The consultation closes on **Friday 31 January 2025 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 **CJCLitigationFundingReview@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 Review of Litigation Funding'

You must fill in the following and submit this sheet with your response:

Your response is (public/anonymous/confidential):	Public
First name:	Kristopher
Last name:	Kilsby
Location:	Wallsend
Role:	Council Member
Job title:	Costs Lawyer
Organisation:	Association of Costs Lawyers
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 and the Data Protection Act 2018.

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 below:

- **Please give reasons for your answers. Please do so by reference, where applicable, to the guidance given in the footnotes.**
- **All answers should be supported by evidence where possible to enable evidence-based conclusions to be drawn.**
- **It is not necessary to answer all the questions.**

Background

The Association of Costs Lawyers (ACL) is a membership organisation representing Lawyers, students and retired practitioners in the field of legal costs.

The ACL was founded in 1977 as the Association of Law Costs Draftsmen (ALCD) with the aim of promoting the status and interests of its members. In 2007, Fellows of the ALCD were granted the right to conduct costs litigation and rights of audience under the Legal Services Act.

In 2011 the ALCD was renamed as the Association of Costs Lawyers (ACL) and became the statutory regulator of qualified costs practitioners. In line with the Legal Services Act, the ACL delegated regulatory obligations to the Costs Lawyers Standards Board (CLSB).

There are currently 440 members of the ACL who represent both paying and receiving parties in all forms of costs litigation. Many members also act for Litigants in Person and the ACL is committed to delivering better access to justice in all costs related matters. All of our members have experience in costs disputes and the vast majority deal with costs on a day-to-day basis.

The ACL has prepared the response to assist the CJC in reviewing the provision of litigation funding given that the vast majority of ACL members will deal with some aspect of litigation funding in their day to day work. However, third party funding is a particularly niche area of litigation funding and Costs Lawyers usually have a limited amount of input into the mechanism and terms of a third party funding agreement. Costs Lawyers are usually involved in the potential recovery of costs once such funding arrangements are in place.

The ACL have implored members who have first-hand experience of dealing with third party funding to prepare their own responses and we understand that some members have taken up this approach.

Questions concerning '*whether and how, and if required, by whom, third party funding should be regulated*' and the relationship between third party funding and litigation costs.

1. To what extent, if any, does third party funding currently secure effective access to justice?[1]

   The ACL believes that the third party funding model can assist and promote access to justice. It is believed that this is primarily because of the significant imbalance that has been growing as a result of the combination of globalisation and enterprise and the Jurisdiction of England and Wales continuing to be a favoured jurisdiction in many international agreements. The

[1] When considering this question please bear in mind that access to justice encompasses access to a court, judgment and enforcement and access to non-court-based forms of dispute resolution, whether achieved through negotiation, mediation, complaints or regulatory redress schemes or Ombudsman schemes.

sheer value and size of some multi-national companies can, in some circumstances, dwarf the value of some small nations and this has resulted in individuals facing a herculean task to attempt to achieve access to justice against these global behemoths.

The access to third party funding agreements creates an opportunity for law firms to be able to pursue cases or large group actions against these large companies on behalf of individuals or a class of individuals. This is because the costs of such a large claim failing or running on for an extended period of time would likely result in that law firm becoming insolvent. The provision of third party funding allows the management of cash flow of law firms during the life of a claim and also ensures that law firms will be prepared to shoulder a lesser risk should the litigation fail. As such, it would not be feasible for law firms to bring these high value or large scale claims without access to third party funding arrangements.

The ACL is also aware that third party funding, unlike like government legal aid provision, is not provided without some form of incentive in return. Such an incentive is highly likely to be dependent on a successful outcome of a case or group litigation action. Therefore, it is highly likely that the majority of third party funders will undertake a thorough vetting process to establish the probabilities of achieving a successful outcome in each piece of litigation that they decide to back. This should mean that any potentially unmeritorious or vexatious claims are unlikely to receive the backing of a third party funder.

Furthermore, the current form of third party funding appears to be based within the realm of large scale litigation, whether this be cases of significant value or cases where the group action is brought on behalf of a large number of claimants, and this means that the application of third party funding may only be in a very small percentage number of cases (despite the potential value in terms of damages of costs incurred being a higher percentage of the overall damages value within the civil market, for example: a handful of cases but with a potential damages value of several billion pounds). Therefore, it is unlikely that this form of funding litigation is likely to be used in a greater volume of cases except these exceptional cases where no other funding arrangement would be viable.

Ultimately, the ACL considers that the third party funding arrangements do have a net benefit in respect of access to justice and they have provided a solution to an issue which otherwise would leave potential meritorious claimants without an avenue to bring their claim.

However, the ACL does consider that the significant volume of funding coming into the market could have a negative impact and therefore some form of regulation, through an independent regulator or legislation, would be beneficial to ensure that the net positive that is currently provided is not eroded away.

2. To what extent does third party funding promote equality of arms between parties to litigation?

The provision of third party funding agreements does assist the equality of arms between parties to litigation. As mentioned in the response to question 1, the significant size of some companies now can mean that an individual attempting to access justice against a large business can have their resources significantly reduced or exhausted purely through large businesses' ability to engage in 'lawfare' which is designed specifically to frustrate access to justice and use the significant imbalance of equality of arms to defeat potentially legitimate and justly brought claims.

The provision of third party funding can provide those individuals with resources which, they alone, would not be able to muster, even through their own personal financing. As such, it can mean that cases can be brought by individuals or pulled together as a group action and can ensure that injustices committed by large companies are able to be challenged.

The ACL is also aware that the courts can also have input in respect of ensuring equality of arms through active case and cost management. This was shown in the recent "Diesel-gate" litigation where a 3 day Case and Costs Management Conference took place and the parties involved submitted some of the highest Cost Budgets that had ever been filed. The courts were able to fully interrogate the contents of these Cost Budgets and significant reductions were made in respect of the amount of costs that the courts considered to be reasonable and proportionate to bring the claims through the next stages of the litigation. This demonstrated that the courts also have a significant role in promoting access to justice and ensuring that parties are on an equal footing and that the Cost Budgeting process is adaptable enough to apply to claims of all values.

3. Are there other benefits of third party funding? If so, what are they?

   The ACL cannot comment on other benefits at this point and would defer to third party funders to provide alternative benefits in support.

4. Does the current regulatory framework surrounding third party funding operate sufficiently to regulate third party funding?[2] If not, what improvements could be made to it?

   The ACL does not hold itself out as an expert in the regulation of third party funding arrangements. As far as the ACL is aware third party funders are currently subject to self-regulation and that there is limited independent regulation when it comes to third party funders and third party funding arrangements.

   Furthermore, the ACL understands that the vast majority of third party funding agreements are extremely technical and relate to very complex arrangements in respect the funds are provided and any returns received. The ACL considers that this is beyond its scope of input and defers to the submissions of others.

   The areas which raise some concern in respect of third party funding will be in respect of:
   1) The potential returns agreed between parties can mean that the third party funder may make significantly more out of the litigation than any individual or class of individuals;
   2) The potential influence a third party funder may have in respect of dictating how litigation should be run or settled through the threat of withdrawing from the agreement;
   3) The source of funds that are used to finance third party funding arrangements should also be transparent.

   The ACL considers that these are legitimate concerns and that they may, in many circumstances be hypothetical, but that these scenarios and concerns should be considered and 'safety nets' put in place to ensure that consumer protection is maintained.

[2] This question includes consideration of the effectiveness of courts and tribunals assessing an appropriate price for litigation funding.

5. Please state the major risks or harms that you consider may arise or have arisen with third party funding, and in relation to each state:
    a. The nature and seriousness of the risk and harm that occurs or might occur;
    b. The extent to which identified risks and harm are addressed or mitigated by the current self-regulatory framework and how such risks or harm might be prevented, controlled, or rectified;[3]
    c. For each of the possible mechanisms you have identified at (b) above, what are the advantages and disadvantages compared to other regulatory options/tools that might be applied? In answering this question, please consider how each of the possible mechanisms may affect the third party funding market.

    The ACL refers to the response to question 4 and restates that there are three main concerns in respect of third party funding arrangements.

    The ACL cannot comment on the effectiveness of the current self-regulatory framework that is currently in place and does not have access to evidence as to how this has operated in the past. All the ACL can state, as is true with all self-regulatory frameworks, that there must be robust rules that are enforced when it comes to conflicts of interest and that consumer protection must also be at the heart of such regulation.

6. Should the same regulatory mechanism apply to: (i) all types of litigation; and (ii) English-seated arbitration?
    a. If not, why not?
    b. If so, which types of dispute and/or form of proceedings[4] should be subject to a different regulatory approaches, and which approach should be applied to which type of dispute and/or form of proceedings?[5]
    c. Are different approaches required where cases: (i) involve different types of funding relationship between the third party funder and the funded party, and if so to what extent and why; and (ii) involve different types of funded party, e.g., individual litigants, small and medium-sized businesses; sophisticated commercial litigants, and if so, why?

    The ACL does not have experience of financial regulation and therefore consider that it is not appropriate to comment save as to say that a balance should be struck between the protection of consumers and to enable freedom to contract and provide suitable third party funding documents and agreements that will enable access to justice.

7. What do you consider to be the best practices or principles that should underpin regulation, including self-regulation?

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[3] Please give full details of each possible mechanism and explain how each would work (including who any potential 'regulator' or self-regulator might be). Such details may make reference to mechanisms used in other countries. Possible mechanisms may include, but are not limited to, various forms of formal regulation (including licensing and conditions, requirements, etc) self-regulation, co-regulation, standards, accreditation, guidance, no regulation, or any other relevant mechanism.

[4] Different forms of proceedings include, for instance: individual claims; group litigation; collective proceedings in the Competition Appeal Tribunal; representative proceedings before the civil courts.

[5] Examples of types of cases include, for instance: personal injury claims; consumer claims; financial services claims; commercial claims.

The ACL does not have experience of financial regulation and therefore consider that it is not appropriate to comment save as to say that a balance should be struck between the protection of consumers and to enable freedom to contract and provide suitable third party funding documents and agreements that will enable access to justice.

8. What is the relationship, if any, between third party funding and litigation costs? Further in this context:
    a. What impact, if any, have the level of litigation costs had on the development of third party funding?
    b. What impact, if any, does third party funding have on the level of litigation costs?
    c. To what extent, if any, does the current self-regulatory regime impact on the relationship between litigation funding and litigation costs?
    d. How might the introduction of a different regulatory mechanism or mechanisms affect that relationship?[6]
    e. Should the costs of litigation funding be recoverable as a litigation cost in court proceedings?
        i. If so, why?
        ii. If not, why not?

The ACL does not believe that the availability of third party funding regimes has any impact on the level of litigation costs. The ACL believes that such funding arrangements are akin and comparable to any multi-millionaire or billionaire bringing a claim on a privately funded basis. The availability of funds should only be considered as 'opening the door' and providing access to justice whereas, it is the usual rules and procedures that should be in place to effectively manage litigation and ensure compliance with the overriding objective that claims are brought at a proportionate cost.

The ACL refers to concerns raised above that there should be transparency as to where funds originate from so that it can be said with certainty that money from certain kinds of funds are not being used to bring litigation in UK Courts where the primary focus is not to improve access to justice but to obtain a return on the funds provided.

9. What impact, if any, does the recoverability of adverse costs and/or security of costs have on access to justice? What impact if, any, do they have on the availability third party funding and/or other forms of litigation funding.

The ACL does not believe that the recoverability of adverse costs or obtaining Orders for security for costs has a significant impact on access to justice whether the funding is via a third party or through any other form. Litigation is ultimately founded on risk. In the majority of cases, settlement offers (and the potential for adverse costs orders through the operation of the Part 36 regime) are one method available to the Defendant parties to redistribute that risk and ultimately it can result in settlements being reached.

Third party funders must be susceptible to that risk as well, otherwise, they may not be encouraged to settle claims if that was not the case.

10. Should third party funders remain exposed to paying the costs of proceedings they have funded, and if so to what extent?

[6] Please explain your answer by reference to a specified regulatory mechanism or mechanisms.

Yes, the ACL believes that this is part and parcel of risk that third party funders must taken on board. A fair balance was struck following the introduction of the 'Arkin Cap' and it is right that some risk is placed on third party funders. A failure to do this would mean that third party funders could pursue large swathes of litigation without a concern of what outcome may be achieved. This would place the balance far too much in third party funders' favour and could result in significant amounts of unmeritorious or vexatious claims being brought.

Questions concerning 'whether and, if so to what extent a funder's return on any third party funding agreement should be subject to a cap.'

11. How do the courts and how does the third party funding market currently control the pricing of third party funding arrangements?

    The ACL has not received input on the mechanics and pricing of third party funding agreements and therefore cannot provide an informed comment.

12. Should a funder's return on any third party funding arrangement be subject to controls, such as a cap?
    a. If so, why?
    b. If not, why not?

The ACL considers that a cap is warranted in the vast number of cases. Such a cap should be in place to ensure that claimants are able to recover a suitable proportion of the compensation that they are entitled to. Failure to do so may result in litigation being brought primarily for the profit of the third party funder instead of to compensate claimants who have suffered a justifiable loss.

However, the ACL is aware that third party funders do take on a significant amount of risk when facilitating third party funding arrangements and any cap should be reflective of that risk. The ACL has not had sight of any evidence in support of how third party funders assess the level of risk of funding a claim and, therefore, cannot provide any substantive comments in respect of where a cap should be set at.

However, the ACL can see that the situation is analogous to the way that success fees are calculated and the established principles and case law that underpin the assessment of success fees based on the risk that a solicitor undertakes in acting in a particular case. The ACL could see something similar in principle might be suitable in such cases where third party funding arrangements are applied.

The ACL is also aware that as a matter of public policy a cap was introduced on the amount of success fee that could be recovered from a claimant's damages. This was set at 25% of past losses and general damages. It specifically excluded future losses to ensure that a claimant, who had been compensated would not end up 'out of pocket' as a result of the funding arrangement entered into.

The ACL considers that such approach may be suitable but that a balance must be achieved to ensure that a claimant's compensation is adequately protected on the one hand and on the other hand continue to make third party funding arrangements attractive to third party funders.

13. If a cap should be applied to a funder's return:
    a. What level should it be set at and why?

b. Should it be set by legislation? Should the court be given a power to set the cap and, if so, a power to revise the cap during the course of proceedings?
c. At which stage in proceedings should the cap be set?
d. Are there factors which should be taken into account in determining the appropriate level of cap; and if so, what should be the effect of the presence of each such factor?
e. Should there be differential caps and, if so, in what context and on what basis?

The ACL refers to the answer given to question 12 as covering some of the questions which have been raised in question 13(a)-(e).

Questions concerning how third party funding 'should best be deployed relative to other sources of funding, including but not limited to: legal expenses insurance; and crowd funding.'

14. What are the advantages or drawbacks of third party funding?
Please provide answers with reference to: claimants; defendants; the nature and/or type of litigation, e.g., consumer claims, commercial claims, group litigation, collective or representative proceedings; the legal profession; the operation of the civil courts.

The ACL refers to the detailed answers above which it believes sets out its thoughts on the advantages and drawbacks of third party funding.

15. What are the alternatives to third party funding?
    a. How do the alternatives compare to each other? How do they compare to third party funding? What advantages or drawbacks do they have?
    Please provide answers with reference to: claimants; defendants; the nature and/or type of litigation, e.g., consumer claims, commercial claims, group litigation, collective or representative proceedings; the legal profession; the operation of the civil courts.

    Given that third party funding is a relatively new form of funding, certainly as compared to the alternatives, it is somewhat difficult to compare. Furthermore, third party funding appears to be prevalent in high value commercial and international litigation, often those involving arbitration. It is not clear how widely used third party funding is used, at least in the UK for UK clients. It is our understanding that many third party funded claims are in respect of non-UK claimants whose preferred jurisdiction, in the interest of fairness, procedure and justice, is England and Wales.

    Group litigation is more commonly funded by alternative means, by trade unions for example, who play a key part effectively as pure litigation funders (as opposed to third party funders), acting in their members' interests rather than as a means of making profit.

    Litigation funding generally is far more prevalent in England and Wales. That includes trade unions, BTE and ATE, all of which can be suitable for a variety of claims for private individuals and businesses, from group actions to individual claims. Most solicitors acting in contentious matters offer conditional fee agreements or are able to act under collective conditional fee agreements for organisations such as trade unions. In group actions costs sharing agreements are commonplace alongside CFAs in terms of the solicitors' fees, used in conjunction with ATE, to cover unrecovered disbursements and adverse costs. Insurers offer funding to their policy holders pursuant to an existing insurance policy such as a household or motor policy, usually in respect of defending a claim. BTE insurance also offers cover to policyholders but that can be subject to unfavourable conditions such as being subject to a limited level of indemnity or where terms restrict the policyholder's freedom of choice of solicitor.

A drawback for virtually all types of funding available to claimant, except perhaps trade union funding and some BTE policies, is that deductions are likely to be made to claimants' damages. From the limited highly publicised cases on third party funding, we know the deductions can be significant e.g. Mastercard and Post Office Horizon litigation with the potential to wipe out most of a claimant's damages in order to repay the funder. We are not aware of any such deductions made by pure funders. In personal injury cases there is a cap on the success fee that can be charged but otherwise it would appear that market forces alone regulate the level of deductions made from damages. Certainly, claimants are worse off financially in most cases post LASPO since success fees and ATE premiums could no longer be recovered from opponents. As a result, the true principle of tort, that a claimant is financially compensated to the extent that they are in the position they were had the tort not been committed, rarely applies.

Solicitors carry a significant burden on funding though this is increasingly passed on to clients post Jackson by way of success fee and shortfall deductions as well as ATE. Where the costs of litigation are significant, claimants often do not have the means to pay for disbursements upfront and in the absence of having take out a loan with interest, solicitors may have to look to disbursement funders to assist. In either case, disbursements are usually repayable with interest, a cost which may be passed on to the client and is not recoverable from the opponent. In some cases the disbursement funding is implemented in conjunction with an ATE policy whereby funded disbursements are covered in the event they are not recoverable.

We do not believe that the operation of the courts are impacted significantly by the mode of funding, whether by third party funding or otherwise. In larger actions where costs are likely to be significant there may of course be more chance of security for costs application in the absence of apparently adequate litigation funding.

b. Can other forms of litigation funding complement third party funding?

Bearing in mind what we have said above, there may be some opportunity for third party funders to partially cover the litigation costs e.g. disbursements in a large group action but the returns are unlikely to be attractive and the deduction from claimants' damages may well be far greater than if existing alternatives are employed instead.

c. If so, when and how?

Third party funders are likely to have different interests to trade unions, ATE and BTE providers. Based on our understanding of third party funding, the damages would need to be very significant in order for claimants to benefit. That is of course unless alternative forms of funding are unavailable to the claimants because they are not members of a trade union or do not have access to BTE or ATE, and otherwise would not otherwise have access to legal services.

16. Are any of the alternatives to be encouraged in preference to third party funding? If so, which ones and why are they to be preferred? If so, what reforms might be necessary and why?

The existing alternatives are likely to be more desirable in all but the highest value cases. Forms of funding which allow claimants in tort claims as far as possible to be put in the position they would have been but for the tort. This is not the case where significant deductions from damages are made. The Jackson Reforms removed the right to recover a success fee or ATE

ATE premiums in the majority of cases, resulting in an unavoidable reduction in payment of damages. While this has been favourable to paying parties, it has not benefitted claimants.

A balance needs to be struck whereby the costs of funding is recoverable from an opponent. That may include interest predating judgment and/or costs as set out in *Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd* [2016] EWHC 2361.Additionally we suggest that QOCS should be reviewed and extended to all types of civil case. Contingency fees should be allowed with consideration of a statutory cap for all types of cases. The DBA Regulations should be reviewed to encourage wider use of DBAs, as recommended by the CJC some years ago.

17. Are there any reforms to conditional fee agreements or damages-based agreements that you consider are necessary to promote more certain and effective litigation funding? If so, what reforms might be necessary and why? Should the separate regulatory regimes for CFAs and DBAs be replaced by a single, regulatory regime applicable to all forms of contingent funding agreement?

    As already stated above, reforms are need to the DBA Regulations. Notably provision for hybrid DBAs is essential, whereby hourly rate charging is permissible in specified circumstance e.g. in the event of termination of the agreement. Consideration also needs to be given in respect of the level of cap of the deduction. Other costs such as counsel's fees should be excluded from such caps.

    We do not believe further reform is needed in respect of CFA. The two regimes, of DBAs and CFAs, should remain separate.

18. Are there any reforms to legal expenses insurance, whether before-the-event or after-the-event insurance, that you consider are necessary to promote effective litigation funding? Should, for instance, the promotion of a public mandatory legal expenses insurance scheme be considered?

    It is important that ATE and BTE providers, while remaining as pure funders, do not adopt an unhealthy interest in the case. That might include unreasonable reporting requirements for the acting solicitors which involve significant amounts of unrecoverable work and expense. More commonly, non-BTE panel solicitors are deterred from acting by such requirements or claimants are simply only allowed to use the BTE panel solicitors thus limiting freedom of choice whereby, especially in specialist claims, the required expertise may not always be available.

    Mandatory legal expenses insurance is likely to be undesirable as it likely to increase insurance premiums even further. Many consumers already opt out of BTE when taking out insurance e.g. on price comparison websites to minimise premiums.

    We would question how such a scheme would be operated, whether by a public body or a conglomeration of competing insurers. If state run system was implemented, there is surely the risk the availability of enhanced or extended cover would be expensive as many insurers would have left the market and the price of premiums would be high enough to leave consumers without adequate cover.

19. What is the relationship between after-the-event insurance and conditional fee agreements and the relationship between after-the-event insurance and third party funding? Is there a need for reform in either regard? If so, what reforms might be necessary and why?

    As we have set out above ATE work well with CFAs and there is no pressing need for reform. We have learned lesson and moved on from the trouble of the early 2000s when rigid regulation led to significant satellite litigation and unenforceable agreements.

    As we have stated above, recovery of the costs of funding should be considered.

20. Are there any reforms to crowdfunding that you consider necessary? If so, what are they and why?

    The ACL has not received input on the potential for crowdfunding litigation and therefore cannot provide an informed comment.

21. Are there any reforms to portfolio that you consider necessary? If so, what are they and why?

    The ACL has not received input on reforms to portfolio and therefore cannot provide an informed comment.

22. Are there any reforms to other funding mechanisms (apart from civil legal aid) that you consider are necessary to promote effective litigation funding? How might the use of those mechanisms be encouraged?

    The ACL refers to the comments made above in respect of specific forms of litigation funding. The ACL considers that it is not appropriate to consider civil legal aid separately and that all options for civil litigation funding must be considered together to ensure that there are no gaps where potentially meritorious claims are unable to be brought due to a lack of litigation funding options.

Questions concerning the role that should be played by 'rules of court, and the court itself . . . in controlling the conduct of litigation supported by third party funding or similar funding arrangements.'

23. Is there a need to amend the Civil Procedure Rules or Competition Appeal Tribunal rules, including the rules relating to representative and/or collective proceedings, to cater for the role that litigation funding plays in the conduct of litigation? If so in what respects are rule changes required and why?

    The ACL does not have the expertise nor has it received any evidence or comments in respect of amendments to the rules regarding representative or collective proceedings and therefore defers its response.

24. Is there a need to amend the Civil Procedure Rules or Competition Appeal Tribunal Rules to cater for other forms of funding such as pure funding, crowd funding or any of the alternative forms of funding you have referred to in answering question 16? If so in what respects are rule changes required and why?

The ACL has not received input on the potential for pure funding, crowdfunding litigation or any other alternative form of funding and therefore cannot provide an informed comment. However, the ACL does refer to the main three concerns expressed above and that should any other forms of funding arrangements be explored then there must be consideration of:

- The impact it has on the claimant's proportion of damages;
- The ability of third parties to dictate the course of litigation;
- Transparency as to the source of funds provided.

25. Is there a need to amend the Civil Procedure Rules in the light of the *Rowe* case? If so in what respects are rule changes required and why?

It is unclear what rule amendments should be introduced following the decision in *Rowe*. It is clear that the circumstances that arose in that case were unusual. However, such notice, that a third party funder has not agreed to indemnify the claimants for any adverse cost orders, should be provided when the funding arrangement details are disclosed to the opposing party. This would ensure that an opposing party would be fully informed of their potential liability and to whom a potential adverse costs liability would attach.

It is considered that such an approach, a third party funder including a term absolving themselves of indemnifying adverse costs orders, would be a significant factor that ought to be taken into account when setting a reasonable cap on the level of damages which that third party funder is entitled to. Failure to do this would mean that:

- A third party funder shoulders no risk but gains a significant reward;
- That claimants may be left with a smaller amount of compensation which may then be further depleted by adverse costs liabilities;
- Defendants are deprived of recovering adverse costs as a result of claims which may have only been brought as a result of the provision of third party funding arrangements.

26. What role, if any, should the court play in controlling the pre-action conduct of litigation and/or conduct of litigation after proceedings have commenced where it is supported by third party funding?

If appropriate safeguards and regulation is in place in respect of third party funding arrangements, as there are with other forms of litigation funding arrangements, the ACL does not believe that the court should adopt a different approach depending on the type of litigation funding arrangement that is in place. Arguably, the costs of litigation should be kept to a reasonable and proportionate amount regardless of the type of funding that is in place and the recoverability of costs should not be affected either.

27. To what extent, if any, should the existence of funding arrangements or the terms of such funding be disclosed to the court and/or to the funded party's opponents in proceedings? What effect might disclosure have on parties' approaches to the conduct of litigation?

The ACL considers that it would not be necessary to disclose any information regarding the type of litigation funding that is in place during the course of proceedings, unless, the type of funding would mean that the opposing party would have an additional liability for costs related to that funding arrangement. This was the approach adopted pre-LASPO and it would

provide the opposing party with information so that it could make informed decisions when it came to making offers and settling a case.

If no additional costs liability arises as a result of a case being funded by a Third Party then it is unclear what insight such information would provide to the opposing party. However, it is noted that where QOCS does not apply, such notice can assist opposing parties where security for costs is a concern. The provision of a notice of funding by way of a third party funding arrangement may negate the need for a security for costs application in those circumstances. As stated above, the Rules and the court should act in such a way to ensure that any costs liability is kept to a reasonable and proportionate level regardless of the funding arrangements in place.

Questions concerning provision to protect claimants.

28. To what extent, if at all, do third party funders or other providers of litigation funding exercise control over litigation? To what extent should they do so?

    The ACL has not been privy to the contents or terms of third party funding agreements and therefore cannot say with any certainty as to what control is conferred to third party funders within the litigation that they choose to fund.

    However, the ACL believes that a balance needs to be struck to ensure that third party funding arrangements remain attractive to third party funders on the one hand, whilst on the other hand ensuring that claimants are not left at the mercy of the decisions and potential self-interest of third party funders.

    A recent example of this is in the Mastercard litigation where the third party funder was applied to oppose a settlement proposal. The third party funder considered the settlement too low and wanted the litigation to proceed despite the decision of the lead Claimant to accept the settlement proposal..

29. What effect do different funding mechanisms have on the settlement of proceedings?

    It is difficult for the ACL to advise on this given that the vast majority of members will only be instructed once a claim has been settled.

    It is clear that having a third party involved in a funding arrangement can mean that there is another party to be involved in the settlement negotiations and there is a risk that this third party may place undue influence on the parties to the litigation in respect of whether they should settle or not. This has been evidenced in the recent “Mastercard” group litigation.

    In respect of other funding mechanisms’ impact on settlement it is difficult to say. Usually, it will be for the Solicitor or instructed Counsel to advise their clients on the potential litigation risk of running a matter to trial and the potential consequences, both in terms of outcome at trial and liability for costs, will be considered concurrently. The Part 36 regime can also play a significant part when it comes to considering settlement and again can be used as a way of shifting the balance of risk from one party to another in the hope that it will encourage a settlement to be reached at a level that is reasonable for all parties involved.

Furthermore, the introduction of Cost Management and the Fixed Recoverable Costs regime have provided differing levels of certainty when it comes to the consideration of costs consequences when it comes to settling a case. However, whilst this increase in certainty may have been introduced on an inter partes basis, it has become more of a consideration of the solicitor and claimant because they will have to take into account any reduction to their damages which may be made by the deduction of success fees, ATE premiums and potential shortfalls between the costs incurred and the costs recovered.

30. Should the court be required to approve the settlement of proceedings where they are funded by third party funders or other providers of litigation funding? If so, should this be required for all or for specific types of proceedings, and why?

    In the absence of a cap and independent regulation (as opposed to self-regulation of the third party funding sector) court approval would be a sensible step in order to protect claimants. Our reservation would be that this might have the effect of deterring third party funders given the additional risks of a court not approving their return.

31. If the court is to approve the settlement of proceedings, what criteria should the court apply to determine whether to approve the settlement or not?

    We consider that the court should have regard to the following:
    - Whether The funding arrangements are fair and reasonable;
    - Whether there is no conflict between the funder and the claimant which prevents the solicitors acting in the clients' best interests;
    - The level of damages deducted from the claimant's damages to be considered against the risks involved, the level of costs involved together with advice given to the claimant regarding funding from the outset.

32. What provision (including provision for professional legal services regulation), if any, needs to be made for the protection of claimants whose litigation is funded by third party funding?

    The ACL refers to the responses made above regarding the areas of concern that should be considered when setting potential regulation or guidelines on third party funding arrangements.

33. To what extent does the third party funding market enable claimants to compare funding options different funders provide effectively?

    The ACL has not been privy to information that is available in respect of the third party funding market. However, the ACL believes that the provision of third party funding to individuals is unlikely to be considered because it is highly unlikely that the returns that could be generated would be sufficient. Instead, it is highly likely that alternative litigation funding options would be considered on this basis.

    Instead, it is likely that Solicitors would be approached in respect of large-scale claims or group actions and that the Solicitors would then approach third party funders on their and their clients' behalf. Solicitors remain under the SRA Code of Conduct to ensure that all relevant funding information is provided to clients so that they can make an informed decision.

34. To what extent, if any, do conflicts of interest arise between funded claimants, their legal representatives and/or third party funders where third party funding is provided?

    The ACL refers to comments made above and below in respect of the potential tensions that may arise between claimants, their solicitors and third party funders.

35. Is there a need to reform the current approach to conflicts of interest that may arise where litigation is funded via third party funding? If so, what reforms are necessary and why.

    The ACL refers to comments made above and below in respect of the potential tensions that may arise between claimants, their solicitors and third party funders.

    Reform could be in a way that provides a cap in respect of the returns that a third party funder can receive to ensure that claimants receive a reasonable proportion of the compensation that they are entitled to or it can be through setting out clear rules which restrict a third party funder from using the funding provision as a bargaining chip to exert undue influence over claimants or solicitors when making decisions in respect of the claim being brought.

Questions concerning the encouragement of litigation.

36. To what extent, if any, does the availability of third party funding or other forms of litigation funding encourage specific forms of litigation? For instance:
    a. Do they encourage individuals or businesses to litigate meritorious claims? If so, to what extent do they do so?

    The ACL considers that the availability of all forms of litigation funding provide a form of access to justice in one form or another and can certainly assist clients with bringing meritorious claims. As stated above, the provision of litigation funding can ensure that individuals have access to justice. If there is no, or limited access to justice then regardless of the whether a claim is meritorious or vexatious it will not be able to be brought.

    b. Do they encourage an increase in vexatious litigation or litigation that is without merit? Do they discourage such litigation? If so, to what extent do they do so?

    The ACL does not believe that the provision of litigation funding encourages the bringing of vexatious or unmeritorious claims. The ACL considers that such claims would likely be brought regardless of the litigation funding that would be available to the individual who brings them.

    Instead, it is for legislation and the CPR to provide disincentives to individuals to not bring such claims. The CPR already does this through the Part 36 provisions and also through the increasing reference to ADR and the provision of discretion to judges to award costs orders as they see fit if they find that the usual order of costs following the event would result in an injustice.

    Ultimately, the balance has to be struck in one form or another and arguably, from a moral point of view it would be better to ensure that litigation funding was available for a large amount of claims and then use rules/regulation to penalise any vexatious claims than to change the rules and limit the availability of litigation funding in the first place and prevent meritorious claims being brought in the first place.

c. Do they encourage group litigation, collective and/or representative actions? If so, to what extent do they do so?
When answering this question please specify which form of litigation funding mechanism your submission and evidence refers to.

The ACL refers to the comments made above in respect of modern legal and business world compared to the position of a few decades ago. The imbalance and inequality of arms has significantly increased and consolidation and globalisation of many companies means that any potential liability could now be against thousands, if not millions of consumers.

As such, this means that the values of such claims are going to be increased by significant orders of magnitude and the need to access and fund such claims will grow significantly.

37. To the extent that third party funding or other forms of litigation funding encourage specific forms of litigation, what reforms, if any, are necessary? You may refer back to answers to earlier questions.

The ACL does not believe that it has anything further to add that it has not already covered above. The availability of litigation funding options are a necessity to ensure that meritorious claims, in whatever form that they take, are able to be brought.

38. What steps, if any, could be taken to improve access to information concerning available options for litigation funding for individuals who may need it to pursue or defend claims?

The ACL is aware that there are already obligations imposed on Solicitors and other regulated litigators to provide clients with the best available information and options available when making a decision regarding the funding of their claim. We are not able to comment on how this regulation is enforced either by the individual regulators or by the Legal Ombudsman, but we believe that the current framework is sufficient to meet and protect consumer's interests.

Claims management companies should also be subject to regulation to ensure that claimants are provided with proper information regarding litigation funding to ensure that they are able to make informed decisions on the funding of their claim.

The ACL considers that further information regarding BTE insurance availability and its ability to fund litigation should also be promoted to the wider public to ensure that they are aware that this could be a viable option should they need to bring a claim in the future.

General Issues

39. Are there any other matters you wish to raise concerning litigation funding that have not been covered by the previous questions?[7]

The ACL considers that we are now over a decade post-LASPO and it would be a reasonable step for the CJC or the CPRC to review the impact that the LASPO reforms have had on striking the balance in respect of access to justice. The removal of the recovery of success fees and other additional liabilities from the losing party has resulted in a significant amount of satellite litigation which has arisen.

[7] Please note that the Working Party is not considering civil legal aid.

Following from the previous point the ACL also considers that the Solicitors Act 1974 is being repeatedly exposed as being severely out of date and unfit for modern legal practice. The ACL believes that the Act should be reformed to ensure that solicitors and clients are able to address any dispute quickly and efficiently and, most importantly, at a proportionate cost.