

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:	Helen
Last name:	Buczynsky
Location:	London
Role:	Solicitor
Job title:	Senior Legal Officer
Organisation:	UNISON
Are you responding on behalf of your organisation?	Yes
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.



UNISON Response
Civil Justice Council review of litigation funding

Introduction

UNISON is the UK's largest trade union serving the public sector. UNISON currently has in the order of 1.4 million members working in the NHS, local government, schools and universities, as well as in the police and justice sector and the electricity, gas and water industries, transport and voluntary sector. Approximately one million of our members are women – many of whom are low paid, a significant proportion earn less than £14,000 per annum.

A fundamental part of our legal scheme is to offer legal assistance to our members who have suffered a personal injury (PI), and for non-work-related PI matters their family members are also covered. UNISON's legal scheme supports thousands of PI matters per annum. The vast majority of these claims are civil claims and we also support members seeking compensation following an assault at work through the CICA. This PI service is a free service to members and their family members whatever the outcome, win or lose. If our members are successful, no deductions are taken from their damages.

Another fundamental part of the UNISON scheme is to give members assistance and representation in relation to their employment issues. Such support is given by UNISON locally through its branches and regions. Should legal assistance be needed it will then be referred through, for consideration, to our legal scheme. In this way we support thousands of our members with employment tribunal and related appeal claims. These can be, for example, individual claims for discrimination or group claims for equal pay through the employment tribunal. We also run strategic employment litigation in house, via our specialist legal services team, which can include pursuing groundbreaking cases, setting legal precedents, and Judicial Reviews through the higher courts.

For our members effective access to justice can only be obtained by relying on our comprehensive legal assistance scheme, ensuring they receive legal representation when needed. It is essential that our members have this support as the employers, and other defendants, against whom our members claim, will invariably be insured and represented. Such Respondents and Defendants will understand very well the legal process, and have the resources to defend the claim.

We rely on specialist solicitors with whom we have agreed standards of service in place to ensure quality legal representation. Our scheme also acts as an important filtering process. Our lawyers assess the cases and only proceed where there are reasonable merits.

UNISON represents the interests of claimants and does not exist to make a profit. We want to ensure that our members and their family members receive access to justice, obtaining their full compensation through a fair and efficient court system.

In light of the above, and the fact UNISON's legal scheme supports thousands of litigation matters per annum, on behalf of individual claimants, we feel well placed to respond to this consultation, and welcome the opportunity to do so. Due to the nature of our legal

scheme/the support we give, our responses focus specifically on consumers as claimants rather than on commercial/corporate litigants.

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?*

Third party funding (TPF) has in some instances allowed claimants access **to** the justice system. There are cases where without such funding claimants would not have been able to assert their rights (ie consumers who have a collective action against a large, well-resourced company) and so in this respect it may be seen as a useful, alternative, funding option.

However, whether consumers have then gone on to obtain effective access **to justice** is another matter – and depends largely on the outcome of such proceedings.

In our view they will only have done so if they have, in successful cases, gone on to receive a fair and just result, such as appropriate compensation from the negligent party, after all costs and deductions have been paid. Whilst there are currently cross checks and balances for cases involving TPF, through, inter alia, the voluntary codes, the Courts and the UK Competition Appeals Tribunal (CAT) rules, we are concerned about recent cases where the outcome of the litigation, having relied on TPF, seems to be far from satisfactory for individual claimants (such as in the recent Post Office cases¹ and following recent coverage of the Mastercard case²).

This is why we believe, to protect consumers, consideration needs to be given to better safeguards. Looking to improve the regulation is a way forward to try and secure this.

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

TPF does go some way to ensure equality of arms in relation to putting the parties on a more even commercial footing. Having the resources to bring an action, as stated above, can assist claimants where they have no other viable funding option.

However for real equality of arms, for all parties to the litigation, and specifically referencing the end party – the consumer, there also needs to be equality in relation to (i) the legal representation they receive; and (ii) clear, consistent guidance (by way of regulation) to make sure what is expected of any TPF. This should include crucially the information they are required to give (to try and ensure a fair and transparent funding agreement is in place)

¹[CJC-Review-of-Litigation-Funding-Interim-Report.pdf](#)
CJC Interim report (p16, paragraph 2.20, ref 30)

² [Mastercard settlement: Merricks' solicitor condemns funder's 'greed' | Law Gazette](#) and [Revealed: Mastercard claimants could get as little as £2.27 each, while litigation funder gets millions | Law Gazette](#)

so that claimants can be given unfettered and clear advice, and have a real understanding of the overall funding position, and potential outcomes.

This is why we are calling for better regulation below.

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

Please see above.

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

No, for the reasons stated above, as far as consumers as claimants are concerned, we do not believe this is the case.

TPF has now been part of our litigation landscape for a number of years. When it began to emerge in the UK, it was thought best to use “light touch” regulation, because it was a developing market. However, even with this acceptance at that time, as highlighted in Sir Rupert Jackson’s report, and referenced in this Interim Review³, self regulation was seen as a way forward on the basis of a voluntary code **if all** funders signed up to it.

We have now moved on substantially. As the CJC Interim Review acknowledges the TPF market in the UK is now the second largest in the world, with those funders’ assets increasing (from £198m to £2.2bn) 10fold⁴, over a relatively short period of time from 2012. Consequently, we believe change is needed.

Moreover, not all the funders involved in this market have signed up to the voluntary code, far from it. This is, in our view, an indication that self regulation in its current form is not working as well as it might. In fact, only 16 out of 44 are in the Association of Litigation Funders (ALF),⁵ albeit 8 of whom are also members of the international ALF (IALF).

Whilst it may be the case that some funders not signed up to the ALF are regulated through other means, we do not feel this is enough. Such regulation may not focus on what should be paramount specifically for TPFs because of the position they are in with consumers. Further in the current very much larger TPF market, consistency is, we believe, key to protecting consumers, and potentially improving the public perception of this funding option following on from the recent cases we have highlighted above.

As referenced earlier there have been issues recently with cases for consumers funded through TPF. The Post-Office litigation was, in our view, an example of TPF failings following court action. As the CJC report highlights the defendant’s conduct and the high costs of the litigation lead to such significant deductions that only £20K went to each claimant rather than £99K⁶. Follow up action was then taken via the Government’s Group Litigation Order, funded by taxpayers to enable claimants to receive full and fair compensation.

³ CJC Interim report (p21, paragraph 3.4, ref 45)

⁴ CJC Interim report (p23, paragraph 3.8)

⁵ CJC Interim report (p26, paragraph 3.17, ref 64)

⁶ [CJC-Review-of-Litigation-Funding-Interim-Report.pdf](#)
CJC Interim report (p16, paragraph 2.20, ref 30)

There is also the case of *Mastercard Inc v Merricks*, whilst reference is made to the issues arising from that litigation in the CJC Report, more recent press coverage has highlighted once again the profits secured by the funders through the current litigation, and the potentially minimum outcome for consumers. The CAT has now considered those issues, and recently confirmed despite the competing interests here, from the numerous intervenors involved, including the funders, that the agreed settlement can stand. So it seems on this occasion rejected the funders position and accepted that of the representatives, but that does not detract from the overall outcome for the consumers here⁷.

Such cases highlight the need, in our view, for change. This could be through better regulation, and in this respect, see the rest of our answer below. Or if not, earlier and greater intervention as the matter progresses, or more intervention by way of shifting the recoverability of the costs of litigation funding from consumers to defendants, or the need for a cap, to ultimately ensure a more proportionate return for claimants.

As both the CJC and Sir Rupert Jackson previously mooted if the market expanded, full statutory regulation, should be revisited⁸. Due to TPF's substantial rise over the last 14 years the TPF market is now a far bigger market, where the risks involved to claimants are potentially higher and may well impact on a much higher number of consumers as the numbers of such claims increases. This is why we think more robust regulation is needed to protect claimants. Further with such a significant expansion of the market (encompassing 44 funders) we assume the TPF market is not only profitable but a much more stable market, and so one which should be able to withstand some increased regulation, without leading to the market failing. Access to justice would then improve whilst leaving this funding option in place for consumers where needed as a last resort.

We do not see this as anti-competitive, or over regulation but rather necessary regulation. Especially if that regulation largely mirrors the current self regulation and wider market regulation in place. This is not least because the Association of Litigation Funders' (ALF) Code of Conduct contains very important principles. Of great importance is the fact that ALF members need to take reasonable steps to ensure access to independent legal advice concerning the TPF arrangement. The ALF code also has very useful provisions not to seek to exercise control over the case, and provisions concerning confidentiality and legal professional privilege. It is for the very reason that the Code offers valuable consumer protections that we believe regulation should now be tightened to make sure **all** TPFs sign up to the code.

Making the regulation mandatory for those engaged in the market is a crucial first step, in our view, to improve consistency in the market and access to justice.

Additionally, in relation to the scope of that regulation, we believe it is important to make specific/more detailed reference to the principle of access to justice. We accept the main focus of any TPF, distinct from the litigating parties, by their very nature is profit. In light of this we believe the fundamental principle of access to justice needs to be enshrined first

⁷ [£200m Mastercard settlement approved by Competition Appeal Tribunal | Law Gazette](#)

⁸ CJC Interim report (pp 21-22, paragraphs 3.5 and 3.6)

and foremost in the regulation. This would then shift some of that focus, to try and ensure the TPF keeps in mind the needs of the end user/consumer and the purpose of the litigation for those claimants throughout the litigation. Including the need to ensure that the claimant receive appropriate compensation. This would also ensure consistency with the overriding objective to deal with a case justly and at proportionate cost, as sent out in CPR 1.1(2).

A further change we would suggest would be more specific reference to avoiding conflicts of interest, and providing more detailed, clear and transparent information on the funding agreement so this can be explained to the funded parties. We know from our own surveys how difficult it can be for claimants, as inexperienced users of the court system, to understand the litigation process, which may be even more stark with the complexities of group litigation/TPF claims. Having this principle in place could potentially facilitate a better understanding for all the parties involved. These latter points are ones that already form part of the TPF landscape via the IALF and the Code of Conduct of the European Litigation Funders Association. This shows that there are regulatory requirements in similar markets, and these have not led to any TPF failure. These principles and best practices should form part of the mandatory regulatory landscape here, in this now significantly increased TPF market. Once again, we see this expansion of the Code not being over-regulation but necessary regulation for claimants.

We have also commented on the potential use of caps below (question 12), and the use of shifting recoverability of the costs of litigation funding (question 8) to ensure a fair outcome for consumers, in appropriate circumstances.

Finally, the complaints procedure under the current ALF code is far from comforting. The sanctions (of suspension or expulsion) have little teeth, in a non mandatory Code. The fine up to a limit of £500, and for the costs of the complaint to be covered, are also in our view totally insufficient, bearing in mind the sums involved in litigation funding of this type. There needs to be an external body (funded by the industry) overseeing the regulation. To do this it would need to have in place and need to administer a much more robust complaints procedure, leading to significant fines should the complaint warrant; as well as other sanctions that have a real impact; and the provision for proper redress (through a dispute resolution system) leading to compensation, again should the complaint warrant that.

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;*

We believe there are significant risks/harms due to TPF.

Please see our answers above, with reference to the cases we have mentioned.

In particular those major harms can not only impact on individual claimants but also on the reputation of TPF and the wider legal profession.

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;*

The risks/harms have not been addressed by the current regime. This is why change is needed. The changes we have suggested in answer to Question 4 would, we believe, go some way to addressing such issues.

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 answer to question 4, above. There is a clear imbalance of power between consumers as litigants and TPFs.

We can see clear advantages to making the regulatory regime more robust. This would include it being a mandatory regime, it being expanded to include the points we have raised above and there be a proper system for complaints/fines/redress, and enforcement of such redress should things go wrong.

As stated in our answer to question 4 above we do not think this will have a detrimental impact on the market, as it is a much more substantial, secure and mature market.

We believe this is warranted to give the protections needed to consumers and to try and ensure access to justice.

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

As stated at the outset our response is focussed on cases concerning individual litigants/consumers.

When considering such claimants – who are often one-time users of our justice system, without detailed, specialist knowledge, without access to large funds – it is crucial that there are adequate protections in place through regulation, to try to ensure equality of arms and access to justice.

Accordingly, we believe such claimants are involved in the types of cases, and are the types of litigants, which can not be left relying on the current regime.

In light of this we accept there may also be benefit from differing forms of regulation, so that there is regulation that is more specific to their particular needs (in the form outlined in our answer to question 4 above), as opposed to a different type of approach that may be warranted for large, sophisticated corporate litigants.

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

Please see our answers to question 4 above.

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?

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?

As pure litigation costs have continued to rise, this may well have led to the need for TPF.

TPF then inevitably increases those costs further. TPFs are commercial entities, it has to be accepted that profit is their key focus. Their involvement leads to additional costs, namely the costs of litigation funding – which then forms part of the overall litigation costs, which falls on claimants.

Parts of the current regulatory regime impacts on both litigation funding and costs (such as those involving control and settlements).

Introducing the types of further protections we have outlined in question 4 above will therefore also to some extent impact on the relationship between TPF and litigation costs.

Whilst we appreciate the significant risks undertaken by TPFs, it is a calculated risk (we note that the CJC Interim Report references TPF only taking on 3-5% of those matters pitched to them⁹. As such it is important for claimants and for the wider reputation of the industry for the ultimate returns for the TPF to be kept in check where, if not, the eventual outcome, by way of excessive deductions from damages for claimants, were to arise. There needs to be protection to ensure consumers receive a fair result for there to be access to justice. This can be done through regulatory reform as well as more active case management.

⁹ CJC report (p12, paragraph 2.17)

In addition, where consumers are relying on TPF as the only viable option to be able to bring a claim, and if the costs of litigation funding were to lead to an access to justice failure, then this could potentially warrant a re-evaluation of the principle of recovery of litigation funding costs, especially where for example the behaviour of the defendant has led to spiralling litigation costs. There may well be merit, in considering where the costs of TPF need to fall. Whether the increase in litigation costs due to TPF should always/solely fall on consumers in successful claims should not be a given, and as referenced within the CJC report, depending on the situation, part or all of those costs could be recoverable from the defendants/other side.

This is a principle that should also, we believe, be reviewed more widely in PI litigation generally to help ensure access to justice. In PI litigation, the increase and the burden of unrecoverable costs leading to, in our view, unfair deductions from injured claimants' damages should be considered further. As the CJC's interim report indicates¹⁰ times have moved on, and such a re-evaluation could therefore be justified.

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.*

See above.

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

See above.

Yes, to ensure security for claimant/consumers should the case not proceed or fail. Although there may be instances not dissimilar to those raised above where the actions of the defendants should also play a part in the ability to seek some of the costs of funding the proceedings from them.

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?*

Whilst there are already some controls in place through the Court's and CAT rules and within current TPF self-regulation, we have concerns that this is not necessarily sufficient control.

It is difficult to tell if that pricing is sound without adequate transparency.

¹⁰ CJC Interim report (p65, paragraph 6.56)

Further the overall pricing/costs may be seen to be too high in view of how some of the cases recently funded by TPF have played out.

This is why we are calling for change - please see our answers to question 4 above.

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?

Consumers bringing collective proceedings/group litigation may well need to rely on TPF as a last resort to bring their case, but this can not be at any cost. The deductions claimants suffer must be reasonable. The cases we have referred to above show in our view some of the failings of the current regime. We therefore see merit in looking at caps. Also, caps are often used in other litigation funding models (CFA/DBAs) and the markets have adapted.

However, setting a single cap presents a very difficult issue. TPF covers a whole myriad of different types of cases, for different types of claimants and defendants. Consequently, a one size fits all approach would not in our view be appropriate. Whilst we think caps are most appropriate in opt-in claimant/consumer cases, even different set caps for different situations could in our view prove problematic.

Regulation that tries to achieve the same result, with in-built flexibility, may assist here, as part of the solution. Regulation that seeks to ensure a "reasonable return on investment, whilst ensuring the claimant gets a reasonable proportion of their damages". Or caps that can be more flexible, following consideration/management of the courts, can play their part.

However, we appreciate that set against this is that flexibility leads to uncertainty. Without a set cap at the outset claimants will not necessarily have a clear understanding of their position. As a corollary to this there could potentially be some flexibility as outlined above but with a final longstop set cap. As suggested above there could also be provision for some of the costs of litigation funding to be recoverable from other parties, if the circumstances warrant, to preserve a longstop cap.

This is a particularly difficult issue to resolve. We believe further consideration needs to be given to this, following more evidence gathering and additional consultation before a clearer picture emerges as to what the most viable recommendations in this area are.

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?

See our answer to question 12 above.

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.

Please see our answers to the questions above, particularly question 4.

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.

Trade Union Legal Services offer a very different form of litigation funding to the TPF referenced within the CJC’s Interim Report and Consultation. UNISON represents the interests of claimants and does not exist to make a profit. We want to ensure, through the funding and support given, our members and their family members receive access to justice obtaining their rightful compensation through a fair and efficient court system - no deductions are taken on successful claims from our members/family members damages. We also hope that our support will improve our members working lives by, for example, improving health and safety in their workplaces generally (see below).

We note in Chapter 7, Part 6 (B) – Funding options, in particular 7.12 (p 73) that the Working Party asks for more evidence on Trade Union litigation funding - its availability, incidence, utility and drawbacks. In relation to that request, we would refer you back to our introductory paragraph and would also set out the following below:

All our members can access our legal scheme as long as they have been in membership for at least 4 weeks before the legal matter they are seeking assistance on arose; they are up to date with paying the Union’s set subscriptions (by reference to member income); and they continue to pay those subscriptions throughout the case. No other payments are required/sought. In addition, those subscriptions entitle our members to a whole range of benefits/support, not just legal assistance.

A fundamental part of our legal scheme is to offer legal assistance to our members who have suffered a personal injury (PI) at work or outside work, and for non-work-related PI matters their family members are covered too. The UNISON scheme covered in 2023/2024 around 4000 PI cases. Although the majority of these cases arise from employment related injuries/diseases we also assist members and their family members in relation to, for example, road traffic accident claims.

Their legal case will be assessed and supported if the claim has reasonable prospects of success. This is a no fee service to our members and their families whatever the outcome, win or lose. We are acutely aware that PI claimants do not choose to be litigants, they are forced to take action having been injured due to the negligence of others. As a result, we believe they should be entitled to full compensation to put them back into the position they would have been in had the negligence not occurred. This has however largely not been the case for PI claimants generally following LASPO, and other legal reforms including very limited fixed costs, which have not been appropriately reviewed and updated. Hence our reference to recoverability in answer to question 8, and the need to reconsider/re-evaluate this. Although for our members/family members this principle of full compensation has continued to be adhered to within our scheme.

Last year we secured in the order of £40 million in compensation for our members. We rely on specialist personal injury Solicitors with whom we have agreed standards in place to ensure quality legal representation. It is important to note that our scheme also acts as an important filtering process, under our scheme only legitimate and meritorious claims (those with reasonable prospects of success) are pursued by our lawyers. Because we insist all of our cases with such prospects are run our lawyers can not cherry pick cases.

Without legal representation generally our members would simply feel too intimidated to pursue a claim. We know from previous research commissioned that many of our members (63%) who have made claims in the past would not have proceeded with their case or not have felt confident about going before the courts without legal representation. It is clear from the demographic of our membership that they may well struggle with forms and legal concepts much more than those who are legally trained appreciate. Without our scheme, our members (often low paid and vulnerable claimants) would not have access to justice and it would also mean the negligent party would secure a windfall. They would not have to pay the compensation the injured party is entitled to or their legal costs.

Whilst the majority of PI cases we send to our lawyers arise from employment-related injury/diseases (EL/ELD), employer-liability matters only make up a small minority (just over 9% from the latest CRU figures¹¹ of the total overall market of PI claims. It is important to remember that such claims are fundamentally different from lower value road traffic accident cases. This is because of factors such as the balance of power and information between the parties, complexity of the law (with specific technical regulations that are not easily interpreted), the more complex type of injury suffered, and how that may affect issues such as limitation and causation. As a result it is particularly crucial our members are legally represented by PI specialists in the field.

It is of paramount importance for UNISON to promote and improve health and safety in the workplace generally, to prevent accidents/injuries occurring. In addition on a wider societal basis it is, in our view, right that not only does the claimant obtain the damages to which they are entitled from their employer because of their employer's negligent action, but the costs incurred to secure this award are paid by the defendants. Such a system acts as a

¹¹ [Compensation Recovery Unit performance data - GOV.UK](#)

catalyst to employers to take effective safety measures to safeguard employees at work in the future.

Many employers are keen to reduce their exposure to compensation claims and this process assists in securing better working practices and, in turn, reduces accidents in the workplace. In a survey we undertook some years ago (involving 850 members) 80% confirmed they wanted to pursue the matter because they did not want anything similar to happen to their colleagues, and around 65% of those surveyed said that after they had made that claim they saw a positive change in their workplace as a result. Therefore, our support can have a very wide-ranging impact not just for our members but for their fellow employees following a workplace accident too, be it one involving manual handling, or a fall, or defective equipment.

Our legal scheme can also play a crucial part in ensuring the pursuit of very difficult claims, for example assault at work claims, or an asbestos or work-related stress case. Cases that are complex and so often may not be run more generally, outwith our scheme, due to the risks involved in taking such legal matters, especially where they are deemed by others not to be of sufficiently high value. Our scheme means such cases continue to be run, and in addition can lead to running borderline/test cases which not only protects those claimants who have suffered an injury but can also go on to set good legal precedents for others.

We have an ongoing relationship and links with our members. Our branches and regions are involved in supporting our members with their employment issues. Improving our members' lives by securing and safeguarding good employment working practices. They are also involved with working with our solicitors regarding workplace accident claims, to help improve health and safety on the ground, and hopefully prevent similar accidents.

Another hugely significant part of our legal scheme is the employment law assistance we offer our membership. In 2023/2024 we supported over 6000 members with their employment law cases. This covered collective actions for, for example, equal pay and holiday pay as well as individual cases before the employment tribunal for various types of discrimination. As a result, we secured around £5m in compensation for them.

A further benefit of our legal scheme is that it offers a range of legal services. It covers not only employment and PI legal assistance but also support when defending work related criminal allegations, a free wills service and discounted probate and conveyancing services, as well as access to our free legal advice helpline. The latter provides initial legal help on any non-work-related matters – such as debt advice, family law issues and neighbourhood disputes. This is not only of great value to our members but also assists more widely as it reduces the burden on other public legal resources such as CABs/legal helplines, because our members, as consumers, can rely on our scheme.

We also note the comments in the CJC Interim Report about Legal Expenses Insurance particularly BTE. The Report and Consultation (at p75; paragraph 7.20) asks for evidence as to this funding option's availability, incidence, utility and drawbacks; as well as the promotion of mandatory public LEI.

We understand BTE policies are frequently sold to individuals who ultimately, when they need legal assistance, are unaware they have a policy so they are often unused. They are

sold as an add-on policy to other insurance such as household or car insurance. In addition, the most low paid and vulnerable consumers are the least likely to be car or homeowners, and so have access to this type of BTE. They are currently sold for a low premium presumably as BTE in practice is rarely relied upon.

When it is relied on, we understand such policies may only offer limited cover (there may be caveats excluding for example complex disease cases) and they can often be subject to funding restrictions or have in place prohibitive indemnity or costs ceilings (which is all the more limiting in light of rises in the costs of litigation/or where the claims are not straightforward). Further conflicts may possibly arise where the case is funded via insurers against an insured defendant; and the ability to give specialist/quality legal services where there is no ongoing relationship with the claimant (under a low cost one off BTE premium) is also an issue.

UNISON is concerned about extending BTE funding as a form of mandatory public LEI. We have serious reservations about the extent to which BTE insurance can be widely used to effectively secure access to justice for all the reasons above.

Should many more claimants rely on this type of insurance cover (if it applies to them) to pursue their legal cases, or stand alone comprehensive BTE policies (to cover legal claims) were to apply, BTE policy premium costs would invariably significantly increase.

The least well-paid and vulnerable would be the least likely to be able to afford BTE insurance which could potentially assist them. Further if such a system were compulsory it would mean the public at large would be forced to pay such premiums for something a very high percentage may never rely on, and we would be concerned about what provision would be in place for those who could not or do not pay.

We also have concerns about the practical effects of such a system, such as the extent to which a compulsory form of public LEI would cover anything but the most standard and least expensive type of litigation.

In addition, those that unfortunately do need to pursue a legal case following a dispute at work/accident or injury would then seem to have little independent choice but to rely on their BTE insurers lawyers. If mandated (so that many more cases are referred by insurers, to be pursued by the insurance industry in claims being made against insured defendants) this would also give the insurance industry significant control over the UK legal market, which would then, in our view, potentially lack appropriate independence and could be subject to potential conflicts, undermining protection for consumers.

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.

We see TPF as a funding option of last resort, because of the risks involved, and the fact it is most likely to lead to greater litigation costs overall and more deductions from damages for the consumer by its very nature.

Accordingly, we do not think other, more mainstream, types of funding can complement TPF. These mainstream forms of funding should be used in preference.

c. If so, when and how?

See 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?

Yes, other types of mainstream funding should be used in preference. See our answer in question 15 above. We have already outlined the benefits of Union funding.

Re: reforms see our answers below.

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?

We do not think there is a need for a single, regulatory regime. We also believe it would be very difficult to draft such an all-encompassing regime.

We do not believe any reforms are needed to the CFA regime. Although please see our points on recoverability more generally in our answer to question 8.

DBAs are more problematic. There have been widespread calls for these regulations to be reformed for many years now. There are concerns about their complexity and their interplay with other funding mechanisms. At present due to the issues with DBAs they are not as widespread as they could be. Reviewing and reforming the DBA regulations would be useful, it could increase this type of more mainstream funding for the benefit of consumers.

The final decision on PACAAR may also have some bearing on this issue. We note that the Court of Appeal¹² will be considering this matter shortly, looking at the extent to which certain TPF arrangements are caught by the DBA regulations, and so depending on the outcome this may play into considerations about the DBA regulatory regime too.

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?

¹² [Court of Appeal to rule on litigation funding agreements based on 'multiple' of sum invested | Law Gazette](#)

In relation to BTE please see our response to question 15 above.

No, for all the reasons stated above we do not think there should be promotion of a public mandatory legal expenses insurance scheme.

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?*

Where TPF applies to a case, regulation plays a crucial role in controlling the conduct of the litigation. As outlined in question 4 this is why we are calling for more detailed /stronger regulation. Particularly in the absence of this, the courts and CAT, have an overriding role to play, to make sure consumers are protected in relation to the risks we have highlighted above (ie if access to justice is not being served then there should be the ability to, for instance, shift the costs of such litigation funding onto the defendants to protect consumers). Putting in place safeguards through the courts as the case is progressing would hopefully lead to a fairer outcome.

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?*

Where TPF applies the same principles arise as we have outlined in question 23 above.

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?*

TPFs do have the potential to exercise control, which is why we have suggested more robust regulation – to improve inter alia - the transparency around their funding, the capital adequacy in place, and what returns they may receive.

Their justification for funding is their own profit which does not, as a result, align with the purpose claimants have in bringing a claim to achieve access to justice. This is why TPF should not be able to exercise control of the litigation, ultimate control should be in the hands of those representing consumers (who will have their own regulatory regimes in place), and be overseen by the Courts.

As stated above, for cases involving TPF, more robust regulation and an ability to deal with bad behaviour/problems by way of proper sanctions etc is key.

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

Please see our answer to the question above.

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?*

We do not believe this should have to happen. We would hope that this would not be necessary if other safeguards are in place.

First and foremost, better regulation, that is sufficiently enforceable is needed. To the extent further protection is then required some overriding control via the Courts as the case progresses could assist. This is in our view a much more effective way to ensure a proper outcome for consumers. Looking retrospectively, to fix issues, at settlement stage would be far from ideal.

That said, having the ability to review and approve settlement can be a welcome safeguard. It is one which we believe is important in CAT cases, with the extent to which the CAT can use its rules in such situations, having been recently tested in the Mastercard case.

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

We believe the overriding criteria should focus on the ultimate objective - for claimants as consumers - to ensure they obtain, as far as possible, access to justice.

Settlement should not be approved where the outcome would lead to TPFs being the only real beneficiaries, securing vast profits and leaving consumers with very little, their damages being depleted by substantial deductions.

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 answers to question 4 above. We believe the focus on better, stronger regulation/provision to protect consumers needs to be extended to TPFs rather than other professionals involved in legal services.

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

From the evidence set out in the CJC's interim report, and the points we have already raised around the need for clear information and the current lack of transparency in the market, we do not believe claimants can easily compare the different options TPFs' provide.

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?*

We believe conflicts of interest do arise where TPF is used – see our answer to question 4.

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.*

Yes, please see our answer to question 4 above.

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.

For all the reasons outlined above we do believe TPF encourages group litigation, as it is used as a funding option of last report, and so without TPF such claims would not be brought.

That said the evidence in the CJC interim report highlights the high risks and high costs involved in such claims. It makes reference to the fact that TPFs only actually fund in the order of 3-5% of the cases that are pitched to them. This would seem to point to the fact that such funding is not leading to an increase in vexatious or unmeritorious litigation.

Neither do we believe other common types of litigation funding encourage vexatious or unmeritorious litigation. In particular, in relation to Trade Union litigation see our answer to question 15 above. We only support meritorious cases.

In the area of PI law – an area where we support claims, cases are continuing to fall overall¹³. There has been a very substantial fall from the claims' figures of 2013/2014 (EL numbers have fallen by 58%). This, in our view, is partly due to the introduction of various limited fixed costs regimes, which have not been reviewed regularly or properly updated, and the legal reforms leading to the unrecoverability of legal costs, disbursements and funding costs from defendants.

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.

Please see our answers above.

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?

We think there should be a wider educational piece about all available litigation funding options.

The ability to be able to effectively assert individual legal rights is crucial. The way claimants can do this and the best mechanisms for doing so should be dealt with as a matter of general education in schools and thereafter through trusted websites – such as Government websites. Clear and objective information about all the options, including trade union legal services, should be easily accessible to consumers/claimants.

¹³ [Compensation Recovery Unit performance data - GOV.UK](#)

This information should also form part of the initial signposting used more generally within the insurance industry/legal profession when individuals are seeking advice about making a claim.

With TPF, in particular, we have made reference in our answers above to the fact that we do not think there is readily available information to allow consumers (seeking to rely on TPF) to compare the different funders, and the offering they are making via this route. We have also outlined the importance of clear and transparent TPF information being given so it can be properly explained to claimants. Improving access to this information could, in our view, be achieved through better regulation.

General Issues

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

This interim review covers the very wide ranging and important area of litigation funding. We hope the responses received from the current consultation will give the CJC valuable evidence and insight into the many issues the consultation questions cover.

In view of the extent of the issues raised, following an analysis of those replies, we believe it would be very useful for the CJC to initially set out in more detail its findings/recommendations and potentially any draft regulations; and thereafter to undertake another short period of consultation before sending any final report to Government.

UNISON Legal Services
March 2025