

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:	E
Last name:	Howey
Location:	UK
Role:	Member of the public
Job title:	Design Consultant
Organisation:	
Are you responding on behalf of your organisation?	No
Your email address:	

Information provided to the Civil Justice Council:

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

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

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

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

The full list of consultation questions is below:

- Please give reasons for your answers. Please do so by reference, where applicable, to the guidance given in the footnotes.
- All answers should be supported by evidence where possible to enable evidence-based conclusions to be drawn.
- It is not necessary to answer all the questions.

Questions concerning *‘whether and how, and if required, by whom, third party funding should be regulated’* and the relationship between third party funding and litigation costs.

1. To what extent, if any, does third party funding currently secure effective access to justice?¹

My observation is that the aspiration of accessing good quality justice in a legal system where litigation funding exists is currently naïve and compromised. Court delivered results are not what they would be had commercial as opposed to altruistic or public interest (no strings attached) third party investment not been involved. That is because the litigation funding models in operation can interfere to such an extent as to change the nature and dynamics of established process and even change the nature of assets subject to litigation. It can also wipe out any resulting gains.

Current models are not adequately risk assessed so that a variety of strategic or inadvertent offences can occur during operation which end up at the regulators doors. This oversight to not risk assess is playing fast and loose with individual(s), society and business stability and also wellbeing in the interest of financial returns alone.

The failure to risk assess is not only down to funders. It extends to solicitors not doing risk assessments which they are required to do and to lodge on case files as a process which has been gone through.

I would pose a question back : ‘At what cost should the concept of justice be delivered?’

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

It can readily undermine equality of arms by its’ very existence. There is no equality where one party is funded and the other not nor where 2 parties are funded either by the same funder where a conflict of interests can arise or by different funders where costs can be inflated through protracting cases which could be resolved by other, less harmful techniques like mediation or arbitration. Additional inequality can arise where each side, if both funded, has access to differing levels of funding and even if their funding amount was equal they are at the mercy of how their solicitor/legal team spend that up within a remit of client best interest. In summary, it is a lottery. It is gambling.

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

Perhaps for complex commercial disputes where it is a choice to litigate if vast sums are at stake but there is no justifiable place for it on current operations within the civil realm including the subset of

¹ When considering this question please bear in mind that access to justice encompasses access to a court, judgment and enforcement and access to non-court-based forms of dispute resolution, whether achieved through negotiation, mediation, complaints or regulatory redress schemes or Ombudsman schemes.

family law. The risks posed by third party funding can outweigh the benefits and there are numerous examples of this both anecdotal and published.

Does the current regulatory framework surrounding third party funding operate sufficiently to regulate third party funding?² If not, what improvements could be made to it?

Evidently not because the reactions of regulators to the problems they are being presented with and their own categorisation of disputes involving litigation funding did not exist for easy reference or comparison. They have been caught unawares and been asked to consider complexities and events which they did not foresee. Those suffering harm have led the regulators to understand and address the nature of inherent business model flaws and resultant problems in their responsible operation.

Litigation Funding products such as loans have not been designed with full regard to regulations and consumer care but have been designed to suit commercial aims, seeking to sidestep or evade established protocols, laws and rules.

4. Please state the major risks or harms that you consider may arise or have arisen with third party funding, and in relation to each state:

Loss of more than people can afford to lose.

a) The nature and seriousness of the risk and harm that occurs or might occur;

The harm is very likely financial both personally and regards any business or livelihood, risk of loss of a home or homelessness, risk to health through stress and worry and in the worst scenario, risk to life, self inflicted or otherwise. Litigation is a dangerous activity. It should not be made easier to access but should be a method of last resort or limited scope. Litigation funding has become the tail that wags the dog.

c) The extent to which identified risks and harm are addressed or mitigated by the current self-regulatory framework and how such risks or harm might be prevented, controlled, or rectified;³

The public facing image of the Association of Litigation Funders came across as amateurish, selective and secretive. It would be hard to know looking in, how it worked either positively or negatively. The concept of self regulation in this arena could be compared to people being allowed to drive without taking lessons or a driving test. No rational person, government or society would allow it.

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

³ Please give full details of each possible mechanism and explain how each would work (including who any potential 'regulator' or self-regulator might be). Such details may make reference to mechanisms used in other countries. Possible mechanisms may include, but are not limited to, various forms of formal regulation (including licensing and conditions, requirements, etc) self-regulation, co-regulation, standards, accreditation, guidance, no regulation, or any other relevant mechanism.

d) For each of the possible mechanisms you have identified at (b) above, what are the advantages and disadvantages compared to other regulatory options/tools that might be applied? In answering this question, please consider how each of the possible mechanisms may affect the third party funding market.

5. Should the same regulatory mechanism apply to: (i) all types of litigation; and (ii) English-seated arbitration?

Probably no

- a. If not, why not?

Regulation is needed that can oversee and respond to the different types of litigation funding based on business model and risk assessments. One regulator could have a tiered system and indeed the issue of cost thresholds needs addressing within that too.

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- b. If so, which types of dispute and/or form of proceedings⁴ should be subject to a different regulatory approaches, and which approach should be applied to which type of dispute and/or form of proceedings?⁵

This is a complex question requiring complex answers which are beyond my knowledge base. But I could propose that regulation of chancery court commercial litigation will need to monitor specific factors as compared to civil and family court say

I observe that the footnote to this question at 5 omits the example of family proceedings in respect of ancillary relief (marital finances), TOLATA claims and child arrangement orders when funded at the same time/concurrently with ancillary relief. In all these examples which are not mentioned, third party litigation funding is the structural backbone of what are known as 'litigation loans'. It is my understanding that the Novitas operation for family litigation loans would only lend on child cases when in court alongside finances as there was no clear route to repayment otherwise.

It may be prudent to have a risk specific regulation for family financial and family child cases IF these are allowed to persist as fundable.. Scrutiny is needed as to whether any family child arrangements cases have in fact been funded by litigation loans in isolation (without finances) as it seems less of a moral barrier and more of a commercial barrier currently.

Within this regulatory sensitivity as to what is and is not allowable for litigation funding clear definitions and rules need setting about loan creation. Currently the regulators to whom complaints may emerge in the family sphere include

SRA, Legal Ombudsman, Financial Ombudsman, FCA, ICO, JCIO, Bar Standards Board plus the litigation loan providers and funders and the courts – this is a wide range of regulators and bodies to

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

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

need to approach when things go wrong and findings are segmented providing an unclear route to redress. This is unfair to the public.

Are different approaches required where cases: (i) involve different types of funding relationship between the third party funder and the funded party, and if so to what extent and why; and (ii) involve different types of funded party, e.g., individual litigants, small and medium-sized businesses; sophisticated commercial litigants, and if so, why?

(i) Not necessarily. Whilst commercial entities may be considered more sophisticated as consumers than individuals they are still vulnerable to exploitation and lack of understanding as organisations are also made up of people and people, on the whole, do not understand this niche sphere of finance and the implications of different relational dynamics. Assuming no knowledge is always a safe place to start from. Plain English Key Facts documents would be appropriate in this business area.

(ii) As per (i) above because the 2 issues are not exclusive, they both involve a complex interplay of legal, commercial and structural dynamics. Not understanding things is a common risk factor and everything that can be done should be done to define and refine Third Party Funding.

6. What do you consider to be the best practices or principles that should underpin regulation, including self-regulation? [Transparency including identity of funders being known to each side and risk assessments to include checking any conflict of interests especially where investors in funding products and funds might be delivering any legal services or judicial roles.](#) This is essential because each commercial entity, individual or otherwise, has a duty under data laws to uphold relevant data obligations and provide privacy policies to anyone whose data is being used by them. This obligation has not been being upheld which demonstrates the amateuristic operation of these impactful financial products and arrangements.

7.

8. What is the relationship, if any, between third party funding and litigation costs? [Surely they are two sides of the same coin, bedfellows.](#) Litigation Costs in relation to some business models will be determined by what the contracts allow. In the family arena that means the litigation costs must not exceed one third of the assets subject to division. That is a very high percentage and can have catastrophic consequences because it is not the individual running the costs up necessarily but a relational process in which they have become a pawn. The relationship being tri-partite, client, solicitor, funder. The financial incentives between solicitor and funders are bigger than the greater good

Further in this context:

- a. What impact, if any, have the level of litigation costs had on the development of third party funding?

[I cannot comment on this accurately because I did not know the cost realities pre-litigation funding. However it is pretty obvious that an interest in litigation on which there will be investment returns will inflate litigation costs, not reduce them unless strict guidelines are imposed. Given it was 1967](#)

when the Criminal Law Act came about there is now almost 58 years of evidence to review to attempt to answer that question mathematically.

What could be assessed readily are comparable cost consequences of the more recent TPF product of the litigation loan where the costs of divorce ancillary relief and child cases before and after this TPF product infiltrated our legal system.

- b. What impact, if any, does third party funding have on the level of litigation costs?

It is surely responsible for the now high levels of litigation costs seen in case after case. Higher returns to investors and funders are achieved when litigation is protracted and carried out slowly and inefficiently.

- c. To what extent, if any, does the current self-regulatory regime impact on the relationship between litigation funding and litigation costs?

It is probably not impacting at all from what I know of the Code of Conduct of ALF.

- d. How might the introduction of a different regulatory mechanism or mechanisms affect that relationship?⁶

It could ensure it worked within reasonable and just parameters where risk is limited and harm prevented.

- e. Should the costs of litigation funding be recoverable as a litigation cost in court proceedings?
- i. If so, why?
 - ii. If not, why not?
9. What impact, if any, does the recoverability of adverse costs and/or security of costs have on access to justice? What impact if, any, do they have on the availability third party funding and/or other forms of litigation funding.
10. Should third party funders remain exposed to paying the costs of proceedings they have funded, and if so to what extent?

Questions concerning ‘whether and, if so to what extent a funder’s return on any third party funding agreement should be subject to a cap.’

11. How do the courts and how does the third party funding market currently control the pricing of third party funding arrangements?
12. Should a funder’s return on any third party funding arrangement be subject to controls, such as a cap?

Yes

- a. If so, why? Harm is caused by costs running away out of all proportion
 - b. If not, why not? N/A
13. If a cap should be applied to a funder’s return:
- a. What level should it be set at and why?

⁶ Please explain your answer by reference to a specified regulatory mechanism or mechanisms.

- b. Should it be set by legislation? Should the court be given a power to set the cap and, if so, a power to revise the cap during the course of proceedings?

Yes court needs powers to set and revise a cap but only by agreement following consultation with both parties.

In respect of family TPF litigation loans there needs careful thought on this which may require legislation as even the Law Commission scoping report published in December 2024 on Financial Remedies on Divorce evades the issue of divorce litigation loans head on and the interference they create as they seek to dovetail into the court led system and processes. It is my stance that they materially destabilise this process and create unwarranted harm through a variety of offences. A search of that document illicitly no reference to 'litigation loan' specifically and has zero hits on 'loan.' It skirts the issue and advances old arguments which have sought to justify the creation of litigation loans aimed at women primarily, but things have moved on and it does not show evidence of having engaged with the public enough to get the current and anecdotal situation assessed.

- c. At which stage in proceedings should the cap be set?

At the beginning with the option to revise throughout, openly and transparently. Currently there is no declaration of loan sums having been advanced.

- d. Are there factors which should be taken into account in determining the appropriate level of cap; and if so, what should be the effect of the presence of each such factor?

Affordability assessments based on what individuals or entities can afford to lose without creating harm.

With reference to family TPF litigation loans. If they are to persist and not going to be outlawed due to their now revealed inherent dangers there needs to be an affordability assessment which considers broad factors such as health, income, financial and life obligations of the parties and calculates a safe level of fees via a transparent process involving both parties to proceedings.

This process should curtail the ability for one party to unilaterally create debt within a process where dissipation of assets is an offence without the agreement of the other party.

However it is more than likely that there are better, less risk ridden ways to pay than via litigation loans at 18% interest rates and these need promoting.

A bit like a funeral plan, there should be levels available Yes, appropriate charging for work done. It should not cost grossly more to a millionaire/multi millionaire than a lower level case. Caps here need to be based on what people can afford to lose. Currently it seems to be the case that a high net worth financial settlement costs figures artificially high but relative to the net worth and not commensurate with the actual work involved in a case. This is an artificial construct.

There needs to be urgent prevention of harm process to halt runaway costs created by unilaterally constructed loans by one party against the other but which drains joint assets.

It should be noted that data offences exist on the part of solicitors creating loans secured on assets and sharing private information with funders without the knowledge or consent of all those involved and will be affected. This is a gross oversight.

Should there be differential caps and, if so, in what context and on what basis?

Questions concerning how third party funding 'should best be deployed relative to other sources of funding, including but not limited to: legal expenses insurance; and crowd funding.'

14. What are the advantages or drawbacks of third party funding?

I cannot see any advantages other than to big corporations or businesses who wish to litigate or see no other option but to litigate.

Please provide answers with reference to: claimants; defendants; the nature and/or type of litigation, e.g., consumer claims, commercial claims, group litigation, collective or representative proceedings; the legal profession; the operation of the civil courts.

Why does CJC not specifically identify family court or do you cover that under civil courts? Is this an oversight or purposeful. It certainly is not clear.

15. What are the alternatives to third party funding?

Credit cards especially at 0% incentives, bank/building society loans, loans from friends and family, remortgage to the benefit of both parties, and others

- a. How do the alternatives compare to each other? How do they compare to third party funding? What advantages or drawbacks do they have?

Cheaper, borrower remains IN control, greater clearer regulatory safeguards, loans from friends and family

Please provide answers with reference to: claimants; defendants; the nature and/or type of litigation, e.g., consumer claims, commercial claims, group litigation, collective or representative proceedings; the legal profession; the operation of the civil courts.

- b. Can other forms of litigation funding complement third party funding?
Alternatives include: Trade Union funding; legal expenses insurance; conditional fee agreements; damages-based agreements; pure funding; crowdfunding. Please add any further alternatives you consider relevant.
- c. If so, when and how?

16. Are any of the alternatives to be encouraged in preference to third party funding? If so, which ones and why are they to be preferred? If so, what reforms might be necessary and why?

Run out of time to answer this

17. Are there any reforms to conditional fee agreements or damages-based agreements that you consider are necessary to promote more certain and effective litigation funding? If so, what reforms might be necessary and why? Should the separate regulatory regimes for CFAs and DBAs be replaced by a single, regulatory regime applicable to all forms of contingent funding agreement?

18. Are there any reforms to legal expenses insurance, whether before-the-event or after-the-event insurance, that you consider are necessary to promote effective litigation funding? Should, for instance, the promotion of a public mandatory legal expenses insurance scheme be considered?

19. What is the relationship between after-the-event insurance and conditional fee agreements and the relationship between after-the-event insurance and third party funding? Is there a need for reform in either regard? If so, what reforms might be necessary and why?
20. Are there any reforms to crowdfunding that you consider necessary? If so, what are they and why?
21. Are there any reforms to portfolio that you consider necessary? If so, what are they and why?
22. Are there any reforms to other funding mechanisms (apart from civil legal aid) that you consider are necessary to promote effective litigation funding? How might the use of those mechanisms be encouraged?

Questions concerning the role that should be played by ‘rules of court, and the court itself . . . in controlling the conduct of litigation supported by third party funding or similar funding arrangements.’

23. Is there a need to amend the Civil Procedure Rules or Competition Appeal Tribunal rules, including the rules relating to representative and/or collective proceedings, to cater for the role that litigation funding plays in the conduct of litigation? If so in what respects are rule changes required and why?

Yes as the TPF products operating in the family arena interfere with process

24. Is there a need to amend the Civil Procedure Rules or Competition Appeal Tribunal Rules to cater for other forms of funding such as pure funding, crowd funding or any of the alternative forms of funding you have referred to in answering question 16? If so in what respects are rule changes required and why?
25. Is there a need to amend the Civil Procedure Rules in the light of the *Rowe* case? If so in what respects are rule changes required and why?
26. What role, if any, should the court play in controlling the pre-action conduct of litigation and/or conduct of litigation after proceedings have commenced where it is supported by third party funding?

Yes, or if not the court somebody needs to. It is a total mess at the moment. The court cannot do its job correctly and gets infected by it because contract is controlling settlements.

27. To what extent, if any, should the existence of funding arrangements or the terms of such funding be disclosed to the court and/or to the funded party’s opponents in proceedings? What effect might disclosure have on parties’ approaches to the conduct of litigation?

This is vital, yes. Full transparency is needed.

Questions concerning provision to protect claimants.

28. To what extent, if at all, do third party funders or other providers of litigation funding exercise control over litigation? To what extent should they do so?

In current terms they do as they can control cases by pulling funding as and when their risk appetite changes or even by persuasion of solicitors.

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

30. Should the court be required to approve the settlement of proceedings where they are funded by third party funders or other providers of litigation funding? If so, should this be required for all or for specific types of proceedings, and why?
31. If the court is to approve the settlement of proceedings, what criteria should the court apply to determine whether to approve the settlement or not?
32. What provision (including provision for professional legal services regulation), if any, needs to be made for the protection of claimants whose litigation is funded by third party funding?
33. To what extent does the third party funding market enable claimants to compare funding options different funders provide effectively?
34. To what extent, if any, do conflicts of interest arise between funded claimants, their legal representatives and/or third party funders where third party funding is provided?
35. Is there a need to reform the current approach to conflicts of interest that may arise where litigation is funded via third party funding? If so, what reforms are necessary and why.

Questions concerning the encouragement of litigation.

36. To what extent, if any, does the availability of third party funding or other forms of litigation funding encourage specific forms of litigation? For instance:
 - a. Do they encourage individuals or businesses to litigate meritorious claims? If so, to what extent do they do so?
 - b. Do they encourage an increase in vexatious litigation or litigation that is without merit? Do they discourage such litigation? If so, to what extent do they do so?
 - c. Do they encourage group litigation, collective and/or representative actions? If so, to what extent do they do so?When answering this question please specify which form of litigation funding mechanism your submission and evidence refers to.
37. To the extent that third party funding or other forms of litigation funding encourage specific forms of litigation, what reforms, if any, are necessary? You may refer back to answers to earlier questions.
38. What steps, if any, could be taken to improve access to information concerning available options for litigation funding for individuals who may need it to pursue or defend claims?

General Issues

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

Run out of available time for such deep questions which need further thought. I may send replies after the event and deadline.

⁷ Please note that the Working Party is not considering civil legal aid.