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:	Oliver
Last name:	Jackson
Location:	11KBW, 11 Kings Bench Walk, Temple, London EC4Y 7EQ, United Kingdom
Role:	Barrister
Job title:	Barrister
Organisation:	Society of Labour Lawyers
Are you responding on behalf of your organisation?	Yes
Your email address:	[redacted]

Information provided to the Civil Justice Council:

We aim to be transparent and to explain the basis on which conclusions have been reached. We may publish or disclose information you provide in response to Civil Justice Council papers, including personal information. For example, we may publish an extract of your response in Civil Justice Council publications or publish the response itself. Additionally, we may be required to disclose the information, such as in accordance with the Freedom of Information Act 2000. We will process your personal data in accordance with the General Data Protection Regulation and the Data Protection Act 2018.

Consultation responses are most effective where we are able to report which consultees responded to us, and what they said. If you consider that it is necessary for all or some of the information that you provide to be treated as confidential and so neither published nor disclosed, please contact us before sending it. Please limit the confidential material to the minimum, clearly identify it and explain why you want it to be confidential. We cannot guarantee that confidentiality can be maintained in all circumstances and an automatic disclaimer generated by your IT system will not be regarded as binding on the Civil Justice Council.

Alternatively, you may want your response to be anonymous. That means that we may refer to what you say in your response but will not reveal that the information came from you. You might want your response to be anonymous because it contains sensitive information about you or your organisation, or because you are worried about other people knowing what you have said to us.

We list who responded to our consultations in our reports. If you provide a confidential response your name will appear in that list. If your response is anonymous, we will not include your name in the list unless you have given us permission to do so. Please let us know if you wish your response to be anonymous or confidential.

Submission from the Society of Labour Lawyers to the CJC Review of Litigation Funding Consultation

Introduction

1. The Society of Labour Lawyers ("SLL") is a think tank which provides legal and policy advice to the Labour Party. The Society was founded in 1948 by the former Lord Chancellor Gerald Gardiner KC. Our objectives are to contribute legal expertise to the Labour Party and uphold the principles of justice, liberty, equality, and the rule of law in the UK and around the world.

2. We advise Labour Members of Parliament and the House of Lords, develop and scrutinise policy and legislation, contribute to debate within the Labour movement by hosting events and discussions, and mentor future members of the legal profession.

3. This is the SLL's submission to the Civil Justice Council ("CJC") Review of Litigation Funding Consultation. The SLL understands that the deadline for responses is 3 March 2025 at midday. This submission does not address every one of the questions set out in the CQC Consultation paper.

Questions 1-3 (access to justice)

4. We believe that third party funding (TPF) plays a very important part in securing effective access to justice in civil cases.

5. Previously, civil legal aid was available to a claimant. In addition a legally aided claimant was protected against the risk of adverse cost, by reason of the provision which made the enforcement of such costs subject to an assessment of the claimant's means. Since about 1999 these arrangements have ceased to exist for the majority of civil cases. Originally, they were replaced by Conditional Fee Arrangements (CFA), two vital components of which were the ability of the claimant to recover from the defendant the cost of an ATE premium, and the ability of the claimant's lawyers to recover a success fee. Once again, however, these arrangements have ceased to exist for the majority of civil cases, and in many cases therefore, third party funding is the key method of securing effective access to justice.

6. We believe that TPF promotes equality of arms. This is partly because TPF is in principle available both to a claimant and to a defendant. In a case in which the claimant is impecunious and the defendant is well resourced, TPF enables the claimant to pursue a meritorious case which might not otherwise be brought at all. The commercial interest of the funder ensures that the claimant's case will be pursued if, and only if, it is meritorious. Similarly, the defendant for its part (funding its own case) will only pursue that case if it sufficiently meritorious. Much the

same applies if a claimant is well resourced and the defendant is impecunious (such as, for instance, 'SLAPP' cases[1]), where TPF enables the defendant to pursue a meritorious defence where they might otherwise be forced to concede the claim. Again, the commercial interest of the funder ensures that the defence will only be pursued if it is meritorious

7. In facilitating access to justice, for either or both parties, TPF helps to secure a just outcome to the litigation and thereby enhances the rule of law.

Questions 4-7 (regulation of third-party funding)

8. It is important to differentiate between two different categories of TPF arrangements.

9. First, there are commercial enterprises and other businesses who, for commercial or strategic reasons of their own, will enter into arrangements with third parties (who may or may not be formal litigation funders) to help fund their involvement in litigation (whether as a claimant, a defendant, or otherwise). For example, there are cases where commercial creditors seek TPF to fund their expenses arising from disputes over a failed investment.

10. There does not appear to us to be any pressing need to regulate these kinds of funding arrangements. They are generally entered into between sophisticated commercial enterprises, who will be better placed to judge the relative risks and merits of any particular agreement than regulation which necessarily operates on a more 'broad brush' basis

11. Second, there are arrangements that involve unsophisticated consumers seeking to access litigation funding. These are the kinds of cases where regulation is more likely to be required in the public interest, given the vulnerable position that some consumers may be in, and to prevent funders making arrangements which are seen as unacceptable (such as those which involve an excessive level of return to the funder at the expense of the consumer(s) that are party to the litigation).

12. The relevant point for the purposes of this consultation, for the kinds of arrangements which fall into the second category, is that the system must facilitate suitable arrangements for those who are unable to afford to fund litigation from their own resources.

[1] 'Strategic Litigation against Public Participation' i.e. unmeritorious claims, often involving defamation or data protection causes of action, brought against an individual or organisation for the purpose of preventing them from publishing information in the public interest about the claimant.

13. In relation to crowdfunding, we believe that crowdfunding can play and has played a very valuable role in enabling cases with a significant public interest component to be brought before the courts, in particular where damages are not being sought (most obviously, in judicial review cases). However, there are significant issues with the model, which in our view justify some degree of regulation – not least in order to avoid it becoming discredited by abuse. As matters stand, there is little to stop someone seeking, on the basis of entirely implausible claims as to its chances of success, crowdfunding of a claim which may well attract a significant degree of political support but which has little legal merit, and launching proceedings off the back of such funding. We acknowledge that the permission stage (in judicial review) and the possibility of strike out or summary judgment (in other civil matters) provides some protection against such actions getting anywhere, but even in those cases defendants will have been put to unnecessary expense and may face difficulties in costs recovery. We consider that at the very least crowdfunding of litigation should only be possible if a legal team has been instructed and has taken the view that they can act in the matter consistently with their professional obligations, and we also consider that there is a case for requiring that those seeking crowdfunding should have to disclose to those from whom they are seeking funding their legal advisers' overall assessment of chances of success (perhaps accompanied by a rule preventing reference to any such assessment in subsequent court proceedings save as to costs).

Questions 8-10 (costs)

14. The argument in favour of allowing recovery of funding costs in litigation is straightforward. Third-party funding enables claimants who lack the means to pursue meritorious claims to access justice. If successful, they should be able to recover not only their legal costs but also the costs associated with securing the funding needed to bring the claim. Without this, a funded claimant's recovery is significantly reduced by the funder's success fee, which can be substantial. This, in turn, discourages claimants from bringing claims, as the net benefit after funding costs may be insufficient to justify the risks involved.

15. There is a discrepancy between litigation and arbitration costs in England and Wales regarding whether the costs of funding can be recovered. Under the current legal framework, claimants in litigation cannot recover the funder's costs from the losing defendant. In contrast, in arbitration, certain funding costs have been held to be recoverable. The leading case in arbitration is Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd [2016] EWHC 2361 (Comm), where the arbitrator allowed the recovery of the funder's success fee from the defendant. This was on the basis that it fell within the definition of 'other costs' under the Arbitration Act 1996. The Commercial Court upheld this decision. However, there is no equivalent provision in English litigation.

16. The current discrepancy between litigation and arbitration costs is difficult to justify in principle. If a claimant who successfully arbitrates a dispute can recover their funding costs, it is unclear why a litigant in the courts should be treated differently. This creates an uneven playing field where claimants with arbitration agreements may be better positioned than those who have no choice but to litigate in court. Such an approach runs counter to the principles of fairness and access to justice.

17. We suggest that recoverability of funding costs should be permissible, though not be mandatory, and at the discretion of the court. This would allow judges to assess whether such costs should be recovered in particular cases, taking into account factors such as the conduct of the defendant, the financial position of the claimant, and the necessity of litigation funding in the case at hand. Such a discretionary approach would mirror the position in arbitration, where arbitrators have the flexibility to award funding costs in appropriate cases.

18. We also suggest early disclosure of litigation funding arrangements should be required. If a claimant seeks to recover a funder's costs from the defendant, they should be required to disclose the existence of the funding arrangement at an early stage. This would give defendants fair warning of their potential liability and allow them to factor this into their litigation strategy. It would also promote transparency and prevent any surprises at the costs stage.

19. These changes should be explicitly provided for in the Civil Procedure Rules, to provide for certainty and clarity.

20. Funders should also continue to remain exposed to paying costs of proceedings in order to align their own commercial self-interest with the merits of a case (and, in turn, access to justice). That commercial self-interest requires funders to balance the risk and rewards of a particular funding decision. The risk is the risk of paying the other side's legal costs should 'their side' (i.e. the party that they are funding) prove unsuccessful. That risk provides an important check on the actions of a funder and prevents them from financing clearly unmeritorious cases, with the concomitant burden such unmeritorious cases place on the courts.

Questions 11-13 (Capping returns for funders)

21. High profile cases where substantial sums from damages are used to pay funding costs have provoked interest in whether the funder's return should be capped, and whether this would have a positive impact or an adverse effect on litigation funding and its availability.

22. We think this concern has been largely overstated. There are no cases that we are aware of where, as a matter of fact, it has been demonstrated that the funder

made excessive profits out of a litigation funding arrangement. There have been some reports and concerns, but as far as we are aware these are unsubstantiated.

23. That is no great surprise where funders compete with each other in the market for meritorious cases. In many cases, the relevant party or their legal representatives approach different funders and play them off against each other to see which funder will offer the 'best deal'.

24. Further, litigation funders could potentially place their "hot money" anywhere in the world, if the UK imposes caps which make it more profitable to fund cases in jurisdictions which are not subject to such caps.

Questions 14-22 (Third party funding relative to other sources of funding)

25. The alternatives mentioned include Trade Union funding, legal expenses insurance, conditional fee agreements, damages-based agreements, and crowd funding. We doubt whether these alternatives can be viable other than in relatively modest cases.

Questions 23-27 (the role of the court and the rules)

26. We consider that it would be preferable for any regulatory changes to be clearly set out in the Civil Procedure Rules and/or Competition Appeal Tribunal Rules.

Questions 28-35 (provision to protect claimants)

27. We have largely addressed these questions in our responses above.

Questions 36-38 (encouragement of litigation)

28. We have largely addressed these questions in our responses above.

Society of Labour Lawyers

Sunday 2 March 2025