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:	Lisa
Last name:	O'Dwyer
Location:	London
Role:	See below
Job title:	Director Medico Legal Services
Organisation:	Action against Medical Accidents (AvMA)
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.

RESPONSE TO CIVIL JUSTICE COUNCIL'S CONSULTATION ON REVIEW OF LITIGATION FUNDING

Closing Date: Monday 3rd March 2025

Submitted: Wednesday 12th February 2025

1. About AvMA

1.1 Action against Medical Accidents (AvMA) is the national patients' charity for patient safety and justice. We provide free independent specialist advice and support to patients and families who have been affected by avoidable harm in any kind of healthcare. This provides us with a unique and extensive insight into the experience of patients and families following such patient safety incidents. We use this experience and our knowledge of the healthcare system to work with others to develop policies, systems and practice to improve patient safety and the way that patients and families are treated following avoidable harm.

1.2 Although most of the people AvMA help do not go on to make a clinical negligence claim, such claims are a vitally important option for many who need compensation to help cope with the implications of the injury or loss that has been sustained, and/or have exhausted other attempts to resolve their concerns and hold the organisation responsible for the injury to account. We have therefore always taken a strong interest in clinical negligence and have extensive in-house knowledge of how the system works.

1.3 We accredit specialist claimant solicitors and provide training for lawyers practising in clinical negligence. We get useful intelligence from the claimant lawyers we work with and from medical experts which we use to help inform our response.

1.4 AvMA services provide advice, information, and signposting to the public. Our advice and information can be delivered via our telephone helpline service which is open to the public five days a week, from 10.00 am to 3.30 pm. The helpline is staffed by professional volunteers, mainly clinical negligence lawyers and some medics, who have been trained by experienced AvMA staff.

1.5 Some of the enquiries we receive on the helpline need bespoke help and assistance. Members of the public requiring this level of service complete a New Client Form. The New Client Form is submitted with any documentation they consider relevant and/or supportive of any potential case they may have.

1.6 AvMA operates a pro bono inquest service for members of the public whose loved one has died as a result of, or where healthcare service provided or omitted are thought to have contributed to the death. AvMA works closely with the bar, especially chambers leading in the field of clinical negligence to arrange representation at the inquest hearing for cases that meet our criteria.

1.7 AvMA understands the litigation process but importantly, does not act for its beneficiaries. AvMA does not issue proceedings or run litigation or enter any sort of funding arrangement.

2. Our Response:

2.1 AvMA's costs leaflets (costs principles: https://www.avma.org.uk/wp-content/uploads/Costs-principles.pdf and understanding legal costs: https://www.avma.org.uk/wp-content/uploads/Understanding-legal-costs.pdf) receive on average 400 downloads per annum. Each year, we deal with close on 100 calls to the helpline from members of the public who need advice and assistance with costs related issues.

2.2 In responding to this Review we have considered the nature of the costs and funding enquiries we receive from the public who have sought advice either through our helpline service and/or our written advice service. Most of those enquiries concern Conditional Fee Agreements (CFAs) and After the Event (ATE) insurance policies.

2.3 Please note that all of AvMA's responses are given in the context of our experience of clinical negligence litigation only.

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.**

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?**

   In answering this question we have been mindful of the description of litigation funding set out at page 6 of Professor Rachael Mulheron's report https://legalservicesboard.org.uk/research/a-review-of-litigation-funding dated 28.03.24 which says: "**Litigation funding – that is, the application of non-recourse funding to funded clients, in return for a success fee, whether calculated as a percentage-of-recovery of the financial benefit recovered, or a multiple of the costs invested in the claim…"**.

   A further definition is offered page 11 of that report under Section 3: Litigation Funding which reads:

   "**(a) Definition**
   Essentially, litigation funding:
   Involves a third party financing some or all of the legal expenses of one or more legal disputes in exchange for a share of the proceeds recovered from the resolution of the dispute(s)"

   Applying those descriptions/definitions AvMA has responded to this consultation on the basis that lawyers offering clinical negligence clients a Conditional Fee Agreement (CFA) arrangement are third party funders (TPF) for not only do they take a success fee out of client damages (proceeds recovered from the resolution of the dispute) but they are also entitled to recover any shortfall in the hourly rate agreed between solicitor and client as set out in the CFA, the shortfall is also deducted from client damages.

   To understand the extent to which TPF secures effective access to justice it is important to appreciate what the typical funding situation was for claimants (patients) prior to the introduction of TPF arrangements in particular CFAs and ATE insurance. Usually there were two options open to would be claimants, self-funding and legal aid.

Self Funding: During the 1990's TPF was generally not available, at that time the cost of litigation would fall to the individual bringing the action unless they were eligible for legal aid but the eligibility criteria was very difficult to meet especially for middle income and above families, which meant that most of them did not receive legal aid (see more below). If legal aid was not available then unless an individual could self fund the action, then generally the claim would not be brought. Self funding was cost prohibitive for the vast majority of claimants and although there was some limited Before the Event (BTE) funding in the 1990s this was extremely rare, the limits on those BTE policies tended to be low which made investigations difficult in any event.

Individuals wishing to bring a claim are faced with the fact that the majority of clinical negligence claims require investigation (that fact remains) which in turn means that a Medico Legal Expert needs to report on liability – today, a report of this nature is likely to cost about £2,000 (it may be more or less depending on the complexity of the issue under consideration), the cost would have been equivalent to about £1,000 in the 1990's.

Frequently another speciality medico legal expert was (is) required to report on causation, that too will attract a separate charge of another estimated £2,000 (or circa £1,000 in the 1990's). In addition, clients would be expected in advance to put a sum of money on account of their solicitor's costs; they would pay an hourly rate to the solicitor and a typically they would be asked for £500 - £1,000 on account of costs .

Most claimants did not (and do not) have sufficient disposable income to spend on commissioning these essential reports. Medico legal reports on liability and causation are an essential part of being able to identify whether there is a legal claim and to have a realistic assessment of the merits of the case and the prospects of the case succeeding, without these reports the claim is unlikely to get off the ground, that remains the situation for anyone bringing a clinical negligence claim today.

Not only was the average injured member of the public or family member unlikely to be able to cover the cost of the medico legal reports but they were unable to pay additional sums to cover their solicitor's hourly rates. As a consequence, many patients or their families were simply unable to bring clinical negligence claims and therefore had no access to justice.

Legal Aid: Although Legal aid was available for most clinical negligence claims before 2013, that is no longer the case now.

However, even before 2013, eligibility for legal aid was restricted to those people who could satisfy both the merits and a financial means test, many middle income earners failed to meet the requirements of the legal aid financial means test - generally only people in receipt of income support and/or other similar state benefits or on very low income could satisfy the merits test. The capital threshold for the means test was low so that anyone who owned their own property usually automatically fell outside of the financial eligibility requirements.

Consequently, there were many potential clinical negligence claims which could not be financed and therefore not brought, this created a huge injustice for large sectors of the population. That injustice was only addressed by the introduction of CFA and ATE

insurance both of which took some time to become established even once the legislation allowed them.

Since 2013, there is only a very small cohort of cases for which legal aid is available, that is claims involving babies who were born during or after the 37th week of gestation, and who have sustained brain injury at birth and where it can be shown there is a neurological injury resulting in a physical and/or mental disability. The injury must have been caused by clinical negligence which occurred whilst the individual was in the womb or during their birth or within eight weeks after their birth.

Even where claimants are eligible for legal aid they encounter difficulties instructing relevant medico legal experts because the legal aid rates of remuneration allowed for medico legal experts are much lower than the market rate. Clients and/or their lawyers are unable to top up the cost of the legal aid rate to offer a commercial fee.

Consequently, in practice many good and experienced medico legal experts refuse to work for legal aid rates. However, legal aid may be beneficial to a client to the extent that no success fee is awarded where legal aid is granted which in turn means damages are preserved and applied for the purpose for which they were awarded that is providing care and other services to the injured person for the rest of their lives. Mindful of this, many clinical negligence specialist lawyers who are offering a CFA in these type of cases will not take a success fee so the client's damages are preserved and their funding arrangements do not put them in any worse position than they would have been had legal aid been granted.

Conditional Fee Agreements (CFAs)

Given the definitions set out above, it follows that solicitors (and their firms) who offer Conditional Fee Agreements (CFA) with their clients should be considered third party litigation funders (TPF) – they carry the costs of their own work on the basis that if they succeed in proving the claim by way of settlement or judgment in their client's favour at trial, they will be entitled to a success fee and/or any shortfall in the hourly rate agreed between solicitor/client (as set out in the CFA) to be deducted from client's damages. If the client is unsuccessful, the solicitor recovers nothing.

With clinical negligence litigation the majority of cases are usually funded by Conditional Fee Agreements (CFA) with After the Event Insurance (ATE) provided by insurers.

Many clinical negligence lawyers will not take a success fee in cases where they are acting for a minor or a protected party, but that is a matter of choice. While many lawyers won't take a success fee, there are some who do. In our experience it is commonplace for the shortfall in costs to be deducted from damages.

After the Event (ATE) Insurance:

Typically, in a clinical negligence case, ATE insurance is taken out to cover the cost of the client's expert reports and to protect them against any adverse costs orders including a failure to beat a Part 36 offer. There is no need for ATE insurance to cover the other party's costs because of the concept of Qualified One Costs Shifting (QOCS) (see below).

The ATE policy is split into two parts, Part A and Part B. Part A, covers the cost of expert reports and Part B covers adverse costs orders, failure to beat a Part 36 offer and such like. The cost of liability and causation experts in proving a clinical negligence claim are covered under Part A of the policy – where a case is successful Part A part of the ATE premium that covers medico legal expert costs on liability and causation issues is recoverable from the losing party. Any part of the premium which relates to other disbursement costs under Part A and any of Part B is not recoverable from the losing party and is payable from deductions made from the client's award of damages. The insurers providing appropriate ATE insurance in clinical negligence claims are third party funders (TPF). If the client/claimant loses the action, then the cost of the liability and causation reports are covered by the ATE insurance. The cost of the premium may also be covered by some form of premium indemnity guarantee.

Prior to 2013, the total cost of the ATE premium (Part A and B) was refundable in successful cases. At that time the losing party had to pay not only their own costs but those of the successful party which left the claimant and their insurer considerably financially exposed, consequently the cost of the premiums reflected that risk and were very high.

QOCS:

Prior to 2013, the losing party paid the successful party's costs. At that time, it was usual for the ATE insurance to cover the successful party's costs as well as some of the disbursement costs of the losing party. This meant the insurers risk of costs was high and this risk was reflected in the cost of the ATE premium.

Since 2013, Qualified One Way Cost Shifting (QOCS) has been in place which means that where a claimant loses their clinical negligence claim they are no longer responsible for paying the defendant's costs. This has reduced the need for the ATE insurance to cover these costs and consequently the insurers financial exposure to risk of those costs has been reduced. This has seen a corresponding reduction in the cost of the ATE premium.

Where the claimant is successful, the defendant does not have the same QOCS protection and is liable to reimburse the claimant's reasonable costs on the standard basis from the losing party. The claimant's solicitor will also take a success fee from the client's award of damages in cases where they are successful. If lawyers acting for the claimant/patient are unsuccessful they receive nothing and will be out of pocket.

Before the Event Insurance (BTE)

Some patients/clients do have other forms of TPF such as Before the Event (BTE) insurance policies, often as part of legal expense insurance (LEI) which has been added on to things like household insurance or car insurance policies. Many clients do not know they have BTE insurance until they check the terms of their policies, however, most people with potential claims are not covered by BTE insurance.

BTE can offer some access to justice, but it most usually comes with restrictions, such as a cap on the amount of costs that can be spent in total and at any particular stage of the investigation process. Most policies restrict claimants from seeking advice from a

solicitor of their choice, they are eligible to use the policy only if they seek advice from solicitors who are on the insurers panel. Many of those solicitors are not accredited, it is often unclear how much expertise and/or experience they have in clinical negligence work and so the initial management and investigation of these complex claims may not be done adequately resulting in cases being turned down when they should not be. Insurers do tend to say that the claimant/insured is able to turn to a solicitor of their choice at the point at which they authorise issuing of the proceedings but that is often a long way down the line and it can be difficult for a claimant to find a solicitor who will take on a case where the initial investigation has already been carried out by another firm and where costs will be incurred in reviewing the insurance panel solicitors file. Although the option exists in principle, there are valid practical reasons why it is not exercised in practice.

BTE insurance can be particularly beneficial to a claimant depending on the terms of the policy which do vary considerably. Where a BTE insurance policy covers the claimant/solicitor's costs of investigation the claimant does not have to enter into a CFA with the solicitor so no success fee attaches to any damages awarded which obviously preserves the damages secured for the benefit of the client. Some policies cover the cost of initial investigation such that the solicitor's fees during this phase are covered under the policy. Once the solicitor is satisfied and is able to report to the insurer that the action has merit, they are often then expected to move to a CFA based arrangement, at which point a success fee is claimed.

Conclusion:

There is no doubt that access to justice only exists if the public know (i) what their rights are and (ii) if they are able to access those rights effectively and efficiently – given the complexity of clinical negligence claims this is best navigated if the claimant has access to legal representation.

AvMA refers to the fact that the number of people seeking advice and information from our public facing services, on adverse medical outcomes is consistently high. There are many members of the public who do not know their rights or how to access them. AvMA's review of its own data from 01.01.2023 reveals that in that year, more than 2,250 members of the public had rung into our helpline for advice on the outcome of the medical care they or a loved one had received. We had more than 480 written enquiries for assistance - this illustrates not only how extensive concerns are about healthcare provided but the number of people seeking advice suggests that a great deal more needs to be done to educate the public on what their rights are.

There are many more members of the public who do not know of AvMA and who have no access to advice and information, the 3,000 people seeking help from AvMA each year is likely to be the tip of the iceberg. This view is arguably corroborated by the NAO findings from their 2017 report (see link below) and which are highlighted in the transcript of the NAO podcast produced to support the findings of this report. Re the podcast and the answer to Question 4: "What else did you discover in this report?" the response was: ***"We found that the relationship between patient care, patient attitudes and clinical negligence claims is not yet very well understood . Understanding better why people choose to make a claim is important, because currently only a small proportion of people who experience harm will make a claim. If that proportion were to increase, this could have a big impact on the number of***

claims". https://www.nao.org.uk/wp-content/uploads/2017/09/NAO-podcast-on-Managing-the-costs-of-clinical-negligence-in-trusts-transcript.pdf [AvMA's underlining].

It is difficult to find exact data correlating the increased number of claims with the use of TPF but the number of claims has grown. On 3rd May 2007: https://publications.parliament.uk/pa/cm200607/cmhansrd/cm070503/text/70503w0014.htm Andy Burnham advised the House that in 1996-97, 101 clinical negligence claims were closed costing £294,520 including claimant, defendant costs and damages paid to the injured party. The number of claims closed in 2006/7 was double that at 6,538 this was at a cost of £466,276,595 including claimant, defendant costs and damages paid. While the NHS accounts do not say how many claims were involved, it is possible that the marked increase in costs expended between 1996/97 and 2006/7 is due to an increase in the public access to funding to bring a claim.

The National Audit Office (NAO) report "**Managing the cost of clinical negligence claims in trusts**" published in September 2017: https://www.nao.org.uk/reports/managing-the-costs-of-clinical-negligence-in-trusts/ identified that in the ten years from 2006/7 to 2017 the number of successful claims where damages were awarded had more than doubled from 2,800 to 7,300.

Given the complexity of this area of law, the fact that damages were awarded in those cases suggests that the claimant was legally represented, and the increased number of claims and settlements may be testament to how effective third party funding, in particular the emergence of CFAs and ATE insurance provision during this time, has been in increasing access to justice.

We refer again to the link to the transcript of the NAO podcast (see above) on the cost of clinical negligence to NHS trusts: where in response to Question 2: "Why are costs rising?" the NAO advised ***"Our report showed that the cost of clinical negligence has been rising every year. We analysed the claims data for the last ten years, and found that just under half of the rise in cost is due to a higher volume of claims. In fact, the number of clinical negligence claims received has doubled in the last ten years."***

The increase in the number of claims being brought appears to correspond with Professor Rachael Mulheron KC (Hon) finding in her report (referred to above) where in the Executive Summary under the bullet point "Improving access to Justice" she states: ***"Litigation funding offers consumers a hitherto unobtainable route to access to justice..."*** and at page 13 sub paragraph (b) "A brief history of litigation funding in England" she notes "***As a concept, litigation funding emerged as a serious form of funding in England in the 1990s...However, it was primarily in 2000s that the industry received a significant uptick in both activity and credibility..."*** she then goes on to cite various key events which occurred to promote this form of funding (p14) and then conclude at page 15 "***Today, litigation funding ....has evolved into a landscape where it is not only the impecunious for who such funding can offer access to justice..."***

In clinical negligence claims it is certainly the case that if TPF were not available (particularly by way of CFA offered by solicitors and ATE insurance) the vast majority of the public would be unable to secure access to representatives to navigate their rights

and their access to justice would be thwarted. As Lord Thomas said in Parliamentary debate (Digital Markets, Competition and Consumers Bill:HL Committee Stage (Day 4, 31 Jan 2024) "***...the Horizon scandal, and the miscarriage of justice that occurred, would never have been uncovered if there had not been litigation funding to support Mr Bates and others when they brought their action...if you read what Mr Bates said in his article recently in the Financial Times, you would see from the perspective someone seeking access to justice why litigation funding is important"***

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

TPF is the cornerstone of enabling the public to take on large and/or powerful organisations in order to seek accountability and justice. Without TPF there is no equality of arms and no access to litigation for ordinary members of the public.

As explained in our response to question 1 above, TPF is the most common form of funding in clinical negligence claims. If TPF were to be removed, the public would not be able to access a lawyer especially given the paucity of legal aid available for clinical negligence claims, their options would be reduced to having rights which could only be actioned by paying privately for their litigation which most people will find cost prohibitive, acting as a litigant in person which most people will find daunting or by dropping the matter entirely and not bringing any action at all. None of these options are satisfactory and do not promote equality of arms.

There is good evidence that many people are driven to litigation not for financial reasons but in order to be heard, it is a last resort. This is well illustrated in the recent paper **"Humanizing processes after harm part 1: patient safety incident investigations, litigation and the experience of those affected"** published on 3rd January 2025: https://www.frontiersin.org/journals/health-services/articles/10.3389/frhs.2024.1473256/full

Page 1 of that report the subheading "Findings" identified that ***"patients and families started investigation processes with cautious hope but over time came to realize that they lacked power, knowledge, and support to navigate the system, made clear in awaited investigation reports. Systemic fear of litigation not only failed to meet the needs of those affected, but also inadvertently led to some pursuing litigation.***

Page 5, paragraph 2.6 of the report headed "On the sidelines of organisational agendas" observes: "***Over time, patients and families experienced widening power gaps, leaving them disillusioned by a lack of compassion, acknowledgement and accountability...everything became a challenge at a time when they needed support"***

Page 8, paragraph 2.9 headed "Litigation as a last resort" clearly identifies that families and patients felt powerless and that litigation was option open to them. One of the patient cohort interviewed for that research is quoted as saying "***...I was very aware the NHS is a very large organization and, you know, that it was little me against them. I didn't feel like I wanted to take it on...I felt like I was in a boxing ring with my hands tied behind my back. And I felt desperate"***

There are many more examples both in the cited paper and elsewhere to illustrate how disempowered and disenfranchised the public feel when navigating redress processes alone, especially where that redress is sought from a public body. The recent post office, contaminated blood and Windrush scandals illustrate this point very well. These quotes support the view that the public often come to litigation already feeling disadvantaged by the inequality of power between the parties, the decision to litigate is not taken lightly and there is an acknowledgement "***that pursuing litigation required capital, both financially and mentally, to allow people to repeatedly visit what happened"*** (page 8, para 2.9) but on gaining legal advice, some found ***"That was the first time that somebody had just listened and then taken it all in…that validation just helps you"***

Rights without access to justice are meaningless, TPF enables the public to litigate where necessary and creates an ability to make public bodies and large organisations accountable which might otherwise be lost. Public bodies such as the NHS have easy access to legal advice through the NHS Resolutions panel of solicitors – that legal advice is financed by the public through taxes, it is therefore only right that those bodies are held to account.

It would be a considerable public disservice were TPF to be withdrawn and would inevitably result in considerable loss of access to justice, making it accessible to the wealthy only so that litigation would become elitist, and that fact creates inequality.

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

TPF in clinical negligence claims carries with it its own checks and balances. Claimant solicitor's firms carefully risk assess cases to ensure there are merits to the claim, that is there is at least a greater than 50% chance of the case succeeding, that in itself is a powerful tool to ensure that cases without merit are not brought. To that extent, solicitor's firms have skin in the game – if they do not win the case, they do not get paid. In turn, ATE providers risk assess solicitors to make sure that their own exposure to risk of not recovering the premiums on their ATE products is minimised. Further checks are afforded by the Civil Procedure Rules (CPR) and the courts strict interpretation of proportionality where a primary consideration in cost recovery is whether the costs exceeded the amount recovered.

This triage also provides a service to the NHS and other defendant organisations in that it filters out claims that do not have reasonable prospects of success and advises patients/claimants of this fact and generally why the claim won't succeed. This ensures that so far as possible only cases with prima facie prospects of success move forward.

In clinical negligence claims, the introduction of qualified one way costs shifting (QOCS) where a losing claimant is not expected to pay the successful parties costs means that ATE premiums in this area of work are kept manageable and affordable. TPF creates its own market forces and the responses to managing those market forces can often create workable solutions.

These are important factors which help to ensure that where clinical negligence litigation is brought by lawyers who are accredited in this area of law, and/or who can

demonstrate expertise and experience that frivolous and unfounded litigation is avoided as it is simply not commercially viable.

Other benefits of third-party funding is to create accountability, large public bodies and others are called to explain their action and explain why things have gone wrong. Not only does that create a fairer society and one which serves the citizens, but it also provides an opportunity for public bodies to improve the level of service they offer.

In clinical negligence claims other incidental benefits of third-party funding is the ability to identify (through access to litigation) what went wrong with the care provided. Not only can this result in the potential for improvements but it also creates an opportunity to capture data on patient safety issues.

4. **Does the current regulatory framework surrounding third party funding operate sufficiently to regulate third party funding?[1] If not, what improvements could be made to it?**

AvMA has no detailed knowledge of the regulatory framework surrounding TPF so can only make general observations in this regard.

Our first observation relates to complications that become apparent when a solicitor/client wish to part company. That might happen for several different reasons, the relationship between the solicitor/client may have broken down or the solicitor may consider that the claim is no longer commercially viable and wants to bring the CFA contract to an end whilst retaining a lien over the papers for the work already done.

Where the client finds another solicitor to consider the case (firm 2) we see cases where despite Firm 1 having decided not to proceed with the matter when the papers are to be transferred to Firm 2, Firm 1 often insists that Firm 2 undertakes to recover Firm 1 cost in the event that they are successful. This places additional work on Firm 2 which makes such cases unattractive.

The other area of TPF which requires improvement is protection of the client's damages. The is no cap on the shortfall in solicitor's costs deductible from client damages. By contrast, there is a cap on the success fee payable which is chargeable at 100% but must not exceed 25% of the client's damages awarded for general damages and past losses.

The difference between the interparty costs awarded on the standard basis and the amount chargeable as set out under the terms of the CFA is often referred to as the shortfall. There is no protection for the client's damages; the shortfall in solicitor/client own costs could wipe out the damages awarded and in the worst-case scenario leave the claimant actually owing money to the solicitor.

This scenario became much more apparent when the government was considering introducing fixed recoverable costs (FRC) in low value claims for clinical negligence. In these proposals, the amount recovered from the unsuccessful, losing party was fixed at rates much lower than those generally awarded on the interpartes standard basis, they

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

were also lower than the rates set under the Guideline Hourly Rates: https://www.gov.uk/guidance/solicitors-guideline-hourly-rates The net effect is that it inevitably increases the shortfall payable by the claimant, the shortfall would then have been deducted from the client's award of damages.

Clearly, the principle of the client having to make some contribution to their own costs, even where they have been successful is well established, this principle serves to ensure that solicitor and client are both invested in the best outcome of the litigation or settlement. However, costs are difficult for the public to understand, and the messaging needs to be simple and clear, the current arrangement is complicated.

The public need clear and simple messages for example, we will never take more than 25% of your total damages, the current regulatory framework could help to improve that messaging and ensure that a certain percentage of client damages are ringfenced to compensate the claimant for their injury.

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;**[2]
    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.**

Please see our response to Question 4 above re difficulties with transferring to another firm and the risk of client's losing all of their damages to the shortfall in costs and the messaging around that.

Other risks are around the terms of the CFA. At one stage the Law Society was offering a model CFA but since the case of Belsner: https://www.judiciary.uk/wp-content/uploads/2022/10/Belsner-v-CAM-judgment-271022.pdf that standard model has been under review. In any event, the public often do not read and/or understand the terms of the CFA and too often rely upon what their solicitor tells them about how it operates, particularly how a short fall in costs is managed. The public do not always appreciate that a CFA is a contract and as such the terms of the arrangement can vary – the CFA could make this clearer and make more of urging the public to read the document carefully and to note that the terms can vary from one solicitor to another.

The self regulation aspect of TPF which claimants consider unhelpful is the ability for TPF who have signed up to Association Litigation Funders (ALF) Code of practice which includes offering a complaints process. While that on its own is not problematic the fact the complaints process operates by the party seen as perpetrating the action

[2] 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.

complained of – in the case of CFAs usually law firms - means that the public do not always feel that any complaint they have about costs has been listened to objectively and impartially and that the law firm is simply marking its own homework.

This also presents problems for members of the public who may already feel beleaguered by the litigation of their original action, the thought of having further adversarial involvement with the same firm who you looked to for support and representing your interests in the litigation is a daunting and difficult prospect, particularly where no advocacy is available. Many members of the public feel battle weary, isolated and uncertain in these situations. It is far from clear that offering a complaints process is an effective way to resolve disputes between solicitor client on the deductions claimed under the CFA and to this extent, self regulation could be improved

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[3] should be subject to a different regulatory approaches, and which approach should be applied to which type of dispute and/or form of proceedings?[4]**
    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?**

AvMA has not responded to this question.

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

Clarity: Communication between solicitor/client is key, as is clear language so the layman can better understand the implications and financial arrangements in place. Being able to understand what the CFA covers
Openness: so client understands how much of their damages they will receive even after deductions for shortfall in costs.
Freedom of choice for consumer: Claimants need to understand their options better, they should have freedom to choose a solicitor who they believe will have their best interests at heart. It should be easier for claimants to change solicitors firms if for any reason they wish to move to another firm

8. **What is the relationship, if any, between third party funding and litigation costs? Further in this context:**

It is difficult to know what the relationship between TPF and litigation costs is, if indeed there is any relationship at all. Solicitors offering a CFA will have base costs they need to recover to enable the business to function at all eg. The cost of rent, light, heat etc.

[3] Different forms of proceedings include, for instance: individual claims; group litigation; collective proceedings in the Competition Appeal Tribunal; representative proceedings before the civil courts.
[4] Examples of types of cases include, for instance: personal injury claims; consumer claims; financial services claims; commercial claims.

Then there needs to be a profit element to ensure the business is viable and worth running, those costs will vary from firm to firm. The firm's hourly rate will be assessed with those factors in mind.

Litigation costs appear to be driven by the amount of time spent on the case – the longer a case runs, the greater the expense, the complexity of the case is another factor although complexity and the amount of damages awarded bear no relationship, low value claims can be expensive to run too. The longer a case runs on for, the more expensive it is, the sooner the case settles, the sooner there is resolution for the claimant and their solicitor has certainty of entitlement to recovery of costs.

Other costs such as disbursements have their own absolutes such as medical expert costs – those experts who want to do medico legal expert work and who have experience and a good reputation for the work will be more marketable and therefore charge a higher hourly rate than perhaps an expert with less experience. The cost of an expert's report will reflect the work they have undertaken, the time taken to review the documentation, fact check including research and form an opinion. There may be an element of their medico legal expert costs which are driven by the need to be sure that their opinion is rational and the arguments on breach can be supported, failure to do so may result in the expert being criticised by the trial judge and a subsequent loss of reputation and possibly professional standing.

If a TPF such as an ATE provider covers the expert's costs and those costs are subsequently recovered in any successful case, then there may be less scrutiny around the amounts charged by the expert and those costs will be recoverable. To that extent there might be an argument to say that a lack of a cap on expert fees drives up the amount they can charge and this in turn drives up the cost of litigation but that is far from clear.

If we contrast the availability of experts to do the work under legal aid rates (which effectively operates a cap) it is apparent that fewer experts are willing to work on those terms, the experts simply withdraw from the legal aid rate market. Experts will generally have their own margins for profitability and if they are not met, they will withdraw from the work altogether, those commercial decisions are based on the expert's own bottom line which will likely include the amount of time they have to spend on the case and any other incidental costs such as those of preparing the report. Those bottom line decisions will be made without recourse to the availability or otherwise of TPF.

Other factors that increase the cost of litigation include the level of court fees charged. Again, the basis upon which those fees are charged are presumably referable to the HM Courts and Tribunal Service, not the availability of TPF.

The factors that increase the cost of litigation are complex and many, the relationship between TPF and costs is not clear.

a. What impact, if any, have the level of litigation costs had on the development of third party funding?

The high level of litigation costs, whether solicitor/client own costs, court fees, or disbursement costs has meant that for most people the costs of litigating are

prohibitive. As referred to above, during the 1990's middle income families who had experienced an adverse medical outcome rarely brought proceedings as they could not be eligible for legal aid and could not afford the disbursements and the solicitor's hourly rate. The introduction of TPF changed this and so naturally more people were able to bring claims than before. Coupled with this, the number of claims has increased – we refer to the quotes from the NAO report set out in our response to question 1 which confirms that the number of claims had doubled between 2006/7 and 2017. TPF clearly meets a public need which was previously not served.

b. What impact, if any, does third party funding have on the level of litigation costs?

See comments above

c. To what extent, if any, does the current self-regulatory regime impact on the relationship between litigation funding and litigation costs?

AvMA have not responded to this question.

d. How might the introduction of a different regulatory mechanism or mechanisms affect that relationship?[5]

It is impossible to comment without knowing the nature the different regulatory mechanism proposed.

e. Should the costs of litigation funding be recoverable as a litigation cost in court proceedings?

i. If so, why?

TPF will not provide funding unless it can be profitable for them and their outlay is recoverable. If litigation costs are not recoverable as cost in court proceedings payable by the losing party then it would have to be paid by someone, the only person contractually bound to a TPF is the claimant, the only money they have will come from any award of client damages. If the TPF costs are not recoverable as litigation costs in court proceedings they will need to be paid by the client out of their award of damages and this could substantially reduce or wipe out the damages altogether making the litigation pointless.

ii. If not, why not?

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 recoverability of adverse costs on an ATE policy enables a client to make reasoned choices as part of the litigation. It may avoid a claimant's lawyer from persuading them to accept the first offer of settlement when that offer is patently too low, it prevents the lawyer from being too focused on their own interests in the litigation.

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

If for example, a Part 36 offer is rejected, the acting solicitor will be aware that any adverse costs arising from the failure to beat the part 36 offer will be met by the ATE policy. The defendants will not be able to eat into the client damages in order to recover money payable under the adverse costs order, that preserves the damages for the client and for the client's solicitor to deduct any shortfall and/or success fee recoverable.

It also means that the client can reject the offer secure in the knowledge that they are able to continue to fight for full and fair compensation and not have to take the first offer that is made. The fact that the ATE provider has to agree that they would continue to support the policy in advance of the Pt 36 offer being rejected acts as a safeguard to ensure that reasonable offers to settle are not rejected unreasonably.

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

    AvMA has not replied to this question.

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?**

    AvMA has not responded to this question.

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?**

    Yes, in order to preserve the clients award of damages and prevent situations where the client may end up owing money to their solicitor there needs to be a cap on the return on TPF.

    Please see AvMA's response to questions 4 and 5 above.

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?**

    Any cap on TPF should be set at the outset and should be communicated clearly to the client.

The messaging needs to be easy to understand and couched in terms such as no more than 25% (or whatever figure agreed) of your damages will be deducted by way of success fee and shortfall.

There should be a ceiling on the amount of damages which will attract deductions – for example if a case settles for £1M and half of that is awarded to cover care costs and therapies, that expenditure which is essential to the client's needs and/or recovery should not be subject to deductions. Certain heads of damage should be ringfenced and preserved for the client's best interests and well being.

While accepting that certain heads of damage should be preserved, there should be room for the TPF recovery to be increased to reflect particular complexities and risks associated with the litigation which materialise as part of the investigations. However, the overall recovery of damages for the client should never be less than 50% of any damages which fall outside of sums ringfenced.

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.

    AvMA has not responded to this question.

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.**
    b. **Can other forms of litigation funding complement third party funding? Alternatives include: Trade Union funding; legal expenses insurance; conditional fee agreements; damages-based agreements; pure funding; crowdfunding. Please add any further alternatives you consider relevant.**
    c. **If so, when and how?**

    See our response to Qn 1 above.

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 only other form of TPF not discussed at Qn 1 above relates to Damages Based Agreements (DBA) which operates on the contingency fee model, that is that whatever the amount of the award of damages secured, the TPF will take a straight percentage of those damages, the percentage having been agreed between solicitor and client at the outset.

From the TPF point of view, given that they can recover their costs, disbursements and a success fee under a CFA and ATE there is little or no incentive to move to a DBA. In personal injury claims a cap on the recovery of client damages operates at 25% of past losses, pain and suffering and loss of amenity, that cap applies in both CFAs and DBAs. The cap exists to protect the client's much needed damages but restricts the amount of money the lawyer can recover, there is therefore a very real risk that the lawyer will be out of pocket by the time the disbursement costs, VAT and success fee are taken into account.

It should be noted that solicitors acting under a DBA are unable to recover the shortfall in their solicitor/client costs from client damages. Under a DBA the risk lies with the solicitor, they will not take that risk if they do not have to and given that CFAs offer a good alternative which secures the lawyer's access to costs recovery from the losing party and any shortfall in costs become recoverable from client damages there is no incentive to move to a DBA funding model.

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?**

AvMA has not responded to this question.

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?**

Please see response to Qn 1 above on Before the Event Insurance (BTE). Where a client has BTE insurance they should have freedom to choose the solicitor they think is best placed to serve their interests, not be directed by the insurers to using solicitors on the insurers panel in order to be able to access their own BTE funding.

In promoting freedom of choice of solicitor, there needs to be greater public awareness of the benefits of accredited schemes which help the public identify what solicitors have specialist expertise and knowledge in this field. That is a public awareness piece.

If there were to be promotion of mandatory legal expense insurance (LEI) this could alter the current TPF market which is dominated by CFA and ATE insurance – upsetting that market, may create an increase in the cost of ATE policies and may cause many insurers to withdraw from the market if it results in insufficient cases to make their products commercially viable. In turn this could have the effect of removing or limiting the availability of CFA and ATE modes of financing litigation claims which in turn limits public choice and access to justice.

Any mandatory LEI product must be fit for purpose, that is, there has to be adequate funds to cover the claimant lawyer's costs and all of the disbursements all the way to trial. Many of the current LEI policies come with a maximum spend of say £50,000 – that is often too low for clinical negligence litigation and does not allow for the fact that some cases are more time consuming and expensive to run than others.

Currently insurers often insist on authorising the expenditure before it is incurred. There would need to be sufficient safeguards in place to prevent insurers from refusing expenditure in claims that have reasonable prospects of success. The insurer may be incentivised to refuse the continuation of LEI funding in the knowledge that preventing the claimant's ability to litigate will bring the claim to an end which will mean reduced financial risk for the insurer and greater certainty for them.

This sort of behaviour needs to be kept in check to ensure that funding is not being cut off simply to save the insurer the risk of financial exposure to the claim. There may need to be some sort of independent overview of these sorts of decisions to ensure that they are being made fairly and impartially. The risk is, that the BTE insurer is too invested in the litigation – they have recovered the clients premium for the policy, they want to avoid the risk of paying for proper legal advice under the policy when the risk materialises.

The BTE insurance policy would also need to be clear about what prospects of success they commanded when the policy was taken out. That is to say the insurer needs to be transparent about whether they are looking for prospects of success which are greater than 51%, 60%, 70% etc.

It is of paramount importance that patients and would be claimants have a better understanding of private healthcare provider's insurance arrangements. It should be mandatory for any healthcare provider offering private healthcare to (i) carry insurance (ii) that the insurance cover is adequate to cover the likely cost of damages and costs incurred (iii) that this is checked annually and disclosed to the healthcare providers professional regulator (iv) that the healthcare provider direct the patient to where they can see the terms of the indemnity insurance (v) that professional indemnity insurers are unable to wriggle out of their obligations to cover their insured's actions on the basis that the healthcare provider was acting on a frolic of their own and therefore outside of the terms of the insurance and consequently is not covered. There needs to be an all round public and professional education piece around this issue.

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?

CFAs and ATE insurance appear to work together well at the moment. As described above, insurers have their own panel criteria and will generally only offer their insurance products to firms they recognise as being able to
run clinical negligence claims efficiently. Insurers do not want to offer their products to lawyers who frequently run their cases to trial and lose as this costs them money – this rigour offers an additional form of quality control to the lawyers although it would be preferable if certain accreditation schemes were recognised at the outset.

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

AvMA has not responded to this question

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

    AvMA has not responded to this question

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?**

    AvMA has not responded to this question

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?**

    AvMA has not answered this question.

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?**

    AvMA has not responded to this question.

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?**

    AvMA has not responded to this question.

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?**

    AvMA has not responded to this question but please note our response and case example in response to Qn 27 below.

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?**

    In the spirit of openness, the parties funding arrangements should be disclosed to the other side as soon as possible and at the outset. However, as the case example referred to below illustrate there are factors relevant to the parties pre and post litigation conduct which should be taken into account, when considering Qn 26 above as well as this question.

Disclosing your funding arrangements can leave a party open to tactical advantages. There need to be safeguards in place to ensure that cases which can and should be settled are settled without the need to revert to litigation. Litigation should always be a last resort.

The pre action protocol for clinical disputes is clear about what it expects from the parties, it is for the courts to be satisfied that conduct of parties has been reasonable and that tactics have not been employed to simply avoiding settling a claim and tactically driving people into litigation with all its associated expenses. If those principles are applied and sanctions for non compliance encouraged then it should not matter whether the access to litigation is supported by third party funding or not.

AvMA is aware of situations where defendants in healthcare claims who carry professional indemnity insurance have refused to give details of their insurance either before or during the course of the litigation. In an actual case example, the claimant lawyers only discovered following an admission of liability (made 5 years after the claim was notified, 3 years after proceedings were issued, only 8 months before trial and almost 2 years after the costs budgets had been approved) that the defendant's indemnity cover had a ceiling of £1m. The £1M was to cover the Claimant's damages, and both sides costs. By this stage, the Defendant's Solicitors had spent nearly £500,000 of this sum leaving only £500,000 to cover the Claimant's damages, all of their legal costs and disbursements. Given that the claimant's case was valued at seven figures and the Claimant's approved costs budget exceeded £500,000 it gave rise to a conflict of interest between the solicitor and Claimant; the defendant was a man of straw and would not be able to fulfil any judgment debt secured in the action.

It also became apparent that the indemnity policy was an eroding policy, which meant that the Defendant was entitled to pay their legal costs from the policy before the case was resolved, thereby reducing the amount available to settle any claim at the conclusion.

The only real recourse for the solicitors in this situation was to seek a non-party costs order (also known as a third party costs order) against the Defendant's insurers under *s.51 Senior Courts Act 1981*, on the basis that the insurers were the "real Defendant". This would have the effect of making the Insurer primarily responsible for the Claimant's costs of the action, regardless of any limit of indemnity under the Defendant's policy. In the Court of Appeal case, *TGA Chapman Ltd v Christopher [1998] 1 WLR 12*, the Court of Appeal upheld a non-party costs order against a Defendant's insurers following a judgment for damages which exceeded the limit of indemnity.

The firm involved in this case example, notified the insurers of their intention to rely on S.51, making it clear that the following factors would be brought to the Court's attention: (i) the Defendant had no assets and therefore no judgment could be enforced upon him personally (ii) the insurers had pursued the defence to protect their own interests i.e. to avoid or reduce their liability to the Claimant to pay a sum in excess of the limit of indemnity (iii) If the case were to go to trial and the claimant's solicitors were to win, they would not only be paying out the full £1m under the insurance policy, but they would also be paying out the Claimant's legal costs on an indemnity basis.

In response, the Insurer's legal representatives advised that if the Claimant did not accept the Defendant's increased (but still inadequate) settlement proposals, then the Insurer

would transfer the entire remaining limit of indemnity to the Defendant; the Defendant would spend that money running his Defence to trial, thus leaving the Claimant with nothing. The matter did resolve but only because the firm in this case heavily compromised their costs to ensure that their client received the compensation needed.

This example well illustrates what can happen when parties are not open about their funding arrangements and limitations at the outset. It is notable that in this case a copy of the professional indemnity insurance was requested at the outset. However, the difficulty is where a Defendant refuses (as in this case) the Court will not order them to disclose this. It highlights a wider public interest point, it cannot be fair or equitable to allow private healthcare practitioners to undertake medical treatment either without insurance at all, or with wholly inadequate insurance which serves only to protect the interests of the Defendant and not the injured party.

As suggested at the outset, the issue goes to the parties conduct. Instinctively one's reaction is to say there needs to be a change in Civil Procedure Rules to facilitate mutual exchanges of notices of funding at the point of service of the Letter of Response/Defence (if not before). This would then put the parties on notice of any potential indemnity problems. However, it can also put a claimant at risk in so far as if a proposed defendant understands that the limit of a claimant's BTE policy is £50,000 it is quite possible that delay and defend tactics could be employed to ensure that the level of cover is run down quickly and before the issue is resolved thereby disabling the claimant's ability to proceed with litigation no matter how meritorious their claim.

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?

For the most part, TPFs in clinical negligence claims behave honourably, the fact they stand to gain from the litigation if successful provides an incentive for them to continue to pursue the claim providing the prospects of success remain reasonable.

However, it is certainly true that if a solicitor decides that they no longer have confidence in a case they can bring the CFA to an end. To that extent, the solicitor as TPF under a CFA does have considerable control over the litigation. However, if a solicitor does terminate the CFA then generally, they will not get paid for the work done to date (unless the case is taken over by another firm who successfully brings it to a conclusion and who have given an undertaking to recover Firm 1s costs).

Where solicitors who are experienced and have expertise in bringing these type of claims make decisions to proceed with litigation or not, then usually those decisions are robust, reliable, commercial decisions made for valid reasons. However from the public's point of view they do not always recognise providers who have experience and expertise and so there is more work to be done in educating the public on the benefits of accreditation.

ATE providers in clinical negligence claims will only work with firms known to them. They assess how commercial firms are using a variety of indicators such as how often their cases settle and the point at which they settle; how often they cease to act for the client because the claim does not have reasonable prospects of success, the point at which that decision was made; how often the firm has gone to trial and won or lost a

case. ATE providers want to be satisfied that the case is viable and has commercial prospects before it will confirm that they will insure up until trial and to that extent they too have control over the litigation. Most usually these forms of control act as effective checks and balance to test the viability of a case proceeding and to that extent they have an important role to play.

Please see our response to Qn 27 above and in particular the case example which demonstrates that from time to time TPFs can and do act in bad faith and hide behind poor conduct as a means by which this can adversely drive litigation.

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

Funding mechanisms can have an effect on settlement of proceedings.

As described above CFAs mean that both solicitor and client both have an interest in the outcome of the case, they are both driving towards a resolution that enables the claimant to recover damages and the solicitor to recover their reasonable costs and usually a success fee. However, there are times when a risk averse insurer can stymie the proceedings by not wanting to fund a claim to trial (even though there are good reasons to proceed) which then forces a claimant and their solicitor to resolve proceedings on terms available to them – these terms may not be favourable and may not represent a claimant's best interests, and/or a fair and reasonable award of damages. For example, if a defendant has put in a Part 36 offer which is low but one which carries with it risks of not beating the offer at trial then the claimant may be forced to accept that offer if the ATE provider will not cover their adverse Part 36 costs, for not beating the payment in.

We refer to the effects of a professional indemnity insurance which has a financial limit to it and/or which may have an eroding clause which enables the defendant's legal representatives to take their costs out of the policy without having to give consideration to there being sufficient funds to cover either the successful claimants claim and their solicitors costs – see case example at Qn 27 above. That can see the claimant being able to successfully prove their claim, a claim that is high value and worth pursuing but which generally cannot be proceeded with as there may not be the funds left in the policy to settle the award of damages.

These factors influence the outcome of the litigation. Equally, as the courts place the burden of proportionality on claimant lawyers, that is that the cost of bringing the case (regardless of merits) should not outweigh the amount likely to be recovered, so that also influences the prospects of a case getting off the ground and the extent to which it can continue.

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 clinical negligence claims the courts do have to approve any award of damages secured on behalf of a protected party (usually, children and those under a mental

disability). Court approval is required in these cases regardless of whether the claim was funded by legal aid or TPF – that is an important safeguard and should be retained.

However, if court approval were required in all cases where TPF were involved they would be overwhelmed by work, and settlements would be delayed. There is no evidence that this would add anything to the proceedings just as there is little or no evidence that the system does not operate well in clinical negligence claims and that this is required at the moment.

AvMA refers to the case example give at Qn 27 and suggests that cases such as these might be considered separately, such that where conduct is clearly an issue there should be provision for the court to approve the settlement figure and at the same time consider the extent to which, if at all, poor conduct contributed to the outcome. However, if the courts were to have this power, they should also have the power to send a message that such conduct is not acceptable and that the insurance company be liable to pay punitive damages as a warning to other TPF that litigation is not to be exploited in this way.

It might also be an effective tool to ensure that insurers offering BTE insurance must ensure that potential claimants bringing clinical negligence claims have the right to access solicitors of their choice or at the very least solicitors who are accredited in clinical negligence work. That will require the BTE provider to ensure that firms are paid a proper market, hourly rate so it is viable for them to undertake the work.

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?

Currently, the judge approving settlement proceedings under Part 8 CPR will have an advice on quantum and/or settlement from counsel to demonstrate that the terms of settlement are fair and reasonable, typically this will refer to relevant case law where awards have been made for similar injuries.

If that advice were to be extended so it covers details of how much of the award the client will retain after deductions have been made for the success fee, any shortfall in costs and unrecovered disbursements this would ensure that the as much of the claimant's damages have been retained for their benefit as possible.

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?

Please see our response to Qn 4 above re claimant's continued obligations to Solicitor 1 despite the fact they have turned the case down and refuse to run it further leaving the claimant with have to drop the litigation of find another solicitor who will take the case on. See also our comments on protecting client damages from the shortfall in solicitor costs which can see damages severely curtailed and in the worst-case scenario wiped out altogether.

There is a need for clear and understandable message so the client/claimant understands their risks as fully as possible at the outset of the litigation.

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

AvMA has reviewed the helpline calls from the public concerning costs issues, it is clear that there are some claimants who do shop around for the best offer and terms of funding. Those clients are a minority and even then, they often find it difficult to compare like with like – in one case (HELP01137) H had offers of entering into a CFA from two different firms, but in one case they were unable to give advice about how much the shortfall would be until the bill of costs had been drawn and the defendants had commented on it. The other was able to give her a rough estimate of what she would retain. H said that although both solicitors had offered to represent her on a CFA she was not clear which one to choose as they both had different terms and were offering different things.

It can also be difficult for clients to know if the firm will offer them a CFA at the outset – some firms will not commit to a CFA until they have undertaken some level of risk assessment such as obtaining the medical records, complaints correspondence and so on. It can take firms a number of weeks before medical records are fully disclosed so giving an immediate assessment is not always possible, by the time the records have been considered and the firm formed a view, many claimants do not feel able to negotiate on the success fee. It is AvMA's strong impression that the majority of the public feel obliged to accept the terms of the CFA offered, do not negotiate on the terms and do not tend to shop around for the best deal which is clearly a time consuming exercise.

Some would be claimants are confused by the fact there is a cap on the success fee to protect their damages, they can be lured into a false sense of security by this, thinking their damages will be protected. They often do not appreciate that there is no equivalent cap on the shortfall of costs, as such that the shortfall could wipe out the award of damages completely.

Some callers find it difficult to accept that they need to contribute to the litigation costs at all and do not want to give away 25% of their damages (HELP00001).

Some callers do not want to stay with the solicitor they first signed a CFA with, for example the case of AA who wanted to claim for mental harm but who did not want to pay for a psychiatric report himself. AA explained that the acting solicitor said it was not a justifiable expenditure in the claim and if AA wanted the report it would need to be commissioned by him. AA felt this was unreasonable and placed a huge financial burden on him to prove what he believed to be true.

Another caller AV took issue with a negative expert report, the report's conclusion was reported to the ATE provider who then said they were not confident that case should proceed. AV was left without the opportunity to commission a separate, second expert report which they felt would have likely been supportive.

It is important that the public understand that when they shop around for the best deal they need to understand that the solicitor's ability to do the job is of paramount importance. Promoting accreditation is one form of quality assurance and helps the public not to be lured into favourable terms on a CFA by a solicitor who does not have the experience or expertise to run clinical negligence claims. To some extent, recognising that you get what you pay for is of important.

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?**

Conflicts do arise between funded claimants, their legal representatives and TPFs we refer to the case example given at Qn 27 above where the insufficient cover available under the defendant's professional indemnity policy created a conflict over whose right to the fund was greater – the claimant whose full award of damages was not going to be completely satisfied even if they took the balance of the indemnity insurance available or, the solicitors acting for the client who needed to recover more than 5 years of work undertaken on a no win, no fee basis. In that case the matter was resolved by the firm standing back. While that may be commercially viable in one case, it is easy to see that it would not be sustainable as a matter of routine.

Conflicts can also arise where the acting solicitor believes the case should go to trial or that a Part 36 offer can and should be beaten but the ATE provider wants certainty and does not want to be exposed to full litigation risks and draws a line under the availability of ATE funding ,requiring the client to take the low Part 36 offer.

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.**

It is clear from the examples provided that conflicts of interest can and do arise giving rise to tensions between solicitor and client and that this needs further attention to mitigate the risks of this occurring. AvMA is not able to say what reforms should be implemented.

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 availability of TPF does encourage individuals to litigate meritorious claims – please see our response to Qn 2 above on the extent to which TPF promotes equality of arms between parties to litigation. See also response to Qn 3 on other benefits of TPF and our observation that this type of funding carries with it its own checks and balances.

    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?**

AvMA's observation and understanding of TPF in clinical negligence litigation does not support there being evidence of an increase in vexatious or unmeritorious litigation. On the contrary, as the solicitor is acting on a CFA is invested in the case – it is not financial viable for claimant solicitors to continue with a case where there are no reasonable prospects of succeeding which means the solicitor will not recover any costs for the work they have done, likewise for vexatious litigation.

AvMA has seen cases where the defendant has taken video evidence of the claimant's alleged mobility and used that to allege fundamental dishonesty by the claimant (Preater –v- Betsi Cadwaladr University Health Board, County Court at Wrexham, 03.08.2022, H.H.J. Howells) That led to the claimant's solicitor dropping their case even though the Claimant was able to offer an explanation and point to the fact the video provided selective footage. The case was then taken up by Firm 2, who dispelled the claim of fundamental dishonesty and enabled the claimant to resolve the case successfully at trial but they had considerable hurdles to overcome due to TPF, ATE funding having been withdrawn following firm 1 decision to drop the case. In this case Firm 2, took the risk which paid off but it was a big risk to take

CFAs are an effective way of ensuring that only claims with merit and therefore prospects of succeeding are brought and continued with. In order to protect the public they need to understand the importance of instructing the right solicitor with the requisite skills and experience , at the outset and accreditation schemes have an important role to play in helping the public identify the right solicitor for them.

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.

AvMA has not responded to this question.

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.**

AvMA has not responded to this question.

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?**

As we have referred to above, AvMA believes that the public require an education piece on options for litigation funding and appointing the right solicitor with requisite skills and experience at the outset.

The public find funding issues and costs complicated. AvMA does carry information sheets on funding to assist the public with their understanding of this complicated area which often leaves individuals feeling overwhelmed. Our self help leaflets can be found here:

Things to consider when choosing a solicitor: https://www.avma.org.uk/wp-content/uploads/Choosing-a-solicitor.pdf

How to approach a lawyer for the first time: https://www.avma.org.uk/wp-content/uploads/Approaching-a-lawyer.pdf

Understanding legal costs, the principles: https://www.avma.org.uk/wp-content/uploads/Costs-principles.pdf

Understanding legal costs in medical negligence claims: https://www.avma.org.uk/wp-content/uploads/Understanding-legal-costs.pdf

Funding option in clinical negligence claims: https://www.avma.org.uk/wp-content/uploads/Funding-options.pdf

Independent funding should be made available to help disseminate information on costs further, for example leaflets could be carried in libraries, CABs, Hospitals, doctors surgeries. Organisations like AvMA could do more to educate the public if funding were available for us to carry animation on our website to help communicate the principles of funding to the public.

General Issues

39. Are there any other matters you wish to raise concerning litigation funding that have not been covered by the previous questions?[6]

AvMA has nothing to add.

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