

**Government Response to  
Report of Te Aka Matua o te Ture | Law Commission  
on  
Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa | Class  
Actions and Litigation Funding**

**Presented to the House of Representatives**

# Government response to Report of Te Aka Matua o te Ture | Law Commission on Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa | Class Actions and Litigation Funding

## Introduction

- 1 The Government has carefully considered the report of te Aka Matua o te Ture | the Law Commission (the Law Commission), Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa | Class Actions and Litigation Funding (the Report).
- 2 The Government thanks the Law Commission for its substantial review of the law on class actions and litigation funding.
- 3 The Government responds to the report in accordance with Cabinet Office circular CO (09) 1, entitled *Law Commission: Processes for Setting the Work programme and Government Response to Reports*.

## Class actions and litigation funding

- 4 A class action is a civil legal action brought by an individual on behalf of a group or class of people with similar legal interests. Financial barriers exist due to both the costs of bringing a claim to court, as well as the risk of an order for adverse costs which would require the plaintiff to pay the defendant's costs. Combining many small claims creates a much larger claim which is more likely to be economically viable.
- 5 New Zealand does not currently have a class actions regime. Instead, claims that might be brought as class actions in other jurisdictions are brought as representative actions under High Court Rule 4.24. This rule allows a claim to be brought "on behalf of, or for the benefit of, all persons with the same interest in the subject matter of the proceeding."
- 6 Litigation funding is where a third party, with no interest or involvement in court proceedings, resources a party to bring a legal action. The resourcing can amount to some or all of a party's court related costs. Typically, if the action is successful, the funder will obtain a portion of the damages or costs recovered in order to reimburse them for the costs of litigation and compensate them for the risk taken on by funding the case. Litigation funding is most commonly used in representative proceedings/class actions but can also be used in other proceedings.

## Law Commission Report

- 7 In 2019, the Law Commission began its review of the law relating to class actions and litigation funding. The review was prompted by the profession as the absence of specific legislation and regulation relating to class actions and litigation funding has resulted in legal practitioners, litigants and litigation funders operating without clear guidance.
- 8 The final Report was tabled in the House on 27 June 2022 and includes 121 recommendations. The Law Commission states that in the absence of a class actions regime, the law on representative actions has developed incrementally without a comprehensive public policy process or clear procedural rules. The report notes that this has resulted in a lack of certainty and clarity, leading to extensive, costly and slow litigation due to the number of procedural issues to be determined which requires considerable court resources. The significant costs to the parties are likely to have created access to justice barriers for some plaintiffs.
- 9 The Law Commission observed that the torts of maintenance and champerty<sup>1</sup> create uncertainty about the permissibility of litigation funding in New Zealand. This uncertainty may impact on the availability and affordability of litigation funding. However, as litigation funding can improve access to justice by enabling people to bring claims that they otherwise would not have been able to afford to bring, the courts have adopted a cautiously permissive approach to it.
- 10 The Law Commission found that both class actions and litigation funding could benefit from clear procedures and guidance.

### *The Law Commission's Recommendations*

- 11 The Law Commission's report makes 121 recommendations and concludes that both class actions and litigation funding could benefit from clear procedures and guidance.
- 12 The Law Commission identified consumers and shareholders/investors as groups likely to benefit from class actions. In turn, this can also strengthen regulatory regimes which rely, to an extent, on these groups being able to enforce their rights.
- 13 The key recommendations are as follows:

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<sup>1</sup> Maintenance is where a person, without lawful justification, assists a party to civil action to bring or defend the action, causing damage or financial loss to the other party. Champerty is also a form of maintenance, where financial assistance is provided in return for a share of any recovery.

### ***Statutory class actions regime***

13.1 The Law Commission recommends the creation of a statutory class actions regime, underpinned by a Class Actions Act. The regime would:

- set out the procedure for class actions from commencement and certification (court approval for the class action to proceed through the court) through to settlement or judgment;
- explicitly state the role and duty of the representative plaintiff;
- prescribe procedures for concurrent class actions;
- establish the test for certification of a proceeding by the court before it can proceed; and
- specify processes for potential class members to choose whether or not to participate in the class action (opting in and out).

### ***Maintenance and champerty***

13.2 The Law Commission recommends abolishing the torts of maintenance and champerty to clarify that litigation funding is permitted.

### ***Court oversight of litigation funding agreements***

13.3 There is currently no regulatory regime or oversight mechanism for litigation funding at present. However, litigation funding can enable plaintiffs to bring class actions by removing the financial burden.

13.4 The Law Commission recommends introducing a court oversight model in the Class Actions Act for litigation funding in class actions to protect plaintiffs and ensure the court's integrity.

13.5 Litigation funding agreements for class actions would only be enforceable by funders if approved by the court. This would include:

- the plaintiff disclosing their litigation funding agreement to the court; and
- consideration by the court as to whether the litigation funder's commission is reasonable and fair.

### ***Government fund for public interest class actions***

13.6 The Law Commission recommends that the Government consider establishing a government-funded public class action fund for public

interest claims that are not sufficiently profitable for litigation funders to take on.

***Class actions rules for the employment jurisdiction***

13.7 The Law Commission also recommends that the Government consider developing class action rules for the employment jurisdiction as this fell outside the scope of its review. The Law Commission notes that this work could be progressed separately from the other recommendations.

**The Government accepts the Law Commission's recommendations in principle**

14 The Government thanks the Law Commission and all those who have contributed to its thorough review of class actions and litigation funding.

15 The Government notes that the recommendations in this report align with the work being undertaken to support victims to enforce their rights. Those who would benefit from a statutory class actions regime, such as consumers, are also struggling to access justice and enforce their rights.

16 The Government accepts the Law Commission's recommendations in principle, that:

16.1 a statutory regime for class actions, underpinned by a Class Actions Act, will provide clarity and could enhance access to justice;

16.2 abolishing the torts of maintenance and champerty would clarify the permissibility of litigation funding; and

16.3 court oversight of litigation funding agreements in class actions should aid in ensuring the terms of agreements are fair and reasonable.

17 The Government also acknowledges the Law Commission's recommendations to consider establishing a public class action fund and developing class actions rules for the employment jurisdiction.

***Further work is required***

18 While the Law Commission has produced a comprehensive package of recommendations, there are some aspects of the recommendations that require further consideration. These include:

18.1 the policy and implementation considerations of introducing a public fund for public interest class actions litigation;

18.2 whether litigation funding oversight should be restricted only to class actions; and

- 18.3 analysis on the impact of both class actions and court oversight of litigation funding agreements on court resource, considering that implementing the regime will be putting extra responsibilities onto the judiciary and court processes, against the context of the increase in the number of active cases currently before the High Court.
- 19 Consideration will also need to be given as to whether to progress developing class action rules for the employment jurisdiction concurrently with the other recommendations.

## **Conclusion**

- 20 The Government acknowledges the substantial work that has gone into the Law Commission's report and is appreciative of the detailed recommendations produced by the Law Commission.
- 21 The Government is supportive of the recommendations in principle and intends to undertake policy work to advance them beginning in 2023. Due to the technical nature of the issues and the need for legislative reform to give effect to the recommendations, advancing these reforms will take a period of time and resourcing this work will need to be balanced against other Government priorities.