

**Hon Kiri Allan**  
Minister of Justice

**Proactive release – Documents relating to the Government response to the Law Commission’s report *Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa* | *Class Actions and Litigation Funding***

Date of issue: 15 December 2023

The following documents have been proactively released in accordance with Cabinet Office Circular CO (18) 4.

No.	Document	Comments
1	<b>Government Response to Te Aka Matua o te Ture   Law Commission’s Report Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa   Class Actions and Litigation Funding</b> <i>Cabinet paper</i> Office of the Minister of Justice 24 November 2022	Released in full.
2.	<b>LEG-22-MIN-0220</b> <i>Cabinet minute</i> Cabinet Office Meeting date: 24 November 2022	Released in full.

## In Confidence

Office of the Minister of Justice

Cabinet Legislation Committee

### GOVERNMENT RESPONSE TO TE AKA MATUA O TE TURE | LAW COMMISSION'S REPORT KO NGĀ HUNGA TAKE WHAIPĀNGA ME NGĀ PŪTEA TAUTIRINGA | CLASS ACTIONS AND LITIGATION FUNDING

#### Proposal

- 1 This paper seeks approval of the Government's response to Te Aka Matua o te Ture | Law Commission's (the Law Commission) report *Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa* | Class Actions and Litigation Funding (the Report).

#### Executive Summary

- 2 The Law Commission recently completed a review of the law relating to class actions and litigation funding. On 27 June 2022, I tabled their Report in the House. The Government's response is due no later than 13 December 2022.
- 3 I am seeking Cabinet's approval to table the proposed Government response (**Attachment 1**) in the House.
- 4 The Law Commission made 121 recommendations in its report, with key recommendations proposing a statutory class actions regime, underpinned by a Class Actions Act.
- 5 After examining the Law Commission's recommendations, I consider that a statutory regime for class action, including court oversight for litigation funding agreements will ensure that class actions become a more accessible and efficient mechanism for New Zealanders to bring civil proceedings, and thereby should improve their access to justice.
- 6 While the Law Commission has produced a comprehensive package of recommendations, there are some aspects of the recommendations that require further consideration.
- 7 These include:
  - 7.1. the policy and implementation considerations of introducing a public fund for public interest class actions litigation;
  - 7.2. whether litigation funding oversight should be restricted only to class actions; and

- 7.3. 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.
- 8 I therefore propose the attached Government response to the Law Commission's report on class actions and litigation funding which:
  - 8.1. thanks the Law Commission for the substantial work that was put into the review;
  - 8.2. notes that the Law Commission's recommendations align with the Government's access to justice priorities, including a focus on enhancing the rights of victims;
  - 8.3. accepts in principle the Law Commission's recommendations to implement a statutory class actions regime, introduce court oversight of litigation funding agreements, and abolish the torts of maintenance and champerty;
  - 8.4. acknowledges the Law Commission's recommendations to introduce a public fund for public interest litigation and class actions rules for the employment jurisdiction and states that further work is required on the policy and implementation considerations of these recommendations;
  - 8.5. indicates that the Government will need time to work through the policy, operational and legislative implications of the Law Commission's recommendations; and
  - 8.6. indicates the Government's intention to advance this work as quickly as resource permits.

## Background

- 9 The Law Commission recently completed a review of the law relating to class actions and litigation funding. The review was prompted by the legal 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.
- 10 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.

- 11 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.”
- 12 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.
- 13 The torts of maintenance and champerty create uncertainty about the permissibility of litigation funding in New Zealand.

**The Law Commission found that both class actions and litigation funding could benefit from clear procedures and guidance**

- 14 In 2019, the Law Commission began its review of class actions and litigation funding. The final Report was presented to the previous Minister of Justice on 27 May 2022 and includes 121 recommendations.
- 15 The Law Commission found that High Court Rule 4.24 on representative actions is not fit-for-purpose for today’s complex litigation that is being brought under it. In the absence of a class actions regime, the law on representative actions has been incrementally developed without a comprehensive public policy process or clear procedural rules. 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 barriers for some plaintiffs.
- 16 The Law Commission also noted that litigation funding could improve access to justice by enabling people to bring claims that they otherwise would not have been able to afford to bring and so the courts have adopted a cautiously permissive approach to it.
- 17 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.

***Key recommendations***

18 The Law Commission ultimately concluded that a statutory class actions regime, underpinned by a Class Actions Act, would benefit New Zealanders by providing better clarity of law, regulation and procedure. The proposed regime would:

- 18.1. 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;
- 18.2. explicitly state the role and duty of the representative plaintiff,
- 18.3. prescribe procedures for concurrent class actions,
- 18.4. establish the test for certification of a proceeding by the court before it can proceed, and
- 18.5. specify processes for potential class members to choose whether or not to participate in the class action (opting in and out).

19 In terms of litigation funding, the Law Commission also recommends:

- 19.1. abolishing the torts of maintenance and champerty to clarify that litigation funding is permitted;
- 19.2. introducing a court oversight model in the Class Actions Act for litigation funding in class actions specifically. Litigation funding agreements for class actions would only be enforceable by funders if approved by the court. This would include:
  - 19.2.1. the plaintiff disclosing their litigation funding agreement to the court; and
  - 19.2.2. consideration by the court as to whether the litigation funder's commission is reasonable and fair.
- 19.3. establishing a Government-funded public class action fund for public interest claims that are not sufficiently profitable for litigation funders to take on.

20 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.

## Comment on the Law Commission's findings

- 21 I recommend that we accept the Law Commission's recommendations in principle, and I support undertaking work to advance the Law Commission's recommendations.
- 22 I consider that a statutory regime for class action, including court oversight for litigation funding agreements will ensure that class actions become a more accessible and efficient mechanism for New Zealanders to bring civil proceedings, and thereby should improve their access to justice.
- 23 While the Law Commission has produced a comprehensive package of recommendations, there are some aspects of the recommendations that require further consideration. These include:
- 23.1. the policy and implementation considerations of introducing a public fund for public interest class actions litigation;
  - 23.2. whether litigation funding oversight should be restricted only to class actions; and
  - 23.3. 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.
- 24 The Law Commission also recommends that the Government consider developing class action rules for the employment jurisdiction. If Cabinet approves the Government response, I will consider whether to progress this recommendation concurrently with the other recommendations when I make determinations on the scope of the project. As a next step, my officials will be providing me advice in March 2023. I will be looking to progress legislation as quickly as possible.
- 25 I have previously noted my intention to undertake a victim-centric approach to the Justice portfolio. I note that the recommendations in the Law Commission's 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.
- 26 Based on the above, I therefore seek Cabinet's agreement to present the attached Government response to the House (**Attachment 1**) which:
- 26.1. thanks the Law Commission for the substantial work that was put into the review;

- 26.2. notes that the Law Commission's recommendations align with the Government's access to justice priorities, including a focus on enhancing the rights of victims;
- 26.3. accepts in principle the Law Commission's recommendations to implement a statutory class actions regime, introduce court oversight of litigation funding agreements, and abolish the torts of maintenance and champerty;
- 26.4. acknowledges the Law Commission's recommendations to introduce a public fund for public interest litigation and class actions rules for the employment jurisdiction and states that further work is required on the policy and implementation considerations of these recommendations;
- 26.5. indicates that the Government will need time to work through the policy, operational and legislative implications of the Law Commission's recommendations; and
- 26.6. indicates the Government's intention to advance this work as quickly as resource permits.

### **Timing of the government response**

- 27 The relevant Cabinet Office circular CO (09) 1 sets out processes for responding to Law Commission reports. It requires the Government to present a formal response to the House within 120 working days of the presentation of a Law Commission report.
- 28 This means I am required to present the Government's response to the report no later than 13 December 2022.

### **Consultation**

- 29 The Law Commission, Ministry of Business, Innovation and Employment, Crown Law and the Treasury were consulted in developing this paper and their feedback has been incorporated. The Department of Prime Minister and Cabinet's Policy Advisory Group has also been informed.
- 30 In the course of its review, the Law Commission consulted with Government agencies, members of the legal profession, litigation funders, business and community organisations, participants in representative actions, the Rules Committee, academics both domestically and internationally, and the public.

### **Treaty implications**

- 31 Approval of the Government response raises no direct concerns in relation to the Treaty of Waitangi.

32 The Law Commission did consider the impact of a class actions regime on Māori collective litigation. As there are existing mechanisms for pursuing Māori collective litigation, such as the Waitangi Tribunal, the Law Commission do not envision an increase in class actions in this area. However, they note that individual Māori plaintiffs could still benefit from using the system.

### **Human rights**

33 Approval of the attached Government response has no direct human rights implications. There are existing procedures for bringing group litigation under the Human Rights Act 1993.<sup>1</sup>

### **Gender implications**

34 Approval of the Government responses raises no direct gender concerns.

### **Disability perspective**

35 Approval of the Government response raises no direct implications for people with disabilities.

### **Legislative implications**

36 This paper has no legislative implications, however, implementing the Law Commission's recommendations will require new legislation, as well as amendments to existing legislation. The legislative implications of these proposed changes will form part of further advice to Cabinet in due course.

### **Regulatory impact analysis**

37 Regulatory impact analysis is not required as this paper poses no regulatory implications. I intend to undertake regulatory impact analysis once policy decisions are being sought.

### **Financial implications**

38 This paper has no financial implications. The Ministry of Justice will be able to fund the scoping and analysis associated with implementing the recommendations within baselines. However, policy decisions resulting from implementing the Law Commission's recommendations, in particular, introducing a public class actions fund will have substantial financial implications which will be considered when policy decisions are being sought.

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<sup>1</sup> Sections 92B(2) and 90(1)(c).



## Publicity

39 I propose to release a media statement announcing the presentation of the Government response on the day that it is presented to the House of Representatives.

40 The Law Commission will publish the Government response on its website.

## Proactive Release

41 I propose to proactively release this paper in full, within 30 business days of the decision.

## Recommendations

42 The Minister of Justice recommends that the Cabinet Legislation Committee:

42.1. **note** that on 27 June 2022 the Minister Responsible for the Law Commission presented the Law Commission's report entitled *Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa* | Class Actions and Litigation Funding to the House;

42.2. **note** that the Law Commission found that class actions and litigation funding would benefit from clear procedures and processes;

42.3. **note** that the Law Commission made 121 recommendations relating to the law on class actions and litigation funding, including:

42.3.1. introduce a statutory regime for class actions, underpinned by a new Class Actions Act;

42.3.2. establish a court oversight model for litigation funding agreements in class actions; and

42.3.3. abolish the torts of maintenance and champerty.

42.4. **approve** the proposed government response, attached to this submission, to the report of the Law Commission entitled *Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa* | Class Actions and Litigation Funding, which;

42.4.1. thanks the Law Commission for the substantial work that was put into the review;

42.4.2. notes that the Law Commission's recommendations align with the Government's access to justice priorities, including a focus on enhancing the rights of victims;

- 42.4.3. accepts in principle the Law Commission's recommendations to implement a statutory class actions regime, introduce court oversight of litigation funding agreements, and abolish the torts of maintenance and champerty;
  - 42.4.4. acknowledges the Law Commission's recommendations to introduce a public fund for public interest litigation and class actions rules for the employment jurisdiction and states that further work is required on the policy and implementation considerations of these recommendations;
  - 42.4.5. indicates that the Government will need time to work through the policy, operational and legislative implications of the Law Commission's recommendations; and
  - 42.4.6. indicates the Government's intention to advance this work as quickly as resource permits.
- 42.5. **note** that the government response must be presented to the House by 13 December 2022;
- 42.6. **invite** the Minister of Justice to present the government response to the House.

Authorised for lodgement

Hon Kiri Allan

Minister of Justice



# Cabinet Legislation Committee

## Minute of Decision

*This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.*

### Government Response to the Law Commission's Report on Class Actions and Litigation Funding

Portfolio Justice

On 24 November 2022, the Cabinet Legislation Committee:

- 1 **noted** that on 27 June 2022 the Minister Responsible for the Law Commission presented the Law Commission's report entitled *Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa* | Class Actions and Litigation Funding to the House;
- 2 **noted** that the Law Commission found that class actions and litigation funding would benefit from clear procedures and processes;
- 3 **noted** that the Law Commission made 121 recommendations relating to the law on class actions and litigation funding, including:
  - 3.1 introduce a statutory regime for class actions, underpinned by a new Class Actions Act;
  - 3.2 establish a court oversight model for litigation funding agreements in class actions;
  - 3.3 abolish the torts of maintenance and champerty;
- 4 **approved** the proposed government response, attached to the submission under LEG-22-SUB-0220, to the report of the Law Commission entitled *Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa* | Class Actions and Litigation Funding, which:
  - 4.1 thanks the Law Commission for the substantial work that was put into the review;
  - 4.2 notes that the Law Commission's recommendations align with the government's access to justice priorities, including a focus on enhancing the rights of victims;
  - 4.3 accepts in principle the Law Commission's recommendations to implement a statutory class actions regime, introduce court oversight of litigation funding agreements, and abolish the torts of maintenance and champerty;
  - 4.4 acknowledges the Law Commission's recommendations to introduce a public fund for public interest litigation and class actions rules for the employment jurisdiction and states that further work is required on the policy and implementation considerations of these recommendations;

- 4.5 indicates that the government will need time to work through the policy, operational and legislative implications of the Law Commission's recommendations;
- 4.6 indicates the government's intention to advance this work as quickly as resource permits;
- 5 **noted** that the government response must be presented to the House by 13 December 2022;
- 6 **invited** the Minister of Justice to present the government response to the House.

Rebecca Davies  
Committee Secretary

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**Present:**

Hon Chris Hipkins (Chair)  
Hon Poto Williams  
Hon Dr David Clark  
Hon Kieran McAnulty  
Dr Duncan Webb, MP

**Officials present from:**

Office of the Prime Minister  
Officials Committee for LEG