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SUBMISSION TO THE LAW REFORM COMMISSION

CONSULTATION ON THIRD-PARTY LITIGATION FUNDING

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LAW REFORM COMMISSION

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SUBMISSION OF THE BAR OF IRELAND

Contents

Introduction

1. The Council of The Bar of Ireland ("the Council") is the representative body of the independent referral Bar in Ireland. The Bar of Ireland is long established, and its members have acquired a reputation amongst solicitors, clients and members of the public for the provision of representation and advice to the highest professional standards. The principles that barristers are independent, owe an overriding duty to the proper administration of justice and that the interests of their clients are defended fearlessly in accordance with ethical duties are at the heart of the independent referral bar.

2. This written submission are delivered on behalf of the Council in response to the Law Reform Commission ("the LRC") consultation paper on third-party litigation funding ("TPF"). The consultation paper has identified policy arguments in support of, and against, legalising TPF.

3. The scope of these submissions is to address the concerns identified in the LRC paper, identify a number of other factors which ought to be considered, and comment on the legalisation and regulation of TPF.

4. Following some general observations, this submission will examine the experience of comparable jurisdictions, and analyse the principal arguments in favour of, and against, liberalisation.

5. The issue of access to third party funding has been debated in Ireland for a number of years. For example, in 2020 the Irish Society of European Law ("ISEL") and the EU Bar Association (hereinafter "EUBA")[1], jointly called for proper provision to be made for a modification of the ancient laws on maintenance and champerty that remain in place. They viewed litigation funding as an essential tool in enabling Ireland to attract international and cross-border litigation and arbitration. In report[2], they noted that:

> *"… in Persona, the plaintiffs referred to Ireland's place on the international stage, and pointed to the International Financial Services Centre, the Arbitration Act 2010, and to international trade. With Brexit, there has been an increased focus on Ireland's role in this regard. However, litigation funding is a feature of most complex international litigation and arbitration. Thus, insofar as Ireland wishes to attract litigation and arbitration here, it will be competing with English language commercial courts in the Netherlands and Paris, and in circumstances in which the laws of Germany, France and the Netherlands are significantly more tolerant of litigation funding and assignments than here."*

6. The ISEL and EUBA identified many other advantageous consequences of litigation funding, including:

    a. expanding access to justice in Ireland;

[1] Report of the EU Bar Association and the Irish Society of European Law relating to Litigation Funding and Class Actions, 29 January 2020

[2] The Bar Review, 2019, 24(4), 107-111, The case for litigation funding, Catherine Donnelly BL, Ellen O'Callaghan BL

b. improving equality of arms between opposing parties, thereby avoiding the type of imbalance that causes force weaker parties to accept unsatisfactory settlements;

c. increasing assets available to creditors in insolvency proceedings;

d. resolving the anomaly whereby corporate entities can effectively engage in third-party funding under another name, by issuing shares or transferring shares between corporate entities.

7. Ireland has continued to go against the global grain and has made the active choice to retain maintenance and champerty as both tortious and criminal wrongs[3] despite their ancient origins and widespread abolition across the globe. One consequence is that this has led to a deficit in Irish citizens being able to pursue follow-on claims in respect of redress for breaches of competition law. This situation was highlighted by the ISEL and EUBA[4]:

> *"In general, there has been a dearth of competition damages claims in Ireland. In particular, there have been very few "follow on" claims by consumers, which are claims for redress following a finding of the European Commission of a breach of competition law. The most popular jurisdictions across the European Union for such claims are London, the Netherlands and Germany. These jurisdictions have a range of procedural mechanisms available to litigants which render them more suitable for managing such litigation efficiently and effectively. The two most relevant procedural mechanisms are: representative actions and litigation funding…..In particular, they have implications for any situation in which there are a large number of victims of wrongdoing, each of whom may have suffered a loss, but not a sufficiently serious loss to warrant risking the costs of litigation."*[5]

8. ***Persona Digital Telephony Ltd v Minister for Public Enterprise, Ireland*** **[2017] IESC 27** cemented the conservative approach to maintenance and champerty when it held that TPF to support a plaintiff (where none of the exceptions applied) was unlawful by reason of the rules on champerty. The Supreme Court declined the opportunity to develop the common law on champerty in light of modern policy and constitutional issues, opining that such matters would involve multi-faceted complex situations more suited to legislation, after the benefit of an LRC Report.

9. Denham CJ noted[6] that as to the constitutional issues, the case was not brought as a constitutional challenge and would not be dealt with in that instance. Whilst stopping short of saying the outcome may have been different it certainly does leave open a challenge to the existing rules on grounds of constitutional breaches, most obviously in terms of the right to access to the courts.

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[3] Notwithstanding the reality that no one has ever been criminally charged with either, perhaps this is in itself evidence of the disconnect between the current laws and the actual need for them.
[4] Report of the EU Bar Association and the Irish Society of European Law relating to Litigation Funding and Class Actions, 29 January 2020 at page 3.
[5] Report of the EU Bar Association and the Irish Society of European Law relating to Litigation Funding and Class Actions, 29 January 2020 at page 3
[6] *Persona* at para [54 (v)]

10. In ***SPV Osus v HSBC*** **[2018] IESC 44,** the Supreme Court again choose to uphold Irelands position when it came to maintenance and champerty. However, Clarke CJ thought that although the law was clear, he did not necessarily agree with it, at paragraph [2.5]:

> *"However, I remain very concerned that there are cases where persons or entities have suffered from wrongdoing but where those persons or entities are unable effectively to vindicate their rights because of the cost of going to court. That is a problem to which solutions require to be found. It does seem to me that this is an issue to which the legislature should give urgent consideration."*

11. If it is implicit in the judgments in both *Persona* and *Opus*, that some action ought to be taken by the Oireachtas, it seems inevitable that some form of regulation is required. An obvious starting point on determining the best regulatory way forward requires a comparative look at other jurisdictions.

Comparative Jurisdictions

England and Wales

12. TPF is long established in England and Wales, is used by all types of clients and law firms, and accepted as part of the general legal landscape. Maintenance and champerty are no longer classed as criminal offences (since 1967[7]) and no longer give rise to a tort for which damages may be awarded[8]. The motivation behind the decriminalisation was partly rationalised[9] on the grounds that so much litigation was funded by third parties with lawful justification through trade unions, trading associations, friendly societies, insurers, the State (via legal aid), and by parties who may justifiably be interested in funding the litigation of another - that there was very little room for the torts to operate in the real world.

13. *Mulheron*[10] points out that there is strong judicial approval in England[11] for such funding as it is viewed as promoting litigants access to justice where otherwise there might be none. So important is this concept that it is deemed fair and acceptable that claimants may have to forego a percentage of damages in the event of success. In the Court of Appeal it was observed, in ***Gulf Azov Shipping Co.Ltd. v Idisi*** **[2001] EWCA Civ 491** that:

> *"[p]ublic policy now recognises that it is desirable, in order to facilitate access to justice, that third parties should provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation".*

14. In England and Wales, funders subscribe to a Code of Practice, which provides general standards to which members, must adhere and aims to counteract concerns that arise in the area of TPF. The Code requires *inter alia* that:

    a. funders maintain adequate financial resources to meet their obligations and commitments to fund all of the disputes they have agreed to fund and to cover aggregate funding liabilities under all of their funding agreements for a minimum period of 36 months. (Section 9.4);

    b. funders must behave reasonably and may only withdraw from funding in specific circumstances. If a dispute arises in respect of terminations or settlements of proceedings then a binding opinion from an independent QC must be obtained, such a QC having been either instructed jointly or appointed by the Bar Council. (Section 13.2). This particular requirement was viewed as encouraging 'best practice'[12];

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[7] Pursuant to s. 13(1) of the Criminal Law Act 1967.
[8] Pursuant to s.14(1) of the Criminal Law Act 1967
[9] EWLC, Proposals for the Reform of the Law relating to Maintenance and Champerty (Rep. 7, 1966), at paras. [9]-[15].
[10] Mulheron, R. Cambridge Law Journal C.L.J. 2014, 73(3), 570-597, England's unique approach to the self-regulation of third-party funding: a critical analysis of recent developments
[11] See e.g. Giles v Thompson [1994] 1 A.C. 142 (HL); Thai Trading Co. v Taylor [1998] Q.B. 781 (CA); Arkin v Borchard Lines Ltd. [2005] EWCA Civ 655 ("Arkin"); Hamilton Al Fayed (No. 2) [2003] Q.B. 1175 (CA).
[12] Mulheron, R. Cambridge Law Journal C.L.J. 2014, 73(3), 570-597, England's unique approach to the self-regulation of third-party funding: a critical analysis of recent developments

c. funders should not seek to influence the funded party's legal representation to cede control or conduct of the dispute to the Funder (Section 9.3);

d. funders must take reasonable steps to ensure the funded parties receive independent advice on the terms of the litigation funding agreement prior to its execution, which obligation shall be satisfied if the funded party confirms in writing to the funder that the funded party has taken advice from the solicitor or barrister instructed in the dispute. (Section 9.1)

e. funders must consent to the complaints procedures maintained by the Association of Litigation Funders ("ALF") (Section 15).

15. Breaches of the Code can be sanctioned with private warnings, public warnings, publication of the opinion containing the conclusions as to what sanctions should be imposed, payment by the funder to the ALF of the costs of determining the complaint against them, the funder's suspension or expulsion from the ALF, and the imposition of financial penalties.

16. The courts in England and Wales have at times been critical of the Code adopted by the ALF. The Court of Appeal and remark that "*it is not a very long or detailed document*"[13] is perhaps understandable as it extends to five pages.

17. *Mulheron* noted that neither the Code nor any other source compels the establishment of an indemnity fund by which to cover any unmet funding obligations on the part of a funder. Further, there is no regulation or supervision of the sector by the Prudential Regulation Authority or the Financial Conduct Authority. Moreover, the State-funded Financial Services Compensation Scheme does not cover compensation to claimants if a funder is unable to pay liabilities which are incurred under litigation funding agreements[14].

18. In terms of the Code itself there are specific financial obligations. The 2014 Code intensified the obligations on members to:

a. ensure that it "maintains access to a minimum of £2 million of capital or such other amount as stipulated by the ALF";[15]

b. "accept a continuous disclosure obligation in respect of its capital adequacy", and must notify the ALF and the Litigant if that funder "reasonably believes that its representations in respect of capital adequacy are no longer valid because of changed circumstances"[16];

[13] Rowe v Ingenious Media Holdings PLC [2021] EWCA Civ 29 at para 77 ("Rowe"), [2021] 1 WLR 3189

[14] This Scheme only covers business conducted by firms which are authorised by the FCA and the PRA to conduct regulated financial services, as outlined at <http://www.fscs.org.uk/what-we-cover/about-us/>.

[15] Per cl. 9.4.2, this amount is subject to annual review by ALF

[16] Per cl. 9.4.3.

c. arrange annual auditing, and provide the ALF with an audit opinion about the funder's most recent annual financial statements[17]; and

d. provide to the ALF "reasonable evidence from a qualified third party (preferably from an auditor, but alternatively from a third-party administrator or bank) that the funder … satisfies the minimum capital requirement prevailing at the time of the annual subscription[18]".

19. These requirements are in addition to the general obligation in the Code that a funder must "*maintain at all times adequate financial resources to meet the obligations of the funder, its funder subsidiaries and associated entities, to fund all the disputes that they have agreed to fund"*.[19]

20. Other specific requirements within the Code include:

a. The duty of funders to ensure Litigants have "received independent advice on the terms of the LFA" (per clause 9.1).

b. The funder must not take any steps that would cause, or be likely to cause, the Litigant's solicitor or barrister "to act in breach of their professional duties" (per clause 9.2).

c. The funder must ensure that it will not "seek to influence the [Litigant's legal counsel] to cede control or conduct of the dispute to the funder" (per clause 9.3)

21. Caselaw also makes clear that the law still requires 'anti-champerty' behaviour from funders in that they must not:

a. "*improperly stir up litigation and strife"*[20]*, nor*

b. *engage in "wanton or officious intermeddling" in another's claim*[21].

22. It is clear that the increase in the requirements from funders was in response to the common criticism that were levied at the industry, in particular with regard to the lax approach to capital adequacy.

23. In terms of whether such a self-regulation approach would fit within this jurisdiction the LRC does recognise that such a means of regulation could carry advantages[22]. It also recognises the reality whereby even if funding was to be legalised here, there is no way of estimating the attraction such funders would have to Ireland and that to invest in a legislative and comprehensive regulatory framework before such matters were realised could be a '*disproportionate first response*[23]'.

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[17] Per cl. 9.4.4. T
[18] Per cl. 9.4.4.2.
[19] Per the opening words of cl. 9.4
[20] Re Trepca Mines Ltd. (No. 2) [1963] Ch. 199 (CA), 219, and cited e.g. in Lewis v Tennants Distribution Ltd. [2010] EWHC 90161 (Costs), at [7]
[21] Massai Aviation Services v A.G. (The Bahamas) [2007] UKPC 12, at [20]; British Cash and Parcel Conveyors v Lamson Store Service Co. Ltd. [1908] 1 K.B. 1006 (CA), 1014.
[22] LRC Consultation Paper on Third Party Funding Litigation,2023, at page [97]
[23] LRC Consultation Paper on Third Party Funding Litigation,2023, at page [7]

24. The model of self-regulation in England and Wales is attractive in part because levels of poor and fraudulent practice there are lower than other countries with stricter regimes[24].

25. The idea of self-regulation was discussed by Australian legal writer John Braithwaite, who recognised it as a method for controlling corporate crime. He suggested it was: "*a response both to the delay, red tape, costs and stultification of innovation that can result from imposing detailed government regulations on business, and to the naiveté of trusting companies to regulate themselves*".[25]

26. Confusingly, the caselaw on maintenance and champerty is still relevant. This is because section 14(2) of the Criminal Law Act 1967, which removed criminal and civil liability, also provided that it:

> "*shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal".*

27. This has resulted in a scenario where funding agreements can still be struck down as unenforceable by the courts should they deem the agreement to be contrary to public policy. Funding agreements will be considered in their entirely when considering whether they "*undermine[s] the ends of justice*"[26]. Factors the court will take into consideration include those specified in the Code[27], namely independent advice, an absence of conflicts of interest, and no improper control.

28. In terms of what share a funder can take of any ruling or settlement there is significant caselaw in that regard. In one case, 8% was described as a "*modest percentage*" and accordingly acceptable[28] but came with a caution from the Court that the greater the percentage the greater the risk of straying from the path of rectitude. ***Arkin***[29] and ***Latreefers***[30] saw 25% and the 55% success fees deemed acceptable, although it might be noted the higher of the two was due to the funder having a pre-existing interest in the subject matter of the dispute which it was entitled to seek to recoup. As for other jurisdictions, they seem to approve similar percentages. In Bermuda a share of 40% of the recovered damages was found to be fair by the Supreme Court of Bermuda the 2014 decision of ***Stiftung Salle Modulable v Butterfield Trust (Bermuda) Ltd. (Commercial Court, Civil Jurisdiction, 21 February 2014***), at **[**329**]** with the Court commenting that "*such funding arrangements should be encouraged rather than condemn*ed". Ultimately however, each percentage will be considered on a case-by-case basis as made clear in ***Rees v Gateley Wareing (a Firm)*** **[2013] EWHC 3708, Ch.,** at **[169]** per Morgan J.

29. In terms of liability for costs orders, consideration must be had of the so-called *Arkin Gap* which appears to be a unique principle of English law. A funder may be subject

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[24] LRC Consultation Paper on Third Party Funding Litigation,2023, at page [96]
[25] Braithwaite, "Enforced Self-Regulation: A New Strategy for Corporate Crime Control" (1982) 80 Michigan Law Review 1466 at page 1470
[26] Factortame [2003] Q.B. 381 (CA), at [36], per Lord Phillips M.R.
[27] Per cl. 9.
[28] Factortame [2003] Q.B. 381 (CA), at [84]-[85], per Lord Phillips M.R
[29] Arkin v Borchard Lines Ltd & Ors [2005] EWCA Civ 655
[30] Stocznia Gdanska SA v. Latreefers Inc. [2000] All E.R. (D) 148

to an award of costs against it as a non-party although the funder's liability to pay those adverse costs shall be capped to the extent of the level of funding which that funder provided to the Litigant in the first place. In circumstances where the funding agreement was silent on adverse costs, the court felt it to be "*unjust that a funder who purchases a stake in an action for a commercial motive should be protected from all liability for the costs of the opposing party if the funded party fails in the action*"[31]. There has been considerable debate about the fairness behind the *Arkin principle* where it can allow successful defendants to be left in the unfortunate position of facing huge costs leading Sir Rupert Jackson to opine[32] that it should be overruled (although this is yet to happen).

30. Another concern amongst critics of TPF is the possibility of funders withdrawing funding and thereby preventing a litigant from being able to proceed with their case.

31. The Code now provides for three situations[33] that allow termination of the agreement where the funder:

    a. reasonably ceases to be satisfied about the merits of the dispute; or
    b. reasonably believes that the dispute is no longer commercially viable; or
    c. reasonably believes that there has been a material breach of the LFA by the funded party.

32. There is no discretion on the part of the funder to withdraw unless one of these criteria is met and unless they do the Code states[34] that they will remain liable for all funding obligations accrued to the termination date.

33. Any current analysis of TPF would be lacking if it did not consider the implications of the recent UK Supreme Court decision of ***R (on the application of PACCAR Inc and Others) v. Competition Appeal Tribunal and Others*** **[2023] UKSC**. The nett issue of the case was explained at paragraph [3] therein as follows:

> *"The specific issue for determination is whether litigation funding agreements ("LFAs") pursuant to which the funder is entitled to recover a percentage of any damages recovered constitute "damages-based agreements" ("DBAs") within the meaning of the relevant statutory scheme of regulation ("the DBA issue"). This depends on whether litigation funding falls within an express definition of "claims management services" in the applicable legislation, which includes "the provision of financial services or assistance". If the LFAs at issue in these proceedings are DBAs within the meaning of the relevant legislation, they are unenforceable and unlawful since they did not comply with the formal requirements for such agreements."*

34. The Supreme Court found, by a 4:1 majority[35], that the funder's remuneration was in the form of a share in the damages recovered through the claim, thereby constituting

[31] At paragraph [38] and see also paragraphs [39], [41]-[42].
[32] Jackson Final Report, ch. 11, at paragraph [4.6].
[33] Per cl. 11.2.
[34] Per cl. 13.1.
[35] The only dissenting judgment from Lady Rose while agreeing with the lower court's decision opined that TPF was never intended to fall under the ambit of "claims management services."

a DBA within the meaning of Section 58AA of the Courts and Legal Services Act, 1990, and therefore, unenforceable.

35. The Applicants entered into a funding agreement with a TPF for the "*provision of financial services or assistance"… "in relation to the making of claim*." The Supreme Court concluded that this resulted in the acquired TPF services being classified as "*claims management services*" under Section 4 of the Competition Act, 1998. Additionally, the payment to the TPF was to be determined by reference to the quantum of damages recovered. The Supreme Court concluded therefore that the agreement was a DBA.

36. Through Lord Sales, the Supreme Court held that fund agreements fall within the broad legislative definition of "*claims management services*" and therefore, are covered under the category of unenforceable DBAs.

37. The practical implications of the judgment for the TPF industry are potentially huge. Most pre-existing funding agreements do not meet the pre-requisite conditions of the 2013 Regulations[36]. Any TPF agreement where the funder's returns are calculated based on the recovery is potentially unenforceable DBAs in England and Wales unless compliance with the 2013 Regulations is achieved.

38. Restructuring TPF agreements so that are not classed as DBAs may be an option for funders but it would require the claimants to sign same. It may also be an option for the TPF industry to lobby for changes to the definition of DBAs in the UK or the DBA Regulations itself, expressly exempting LFAs from statutory restrictions.

Hong Kong

39. Hong Kong favours an enforced self-regulation regime[37] with the State reserving a supervisory role to regulate more intrusively if self-regulation is insufficient. At present neither the criminal or tortuous liability of maintenance and champerty have been abolished in Hong Kong[38]. Rather, they prefer the statutory exception approach which is to maintain the *status quo* but to allow exceptions such as in the field of arbitration[39]. Fines and imprisonment can still be imposed in circumstances where there has been maintenance and champerty[40].

40. ***Unruh v Seeberger*** **[2007] 10 HKCFAR 31** set out three exceptions to the general prohibition on litigation funding which are:

    a. 'common interest' cases, involving third parties with a legitimate interest in the outcome of the litigation;
    b. where 'access to justice considerations' apply;
    c. and a miscellaneous category, including insolvency proceedings.

[36] https://www.lexology.com/library/detail.aspx?g=519f1a79-b526-434d-a283-8404d51a8e9d
[37] LRC Consultation Paper on Third Party Funding Litigation,2023, at [11 (a)]
[38] LRC Consultation Paper on Third Party Funding Litigation,2023, at [4.29]
[39] Hong Kong's Arbitration Ordinance, sections 98K to 98M
[40] section 101I of the Criminal Procedure Ordinance

41. Where one of the exceptions applies litigation funding will be permitted. It should be noted that whilst the third category is frequently used in Hong Kong as grounds for falling within the exception the other two grounds are rarely used[41]. Litigation funding in Hong Kong is most widely used in insolvency proceedings and permits the assignment of a cause of action by a liquidator[42]. It is notable that the consent of the court is not required for such agreements[43]. Should a matter fall outside the assignment category the courts will still consider applying the exception in an (***Jeffrey L Berman v SPF CDO I Ltd*** **[2011] 2 HKLRD 815)**.

42. Arbitration was held out to be exempt from the prohibition on maintenance and champerty in ***Canonway Consultants Ltd v Kenworth Engineering Ltd*****[1997] A.D.R.L.J. 95**. However, this approach was not codified until 2019 as discussed below.

43. By way of aside, the decision to allow litigation funding in the context of arbitration was followed by the Paris Bar, which passed a resolution in 2017 endorsing third party funding in arbitration, and also confirming that it was consistent with French law. Also, in Dubai the International Financial Centre recently adopted a "Practice Direction" on third party funding in arbitration[44].

44. The regulatory system at play in Hong Kong is described as 'unusual' by the LRC[45]. Regulation there comes in the form of various independent pieces of legislation, including Section 98P of Hong Kong's Arbitration Ordinance - which allows for the creation of an advisory body which may issue a non-statutory code of practice "*setting out the practices and standards with which third party funders are ordinarily expected to comply in carrying on activities in connection with third party funding of arbitration*".

45. The Code adopted deals with the typical TPF concerns such as capital adequacy requirements[46], conflicts of interest[47], etc. The Code itself is considered[48] 'soft' regulation in that it imposes no civil or criminal sanctions if a funder breaches it. The only caveat is that a court or arbitral tribunal may take into account noncompliance with the Hong Kong Code if it is relevant to another question being decided by the court or arbitral tribunal[49].

46. However, the Hong Kong approach is unique in that when the Law Reform Commission of Hong Kong recommended the legalisation of third-party funding, the recommendation for "light touch" regulation was only for an initial three year period, after which it was considered suitable for the Secretary of Justice to review the

[41] https://www.mondaq.com/hongkong/finance-and-banking/1285984/litigation-funding-comparative-guide
[42]section 199(2)(a) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32)
[43]section 199(2)(a) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32)
[44] (Debevoise & Plimpton, "Hong Kong and Singapore Permit Third-Party Funding in International Arbitration" (28 June 2017) Client Update. Available at https://www.debevoise.com/~/media/files/insights/publications/2017/06/20170628_hong_kong_and_singapore_permit_third_party_funding_in_international_arbitration.pdf.
[45]LRC Consultation Paper on Third Party Funding Litigation,2023, at [5.41]
[46] Paragraph 2.5 of the Hong Kong Code. Paragraph 2.5(2) sets a minimum capital access threshold of HK$20 million to be permitted to provide third-party funding. At the time of writing, this is about €273,500
[47] Para [2.6] of the Hong Kong Code
[48] LRC Consultation Paper on Third Party Funding Litigation,2023, at [5.43]
[49] Section 98S of the Arbitration Ordinance.

effectiveness of the regime. During this review it was stipulated that recommendations should be made on whether a statutory or other form of body was needed, how to set such a body up and the criteria for selecting members of such a body. During the intervening period the Secretary of Justice could at the end of each year review whether or not to speed up the process for regulation by an independent statutory or other form of body. The review should also deal with the effectiveness of the [Hong Kong] Code and make recommendations as to the way forward[50].

47. The requirements placed upon Hong Kong funders are summarised in the LRC at [5.46] as:

> *"The Hong Kong Code requires third-party funders to submit to the Secretary for Justice annual returns of complaints made against them and of any findings by a court or arbitral tribunal of their non-compliance with the Hong Kong Code."*

48. Further obligations are imposed on funders in respect of maintaining access to a minimum of HK$20 million of capital, maintaining the capacity to cover all its aggregate funding liabilities under all its funding agreements for a minimum of 36 months, and setting out in the funding agreement the level of involvement of the funder, etc. These are similar requirements to those under the ALF Code in England and Wales.

49. The termination of a funding agreement can only take place in certain circumstances under [2.13] of the Code of Practice which requires funding agreements to state 'whether (and if so, how) the TPF may terminate the funding agreement' if the funder:

a. reasonably ceases to be satisfied about the merits of the arbitration;
b. reasonably believes there has been a material adverse change to the funded party's prospects of success, or recovery on success; or
c. reasonably believes that the funded party has committed a material breach of the funding agreement.

50. Critically, the Code is emphatic that funding agreements '*may not establish a discretionary right for a third-party funder to terminate the funding agreement in the absence of the circumstances described in paragraph 2.13'*.

51. Further to the Code itself there are other rules under the Arbitration Ordinance umbrella. For example, the Arbitration (Outcome Related Fee Structures for Arbitration) Rules allow for ORFS and contingency fee arrangements in arbitration and arbitration-related court, emergency arbitrator and mediation proceedings.

52. Further, in respect of mediation proceedings not related to arbitration, the Mediation Ordinance also permits TPF of mediations that are not related to an arbitration.

53. The LRC does not appear to be critical of the approach adopted in Hong Kong and highlights its advantages at [5.46]:

[50] Law Reform Commission of Hong Kong, Report on Third Party Funding for Arbitration (2016) at page [61].

"This requirement appears to serve both as a coercive mechanism, impressing upon funders that they operate under the watchful eye of the Secretary for Justice, and a data-gathering mechanism to provide a means by which the Secretary for Justice can assess the success of the framework and consider whether to adopt a more intrusive style of regulation."

54. Whilst the *status quo* is maintained at present in Hong Kong and maintenance and champerty remain civil and criminal wrongs, there are concerns amongst the judiciary there that this may not be the correct approach. In ***Unruh*** the judgment of Ribeiro P.J. discussed the public policy behind champerty and at paragraph 119 he said:

'The continued retention by Hong Kong of criminal and tortious liability for maintenance and champerty may not be justified and this question merits serious legislative attention.'

55. Further, in ***Re A* [*2020] HKCU 705*** Justice Marlene Ng said:

"the origin of the laws of maintenance and champerty, which goes back to medieval times, is ancient and obscure"[51]*;*

...

"notions of public policy necessarily evolve to meet the changing legal, moral, social and economic environment, which requires the court to unshackle itself from the formerly strict constraints against maintenance and champerty."[52]

56. In Hong Kong there are no specific limitations on the charges between the funder and the Litigant[53]. Fees and interest are matters for agreement between the funder and the funded party. Hong Kong law does not impose specific limitations on the amounts that third-party funders can charge.

57. In terms of the criminality aspect of maintenance and champerty Hong Kong appears to stand apart from other Commonwealth jurisdictions in that regard as it has seen relatively recent prosecutions and convictions for maintenance and champerty. ***HKSAR v Winnie Lo [2012] HKCFA 23*** saw a solicitor convicted for conspiring to recover with the help of an agent to unlawfully maintain a personal injury action by entering into a conditional fee agreement. A 15-month sentence was handed down and although it was later quashed in the Hong Kong Court of Final Appeal it was still held that the ingredients of the criminal offences of maintenance and champerty were certain enough to remain law in that jurisdiction.

58. There is considerably less data available to allow for a fair comparison of Hong Kong to more mature jurisdictions such as the United Kingdom and Australia. However, some analysts[54] contend that the trajectory of acceptance and use of TPF in Hong Kong, when compared in the same timeframe against other jurisdictions, is implicit of a quicker acceptance.

New Zealand

[51] At paragraph [51]
[52] At paragraph [60]
[53] https://woodsford.com/wp-content/uploads/2022/01/2022-Litigation-Funding-Hong-Kong.pdf at page [7]
[54] https://www.mondaq.com/hongkong/finance-and-banking/1285984/litigation-funding-comparative-guide

59. The approach taken by New Zealand to TPF is lenient[55], with regulation primarily evolving through caselaw where the courts only intervened in circumstances that suggested an abuse of process. In ***PricewaterhouseCoopers v Walker*** **[2017] NZSC 151,** the Supreme indicated that judicial intervention may be required where the proceedings[56]:

a. deceive the court,
b. are fictitious or mere sham;
c. use the process of the court in an unfair or dishonest way,
d. for some ulterior or improper purpose, or in an improper way;
e. are manifestly groundless, without foundation or serve no useful purpose; or
f. are vexatious or oppressive.

60. As in Australia, TPF is widely linked to class actions in New Zealand (such as those for leaky cladding, defective steel tubes, *etc*.) and is widely endorsed by the government.

61. An analysis of litigation funding in New Zealand[57] reveals it is regulated to only a limited extent by the following.

a. General mechanisms available to the court for managing litigation, such as the courts' powers to stay or strike-out proceedings, and order security for costs.
b. Principles developed through the courts to address some of the issues arising in funded litigation, for example principles applicable to the disclosure of litigation funding arrangements.
c. General statutes that may be interpreted as applying to litigation funding, such as consumer protection legislation.

62. A thorough review of the law on TPF was carried out by the New Zealand Law Commission[58], which recommended the torts of maintenance and champerty should be abolished[59]. Amongst the reasons for promoting this objective was the need for accountability and transparency within litigation funding industry[60]. At [13.2] the Report identified the following extensive list of advantages to litigation funding:

a. improving access to justice for plaintiffs by alleviating the costs of litigation and "levelling the playing field" in litigation against well-resourced defendants.
b. reducing the financial risks of litigation for plaintiffs, particularly the risk of an adverse costs order if the litigation is unsuccessful.

[55] Report of the EU Bar Association and the Irish Society of European Law relating to Litigation Funding and Class Actions, 29 January 2020
[56] At paragraph [14]
[57] New Zealand Law Commission, Report 147, Class Actions and Litigation Funding at [14.2]
[58]New Zealand Law Commission, Report 147, Class Actions and Litigation Funding
[59]Ibid at page [41]
[60]Ibid at [14.4]

c. allowing plaintiffs to stay focused on activities other than litigation, for example allowing commercial plaintiffs to stay focused on their core business.
d. expanding financing options in respect of litigation.
e. benefitting from the availability of a funder's litigation expertise and experience.
f. providing defendants with confidence that their costs will be met by the funder if they are successful.

63. By way of contrast the Report only identified three disadvantages (a burden on the court system due to an increased number of cases, the risk of meritless litigation and the impact on availability and affordability of directors and officers liability insurance[61]).

64. The report identified at [13.8] the fact that notwithstanding the illegality of maintenance and champerty in New Zealand there are no examples of a successful claim based on the torts, nor are there any examples of a litigation funding agreement being unenforceable as contrary to public policy.

65. In respect of the disadvantages of litigation funding the Report considered each of them in turn. Regarding an increase in meritless claims it was said that the majority of submissions in respect of that concern only rated it as a low risk at [13.30] and at [13.63] it said the risk of litigation funding leading to an increase in meritless cases is minimal as litigation funders have little or no incentive to fund meritless cases as this is unlikely to be profitable. It was opined that the risk of an unsuccessful litigant facing costs orders and due diligence on the part of funders would counteract these concerns in reality.

66. In response to a fear that the abolition of maintenance and champerty could affect insurance, the Report found at [13.62] that there was no reason to believe litigation funding will have a significant impact on the availability and affordability of Directors and Officers or other types of insurance in New Zealand.

67. Fears about over burdening the judicial system were dealt with at [13.65] where it said:

> *"We note that funded class actions are likely to make up a very small proportion of civil litigation overall and that a well-designed procedural regime for class actions and litigation funding should minimise the impacts on the court system".*

68. Amongst the recommendations in the New Zealand Law Commission Report is the adoption of a certification system when designing any regulatory framework, at least in respect of representative actions. The Report suggested that any potential certification system would help ease concerns about over burdening the judicial system with meritless claims. It was suggested that prior to commencing proceedings a certificate should be required and that the court should consider several factors prior to issuing same.

[61] Ibid at [13.3]

69. Examples of areas that litigation funding has been successfully utilised by litigants in New Zealand include:

a. ***White v James Hardie New Zealand*** **[2017] NZHC 2112** and ***Paine v Carter Holt Harvey Ltd*** **[2019] NZNC 1614** in relation to defective building products;

b. ***Cooper v ANZ*** **[2013] NZHC 2827** relating to illegitimate fees charged to consumers by banks;

c. ***Walker v Forbes*** **[2017] NZHC 1212** and ***Mainzeal Property and Construction Ltd (in liq) v Yan*** **[2019] NZHC 255** regarding breaches of directors' duties owed to companies.

70. The *laissez fare* approach of the New Zealand courts in regulating the TPF market is perhaps best seen through its approach to the fees that are charged by funders. At present there are no limits prescribed by either legislation or the common law. Furthermore, in the context of a non-representative funded actions, the Supreme Court of New Zealand was adamant that it was not its role to assess the fairness of any bargain between a funder and a claimant[62].

71. Whilst there is no regulation *per se* in New Zealand for TPF it can still be caught by other pieces of legislation. As providers of financial services and products in trade, litigation funders are subject to the provisions of the Fair Trading Act, 1986 which offers consumer protection against misleading and deceptive conduct, unsubstantiated representations, and false or misleading representations and redress for same. There could be argument made that the Consumer Guarantees Act, 1993 might also apply to TPF and impose statutory guarantees in relation to services provided.

72. Whilst there are no specific regulations in terms of the ethics and conduct expected from TPF in respect of litigation funding their normal obligations under existing codes of conduct such as the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 would apply equally in this context. ***Houghton v Saunders*** **(2011) 20 PRNZ 509**[63] advised the following as a guide for lawyers dealing with TPF:

a. There should be a direct client–solicitor relationship between the members of the represented group and the lawyer acting for the represented group in the litigation.

b. The lawyer acting for the represented group must be responsible for advising the named claimants and members of the represented group about the merits of the case and all material developments in the case. That advice must be prepared and provided without interference by the litigation funder.

c. The litigation funder must not provide expert evidence in the litigation. Expert witnesses must be instructed directly by the lawyers acting in the litigation and the litigation funder should have no direct involvement in that process.

[62] PricewaterhouseCoopers v Walker [2017] NZSC 151 at paragraph [48]
[63] At paragraph 75

73. In terms of when a TPF can terminate funding there again is no specific regulation on this point and it is felt the courts would be inclined to follow whatever is provided for in the funding agreement[64]. However, should such scenario not be covered then the default position is that under the Contracts and Commercial Law Act 2017. Under that Act a funder would be able to cancel the agreement:

a. for misrepresentation by the plaintiff(s) prior to the agreement that has induced the funder to enter the agreement;

b. if a term of the funding agreement is broken by the plaintiff(s); or

c. if it is clear that a term in the funding agreement will be broken by the plaintiff(s).

Australia

74. Australian jurisdictions are viewed by many as having most developed and sophisticated[65] system for TPF, which has been lawfully used since 1999. New South Wales, South Australia and Victoria have abolished the torts and crimes of maintenance and champerty**.** In relation to the remaining territories in Australia, the High Court decisions in 2006 in the cases of ***Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*** **[2006] HCA 41** and ***Mobil Oil Australia Pty Ltd v Trendlen Pty Ltd*** **1996 2 VR 34** put an end to torts of maintenance and champerty. The TPF industry in Australia has steadily grown since those decisions, as has the number of funded class actions.

75. The LRC noted that whilst the country has a small litigation market overall it still has a mature and sophisticated third-party funding sector[66]. Research from Australia in 2011 suggested that the availability of third-party funding only resulted in only a 0.1% increase in civil cases[67].

76. *Williams* opines that one of the main contributors to the Australian TPF growth is the prohibition on contingency fee-based arrangements which do not allow a proportion of any settlement or award to be charged by lawyers whereas TPF was not subject to that same prohibition. *Williams*[68] outlines a typical structure of an Australian funding arrangement as follows:

a. a contract between the funder and the claimant pursuant to which the claimant agrees to pay the funder a percentage of any amount they obtain by way of judgment or settlement in exchange for the funder agreeing to pay

[64] https://woodsford.com/wp-content/uploads/2022/01/2022-Litigation-Funding-New-Zealand.pdf at page 11
[65] As described e.g. in J. Walker, "Litigation Funding Rules Face Scrutiny" (The Australian, 2 August 2013); J. Emmerig and M. Legg, "Litigation Funding in Australia: A Tangled Web" [2013] C.D. 48
[66] LRC Consultation Paper on Third Party Funding Litigation,2023, at page [13]
[67] Barker, "Third-Party Litigation Funding in Australia and Europe" (2011-2012) 8 Journal of Law, Economics and Policy at page 451. The Commission notes the age of these data
[68] Williams, Greg, United States,Defense Counsel Journal, Vol. 87 No. 2, April 2020, The Rise and Minor Fall of Litigation Funding in Australia.

the costs of the litigation (usually including any cost order made against the claimant);

b. a contract between the funder and the lawyer, pursuant to which the funder agrees to pay the lawyer's fees and the lawyer agrees that the funder may direct certain aspects of the litigation (subject always to the lawyer's overriding obligation to their client); and

c. a contract between the claimant and the lawyer pursuant to which the lawyer agrees to represent the client and the client acknowledges role of the funder in directing the conduct of the litigation.

77. There has been a systemic review of the TPF regulatory system in recent years. The first review came in the form of the Productivity Commission Report in 2014 which essentially promoted the idea of a licensing regime for litigation funders and the removal of the ban on lawyers charging damages-based contingency fees, which would provide another funding option for clients.

78. Thereafter the Attorney-General of Australia asked the Australian Law Reform Commission the ("ALRC")[69] to consider whether class action proceedings and third-party litigation funders should be subject to regulation. The ALRC went on to make 24 recommendations aimed at promoting fairness and efficiency in class action proceedings; protecting litigants from disproportionate costs; and ensuring the integrity of the civil justice system.

79. There are close links between TPF and representative actions/class actions generally in Australia. Litigation funding is regarded as having assisted the development of class actions. Supporters claim that litigation funding is vital to the health of the Australian class action regime. Litigation funding and class actions are so inextricably linked that they were examined in tandem in the reports and reviews into litigation funding.

80. There is a process of regulatory oversight provided by the Courts on a case-by-case basis. The Federal Court requires litigation funding arrangements in class actions to be disclosed to the Court, together with the solicitors' costs agreement, at the commencement of the case. The Courts scrutinise the funding agreements in detail. It is routine in class actions for the Federal Court to require the litigation funder to provide security for costs, on application or on its own motion. However, it is of note that the ALRC refers mostly to TPF in respect of class actions and they are subject to far greater judicial supervision than individual cases.

81. Critically, the ALRC recognised the vital role TPF plays in providing access to justice[70], although they did also identify inherent risks such as funders failing to meet their obligations under funding agreements or exercise influence over the conduct of proceedings to the detriment of group members.

[69] Resulting the Final Report of the ALRC on Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders

[70] ALRC Final Report on Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders at [6.1]

82. In May 2020 and in a departure from its previous reluctance to impose regulations on the litigation funding sector the Austrian Government announced new stricter regulations in the form of the Corporations Amendment (Litigation Funding) Regulations 2020 (Cth) (hereinafter the "2020 Regulations"). The objective was to ensure litigation funders would be required to hold an Australian Financial Services Licence (AFSL) and comply with the managed investment scheme (hereinafter the "MIS") regime to ensure they are subject to greater regulatory oversight and accountability as well as under the Corporations Act 2000.

83. Since coming into force the 2020 Regulations have been the subject of much controversy, for example by causing delays in the proceedings that were being funded coming before the courts. Judicial criticism of them was forthcoming in ***LCM Funding Pty Ltd v. Stanwell Corporation Limited (Stanwell)*** **[2022] FCAFC 103**.

84. In response to that decision the Australian Government made the Corporations Amendment (Litigation Funding) Regulations 2022. Its purpose was set out by the Assistant Treasurer of Australia:

> *"….to provide litigation funding schemes with an explicit exemption from the Act's managed investment scheme (MIS) regime, Australian Financial Services Licence (AFSL) requirements, product disclosure regime and anti-hawking provisions (i.e. unsolicited sales of financial products)."*

85. In real terms the effect of the 2022 Regulations is that TPF are exempt from regulation under the Corporation Act 2000 and in particular funders are not required to hold a licence to carry out business activities.

86. Although the matter of regulating litigation funding is settled for now in Australia there is clearly still uncertainty about the future exacerbated by the lack of consistent federal policy. However, such problems should not prevent the LRC from considering the voluminous reviews and reports drafted by the various Australian authorities on the matter and from taking guidance from them.

United States

87. The ISEL and EUBA summarised the link between litigation funding and lawyers in the United States as follows:

> *"In the United States, lawsuits are often litigated on a contingency fee basis, which means that the plaintiff's lawyer agrees to advance all litigation expenses, including attorneys' fees. Should the case succeed in achieving a monetary award or settlement, the lawyer receives a percentage of the recovery as its fee, in addition to reimbursement of its costs and expenses. However, should the case fail, the lawyer receives nothing. Accordingly, contingency fees are a method of litigation financing"*[71].

[71] Ibid at page [8]

88. The benefits of such a system in the US are seen to include equal access to justice, and they ensure that only meritorious cases are filed because lawyers have no incentive to waste time and resources litigating suits that have little chance of recovery[72].

89. There is a different system used (the Common Fund Doctrine) in the US when the funding is required for a class action. In such circumstances contingency fees are not permitted because absent class members do not have the opportunity to contract with attorneys prior to the filing of the case[73]. Under this Doctrine the court's approval is required as to whether the percentage of the common fund claimed by the lawyers is reasonable given, *inter alia*, the results achieved, the difficulty of the case, and the risks associated with the litigation[74].

90. By way of stark contrast to what happens in Ireland, in the US each side is obliged to pay its own fees regardless of the outcome unless the contrary is provided for by statute or contract.

91. Apart from the situation where a lawyer funds the litigation the other option open to claimants is TPF which has recently become more prevalent in the United States. It is estimated that TPF is a €6.6[75] billion industry in the United States[76]. The most dominant players in the TPF industry in the US are Burford Capital and Bentham Capital[77]. A report by Burford Capital, in 2017, reported a 36% jump in the number of law firms using TPF which represented a growth in use of 414% since 2013[78].

92. The legality and regulation of TPF in the US is determined at State level. However, it is said that in the vast majority of states TPF is considered not "*champertous*". Many states have abolished their champerty laws[79], whilst many others never had such laws to begin with[80]. New York has now passed legislation exempting transactions in financing so that they can be provided either to the plaintiff directly, or to the plaintiff's law firm. The general rule in the US is that so long as litigants and their attorneys and not the funder control the litigation, then TPF is considered acceptable. This attitude is reflective of the US's "*consistent trend across the [United States]… toward limiting, not expanding, champerty's reach*.[81]"

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[72] Report of the EU Bar Association and the Irish Society of European Law relating to Litigation Funding and Class Actions, 29 January 2020

[73] See Boeing Co. v. Van Gemert, 444 U.S. 472 (1980) (endorsing the common fund doctrine for use in federal class actions).

[74] See Fed. R. Civ. P. 23(h).

[75] This figure is calculated using data from 2019: Saulnier et al, Responsible Private Funding of Litigation: European Added Value Assessment (Directorate General for European Parliamentary Research Services 2021) at page [5].

[76] See Kevin LaCroix, The Latest on Third-Party Litigation Financing, The D&O Diary, Jan. 15, 2018, available at https://www.dandodiary.com/2018/01/articles/litigation-financing-2/latest-third-party-litigation-financing/.

[77] See Ben Hancock, Who Rules the World of Litigation Funding?, The American Lawyer, Mar. 30, 2017, available at http://www.nationallawjournal.com/supremecourtbrief/id=1202782561037/Who-Rules-the-World-of-Litigation-Funding?mcode=1202615549854&curindex=8&slreturn=20170916103347

[78] See Burford Capital, 2017 Litigation Finance Survey, available at www.burfordcapital.com. Notably, litigation financing in the United States can be provided either to the plaintiff directly, or to the plaintiff's law firm.

[79] See, e.g., Osprey, Inc. v. Cabana Ltd. P'ship, 340 S.C. 367, 384 (S.C. 2000); Saladini v. Righellis, 426 Mass. 231

[80] See ABA Comm. on Ethics 20/20, Informational Report to the House of Delegates 11 (2012), available at https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_wh

[81] Del Webb Communities Inc., 652 F.3d at 1156.

93. The United States are becoming increasingly supportive of TPF financing in recent years an example being the New York State Supreme Court when it recently extolled the value of TPF[82] when it commented:

> *"the sound public policy of making justice accessible to all regardless of wealth," and recognizing that the costs and expenses of litigation often otherwise deter lawsuits against "deep pocketed wrongdoers."*

94. A similar tone was clear in the California Supreme Court which opined that a prohibition on TPF would create "*pernicious barrier to free access to the courts*."[83]

[82] Hamiltan Capital VII LLC I v. Khorrami LLP, No. 650791/2015, 2015 WL 4920281, at *5 (N.Y. Sup. Ct. Aug. 17, 2015).
[83] PG&E v. Bear Stearns & Co., 50 Cal.3d 1118, 1136-37 (1990)

The various arguments in favour

95. In this section, the submission will analyse the various arguments made in the context of the proposal for liberalisation, and look at the options for reform.

Access to Justice and Equality of Arms

96. One of the primary arguments in favour of TPF is that it will facilitate access to justice on the basis that it is entirely undesirable for a plaintiff's case to be impeded due to a lack of funding. In *Persona*, Clarke J noted that:[84] "*...the source of disquiet which arises on this appeal stems from the very real possibility that this case might not go to trial because of the difficulties encountered by the plaintiff/appellant ('Persona') in being able to run the case without third party funding".*

97. The majority in *Persona* also alluded to the concerns of prejudicial impact associated with a plaintiff with a legitimate claim who could not continue with proceedings due to a lack of funding. Denham CJ said this:[85] "*...I do have a concern that the defendants and third party who vigorously opposed the plaintiffs' motion are beneficiaries if the case does not proceed. This may be a matter for consideration at another time and place".*

98. The Council is of the view that it is entirely unsatisfactory that access to justice should in any way be connected with impecuniosity. Fairness is only reasonably possible if both parties have access to funding to litigate or provide a proper defence. The Council recognises the significant prejudicial impact and concerns that arise where a meritorious claim is dropped due to a lack of funding, and where the opposing party is ultimately the beneficiary. By the same token, the Council recognises that an imbalance can arise between a party with access to funds on one hand, and a party without access to funds on the other. TPF provides a solution in many cases.

99. In response to concerns about access to justice, it is often said that: "*no foal, no fee*" or *pro bono* work may be pursued. The Council submits that this is not a satisfactory solution. As noted by Clarke J: "*it is one thing for lawyers to be prepared to take on relatively short litigation at the risk that they will not be paid unless they are successful*"[86]. The Council echoes this sentiment - it is difficult to expect complex and lengthy litigation to be pursued on this basis.

100. By the same token, it is difficult to see how expert witnesses could expect to take on the risk of litigation where renumeration is based entirely on the outcome of the proceedings. Further, the perception of a conflict of interest would likely arise on the basis if it is said that a person may only be paid if the case is successful.

[84] *Ibid* at 2.2
[85] *Ibid* at 54(vii)
[86] *Ibid* at 2.8

Collective Redress Actions

101. The Protection of the Collective Interests of Consumers Act, 2023 ("the Consumer Act 2023") (signed into law on 11 July 2023) transposes Directive (EU) 2020/1828 ("the Directive") on representative actions for the protection of the collective interests of consumers.[87] The Directive is aimed at providing protection for the collective interest of consumers by allowing representative actions to be brought on behalf of by groups of consumers by designated entities in respect of infringements of a wide range of EU consumer rules, including financial services, data protection and telecommunications. Article 10 of the Directive expressly requires EU member states to regulate the operation of TPF in respect of such representative actions, in circumstances where national law permit TPF.[88]

102. Collective redress actions are an important mechanism for consumer protection. One of the problems with collective redress is funding. Collective actions often have a significant number of complainants with relatively small financial claims; nonetheless the litigation is often complex. In light of this, the Directive suggests that member states provide for funding in relation to such actions. It is submitted therefore that in order to facilitate collective actions in Ireland, it is appropriate that TPF be legalised.

103. It would not make sense to provide for TPF solely in relation to collective actions that derive from provision of EU law as this could have the effect of creating a different level of court protection for rights derived from national law.

104. In 2015 the Volkswagen emissions scandal arose when the German car manufacturer allegedly programmed vehicles to activate an emissions control mechanism during testing. This resulted in consumers being misled as to the environmental impact of the vehicle purchased. This was said to affect 11 million cars worldwide (and thousands in Ireland). Any Irish affected consumer had to bring their own separate proceedings. The Consumer Act 2023 provides a basis on which collective action may be taken in such a scenario. Nonetheless, the issue of funding may create barriers to, and prevent consumers from, obtaining redress. In order to strengthen consumer protection in a scenario like this, access to TPF is therefore essential.

105. As recognised by the LRC, the number of representative actions will increase now that the Directive has been transposed into Irish law. It might be worth considering the inextricable links between representative actions and TPF in this context, particularly in Australia and New Zealand as discussed above. Further, the legal industry here has already started asking how such representative actions will be funded[89] once the 2023 Act is commenced.

106. The European Union shared the same concerns as the LRC when composing the draft Directive (excessive returns being exacted by third party funders, consequent under-compensation of claimants, etc). Nonetheless, it appears to have successfully navigated such issues.

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[87] Repealing Directive 2009/22/EC OJ L 409, 4.12.2020.

[88] The Directive does not require TPF to be legalised in member states.

[89] https://www.mccannfitzgerald.com/knowledge/disputes/the-representative-actions-act-2023-signed-into-law-but-lacks-clarity-on-litigation-funding

International Commercial Arbitration

107. The Civil Law (Miscellaneous Provisions) Act 2023[90] amends the Arbitration Act 2010 ("the Arbitration Act") with the inclusion of a new Section 5A, which expressly provides that the torts of maintenance and champerty do not apply to:

(i) international commercial arbitration;

(ii) any proceedings arising out of an international commercial arbitration; or

(iii) any mediation or conciliation proceedings arising out of an international commercial arbitration or proceedings arising out of same.

108. The purpose of this statutory exception is to provide a basis on which Ireland can compete on an international level in terms of commercial dispute resolution. Prior to its introduction, the Minister for Justice noted that this statutory exception "…*should assist the broader Government policy of promoting Ireland as a destination of choice for international commercial legal business under the Ireland for Law initiative.*"[91]

109. There is no reason why the same should not hold for litigation. Reform of TPF would further promote Ireland. TPF is often a feature in complex commercial litigation and is one of the factors considered by international businesses. Complex international litigation has become attracted to the Irish Commercial Court in recent years. TPF allows business to offset litigation risks and focus on their primary business activities as opposed to diverting funds to litigation. As part of a government policy to promote Ireland in terms of international business, TPF ought to be legalised.

European Union developments

110. In addition to the issues relating to collective redress referred to above, the European Parliament passed a Resolution in September 2022 seeking the European Commission to draft a Directive regulating third-party funding for all Member States, and the Resolution contains the text of a draft directive. If implemented this would mean Ireland would be obliged to give effect to it, regardless of any national law to the contrary.

111. *Donnelly and O'Callaghan* also touched upon the role the European Union's case might have in this jurisdiction. It said:

> *"While there may not be any clear statement under the Convention in respect of litigation funding, the case law under the Convention and the Charter could certainly be interpreted to support recognition of litigation funding.*[92]*"*

[90] Awaiting commencement by way of Ministerial order.
[91] https://www.oireachtas.ie/en/debates/question/2022-09-20/459/
[92] The Bar Review, 2019, 24(4), 107-111, The case for litigation funding, Catherine Donnelly BL, Ellen O'Callaghan BL

Development of the Law

112. TPF will undoubtedly contribute to the development of the law. A claim is more likely to be pursued in areas of law with little jurisprudence if TPF is available. It may well be the case that litigants are not prepared to undertake the risks associated with litigation, especially in circumstances where the law in that has not been tested already or is unclear. On this basis, it is possible that more comprehensive legal principles emerge from these cases providing for a stronger and more well-developed legal system.

Deterring Unlawful Conduct

113. Another effect of funding is to deter unlawful conduct, in particular in shareholder and commercial claims. Litigation serves to deter unlawful conduct where a party may be held accountable for its actions. With improved access to justice, repercussions in the form of damages and costs orders will serve to encourage higher standards of professional conduct and corporate governance. It is submitted that, in the long run, this will increase public confidence in all areas of business and the legal system.

Consideration of the case against

Increase in Vexatious and Meritless Proceedings

114. One of the commonly mentioned arguments against the legalisation of TPF is that its availability will result in an increase in vexatious and meritless proceedings. The basis for this argument is, first, that a party that has received funding will have less to lose personally and will therefore continue with more risky litigation and, second, that TPF will encourage nuisance settlements where a defendant settles an otherwise defendable case rather than be drawn into potentially costly litigation. This concern is overstated.

115. First, the jurisdiction already vested in the Courts to deal with vexatious and meritless proceedings offers a sufficient safeguard. This includes:

(i) a power to strike out meritless or vexatious proceedings; and

(ii) the jurisdiction to make costs orders against unsuccessful parties, including wasted costs orders against legal practitioners.

116. Second, the risk is minimal. There is simply no incentive to fund a meritless case if it is unlikely to be profitable. It is in the interest of a profit-motivated commercial funders to undertake careful due diligence in order to ensure that they fund a meritorious case which is likely to provide a return on their investment. This is what happens in practice.

117. In addition, the ethical rules of legal practitioners provide further protection. Both the Solicitors' Guide to Professional Conduct and, in the case of barristers the Code of Conduct expressly provide an ethical obligation against the facilitation of vexatious and meritless cases. Although it has been recognised in the LRC Consultation Paper that a breach of ethical standards may be non-justiciable,[93] it is submitted that these ethical codes provide further protection against an increase in vexatious and meritless proceedings.

Under-Compensation

118. The second disadvantage mentioned in the LRC Consultation Paper is that that parties that are successful in their proceedings may be under-compensated. The model of commercial funding involves investing capital into legal proceedings and, where the proceedings are successful, the funder is reimbursed with their capital investment along with an additional profit. It is argued that this takes away compensation from a funded party who has suffered harm, and therefore, are under-compensated.

119. It is true that a successful party ought to be fully compensated for harm suffered and that TPF may well lead to a reduction in that compensation for a funded party. It is important however to consider this factor in the context of access to justice issue. It

[93] McMullen v Clancy (No. 2) [2005] IESC 10, [2005] 2 IR 445

is surely better for a funded party to forego a portion of their compensation than to prevent it from bringing the claim at all due to a lack of funding.

Increase in Insurance Premiums and Costs for Business

120. Another disadvantage identified in the LRC Consultation Paper is the possibility that funding in representative actions might cause the cost of insurance premiums to increase as a result of an increase in litigation. Specifically, Directors' and Officers' liability insurance is mentioned, a form of insurance which protects directors and senior officers against personal loss arising from liabilities incurred in the performance of their duties, where insurance may fund the legal costs of their defence.

121. There is no evidence to suggest that TPF would have a significant impact on the availability or affordability of such forms of insurance. Whilst it is recognised that the insurance market has experienced significant increases in premiums in general in the last few years, there does not appear to be any connection between funding liberalisation (where this has happened) and such costs increases.

Different Types of Legal Proceedings

122. The LRC suggests that general damages for past and future pain and suffering in a personal injuries claim are inherently individual to the injured person and that any departure from that might provoke a societal reaction to seeing such damages as an investment opportunity.

123. As a solution to these issues it is suggested by the LRC that perhaps there could be a blanket ban[94] in the form of any statutory exception to tortious and criminal liability for maintenance and champerty not being applicable to actions falling within the definition of "civil action" as contained in section 4 of the Personal Injuries Assessment Board Act 2003 ("the Act of 2003") and to which section 3 of the 2003 Act applies. This approach however, carries certain dangers most notably that it could prevent access to justice in cases that must for legal reasons be classes as personal injuries claims (e.g. historical sexual abuse cases and other cases that include a personal injuries element irrespective of how minor it is). Nonetheless, the LRC suggestion has much to recommend it.

124. Furthermore, litigation in areas such as family law, criminal law, and childcare law are examples of proceedings which may not be appropriate, or indeed appealing commercial funders, as it may be considered exploitative and the prospects of profits are often negligible.

125. The Council shares the sentiment noted in the LRC Consultation Paper with the view that the mere fact that TPF may not be appropriate in all types of proceedings is not a sufficient justification against a broader reform of TPF.

94 LRC Consultation Paper on Third Party Funding Litigation,2023, at [6.9]

126. Indeed, experience shows that funders have no interest in these types of claims, not least because compensatory damages are not a feature.

The Process of Legalising TPF

127. In the event that a decision is taken in principle to legalise TPF in Ireland, it is important to consider the various ways in which this might be achieved. The LRC Consultation Paper has provided a thorough examination of the various approaches available and has also examined the approaches taken in other jurisdictions. The following section will provide an overview of these approaches followed by the Councils views and recommendations.

128. One way to legalise TPF would be to abolish the torts and offences of maintenance and champerty but to preserve the rules and public policies behind the torts and offences (the preservation approach). As stated, and by way of example, in England and Wales the torts and offences of maintenance and champerty has been abolished save as to rules and public policies which have been developed.[95]

129. The second possibility is to simply abolish the torts and offences of champerty and maintenance altogether, without the "preservation" of any public policy or illegality underpinning them. This approach has been adopted by the British Virgin Islands and has recently been recommended by the New Zealand Law Commission (the Abolition Approach).

130. Another option is to preserve the torts of maintenance and champerty, whilst creating a statutory exception which expressly permits TPF. This approach would allow for the legalisation of TPF while maintaining a level of restraint (the Statutory Exception Approach).

131. The Council's view is that TPF should be legalised and in that regard, any form of legalisation would be considered a positive step.

132. The Preservation Approach is the least preferable option. It is submitted that the combination of abolition of the torts and offences of maintenance and champerty, while at the same time preserving public policy considerations is in many respects illogical. This approach does not provide sufficient clarity to the law, as it still leaves the courts to determine issues of public policy. The approach of the UK Supreme Court in the recent *PACCAR* case underlines the dangers of this approach.

133. While the LRC Consultation Paper identifies that a body of case has developed in England and Wales based on the interplay between public policy and TPF, the fact that a body of case law exists in the first place is arguably indicative of an overly complex system. As observed by Danckwerts LJ, and noted by the LRC Paper, public policy "*is not a fixed and immutable matter. It is a concept which, if it has any sense at all, must be alterable by the passage of time*."[96] It is not ideal to have an underpinning public policy that is not sufficiently identifiable.

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[95] This is provided for by Section 13 and 14(2) of the Criminal Law Act 1967 in the following terms: "*[t]he abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.*"

[96] [1968] 1 QB 686 at page 697.

134. The Council is of the view that the statutory exception approach is more appropriate. This is consistent with the statutory exception to maintenance and champerty that has already been created for international commercial arbitration. Such an approach could also allow for delegated legislation to regulate attendant issues.

135. The abolition of the torts of maintenance and champerty simpliciter is the most preferable approach. Sufficient safeguarding mechanisms are already vested in the courts to stay or dismiss proceedings which are meritless or contrary to public policies and therefore, it is unnecessary to underpin these by reference to public policy or other considerations.

Regulatory Models

136. The primary aim of regulation ought to provide protection for those who avail of TPF as well as the non-funded party in a dispute, and to improve the proper administration of justice. There are five models of regulation which fall to be considered. These can be summarised as follows.

Voluntary Self-Regulation

137. A voluntary self-regulation model involves allowing the TPF industry to regulate itself, setting its own standards and overseeing compliance with those standards. Here, membership of an industry association is voluntary and the standards set by the industry association are binding on members, with sanctions imposed on non-complying members by the industry itself. This is the model that operates in England and Wales.

138. The view of the Council is that a voluntary self-regulation system may not be appropriate. A code of conduct would not sufficiently safeguard the industry and provide protection to those who avail of funding. Without independent oversight, it is difficult to regulate funders to sufficient standards and maintain public support. Furthermore, even if industry-led regulation did provide sufficient standards and oversight, in a situation where subscribing to an industry-led association is voluntary, any weight associated with the rules and regulations is entirely undermined.

Enforced Self-Regulation

139. The second model of regulation is for members of the TPF industry to be required by law to subscribe to an industry-led association discussed in the preceding approach. This model is used in Hong Kong.

140. This approach offers more security to those availing of TPF as it ensures that funders are subscribed to an industry-led association. In this regard, funders have a greater level of oversight and can be held accountable for breaches of rules or code of conduct, however concerns remain over the lack of independent industry-led regulation.

Court Certification

141. This model would require court analysis of funding agreements at an early stage. This approach essentially imposes the duties of a regulator on the courts. This approach has recently been recommended by the New Zealand Law Commission (in terms of collective redress actions) and previously adopted by the courts in the Canadian province of Ontario.

142. There are strong arguments in favour of a court certification model. It offers oversight of agreements by impartial means. As noted in the LRC Consultation Paper this approach, would also comply with requirements under the Collective Redress Directive.[97]

Existing Regulator

143. The fourth model is for an existing regulator to take on oversight. Such an approach could involve a licensing scheme vested in, for example, the Central Bank, the Legal Services Regulatory Authority, the Competition and Consumer Protection Commission or another appropriate body. This approach has much to recommend it, on the assumption that the regulatory requirements are not so onerous as to conflict with the existing jurisdiction.

Sui Generis Regime Administered by a New Regulator

144. A *sui generis* regime administered by a new regulator would involve a new independent body being set up to oversee the funding sector. This body could be developed specifically for TPF.

145. Although, this approach would certainly provide the independent oversight necessary, it is not consistent with the need for an proportionate initial response outlined in the LRC paper. This is somewhat of a secondary option to allowing an existing regulator to oversee TPF in that it may be more appropriate for an existing body to regulate TPF provided it has appropriate funding and adequate experience in the area.

Substance – regulatory requirements

146. Best practice in other jurisdictions can operate as a guide. Some or all of the following are examples.

(a) Capital Adequacies of Funders: this refers to the requirement that funders maintain adequate financial resources at all times to meet their obligations to fund all of the disputes they have agreed to fund.

(b) Termination and approval of settlements – the requirement that funders act reasonably and only withdraw services under certain conditions.

[97] Article 10 Directive (EU) 2020/1828

(c) *Control* – funders should exercise control of the litigation or settlement negotiations or cause a litigant's lawyers to act in a certain way.

(d) *Complaints and Sanctioning* - procedures by which complaints can be brought against funders and sanctions as a result.

Overall Conclusion

147. TPF should be legalised in Ireland. The advantages in terms of access to justice, the need to ensure adequate collective redress procedures, and the attraction for business outweigh any potential risks. Funding has been legalised for international arbitration and may be required as a matter of EU law. Ireland is an anomalous outlier in the common law world in maintaining the rules on champerty and maintenance.

148. The most appropriate approach to legalisation is to abolish the torts and offences of maintenance and champerty altogether.

149. TPF should be the subject of some form of independent regulation, the objective of which should be the protection of those who avail of funding and (possibly) the non-funded party to a dispute. Court certification or (or maybe together with) an existing regulator, should be recommended.

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