

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?

Yes where the test at 6. is satisfied

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

N/A

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

See 6 above

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?

For the reasons set out above, we doubt this will make any significant difference in the narrow context of our Members' claims. However, we do see that generally this may be desirable particularly where there may be consideration of an interim payment for a party of uncertain litigation capacity.

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?

Yes- but limited by reference to the test set out at 6. The Directions Questionnaire has provision for information about vulnerable parties and more recently the Claim Form seeks the same information. Provision could be extended within these and/or other key court forms as to any concerns about capacity to litigate and/or financial capacity.

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

We anticipate that particular sanctions may be appropriate in relation to a litigant in person and are content to leave this to others but not otherwise as legal representatives are well aware that sanctions may apply for failures to assist the court and further 'particular' sanctions may be unfair and unnecessarily restrict judicial discretion.

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.

In our experience such situations are very rare. In one case an unrepresented Defendant appeared unable to deal with the obligations of disclosure or understand the implication of a settlement proposal and costs consequences. The 2nd Defendant was not willing to indemnify or agree with that party an apportioned settlement. A hearing was applied for and judgement was entered against the 2nd defendant. The 1st defendant lacked capacity (but no costs were expended proving this or discontinuing proceedings) the proceedings were stayed against the 1st Defendant by Tomlin order and a Bullock costs order against Defendant 2.

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

a. The court? Yes. **Where the test at 6 is made out the court should instigate investigations but not carry out the investigation itself not least because there are unlikely to be sufficient resources.**

b. Other parties and/or their legal representatives? **Yes to a limited extent by legal representatives in the context of the duty owed by them to the court to ensure relevant issues are brought to the judge's attention..**

c. The Official Solicitor (Harbin v Masterman enquiry)? **Only if the OS were given additional resources which seems unlikely. Even if resourced, the OS would have to tread very carefully and not go beyond assisting those protected parties or beneficiaries to assert their position.**

d. Litigation friend (interim declaration of incapacity)? **No. There are substantial hurdles which would make this risky for them and unlikely to be a reliable solution including the possible exposure of the litigation friend to legal costs and the likely lack of expertise for this purpose of most litigation friends.**

e. Other (please specify)? **Yes third parties with suitable expertise to investigate litigation capacity such as Charities (Headway or Child Brain Injury Trust for example) Court of Protection Panel Member Deputies or CABs to assist the unrepresented Party or Litigation Friend and which should receive appropriate funding for such purpose.**

14) Do you have any comments to make in relation to your answers to the previous question? **Our Members' experience is almost invariably through acting for individuals whose litigation capacity is not clear and so would have investigated this at the outset and for reasons set out above. Where the issue of another Party's litigation capacity comes before the court we envisage the Judge may instigate the investigation of that Party's capacity (in circumstances we set out above) and which should mean reference of the Party to a suitable independent third party which has appropriate expertise. We identify Headway and CBiT as Charities which maintain lists of solicitors with experience of brain injury and also the Court of Protection's list of Deputy Panel Members as possible third parties. Suitable funding would have to be available. The other Parties in the litigation would assist the court as appropriate for example raising the issue of that Party's litigation capacity and identifying possible third parties.**

15) Should the civil courts have more clearly defined powers to order disclosure of relevant documents for the purpose of investigating litigation capacity? **No - not for this purpose as we envisage the appointment of a suitable independent third party who would be better suited and experienced. Capacity documentation would be classed as "relevant" if in dispute so would be disclosed in any event and directions would provide for service/exchange of expert evidence.**

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

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? **Yes where the investigation is carried out and reports are commissioned by an independent third party and the Parties haven't already provided for this.**

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? **Yes**

19) Should the party be granted anonymity and/or should reporting restrictions be imposed in relation to the hearing? **Yes exceptionally where the risk of prejudice to the Party in the particular circumstances outweighs the general presumption of open reporting.**

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? **Through incorporation of that right in an order of the court and a Direction for investigation by a suitable third party independent of any legal representative of that party in similar manner to that envisaged at Answers 13 and 14 above. It is important to note that Capacity is issue/decision specific and can fluctuate over time and so proper allowance should be made for redetermination where appropriate for example in the wording of the order/direction for investigation. Having a right of appeal is unavoidable. We envisage a 2 stage process where permission to appeal is sought first to weed out hopeless appeals.**

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? **Yes and including the party's fluctuating capacity.**

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? **Yes but in expectation that in part through provision of a Central Fund for Parties without representation there would be speedy resolution.**

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? **Yes.**

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

25) What factors should be included in such a test? **The likely time it will take for the determination of capacity, what prejudice other Parties may suffer if determination will take such time, what prejudice may be suffered by the party whose litigation is to be determined if steps/actions are taken prior to the determination. The court should have regard to whether some (likely the most pressing) steps/actions should be taken. The court should have regard to whether the Party's litigation capacity has previously been investigated, by whom, the evidence then gathered and the conclusions drawn. The court may decide to adopt those conclusions until rebutted (if at all).**

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. **Legal Aid is not available at all for personal injury claims and although in theory is available to a limited degree for clinical negligence claims in practice is used rarely in part because of rules which severely restrict eligibility and which experts can be given instructions.**

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? **We don't believe that legal aid is either a practical or the most economical solution for our members cases. We would advocate for a separate central fund not subject to financial means assessment.**

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?

Not applicable

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? **Our experience is that our assertions of litigation incapacity are frequently challenged by insurers so costs issues are commonplace within those claims. However, where properly evidenced, Insurers rarely successfully challenge litigation incapacity and accordingly are responsible for payments of costs following a successful outcome for the Claimant. Where a claim does not succeed disbursements incurred for such purpose are generally paid by After The Event insurers provided prior approval is given.**

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; **No**

b) When the other party is the Claimant; **No**

c) When the other party is a public authority; **Our preference would be for a central fund and in suitable cases the Defendant should pay.**

d) When the other party has a source of third-party funding; **No**

Or,

e) Should the rules remain as they are (with the court able to order/invite such an undertaking in appropriate cases). **The court has or should have the power to make a costs order against other parties on determination of the issues between the parties and which should include those relating to determination of litigation capacity. Funding should be through a central fund which could be re-imbursed following any such costs order.**

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? **In our view the central fund should be the primary source of funding. At least in relation to incapacity through brain injury we anticipate there will be many Headway and CBiT panel solicitors who would be prepared to act for reduced rates.**

32) On what principles should the costs of a determination be decided? **In the first place the Judge would order costs to be paid from the central fund to reflect a prescribed fee for the solicitor and with disbursements in addition. There may be provision to exceed the prescribed fees in exceptional cases. On conclusion of the issues between the parties the Judge might make an order for a party to reimburse the central fund and would be expected to treat such costs as in the case.**

33) Do you have experience of issues relating to the procedure for determination of litigation capacity in the civil courts not referred to above? **No**

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

We consider there are five improvements which should be made in the context of pursuing compensation claims on behalf of those whose litigation capacity is impaired:

a/ the costs currently attributed to the Litigation Friend should be treated as those of the Protected Party. At the very least there should be a rebuttable presumption that the Litigation Friend's costs liability will be reimbursed absent wrong doing on their part. The existing provisions for the Litigation Friend to be personally responsible impose an unfair and unwelcome liability and significantly discourages litigation friends from acting;

b/ there should also be a rebuttable presumption that the solicitor acting for a Protected Party can and should rely on the reasonable instructions from a Litigation Friend that have been provided with informed consent. In doing so the solicitor should be entitled to be paid for the work relating to following those instructions in the same way as they would when acting for a client with full capacity.

c/ the costs both as between Parties and those of the Protected Party should be determined/approved by the same judge at the same time as seems to be provided for in CPR 25.10. Currently within the District Registries there is a most unhelpful separation of these assessments: following the assessment of costs between Parties, assessment of the Protected Party's costs are commonly dispatched by the Costs District Judges to the SCCO. In our strong view the District Judges should assess both within the same detailed assessment procedure;

d/ we agree with the recommendation of the CJC at paragraph 3.26 of its Costs review of May 2023 that CPR 46.14 should be amended. We contend there is already discretion for the court to deal with the incidence of the costs of approval of inter partes costs settlements as part and parcel of the inter-related issue of the deduction of any residual balance of costs from a protected party's damages. However, the fact that a working assumption on behalf of some courts is that there is or may be no such power reinforces the need for a rule change to make it clear that judges do have that discretion. As a matter of principle there is no material difference between the costs of the damages approval hearing and that of any consequent approval on an inter partes costs settlement. They are a by-product of the long-standing principal that you "take your victim as you find him", plus in a significant proportion of such claims the mental incapacity is itself part of the damages that the claim relates to.

e/ we also agree with the recommendation of the CJC at paragraph 3.27 of its Costs review of May 2023 that the process of assessing and approving protected party costs

pursuant to CPR 46.14 should be revised to make it more efficient for both the parties and the court. We would welcome engagement with the CJC and/or CPRC on how such process improvements could be achieved.

FORUM OF INSURANCE LAWYERS

Informing Progress – Shaping the Future

Response to the CJC consultation by the Procedure for Determining Mental Capacity in Civil Proceedings Working Group.

March 2024

FORUM OF INSURANCE LAWYERS

Informing Progress – Shaping the Future

FOIL (The Forum of Insurance Lawyers) exists to provide a forum for communication and the exchange of information between lawyers acting predominantly or exclusively for insurance clients (except legal expenses insurers) within firms of solicitors, as barristers, or as in-house lawyers for insurers or self-insurers. FOIL is an active lobbying organisation on matters concerning insurance litigation.

FOIL represents over 8000 members. It is the only organisation which represents solicitors who act for defendants in civil proceedings.

The response was drafted following consultation with the membership.

Any enquiries in respect of this response should be addressed initially to:

[redacted]

Response to the CJC consultation by the Procedure for Determining Mental Capacity in Civil Proceedings Working Group.

Although FOIL members have experience in a wide range of litigation where one party is backed by insurance, the issues raised in this consultation arise most frequently in the personal injury claims they handle. FOIL is therefore limiting its response to consider capacity only in relation to personal injury claims, leaving others with appropriate experience to address the matter in the wider context of other types of litigation.

It is clear from the consultation paper that in some types of litigation, housing cases for example, issues around capacity to litigate may be more complex and problematic than in personal injury claims, where both parties will usually be represented.

As was recognised in the discussion at the CJC seminar on 1 March, the consultation raises difficult issues. Being wary of the potential for rule change to lead to unforeseen consequences and satellite litigation, FOIL would echo concerns at the lack of data on how many cases the issue affects. Whilst there are improvements that could be made in relation to personal injury claims (as set out in the answers below), in general the current processes work well and FOIL does not believe it would be helpful to introduce significant reforms.

If parties in other areas of litigation are experiencing more serious issues of concern FOIL would argue that the correct approach would be to seek tailored reforms to address those issues rather than introducing general changes for all types of litigation.

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?

It is important to note that capacity can impact upon personal injury claims in two respects:

Capacity to litigate concerns the ability to give instructions and conduct and progress a claim (and much more rarely, a defence) through the litigation process. It is this form of capacity which is addressed through CPR Part 21, including by the appointment of a litigation friend and the requirement for court approval of any settlement where capacity is lacking.

Capacity to administer one's own affairs, particularly financial matters, is relevant in determining damages. In provisions arising from the Mental Capacity Act 2005, and the involvement of the Court of Protection, a deputy can be appointed to administer the affairs of a receiving party who cannot manage their own, and damages will be recoverable to cover the ongoing costs of the deputy.

Whilst the issue of capacity to litigation will primarily be a solicitor/own client matter, other parties to the litigation will have a legitimate interest in the determination of capacity. The outcome of that determination will indicate whether or not a defendant can satisfactorily settle a claim and conclude litigation.

The issue of capacity to manage one's affairs impacts directly on the award of damages and is addressed in the same way as the award and assessment of other heads of damage. The appointment of a deputy can result in additional costs of around £20k pa, which in some claims can increase the value by a seven-figure sum. A paying party has a legitimate interest in determining whether or not a claimant will require a deputy and it would not be unusual for the defendant to make representations and present evidence to the court on the point.

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?

In the vast majority of claims in which capacity becomes an issue, the matter will be addressed by the party's representative in accordance with the principles and guidance published by the Law Society. Establishing, as a solicitor, that you are able to accept and act on your client's instructions is a regulatory matter. FOIL believes that the regulatory regime is the most appropriate way to deal with these issues. Although there may be rare cases where it is necessary for the court to become involved, these can be dealt with either in accordance with general principles and powers within the CPR, or by modest change to the current rules. FOIL does not believe it would be appropriate or helpful for the issue of determination of capacity to litigate to be shifted into the CPR.

With respect, FOIL does not agree with the statement in the consultation paper (para 20) that, "*the legal representatives' role would appear to be limited to that of assisting the court".* In the vast majority of claims there will be no need for the court to be involved directly in the question of capacity to conduct litigation. The matter will be addressed by the client's legal representative and, if capacity is lacking, a litigation friend will be appointed to conduct the litigation. In very rare instances it may be necessary for the matter to be brought to the attention of the court. It would be extremely rare for the court to become involved in assessing capacity to litigate but if the court were required to consider the matter, FOIL would agree that the approach should be inquisitorial.

It is important to state that the issue of capacity to manage one's own affairs is a factual matter for the court to determine. In line with the determination of other issues of fact, the approach will be adversarial, with all parties entitled to make representations and put evidence before the court.

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?

FOIL would agree with the views expressed in the consultation paper, that where a party whose capacity is in question has legal representation, in most cases the legal representative will both identify and investigate the issue, in accordance with professional obligations. FOIL does not believe a specific duty should be introduced, requiring a legal representative to raise the issue of capacity to litigate with the court: the matter should be dealt was as a solicitor/own client matter in accordance with professional obligations.

A guidance note for practitioners on mental capacity, dated 27 June 2023, has been published by the Law Society and is available on their website. This provides specific advice on the legal test for capacity in relation to the conduct of civil proceedings. The

guidance also covers the issues of assessing capacity, techniques for assessing capacity and the obtaining of a medical or expert opinion.

The guidance indicates that where a client is a party to proceedings but lacks capacity, a litigation friend must be appointed. The section on assessing capacity indicates that if you are not able to form a view on the client's capacity "*you should seek the opinion of an appropriately skilled and qualified professional."* In FOIL members' experience a wide range of professionals can be involved in assessing capacity, including GPs, psychiatric nurses and even social workers. If would be helpful if a minor change were made to the note to give better guidance on suitable professionals to be involved in the assessment, where required.

The guidance in the Law Society note reflects what happens in practice. A legal representative with concerns regarding the capacity of a client will investigate the matter. If the investigations confirm lack of capacity the representative will ask a relative to act as a litigation friend. If no-one suitable is available, the Official Solicitor will be approached to act as the litigation friend of last resort. The necessary steps can then be taken to appoint a litigation friend in accordance with CPR Part 21, usually by serving a certificate of suitability. Any settlement of the claim will then require court approval.

In very rare cases, circumstances have arisen in which the issue of capacity has been brought before the court. The case of *Folks v Faizy* [2006] is referenced in the consultation paper, alongside the case of *Master-Lister v Brutton & Co* [2002]. Although the consultation (para 23) indicates that "*it is the duty of the court to investigate and determine whether or not a party has capacity*", FOIL believes this significantly overstates the role of the court. The Law Society guidance rightly states that "*ultimately it is a court that decides whether the client has or does not have capacity, taking into account the evidence and various opinions* (*Master-Lister v Brutton & Co* [2002])". It is clear that in rare and unusual circumstances, "*ultimately*" the matter can be brought before the court but this is not normal procedure.

In the case of *Folks v Faizy* the issue of capacity to litigate was brought before the court by way of trial of a preliminary issue – confirming that the court has inherent power to deal with the issue when circumstances require it. In the judgment Pill LJ emphasised that in getting involved in the issue when required the judiciary was "*not seeking to promote or encourage routine satellite litigation to determine the issue*". In para 19 of the judgment, he repeated that "*the rules as to capacity are not designed to create additional litigation*." Pill LJ approves the comments of Chadwick LJ in *Masterman-Lister*, in considering the former RSC Order 80, the precursor to Part 21:

"The rule making body plainly contemplated and intended, that the question whether a party was required to act through a next friend or guardian ad litem (as the case might be) should, in the ordinary case, be determined by the party himself or by those caring for him, perhaps with the advice of a solicitor but without the need for enquiry by the court".

In FOIL's view the guidance provided by the Law Society is helpful and comprehensive and, save for the minor change mentioned above, no further guidance is required. If it were felt that the available advice could be improved, FOIL believes the appropriate way to deal with this would be through enhancement of the existing Law Society and other professional guidance rather than the publication of a new document.

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

FOIL does not believe that a specific duty should be introduced to require legal representatives to raise the capacity to litigate of their own client with the court. The guidance already provided by the Law Society sets out the test for lack of capacity, with reference to the Mental Capacity Act 2005 and the common law principles. The key question to be asked in assessing capacity is set out, from the judgment of Chadwick LJ in *Master-Lister v Brutton & Co*:

"a party to legal proceedings is capable of understanding, with the assistance of such proper explanation (in broad terms and simple language) from legal advisors and other experts as the case may require, the matters on which their decision was likely to be necessary in the course of the proceedings."

Advice is also provided on the type of insight the client will be required to have to be judged to have capacity. If the legal representative has concerns that the client is not able to meet the test, that will provide the trigger for investigation. FOIL would argue that the development and introduction of any further test would be likely to prove very difficult, would be inappropriate, and would be likely to cause confusion and complication.

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?

The consultation paper notes (para 34) that the working group considers there is a duty on legal representatives to raise with the court the issue of capacity of their own client, and, therefore, there must similarly be a duty to raise with the court any reasonable doubts about the litigation capacity of another party acting in person.

With respect, FOIL believes this overstates the position. The comments in the judgments of both *Masterson* and *Folks* set out above, give a clear indication that the issue of capacity will normally be a matter between solicitor and own client: it will only be in very unusual circumstances that the matter will need to be brought before the court. FOIL does not believe that the authorities support the assertion that a solicitor has a duty to bring capacity issues concerning their own client before the court: it therefore follows that there is no existing duty on a solicitor to bring the issue of capacity of an opposing LIP before the court. The omission of such a duty from the professional guidance published by the relevant regulators supports that.

In the absence of such a duty on an opposing legal representative, FOIL would argue strongly that it would be inappropriate for such a duty to be introduced. Defendant representatives often have little contact with an opposing LIP to enable any judgment to be made on mental capacity and with very limited information available, the exercise of any duty would be fraught with difficulties. In some cases, for example, where the defendant is a Mental Health Trust, such a duty would create an inherent conflict of interest. Where, in rare circumstances, the defendant representative does have significant concerns, it is already open to them to bring the matter before the court by way of application, to be dealt with as part of the normal case management of a claim. The noticeable gap in the current provisions is pre-issue, where a defendant representative can be faced with a potential unrepresented litigant with concerns at that party's capacity, with no obvious route to clarify the position. FOIL believes this position would be improved by giving the defendant representative the ability to bring

the issue of the need for a Certificate of Capacity to Conduct Proceedings to the court as a pre-issue matter.

In practice, the possibility that an opposing party may not have capacity will cause concerns for defendant representatives. In accordance with the Supreme Court decision *Dunhill v Burgin* [2014], if a claim is settled with a claimant who does not have capacity, without the approval of the court, any settlement of the claim can be set aside with the claim then proceeding to trial. This approach provides significant protection to a claimant LIP and will clearly focus the mind of any defendant representative who will wish to take all steps to finalise the litigation for the benefit of both claimant and defendant.

Where a claim has been handled on the basis of the presumption under the Mental Capacity Act, (that a person is assumed to have has capacity until it is proven that they do not have capacity) but there are concerns that a represented party may lack capacity, in practice claimant and defendant representatives will often agree that it is appropriate to seek the court's approval, as if the party did not have capacity. The judgments in *Coles v Perfect* [2013] and *Grimshaw v Hudson* [2021] confirm that the court has inherent jurisdiction to secure approval whether neither party asserts that the claimant lacks capacity but there is a doubt as to that capacity. The court in such circumstances will be in a similar position to a court asked to approve a settlement where there is a lack of capacity.

This approach provides protection for all parties. FOIL believes it would be of considerable assistance if defendant representatives were similarly able to seek the approval of the court when settling a claim with a LIP where concerns over capacity have arisen. There could be no disadvantage to a claimant in having the court consider a proposed settlement, and in practice, it provides valuable reassurance to an unrepresented party.

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

As indicated above, FOIL does not believe that a duty should be introduced.

7. Should other parties to proceedings have a general duty to raise with the court an issue as to the 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.)

As indicated above FOIL does not believe that legal representatives should be under a duty to raise with the court the issue of capacity of an opponent. Imposing the duty on lay parties with regard to an opponent would be more problematic and create significant difficulties. In practice it would be unreasonable to expect a lay litigant to have sufficient awareness of a LIP and have the legal knowledge and ability to apply any test on capacity. FOIL would argue strongly that such a duty should not be introduced.

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

FOIL does not believe that such a duty should be introduced. The difficulty of identifying the level of belief or evidence that would be required highlights the practical problems that would be created by 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?

As indicated above, FOIL believes the issue of capacity is one which is properly addressed between solicitor and own client, in accordance with the professional guidance provided. In practice, issues of capacity will be appropriately addressed within the processes already in existence and there is no need for the issue to be specifically considered in every case as part of the pre-action process.

If there are types of litigation where changes are required, additions limited to the PAPs in those areas would be the best approach.

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?

As indicated above, FOIL believes the issue of capacity is one which is properly addressed between solicitor and own client, in accordance with the professional guidance provided. In practice, issues of capacity will be appropriately addressed within the processes already in existence and there is no need for the issue to be specifically considered in every case as part of the court process.

If there are types of litigation where changes are required, additions limited to the documents in those areas would be the best approach.

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

The issues under consideration in this consultation are complex and difficult. They require careful consideration, with the benefit of professional guidance, to ensure that decisions are made which are in the best interests of a litigator client. The nature of the exercise makes it ill-suited to being expressed in CPR rules. For such issues to be included within a regime best suited to black and white issues of compliance, where punishment is aimed at enforcing adherence to mandatory rules, would be entirely inappropriate.

12. Do you have any examples of issues you have faced in practice when you have had to decide whether or not another party was being 'difficult' or whether they might lack litigation capacity? If so, can you explain how they were dealt with.

FOIL members have not reported any examples of this issue. As indicated above, where there are no assertions that a party lacks capacity to litigate, but questions remain, it is open to the parties to seek approval of any settlement from the court.

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)?

In practice, except in very rare circumstances such as those resulting in some of the case law referred to previously, the court will not get involved in assessing the capacity of a LIP. FOIL would agree with the conclusions in the consultation paper, that it is unrealistic to expect the court to conduct an investigation.

In personal injury litigation, with no legal aid available, a referral to the Official Solicitor would be the most obvious and practical route for addressing issues of capacity of a LIP. FOIL would endorse the comments in the consultation paper, that the OS has very limited resources. In FOIL's experience, even where the OS accepts an invitation to act, the delay in the matter being addressed can be 12-18 months.

FOIL believes that the position could be improved significantly by action in two areas. Firstly, by enhancing the ability of the Official Solicitor to accept an invitation to act by improving funding. Secondly, at present a Certificate of Capacity to Conduct Proceedings can only be obtained after proceedings have been issued. A right to bring the matter before the court as a pre-issue matter would be of assistance.

It is likely that, in practice, referrals to the OS will need to be limited to those claims where the need for a referral is most pressing, not as a matter of routine. This practical limitation gives support to an approach in which, for most claims in most types of litigation including personal injury, it is recognised that the current processes are working reasonably well with no need for significant change. Limiting the intervention of the OS in this way would make it more likely that reforms could be introduced where needed at limited cost.

On a more general point, the experience of FOIL members is that in cases where a client lacks capacity, and where there is no-one able to act as a litigation friend, if can be very difficult to persuade the Official Solicitor to become involved. The issue of funding of the Official Solicitor in general is worthy of review.

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

No

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

FOIL believes the courts already have the powers they need to order disclosure of relevant documents.

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

Powers should be exercised in line with the existing powers of case management and determination of a claim within the CPR.

17. Should the civil courts have powers to call for reports, similar to those of the Court of Protection, for the purposes of investigating and determining issues of litigation liability?

The court already has powers to call for reports under general rules on case management.

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?

As indicated in the answers above, FOIL does not believe that mental capacity should be an issue which is routinely brought before the court for determination. The appropriate way to address the investigation of the issue is foremost as a solicitor/own client matter, with the involvement of the Official Solicitor where the relevant party is unrepresented. In claims where the receiving party does not have capacity, court approval of any settlement will be required. All parties are entitled to attend the hearing. Issues may arise which are solicitor/own client matters and it is normal in such circumstances for the court to ask the paying party to leave the court to enable those matters to be considered privately. That process works well.

As set out above, and as demonstrated by existing case law, there will be rare occasions when the court is called upon to make a determination on a party's capacity to litigation, most usually as a preliminary issue, or perhaps by way of application to set aside a consent order. These hearings are a normal part of litigation with all parties being entitled to attend, present evidence and make such representations as are appropriate.

In particular, it is important to note that hearings to determine a party's capacity to manage their own affairs are adversarial in nature and treated as any other hearing in litigation, with all parties entitled to present evidence and make representations to the court.

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

These issues should be a matter for the court.

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?

Decisions on issues of capacity which are brought before the court can be challenged by way of appeal, in line with other decisions made of the court.

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?

This situation would be very rare. Where it did occur the most appropriate challenge would be by way of Judicial Review, with the involvement of the Official Solicitor where appropriate.

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?

As indicated in the answers above, FOIL believes there is only a need for the court to become involved in a determination of mental capacity to conduct proceedings in rare circumstances. Where those arise it would be appropriate for no steps to be taken in the proceedings without the approval 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?

Yes, in those rare cases where court involvement is required, the starting point should be that existing orders are stayed until the issue is resolved.

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

Whilst the test proposed, in line with that in the Family Act 1996, may be relevant in family matters, it appears much less appropriate in civil proceedings dealing primarily with financial matters. It would be more appropriate to have a test based on balancing the interests of justice between the parties.

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

The potential for each of the parties to suffer detriment by the decision, together with access to justice issues should be considered.

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.

FOIL members have not reported any relevant experience.

27. Should legal aid 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?

FOIL has limited experience in this area and declines to comment.

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?

Yes. If the circumstances which will bring the issue before the court are narrow and closely controlled, resulting in only exceptional cases requiring legal aid, the funding required would be modest. On the basis that the current processes work reasonably well in the vast majority of cases, the availability of non-means tested legal aid in those few, difficult claims, would be more affordable, and cost-effective.

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?

FOIL has no relevant experience.

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 those costs, should the court have the power to require

another party to the proceedings with sufficient resources to pay those costs upfront:

a. In all cases?
b. Where the other party is the claimant?
c. Where the other party is a public authority?
d. Where 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)?

In personal injury claims, the need for a determination by the court, or the involvement of the Official Solicitor where a party is unrepresented, will be very unusual. In these circumstances, where the party is question does not have funds or funding to meet the costs involved, the most appropriate method of funding would be by non-means tested legal aid. As indicated in the answers above, capacity to conduct litigation is essentially a solicitor/own client matter: it is not appropriate for the costs of the steps necessary for a legal representative to meet their professional obligations to be routinely passed on to an opponent.

There is a danger that if the issue of capacity becomes a cost-bearing matter, with costs available from an opposing party, the process of court determination will be over-used.

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 reasonable source of funding?

FOIL would agree – presumably this would be a form of non-means tested legal aid.

32. On what principles should the costs of a determination be determined?

The usual costs rules in litigation should apply.

Cover sheet

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**.

You must fill in the following before submitting your response:

Your response is (public/anonymous/confidential):	Public
First name:	Jan
Last name:	O'Neill
Location:	London
Role:	Lawyer (qualified Australia)
Job title:	Professional Support Lawyer
Organisation:	**HERBERT SMITH FREEHILLS LLP**
Are you responding on behalf of your organisation?	Yes
Your email address:	[redacted]

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?

We agree that the question of whether a party does or does not currently have litigation capacity turns solely on the factual findings regarding the individual, and that other parties' interests are not a relevant factor in that factual assessment.

However, the other parties are likely to be affected by the outcome, whichever way it is decided, and in that sense have an interest in the determination.

The rules regarding litigation capacity serve to protect the interests of not only vulnerable/protected parties but also their opponents in litigation. As the Court of Appeal noted in the leading authority *Masterman-Lister v Brutton* [2002] EWCA Civ 1889:

> "*The pursuit and defence of legal proceedings are juristic acts which can only be done by persons having the necessary mental capacity; and the court is concerned not only to protect its own process but to provide protection to both parties to litigation which comes before it. A defendant is entitled to expect that he will not be required to defend proceedings brought against him by a person of unsound mind acting without a next friend*." (emphasis added) (paragraph 65)
>
> And, in discussing the predecessor rule to CPR 21.10 (requiring court approval of settlements):
>
> "*Absent that rule, a defendant sued by a person whom he knew to be of unsound mind … could not safely compromise the claim by a payment. There was a risk that the compromise would be set aside. In that context, the rule may be seen as facilitative; it enables a binding compromise to be made*." (paragraph 67)

The extent to which other parties' legitimate interests regarding the outcome may justify them being involved in aspects of the process will depend on the circumstances. However, we believe that any consideration of other parties' involvement should take into account that their legitimate interests may include:

(a) ensuring that any capacity issue is determined in a manner that:

  (i) is timely and seeks to minimise disruption to the progress of the proceedings
  (ii) considers the issue appropriately, so as to minimise the potential for subsequent challenge, and provides all parties with as much certainty as possible as to the finality of orders made in the proceedings, both historical and going forward

(b) ensuring that capacity issues are not raised (by an opponent or a party themself) for tactical or other improper reasons, such as to delay proceedings or avoid the effect of some past agreement or order. We would expect such cases to be rare (particularly where all parties are legally represented). However, it is important that any relevant guidance or rules do not preclude the ability of other parties to raise such concerns if appropriate;

(c) ancillary / consequential decisions in connection with the determination. For example:

- to what extent pre-existing orders should be stayed pending determination (see response to Question 23 below);
- in the event of a finding of no capacity, the appropriate case management approach going forward;
- whether a finding of no capacity may affect the validity or operation of any prior orders/agreements.

The last of these issues in particular could depend to some extent on the factual basis of the finding (eg. the nature of the impairment, its history, etc), and therefore justify the other parties having at least some visibility of those details. In any event, any exclusion of the other parties from the court process of determining capacity should not have the effect of excluding them from any consideration of such ancillary issues in the proceedings.

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?

In principle, yes – but with regard to the other parties' legitimate interests in relation to the impact on the proceedings, as mentioned above.

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*?
Yes.

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

We do not express a view on precisely how the threshold should be formulated. However, we consider that it should take into account the following:

- The threshold for raising the issue with the court should be distinct from, and higher than, the threshold as to when a representative should investigate the issue themselves (including seeking medical opinion) - which the case law suggests will be an appropriate preliminary step in most cases. For example, if representatives were required to notify the court as soon as they had "doubts" (or "reasonable doubts") as to whether their client has capacity, that would effectively require notification before they conducted any investigation and obtained any medical opinion (which of course might provide assurance that there is capacity). That could result in issues being raised with the court unnecessarily, and might also potentially deter some legal representatives from embarking on such investigations in some circumstances.

- Where the threshold is set should reflect a balance between the importance of identifying any lack of capacity and the following practical issues for legal representatives:

    - Even with further guidance as to when the duty will be triggered, the nature of the issue means that applying it in practice will often not be straightforward. That will particularly be the case where no reliable medical opinion can be obtained (due to the client's refusal, funding restrictions, or some other reason). As the consultation notes, it may 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. In many cases, the assessment will require a judgment call, on which reasonable minds may differ.

- The decision to raise the issue with the court is a serious one, given the immediate impact it has on the proceedings – including interruption of case preparations, costs implications and the possibility of it being used as a basis to challenge or avoid recent orders or agreements. Such notification might also feasibly affect any arrangement with funders or insurers, or have some other ramifications for the client stretching beyond the proceedings (eg. with regulators, or in the individual's personal life). The potential for adverse impacts will obviously be a particular concern for a representative where the client does not consent to the notification. In addition to the issues the consultation document notes in this regard, we would add the question of legal privilege - given that there is clearly potential for facts relevant to capacity to be contained in privileged communications (eg. lawyer/client communications revealing a client's inability to understand advice or to provide coherent instructions). This could throw up issues as to the representative's ability to disclose such information in the capacity determination and, potentially, waiver.

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?

Yes.

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

Many of the challenges for the client's own legal representatives mentioned in response to Question 4 apply equally here. However, opposing legal representatives will usually have much less insight into the issues. The threshold as to when such a duty would be triggered should therefore be high.

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?

We would be concerned about the possibility of this resulting in capacity issues being raised in circumstances where it is unwarranted – by representatives or unrepresentative parties who have not familiarised themselves with the law in this regard and/or who do so out of abundant caution, to protect themselves from any subsequent criticism. That would be a particular risk if there were specific sanctions for failing to raise the issue.

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

See question 10 above.

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?
Yes

b. Other parties and/or their legal representatives?
Potentially – but probably only to the extent of (i) limited administrative assistance and/or (ii) contributing relevant information in their possession (not under a formal disclosure obligation)

c. The Official Solicitor (*Harbin v Masterman* enquiry)?
Yes

d. Litigation friend (interim declaration of incapacity)?
Yes

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?

It may be preferable for this to be assessed on a case by case basis. In any event, we do not consider there should be a blanket rule against such participation. There may be circumstances where it is appropriate for other parties, or at least their legal representatives, to attend (to assist the court and/or in connection with the legitimate interests noted in response to Question 1 above).

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?

Yes

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?

If so, it should be only on the basis that there is generous liberty to approach the court for such permission on an urgent basis if necessary.

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?

The following types of orders (at least) should not be stayed as a general rule:

(i) interim injunctions (ie. on the substantive claim)

(ii) orders aimed at facilitating enforcement / supporting the court process – such as freezing injunctions and confidentiality/reporting restrictions.

As to other types of orders, it would seem safer to leave this to be decided on a case by case basis when a capacity issue is raised – taking into account the purpose of the orders and also the likely delay before capacity is determined. That would limit the risk of a blanket stay having unintended consequences.

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?

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**.

You must fill in the following before submitting your response:

Your response is (public/anonymous/confidential):	Public
First name:	Philip
Last name:	Glen
Location:	Western Circuit
Role:	Designated Civil Judge
Job title:	His Honour Judge
Organisation:	Judiciary
Are you responding on behalf of your organisation?	No
Your email address:	[redacted]

Information provided to the Civil Justice Council:

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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?

No – there are circumstances in which the other party may wish to challenge an assertion of lack of capacity where it is raised (particularly in possession proceedings) for tactical reasons.

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?

Yes

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*?

Yes

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

Substantial grounds for believing that the party may lack capacity

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?

Yes (and should include in house legal representatives)

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

Substantial grounds for believing that the party may lack capacity

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.)?

No – it is rare for public bodies to act otherwise than through an external or in house legal representative. In possession proceedings, where bodies classified as public authorities do use non-legal representatives, this requirement is already captured by the PSED and the Pre-action Protocols.

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?**

No – the duty at 4) and 6) above should simply be a general and continuing one before and throughout proceedings.

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?**

No – see above.

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

No – In practice the sanctions will include setting aside orders made previously, imposing stays and making adverse costs orders (including for wasted costs)

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)?**

Yes to all, depending on the circumstances of each case

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?**

Yes

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

I am not convinced that this requires definition

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?**

Yes

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?**

There should be a rule that the other parties may only attend with the permission of the court

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

Yes – this is plainly a justifiable exception to the general principle of open justice

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?**

Would any determination not be subject to appeal? It is not desirable for one judge to be 'reviewing' the decision of another unless by way of appeal or quasi-appeal to a more senior judge

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?

Yes

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?

Yes

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

Yes

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

Whether the step or order being proposed (or failing to permit or make it) will result in harm to the party that cannot be remedied by a subsequent order of the court.

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?

Yes – but see below

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?**

Yes

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).

(e)

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?

Only as a second-best alternative to legal aid funding

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

On the assumption that this is intended to refer to inter partes costs, they should be in the case

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?

Procedure for Determining Mental Capacity in Civil Proceedings Working Group Consultation Paper

Submission from the Housing Law Practitioners Association

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

The Nature of the Issue and 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?

Yes

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?

Yes

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?

Yes, particularly given that they may well be raising the issue against their own client's instructions

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

A reasonable belief that the client may lack capacity to give instructions seems a good starting point – or something similar.

We do not think it would be sensible to introduce any evidential burden at this stage as the representative might not be able to provide such evidence for their belief – particularly if the client is resistant to the suggestion they may lack capacity. Many of our members are duty advisers on housing possession day and there is only limited time to make such assessments.

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?

Yes

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

It seems sensible that the same level of belief should apply – to apply a different test would create confusion

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.)?

It seems impractical to apply to all parties (as opposed to all legal representatives) as lay parties cannot be expected to be able to identify the issue appropriately. It would seem sensible that a duty to raise should arise only in the case of public bodies, insurers and other regulated bodies (such as banks/mortgage companies etc)

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

Again, it would seem sensible that the same test applies.

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?

Potentially, but only those protocols that apply to public bodies/ other regulated bodies as above (eg in the housing context the Pre-Action Protocol for Social Landlords in Possession Proceedings and the Pre-Action Protocol for Mortgage Arrears)

It does not seem an appropriate to require this of other litigants for example, it would seem inappropriate for a tenant with no legal experience to have to identify a possible issue of litigation capacity relating to their private landlord for example.

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?

Only if for a defined end and not simply as a box ticking exercise. For example, if doing so triggered the case being heard by a judge with COP experience. It might also be sensible to introduce in cases (for example in the housing context in Accelerated Possession Claims) where the matter would ordinarily be determined on the papers without a court hearing to ensure that a hearing took place.

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

Only in cases of clear attempts to gain advantage or to mislead the court. Costs consequences at the one end of the spectrum and dismissal of the claim at the other would seem appropriate depending on how egregious the failure is and consequences if it had not been picked up during the proceedings

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.

Where a client was deeply mistrustful of all in authority and therefore refusing to accept his solicitor’s advice re how to plead his defence and a psychiatric report was ultimately obtained which confirmed he lacked capacity due to his inability to weigh up information when giving instructions.

Where there were concerns about a client’s capacity to litigate and she refused to attend an appointment with an independent psychiatrist and the GP refused to provide a report without consent which she withheld. Ultimately, the Court made a determination she lacked capacity when she failed to engage with these processes while also failing to take steps to clear the property.

If a wider range of experiences was wanted we would need more time to ask the membership.

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? *Yes – and it would be sensible if possible for a judge with COP experience to be involved*

b. Other parties and/or their legal representatives? *Yes to the extent that they should be required to assist the Court*

c. The Official Solicitor (Harbin v Masterman enquiry)? *Would be ideal but clearly there are issues of resourcing as pointed out in the paper*

d. Litigation friend (interim declaration of incapacity)? *Seems potentially problematic when it comes to disclosure of documents etc to that person at a stage before a final determination on capacity has been made*

e. Other (please specify)?

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

The role of social workers and mental health support workers should be considered. Could, for example, a profession-appropriate questionnaire be developed to seek views of such professionals?

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

Yes

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

Where a party or legal representative has indicated that they have a reasonable belief that a party may lack litigation capacity (or whatever the test may be) and no evidential information has already been provided to the court. Also, where it would be a breach of other professional or legal obligations for information held by one of the parties/legal representatives to otherwise be disclosed (eg where disclosure would breach client confidentiality).

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?

Yes potentially, but there is clearly a serious issue in relation as to how such a report is paid for – it seems unjust that a party about whom there is concern as to litigation capacity could be burdened with such an expense.

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?

Yes

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

Yes

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?

Hard to say, but a very simple form perhaps initially enabling them to request that there is a review by another judge

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?

Yes

Substantive Proceedings Pending Investigation

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?

Yes

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?

Yes

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

Yes

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

It seems to us that the factors to be considered will depend entirely on the nature of the case. For example, in a possession case the court would need to consider the harm caused to the party if a claim for possession is not stayed as against the harm to the landlord (or other parties such as neighbours being impacted by a tenant's behaviour) of not being able to enforce the order. Again in a housing context, if an injunction order is not stayed then the potential harm for the party is that they are arrested and at risk of committal to prison for a

breach, as against the harm to neighbours etc if no injunction is imposed and the behaviour continues, but, that said, an injunction might not be effective against someone who possibly lacks capacity to litigate in any event.

Where the balance is even then the status quo should be maintained.

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.

Yes because of difficulties in obtaining evidence of means/get forms signed

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?

It would be more appropriate to provide non-means tested legal aid as below as requiring the solicitor to sign to say they have reasonable grounds to believe the client is financially eligible seems quite a high risk thing for a solicitor to have to do (as the Legal Aid Agency might seek to challenge whether the grounds were reasonable)

We may take a different view if there was a guarantee that the solicitor's view would not be impeached but solicitors would not trust the LAA without such a guarantee.

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?

It seems more sensible to limit to cases within the scope of civil legal aid, at least at first for all sorts of reasons including:

- *Confusion to parties if they have a solicitor and they suddenly stop acting*
- *Difficulties in finding legal aid solicitors with sufficient knowledge of the proceedings in hand if extended to all cases*
- *There are enough pressures on the legal aid budget without adding another whole new area of non-means tested legal aid!*

However, there may be ways to ensure that such legal aid could be extended to all cases. This would have to be examined in the light of RoCLA.

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?

No

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;

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

Unsure.

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?

Yes

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

That the subject fo the determination should not be burdened unduly.

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?

No

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

An overriding suggestion would be that the civil courts generally have some access to the expertise and procedures available in the CoP so that whole new specialisms and procedures do not need to developed.

HLPA strongly feels that a properly resourced local county court system is essential for effective access to justice for those parties where capacity is in issue.

Cover sheet

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**.

You must fill in the following before submitting your response:

Your response is (public/anonymous/confidential):	**Public – apart from specific references to** [redacted]
First name:	**Katherine**
Last name:	**Gee**
Location:	**London**
Role:	**Former Litigation Friend**
Job title:	**Former Litigation Friend**
Organisation:	**n/a**
Are you responding on behalf of your organisation?	**No**
Your email address:	[redacted]

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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.

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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?
Yes. Their position is not relevant to the determination of capacity by appropriately qualified professionals. However I see no reason why they should not agree the choice of mental health professional used for the determination.

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?
No. It should be established procedurally what evidence is required, together with objective standards for the source and quality of that evidence. Thus, when evidence which conforms to these standards is provided by the party claiming incapacity, that should be sufficient. Judges and other legal practitioners are not qualified to 'inquire' or otherwise be involved in any assessment of whether a person does or does not have capacity: only in the procedure for its determination.

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*?
Yes. The SRA should be very clear on this as well: currently they are not. The Claimant in the above case quite clearly had issues that needed to be assessed (see below, 4)).

[redacted]

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

Where their behaviour is peculiar or is contrary to their own best interests, begging further investigation; and where mental health issues have been outlined in client conference and evidence. At the very least.

[redacted]

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?
Yes**.** They are manifestly ignorant of any such duty.

If a bank clerk in any high street bank in the UK has a duty to raise concerns regarding the mental health of a customer, unknown to them, in order to protect their financial position, so too should a legal professional *especially* in the civil courts, where consequences can be so severe.

[redacted]

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

- Where the other party's mental health forms part of either side's evidence in proceedings;
- Where the legal representative's client alludes to or discusses the unrepresented party's mental health issues;
- Where the other party is subject to an active Lasting Power of Attorney, has been sectioned, or has experienced similar formal interventions;
- Where there is a medical history of brain injury or previous mental health issues in either side's evidence;
- Hearsay, via sworn testimony from friends, family or associates of the party in question, subject to formal investigation;

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? In the interests of ensuring justice is served, yes.

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?

This can't hurt, but it should be recognised that those who are really mentally ill don't know or assess themselves as being mentally ill when they are at their worst, so the issue may only become evident whilst proceedings are underway, not only at the commencement of proceedings.

What is more important I think is a pre-action protocol that establishes 'equality of arms.' By that I mean, where one party manifestly enjoys an advantage over the other party, because of the mental health difficulties of the other party (or actually I believe for other reasons as well: the fact there are unrepresented or impecunious, for example), the courts should be able to make a presumption, or similar, that there is a potentially fundamentally exploitative aspect to the proceedings and that there is a need to investigate further before allowing the claim to proceed. Something akin to the CPS perhaps.

It must also be possible for parties to submit concerns at *any* point in proceedings. This is key, as there is currently no procedure at all.

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?

As at paragraph 9) (above), if the other party is unrepresented, they won't self-identify as mentally ill so are unlikely to complete these. I worry if such representations are not made at that stage, it may go against the incapacitous party later in proceedings.

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

Where clear they were aware, yes: as to not do so is fundamentally exploitative. There should be clear sanctions for those who seek to take advantage of the party who lacks capacity, including their legal representatives, in order to further their own case.

[redacted]

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.

[redacted]

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?** I believe the court should simply act on clear, objective standards for evidence regarding a person's litigation capacity, as legal professionals lack the appropriate qualifications to assess on an inquisitorial basis.

b. **Other parties and/or their legal representatives?** No. The opposite side should have nothing to do with it, they too lack the appropriate qualifications to rebut a medical diagnosis of litigation incapacity.

c. **The Official Solicitor (*Harbin v Masterman* enquiry)?** Yes**.** The Official Solicitor should always be involved in my view, where a person cannot afford legal representation. **No lay person should ever be a litigation friend ever again.**

d. **Litigation friend (interim declaration of incapacity)?**

Yes. As long as they are a legal professional**. I am utterly opposed to lay Litigation Friends.** Any concerned party should be able to give evidence as to concerns over a party's mental health, though this must of course only trigger an investigation into whether or not there is in fact an issue.

e. **Other (please specify)?** Just like the risks of any investment are, by law, required to be outlined in writing and verbally by a financial advisor, so too must the risks and obligations of the role of Litigation Friend be explained in full to any lay person before the court agreeing to perform this role.

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

The lay Litigation Friend must become a thing of the past, especially when the incapacitous party is a Litigant in Person. This is a job for the Official Solicitor, or a similarly legally qualified and experienced individual. They are a Protected Party of the Court and need advice appropriate to their circumstances, circumstances which are even more legally complex than a normal trial. A lay person simply cannot provide this assistance in their best interests.

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

I am not sure how this assists, where there are objective standards and guidelines as to what the court needs to see to make a finding of litigation capacity. However the Court must have a duty to have the capacity of a party investigated by professionals, should they feel there may be an issue.

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

All circumstances where the concern exists.

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?**
Yes – although perhaps where one of the parties in proceedings is incapacitous, civil cases should be automatically referred to the Court of Protection, where judges and legal practitioners are more experienced in dealing with the corresponding challenges of legal proceedings.

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?** Yes.

19) **Should the party be granted anonymity and/or should reporting restrictions be imposed in relation to the hearing?** Yes. The Claimant in the above proceedings released all the incapacitious Defendants medical documents, which are now part of the public record. My medical records, as the Litigation Friend, also had to become public, when I needed to step down due to ill-health.

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?**
For the period during which their capacity is in question, a party must have legal representation provided by the Court. They are a vulnerable party.

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?** Yes.

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?** Yes, see below at 24).

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?** Yes, see below at 24).

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

No. It is impossible to retrospectively assess when some loses the capacity to litigate, so any previous orders are tainted. If a party is deemed to lack capacity in the course of proceedings, any proceedings to date should voided and proceedings reset to the beginning, perhaps automatically referred to the Court of Protection.

25) **What factors should be included in such a test?** See 24), above.

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.**

Yes – it is virtually impossible to get legal aid for civil proceedings, particularly where proceedings are already under way.

[redacted]

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? I'm not sure what this means.

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?** Yes, for Defendants at least.

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?
Yes, it is extremely costly and most people who lack the capacity to litigate are likely to also find holding down paid work problematic. The courts can also deem an assessment 'unworthy' and demand another.

[redacted]

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;**
Claimants with means, seeking to make claims against a Defendant whose capacity in question, should be required to pay all costs associated with the capacity assessment and provide surety of costs for the Official Solicitor to provide the appropriate assistance to the Defendant.

It might also be wise for the court to consider the question of the Claimant's motivations in such circumstances, for bringing a claim against a Defendant who lacks the means to even pay for such an assessment.

c) **When the other party is a public authority;** Yes.

d) **When the other party has a source of third-party funding;** Yes.

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?

A central fund should be created for incapacitous parties, to fund both their assessment and proceedings in these circumstances.

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

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?

There's a procedure?

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

- Ensure that Litigation Friends and the incapacitous party are both kept informed of proceedings. Whether lay or not, a Litigation Friend is likely the only one who will read and appropriately respond to court communications. This is especially important when informing the parties of venue changes from remote to in person, and vice versa, which seem to change daily in the run up to a hearing; and provide both parties with links to remote hearings.

- Removal of judges who express discriminatory attitudes to mental health. I would suggest that 'goo-goo gaa-gaa' is an example of such an expression; likewise, expressing beliefs that one has to be comatose or otherwise catatonic to lack the capacity to litigate.

- Create stronger powers of censure to the SRA who, I quote '…don't know whether they [solicitors] are allowed to do that [write to a person being investigated for mental capacity demanding they waive their legal privilege] or not, we're not lawyers.'

- The SRA also needs to know that serving a Protected Party is not OK and should be sanctioned.

- Ensure trial judgements make it abundantly clear that the incapacitous Defendant lacks the capacity to litigate and will thus require the appointment of a Litigation Friend in order for subsequent proceedings to continue against them in other fora, e.g. bankruptcy proceedings etc. Currently one apparently needs a new assessment and the appointment of a Litigation Friend for each stage.

- Where an incapacity assessment is obtained whilst proceedings are underway, those proceedings need to restart, where it is not ascertainable precisely when the incapacitous party ceased to have capacity. At the beginning of the trial in the above proceedings, before any of the evidence had even been tested, the trial judge made the extraordinary finding that the incapacitous Defendant '…clearly had capacity prior to this [the period when concerns were raised and the incapacity assessment obtained].' How that was clear to anyone is a mystery to everyone else, including at least four mental health professionals.

- Education of the judiciary and their staff. In the above proceedings (at first instance) both judges seemed to be under the impression that to be *truly* incapacitous, one has to be catatonic. In truth they can be the complete opposite: my friend when manic can stay up for five days straight, produce reams of prose (some makes sense, some doesn't) and was wont to email judges and other parties directly, potentially prejudicing his own case.

- Respect – both for the incapacitous party and their Litigation Friend.

- Appreciation that legal proceedings are intolerably stressful for anyone, especially those against whom claims for large sums, that they likely do not have, are brought: compound this with mental health difficulties, so severe that they are deemed by medical professionals to lack the capacity to litigate, and there is a very real chance of suicide and other forms of self-harm. In my opinion the courts are currently reckless - at best - to this potential consequence. Hundreds, if not thousands of unnecessary deaths will have resulted from this system: far more every year than the State of Texas has executed since they reintroduced the death penalty in 1982.

- Finally, the judicial complaints procedure needs to be extended from the current three-month cut off – it effectively requires one to complain about the judge who is likely to be hearing your trial, whilst proceedings are ongoing, thus likely prejudicing one's own case. In no other professional arena is this conflict of interest permitted.

My Two-Cents

To paraphrase a politician I rate very highly, I have seen first-hand how solicitors and barristers in the civil courts actively enrich themselves by exploiting vulnerable people, who struggle to make sense of the bureaucracy and idiosyncratic processes and procedures employed by the courts' system – as system in which dysfunction is normalised; and bullying, harassment and exploitation for personal financial gain, encouraged.

Do this in my world you go to jail; and your bank gets fined £100 million by their Regulator. HSBC were recently fined £57mm for misclassifying some of their customer accounts, such that they *might* not be given regulatory compensation, *should* the bank go bust: why is it one rule for banks and another for the institution that makes decisions about people lives and wellbeing, at first instance at least, as significant as whether someone is made bankrupt; if they lose their family's home; whether life-saving treatment is withdrawn; or how much access they have to their own children?

[redacted]

However most importantly, the civil courts' current approach to Protected Parties seems to consider keeping to a scheduled trial date to be more important than a Protected Party having an adequate defence and legal representation.

[redacted]

It is vitally important that any revisions to procedures, presumptions and rules put the protected party at the heart of proceedings, ascribing more weight to their more vulnerable position in the court's application of the Overriding Objective, particularly where they are defending themselves from a claim. We are currently infinitely more concerned about the Claimant in this regard, including the supposed Regulator, the SRA.

Finally, a note of caution. When dysfunction becomes normalised in this way it becomes an opportunity for the unscrupulous to engage in practices that can, let's say, 'nudge the balance of probabilities in their favour.'

[redacted]

One would have thought that document management and communication with parties was an intrinsic function of the courts system - so what am I, a member of the lay public supposed to make of this? If I fail to maintain proper records or implement appropriate processes in my business, under the FCA's Senior Managers Certification Regime (SMCR), I face *unlimited* personal fines from my Regulator. My employer, likewise. All we do is manage money that customers actually have.

[redacted]

The lower courts of England & Wales are a national disgrace.

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You must fill in the following before submitting your response:

Your response is (public/anonymous/confidential):	Public
First name:	Deborah
Last name:	Newberry
Location:	London
Role:	
Job title:	Corporate Affairs Director
Organisation:	Kennedys
Are you responding on behalf of your organisation?	Yes
Your email address:	[redacted]

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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?

- The defendant, its insurer client and legal representative will ordinarily have a vested interest in the outcome of the determination of a party's current litigation capacity (as opposed to the substance of the hearing), especially in cases where a party's purported lack of capacity is disputed.
- In personal injury and clinical negligence cases, a determination of mental incapacity for litigation, finances or welfare has significant damages implications on the costs of professional deputyship or other steps that may be necessary to protect the claimant. It also affects the mode of settlement; specifically, whether Court approval is required.

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?

- Yes, but only where there is an issue in dispute, and also based on the totality of the available and relevant evidence from all interested parties.
- Ordinarily, the Court ought not to be needed to determine a person's capacity to litigate, other than to issue a certificate of suitability for a litigation friend.

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*?

- Legal representatives ought to be aware of the provisions set out in the Mental Capacity Act 2005 around capacity to make specific decisions including to litigate. From a personal injury and clinical negligence perspective, we do not believe guidance is needed in this area. If a client lacks capacity, the duty is already present to apply to appoint a litigation friend. Issues do though arise pre-action and there ought to be guidance in place to enable legal representatives to appoint a litigation friend pre-action, without having to issue proceedings.

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

- It is incumbent on the solicitor instructed by the individual concerned to assess their client's or proposed client's capacity to litigate. Whilst in some circumstances they might require assistance from independent medical experts, such as a psychologist or psychiatrist, in exercising this duty, such evidence should not be required every time. It should only be required when the solicitor is unable to make such a decision on their own.
- The norm should be that medical evidence is not required as this is generally not needed unless there are, for example, complex underlying mental health issues. If there are doubts as to a person's capacity, bearing in mind the presumption in favour of such, and having taken all reasonable steps to enable the person to prove their capacity, that should trigger an application to appoint a litigation friend and to notify other parties (and the Court).

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?

- From a personal injury and clinical negligence perspective, we consider there should be clear guidance and an avenue for legal representatives to raise the issue of capacity with the Court.
- However, in our view, legal representatives should not owe a duty to those they do not represent. It is often the case that a defendant will not have met an unrepresented claimant and may not even have had an opportunity to speak with them on the phone. Little will be known about their capacity to litigate, and guidance would assist with managing this situation. Whilst an ability to raise issues should be available, this ought not to extend to a duty as legal representatives will not necessarily have sufficient information or evidence to trigger a duty and it would be unreasonable to expect them to exercise that duty.
- Where proceedings are already issued, this could be done at a case management hearing or by application notice. This ability to raise issues though should extend to pre-action matters and if so, access to the Court is required before the issue of proceedings – perhaps in the form of a Pre-Action Court process.

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

- A reasonable level of belief and/or medical evidence from an expert witness or treating GP should trigger the ability to raise issues, but this should not extend to a duty. It may also become apparent through communications with the unrepresented party. In exercising this reasonable belief, the legal representative should bear in mind that mental capacity is presumed for all people unless established otherwise.

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?

- In our view, from a personal injury and clinical negligence perspective, it would be too onerous to impose such a duty.

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

- Were such a duty to exist, in our view this should be limited to parties who are represented by an Officer of the Court i.e. a solicitor, barrister or chartered legal executive.

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

- We do not believe that such a duty should be introduced. However, if one was introduced, we suggest the trigger should be a reasonable level of belief and/or medical evidence from an expert witness or treating GP should trigger the ability to raise issues but this should not extend to a duty. It may also become apparent through communications with the unrepresented party.

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?

- Yes and parties should also be able to apply for a litigation friend to act on their behalf without proceedings being issued.

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?

- Yes. The certificate of suitability procedure is limited to those representing the claimant. Having these questions on acknowledgement of service and defence forms allows other parties to raise questions.

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

- No. This would be unreasonable, particularly as we do not consider any such duty should arise.

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.

- Example: We acted for an insurer in a personal injury claim by a legally represented 18 year old who had a diagnosis of Autistic Spectrum Disorder and ADHD who wanted to accept a Part 36 offer to settle his claim. The claimant was seriously injured in an accident and was due to have a below knee amputation.
- When the claimant wanted to accept the defendant's Part 36 offer the claimant's legal representative said they were concerned about the claimant's mental capacity and arranged for him to be assessed. The claimant had a remote/video assessment undertaken by a social worker who concluded the claimant lacked capacity to conduct the litigation. The claimant's legal representatives refused to disclose to the defendant's legal representative a copy of the capacity assessment.
- A litigation friend was appointed, and the matter went to an approval hearing. The Judge was unhappy with the capacity assessment and ordered that the claimant be examined by a Consultant Psychiatrist. The claimant was examined in person by a Consultant Psychiatrist who found the claimant to have capacity.
- The claimant now sought to accept the defendant's original Part 36 offer. The defendant was concerned that there were now two conflicting capacity assessments, one of which the defendant had not been able to see. This was a concern because of the risk that the claimant could in the future allege that he had not had capacity after all when he accepted the Part 36 offer and therefore the settlement was not valid.
- The parties therefore agreed to have the Court approve the settlement in accordance with the decision in *Coles v Perfect* [2013] even though the most recent assessment concluded the claimant did have capacity. The effect of a *Coles v Perfect* order is that if a party lacks capacity, the Court has approved the settlement. Further, it does not matter whether the settlement was approved at the same time that lack of capacity is alleged. This allows the defendant to have finality that the claim is truly settled.

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?

- No other than to issue a certificate of suitability for a Litigation Friend (pre-action if possible/necessary)

b. Other parties and/or their legal representatives?

No.

c. The Official Solicitor (*Harbin v Masterman* enquiry)?

- Yes, although they would need to be better resourced to manage this. If a person is deemed to lack capacity, they need not be appointed as litigation friend though, unless no one else is available.

d. Litigation friend (interim declaration of incapacity)?

- There may be merit in a litigation friend being involved in the investigation of an unrepresented party's litigation capacity. However, we are concerned that they may not be familiar with conducting an assessment for capacity. A litigation friend is unlikely to be sufficiently legally qualified to fully understand the provisions of the 2015 Act and nuances around assessing someone's capacity to litigate.

e. Other (please specify)?

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

- If a party is unrepresented then in our view, all avenues and resources should be explored to determine capacity at proportionate cost.

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

- Yes, although this should be a last resort and any disclosure should be limited to those requiring sight of it and not necessarily any other party, bearing in mind they will contain confidential medical information.

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

- When there is a dispute and/or challenge between any of the interested parties.

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?

- Yes, where necessary, and we would encourage the Court to consider seeking expert opinion from single joint experts where capacity is in dispute between the parties.

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?

- Yes, there should be a presumption that other parties to the proceedings (and/or non-parties) cannot attend a hearing to determine a party's litigation capacity. However, those other parties (and or non-parties) should be permitted to submit any relevant written evidence in relation to the issue.

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

- We consider it would be best to provide anonymity in litigation capacity hearings. In our view, this should be judged on a case-by-case basis and a matter for the court.
- Anonymity should also be offered to those providing evidence in regard to capacity and any ongoing treating clinicians.
- In line with the anonymity orders, we would welcome reporting restrictions to be used/ordered. The reason for this is it would protect the identity of the patient, and also the treating clinicians who are giving evidence from any undue press or reporting.

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?

- We consider there would need to be a formal application, reserved to the judge who made the original determination.

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?

- Yes, using the proposed application procedure we have set out in response to question 20 above, and not just the party affected, but the other parties to litigation, where it has significant procedural or financial consequences.

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?

- No, in our view, the existing rules requiring appointment of a litigation friend before steps are taken are sufficient. There are insufficient Court resources for judges to determine capacity at the beginning of every case.
- Capacity must be presumed unless otherwise established. It is only in certain circumstances, where capacity is in doubt or disputed that determination of capacity might be required. Court determination should be last resort and only if there is a dispute. Where there is a dispute, we agree Court determination is needed before steps can be taken in the proceedings.

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?

- Yes

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

- Yes

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

- We consider the following factors should be included:
  - Access to justice and fairness;
  - Prejudice to the individual party and the legal representatives;
  - Financial implications of delay (costs to all parties and potential damages);
  - Evidence gathering and the need to act quickly to preserve such; any personal harm that might come to the claimant (or a defendant) by a delay;
- These factors should be balanced with the need to ensure the individual's best interests are upheld (either by themselves if they are proved to have capacity or by a Litigation Friend properly exercising their duty). For example, if continuing with proceedings before capacity is established, some steps

might be taken which are against the person's best interests but they are unable to communicate that and there is no one yet appointed on their behalf to do so.

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?

- For personal injury cases, we consider non-means tested legal aid should be available for unrepresented litigants.

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).

- As a general observation, in personal injury cases we consider it would be inappropriate for the Court to have the power to require a defendant to pay the costs of a determination up front.

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?

- The extension of legal aid to cover determinations in unusual circumstances such as unrepresented litigants would be appropriate and welcome in our view.

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

- In our view, where there is a capacity determination, funded under a litigant's retainer with their solicitor and/or legal aid, if that litigant were to be successful then the defendant would be liable for the costs applicable to that determination. On that basis, the normal rules of costs litigation should apply.

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?

- No.

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

- In personal injury cases, the parties frequently instruct the examining experts to opine on mental capacity to litigate, in order to assist the instructed solicitor and any judge ultimately determining the issue. In our view, better guidance and/or training for solicitors and experts would assist both the instructed solicitor and examining expert in their understanding and application of the Mental Capacity Act 2015 and accompanying Code of Practice, including the presumption of capacity, the opportunity for practicable steps to support decision making, and the allowance for decisions that others may regard as unwise.

March 2024

Keoghs
a Davies business

Keoghs LLP - Response to the CJC working group consultation – Procedure for Determining Mental Capacity in Civil Proceedings

Introduction

This is Keoghs LLP response to the CJC working group consultation on the Procedure for Determining Mental Capacity in Civil Proceedings.

Keoghs is the only top 100 law firm to focus exclusively on handling and defending both mainstream and specialist insurance claims. We offer an end-to-end claims service to insurers, public sector bodies and self-insured companies which includes pre-litigation, litigation and costs negotiation services. Keoghs acts for eight out of the top ten UK general insurers, and with almost 1,800 dedicated staff, is a recognised leader in its field. In the last 12 months we handled approximately 90,000 cases across all classes of personal injury claim.

The issue of capacity is raised when dealing with personal injury claims that are being handled within Keoghs from a Defendant solicitor perspective only. We have therefore only provided substantive answers to questions which are relevant to this practice area.

Executive Summary

- The consultation focuses on litigation capacity, but we stress the need for broader reform, including reform of the determination of financial and welfare capacity. Keoghs, a mostly defendant personal injury practice, lacks Court of Protection jurisdiction. Nevertheless, we advocate for CPR reform to update guidelines, emphasising the financial impact on insurers due to Court of Protection costs and urging consistent approaches by claimant practitioners.
- In personal injury claims, defendants typically have a legitimate interest in other parties' litigation capacity, ensuring binding compromises, enforceable judgments, and considering the impact on property/affairs capacity affecting damages. Disputes and the tactical deployment of litigation incapacity are highlighted risks.
- We support an inquisitorial approach to addressing mental capacity, led by the court, reducing the tactical use of incapacity arguments. A quasi-inquisitorial approach, involving collaboration with both parties, strikes a balance for fair presentation, ensuring a comprehensive assessment with procedural fairness.
- Amending Pre-Action Protocols to require early identification of potential litigation capacity issues is advisable for efficient case management. This proactive step promotes a smoother progression of civil proceedings, ensuring fairness and transparency in addressing mental capacity concerns from the outset.
- Clearer guidance is warranted regarding the duty of legal representatives to bring up issues concerning the litigation capacity of their own client with the court. Enhanced guidelines would promote consistency in addressing capacity concerns.
- While opposing routine court determinations of mental capacity, we agree on rare circumstances necessitating assessments. We support a general rule limiting other parties' attendance at hearings on litigation capacity, with a personal injury exception. In personal injury cases, defendants should have the opportunity to attend hearings, especially when costs may be incurred due to competing expert views on the claimed lack of financial capacity.

- In cases necessitating an investigation of a party's litigation capacity without legal aid, the court's power to require upfront costs from another party should be context specific. In personal injury cases, adhering to usual cost provisions is reasonable—either incorporating expenses into overall case costs or assigning them to the 'losing party.'

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?**

   From a personal injury claim perspective a party will almost always have a legitimate interest in the other parties litigation capacity for the following reasons:

   a. A claimant needs to ensure any judgment obtained against a defendant is enforceable and proceedings can continue against the defendant.
   b. In the situation where an insurer is not indemnifying a driver who lacks capacity, with both the driver and insurer being named defendants in proceedings, issues can arise where the driver requires the appointment of a litigation friend with no-one being prepared/able to act in this role.
   c. The defendant insurer will want to ensure that any compromise in a claim is binding. If the claimant lacks capacity they could find themselves in a similar situation as in the case of Dunhill v Burgin.
   d. Conversely consideration needs to be given as to whether the Coles v Perfect scenario of approving a settlement where the claimant may have capacity is appropriate?
   e. The link between litigation capacity and property/affairs capacity is intrinsic. The defendant is entitled to be involved in the determination of the former, due to the impact on the latter - which directly affects the level of damages.
   f. There is a danger that litigation capacity can be deployed tactically, particularly in conjunction with the vulnerable witness provisions, to protect a claimant from cross-examination at trial. Litigation capacity in conjunction with the vulnerable witness provisions can be abused to inflate cost budgets.
   g. Disputes can arise between parties as to the presence of impairment of the brain or mind such as whether there is a TBI or not and interplay with fundamental dishonesty allegations.

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

   We agree that an inquisitorial approach could be beneficial in addressing the potential risks of tactical deployment of a lack of mental capacity in claims. An inquisitorial system, with the court taking the lead in determining the evidence needed, may help mitigate the possibility of strategic use of mental capacity issues. Alternatively, a quasi-inquisitorial approach, wherein the court collaborates with both parties to identify and obtain relevant evidence, could strike a balance. This approach allows each party to present pertinent information, ensuring a fair and comprehensive assessment, while maintaining procedural fairness. Ultimately, the goal is to promote a more transparent and equitable process for determining mental capacity in civil proceedings.

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?**

   Yes, clearer guidance is needed regarding the duty of legal representatives to raise issues regarding the litigation capacity of their clients with the court. Clear guidelines would enhance consistency in addressing capacity concerns across legal practices. This clarity is crucial in ensuring that legal representatives can navigate and fulfil their responsibilities effectively, ultimately contributing to a fair and well-informed resolution of civil proceedings involving mental capacity issues.

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

   We consider this question better answered by claimant representatives who experience this issue most regularly.

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?**

   We do not consider there to be a duty on a party to bring capacity issues before the court relating to any other party, outside of their own client. A legal representative may have limited to no direct contact with an unrepresented party. In limited circumstances there may be obvious concerns about the litigation capacity of an unrepresented party, and in these circumstances a party already has the ability to raise these concerns with the court.

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

   As above, we do not consider there to be a duty on a party to raise litigation capacity issues of another party.

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

   We have no specific feedback on this question.

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

   We have no specific feedback on this 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?**

   Yes, it would be advisable to amend the Pre-Action Protocols to mandate parties to identify potential issues of lack of litigation capacity at the pre-action stage. This proactive measure aligns with the goal of early and efficient case management. Identifying capacity issues early on allows for timely assessment and resolution, reducing delays and uncertainties in the legal process. Such an amendment would contribute to a smoother and more informed progression of civil proceedings, promoting fairness and transparency while addressing mental capacity concerns at the outset.

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?**

    Yes, it would be beneficial to amend key court forms, including claim forms, acknowledgments of service, and defence forms, to incorporate questions about the potential lack of litigation capacity in another party. This modification aligns with the objective of early identification and resolution of capacity issues in civil proceedings. Including such inquiries in the court forms enhances the efficiency of the legal process and ensures that relevant concerns are brought to the forefront from the outset. Such an amendment would contribute to a more streamlined and fair resolution of cases, providing a structured approach to addressing mental capacity issues at the initial stages of litigation.

    It would also be helpful to include an amendment/addition to the acknowledgment of service to allow for the defendant to indicate where they dispute the claimant has a lack of litigation capacity.

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

    If a party or legal representative in an action is aware that the Claimant, or another party, may lack litigation capacity and fails to raise it at the earliest opportunity there is the likelihood of a delay to progression of a claim, including rendering any case management decisions to be invalid. Clearer guidance is needed for legal representatives in accordance with our answer to question 3 above. If a party/legal representative fails to adhere to the guidance and litigation capacity is dealt with late in proceedings, there are potential costs implications. In these circumstances it would be appropriate for there to be a cost sanction against the party/legal representative who failed to act in accordance with the guidance.

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.**

    We are unable to provide examples.

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:**
    13.1 The court?
    13.2 Other parties and/or their legal representatives?
    13.3 The Official Solicitor (Harbin v Masterman enquiry)?
    13.4 Litigation friend (interim declaration of incapacity)?
    13.5 Other (please specify)?

    We have no specific feedback on this question.

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

    We have no specific feedback on this question.

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

Yes, it is advisable for the civil courts to have more clearly defined powers to order disclosure of relevant documents for the purpose of investigating litigation capacity. Clear and defined powers in this regard would contribute to a more effective and transparent legal process. Having specific provisions for ordering disclosure enhances the ability to thoroughly investigate and assess litigation capacity, ensuring that all relevant information is available for a fair and informed determination of the issue. By empowering the courts with well-defined powers, the legal system can better navigate and address mental capacity issues in a manner that is consistent, just, and conducive to timely resolutions.

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

The civil courts should exercise their powers to order disclosure of relevant documents for the purpose of investigating litigation capacity in specific circumstances outlined within the Civil Procedure Rules (CPR), as amended in line with the recommendations discussed in response to question 9 above.

The Court should be granted authority to investigate litigation capacity both pre action, in accordance with the pre-action protocols within the CPR, and post-litigation. This approach ensures consistency and clarity in the application of the law while allowing for thorough examination of capacity issues at various stages of the legal process.

By incorporating these powers into the CPR, the legal system can effectively address concerns related to mental capacity in civil justice claims, promoting fairness, transparency, and timely resolution of disputes.

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?**

Yes, it would be beneficial for the civil courts to have the power to call for reports, similar to those of the Court of Protection, for the purpose of investigating and determining issues of litigation capacity. Granting the courts such authority aligns with the goal of ensuring a comprehensive and informed assessment of capacity issues in civil proceedings. This approach allows for a more thorough exploration of the relevant factors, contributing to a fair and just resolution. Particularly in personal injury related matters, where the determination of litigation capacity can significantly impact proceedings, empowering the courts with similar investigative tools as the Court of Protection enhances the overall effectiveness and equity of the legal process. This positive step would further support a nuanced and thorough examination of mental capacity issues in civil cases.

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?**

We do not believe that mental capacity should be an issue which is brought before the court for determination as a matter of routine. However, there may be rare circumstances when the court has to determine litigation capacity. In these rare circumstances, we agree that there should be a general rule or presumption that other parties to the proceedings cannot attend a hearing to determine a party's litigation capacity, but this is subject to one important caveat. In personal injury proceedings, it is often claimed, that where a party lacks litigation capacity, they might also lack Financial (or Fiscal) Capacity. The claimed lack of Financial Capacity might be said to be permanent or of an unknown period. There will usually be supporting expert evidence for the claimed lack of Financial Capacity. Such cases involve considerable overlap with the Court of Protection. The costs (which are often not inconsiderable) of dealing with a party who lacks fiscal capacity are then claimed from the defendant. Frequently, the defendant may be in possession of expert evidence, which takes a

competing view on the claimed lack of Financial Capacity. In these limited circumstances (i.e. where there is potential for costs to be borne by the defendant), the defendant should be given the opportunity to attend the hearing.

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

    We have no issue with anonymity or the imposition of reporting restrictions.

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?**

    We have no specific feedback on this question.

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?**

    We have no specific feedback on this question.

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?**

    We are in general agreement with this proposition. In the interests of clarity, this should be determined at the earliest juncture.

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?**

    We repeat the answer given at question.22, namely, that if a hearing (and this should be relatively rare) is required to determine a parties litigation capacity, this should be determined at the earliest juncture. We are agreeable to time limited stays. We are not agreeable to open ended stays.

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

    We have no specific feedback on this question.

25. **What factors should be included in such a test?**

    We have no specific feedback on this question.

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.**

    N/A – we mostly act for defendants/insurers.

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?**

    No, legal aid regulations should not be amended to allow a solicitor to sign legal aid application forms and obtain a legal aid certificate solely for obtaining an expert report. This would pose a risk of potential abuse or misuse of legal aid resources. Legal aid eligibility and certification should be based on a comprehensive assessment of financial need and the merits of the case, ensuring that resources are allocated appropriately and responsibly. Limiting the scope to obtaining an expert report may not adequately safeguard against potential misuse of legal aid funding.

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

    No, non-means tested legal aid should not be available for the sole purpose of investigating and determining the litigation capacity of a party to civil proceedings, neither in all cases nor limited to those within the scope of civil legal aid as defined in the Legal Aid Sentencing and Punishment of Offenders Act 2012. Providing non-means tested legal aid for such a specific purpose may not align with the broader principles of legal aid allocation and could lead to potential misuse of resources. It is essential to ensure that legal aid eligibility is determined based on a comprehensive assessment of financial need and the overall merits of the case.

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?**

    No.

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).**

    In cases where it is necessary to investigate and determine a party's litigation capacity, and the party lacks legal aid or other funding, the court's power to require another party to pay these costs upfront should be considered in alignment with the specific circumstances. From a personal injury perspective, following the usual costs provisions seems reasonable. This could involve either incorporating the costs into the overall case costs or requiring the 'losing party' to meet these expenses. The decision could be tailored to the nature of the case, with considerations for fairness and equitable distribution of financial responsibilities. It may be prudent to maintain flexibility in the rules, allowing the court to assess each situation individually and order or invite

undertakings in appropriate cases, ensuring a nuanced approach to addressing the financial aspects of determining litigation capacity.

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?**

    We have no specific feedback on this question.

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

    We have no specific feedback on this question.

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?**

    We have experiences of instances where proceedings are initiated, a litigation friend is either in place from the start, limiting the defendant's actions, or an application is made during proceedings to appoint one. In the latter case, the defendant may present their medical evidence, but only if proceedings have advanced to that stage. For example, if the claim progresses to a trial on a preliminary issue on liability, the claimant might seek to appoint a litigation friend shortly before trial based on medical evidence, potentially classifying them as a vulnerable witness. In such a scenario, the defendant's options include risking the trial date, obtaining their evidence and arguing the point, or proceeding to trial at a potential disadvantage due to limited cross-examination options for the claimant as a vulnerable witness.

    Addressing these issues could be considered in the pre-action protocol for personal injury claims, requiring parties to raise potential litigation capacity concerns before initiating proceedings. This might involve issuing Part 8 proceedings to determine litigation capacity before Part 7 proceedings, allowing early objections and involving the court in a quasi-inquisitorial process for obtaining necessary expert evidence and resolving the matter.

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

    It is clear that the consultation paper is looking specifically at the issue of litigation capacity. In our practice area the issue of both financial and welfare capacity are also areas that require consideration of reform. From Keoghs perspective as a mostly Defendant personal injury practice, they have no locus in the Court of Protection. However, the costs of the Court of Protection and any measures put in place following their involvement, for example a Deputy for the Claimant, will be included as a head of loss in the civil claim and Keoghs insurer clients will be asked to pay that head of loss. Keoghs would therefore welcome reform of the CPR to update the guidelines for dealing with capacity in the civil claim arena. Proper guidance would ensure that Claimant practitioners are dealing with the issue consistently and that Keoghs and other Defendant practitioners can have more oversight and involvement in the procedure and provide input to assist the Court with their decision.

Keoghs LLP

March 2024

For further information, please contact:

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The Law
Society

Law Society's response to the Civil Justice Council's consultation on the Procedure for Determining Mental Capacity in Civil Proceedings Working Group

March 2024

Introduction

The Law Society is the independent professional body for solicitors in England and Wales. We are run by our members, and our role is to be the voice of solicitors, to drive excellence in the profession and to safeguard the rule of law.

This response outlines our views on the Civil Justice Council's consultation on the procedure for determining mental capacity in civil proceedings. Law Society members, including those who serve on our specialist Mental Health and Disability Committee, have shared their expertise as part of this consultation.

Summary

We recognise the challenges which can arise due to the Civil Procedure Rules not being clear on how to act when a party's capacity is in doubt. For a new procedure for determining mental capacity in civil proceedings to succeed it will need to be properly funded, led by expert practitioners, and not delay substantive proceedings unduly.

The response addresses only some of the issues raised in the consultation paper. These are:

- The nature of the issue and role of the court
- Identification of the issue: The use of sanctions
- Determination of the issue: The interests of other parties to the proceedings
- Funding and costs
- Data collection

Our key concerns and recommendations are:

- **A judge should have a range of options to determine litigation capacity:** We propose a range of options for a judge determining mental capacity in civil proceedings. One option would be for Accredited Legal Representatives (ALRs) to carry out an investigation of litigation capacity, given their training and expertise in mental capacity issues. This may include obtaining independent assessments of a party's capacity. However, there are significant challenges to implementing this successfully.
- **We do not support the use of sanctions in most cases:** We do not support the use of sanctions for a failure by another party to raise the issue of litigation capacity. We suggest that there is an inquisitorial process with other parties removed from the determination of litigation capacity. This could be undermined by applying sanctions. We recognise that in some cases the judge may believe that issues relating to another party's capacity are being used as a litigation tactic. In these circumstances, the use of sanctions could be appropriate.
- **We do not support blanket reporting restrictions**: We do not support having blanket reporting restrictions because of the implications for transparency and open justice. Decisions on whether to have reporting restrictions on the assessment of litigation capacity should be made on a case-by-case basis.
- **Non-means tested central funds should be used for assessing litigation capacity:** We propose that central funds are used for assessing litigation capacity. This should be provided on a non-means tested basis due to the difficulties in obtaining financial information for those that lack capacity.

- **There is a need for data on litigation capacity concerns:** There is a lack of data on how often concerns arise in the civil courts that a party may lack litigation capacity. We suggest that HMCTS starts collecting this data to support the development of evidence-based solutions.

Response to consultation

Determination of the issue: The interests of other parties to the proceedings

The media has an important role in communicating and scrutinising the routine business of courts throughout England and Wales.

As with attendance in person, there will be instances where, in the interests of justice or to protect the rights of individuals, it will be necessary to restrict reporting of court proceedings. This might be, for example, if there are significant concerns that the other party could access privileged information which would not otherwise be available to them or which could damage the person's case. Another instance could be when reporting the basic facts of a case will reveal who the parties are. We also recognise that a capacity assessment is intrusive and involves examining a person's medical history.

However, we do not support having blanket reporting restrictions in all cases because of the implications for transparency and open justice. Decisions on whether to have reporting restrictions and what those are should be made on a case-by-case basis.

The nature of the issue and role of the court

Removing the right of someone to conduct their own proceedings is a significant decision. It is important for practitioners who investigate litigation capacity to have the right skills and expertise. This process is likely to require practitioners to meet with a person, consider their capacity to conduct the proceedings, and gather the further evidence required to investigate that person's capacity. Most legal practitioners have limited experience and expertise in dealing with people who lack capacity. Determining capacity to conduct proceedings is complex and requires a significant level of skill. If a court has sufficient doubt about a party's capacity then they should pause proceedings and refer the case to experts to investigate litigation capacity.

There should be a range of options for a judge to take when determining mental capacity in civil proceedings and not a 'one size fits all' approach. The scope of civil proceedings can be vast and the process must be flexible.

As Accredited Legal Representatives (ALRs) are experienced in this field and an existing pool of practitioners, there is a case for them being best placed to investigate a person's capacity to conduct the proceedings. One option would be for ALRs to carry out an initial investigation. To do this, they would be likely to need a direction from the court and, if available, a letter of guidance. They would also need to be provided with information/documentation in relation to the proceedings themselves. Any other type of practitioner tasked with investigating capacity would also need this information.

A judge would be able to direct a report from an ALR, using existing allocation processes. This tends to be a fair 'next on the list' approach adopted by the court hubs. The ALR would then visit the person, either in person or remotely as appropriate, and review their medical records. They would then call for any further assessments by relevant professionals and

provide a report to the court setting out their views. Following this, the judge could make a determination on written evidence, assisted by the ALR's report.

However, there are challenges to doing this successfully. For example, depending on the number of cases in which litigation capacity arises for determination, it could require an increase in the number of ALRs. It could also potentially require further development of the ALR accreditation scheme. It would also be necessary to consider if additional training is needed to widen the scope of the current role of ALRs. The use of experts on capacity would need to be considered along with whether a system akin to the Court of Protection (CoP) Visitor is appropriate to adopt. CoP visitors can visit anyone they are directed to by the court. Their main role is to produce reports of their findings to assist the CoP with its decision making. In doing this, they can take copies of records such as health records, care records and any social services records from the local authority about the person lacking mental capacity. They may also interview the person lacking mental capacity in private.

Ideally, the determination of litigation capacity should be undertaken by the CoP. This is because it is a specialist jurisdiction used to dealing with such matters swiftly and proportionately. It is appreciated that the CoP judiciary is under intense pressure already and may not have availability to take on additional matters. An alternative is that the determination could be made by a judge with a CoP 'ticket', as they would have expertise in capacity issues. If neither of these are available, another possibility could be that the judge hearing the substantive application makes the determination. However, this would require them to have the necessary expertise.

With any process of determining litigation capacity there would need to be a right to appeal or to further consider a determination by the court. This would be in accordance with appeal processes, rather than a second review by the same level of judge. The CoP already has this process in place, making it an appropriate forum for such issues to be determined. This would be an inquisitorial process. However, we recognise that the proceedings they relate to under the Civil Courts are likely to be adversarial in nature.

Funding and costs

Several hurdles would need to be overcome to enable ALRs to take on the role of investigating a person's capacity to conduct civil proceedings.

One is funding. We propose that central funds are used for the assessment of litigation capacity and the processes around this. This would need to be provided on a non-means tested basis due to the difficulties in obtaining financial information for those that lack capacity and to avoid delay.

Importantly, concern regarding a person's litigation capacity is a common issue which can prevent substantive proceedings from being conducted swiftly or progressed at all. It is therefore vital that a scheme is developed for determining capacity which breaks the impasse swiftly and without additional barriers and delays. Otherwise, additional costs will arise, not only for the parties but for the public purse, because of delays and repeated adjournments.

ALRs would need to be paid at the guideline hourly rate, given the variation in how long it can take to investigate capacity. Therefore, a fixed fee system would not be appropriate and would render the system unworkable. There are likely to be many cases that would be quick and straightforward to deal with. However, there would also be complex cases which

could be time-consuming and may require a hearing to take place if, for example, the person disputes the views of the ALR.

Given the complex and specialist nature of this work, we suggest this work is funded at Guideline National rates for solicitors.

While being centrally funded, the scheme could potentially be administered by the Legal Aid Agency, as the Qualified Legal Representative (QLR) scheme is.

If the person's means were considered as part of this scheme, it is not clear at what level it would be appropriate to set thresholds at and who would oversee this process. It is also unclear what would happen if a person has capacity in relation to managing their property and financial affairs but an investigation is required into their capacity to conduct civil proceedings. This would create a stalemate for the Civil Courts akin to where we are now. Non-means tested funding would ensure that this impasse is addressed swiftly, benefitting everyone concerned.

Identification of the issue: The use of sanctions

We do not support the use of sanctions for a failure by another party to raise the issue of litigation capacity.

There should be an inquisitorial process, with other parties removed from the determination of litigation capacity. However, they should be able to make representations, without having access to sensitive and personal information. This process could be undermined by using sanctions.

We recognise that in some cases the judge may believe that issues relating to another party's capacity are being used as a litigation tactic. In these circumstances, the use of sanctions could be appropriate.

Data collection

There is a lack of data on how often concerns arise in the civil courts that a party may lack litigation capacity. We suggest that HMCTS starts collecting this data to support the development of evidence-based solutions.

Cover sheet

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**.

You must fill in the following before submitting your response:

Your response is (public/anonymous/confidential):	Public
First name:	Richard
Last name:	Wilkinson
Location:	London
Role:	Secretary of the Personal Injuries Bar Association
Job title:	Barrister
Organisation:	Personal Injuries Bar Association
Are you responding on behalf of your organisation?	Yes
Your email address:	[redacted]

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.

PERSONAL INJURIES BAR ASSOCIATION

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Secretary: Richard Wilkinson, Temple Garden Chambers, DX 382 London/Chancery Lane [redacted]

Treasurer: Nigel Spencer-Ley, Farrar's Building, DX 406 London/Chancery Lane [redacted]

The Personal Injuries Bar Association's response to the Civil Justice Council's Consultation on the Procedure for Determining Mental Capacity in Civil Proceedings

1. The Personal Injuries Bar Association, "PIBA", is one of the largest civil Specialist Bar Associations with about 1,450 members. PIBA's members practise in personal injury law, including industrial disease and clinical negligence cases. They represent both claimants and defendants.

2. Many PIBA members have considerable experience of litigation in the civil courts involving parties who lack capacity, are close to the borderline of capacity or whose capacity fluctuates, by reason of brain or psychiatric injury or illness.

3. Although many PIBA members also sit in a variety of part-time judicial and tribunal roles at all levels (case managing, trying and determining cases across the full breadth of the civil and other jurisdictions) our response to this consultation is based principally on experience of personal injury work where: (i) most clients have funding; and therefore (ii) most parties have representation; and (iii) those representatives are very experienced in the need to consider their client's capacity.

4. Our observations on the consultation and response to the 34 questions posed are as follows:

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. No. Litigation capacity does not exist in a vacuum. Not only does litigation capacity directly affect another party in many areas of the litigation process and the unfolding of a claim, but it is also often linked to other forms of incapacity in particular around management of funds and management of self. These are of critical importance in the shaping of the quantum of a claim – lack of capacity to make decisions directly impacts (for example) care and lack of capacity to manage finances etc means the claimant will require Deputy support, the cost of which will fall to be paid by the paying party. Further when considering litigation capacity in isolation, in personal injury cases in particular, the determination of a party's current litigation capacity affects:

   5.1. **Limitation.** If a claimant lacks capacity then the 3 year limitation period (for injury claims) is suspended for the period of incapacity – so essentially someone who lacks litigation capacity will not face a limitation defence.

   5.2. **Ability to engage in litigation.** For example, submitting to medical examination requires a decision to do so. If a claimant lacks litigation capacity they may also lack capacity to consent to the medical examinations that will be required by both parties in order to determine the extent of injury and level of quantum.

   5.3. **The amount of damages a claimant will receive in a personal injury case**. If a party is found to lack litigation capacity, they may also lack capacity to manage their property and affairs and be a protected beneficiary. The CPR defines a protected beneficiary as a "protected party who lacks capacity to manage and control any money recovered by them or on their behalf or for their benefit in proceedings" – CPR 21.1(2)(e). This means a mechanism for the management of damages will have to be put in place. In low damages claims this can be investment by the Court with required communication for receipt of funds thereafter or setting up an approved Trust or management fund with suitable protection in place. In multi-track cases it will lead to the involvement of the Court of Protection and a professional deputy. The annual cost of deputyship is likely to exceed £21,000.[1] In the case of a young claimant, for example a 20-year-old woman the multiplier is 75.75 leading to a future loss claim for just professional deputyship costs exceeding £1.5 million. There will be other costs

[1] PNBA Facts & Figures 2023/24 suggests annual costs of £20,855 + bond premium

involved such as costs of making wills, making applications, changing deputy, filing accounts etc. If there is doubt about a claimant's capacity, or if capacity is fluctuating, a defendant has a legitimate interest in the determination of the claimant's litigation capacity because of the significant financial impact if the claimant also lacks capacity to manage their property and affairs. *Folks v. Faizey* [2006] EWCA Civ 381 was a case decided prior to the Equality Act 2010 and the subsequent changes to CPR 21. In that case both parties agreed that the claimant lacked capacity to manage his property and affairs and the only issue was litigation capacity and whether a litigation friend should be appointed. Lord Justice Keene also recognised that there may be cases where the other party has a legitimate interest in the outcome of a determination of capacity (at [26] of the judgment).

5.4. **Whether a matter can be validly resolved or not.** CPR 21 provides that any settlement involving a protected party, whether the protected party is a claimant or defendant, must be approved by the court otherwise it is not valid. For example, in cases where capacity is in doubt or fluctuating, or a party suspected of lacking capacity considers they have capacity, the paying party may not obtain a satisfactory discharge from liability if the matter is settled but not approved. To avoid lingering uncertainties, it has become common in these circumstances for parties to seek court approval of a settlement *without* a prior determination of the capacity issue (following the approach taken in *Coles v. Perfect* [2013] EHWC 1955). Formal recognition of this "work around" approach could be useful in enabling parties to achieve certainty of outcome in cases of marginal or disputed lack of capacity or where capacity might be thought to fluctuate.

5.5. **The extra costs of obtaining court approval.** There are extra costs in relation to an approval advice from Counsel and an additional hearing for approval.

5.6. **Progression of court proceedings.** If the other party is suspected of lacking capacity but refuses to submit to a capacity assessment or have a litigation friend appointed, this is likely to impede the progress of court proceedings, require additional hearings and prevent resolution of the claim.

5.7. **Interim steps in a claim.** Any step taken in a claim will not be valid if one party lacks capacity. Therefore, any admission of liability or interim payment or any

step in the action will need Court approval to be binding if a party lacks capacity – see *Drinkall v. Whitwood* [2004] 1 WLR 462 – this involved a minor but the principle centres around lack of litigation capacity.

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?

6. The issue of capacity is one that is usually identified by lawyers acting for one party or the other instead of being actively promoted by the parties. The issue does not comfortably sit with an adversarial approach. An inquisitorial approach is strongly supported for the assessment of litigation capacity (if required).

7. It is important to recognise that the question of capacity is not always fixed in time and the idea of a single point of determination of capacity being an end to the matter is inappropriate. There are cases where capacity may fluctuate, may be issue dependant, capacity may be gained or lost at points before and during litigation and so engagement in capacity determination may have to take place on a number of occasions in any matter. It is difficult to think of a defined court process that would workably be able to provide Court determination of capacity issues when the same might be invoked on a number of times. The cost would be high and the impact on court listing could be significant. There are presently delays in listing and PI claims in particular do not get given the priority of (for example) welfare and family matters therefore delays are often long. It is easy to imagine the requirement for the court to determine capacity on a fluctuating and ongoing basis providing a significant stall on the progress of litigation as parties waited for determinations to occur. The impact on the need for court time and increased funds is also likely to be significant.

8. The Court will often not be best placed to manage issues of litigation capacity.

    8.1. Most claims engage parties for a significant period of time before a claim is issued in Court – the pre-action protocols and rehabilitation code are examples of actively promoting liaison and engagement between parties without issuing proceedings and without engaging the Courts. All these steps require either capacitous litigants or a recognition of lack of capacity and appointment of a litigation friend. The (relatively) recent introduction of CPR PD.1A (and the amendment of the Overriding Objective) to protect the interests of vulnerable parties (and witnesses) goes further by specifically requiring the parties to assist

the court in identifying any vulnerability which may impede a party's participation in proceedings. That obligation applies "at all stages" of proceedings and should allow vulnerabilities to be identified by the court "at the earliest possible stage".

8.2. Delay in Court listings mean being required to engage the Court for the determination of capacity would lead to unacceptable delays in being able to take any step in a claim, even to commence its investigation, since capacity needs to be resolved at the earliest stage to ensure proper scaffolding is placed around the vulnerable litigant who lacks capacity. As a corollary of this, the Court service would find it difficult to cope with a surge of claims requiring Court time to determine capacity.

8.3. It cannot be presumed that a court 'determination' of a party's capacity would be a singular and final exercise. Personal injury lawyers will commonly see parties whose litigation capacity is on the borderline or whose capacity to litigate fluctuates (depending on, for example, the severity of their symptoms at any particular time, the stress they are under, whether they are undergoing treatment, whether they experience cycles of recovery/relapse and considering the type of decision which is required). In these cases, if the court was required to assess and re-assess litigation capacity at each point a concern was raised (and if all other steps in the proceedings were halted in the meantime), there would be an intolerable delay in the progress of the claim and an immense burden placed on the court, the parties and their lawyers.

9. Further, there can quite often be a legitimate dispute between the parties as to whether a party lacks capacity or not. The resistance can be from a defendant, unwilling to have to pay for deputy fees etc or from a claimant unwilling to accept or recognise they lack decision making litigation capacity. In these instances, it is important for all views to be aired and articulated – but without a descent to adversarial challenge.

10. The skill that a judge with experience of sitting in the Court of Protection can bring to these cases is immense. It would be ideal if every major court centre had a designated Judge who is experienced and specially trained in capacity issues, perhaps one that also sits in the Court of Protection as well. This would mean that issues of capacity that may arise in cases and capacity determinations can be reserved for that

Judge and would take priority over their other court work. This would achieve the aims of having a specialist judge consider the issue, be able to resolve the issues more quickly and have capability to deal with ongoing issues of capacity. However it could lead to an over dependence on a particular Judge – leading to problems if issues arose when that Judge was not available. A lead Judge rather than a sole Judge would be preferable.

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?

11. We note that the Bar Council has published guidance on Client Incapacity (most recently updated in 2021) which states: *"4. The general rule is that once a legal adviser entertains a reasonable doubt about their client's capacity to give proper instructions, it is that adviser's professional duty to satisfy themselves that the client either has or does not have the capacity to give instructions".* The Bar Council guidance refers to *Re. P* [2008] EWCA Civ 462, at paragraph 47: *"...once either counsel or [the solicitor] had formed the view that ... [the client] might not be able to give them proper instructions, and might be a person under a disability, it was their professional duty to have the question resolved as quickly as possible".*

12. Further guidance may be helpful. In practice, issues of capacity are sometimes raised by legal representatives just because their client disagrees with the advice given or has their own firm views about the value of their case or is viewed as "vulnerable". In other cases where capacity is borderline, the issue of capacity may not be picked up immediately until a significant offer is made and a claimant is faced with a decision and it becomes apparent that they have difficulty making that decision. In almost every case it can be difficult for legal representatives to advise their client to embark on a process to determine their capacity when it is potentially fraught with delay, deprivation of their rights and costs. While it is a duty on the legal team to address such issues it can also be a significant challenge to the client relationship and, if capacity is found still to rest with the client, can lead to a breakdown of trust and loss of relationship altogether. This can then mean a claimant wants to change legal team with all the cost and complexity and delay that entails. Clear guidance would help to identify whether there is a real issue earlier and insulate the relationship between lawyer and client.

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

13. A reasonable belief that the party does not comprehend or is not able to engage in the litigation process as required, such that there is reasonable concern that capacity may be lacking. The MCA could provide useful guidance. Reasonable doubt is the phrase in the Bar Council guidance.

14. This trigger would also follow not merely for litigation capacity but could arise for management of money (need to consider the claimant as a protected beneficiary after litigation) or also on a decision specific basis – as articulated in the MCA.

15. This trigger would apply to all parties – so a defendant as well as claimant.

16. It may also apply to anyone with whom the legal team has engagement – guidance on when a witness appears to lack capacity and any duty arising from that situation – both to the Court and to the person - may be helpful.

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?

17. Yes. This is much more difficult to determine because the legal representative will have access to fewer sources upon which to base a doubt about an unrepresented party's capacity. For example, they will be unlikely to be able to speak to the unrepresented party or their friends and family about capacity. The basis for such doubts is likely to be made from the medical evidence, the conduct of the unrepresented party in correspondence or communication and in court or if the unrepresented party relies on another person to make decisions for them. However, the legal representative is unlikely to know if another person is communicating with them on behalf of the unrepresented party if the person does so in the party's name. Further, guidance would be useful not least because an unrepresented party may make unwise decisions or behave in a vexatious way without necessarily triggering the duty or lacking capacity. Finally, raising the issue is likely to create tension with their own client due to the potential delay and costs involved in investigating the issue. So clear guidance would also insulate the relationship between lawyer and client.

Question 6: What level or belief or evidence should trigger such a duty?

18. The trigger for investigation should be a reasonable belief – so the party raising the issue can point to some evidence – and it should mirror the wording of the "own client" duty – so that the duty is the same for all

19. Assessment would then revert to the MCA as set out above.

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.)?

20. In all cases. Not only do all the parties have an interest in the management of the claim, but a represented party also has a particular duty to assist the Court and assist, as appropriate, an unrepresented party. If the unrepresented party is a claimant then ensuring their capacity is correctly assessed is critical since if there is an unrecognised lack of capacity no claim will be resolved (without approval), no step taken will be binding and no limitation will provide a potential claim defence.

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

21. The same standard of reasonable belief as set out above. However, discharging that duty is likely to be much more complex.

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

22. Yes. Amendments to the Pre-Action Protocols, when the matter will likely be in the hands of insurers or public bodies for defendants, to consider capacity and raise it as an issue if necessary would be appropriate.

23. However it must be a rolling duty (as with disclosure) so if capacity issues arise at a later date they can be raised then, even if the pre-action identification was missed.

24. Lack of capacity is a key issue at any point of decision making so a pre-action determination could never be once and for all if, for example, capacity was lost in the course of litigation, consideration at an early stage would be irrelevant and would not render any subsequent decision made by the party lacking capacity binding.

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?

25. We note that since the introduction of the vulnerability provisions in CPR r.1 and PD.1A, the N1 claim form now does have a section which asks: *"Do you believe you, or a witness who will give evidence on your behalf, are vulnerable in any way which the court needs to consider?"* There is nothing, however, about any party's capacity. There is no equivalent question on vulnerability in the N9 response pack.

26. We consider that questions about another party's litigation capacity might be appropriate at the direction questionnaire stage (akin to the need to address the issue of periodical payments) but this should not mean that a failure to refer to lack of capacity at the listing questionnaire stage means it cannot be raised if it arises at a later date.

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

27. No. If the claimant lacks capacity and the defendant does not raise it, the penalty for the defendant will be a claim that cannot end without approval.

Question 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.

28. Yes, see attached Appendix A.

29. We note again that the recent introduction of CPR PD.1A should encourage a more inquisitorial approach by the parties and the Court on how to determine capacity in practice (on issues that vary from litigation to treatment and where to live etc as they affect issues in the litigation). The scope for increased use of the special measures identified in the PD should change the approach of the parties and the court going forward. The introduction of the concept of "best evidence" into the CPR (imported from Criminal and Family practice) should steer away from an adversarial approach to capacity. However, these changes have been in force for almost 3 years and meaningful engagement with the 'new' vulnerability provisions has been far from

universal. Better use will need to be made of the vulnerability provisions in practice going forwards.

INVESTIGATION OF 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)?*

30. Yes, potentially all of them. On the basis that anyone who is involved in a suitable role can raise issues of capacity pursuant to the MCA then it *could* be appropriate for any of (a) to (d) to do so. Legal representatives are already recognised to have such a duty as articulated by the Bar Council and set out above.

31. The other party, if represented, may be able to provide assistance (as suggested in the Equal Treatment Bench Book, see para 47 of the Capacity Consultation paper). For example, a defendant in possession of relevant expert medical evidence which deals with capacity may have a legitimate interest in the investigation of an unrepresented party's litigation capacity. A balance has to be struck, however, to ensure that the best interests of the unrepresented party are protected when involving another party with a financial interest in the claim as an 'interested party' on the capacity issue.

32. It should also be borne in mind that lots of cases in which a party's capacity is in question do not get to or near a judge. There should be consideration of how these vulnerable parties are assessed and evaluated pre-proceedings and in the course of any mediation/ ADR which does not involve independent adjudication but is (as it often the case in injury claims) carried out solely between the parties.

33. 'Others' may also be involved; for example, in the injury arena, a medical expert would (if appropriate) be required to consider issues of capacity when examining an injured claimant. Further, the person who is the Litigation Friend (or proposed Litigation Friend) will likely be able to give lay evidence as to the party's decision making.

34. The Official Solicitor would be well placed to take a role, but we understand that there are insufficient resources/funding at present for that to be viable. Accredited Legal Representatives and Assessors (as in the Court of Protection - see Appendix 2 of the Consultation paper) may be a good idea.

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

35. See above

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

36. The usual rules of disclosure (standard disclosure) are likely to be sufficient in larger cases. In small cases – fast track and small claims track – where disclosure is limited, there may well need to be disclosure of medical records. However, if litigation capacity is assessed on an issue-by-issue basis by an appropriate MCA framework of assessment, it is difficult to be clear what disclosure would be universally required. It is likely to be a question answered only on a case-by-case basis.

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

37. Under PD.1A, the Court is required to identify any vulnerability which may impede a party's ability to participate in proceedings at the earliest possible stage. That could include issues about a party's litigation capacity and allow the Court to make directions at the very start of proceedings. If the capacity issue only becomes apparent later during proceedings the Court should have the power (so as to abide by the Overriding Objective as amended) to pause proceedings until the necessary disclosure is provided to the Court to then consider next steps.

38. The impact of this should be considered and is set out and discussed above.

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?

39. Yes.

Question 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?

40. No.

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

41. No. The principle of open justice is not for proceedings to be anonymised automatically. The mere fact of proceeding by a litigation friend is not sufficient for anonymity to be presumed and this is the likely consequence of lack of capacity to litigate so it would seem out of proportion for anonymity to be imposed at the investigative stage, but not the conclusion.

42. Reporting restrictions can be imposed as required on a case-by-case basis by the Judge. A pre-determined imposition of the same would seem unduly restrictive of the Judge's discretion and against the principle of open justice.

Question 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?

43. In the same way that such a challenge would be made in the Court of Protection.

Question 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?

44. Yes. It is important to treat this as an issue that is to be kept under review to avoid incorporating a cumbersome appeal process.

45. Consideration will have to be given if the Court is required to approve or be involved/ engaged in every capacity decision. Again, as discussed above, this process is likely to have a significant effect on court time and costs and indeed costs to the parties to the litigation.

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?

46. Yes, that has to be the logical next step.

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?

47. Yes.

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

48. Yes

Question 25: What factors should be included in such a test?

49. Factors would need to at least include (i) prejudice to the litigant in delaying the timetable pending determination of capacity, (ii) impact on the outcome of proceedings, (iii) prejudice to any other parties to the litigation and (iv) the court's resources more generally and the overriding objective.

FUNDING AND COSTS

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.

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?

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?

In all cases?

In cases within the scope of civil legal aid, as set out in the Legal Aid Sentencing and Punishment of Offenders Act 2012?

50. The most common form of funding arrangements for claimants in personal injury litigation is some form of conditional fee agreement, not legal aid. It would seem unfair for the claimant's team to take the financial risk on a CFA for a point that is raised and managed by the Court. These issues would also require specific consideration when the court is considering making a costs management order.

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?

51. The issue of capacity frequently arises as a litigation issue in borderline cases because capacity to manage property and affairs can be an issue worth over a million pounds in the claim. However, the costs are usually caught up in the costs of the case rather than dealt with as a separate issue. Nevertheless, there can be scope for the costs of the investigation and determination of litigation capacity to become contentious. For example, where all, or the majority of, the expert medical evidence suggests that a claimant has litigation capacity, but the claimant, or the claimant's legal team, assert that the claimant lacks capacity. In such cases defendant insurers will sometimes put costs in issue, seeking their costs of determining the issue or no order as to costs.

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 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).

52. (e) – the rules should remain as they are.

Question 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?

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

53. PIBA does not have a comment on these questions.

OTHER QUESTIONS

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

54. Personal injury barristers have significant experience of capacity to manage property and affairs being an issue in proceedings because of the large amount of compensation claimed in respect of Deputyship and Court of Protection costs. The typical approach is for the parties to obtain their own medico-legal evidence and for the claimant to obtain lay witness evidence in support. The Judgment of Andrew Edis QC, sitting as a Deputy High Court Judge, in *Saulle v. Nouvet* [2007] EWHC 2902 provides a practical guide but pre-dates CPR PD.1A. With greater focus on the 'new' vulnerability provisions, by practitioners and the Court, there may now be a move towards the inquisitorial approach with, for example, the claimant in such cases also giving evidence with the protection of special measures applied (such as pre-recorded evidence or pre-agreed questions ahead of trial).

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

55. The Court taking the lead and parties beginning to appreciate that the giving of "best evidence" is not what we are used to in an adversarial system. We may need, to ensure compliance with Article 6 and the CPR, to begin using language similar to the Children Act to suggest that the protection of a litigant who lacks capacity to litigate (and may also lack capacity to manage the damages awarded) is of paramount importance.

Emily Formby KC, Marc Willems KC, Jasmine Murphy, Christopher Gutteridge, and John-Paul Swoboda
On behalf of the Executive Committee
15 March 2024

Appendix A to Response by the Personal Injuries Bar Association

Anonymised responses from PIBA members to Question 12 CJC Consultation on Capacity:

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.

Example 1:

I recently settled a case in which the capacity issue had been rumbling for years. My client had a mild brain injury and all of our experts (neuro-rehab, neuropsychology and neuropsychiatry) said he lacked capacity for litigation and finances. On that basis we had a financial deputy appointed, and (because the Claimant was an isolated young man with no family or friend willing to act as Litigation Friend) the deputy obtained an order from the CoP enabling them to act as LF. As the litigation progressed, all the Defendant's experts said the Claimant did have capacity (for finances and litigation). The dispute lasted through joint statements and up to the point of settlement. The key feature was that as we progressed towards settlement, getting closer to trial, the deputy/LF came around to D's point of view. C had been very difficult for the deputy to work with initially. He resisted any intrusion into his finances and that made their relationship very difficult. However, as he came around to the idea, his 'being difficult' ceased and the deputy formed the view that C had regained capacity (or, at least, there was insufficient evidence to displace the presumption). Because we were so close to the JSM, we kept the deputy/LF involved, but C was central to all decision-making. We then had a *Coles v Perfect* approval (and subsequently the deputyship order was discharged).

Example 2:

I have an ongoing case at the moment in which it is abundantly clear to us (inc. my solicitors and leading counsel) that the Claimant lacks capacity (after a moderate-severe brain injury) but the Defendant disputes that on the basis of C's presentation at assessment with their experts (which is obviously not a 'real world' test of her decision-making capacity). And so we are stuck with that dispute until the end of the case. We have an LF in place (C's daughter). I am quite sure that despite their argument in favour of C's capacity, D will eventually insist on an approval to protect their own interests.

Example 3:

The Claimant had an accident causing an obvious cut to his forehead which bled. However the Claimant was convinced that all the MRI and CT scans he had showed serious injuries and brain damage despite having been told by many specialists that this was not the case. When assessing the Claimant for a medico-legal report the Neuropsychiatrist instructed by the Defendant (my client) recorded the Claimant saying that he felt the doctors were falsifying information to his detriment. He also said that he thought his own solicitors and experts were potentially acting against his interests and being given under the table payments by the Defendant's insurance company. In his report the Neuropsychiatrist raised the issue of capacity to litigate because although the Claimant could understand and retain information, he did not necessarily believe information given to him because he didn't trust his lawyers. None of the other experts had raised the issue of capacity to litigate. A few months later the Claimant's solicitors made an application to stay proceedings pending a capacity assessment of the

Claimant. The evidence supporting the application from the Claimant's solicitor was that the Claimant was becoming increasingly difficult to obtain instructions from, clear questions were not responded to in a clear and coherent manner, he went off track and into other topics not related to the issue, his understanding of Part 36 was very confused and incorrect and when this was explained to the Claimant he either didn't understand or was convinced that his understanding was correct. The Defendant objected to that application on the basis that this could just be an indication of a client not being willing to take advice, rather than lack of capacity. Before the application was listed, a capacity assessment was obtained from the Claimant's Neuropsychiatrist. This confirmed that he had no doubts relating to capacity. Both Neuropsychiatrists later agreed in a joint statement that they had no doubts as to the Claimant's litigation capacity and the application was withdrawn.

Example 4:

Our client ('BA') was injured in an RTA. The expert evidence was that he did not have capacity to litigate and a litigation friend (a solicitor) was appointed to act. His wife and family were not prepared to act as a LF.

The injury made BA paranoid and he became convinced that his own lawyers were in league with the defendant's lawyers to keep any money his claim generated. He was also convinced that his lawyers were in league with the medical experts to deem him to be a patient and thereby maintain control of any funds he did receive.

BA went so far as to instruct a private expert outside the litigation to whom he gave a false account of his medical history and obtained an expert report to declare he had capacity. He then approached the CoP with the medical report, to make a determination he had capacity to litigate and to manage his property and affairs. Which they did. The medical experts instructed in the litigation were agreed that he did not have capacity for either.

The matter was ultimately resolved by close liaison between the solicitors and counsel acting together to resolve the issue. It required a great deal of trust in the professional integrity on both sides to obtain resolution. The Defendant agreed to abandon an allegation of fundamental dishonesty based on BA's inconsistent account of his capability to the medico-legal experts, compared to his 'private' expert.

The Defendant was persuaded to make an offer that the Claimant's lawyers could recommend to the court and the court was persuaded to conclude that the CoP determination was based upon inadequate and potentially misleading medical evidence.

At the point where the Claimant's lawyers stepped away from the claim, the Claimant and his professional litigation friend were locked in dispute over costs and conduct.

Example 5

I represent the Defendant in a case where the Claimant suffered a severe brain injury. Despite this, by one year from the accident, the Claimant managed to return to work full time, he lived independently in his own property and required no physical care. Three years after the accident a Neuropsychologist instructed by the Claimant formed the view that the Claimant lacked capacity to litigate and capacity to manage his property and affairs. Therefore the claim was issued with a relative acting as Litigation Friend.

At the CCMC in the Spring the District Judge ordered expert evidence on the issue of capacity from Neuropsychologists to be obtained and served within six months with a joint statement and if there was dispute on capacity to apply to the Court for further directions. By the Summer, following rehabilitation, both Neuropsychologists had carried out careful assessments of the Claimant. Both formed the view that with appropriate support he now had capacity to litigate and capacity to manage his property and affairs (this was now 4 years post-accident)

Despite this, the Claimant via his legal team (presumably on instructions) then took three steps: (1) he applied to the Court for directions stating that there was a dispute on capacity (2) he applied to the Court of Protection to appoint a Deputy and filed the COP3 completed by the Claimant's Neuropsychologist stating that he lacked capacity to manage his property and affairs. However the COP3 pre-dated the Claimant's Neuropsychologist's updated capacity assessment in which she formed a different view; (3) he unilaterally obtained expert evidence from a professional Deputy as to the costs of Deputyship (c. £700,000) or the costs of setting up and managing a PI Trust (c. £500,000).

All of the other expert evidence was then served and in the joint statements it became apparent that the Neurologists, Neuropsychiatrists and Neuropsychologists were of the same view that the Claimant, although needing appropriate measures and help to help him understand the issues, could make decisions himself with regards to litigation and complex financial decisions. This created a problem because the evidence all appeared to indicate that the Claimant had capacity in both realms, yet from the steps taken above, he seemed keen to represent to the Court that he lacked capacity both to litigate and to manage his property and affairs. The outcome made a significant difference to both the value of the case and the procedure for settlement and after settlement.

Because of the change of view in the medical evidence, the Defendant unusually applied under CPR 21.9 for an order bringing the appointment of the Litigation Friend to an end. The Defendant was criticised by the Claimant for making such an application (mainly on the basis of *Folks v Faizey*). However, at an interim hearing the District Judge thought that the application was appropriate in light of the medical evidence and listed it for a hearing to determine litigation capacity.

Cover sheet

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**.

You must fill in the following before submitting your response:

Your response is (public/anonymous/confidential):	Public
First name:	John
Last name:	Gallagher
Location:	88 Old Street London EC1V 9HU
Role:	Solicitor
Job title:	Principal Solicitor
Organisation:	Shelter
Are you responding on behalf of your organisation?	Yes
Your email address:	[redacted]

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?

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?

SHELTER CONSULTATION RESPONSE

Civil Justice Council

Consultation on Procedure for Determining Mental Capacity in Civil Proceedings

March 2024

Introduction

Shelter welcomes the opportunity to respond to the Civil Justice Council's Consultation on the Procedure for Determining Mental Capacity in Civil Proceedings Working Group.

At present we employ over 200 advisers and 40 solicitors to give advice and offer legal representation to the public. We have 11 regional offices with housing advisers and solicitors. Shelter's legal services employ 38 solicitors, 21 advisers and 22 support staff to give advice and provide legal representation to the public.

Within those offices we hold the following legal aid contracts:

- 11 in housing law,
- one in public law
- 12 housing court duty scheme contracts.

Shelter has taken a multi-channel strategy to address advice need. In addition to our local hubs, we have a free national helpline, a website and digital advice service.

Our evidence is concentrated in the areas of housing and homelessness casework and associated matters, in which we have wide-ranging experience.

Response to consultation questions

We have endeavoured to reply to those questions in relation to which we have case work experience, but in relation to questions which require knowledge of practice in the Court of Protection or Mental Health Review Tribunal, we have noted that our experience does not extend into these areas.

In the Appendix to this Response, we have included summaries of seven cases in which our solicitors (in different parts of the country) have encountered issues in the assessment of capacity.

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?

We agree that as a general approach in housing cases, the other party to the litigation does not have a legitimate interest in the outcome of a party's current litigation capacity, other than the inevitable concerns about delay and additional costs. However, there will be exceptions, primarily in some personal injury and other cases where the determination may go to the substantive issue in the case, where there is a legitimate interest in establishing fundamental dishonesty. In personal injury cases, it may be argued that the party is alleging lack of capacity as a litigation tactic. It will also be argued in such cases that a capacity investigation adds significantly to the overall costs of proceedings and affects the prospects of settlement.

In the housing context, there may be a legitimate interest in some possession or injunction cases based on anti-social behaviour. There will be some cases in which the social landlord accepts that a tenant has mental health problems amounting to a disability, and has carried out a proportionality assessment, but would dispute that the person lacks capacity. In those case, it should be a matter for the judge whether the landlord should be represented at the hearing to determine capacity. We accept that they should have the opportunity to put forward written evidence if they will not be present.

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?

Yes, we accept that the court's approach should generally be inquisitorial. The court needs to establish, in pursuance of the overriding objective and in exercise of its case management powers , whether a party appearing before it has the capacity to take part in the proceedings and/or instruct others to do so, and that requires it to play a more active part than its usual role of deciding between two opposed arguments. Again, however, there should be an exception in certain kinds of personal injury case.

At present, of course, there is no power to order a medical report, and in most cases the court will wish to be guided by professional opinion, especially of doctors who have been treating the person (if they are willing to assist – see Q. below). This may be one of those situations in which the court at present finds ad hoc solutions depending on the circumstances of the case, which involve consideration of the further questions below. In the last resort, and especially where it is not proportionate to the issue (eg, a small claim) for anyone to incur the costs of a medical or psychiatric report, it may be necessary for the court to form a view based on its enquiries of, and responses from, the person him or herself.

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*?

We strongly agree that clearer guidance and training is needed, on the issue of principle of whether and when the legal representative's duty to the court overrides their duty to the clients; and in enabling solicitors to identify capacity issues and how the representative in practice approaches the highly sensitive question of whether to raise the issues of capacity, notably where the client doesn't agree that he or she lacks capacity.

There is of course already Guidance / Practice Note from the Bar Council, Law Society and SRA, but there are inconsistencies between the respective guidance. In any event, guidance should be amalgamated into one single resource, so that practitioners can find what they need in one accessible place. Of critical importance is that there must be clarity and unanimity on the fundamental question of when the solicitor's duty to the client gives way to their duty to the court. Although we accept that guidance can only go so far in relation to the wide variety of practical situations, there can be no ambiguity about the nature and scope of professional obligations, and there should be specific examples of how a solicitor should deal with cases in which the client is adamant that they do have capacity .and the solicitor believes otherwise.

We are aware that the Guidance on mental capacity in family cases is regarded by family law colleagues in the profession as being very useful, whereas there is

nothing to guide us on civil procedure. Much of what we do to progress a case procedurally depends on ad hoc creative solutions, or sometimes guesswork drawing on experience, which is not an ideal state of affairs for practitioners.

In the same way, we are in need to composite guidance from the Official Solicitor, as we often do not know what the O/S wants from us. Indeed, it would be helpful to publish the current referral form to the Official Solicitor.

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

The threshold can be expressed in a number of different ways, all of which can be helpful. We would favour a test of having "reason to believe" that a person "may lack mental capacity.

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?

Undoubtedly, clear guidance is necessary as to the scope of the duty to raise with the court any question concerning the capacity of another party 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?

Qq 4 – 8: We agree that in certain cases, notably where the other party is a public body (which would include a local authority, housing association or other social landlord), there should be a general duty to raise with the court an issue as to the litigation capacity of a party to the proceedings who is unrepresented. The opposing party, which is usually the Claimant in possession proceedings or

anti-social behaviour injunctions -- may have information casting doubt on capacity which the court should be aware of, eg, in relation to. We have had cases in which the social landlord was aware of a history of mental health and capacity issues, but these did not come to light until later in the proceedings, in one case only after the tenant had been `sectioned' under s.3 pf the Mental Health Act.

At the same time, there is a need to avoid being too prescriptive. We consider that it would be unduly onerous to impose a general duty on an individual to raise concerns about an opponent's capacity with the court, but there will be occasions when such a duty will indeed be appropriate. There is a need for guidance or a Practice Note to explore these situations.

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?

To some extent, this should already happen in possession cases brought by social landlords, because we have the Pre-action Protocol for Possession Claims by Social Landlords. We believe that there should be an enhanced obligation on social landlords as public bodies to alert the court and others to issues of mental health or capacity on the part of a tenant or another party to the case. There can also be something of an overlap between the capacity issue and the Public Sector Equality Duty (PSED) under s.149 Equality Act 2010 to have regard to a tenant's disability, although the assessment of capacity is clearly a pre-condition to the proportionality assessment which is required to satisfy the PSED.

There is certainly a need for the housing officers of social landlords to receive detailed training on capacity. Housing association staff in particular need training on mental health issues and proportionality assessments.

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?

We agree that court forms should indeed be amended to enable capacity questions to be flagged to the court. This is the most straightforward way of reminding the Claimant to bring their own knowledge of a person's history of mental health to the court's attention.

There is a view that the Vulnerability question which presently forms part of the N1 claim form is of limited value and makes little difference in practice. Likewise, the standard questions in standard Particulars of Claim on possession – eg Q.7 on court from N119 ("The following information is known about the defendant's circumstances") – are often ignored by landlords or completed only by reference to the tenant's financial circumstances. It would be essential for the relevant CPR Practice Direction to emphasise the importance of giving a considered answer to such a question.

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

Sanctions for non-compliance with the Social Landlords Pre-action Protocol are limited to an adjournment of the proceedings and/or being penalised in costs, although an adjournment is only available when the claim for possession is brought on a discretionary ground for possession. It is likely that at least the same level of sanctions would apply in the event of a failure by a social landlord to raise the issue of capacity, but of course it may be that some of the steps already taken and orders made may be of no effect.

We accept that it would not be appropriate in general to have same level of sanctions for private landlords.

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.

The issue of capacity can arise in any kind of housing case, but often occurs in case involving alleged anti-social behaviour (ASB), whether claims for possession or applications following a breach of an ASB injunction. What starts

out as a factual investigation into behaviour sometimes requires consideration of mental health, personality disorder, and drug and alcohol issues. There may be underlying issues of bi-polar disease or brain injury. One issue that can be especially difficult in practice is that of hoarding cases, in which the extent of the disorder only becomes apparent as the case progresses.

Once again, guidance is needed to assist practitioners in making these difficult judgements, where it is uncertain whether determine whether a client is being `difficult' or whether s/he lacks capacity. Where possible, guidance should also take account of the question whether a person's cultural background has influenced their behaviour.

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? Not of interest to other parties – clinical opinion. Except PI – separate regime? Generally, it's a separate decision from the main proceedings

c. The Official Solicitor (*Harbin v Masterman* enquiry)?

d. Litigation friend (interim declaration of incapacity)?

e. Other (please specify)?

What powers does the court have, eg, disclosure of medical records
Early inquisitorial system – summary procedure – party represented.

As far as the court is concerned, its discretion as to how to approach the investigation of an unrepresented party's litigation capacity is a matter its case management functions. In principle, such an investigation is not part of the adversarial system, except in certain cases such as personal injury, where the question of impairment may be central to the issue in the case and may therefore need to be considered as part of the adversarial context. In anti-social behaviour cases, on the other hand, the judge is often in a good position to deal with capacity issue in whatever way he or she deems appropriate.

In relation to the Official Solicitor, as noted in the consultation, the O/S does not currently have resources or funding to carry out *Harbin v Masterman* enquiries.

However, we note that in some cases, the Official Solicitor's requirements are unnecessarily burdensone. In one of our cases, the client presented with suspected vascular dementia. He would not consent to a capacity assessment, but the Official Solicitor was insisting on a consultant psychiatrist's report, which was causing the case to remain inactive for a potentially indefinite period.

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?

Qq 14 - 16: We note only that those who have experience of the different models in the Court of Protection and Mental Health Review Tribunals, including the use of accredited legal representatives, are in a better position to answer these questions than we are. We also understand that it may be possible to learn from the
Beddoe jurisdiction in trust cases, in which there is a separate hearing and a separate judge.

In relation to powers of disclosure, the court already of course has its powers of 3rd party disclosure under CPR 31. In an appropriate case, we would favour an extension of these powers whereby the court of its own initiative may order disclosure, but subject to consideration of a number of factors, including as to who will be able to see the disclosure, and where the party has stated that s/he does not want a particular piece of information disclosed. There is a risk that such an order could ruin the relationship between a party and their doctor or social worker.

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?

Undoubtedly the civil courts should have such powers. Since the Court of Protection already have powers of this nature, there is a model for the civil courts to adopt, and in principle it should not be a matter of controversy that the ordinary courts should have a similar power. There is also something of a correspondence with the provision for Equality Act assessors to be appointed by the court. The difficulty lies in who should do the follow-up work in dealing with the report once obtained, if there is not already a legal representative able to proceed, and how that work is to be paid for. It would be desirable for there to be a coterie of legally qualified court officers who would oversee this process. There would need to be a properly designed framework, and of course the resources to make it work.

Alternatively, the civil court could have power to refer an issue of incapacity to Court of Protection, or conceivable to a panel of approved legal representatives accredited to the Court of Protection, for the purpose of obtaining a limited amount of disclosure of medical and other expert evidence and making a recommendation or determination on that basis. However, this would require both a significant expansion of the work of the Court of Protection and adjustments to the Civil Procedure Rules to permit such cross-ticketing of cases.

In relation to whom the Court can call upon to prepare such a report, the medical practitioner of first resort would presumably be the party's GP, or psychiatrist if there is one. If it proves impracticable to obtain a report from those sources, there may need to be a panel of appropriately qualified practitioners to act as single joint experts, along the lines of the system in the Court of Protection.

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?

Please see response to Q.1 We consider that other parties should have right to put in information, but not a right to hear everything that may be said. It is a matter for the Court's decision as to whether they should be permitted to attend the hearing.

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

We acknowledge the force of the arguments for open justice. But because of the particular legal disability that incapacity involve, we would favour a presumption that consideration of the capacity issue should be in private and an anonymity order granted.

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?

This is an extremely difficult issue. We tentatively suggest that there be the potential for another judge to review the determination, who would be drawn from a panel of specialised judges appointed for this purpose. Such judges would be experienced in issues of capacity and would have the facility for explaining the court's concern in simple terms to vulnerable people.

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?

We consider that a party's own legal representative would have no standing to request a review of a determination in these circumstances. In exceptional circumstances, there may be a particular reason for requesting such a review, but we suggest that the representative would need to seek permission from the judge on certain grounds.

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?

Qq. 22 – 25: We agree that as a starting point, no steps may be taken in the proceedings without the permission of the court, but we consider this should not be an absolute position. There may be good reason for exceptions, such as where there is a claim for a non-molestation order, which may need a power of arrest. Although it may be objected that a defendant lacking capacity may not understand the meaning of the order or the sanctions for breach, the overriding purpose must be the protection of the party requesting the order. Likewise, certain possession claims or injunctions for anti-social behaviour may require to be dealt with to protect the interests of other tenants.

We do agree that these starting points should indeed be subject to a `balance of harm' test, ie who is likely to suffer more if the order is made or not made, as the case may be.

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.

We frequently experience such problems.

It is important to recognise that here are so many competing pressures on solicitors. If client does not have capacity to sign the Legal Help form, much of the early work will be pro bono, which cuts across targets on chargeable time and costs. There is a pressing need for guidance on these very practical issues. Legal aid can to some extent be backdated, subject to LAA guidance on exercise of dedicated functions, but there will always be work that is unfunded.

In assessing capacity, a legal representative should always have access to a senior person, ideally in their own firm or organisation, but otherwise through a publicly funded panel of accredited practitioners, either as part of the legal aid system or (better) funded from an independent source.

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?

Yes, this is absolutely essential. The solicitor should be empowered to sign the CW1 Legal Help form and the application forms for a legal aid certificate, subject to obtaining an expert report. We understand that this is already possibly in relation to work done in the Mental Health Review Tribunal. One of the most frequent difficulties facing solicitors is the client's capacity to sign documents, especially the CW1, and in obtaining evidence of means. If we are lucky, a social worker may be able to assist with obtaining a bank statement, but the statement may only be for one month instead of three.

There should be a presumption that a person in receipt of universal credit, and other benefits, is passported for legal aid eligibility. There should be a presumption that the client is eligible for legal aid unless the solicitor is aware of any circumstance that would indicate otherwise. Flexibility, discretion composite picture

There is a need for clarification concerning the promissory declaration that we have to use if client cannot sign the CCMS declaration before we need to submit an emergency delegated functions application in person. It should not be necessary for the person conducting the case to complete a Declaration Against Instructions. A litigation friend should be able to sign the CCMS Declaration.

Please see Case 6 in the Appendix, in which a Shelter solicitor provides an example of a case in which the possibility of obtaining legal aid limited to obtaining an assessment of capacity would have been of great assistance.

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?

Yes, we believe that non-means tested legal aid should be available for this limited purpose. At present, where the client is not financially eligible for legal aid, this work so often has to be done pro bono by legal representatives, voluntary organisations or Citizens Advice, if it is to be done at all. We agree that in general the cases in which these funds should be made available should be the kinds of case which are within the scope of civil legal aid under LASPO, but we would want to see a discretion available to the LAA (with an appeal to an independent adjudicator) to grant exceptional funding in other cases if it is proportionate to do so, it unlocks the stalemate in the civil courts, and it is in accordance with Article 6 ECHR and the Public Sector Equality Duty.

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?

We have no experience of this kind of case.

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).

We consider that the rules should remain more or less as they are, and that it is not appropriate for the court to have power to require another party to pay the cost of a capacity assessment. But the other party will be aware that they may be unable to make any progress in the case if they do not accept such costs. It would be open to the court to invite another party to give an undertaking to this effect.

Of course, the nature of the case, such as a small claims/consumer dispute, may mean that it is not proportionate to seek an expert report, and the court may be requested to make its own determination of capacity on the basis of the evidence available to it. It is notable that in relation to the forthcoming integrated mediation procedure in the small claims track, the question of capacity does not appear to have been considered.

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?

We agree that a central fund of last resort should be created, to fund capacity assessments in appropriate cases.

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?

We would simply reiterate the need for better training and better guidance on the process for determining mental capacity or the lack of it, for the benefit of judges, legal representatives, public bodies and individual litigants such as private landlords.

For further information, please contact:

John Gallagher, Principal Solicitor, Shelter (johng@shelter.org.uk)

APPENDIX: Case summaries by Shelter solicitors

Case 1

At the start of the case, I didn't have concerns about client's capacity. However, as the case progressed I had concerns that whilst she appeared to understand what I was advising, she didn't actually grasp the reality of it and was paralysed by anxiety of being able to take any steps we discussed. After several months of her repeatedly saying that she would do x (very simple eg put a piece of waste paper in bin) and not being able to do it (instead of choosing not to) I started to have real concerns and arranged for her to meet a psychiatrist experienced in hoarding disorders to assess her.

I asked the GP to refer to CMHT. They took about 4 months to do this. CMHT tried to contact client, but when she did not reply (she doesn't - related to her health) they rejected the referral. Nobody told me. I then chased again and GP made another referral. CMHT tried to contact her again, but gave inadequate opportunity to reply, so again rejected her referral. I persuaded them to reopen it and try again, which they did and they have been able to carry out an assessment.

There have been so many barriers to her receiving any treatment from the health system. There have been safeguarding concerns and nobody has taken any initiative. The LAA did a means assessment part way through the case - I had a notice to show cause where I couldn't work for several months, as I couldn't do the means re-assessment and they wouldn't cancel it. I had to work on the case, but was at risk of not being paid for that work, but it was needed to protect client and it included some safeguarding. Whilst the funding was under a show cause, the O/S wouldn't give me any instructions or speak to me, but I had to take some steps to protect client and her position within the case.

I had to beg the other side frequently concerning the numerous delays caused by our client and the system and was able to get them on relative side by showing how much work I was doing because other statutory bodies weren't doing what they should be doing. I found that if I could show them and the court a little progress each time, I could buy more time.

Case 2

The referral made it clear that our client lacked capacity. We were informed that his mother was his deputy as ordered by the Court of Protection. However, she had not been guided to apply to be his litigation friend (LF).

If we had not become involved, a possession order could well have been made leaving an extremely vulnerable person without suitable accommodation and without being able to access his 24 hour day care

We were lucky in this case as the mother was already deputy and willing to be litigation friend. She is engaged and makes herself available to give instructions. Claimant knew that client lacked capacity but did not apply for a stay when they applied for a possession order, until a LF was appointed. However, that was to our advantage in the end as it has delayed the court being able to process the application. Mother was not appointed LF until the first

hearing. It was fortunate that we were able to engage with client's mother at the very beginning - she needed guidance and reassurance and the knowledge that someone was supporting her through the process.

It was a real concern that the Claimant in this matter knew that the Defendant lacked capacity before making their application, yet they did not apply to have the case stayed until such time as a LF could be appointed and their representative at the first hearing (solicitor agent) had not been informed that the defendant had no capacity

Case 3

Client had learning difficulties and could not read or write

GP failed to respond to any correspondence so had to get second hearing adjourned to instruct psychiatrist to prepare certificate of capacity. Legal aid agency paid. GP refused to complete it.

If passported, fewer issues in obtaining legal aid.

In another case, my client lacked capacity to manage finances and to conduct litigation. He redacted all bank statements which were not accepted by the LAA as a result. This went on for about 6 months before LAA finally agreed to accept redacted bank statements.

Case 4

Client would have been evicted if we had not taken emergency action . The warrant was due to be executed 2 days after the support worker instructed me. Without funding, and without being on the record, I made the application to suspend, and put the support worker in front of the judge to explain why there were concerns about capacity. The warrant was suspended and the case adjourned to do the capacity report.

Support worker said she didn't have it. I couldn't get the client to talk to me or answer the phone to me.

The psychiatrist was willing to do it - the difficulty was finding the client, who didn't understand that she needed to do it. the client was roaming the streets at the time. the psychiatrist went out with the support worker and they sat in a cafe known to be frequented by the street homeless and waited hours for her to turn up. Thankfully she did.

Once the case started, Covid intervened, and then I tried to get fresh instructions once it was apparent that the case wasn't being restored by the C. The O/S didn't reply to me for over 4 months, by which point I'd discharged the cert. It took 3m to get the cert reinstated once the O/S did reply.

Case 5

Introductory tenancy - without representation client would have been evicted.

Assisted twice as court duty and client by then had been detained under S3 MHA and brought to court. Long standing mental health issues - schizophrenia and substance misuse.

Adjourned for legal advice, but difficult to get client to engage. Client then discharged and a lot of chasing around - client, social worker, new mental health nurse to engage client.

Independent psychiatrist - dispute arose between two consulting psychiatrists at the hospital.

Consultant psychiatrist at the hospital declined to complete certificate. Independent report obtained on legal aid.

Due to S3 admission delay would have been avoided if consulting psychiatrist had been prepared to complete capacity certificate. Where the client is detained under MHA and has a treating psychiatrist, time and money could be saved if they were prepared to assist with the assessment. Occasionally I have had cases where they have agreed to do so and their knowledge of the client has proved to be helpful in terms of a thorough assessment, but usually the stock response (as in this case) is along the lines of

> " CMHT and its consultants in the NHS are not contractually obliged to provide capacity assessment to legal or tenancy matters, especially in this occasion I believe it is not related to a criminal prosecution".

This suggests it may be different if it was a criminal case. In this case the Claimant's solicitor had no understanding of the questions around capacity to litigate. This led to some challenging conversations and submissions in the hearing about the length of an adjournment. Standard sensible timescales/ rules for obtaining evidence and inviting the O/S (if necessary) would avoid delay overall and reduce time and cost

Case 6

My client Mr X is a secure tenant of [a local authority]. The Council were granted a possession order in October 2023 on the basis of rent arrears and X hadn’t been present at the hearing because he felt so stressed by the proceedings that he didn’t go to Court. He instructed Shelter in November 2023. At the time, the Council had applied for a warrant.

At the first appointment, it was clear that X was likely to be financially eligible for legal aid but might not have litigation capacity. He was very dishevelled and referred to being sectioned for 2 months in 2021 and to finding the possession proceedings extremely stressful. He would appear lucid in moments and then suddenly raise his voice, express paranoid thoughts and make little sense. He did not appear to understand that the possession proceedings had been brought due to rent arrears and kept mentioning that he was being prevented from seeking employment.

X had not brought any proof of means to that first appointment. He instructed that he had no income and said this was due to his being barred from his local job centre. He said he was surviving on ad hoc donations from friends and had recently opened a bank account. Given the urgency of the situation, I delegated functions, but we agreed that I would not submit the application until he provided his bank statements. He provided bank statements by e-mail the following day but these did not cover the 3 month period preceding the date of the first appointment, as required by the LAA.

A local organisation had been assisting X for a number of years, even though he no longer qualified for their services. The organisation appeared to be the only one X trusted. They

confirmed that X had no income, that he had been barred from the job centre and that he had had lots of issues with making a claim for Universal Credit. They also confirmed that X had opened a new bank account shortly before instructing Shelter and that he did not have access to previous bank accounts.

I wrote to the Council setting out my concerns about his capacity and inviting them to withdraw the warrant for possession which they fortunately agreed to. I also obtained a medical summary from his GP which noted that X had a diagnosis of depression, personality disorder and presented with aggressive behaviour.

In my application for legal aid I set out X's circumstances regarding his income and mental health (by providing a draft witness statement) and my doubts about his litigation capacity. The LAA granted an emergency certificate but requested the standard 3 months means information. I contacted X numerous times to ask that he provide his means information but either I would be unable to get through or he would hang the phone up on me. The organisation also stopped responding to my emails.

I managed to extend the deadline for the provision of means information several times but a `show cause' was placed on the certificate. On 6 February I called the LAA to explain that I was struggling to obtain what was required by the LAA and to find out how they proposed the matter be dealt with. I was transferred to a senior caseworker. He acknowledged the dilemma and noted that there was little wriggle room in the LAA regulations for cases such as X's. He said that in exceptional circumstances, cases could be referred to the policy group who have some discretion. He suggested that put my concerns as outlined to him in writing and he would grant a further 14 days for the provision of information.

I put my concerns in writing and suggested to the LAA that they had the means to undertake their own checks with the DWP. I also sent a further message to the LAA after I managed to speak to Universal Credit who confirmed that there was a claim, but were not willing to provide any more information. The LAA misread my message, and understood that I had not been able to speak to the DWP. They placed a show cause on the certificate again.

The current position is that I am waiting for a response from the LAA to my last message. Meanwhile, I have been in touch with X, who has instructed that his last bank account was closed down due to his credit history and he still has no bank accounts. The Council have been chasing me to ask whether I have been able to undertake a capacity assessment of X.

Case 7

Court adjourned to allow social services to find a solicitor and ask the O/S to act as LF.

Capacity issue was very obvious – client refused to discuss the case at all as she did not believe that it was real.

Legal aid - applied with what I had and explained the circumstances to the LAA.

If I hadn't got involved, client would have been evicted and SS would have had to arrange care home, which is what client absolutely did not want. .

The OS required a letter from psychiatrist. They refused to accept the initial letter from CMHT psychiatrist, which set out diagnosis and that client would not work with them and

that she considered that client lacked capacity for general decisions. We then had to pay for another letter, but psychiatrist wouldn't specifically say client lacked litigation capacity as she hadn't been able to assess. It took a lot of time to persuade the O/S that there was no other evidence and the court had already made a finding and in the circumstances, she lacked litigation capacity. O/S would not accept the assessment by experienced social worker.

There were delays in the court process, but they were beneficial to client. The LAA insisted on a means review part way through which was very difficult to do and I could not get any additional information as client lacked capacity as to her obligation. There was a period with no funding as a result.

Once we were involved and the O/S accepted the invitation to act, it was more straightforward, as the other side instructed solicitors and there was a much more joined up approach that included social services in achieving a successful outcome.

Cover sheet

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**.

You must fill in the following before submitting your response:

Your response is (public/anonymous/confidential):	Public
First name:	
Last name:	
Location:	
Role:	
Job title:	
Organisation:	Society of Clinical Injury Lawyers (SCIL)
Are you responding on behalf of your organisation?	Yes
Your email address:	[redacted]

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?

As a general principle the determination of a party's litigation capacity is one for that party and their legal representatives.

In the field of personal injury/clinical negligence it would not be correct to say that the other party does not have a legitimate interest in the outcome of such a determination, because this will affect overall damages and any settlement will require approval by the court. However, it should not be for the other party to raise this as an issue with the Court directly.

The Court has a legitimate interest should capacity become a matter of contention between the parties, under general case management powers. This may even become a preliminary issue for determination.

The situation is different for a Litigant in Person who does not have the benefit of legal representation, and in these circumstances the Court may need to take a more active role.

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?

Should the court become involved then an Inquisitorial approach is preferable.

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*?

Both the Law Society and the Solicitors Regulation Authority have guidance on accepting instructions from vulnerable clients or third parties acting on their behalf. Whilst the guidance is helpful and reasonably clear, difficult cases often arise and additional resources dedicated to assisting and advising practitioners on their obligations would be welcome, along with expert written and verbal support offered when practitioners encounter what can often be very challenging situations. This would require additional funding.

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

Only a firm belief that the client lacks capacity (preferably supported by an expert report) should trigger a duty to notify the court (but without the client's instructions to do so the practitioner would be in a difficult professional position, hence the need for specialist support highlighted at point 3 above).

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?

See answer to Q1 (ie it is not for the other party to raise with the Court unless the issue of capacity is first raised with the legal representative of the party involved, and this cannot be agreed between the parties)

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

Only a firm belief that the client lacks capacity (preferably supported by an expert report).

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.)?

No response given

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

No response given

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?

Not required – the parties need to be aware of potential capacity issues from the outset and throughout, so to try to capture one moment in time seems unnecessary and likely to be ineffective.

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?

Not required – - see answer to Q10.

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

No, but professional regulators may have a role to play here.

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.

A particular example is the classic one where a legal practitioner has concerns about their client's capacity, which the client does not share: this can lead to a breakdown in the professional relationship and the client seeking alternative legal representation (sometimes with justification). This is why training and support in accepting instructions from vulnerable clients is so essential because many practitioners do not work in areas that require special expertise in assessing capacity.

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)?**

All of the above may have a potential role depending on the nature of the proceedings.

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

The Official Solicitor does not appear to have capacity or resources to support practitioners/parties that lack capacity, except in exceptional circumstances.

Litigation friends can become problematic if they lose focus on acting in the protected party's best interests, and assistance in resolving these issues would be welcome.

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

If the court became involved in investigating litigation capacity this would be required, but it is not a desirable situation and the court should be seen as the last resort.

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

Only where absolutely necessary.

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?

Only where absolutely necessary.

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?

If a hearing becomes necessary this should be restricted to the party and their legal representatives unless the court has good reason to require input from other parties (it is difficult to think of examples where this might assist the court)

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

Yes, unless there is good reason for the court to order otherwise

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?

No response given

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?

No response given

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?

Yes, if capacity has become an issue and is in serious doubt then the general principle that no substantial steps may be taken without permission of the court should stand. However a 'balance of harm' test would be useful in cases where this has arisen at a critical point in any proceedings, or if there is a need for urgency: this would be very difficult position for any party to be in and professional /judicial guidance would be welcome to support practitioners in meeting their professional obligations.

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.

No response given, as Legal Aid is so limited for CN cases these days.

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?

Yes: in an ideal world this would be available for all parties whose capacity to litigate is questionable and needs investigation.

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?

No response given.

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).

No response given

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?

No response given

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

No response given

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?

Whilst outside the scope of this consultation, there are issues concerning parties who have been deemed to have capacity to litigate, but not to manage their financial affairs: in the circumstances the court has very little protective role, and it is of great concern that such parties (who may be awarded

significant sums of compensation) are vulnerable yet receive little/nothing in the way of support. This is of particular concern when their inability to manage their affairs has been caused by the Defendant in proceedings, but they don't meet the requirement for a Court appointed Deputy whose costs are claimed as part of the damages.

Cover sheet

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**.

You must fill in the following before submitting your response:

Your response is (public/anonymous/confidential):	Public
First name:	Melanie
Last name:	Gonga
Location:	London
Role:	Director & Head of Legal Practice (Supervising Solicitor)
Job title:	As above
Organisation:	Springfield Advice & Law Centre
Are you responding on behalf of your organisation?	Yes, as well as based on personal experience
Your email address:	[redacted]

Information provided to the Civil Justice Council:

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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?

Yes - the other parties' interest should only be triggered once the outcome of litigation capacity is known. Whilst they should be advised that there is a capacity issue, they should not be involved in the determination process. This is and should remain, a matter for the Court to determine, based on the submission of suitable/expert evidence.

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?

No, if the capacity evidence submitted is from a suitably, qualified expert, the Court should be able to rely on this evidence to determine capacity, and there is no place or need for an inquisitorial approach. This would otherwise only lead to the potential for satellite and/or a more lengthy litigation. The Court should, upon receipt and acceptance of evidence that a party lacks litigation capacity, give Directions as to: the appointment of a Litigation Friend; the filing and service of a Certificate of Suitability; and whether consideration should be given and/or instructions obtained as to whether the expert evidence upon which the determination of capacity has relied, should be disclosed. Generally, the approach should be that this evidence should not be disclosed, and any report, dealing with the issues directly surrounding the litigation, be separately obtained. Of course, if the determination is that the party in question has litigation capacity, it should be sufficient to advise the Court and the other party of this outcome.

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*?

No, legal representatives are generally alert to the issue of capacity of their own client. However, a duty to raise the issue as soon as reasonably practicable, upon it becoming apparent, or upon evidence coming to light suggesting capacity to be in issue, should be clearly stated, and guidance given as to the appropriate response of the other party.

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

The existing standard is satisfactory, whereby if there is reason to believe or reason for concern, the duty is triggered. At that point, the corresponding duties should be, to raise the issue with the other party and the Court, and to make further enquiries and obtain suitable evidence as to capacity, as soon as practicable, such that the issue is resolved before the matter proceeds further.

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?

Here is where further and clearer codification and duties are necessary. Whilst the matter may be delicate and need careful handling and/or not necessarily be in the other party's interests (e.g. it may weaken their case), they should, nonetheless, be obliged to raise capacity as a potential issue, as soon as they become aware of it so being. Legal representatives against parties that may lack capacity, currently fail (too often, or at all) to consider the litigation capacity of the party they are acting against. This may even be where it is known that the other party has enduring mental health, learning or other difficulties – that ought to trigger them to make proper enquiries as to capacity – and even where the behaviour, acts or omissions lack logical explanation, that call capacity into question. Too often, representatives currently seek to obtain unfair advantage from the other party's lack of litigation capacity (and lack of representation), and take the view that 'it is not our concern' and/or that it is for the opponent (or their representatives, if they have any) to raise capacity as an issue, whereas, it should be for all parties to litigation (including the Court) and regardless of whether a party is represented, to ensure they are satisfied as to capacity before steps are taken (save in the most urgent of short-term circumstances), especially where such steps cannot later be undone (e.g. imprisonment).

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

The level of belief – in view of the fact we are not medical experts – should be low. The threshold should only be that there is "reason" to believe, or "cause for concern" that… In other word, the threshold should be deliberately low, as it is better to err on the side of caution, than for the Court, the parties, the MoJ, the Police etc, to later have to bear the consequences of having turned a "blind eye". There should also be a duty to obtain evidence as to capacity where the nature of the allegations and/or information held on a party (e.g. as to mental health status), may call capacity into question, such that reasonable steps must be taken to address the issue early on in proceedings, rather than waiting for it to later "come out in the wash", potentially ignoring the issue as it is "messy", or (carelessly/recklessly) hoping it never comes to light.

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? Yes, where the nature of the allegations and/or information held on a party (e.g. as to mental health status), may call capacity into question. Any party wishing to proceed with their case and obtain relief, should be obliged to obtain and present independent expert evidence, upon which the Court might then reasonably rely and keep on file, before determining the case, liability etc. This is not onerous or any more than should be expected, as it should be in the interests of all parties that justice is served and that disabled parties are not discriminated against. However, the duty and process should be more stringent where the case involves a public body. Where it does not, the Court are the ultimate public body.**
   b. **In some cases (e.g. where the other party is a public body, insurer etc.)? The duty should apply in any event, but might come with other additional or resultant duties where the party is a public body and/or the PSED also applies. If the party is a private individual – i.e. non-public body – the onus should be on the Court to ensure such evidence is obtained as early as possible, with the state bearing the costs thereof.**

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

The threshold for "belief" should be low, so as to place the onus on ensuring capacity evidence is obtained early, particularly where the nature of the allegations and/or information held on a party

(e.g. as to mental health status), may call capacity into question. Perhaps, it may only need be a "concern".

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?

Yes – e.g. the questions might be phrased along the lines of: 'does, or have you considered whether, the issue of litigation capacity, arises in this case? If so, to which party? How, or what reason do you have for this belief/concern?'

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?

This would be good practice, to ensure the parties have considered the issue at an early stage and deal with it, if necessary, rather than later claiming ignorance, or steps having to be undone (after sanctions have been imposed on the non-capacitous party).

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

The range of sanctions should include those that currently apply – such as the "undoing" of any steps taken up to that point of the case and penalties as to damages and costs. The potential for damages to be a sanction, in favour of the party against whom steps have been taken whilst they lacked capacity, would be a strong motivator for the parties and the Court to err on the side of caution. However, as such sanction could equally apply to the Court – where they have failed to enquire and/or require evidence from the parties at an early stage – the Court will bear ultimate responsibility.

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.

Yes, we have an abundance of examples – too many to set out here – with very different approaches having been taken by clients, opponents and the Court. It is for this reason that the process should be better codified (even if the procedural changes are minor), so as to cover all parties to litigation, including the Court.

There have been cases where the client may have been believed to lack capacity and where they may be open to assessment by expert to determine the issue, as well as those where they do not accept any assessment should occur or is necessary, or deny the findings of such assessment. We have a range of cases, where the opponent has accepted that if and once capacity has been called into question and raised, the proceedings should be halted to allow the matter to be determined; those where the opponents have insisted on "ploughing" ahead regardless, or have refused to permit time for the matter to be determined; those where the Court have been satisfied as to capacity, where a suitable expert's report has been provided and then only required that a Certificate of Suitability be filed and served, and yet others where the Court have ordered the disclosure of the Certificate of Capacity and/or expert's report relied on, notwithstanding that if the client lacks capacity, they cannot and may not authorise the disclosure of their personal/sensitive data, and that the burden of responsibility, in making that disclosure, should not be placed on the

non-capacitous-client's legal representative, in particular prior to the appointment of a Litigation Friend. The latter position exploits the disabled client, who cannot weigh and give instructions or exercise discretion about the disclosure of their sensitive data, and in the absence of the appointment of a Litigation Friend, means the representative is acting as both client and legal rep, acting at odds with any existing instructions.

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?** Yes, the Court should be involved and/or make it a requirement that a party provide evidence as to litigation capacity, before it takes steps or applies sanctions – not only to ensure fairness/the proper administration of justice, but also so as to be able to properly rely on any decision, finding or sanction, it then seeks to impose. Where neither party is a public body, the Court should have facility to make these enquiries itself.
b. **Other parties and/or their legal representatives?** Where a party who may lack capacity is unrepresented, the Court should make it a requirement that the party seeking to advance their case, obtain and provide suitable capacity evidence, which would then ensure the party concerned has given proper consideration to the issue and weighed it in the steps they are seeking to take, as well as that the Court has complied with any PSED and ensured procedural fairness etc, before taking further steps.
c. **The Official Solicitor (*Harbin v Masterman* enquiry)?** Absent considerable further personnel and resources being allocated to the Official Solicitor's offices, there seems considerable doubt as to whether the OS would be able to become involved at the stage prior to capacity-determination, as they currently appear to be struggling and there are lengthy delays to referral, even where capacity is assessed as lacking, the OS is the appropriate Litigation Friend to approach, and costs are indemnified. There would probably need to be a separate department of their offices or of the MoJ that dealt specifically with these investigations.
d. **Litigation friend (interim declaration of incapacity)?** Query: what would the role and "powers" of a "Litigation Friend" be, prior to any formal capacity determination and/or appointment by the Court – unless these were to form part of a list of measures or steps they were empowered to take in specific circumstances. Much the same would apply to the OS, as above.
e. **Other (please specify)?** Local authorities could and should readily assess, as they may already have corresponding Care Act/other duties, that arise, but they should be required to instruct independent experts (as opposed to in-house) to assess, where for the purposes of litigation.

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

The failure to ensure an unrepresented party has capacity to litigate, calls into question the integrity of the Court process and leaves open to criticism the validity of any decisions, findings or sanctions made. In the final analysis and absent representation, the Court should provide the final "backstop".

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

The position should be that evidence should be filed at Court (by expert report and/or Certificate of Capacity), for the Judge alone, to determine on the papers, whether they are satisfied that a litigant has or lacks capacity. The Court may list a hearing where there is any doubt or question about the evidence, but this should not be an inter-party hearing. The decision on capacity should be made known to all/both parties, but not the content of the evidence, as if the party has been deemed to lack capacity, pending Litigation Friend appointment, there is no "client". However, the Court should direct that a Certificate of Suitability be filed and served, and give subsequent Directions, to deal with the appointment of a Litigation Friend and the filing and service of any "party-to-party" expert evidence, to be later relied on in substance. This should only occur after the LF has been appointed. The initial determination of capacity should be a matter for the Court, in reliance on suitable evidence, and not the subject of litigation upon which an opposing party may make representations: it should be a matter of fact. However, should a third party be believed to hold information necessary to the determination of capacity, the Court should be able to make a third-party disclosure Order, to assist in the proper administration of justice, without having to formally join that party to the proceedings.

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

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? Yes – see above and below, in particular, as regards unrepresented parties.**

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? Yes, as this should be an administrative function of the Court, solely dealing with the issue of capacity and based on solely on expert evidence on that point. It should not be a matter for legal argument or nuance. There could be provision, in exceptional circumstances, for other parties to attend (but not the opposing party), and any third party wishing to attend, should be required to justify why they assert they should be present, what pertinent information they hold, and Court discretion exercised only in very limited circumstances. Otherwise, the capacity issue becomes litigious, rather than a matter of fact, where it need not be, and may detract from the main substance of the case.**

19) **Should the party be granted anonymity and/or should reporting restrictions be imposed in relation to the hearing? The existing rules for anonymity are reasonable and it need not be automatic that anonymity or reporting restrictions apply. However, where the evidence disclosed (about a protected party) is particularly sensitive, the Court should be guided towards imposing reporting restrictions and/or anonymity.**

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? A party, who has been determined by a suitable expert to lack capacity and who wishes to challenge that finding, should be permitted to apply to the Court for the issue to be revisited, upon the production of independent expert evidence upon which they rely. They should be required to apply, with their evidence, within a**

fixed timescale and potentially provided with non-means tested funding to cover the costs thereof. If they fail to so apply, or the evidence still supports their lack of capacity, the existing determination should then be binding, unless and until there is any significant passage of time or change of circumstance.

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? Only if "obviously", "seriously" or procedurally flawed and more reliable, contradictory evidence is available, so not on a mere dissatisfaction with the determination. If the defined procedure – e.g. as above – has been followed, the presumption should be against re-opening the issue, absent any significant passage of time or change of circumstance.

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? Yes, although query whether a hearing to determine the issue of capacity is required – in most cases, an application with suitable expert evidence should suffice.

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? Yes, save to protect or preserve from serious harm, person or property. However, the Court must be rigorous in applying a high burden of proof, demonstrating any alleged risk, before making Orders in the first instance, unlike the current position. There are criminal laws to bridge any supposed "gap".

24) If so, do you think those starting points should be subject to a 'balance of harm' test? Yes, but in balancing harm, the Court should actually "balance" the harm, not only hearing from the "complainant", who may already be represented, but properly demonstrating balance, to the potentially vulnerable client who lacks capacity, too. In addition, prior to imposing any sanction for breach, the Court should require capacity evidence, as this may well be material, not only to the propriety of imposing any sanction and its nature, but also to the relevant party's ability to understand and/or comply with any Order made, and the reasons for any breach.

25) What factors should be included in such a test? The seriousness and immediacy of specific harm, to whom, and the basis or realistic likelihood thereof. Prior to the determination of capacity, generalised "harm", or merely an assertion thereof, should not be considered sufficient. Any Order made should be limited in its time and scope, and confined to any serious and immediate harm, and any confinement or detention of the Respondent subject to a continuing assessment of proportionality.

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.

No, but that is not to say the issue has not caused problems – such as, explaining and obtaining the agreement of the would-be-protected party to sign the relevant forms and disclose the necessary information in support. We have also only sought Legal Aid in those cases that fall within the scope of the existing Legal Aid regime, meaning that we do not even seek to apply for those clients who lack capacity but do not currently qualify for Legal Aid, mainly as their case-issue falls outside of

scope – even if this then means they have to go unrepresented. This is very unsatisfactory and should give the MoJ cause for concern.

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? Yes, although should it matter if the solicitor believes the client to be eligible? Shouldn't the most important issue be that evidence resolving the capacity issue is obtained (early on), and a fund that permits such evidence to be obtained (even if limited to the same), is provided for? What happens thereafter will depend on the capacity-determination, but would at least provide either reassurance to the Court and parties as the matter proceeds, or otherwise alert them to the measures and precautions required if the matter is to proceed.

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? Yes

b. In cases within the scope of civil legal aid, as set out in the Legal Aid Sentencing and Punishment of Offenders Act 2012? Yes, but also beyond that, otherwise the Court system will be leaving itself open to later prosecution, and the integrity of it falls into question, in terms of how it treats/protects the vulnerable or actively disadvantages and discriminates against them.

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? No

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; Yes, with the Court as the final "backstop"
b) When the other party is the Claimant; Yes, if they wish to further pursue their case
c) When the other party is a public authority; Yes, they should have considered the issue before starting proceedings, but otherwise be required by the Court to do so
d) When the other party has a source of third-party funding; Yes, again, if the case is to proceed and to do so fairly, all parties should be concerned to ensure action against a non-capacitous party is not taken without the proper protection mechanisms in place.

Or,

e) Should the rules remain as they are (with the court able to order/invite such an undertaking in appropriate cases). No, for the reasons given above and as it seems likely that many cases against parties who lack capacity "slip through the net", to the detriment of those individuals, who cannot always obtain representation (likely to worsen as the number of Legal Aid lawyers lessens). The current position does not afford such litigants adequate protection.

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? Yes, to be administered by the Court Service, in appropriate cases.

32) On what principles should the costs of a determination be decided? The costs should ordinarily be met by the party seeking the capacity report/evidence, even if ordered by the Court to do

so, unless the Court determine that the party pursuing the claim ought to have, but failed to obtain such evidence and are therefore at fault, or there is no costs' protection otherwise afforded to a private individual facing an opponent that lacks capacity.

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? Please see some of the examples 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? Please see suggestions above, but general requirements that may assist, would include: Court forms refer that parties to issues of capacity, even prior to commencement of proceedings; that all parties and the Court consider capacity at an early stage of any litigation where it may be an issue; that the Court positively require evidence as to capacity in cases where it may be an issue, before taking any steps and even if that party is unrepresented (thus not relying solely on representatives (for the individual) to raise the matter); and that there be provision for a person who lacks litigation capacity to be represented by a Litigation Friend, even if Legal Aid would not otherwise be available for that type of case (some measure of means assessment could apply, but if so, query how compliance therewith would work, in practice).

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

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Answers should be submitted by PDF or word document to **ConsultationCJCCapacity@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**.

You must fill in the following before submitting your response:

Your response is (public/anonymous/confidential):	Public
First name:	Samantha
Last name:	Hemsley
Location:	London
Role:	Head of Serious Injury
Job title:	Head of serious injury
Organisation:	THOMPSONS SOLICITORS
Are you responding on behalf of your organisation?	Yes
Your email address:	[redacted]

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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?**
I agree as a general rule yes. However there may be reason for parties to wish to have examination in chief or cross examination at any Trial. The protected party being unable to give evidence may be contentious. Capacity can directly correlate to damages, and that in itself presents obvious consequences to the paying party and moreover to the protected party themselves in terms of future costs of support.
Capacity to manage property and affairs is one matter. Capacity for health and welfare is less contentious.

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?**
The matter is rightly in my opinion determined by the Court of Protection - this is an objective determination based on clinical judgement, and is evidence based. It is not and should not be a determination based on the outcome of any litigation. It should be based on application of the MCA taking into account a range of evidence, form those closest to the vulnerable party.
We would suggest other courts and tribunals adopt the same approach to cases as the court of protection – perhaps seeking advice and input as required case by case.

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***?**
Perhaps, yes ,this is likely relative to the experience of the legal representative recognising the nuances of a persons presentation and the fact that capacity can fluctuate. Further guidance would be welcomed.

4) **What level of belief or evidence should trigger such a duty?**
Any concern should be highlighted given the risks to the proper application of justice, and given the risk posed to any firm or individual representative of making an incorrect assumption. This should be merely a referral not a determination. It is right and proper for such an issue to be explored if we are to ensure that the vulnerable are properly protected.

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?**
Yes for the same reasons as above.

6) **What level of belief or evidence should trigger such a duty?**
I would repeat the answer to 4 above.

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?**

Yes

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

I cannot envisage a scenario where a public body or insurer would or could be determined as having lost capacity.

Any party should highlight concerns to the court to avoid a vulnerable unrepresented party suffering injustice

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

See my answer above

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?**

Yes

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?**

This would be excessive. The law presumes capacity and only sets that presumption aside on the basis of clear evidence. Cannot see a basis for adding this layer of complexity to all cases.

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

The sanction of professional negligence and the possibility of unsafe settlements is already a very compelling sanction and applies to all parties to the litigation.

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.**

Yes – many. Erratic behaviours – anger, refusal to accept help and support, violent outbursts, refusal to engage with the legal team, excessive and uncontrollable spending against advice, inconsistent instructions, inability to recall advice given merely hours or days prior, failure to attend scheduled appointments , acting contrary to best interests, or at times all of the above.

Sometimes the evidence of difficulties is sporadic and requires careful review over a period of time – this is more common in cases with a clear diagnosis of brain injury or prior clinical diagnosis of dementia or psychiatric illness

When concerns arise, we would:-

1. ***Seek input from those close to the person of concern***
2. ***Review attendance notes and responses since instruction***

3. *Secure clinical input from treating experts, and support workers*
4. *Secure a neuro-psychiatric or neuro-psychology assessment*
5. *Seek input from the vulnerable party themselves*

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?** ***Yes – preferably via COP***
b. **Other parties and/or their legal representatives?*** ***The issue should properly be raised and the person of concerns legal representatives should investigate, and report to the court - it should not be opposing litigation teams remit***
c. **The Official Solicitor (*Harbin v Masterman* enquiry)?** ***Only as a last resort***
d. **Litigation friend (interim declaration of incapacity)?** ***Yes in order to ensure progress of litigation, but only is an appropriate person can be identified to satisfy the certificate of suitability***
e. **Other (please specify)?** ***A court appointed deputy, or a professional independent advocate of the persons choice***

14) Do you have any comments to make in relation to your answers to the previous question? ***Capacity is a complex issue of great importance in the discharge of justice. Those best placed to determine the issue are those in regular contact with the person concerned, not those who only see a snap shot. It should not become a contentious and invasive part of the litigation, the implications for the person concerned can be highly distressing and the determination of the issue should be in a carefully supported environment, not an adversarial process.***

15) Should the civil courts have more clearly defined powers to order disclosure of relevant documents for the purpose of investigating litigation capacity? ***Is this not more appropriately the role of the COP? The Court of Protection already determines the issues based on evidence it considers is necessary, with experienced and consistent judicial oversight. I would not advocate adding any additional burdens on the civil courts to duplicate or interfere with the existing processes.***

16) If so, in what circumstances should such powers be exercised? ***In acknowledgement of the overriding objective, of course the court should be able to consider and determine the issue if it becomes highly contentious, but as an exception and not as a routine part of the courts role, given the existence of the COP***

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? ***If as above necessary***

in order to determine the issues as part of the overriding objective, yes at the discretion of the court, not as a routine part of litigation

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? ***Yes, it is a matter for objective assessment and should not become contentious, or subject to parties with financial interests in the outcome having a role. The issue is for the court to determine, and the person concerned has a right to dignity in the process. To open the doors to an inquisitorial process involving third parties would I would opine, be highly detrimental and distressing.***

19) Should the party be granted anonymity and/or should reporting restrictions be imposed in relation to the hearing? ***Yes, this should be a matter of course.***

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? ***They should be entitled to professional representation to support them in their right to assert capacity, and where appropriate determinations should be reviewed and time limited orders given.***

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? ***Yes.***

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? ***Yes.***

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? ***Yes.***

24) If so, do you think those starting points should be subject to a 'balance of harm' test? ***I think it should not become the subject of further satellite litigation, so I favour a clear, and simple stay pending resolution with a court determined timescale, unless exceptional circumstances arise in relation to continued financial support for necessary health and welfare costs***

25) What factors should be included in such a test? ***If one was imposed, the only determining factor should be harm to the protected party for example accessing interim funds to meet the on-going costs of required clinical and other therapies and support***

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. ***Rarely*** **is legal aid available even for the most vulnerable in society**

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? ***Yes***

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

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? ***Yes, costs are always contentious in this regard***

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;** ***No***
- **b) When the other party is the Claimant;** ***No***
- **c) When the other party is a public authority; Yes**
- **d) When the other party has a source of third-party funding; Yes**

Or,

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

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? ***Yes***

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

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? ***Yes, in relation to the suitability of an appointed litigation friend***

34) Do you have any other suggestions for changes that would improve the way the civil courts deal with parties who lack capacity? ***Regular training for the judiciary on the nuances of capacity, and the practicalities of assessing capacity, training on clinical expertise required, and balancing the respective views of the person concerned, and their families, and legal representatives in the process. I would also recommend compulsory training for solicitor advocates and the bar with continued professional training.***

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**.

You must fill in the following before submitting your response:

Your response is (public/anonymous/confidential):	Public
First name:	Olivia
Last name:	Crowther
Location:	Southwest England
Role:	
Job title:	Managing Director and Senior Solicitor
Organisation:	Wiltshire Law Centre
Are you responding on behalf of your organisation?	yes
Your email address:	[redacted]

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?

Agree. Most other parties, even social housing landlords, would view a determination of lack of capacity as a hindrance to the swift resolution of an issue, which would necessarily increase costs of conducting the litigation.

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?

Agree. The determination of capacity should not be subject to the adversarial process. There possibly should be a space for the other party(ies) to submit evidence in opposition to a finding of lack of capacity, particularly as they may have a longer relationship with the party who may lack capacity. For example, another party may be aware of the involvement of statutory services.

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*?

Yes, definitely. It is extremely awkward for a duty solicitor (who often has 5 minutes to speak with a client and/or their support worker) prior to a hearing. We usually will have a layperson's "feeling" about whether a defendant lacks capacity and do raise it ex parte with the Court ahead of the hearing, even if the defendant refuses to instruct us. In my experience, judges tend to carry on with the hearing (without our involvement, if the defendant has refused it), on the presumption that the person lacks capacity, which often results in extremely vulnerable people having outright possession orders made against them, despite genuine defences.

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

The trigger should be when a legal or other professional (eg, social worker, medical professional) has raised the question about a litigant's capacity with the Court. These professionals appreciate their overriding duty and do not lightly question an individual's capacity.

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?

Yes. Too often, the other party's representative will fail to raise what are obvious questions about the capacity of the litigant. It frankly sometimes appears that the opponent's lack of capacity is used as a litigation strategy to ensure swift resolution of a matter that, were the person to be found to lack capacity, would likely lead to significantly increased costs and delays.

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

The trigger should be "reasonable doubt." If a party, representative or the Court has reasonable doubt as to whether the litigant lacks capacity, then there should be an initial finding on that issue before litigation proceeds.

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?** Yes. A party or representative cannot be said to come to the litigation with clean hands, knowing that there is reasonable doubt about the capacity of their opponent. If they do so, then they are withholding information from the Court that it would be reasonable to disclose and thus undermining the overriding objective. Opposing parties should not be seen to take advantage of a litigant's lack of capacity and, if they do so maliciously and intentionally, and it is later found that they did so, then the judgment should be subject to quashing.

   b. **In some cases (e.g. where the other party is a public body, insurer etc.)?** There may be some cases where the other party's duty of care to raise the issue of capacity would be greater, such as where they are a combined local authority and have definitive knowledge of a party's lack of capacity but have failed to make reasonable enquiries within their own departments or, worse, refused to raise known questions of capacity with the Court.

8) **If so, what level of belief or evidence should trigger such a duty?** Reasonable doubt about capacity.

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?** Yes. In the vast majority of cases, this exercise will be perfunctory. However, where there is reasonable doubt about a litigant's capacity, then identifying and dealing with the question during the pre-action stage would save the Court and parties significant time and costs.

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?** Yes. Doing so would reduce Court time, as the Judge hearing the matter in the first instance will know to make relevant enquiries and how to direct the parties.

11) **Should there be any particular sanction(s) for a clear failure by another party to raise the issue?** Yes. Where the Court finds that another party knowingly misled the Court by failing to raise the issue of capacity, there should be possible costs implications, as they have wasted the Court's and other party's time and costs.

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.**

Yes, almost weekly. As laypeople, we often get a sense (sometimes after working with the client for quite some time) that the client is not able to understand our advice or give cogent instructions. We then raise the issue with the opponent and Court and instruct an expert to make a professional finding to confirm our hunch. We often have the experience that the expert will identify issues with capacity that we had not raised within our instructions, as we had not grasped that the client lacked capacity. We also often have the experience that the expert will find that a client has capacity, when we were quite certain that they did not. Many of our clients make decisions for themselves that are not in their best interests, so we often require an expert to make a professional determination as to whether the client lacked capacity in making those decisions.

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?** Yes. Judges should hopefully be a neutral arbiter on this issue.
b. **Other parties and/or their legal representatives?** No, other than perhaps to be invited to submit evidence (as opposed to legal arguments) about capacity, once the issue is raised.
c. **The Official Solicitor (*Harbin v Masterman* enquiry)?** Yes, to the extent that they may be involved in raising the issue of capacity with the Court as laypersons assisting the litigant and also assisting in the production of evidence on the issue.
d. **Litigation friend (interim declaration of incapacity)?** Yes, to the extent that they may be involved in raising the issue of capacity with the Court as laypersons assisting the litigant and also assisting in the production of evidence on the issue.
e. **Other (please specify)?** The Court requires expert evidence to assist in making determinations of capacity. There should be experts available to carry out remote assessments where the issue of capacity is raised, which is my strongest recommendation in this consultation.

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?** The powers already exist, so it would appear that parties and judges require training as to how the issue of capacity should be raised and investigated.

16) **If so, in what circumstances should such powers be exercised?** When the Court has reasonable doubt about a litigant's capacity.

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?** Absolutely. There is a question as to who funds those reports and supports their production. The most vulnerable litigants are those who lack capacity but, symptomatic of their illnesses, refuse to engage in the process of investigating their capacity (eg, granting permission for record release, meeting with experts to complete capacity reports, etc). There should be clear guidance for the Court as to the mechanism for investigating and determining capacity, particularly in those instances. Often, the Court asks the duty solicitor to engage with the defendant to get Legal Aid and obtain a report. However, given the serious vulnerability of these defendants, they cannot engage with the process beyond the hearing date when the issue is raised.

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?** Yes. Capacity is not an inter partes, adversarial issue but a matter for the Court. Other parties should possibly be able to submit evidence for ex parte consideration.

19) **Should the party be granted anonymity and/or should reporting restrictions be imposed in relation to the hearing?** Yes. Most litigants who lack capacity do not acknowledge their lack of capacity or have insight into their underlying health issues that give rise to it. In our experience, representatives for the opponent often use the investigation of capacity as a litigation strategy to deter clients from, eg, defending against possession claims.

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?** Other parties should not have a right to challenge the Court's determination of capacity. Where the Court has made a finding that a party lacks capacity, then the opponent will still have the right to litigate in the usual way, with the only difference being that the litigant lacking capacity will have the assistance of a litigation friend. Thus, the other party would not be prejudiced and thus should not have a legal interest in the Court's determination of capacity.

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?** No, for the reasons stated in question 20.

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?** Yes.

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?** Yes.

24) **If so, do you think those starting points should be subject to a 'balance of harm' test?** No. It is very understandable that the Court may empathise with a possible target of, for example, anti-social behaviour, in considering an order made against a litigant who lacks capacity. However, where the litigant lacks capacity, their defence to date has been entirely ineffective. In the event that they engage in criminal behaviour, then there is a separate mechanism for dealing with that behaviour, which protects a potential victim.

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.**

Yes. Firstly, we need to obtain signatures and means evidence from a client, as well as pleadings and other evidence in support of the means and merits enquiries, in order for the LAA to grant a Legal Aid certificate. Where clients lack insight into their illness and cannot engage in the process of obtaining that evidence, it becomes extremely difficult for providers to assist them. It is often unclear what evidence the LAA will require to issue certificates in these situations. For example, a client who lacks capacity cannot presumably sign a contract to obtain Legal Aid. Who then signs on their behalf before a litigation friend is appointed? Even senior caseworkers are unclear about this process. Where clients do not have anyone who can assist them to obtain bank statements or the pleadings, we have had certificates discharged and nullification threatened. Moreover, we need urgently to instruct experts on the issue of capacity, which can cost £3,500.

However, the default amount granted when we delegate functions is £2,250, and our experience is that LAA are reluctant to grant more.

There is a wider issue here. In the last few years, south and southwest England has effectively lost around ten housing Legal Aid providers. If there are no Legal Aid providers, then clearly it will be difficult of any defendants to obtain Legal Aid.

Moreover, in our experience, clients who lack capacity disproportionately raise service complaints, and handling them is not claimable under Legal Aid. This issue and the facts that these clients are often the most complex and difficult and that dealing with the OS is extremely frustrating, providers become discouraged from accepting this work—which is understandable but clearly discriminatory against persons with mental health disabilities.

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?**

Yes. Having closely reviewed the regulations, I understand that we are already able to do so. However, the process is not widely understood and clarity is strongly welcomed.

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?** No, unless it works like a loan, as opposed to a grant. Legal Aid lawyers should not be in the business of assisting the Court to obtain evidence in relation to capacity. There are simply not enough of us to do so. It should fall to the MoJ to provide resources to make these investigations (eg, by having remote access to experts, who are able to complete assessments on the day of the hearing). Once lack of capacity is established, it should be a matter for, eg, relevant departments within the local authorities to make relevant applications to the Court of Protection to manage the incapacitous person's financial affairs, to release funding to instruct legal representatives. We have recently received referrals from the OS to represent clients who do not qualify for Legal Aid, in which the opponent has undertaken to pay the incapacitous litigant's legal costs, so that the case may proceed. This arrangement is uncomfortable, from a professional conduct point of view, but we have accepted the instructions in order to assist the Court.

b. **In cases within the scope of civil legal aid, as set out in the Legal Aid Sentencing and Punishment of Offenders Act 2012?** Yes. Obtaining means evidence is one of the

greatest barriers to obtaining Legal Aid for clients who lack capacity. While we appreciate that, in fact, some of our clients who lack capacity may ultimately found not be means eligible, the Legal Aid certificate should not be delayed as a result. Where clients are later found to have previously undisclosed assets, then it may be a matter for the LAA to apply a statutory charge where assets are preserved or a contribution for previously granted funding sought. However, it is discriminatory to deny Legal Aid to persons who, as a result of their disabilities, are unable to provide evidence up front in the usual way.

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?** Yes. Because this work needs to be completed at the outset of the matter and thus we incur significant costs in the beginning of the matter, we are often battling with the LAA to claw back our actual incurred costs when clients are unable to provide required means and merits evidence.

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).** Yes, this rule appears fair (noting the question of professional conduct issues raised above). The costs associated with determining capacity should fall to the MoJ, as part of its administrative functions.

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?** Yes, as set out above.

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?** The judiciary requires education on these issues. I found the recent Garden Court Chambers training on 5 December 2023 to be extremely

useful and recommended as required viewing for practitioners and the judiciary. Most judges only are able to cite that there is a presumption of capacity and frankly are uncomfortable with dealing with litigants who may lack capacity, so adjourn matters into the future for colleagues later to deal with (or not). There is no clear path for judges or the parties to investigate or determine capacity, so the underlying legal matter is kicked into the long grass, which does not benefit anyone.

34) **Do you have any other suggestions for changes that would improve the way the civil courts deal with parties who lack capacity?** There should be a hotline for parties or the Court to access remote advice or expert assessments of capacity for litigants attending hearings, to avoid matters being adjourned repeatedly ad infinitum.

Zurich response to CJC Capacity Consultation Procedure for Determining Mental Health Capacity in Civil Proceedings

Mandatory Completion

Your response is (public/anonymous/confidential):	Public
First name:	Nikhil
Last name:	Ramakrishnan
Location:	London
Role:	Public Affairs Manager
Job title:	Public Affairs Manager
Organisation:	Zurich UK
Are you responding on behalf of your organisation?	Yes
Your email address:	[redacted]

ZURICH UK

Zurich UK provides a suite of general insurance and life insurance products to retail and corporate customers. We supply personal, commercial, and public sector insurance through a number of distribution channels, and offer a range of protection, retirement and savings policies available online and through financial intermediaries for the retail market and via employee benefit consultants for the corporate market. Based in a number of locations across the UK - with large sites in Birmingham, Farnborough, Glasgow, London, Swindon and Whiteley - Zurich employs approximately 5,000 people in the UK.

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?

Zurich's ambition is that litigation be always conducted with the overriding objective of the Civil Procedure Rules, balancing the handling of cases justly at proportionate cost. We therefore welcome the opportunity to respond to this consultation.

When a party's ability to litigate at present is in question, it can be a costly process, since the expert who is usually asked to make reports to help the court decide this issue is often expensive and because of the legal costs incurred between the parties to litigation where capacity is concerned.

More widely, compensators do have a legitimate interest in the outcome of a party's current litigation capacity. However, it can be a costly exercise to decide the issue for questions of capacity have evidential requirements, require delicate and sensitive handling and the need to ensure the party in question is treated fairly at all times, There are on occasion instances whereby those acting for a claimant will assert a lack of capacity or indicate an intention to explore the issue thoroughly, without fully appreciating the principles and preliminaries set out at the beginning of Part 1 of the Mental Capacity Act 2005 ("the Act"). The Act quite rightly sets out that capacity is assumed until established otherwise. In layman's terms, to demonstrate that

a person lacks capacity is rightly a high hurdle to overcome. A lack of capacity should not be confused with the presence of vulnerability, which may be far more transient in nature and involve less significant considerations. A vulnerable party may simply at times or throughout the process require additional support or assistance in order to engage effectively with the proceedings, which is rather different from the situation involving a party lacking capacity.

There is also the point that in civil proceedings where compensation is claimed, the issue of litigation capacity can add a substantial amount to the value of the claim, as the costs of professional deputyship / Court of Protection costs will be pursued. This will give any defendant a legitimate interest in the determination of a claimant's 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?

Yes. In our view the court could take a more inquisitorial role in civil proceedings generally, to ensure that case management remains on track, that expense is contained and that the litigation is conducted proportionately to the issues and the overriding objective served. As the court is neutral and the dispenser of justice, it seems to us that the court should ultimately decide 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***?

In our view, the provisions of the Act are sufficiently clear. However, due to what is sometimes seen in practise, the availability of clearer guidance could be helpful.

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

In our view, a legal representative would need to be satisfied and be able to give evidence to the effect that their client was unable to make decisions and/or engage with the litigation process, despite all practicable steps taken to help the client to do so. They should also detail the issues that give rise to that belief and the steps taken to support the client. The Act recognises that people who possess capacity can and do make unwise decisions, may not follow advice and so on. The Act is also clear that unjustified assumptions as to capacity should not be made owing to an aspect of behaviour or the existence of a condition per se. As far as possible, the assessment of the legal representative needs to be objective and insensitive to individual beliefs and biases.

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?

Yes, though the starting point has to be whether there should be a duty at all on the part of a legal representative to identify an issue with the litigation capacity of another party to the proceedings who is unrepresented (taking "proceedings" to include the pre-litigation phase). Zurich supports completely the concept of enabling parties to give their best evidence and present their best case, but the idea of a duty being owed by legal representatives to another party in relation to their capacity raises some concerns, in terms of:

- Conceptually, should a duty be owed to another party?
- If so, what would amount to a breach of that duty?
- What if any sanctions should be imposed in respect of a breach of that duty?

For the purpose of answering this question, Zurich will regard an insurer as a legal representative of an insured party, noting the volume of liability claims presented to insurers by other parties and subsequently handled which do not result in the instruction of lawyers or the issuance of legal proceedings. Occasionally, an unrepresented claimant may issue legal proceedings and conduct the matter as a litigant in person ("LIP"). From an insurer's perspective, the litigation status of the claim makes no difference to the treatment of the LIP, which is at all times to be courteous, professional and assistive to the extent that to do so does not conflict with the insurer's duty toward its own policyholder or insured to act in their best interests, noting also the existence of the recently-introduced Consumer Duty. Also, Zurich abides by the ABI Code of Practice: Third Party Assistance and has its own requirements in respect of handling claims from unrepresented parties.

Insurers have a duty to treat such claimants fairly and take particular care to identify vulnerabilities, as well as encouraging unrepresented claimants to seek legal advice at key stages of a claim, if not to appoint a legal representative generally to conduct the matter on their behalf.

Most liability claims are resolved prior to litigation, whether as a result of the claim being settled or repudiated. The question of capacity is seldom an issue, as in most cases the presence of capacity is apparent to the insurer and in line with the assumption under the Act, but vulnerability is sometimes evident. It needs to be appreciated that an insurer will always have a degree of distancing from an LIP. Therefore an insurer ought not to have to undertake an assessment exercise concerning litigation capacity with the same level of rigour that a legal representative might have to undertake in respect of their own client, based on certain indications through behaviour or otherwise that capacity might be an issue.

Regrettably, insurers at times experience challenging behaviour from LIPs, which is often related to a sense of injustice at having been injured or experiencing property damage, which should not be confused with vulnerability or lead to concerns that the LIP may lack capacity.

It is also apt to mention that proportionality should be an important consideration. Many claims pursued by LIPs are often of comparatively modest financial value and although such are undoubtedly important to the LIP, the cost and difficulty associated with investigating the issue of capacity on the part of another party needs to be taken into account.

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

This is challenging to describe, as circumstances and behaviour among LIPs can vary enormously. Insurers will have no or no relevant antecedent relationship with the LIP. In addition, we will not conduct any form of assessment with the LIP as to the merits of their case in the way their own representative would, which may provide information from which to reasonably assess capacity (recognising that this is an issue going far beyond vulnerability).

There are several factors which may lead a reasonable person to believe or suspect a party may lack capacity. Zurich's view is that for the capacity of an LIP to be doubted by the legal representative of another party, there would need to be very clear and repeated evidence of a

serious inability on the part of the LIP to comprehend information imparted, judged reasonably from the responses to that information - or evidence of considerably disturbed and unexpected behaviour from the LIP , going far beyond a lack of knowledge of the claims process or other matters. It is impossible to be prescriptive as to what level of belief or evidence overall may suffice to trigger such a duty, noting once again that the "bar" is very high in relation to establishing a lack of capacity, as opposed to vulnerability.

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.)?

Zurich's view is that in cases of claims where legal proceedings have been issued (so not the pre-litigation phase), there should not be a general duty to raise with the court the litigation capacity of an LIP where this is in doubt. If there are concerns as to the litigation capacity of a claimant, once proceedings have been issued a duty should exist to raise that issue with the court.

Whilst on the face of it there is no reason to distinguish between categories of party when it comes to a duty to raise with the court an issue as to the litigation capacity of a party to the proceedings who is unrepresented, the reality is that a level of sophistication can be expected among some (i.e public bodies and insurers), that will not be present in the ordinary person. Therefore, the most appropriate answer is "in some cases", but we cannot emphasise enough that the bar for such other parties should be very high, given the lack of prior knowledge of the party whose capacity is in question and the challenge in assessing capacity issues for those at a distance from the LIP.

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

The level of belief should in our view be in line with the response to question 6, in cases where the duty is deemed to apply. Again, we stress caution in imposing a duty on parties which may create conflict with their own clients.

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?

Given the assumption of litigation capacity and what must be absent for it not to be present, it seems to us that there is no need for a requirement for a proactive investigation of the question of litigation capacity within pre-action protocols "PAP". Where evidence is available to legal representatives which leads to a genuine belief that their client may lack litigation capacity, the issue should be raised with the other parties as soon as possible and there should be a PAP requirement that they do so. As in other matters, it is important that prospective defendants understand the claims that they are to meet, noting also that investigations into legal capacity can be costly, not to mention the effect on the value of a claim or case if legal capacity is held or agreed not to be present.

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?

Given the relatively limited volume of matters encountered where litigation capacity is an issue, we do not see a compelling case for the amendment of court documentation to address questions of litigation capacity. Rather, our preference is that where a party has a genuine belief

that another party lacks litigation capacity and has issued legal proceedings as an LIP, there is a duty upon the "believing party" to raise the issue with the court in the first instance.

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

A sanction-free regime must be applied. This is because it is unfair to impose a sanction against parties who for the very most part will not have the degree of knowledge or insight regarding another party to make reliable assessments as to litigation capacity. It will be difficult for a "clear failure" to be identified on the part of another party, who will always be at arm's length from the person in question. Further, the presence of a sanctions regime may have the undesirable consequence of "over-prescribing" capacity concerns out of a fear of falling foul of a sanctions regime. This would bring its own problems in terms of subsequent investigations into 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.

In some cases, usually involving LIPs, we have experienced instances of very challenging behaviour from third party claimants in presenting their claims, particularly when legal liability and/or quantum of their claim is disputed. Whilst most of the time these are manifestations of anger or frustrations in people in whom there is no reason to doubt litigation capacity is present, sometimes parties have disclosed that they have neurodivergent conditions, for example, which can lead to rigidity of thought and belief, as well as exhibiting challenging behaviour. There are also cases where LIPs have disclosed having learning difficulties. These sorts of examples lead to a degree of consideration being necessary as to whether capacity is present, but by reference to the Act, we have been able to establish that capacity is present. In other cases, behaviour has been so challenging that we have asked the party to seek legal representation as we have been unable to progress the claim meaningfully with them. In such cases, the presence of a legal advisor has in our experience resulted in the matter being able to be handled without any issue as to litigation capacity being argued.

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)?

In our view, the following should be involved for the given reasons:

a) The court: Given our response to question 2 that there is a place for an inquisitorial process in relation to this issue, which is independent of the parties' interests and is obviously concerned with the administration of justice.

c) The Official Solicitor: Likely has a role to play in safeguarding and other cases, but when it comes to an LIP pursuing a claim with an insurer, it is difficult to know how the Official Solicitor would become involved other than perhaps via the court.

d) The Litigation Friend: Has a role to play due to the status they have assumed, which brings with it a degree of responsibility. We suggest that the duty of investigation upon a Litigation Friend should not be onerous and should merely entail understanding the principles and preliminaries set out at the beginning of Part 1 of the Act, as it would be unfair in our view to impose more given that they are usually ordinary people and there is already a duty upon a Litigation Friend to act in the relevant party's best interests.

We do not believe it is for others to investigate another party's litigation capacity. This is in our view requiring too much for other parties in what remains an adversarial process.

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

No.

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

From Zurich's experience, there is not presently sufficient indication for this to be introduced, and we believe that the courts' existing powers are adequate. It is more the question of ensuring that where litigation capacity is raised as an issue, the other parties to the proceedings are made aware as soon as possible, so that they are in a position to investigate assertions of a lack of capacity for themselves. A lack of capacity adds greatly to expense and in compensation claims, the amount of the compensation payable, particularly if it is felt litigation capacity will not return, despite treatment or intervention.

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

In cases where a lack of capacity is asserted, but disclosure in support of the assertion is not forthcoming, there is a place for additional powers to be exercised following an accelerated Application process by another party to the proceedings that could be dealt with "on paper", without necessarily requiring a formal Hearing. This could save time and expense.

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?

Yes. It seems to us that there is no obvious reason to deny the civil courts these powers.

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?

No. In claims for which compensation is claimed, the question of litigation capacity is of legitimate interest to the defendant. This is because of the cost of claims increases notably where capacity is asserted not to be present (and such assertion is either specifically denied or needs to be proved). Therefore, other parties should have the right to attend the hearing and if wished, challenge the evidence and cross-examine any witnesses (expert and/or lay) who speak to the question of litigation capacity. In our view, the presumption should be that other

parties wish to attend capacity determination hearings unless expressly stating they have no wish to do so because the issue is agreed. There will be cases where a lack of litigation capacity is readily accepted, such as where a party has sustained profound brain injuries and remains unconscious or is minimally conscious.

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

Litigation capacity is a highly sensitive issue and as such, we would have no objection to a grant of anonymity or the imposition of reporting restrictions 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?

It is not appropriate for Zurich to answer this question, which must be a matter for those advocating for the rights and interests of individuals in this situation. We do however support the right of any party to challenge a determination that they lack capacity, given the issue is of enormous interest and implication for them and affects their rights.

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?

Yes. It seems inherently just for there to be a review process where it is reasonably believed a wrongful decision has been made regarding such an important issue.

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?

Not necessarily. It depends on the nature of the underlying case and the representation status of the party in question.

For represented claimants, if the parties' legal representatives can agree that some if not all matters can progress pending the determination of litigation capacity, we see no reason why further steps should not be taken without the permission of the court. In our view, whilst there is a very strong case to say that no steps should be taken in (for example) eviction proceedings without the permission of the court, in other types of case where the party whose litigation capacity is in question is represented, there seems to be no need to delay the proceedings. For instance, in a personal injury claim where a claimant has sustained polytrauma and a range of medical reports will be needed to assist in the just disposal of the proceedings, there is likely little reason to prevent the parties from obtaining those reports pending determination of the capacity issue, as such would be needed irrespective of deemed capacity status.

There is also the point that if the permission of the court is needed in every case, court backlogs could deteriorate and court resources be stretched yet further if all steps in the proceedings were put on hold pending determination of the capacity issue.

We do stress that in the case of LIPs, the starting point should be that no steps be taken in the proceedings without the permission of the court. We see this as important in order to protect their interests.

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?

Not necessarily. The answer to the previous question applies. There may be existing orders which would be unaffected by the determination of litigation capacity either way. Our view is that in cases where the parties are legally represented, if the parties agree, existing orders should be followed in order not to unduly delay the overall proceedings.

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

Yes, though we prefer a rebuttable presumption that existing orders should be complied with pending a determination of capacity hearing, unless to do so, whether in whole or in part, would undermine or otherwise adversely impact the conduct of the capacity proceedings.

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

- The detriment to the party subject to the litigation capacity determination in not having an existing order in the underlying proceedings carried into effect
- The detriment to the other party(ies) in the underlying proceedings in not having an existing order carried into effect
- Whether the parties agree that certain steps should continue pending determination of the issue of litigation capacity
- The impact upon the court timetable in the underlying proceedings.

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.

Not applicable.

26) 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?

It is not suitable for Zurich to answer this question.

27) 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?

In our experience of civil claims, litigation capacity issues are comparatively rare. They are limited to cases whereby the claimant has sustained a serious injury impacting cognitive function and which has led to the claim for compensation, or more rarely, the claimant has a pre-existing condition such that capacity is asserted not to have been present before an injury or other loss giving rise to the subject claim. Considering that background and the conditions that must exist for capacity not to be present under the Act, there seems to us to be no justification for the availability of non-means tested legal aid for the purpose of investigating and determining the litigation capacity of a party to civil proceedings in all matters.

In our view there is a far stronger case for non-means tested legal aid being available for the limited purpose of investigating and determining the litigation capacity of a party to civil proceedings in cases within the scope of civil legal aid, as set out in the Legal Aid Sentencing and Punishment of Offenders Act 2012.

28) 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?

Zurich is responding in its capacity as a liability insurer and so has very limited experience of investigating the issue of capacity of its customers. In practical terms, it is confined to the personal lines class of customer involved in serious Road Traffic Accidents, given that the question of litigation capacity does not arise in non-natural persons. The investigations in matters involving natural persons are usually conducted in conjunction with lawyers representing the natural person where criminal charges or either brought or are in contemplation. In such cases, the payment of costs of investigating and determining litigation capacity is subject to contractual arrangements or determined by individual agreement.

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?

We have no experience of third-party funding involvement in this issue.

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).

No. The rules should remain as they currently are. Responding from a liability insurer's perspective, it is important to recognise that compensation and costs are only payable once a liability is established, which may go as far as a contested trial. Frequently, legal liability is in issue in many types of claims and is never formally conceded, with a negotiated settlement

resulting from the claim if not a maintained denial and the subsequent discontinuance of the claim.

There are also cases where proceedings name multiple defendants out of an abundance of caution or to bring as many purses as possible to the table with a view to pressing a compensation claim. Some of these defendants are frequently released from the litigation eventually, as it is realised the claim against them is unsustainable. Alternatively, a culpable party may only be identified at a relatively advanced stage in proceedings, after the usual time when litigation capacity would be determined.

In multi-party cases where the liability may be shared, there are often apportionment issues to resolve, which often do not take place until a fairly advanced stage in the proceedings, such as at a mediation or joint settlement meeting, activities usually undertaken after capacity has been determined.

As such, our view is that it would be manifestly unjust to require parties to pay for the costs of determining an issue about which they may ultimately have no involvement. There is also the point that the number of cases in which litigation capacity is a truly contested issue, is in our experience low.

We do feel that reasonable efforts should be made by those representing parties whose litigation capacity is in question to check for and explore sources of funding to assist in the determination of the issue.

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?

Yes. This would be preferable to requiring another party to the proceedings to pay such costs up-front.

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

In our view, a “loser pays” model is apt as a starting point, whereby the party contesting the issue of litigation capacity and having the point decided against them is liable for the costs of the determination. The idea is to limit undesirable unmeritorious assertions and denials of litigation capacity and limit the cases to those where there is a genuine issue to resolve.

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?

No

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

In answering this question, we presume that the question is directed towards unrepresented parties, on the basis that legal representatives can be assumed to act in their clients’ best interests, deal appropriately with parties who lack capacity and take appropriate steps to assist where capacity is not present. Access to justice is enormously important and we commend the steps taken to assist unrepresented parties. The only suggestion we have for unrepresented

parties is that there is a signposting of resources and options for such parties lacking capacity, though there is an inherent challenge that persons lacking capacity may struggle to engage with these or possess the ability to initiate contact with appropriate persons. There is perhaps a role for the court in outlining the roles that Litigation or McKenzie Friends can have where there is no formal legal representation and inviting the party lacking capacity to consider these.