

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](mailto:CJCLitigationFundingReview@judiciary.uk). If you have any questions about the consultation or submission process, please contact [CJC@judiciary.uk](mailto: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:	Sarah
Last name:	Castle
Location:	102 Petty France, London, SW1H 9AJ
Role:	Official Solicitor to the Senior Courts
Job title:	Official Solicitor to the Senior Courts
Organisation:	Office of the Official Solicitor & Public Trustee
Are you responding on behalf of your organisation?	In my statutory role as Official Solicitor to the Senior Courts
Your email address:	

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

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

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?<sup>1</sup>
2. To what extent does third party funding promote equality of arms between parties to litigation?
3. Are there other benefits of third party funding? If so, what are they?
4. Does the current regulatory framework surrounding third party funding operate sufficiently to regulate third party funding?<sup>2</sup> If not, what improvements could be made to it?
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;<sup>3</sup>
  - 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.
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<sup>4</sup> should be subject to a different regulatory approaches, and which approach should be applied to which type of dispute and/or form of proceedings?<sup>5</sup>
  - 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

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<sup>1</sup> 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.

<sup>2</sup> This question includes consideration of the effectiveness of courts and tribunals assessing an appropriate price for litigation funding.

<sup>3</sup> 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.

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

<sup>5</sup> Examples of types of cases include, for instance: personal injury claims; consumer claims; financial services claims; commercial claims.

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?

7. What do you consider to be the best practices or principles that should underpin regulation, including self-regulation?
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?<sup>6</sup>
  - 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?
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.
10. Should third party funders remain exposed to paying the costs of proceedings they have funded, and if so to what extent?

**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?
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?
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?

**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.

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<sup>6</sup> Please explain your answer by reference to a specified regulatory mechanism or mechanisms.

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

**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?
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?
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?

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?
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?

**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?
29. What effect do different funding mechanisms have on the settlement of proceedings?
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?
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?
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?
33. To what extent does the third party funding market enable claimants to compare funding options different funders provide effectively?
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?
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.

**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?
  - 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?
  - 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.
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.
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?

**General Issues**

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

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<sup>7</sup> Please note that the Working Party is not considering civil legal aid.

The Official Solicitor to the Senior Courts is an independent statutory office holder appointed under the Senior Courts Act 1981. My office derives from the long-established duty of the State to protect the interests of those who lack capacity to protect themselves either because of minority or because of lack of mental capacity. My duties and responsibilities derive from statute, rules of court, direction of the Lord Chancellor, common law, or established practice. My primary function is to act as last resort litigation friend in civil and family proceedings and in proceedings in the Court of Protection.

In the majority of cases I have three criteria I apply when considering whether to act as litigation friend. These are:

1. That I am the litigation friend of last resort.
2. That the putative protected party lacks capacity to conduct the proceedings.
3. That there is security for my costs.

In respect of (3) above it is important to note that this refers to security for the costs of retaining external solicitors and counsel for my clients; any disbursements incurred and where relevant sufficient security to cover the risk of any adverse costs orders made against the client.

I do not charge for my inhouse costs of acting as litigation friend to my clients.

There are two classes of persons who are unable to conduct their own proceedings when involved in litigation in the civil and family courts - those who lack the mental capacity to do so and children.

As litigation friend, I conduct the litigation on behalf of the child or incapacitated adult. A litigation friend must make all the decisions that the party would have made, had they been able. The litigation friend must fairly and competently conduct the proceedings<sup>1</sup>.

In the cases in which I act as litigation friend I retain and instruct external solicitors to act for, and provide legal services to, the person for whom I am acting as litigation friend. Those external solicitors must take their instructions from me as litigation friend.

My response to this consultation is specifically directed to questions which would have a particular impact on the persons whom I represent.

**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**

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<sup>1</sup> CPR21.4(3)(a)

**single, regulatory regime applicable to all forms of contingent funding agreement?**

I am frequently asked to act for individuals where security for my costs is provided by way of a conditional fee agreement or a contingency fee agreement. I am therefore frequently asked by a wide variety of external firms to sign fee agreements on behalf of those for whom I act. I therefore have a good understanding of the complexity of these documents, and the considerable variation from firm to firm

It is important when acting for my incapacitated clients that I am as sure as I can be that those agreements are compliant with the relevant regulatory framework.

A single regulatory regime would be preferable for both the profession and clients. Such a regime would bring clarity and certainty.

**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?**

As above I act as litigation friend for those who lack capacity to conduct the proceedings. In many cases where the client's case could or should be funded by way of some kind of insurance policy including by way of a conditional fee agreement with after the event insurance, my office will make enquiries as to the client's financial circumstances.

The result of those enquiries will often be either that the client is managing their own finances but has never taken out insurance policies because due to the impairment or disturbance in the functioning of the mind or brain they do not understand the need for any insurance including home contents or property insurance (to which for example some type of legal expenses insurance might be an add on); or the client's finances are managed on an informal basis by a friend, family member or social care professional who has no legal standing to take out an insurance policy on the client's behalf (not being either a Property and Affairs Deputy appointed by the Court of Protection or an Attorney appointed under a valid Lasting Power of Attorney).

I would be concerned that clients who fall into either group above would not be able to recognise the need to and/or take the necessary steps to obtain mandatory legal expenses insurance and may thus be excluded from this method of funding. If those individuals did not have recourse to any other means of funding to either bring or defend a claim, then they may be left unable to enforce their legal rights and/or comply with their legal duties/orders of the court.

Further I have come across instances where the terms of a before the event insurance policy are such that they in effect excluded me from acting as the cover available was insufficient. If a mandatory legal expenses scheme was introduced specific provisions should be considered for instances where a litigation friend may be required to conduct the proceedings. I would suggest there should be consultation on such terms as this

is a niche area where there is a lack of understanding around the role of a litigation friend and costs considerations, including costs risks which would need to be insured.

**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 a general rule I will not act in cases funded by way of a conditional fee agreement unless after the event insurance is in place.

Where a litigation friend is appointed midway through proceedings it should be mandatory for any professional advisors acting to notify the insurance company that the insured litigant is now represented by a litigation friend and for separate advice to be provided to the litigation friend as to any costs risk they could face in their own right and whether the after the event insurance policy covers those risks.

In my experience this rarely happens unless my staff take the necessary steps to ensure the insurance company is informed of the change and to request any necessary advice.

**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?**

I consider there could be wider dissemination of information such as through leaflets and websites and other web-based forums. Any such initiatives should ensure that information is presented in clear language and offered in a variety of formats with particular consideration given to those who may need the information to be accessible, for example by using supportive diagrams and breaking down of information to small chunks for those with learning disabilities; the use of braille or of sign language videos; thought given to the density of text and how information is presented on the page for those who are neuro divergent. I would suggest that advice should be taken from specialist support groups/associations/agencies as to how best this could be achieved.

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

I am often asked to act for individuals in cases where neither legal aid or after the event insurance is available. In some cases, this may leave my budget exposed to a costs risk. Whilst this is most noticeable when I act for a Claimant and sign the N235 Certificate of Suitability with the costs undertaking therein, there are occasions where the costs risks arise separately. Even where the N235 has not been signed a litigation friend must still meet the requirements of CPR21.4(3).



My budget derives from the public purse and does not provide for my funding the costs of individuals in private litigation (save for in a very small class of serious medical treatment cases). This means that I cannot consent to act in cases where there is a possibility that a party may seek to enforce any adverse costs order made against my client, against me. Although I would be entitled to recover any costs of acting as litigation friend from the client this would not assist where the client was impecunious. In those circumstances I therefore routinely decline to act leaving the court and the parties including my would-be client in difficulties and potentially unable to progress the case.

This situation could be avoided by an amendment to the Civil Procedure Rules in the same terms as can be found in the Family Procedure Rules at FPR15.4(4)<sup>2</sup> and FPR16.9(3).

**Sarah Castle**  
**The Official Solicitor to the Senior Courts**  
**03.03.2025**

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<sup>2</sup> See FPR, r 15.4, and in particular, FPR, r 15.4(4) and FPR, 16.9(3).