The consultation closes on **Friday 31 January 2025 at 23:59**.

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

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

Please name your submission as follows: 'name/organisation - CJC Review of Litigation Funding'

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

| | |
|---|---|
| Your response is (public/anonymous/confidential): | Public |
| First name: | Adrian |
| Last name: | Vincent |
| Location: | The Bar Council, 289-293 High Holborn, London WC1V 7HZ |
| Role: | Head of Policy: Legal Practice and Remuneration |
| Job title: | Head of Policy: Legal Practice and Remuneration |
| Organisation: | The Bar Council |
| 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.

# Bar Council response to Civil Justice Council's "Review of Litigation Funding: Interim Report and Consultation"

## About the Bar Council

We represent nearly 18,000 barristers in England and Wales, promoting:

- Fair access to justice for all
- The Bar's specialist advocacy and advisory services
- The highest standards of ethics, equality and diversity across the profession
- Business opportunities for barristers at home and abroad.

The independent Bar Standards Board (BSB) acts as our regulatory arm for barristers and specialised legal services businesses.

## The value of the Bar

A strong and independent Bar serves the public and is crucial to upholding justice. As specialist, independent advocates, barristers help people maintain their legal rights and duties, often supporting the most vulnerable in society. The Bar is vital to the efficiency of both criminal and civil courts. Its pool of talented people from increasingly diverse backgrounds provides a significant proportion of the judiciary, on whose independence the rule of law and our democratic society depend.

## Introduction and overview of response

1. This is our response to the Civil Justice Council (CJC) Litigation Funding Working Group consultation on its interim report on litigation funding.[1]

2. We note that this is an interim call for evidence where concrete proposals for reform have not been identified by the CJC. Whilst the Bar Council, through its members, has experience of funded litigation, we are not well placed to provide evidence in the sense envisaged by the consultation. This response is therefore a high level one that does not address each question posed. We have sought input from the

[1] https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/current-work/third-party-funding/

Specialist Bar Associations. Their comments have informed this response, and further comments are included at the end of this submission.

**Response on behalf of the Bar Council**

3. We recognise and agree that third party funding can provide benefits in enabling access to justice. This is perhaps most commonly, or easily, seen through collective consumer proceedings in the Competition Appeals Tribunal where the value of an individual claimant's claim would be insufficient to warrant proceedings on their own, but does merit proceedings when considered as part of a much larger class.

4. We also recognise that concerns have been raised about consumer protection, ensuring that claimants are not taken advantage of, and that it may not be uncommon for a funder's recovery to wipe out much of the claimant's damages. It is difficult to say whether these concerns are borne out in a sufficient number of claims to warrant extensive intervention, given the relatively small pool of funded litigation that has concluded as well as the ongoing development of the Competition Appeal Tribunal's approach to the recovery of funders' profits.

5. It is important to note that not all claimants entering into third party funding arrangements will be in the same position. One clear distinction is between consumer claims and smaller group or unity actions. In the former, one is concerned with a large number of consumers, typically each with low value claims, and who on an individual level may not be well informed about the funding arrangements. In the latter, this may involve the claimant(s) having greater involvement with the funder and may involve meritorious claims by impecunious claimants who acknowledge at the outset that their returns will be low, but they wish nevertheless to proceed with the litigation.

6. We consider that the current model of self-regulation through the Association of Litigation Funders (ALF) with members agreeing to abide by the ALF Code of Conduct has not worked. The voluntary code is helpful for those who are members of ALF or otherwise adhere to the code, but not all market participants do. The report notes that only roughly one third (16) of the estimate 44 funders operating in England and Wales are members of ALF.

7. We consider that some form of reform is necessary. We do not at this stage have any firm view on what approach would be best. Any reform should have in mind the need to minimise the risk of satellite litigation focussed solely on funding disputes, which may be used to frustrate the progression of proceedings.

8. Three possibilities for reform that the CJC may wish to consider are:

a. A mandatory code of practice for funders overseen by a new litigation funding regulator:

   i. This would need to be created by primary or secondary legislation,

   ii. A mandatory code of practice and regulator involvement should, in our view, be light-touch and largely address the topics covered by the ALF code, namely:
      1. maintenance of confidentiality;
      2. the provision of independent advice to funded parties;
      3. the maintenance of lawyers' professional duties;
      4. the avoidance of control of funded litigation;
      5. the maintenance of capital adequacy;
      6. settlements;
      7. termination of funding agreements;
      8. dispute resolution between funder and funded party relating to compliance with the code.

   iii. One concern that has been expressed is 'mission creep' or expansion of regulation. It is not clear whether, and how, a mandatory code and regulator would remain 'light-touch' once created.

b. Retaining self-regulation but increasing and/or developing ALF's powers:

   i. It might be possible to provide some oversight of ALF by an established statutory regulator, such as the Financial Conduct Authority. There are statutory regulators that provide an accreditation scheme for non-statutory regulators/membership bodies. For example, the accredited register kept by the Professional Standards Authority records organisations holding a register of their members who meet the standards set out by the Professional Standards Authority; [2]

   ii. A key area to address is dispute resolution. At present the code addresses disputes relating to settlement of a dispute or termination of the funding agreement which are dealt with by appointment of a single KC who issues a binding determination. Complaints relating to breach of the code are addressed by aa separate complaints procedure and punishable by relatively limited sanctions:
      1. Private warnings and recommendations;

[2] https://www.professionalstandards.org.uk/practitioners?conditions[]=&page=1

2. Public warnings and recommendations;
3. Publication of the opinion of independent legal counsel, if so obtained, relating to the complaint;
4. Suspension or expulsion of ALF membership;
5. Imposition of a fine of up to £500; and
6. Payment of the costs of determining the complaint.

iii. ALF could strengthen its dispute resolution mechanisms which might include:

- the appointment of an independent panel to hear complaints made about breaches of the Code of Conduct by funders with increased powers to impose sanctions or fines in the event of a finding of breach;
- the power to instigate the complaints procedure against funders of its own initiative.[3]

This approach would not directly address the fact that membership of ALF would remain voluntary.

c. Involvement of the court in the assessment of the level of the funder's recovery to be paid from damages:

i. Such an assessment could be conducted in a similar manner to solicitor – client assessments, i.e. it would take place at the end of proceedings and thus would not be a forum for defendant(s) to challenge funding arrangements by way of satellite litigation.

ii. The Competition Appeal Tribunal (CAT) adopts a similar oversight role at the conclusion of collective proceedings in that on tribunal determination or on settlement, the CAT determines what sum will be paid to the funder and in what priority. At present the CAT has declined to rule substantively on many of the policy issues in this area. We would not support a certification regime in the High Court (similar

[3] Note ALF's statement in response to the recent dispute between Mr Merricks and Innsworth Advisors arising out of the settlement of the Mastercard collective proceedings. ALF said it is "monitoring" developments. It has communicated about the situation with both parties but had "not received any complaint". Both parties had cited the confidentiality of their private arrangements in declining to engage further with ALF. Reported in the Law Society Gazette on 16 January 2025: https://www.lawgazette.co.uk/news/funding-regulator-monitoring-mastercard-row/5122029.article#:~:text=The%20Association%20of%20Litigation%20Funders,'%20developments%2C%20it%20said%20yesterday

to the CAT regime) because this would encourage satellite litigation about funding arrangements.

iii. Such an approach may help address concerns relating to consumer protection.

iv. Informed consent is of particular relevance in solicitor-client assessments. It is an area that has had significant recent development, and would also be of relevance in assessment of the level of the funder's recovery to be paid from damages.

v. Such a reform could likely be achieved by amendments to the Civil Procedure Rules.

**Specific comments received by Specialist Bar Associations**

9. We also wish to highlight the following specific comments received which the CJC may wish to address:

a. The Personal Injury Bar Association (PIBA)[4] expressed concern that sufficient should be done to protect claimants, particularly vulnerable injured claimants, especially given that often much of their damages will be to fund future needs created by the injury. Those entering into third party funding agreements should be given clear explanation and their interests should be protected. It notes the concerns about cases becoming harder to settle where the recoveries are insufficient to compensate for the actionable wrong, which is of great relevance, where, as above, recoveries are to meet future needs.

b. The Commercial Bar Association (COMBAR) stated that:

i. Light touch regulation/a mandatory code of practice would be the best way forward.

[4] PIBA is one of the largest civil Specialist Bar Associations with about 1,700 members, who undertake the full range of personal injury and clinical negligence work, including inquests and inquiries with an injury component, acting for claimants and defendants (including in related contempt proceedings). PIBA is neutral as between claimant and defendant interests: members represent both sides.

ii. If a funder breaches the code during the life of a case, it can be difficult for those relying on the funder to pay their fees to effectively address the breach. Therefore, some sort of external mechanism would be helpful.

iii. In the experience of their members, it is not rare that a funder's recovery wipes out much of the financial recovery. This is addressed to some extent by the market as funders may compete for the most desirable cases. In some cases, the problem seems to arise from the funded party recovery being substantially less than anticipated at the outset, and the amount of funding required increasing during the life of the case.

iv. A cap in the form of a sliding scale, reflecting the time cost of money, based on a percentage of recoveries and/or a multiple of investment would be the most appropriate solution. The precise level of each would likely require expert input. However, imposing a cap could increase the cost of funding on some cases as the market would be likely to gravitate towards the capped rates.

v. Court supervision of litigation would be undesirable save for dealing with non-compliance in respect of any regulations/mandatory code as it could lead to satellite litigation causing delays, increasing costs, and making funding more expensive. This may result in high-risk claimants, such as group claimants in a retail claim, being unable to find funding due to the likelihood of expensive and time-consuming satellite litigation.

vi. There is uncertainty as to the legal mechanism by which a litigation funder may be paid, if at all, in the context of opt-out representative claims brought pursuant to CPR 19.8, such as Smyth v BA [2024] EWHC 2173 (KB). It may be desirable to consider legislative reform to facilitate litigation funding in this type of claim, for example, by analogy to the regime applicable in the Competition Appeal Tribunal.

3 March 2025

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