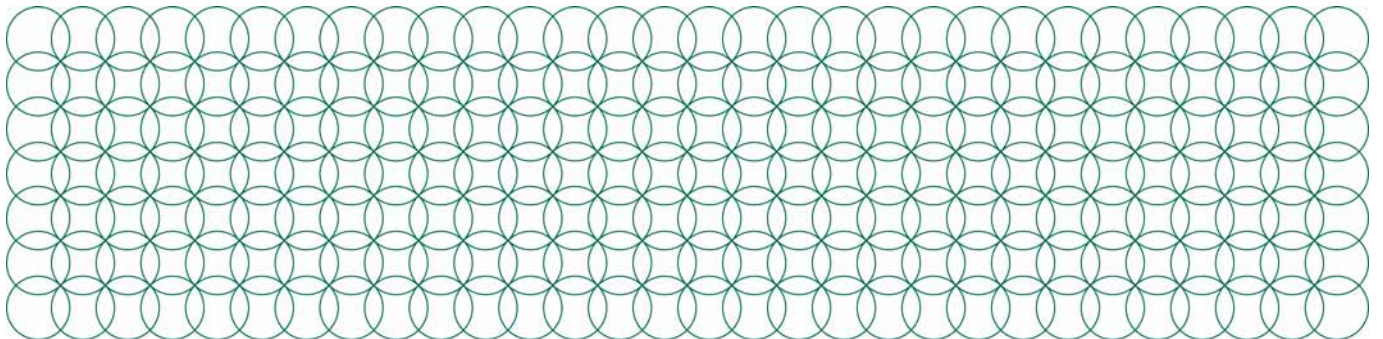




Ministry of  
**JUSTICE**

**The Government's Response to  
the Civil Justice Council's  
Report:  
'Improving Access to Justice through  
Collective Actions'**

July 2009





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**The Government's Response to the Civil Justice Council's Report:  
'Improving Access to Justice through Collective Actions'**

## Executive Summary

- The Civil Justice Council's report *Improving Access to Justice through Collective Actions* (December 2008) recommended that it should be possible for collective actions to be brought by representative bodies in respect of any type of civil law claim.
- The Government does not support the introduction of a generic right of collective action. It believes that such rights should be considered, and where appropriate introduced, in respect of specific 'sectors'.
- Rights of action should be introduced only where there is evidence of need and following an assessment of economic and other impacts and consideration of alternative approaches.
- In particular, regulatory options should be considered before introducing court based options. For example, in some sectors it might be appropriate to give regulators power to order the payment of compensation.
- The distinction between opt-in and opt-out models for collective actions is not necessarily clear cut. They are to some extent part of a continuum. There are several options depending on the stage of proceedings at which the class is closed. Some of these may combine the features and benefits of both models.
- The issue of who may bring collective actions is best determined sector by sector. Different criteria and methods of authorisation may apply (including authorisation by the court on a case by case basis).
- The existence of effective ADR mechanisms in any collective action procedure will be crucial. So too will strong case management by the court, including merits and cost-benefit criteria.
- The 'loser pays' principle for costs should be maintained to help deter unmeritorious litigation.
- The Government will develop a framework document setting out the issues to be addressed when introducing a right of collective action, with options and, where appropriate, a preferred approach. This will act as a 'toolkit' for policy makers and legislators.
- The Ministry of Justice will work with the Civil Justice Council and Civil Procedure Rule Committee to develop flexible generic procedural rules within which any collective action scheme can operate.

## Responses to Recommendations

### Introduction

1. The Civil Justice Council's report *Improving Access to Justice through Collective Actions* was published on 12 December 2008. The report was published as formal advice to the Lord Chancellor and invited him to provide a formal response.
2. This paper constitutes the Government's formal response. The Government would like to thank the Civil Justice Council (CJC) and all those who assisted in the preparation of this important report for all their hard work.

### Overview

3. A collective action is a civil action brought (or defended) by a representative body or party on behalf of a class or group of litigants, all of whom would otherwise have a right to bring a claim individually if they chose. The result binds the members of the group or class as if they were themselves parties before the court. This and related terms are defined in the glossary at the end of this paper and marked GL when they first appear below.
4. The primary recommendation made by the CJC is for the introduction of a generic collective action<sup>GL</sup> enabling actions to be brought by representatives in relation to any type of civil claim in which multiple parties have an interest. The report argues that this will 'introduce a more, efficient, economical and fair means of increasing access to justice for all, claimant and defendant alike, whilst benefiting, through the economies and efficiency gains it brings, the proper administration of justice'.
5. The CJC also recommends that the court should control, by way of a certification process, whether collective actions may be brought and whether they should be on an opt-in<sup>GL</sup> or opt-out<sup>GL</sup> basis. This process could consider, among other things, the availability and suitability of alternative options, legal merits and whether the likely benefits justify the cost. The report also recommends strong case management by the court and court approval of the fairness of settlements.
6. The report makes it clear that a generic right of action need not preclude other reforms of civil court procedure and alternative options, including reform of the Group Litigation Order (GLO)<sup>GL</sup> and development of regulatory compensatory mechanisms.

7. The report refers to a number of cases in England and Wales where it considers that better access to justice and judicial efficiency could have been achieved by a collective opt-out regime. Examples given by the CJC include bank charge claims by bank customers, claims involving unfair terms in consumer contracts; where financial penalties have punished anti-competitive behaviour but follow on actions have not been brought, and employment claims relating to equal pay, sex discrimination and working time directives.
8. The main evidence of a need for reform in the report is extracted from a paper written by Rachael Mulheron, Professor of Law at Queen Mary, University of London.<sup>1</sup> It consists in the main of details of the operation of collective actions in other jurisdictions, primarily Australia, Ontario, Portugal and the USA. It points to the larger number and range of collective actions in the first two compared to the use of the GLO here. But, without consideration of the wider economic, social and legal contexts, such comparisons do not constitute direct evidence of need in England and Wales. There is also little consideration or evidence of wider economic impacts of the overseas systems and whether these have been negative, positive or neutral. For example in Portugal a consumer organisation is exempt from an adverse costs order should it lose a representative claim. Whilst this might remove a disincentive for bringing meritorious claims it could also have the undesirable effect of removing the barrier to bringing borderline or unmeritorious claims, whilst burdening business with their cost. Neither is consideration given to whether there were viable alternatives to the creation of opt-out collective actions.
9. The Government does not support the introduction of a generic right of action across all sectors. We believe that a sector based approach to the introduction of collective action rights is likely to produce a better outcome overall and to be more achievable. This paper sets out the rationale for that view but also identifies where we agree and disagree with the CJC's recommendations that are relevant to the form and operation of any collective action rights that might be introduced. At the end of this paper the response to each specific recommendation is summarised.
10. The purpose of civil litigation should be to secure redress for individuals or groups whose private law rights have been breached. The Government accepts the CJC's conclusion that there may be circumstances where cases could be brought more efficiently on a collective basis. Where common issues of fact or law exist it should in general be more cost effective, for both the parties and their funders and the courts, if they are dealt with only once. That said, adversarial civil litigation is inherently risky and can be very costly. For this reason, both the Government and the courts view litigation as, in general, the dispute resolution system of last resort. Before proceeding to look at court based solutions it is important to consider alternatives and, in the context of problems affecting a large

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<sup>1</sup> R Mullheron, Reform of Collective Redress in England and Wales: A Perspective of Need (2008).

number of people to examine in particular whether there are viable regulatory alternatives. The scope for ADR<sup>GL</sup> (alternative dispute resolution) should also be explored before resorting to court. If court proceedings are appropriate, it will be vital to ensure that there is a strong case management and filters in place to safeguard against weak or trivial litigation and control costs.

11. The Government has concluded that representative rights of action should be introduced only where there is clear evidence of need. Policy makers for the relevant sector should be satisfied that access to justice can be achieved more cost-effectively and proportionately by collective court based litigation, rather than through individual claims or by other options, such as enhanced regulatory powers.
12. The Government considers that the only practical way forward is on a sector by sector basis. The reason for this is twofold. Firstly there are potential structural differences between the sectors which will require different consideration. For example the existence of a regulatory framework, and the nature of the regulation in place is likely to vary substantially between sectors. So will the existence and nature of a body or bodies suitable to act as representatives. The balance of the issues concerning the merits of the opt-in and opt-out approaches, and the implications of the latter for the basis and distribution of damages, could also vary between sectors. All these issues, which are discussed further below, could directly affect what needs to be included in legislation to create a representative action for a sector.
13. Secondly, it will be necessary to undertake a full assessment of the likely economic and other impacts before implementing any reform. However, a meaningful global impact assessment would be virtually impossible to achieve and if such an impact assessment could be constructed it would not necessarily be helpful. An overall positive assessment would inevitably miss or underplay considerations specific to individual sectors, some of which might be significantly adverse. For example, defendants in some economic sectors might be particularly vulnerable to the risk of disproportionate 'blackmail suits'. If the overall assessment were to prove negative that might prevent further progress altogether, even though there were potential benefits to be had in some areas.

### **Primary Legislation**

14. Currently the general law does not provide for a collective action to be brought by any party which does not have a right of action itself in respect of the claim. It is the Government's view that any right to bring this type of action would have to be created in primary legislation. This has already been done in one case by s.47B of the Competition Act 1998 (introduced by s.19 of the Enterprise Act 2002). Amendments to the Civil Procedure Rules could not be used to create such a right, because a right of action is a matter of substantive law, not simply an issue of practice or procedure.

15. We therefore agree with the CJC that any right of representative action must be created by primary legislation. It would be politically and constitutionally inappropriate, as well as legally uncertain, to attempt to do this solely by rules. Furthermore, as noted earlier, the Government does not consider that an identical approach across the full spectrum of the civil rights is necessary or desirable. The approach may vary between sectors according to their respective economic and regulatory circumstances and in respect of issues such as the authorisation of representative bodies and the allocation of damages. For that reason any primary legislation will be specific to the sector concerned and would be introduced by the Government Department responsible for that area.
16. Any legislation would focus on creating the primary right of action and on other substantive issues such as how representative bodies are to be authorised, limitation periods and allocation of damages. Procedural issues would be dealt with in rules of court which will, so far as practicable, adopt a generic approach.

### The Regulatory Environment

17. One of the most important factors that will vary between sectors is the regulatory environment. While some sectors, e.g. public utilities and the financial sector have a formal regulatory framework in place this is not true of every sector. In principle, regulatory solutions would appear to have a number of advantages over private civil litigation as a route to compensation in cases of widespread abuse. They may have the capacity to deal with matters in a holistic and relatively inexpensive and timely way. However, the effectiveness of this approach will depend on the resources available in the relevant regulator. Some regulators have expressed concerns that delivering compensation could distract them from their core role. There are also risks, such as the possibility of challenge by way of judicial review in respect of any new role in securing compensation.
18. The CJC makes the key assumption that regulation is 'not primarily suited to resolve the very wide range of detriment that can give rise to the need for large scale remedial action' and that private action is therefore to be preferred. The Government does not agree with this underlying assumption. While regulatory aims and objectives are usually strategic and not specifically focussed on compensatory objectives, this does not preclude their adaptation for this purpose. Where regulatory bodies exist and are in a position to act on behalf of consumers or other groups they could for example be given power to order compensation to be paid to consumers in addition to or instead of a financial penalty.
19. The decision on whether to adopt what might be termed a 'regulation plus' model would be for the Government Department responsible for the relevant sector, but it might be a more cost-effective way of dealing with cases involving a large number of small claims. A retailer could for example be ordered by a regulator to pay a full or partial refund to all affected consumers who could prove purchase. That would be far less

expensive and risky than a collective action, especially where the individual amounts at stake are very small.

20. This approach could be achieved in some cases without further legislation through the use of more flexible civil sanctions allowed under the *Regulatory Enforcement and Sanctions Act 2008*.

### **Authorisation of Representative bodies**

21. The CJC has recommended that collective claims should be capable of being brought by 'a wide range of representative parties: individual representative claimants or defendants, designated bodies and ad hoc bodies'. CPR Rule 19.6 already provides to some extent for the first, allowing for claims to be brought or defended by those with the 'same interest' on behalf of others in the same category. The recommendation would widen this by providing for such actions to be brought by parties that do not themselves have a direct cause of action.
22. The Government agrees that, in sectors where the case for facilitating collective actions is made, it should be possible for such actions to be brought by representative bodies which do not have a direct claim. This is more likely to deliver cost-effective access to justice than reliance on the existing representative party rule. A representative body should be in a position to manage the litigation more expertly and dispassionately than an affected individual, and be unlikely to wish to pursue weak claims or refuse realistic offers to settle. Access should be easier because a representative body is likely be better placed and more willing to bear the risks and costs of potentially complex litigation than a single party.
23. As noted above, individual litigants with a direct interest in the dispute may already act as representative parties under CPR Rule 19.6 (assuming the 'same interest' condition which the courts have construed narrowly is fulfilled). The CJC suggest that the Lord Chancellor could be given power to designate a second category of bodies in a similar way to the current system for designating bodies entitled to bring claims under the Competition Act. In addition it suggests that a third category could be authorised to bring collective actions by the court on an ad hoc basis, as part of the certification process which it proposes should apply to every claim.
24. In line with our view that collective actions should be introduced on a sector by sector basis, the Government does not believe that there should be a single approach or set of approaches to the issue of authorisation. Some sectors will have strong appropriate bodies, capable and willing to act in a representative capacity. However, in other sectors suitable representative bodies may not exist at all. The suitability criteria for such bodies may also vary between sectors.
25. The best approach in any given sector is likely to vary. It could rely on ministerial designation of one or more bodies or categories of body, or *ad hoc* court authorisation against generic or sector-specific criteria,

or a combination of both. It is the Government's view that the method of designation should be determined by the Department responsible for the relevant sector because they would be in the best position to assess the criteria relevant to that sector. This could be done in primary or secondary legislation or by giving administrative power to designate to a Minister, official or other body.

26. Representative bodies would not be under any duty to bring cases. The decision on whether or not to bring a case must ultimately be for that body, which will take a decision based on all the circumstances, including its other priorities as well as the importance and prospects of success of the particular claim. In the event that a particular representative body decides not to bring an action potential litigants will retain their right of action and will be able to decide whether or not to bring a claim in their own right. It will, however, be important to ensure that measures are put in place to avoid satellite litigation so far as possible, including claims or judicial review proceedings (where applicable) against representative bodies, by parties dissatisfied with a decision to either bring or refuse to bring a particular claim.

### Opt-In versus Opt-Out

27. The CJC recommends that collective claims should in principle be able to be brought on either an opt-out or opt-in basis, subject to consideration by the court as to which was the more suitable as part of the certification process.
28. The CJC suggests, for example, that an opt-out system might be best suited to actions seeking to vindicate civil or other general rights where there is a preponderance of common areas of law or fact.
29. On the other hand, it gives the example of a mass tort claim where the claims are factually complex and with different areas of causation. It suggests that these type of claims might be better taken forward as a number of discrete opt-in actions, where claims are grouped together on the basis of their similarities or as an opt-out action on common issues with decertification to follow and the claims then proceeding on an opt-in basis or as GLOs.
30. This is a complex and contentious issue. Advocates of the opt-out approach point to the procedural difficulties with getting an opt-in action off the ground. In particular, it can be difficult to identify and mobilise sufficient members of a class at an early stage in order to demonstrate that the cost-benefit of the action and secure funding. Evidential difficulties can also arise if only a few members of a class are contained in the group represented before the court.
31. On the other hand, opponents of the opt-out approach point to several difficulties of principle. Parties' rights are determined in their absence and,

quite possibly, ignorance of the action.<sup>2</sup> Secondly, damages have to be assessed without direct knowledge of the individual damage to each class member and quite possibly of the exact size of the class. Also, it is likely that the defendant will pay more in damages than is ever used to compensate class members. Thirdly, some consider it wrong, and likely to fuel a 'compensation culture' for people to obtain damages having taken no positive steps to participate in an action and quite possibly without knowing it existed.

32. Whether an action is taken forward on an opt-in or an opt-out basis, it will be equally important to ensure that the claim is properly advertised. In an opt-in claim this will be necessary in order to achieve a significant number of active participants needed to ensure a viable case. For opt-out claims it will be important because the class representative will need to ensure that as many class members as possible are aware of the claim so that they can take an active decision to remain represented in it or to opt-out. Extensive publicity will therefore be required to minimise the risk that individuals' rights are determined without their knowledge or consent in breach of natural justice and human rights. The only difference will be in the timing of that publicity. For an opt-in it will be at an early stage, probably before a claim is issued. For opt-out cases it will be possible to publicise the claim at a much later stage, quite possibly after an award of damages or settlement.
33. However, the distinction between opt-in and opt-out is not necessarily as clear cut as the above arguments suggest. In order to receive any compensation, a claimant would have to opt in sooner or later, if only to claim a share of a pot of damages that has already been determined (which is likely to be subject to a time limit). A better way of looking at the issue is to consider the stage in the process by which people have to come forward. The group or class to be compensated is effectively defined and closed and that point. The key cut-off points to be as shown in the alternative models described below.
- A.** Before the claim is issued. The representative action would be brought solely on behalf of identified group members. This would be more restrictive than under the Competition Act and GLO regimes; the latter allows new claimants to be added to the register during the litigation. This is a pure opt-in system.
- B.** Before the common issues of liability are decided. The action would be brought initially in terms of a defined class with a minimum number of identified members. Other members of the class could opt-in (confirm participation) at any time before the decision on liability and could then have a say in running the case and be included in any judgment or settlement. Claimants opting-out or unidentified (not coming forward)

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<sup>2</sup> Members of an opt-in group are not formally parties to the action either. But they have been identified and consented to being represented, and the representative party and the court can take their views and circumstances into account.

by that point would not benefit from or be bound by the outcome. They would still be able to bring separate claims after that date, although the decision in the collective action might operate as a precedent. This is a modified opt-in, or hybrid system.

**C.** After the decision on liability but before the quantification of damages. The issue of liability would be *res judicata* for any claimants who had not expressly opted-out before it was decided. But those class members who had not opted in or out could still bring separate claims for damages if the liability decision was favourable. As with example B, this is essentially a hybrid system. It involves modifications of the opt-in approach designed to avoid its perceived disadvantages in the early stages of cases, while also avoiding the issues that arise with an opt-out approach at the stage when damages are quantified.

**D.** After the quantification of damages. Damages would be assessed for all claimants who had not expressly opted out before that point, on the basis of an estimation of the total size of the class. Unidentified claimants can still come forward later to claim their share of the damages. Later claimants would lose their rights if the pot proved inadequate. More likely, there would be a surplus which, after a defined period, would either be returned to the defendant or distributed on a *cy-près* or some other prescribed basis (e.g. used to fund other collective litigation or surrendered to the Treasury). This is a fully-fledged opt-out model.

34. These models (apart from the first) involve some departures from the normal principles that govern private civil litigation. These include:
- changing rules of standing so that an action can proceed (until the defined cut-off point) against multiple defendants, even when a claimant with a direct cause of action against some of those defendants has not been identified;
  - the ability to require disclosure by such defendants and in relation to any/all class members, not just those currently opted-in;
  - and possibly suspension of limitation periods running against absent class members from the start of the action until the cut-off point for opting-in.

These adjustments to normal principles favour the claimants. They can be justified on the basis that they will be balanced by suitable protections for defendants, including a merits filter and robust case management generally.

35. The Government's view is that the appropriate model or models for representative actions will need to be considered on a sector by sector basis. It sees considerable weight in the concerns about a full opt-out model, and considers that the same objectives would be better met in most cases by one of the hybrid models. But it does not rule out adoption of an opt-out system in some sectors where this is the most cost-effective way of achieving a just outcome.

## Damages

36. The most significant issues of principle surrounding the opt-out approach relates to the calculation and distribution of damages. Opt-out requires damages to be calculated on the basis of estimates of the losses of the class as a whole, rather than by quantifying the losses of known individuals. This is more or less problematic depending on the degree of uncertainty about the size of the class and the uncertainty and potential variability of individual losses.<sup>3</sup>
37. More fundamentally, the potential for a shortfall or surplus cuts across the compensatory principle underpinning (most) civil damages. Unless a surplus was returned to the defendant, this could be criticised as inappropriate, unfair to defendants and arguably punitive.
38. These concerns would not arise in the same way if the basis for damages was restitutionary<sup>(GL)</sup> (profit-stripping) rather than compensatory<sup>(GL)</sup>. But, outside the limited circumstances where restitutionary damages already exist, this would require a change of substantive law (which would necessarily apply in all claims of the type concerned, not just class actions). Such a change would need to be assessed on its own substantive merits, not as a mechanism to facilitate a procedural solution. In contexts where the principal objective for promoting 'private enforcement' is regulatory rather than compensatory, profit-stripping may indeed be the more appropriate measure of damages. And a *cy-près*<sup>(GL)</sup> or other distribution of any surplus not required for compensation would have the positive advantage of avoiding the windfall that arises when restitutionary damages are awarded in an individual claim.
39. The CJC did not recommend a change to the compensatory basis of damages. It recommended that the Lord Chancellor should consult on the possibility of allowing the court to award aggregated damages<sup>(GL)</sup>. It also recommended that any surplus damages should be distributed on a *cy-près* basis. The Government considers that these are all issues to be considered on a sector-by-sector basis. Any change would be a matter of substantive law which could be dealt with in the legislation creating the representative action.

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<sup>3</sup> For example, individual losses in a price-fixing claim might be identical and certain, but losses in a mass disaster could be highly uncertain and variable, depending on the nature of injuries and the earnings of victims.

## Certification, Case Management and Alternative Dispute Resolution

40. As noted earlier the CJC recommends the use of a strict certification procedure as an essential element of any collective action mechanism. The Government agrees. Issues likely to form part of a court certification procedure include:
- whether the claim has legal merit;
  - whether the likely benefits justify the likely cost;
  - whether the claim could be achieved more cost-effectively by a non-court mechanism (such as regulatory action or via an ombudsman);
  - if litigation is appropriate, whether a collective action is the most appropriate route (rather than individual claims, a GLO or a test case);
  - whether the representative body or party is likely to be able to meet the defendant's costs if unsuccessful, whether from insurance, its own resources or otherwise, and whether to order the payment of security for costs; and
  - depending on the statutory provisions in the particular sector, authorisation or approval as suitable of the proposed representative body or party.
41. Following certification, it will remain necessary for the court to manage collective actions carefully. A collective action may be the most efficient and straightforward way of dealing with a particular case (and as noted above this is something the court would consider as part of any certification process), but collective actions will be complex by their nature. Add to that the fact that many of the cases will be high value and will deal with issues which are themselves complex and it becomes clear that case management will play a critical role in ensuring that issues are dealt with proportionately and costs are kept as low as possible.
42. Alternative Dispute Resolution (ADR) will form a crucial element of any collective action procedure. There should be a presumption that ADR will be used to try to settle the case, where possible before issuing proceedings and certainly before any trial. Case management will play a major role in ensuring that parties actively take steps to engage in ADR and judges should be ready to use their existing powers to stay proceedings for the purposes of ADR or settlement negotiations. Because of the likely high value and cost of many potential collective claims, it is appropriate to consider whether ADR ought to be mandatory either across the board or in certain circumstances. Because collective actions are usually by their nature complex, settlement negotiations (by which route many claims are resolved) may also be more complex and for that reason ADR, and particularly those forms which offer assisted negotiation, may be particularly helpful in achieving settlement. The Government therefore agrees with the CJC's view that ADR should form a routine part of the

case management of a collective action. It will consider how to achieve this, and the need for any exceptions, as part of the proposed framework of generic procedural rules for collective actions.

43. The Government agrees with the CJC that enhanced case management of collective actions on the lines of the Commercial Court scheme has much to offer. Complex commercial claims have much in common with collective actions. Issues such as compliance with pre-action protocols, disclosure, expert evidence, and control of timetables and costs will be common to both types of case.
44. Another important question is whether settlements reached through ADR (or via agreement between parties) should be required to undergo some form of court approval process (similar to that under Part 21 of the CPR in claims on behalf of children and others under a legal disability).
45. The CJC recommends that it should. The court should be satisfied that any settlement reached is just, fair and reasonable and any member of the represented class who objects to the settlement should be allowed to submit views on the settlement. In an opt-out claim, the court would also direct how absent claimants should opt-in, what reasonable steps should be taken to advertise for absent claimants to notify them of the settlement, what evidence is required to claim a share, what the limitation period should be for doing so and who should administer the judgment and at what cost.
46. Such a regime could bring potential benefits in terms of ensuring that collective actions operate fairly and in the interests of all represented parties. However, it will also impose additional costs, and increasing the costs of settlement could be a potential disincentive for parties to settle. It will be necessary to weigh the benefit of such a requirement against the costs and to determine whether this is something which should apply generally or whether it should be on a case by case basis at the court's discretion.
47. The CJC has recommended that appeals against case management decisions, other interim decisions, decisions on certification issues or final decisions should be subject to normal provisions including the current permission requirement set out in CPR Part 52. The Government accepts that this is a logical way forward. Given that members of a collective action are by definition represented, rather than before the court themselves, it is appropriate that appeals from interim decisions (including certification) should generally be the province of the representative body, and subject to the normal permission requirements that apply to these appeals.

48. However, if the representative party chooses not to appeal a final order, the question remains as to whether class members should be able to do so. The CJC suggests that class members should only be able to appeal if the representative party does not wish to do so, and should be subject to the normal time limits and permission requirements. Furthermore, the class member bringing the appeal should then be treated as the representative party for the class. In general this appears to be a reasonable way forward. There are, nevertheless, potential difficulties where a class member or members wish to appeal but others within the class do not. To what extent should the outcome of an appeal bind the whole class? Appeals relating to liability issues may not be capable of determination in any way other than to affect the whole class. The permission stage may assist in balancing some of these considerations. However, the current CPR permission stage is based on a reasonable prospect of success test rather than the types of issue which might arise in a collective action (similar to those arising at the earlier certification and fairness hearings). It will therefore probably be necessary to review the criteria for permission in the context of a collective action appeal by a class member other than the representative party.

### Costs and Costs Shifting

49. One of the main issues that will need to be addressed in the context of collective actions is that of costs. A particular issue surrounding collective actions in some jurisdictions has been the absence of costs shifting. In some USA class action cases the absence of a 'loser pays' rule has, in the views of many commentators, led to abuses of the system by lawyers. In particular it has led to cases with little merit being brought before the courts and also so-called 'blackmail litigation' whereby unmeritorious claims are made with the intention of forcing the defendant to settle on an objectively unreasonable basis. In particular the system of 'notice pleading' available in the USA (where the alleged wrong need only be described in general terms) has encouraged this tendency, though the bar has been raised by recent case law. With little or no cost shifting and high costs, it will often be financially more advantageous for a defendant to settle a claim, rather than fight and win it with almost no prospect of recovering the costs incurred by so doing.

50. Cost shifting (or the 'loser pays' principle) is for the most part a significant deterrent to such behaviour, in particular where it is combined with the ability of the court to require a claimant to pay a security for costs. The Government believes that the court should retain full discretion to shift costs onto the loser (which is the normal order of the court, although the court may sometimes award limited or no costs to the winner in exceptional circumstances). We therefore accept the recommendation made by the CJC in this respect.

## **The Way Forward**

51. Since the Government has concluded that rights of collective action should be considered and introduced on a sector by sector basis, the responsibility for the necessary primary legislation will fall to the Government Departments concerned, following consultation with stakeholders and assessment of economic and other impacts. However, to ensure that all the relevant issues are considered and, where appropriate, consistent conclusions are reached, the Government intends to develop a policy framework document to assist policymakers and others to address all the issues.
52. The final contents of this framework will be determined as the work proceeds, but it will certainly cover the following areas:
- regulatory and other alternative options;
  - options and criteria for designating or authorising representative bodies
  - funding options;
  - Issues surrounding opt-in, opt-out and hybrid models, and the associated issues around damages and limitation periods;
  - Enforcement and, in particular, cross border issues.
53. In addition to the framework document, the Government will also work with the Civil Justice Council to develop proposals for procedural rules to be put to the Civil Procedure Rule Committee. The rules should be sufficiently flexible to deal with different the models of collective action which primary legislation might provide, for example claims brought on both an opt-in and an opt-out basis, and either ministerial designation or court authorisation of representative bodies. Subject to any sector-specific exceptions, the rules will also include provisions for mandatory use of alternative dispute procedures, certification, security for costs, case management and fairness hearings.
54. It will be for the relevant Government Departments to decide whether to consider introducing collective actions in any given sector and the timetable for doing so. Work on the framework document and generic rules will begin in the second half of 2009, and be led by the cross-Government official working group which drafted this paper.

## Summary of Responses to Recommendations

**1. A generic collective action should be introduced. Individual and discrete collective actions could also properly be introduced in the wider civil context i.e., before the CAT or the Employment Tribunal to complement the generic civil collective action.**

Not accepted. Generic action is not appropriate. Government takes the view that the introduction of additional collective action rights on a sector specific basis is the most appropriate and productive approach (see paras 9–13).

**2. Collective claims should be capable of being brought by a wide range of representative parties: individual representative claimants or defendants, designated bodies, and ad hoc bodies.**

Accepted (see paras 21–26). This will vary between sectors, depending on the availability and suitability of different bodies.

**3. Collective claims may be brought on an opt-in or opt-out basis, subject to court certification (see Recommendation 4). Where an action is brought on an opt-out basis the limitation period for class members should be suspended pending a defined change of circumstance.**

For consideration sector by sector. But the Government considers that in most cases a hybrid opt-in model will be preferable to a full opt-out model (see paras 27–35).

**4. No collective claim should be permitted to proceed unless it is certified by the court as being suitable to proceed as such. Certification should be subject to a strict certification procedure, which is to include provision for the imposition of security for costs.**

Accepted. Exceptions to the normal criteria would be for consideration on a sector by sector basis; security for costs should be considered but may not be appropriate in every case (see paras 40–48).

**5. Appeals from either positive certification or a refusal to certify a claim should be subject to the current rules on permission to appeal from case management decisions. Equally, all other appeals brought within collective action proceedings should be subject to the normal appeal rules. Class members may seek to appeal final judgments.**

Accepted in principle. But further consideration is needed as to whether all class members should be able to appeal final judgments, and in what circumstances. (see paras 47–48).

**6. Collective claims should be subject to an enhanced form of case management by specialist judges. Such enhanced case management should be based on the recommendations of Mr Justice Aikens' Working Party which led to the Complex Case Management Pilot currently in the Commercial Court.**

Accepted (see paras 41–43).

**7. Where a case is brought on an opt-out basis, the court should have the power to aggregate damages in an appropriate case. The Civil Justice Council recommends that the Lord Chancellor conduct a wider policy consultation into such a reform given that it affects both substantive and procedural law.**

For consideration sector by sector (see paras 36–39).

**8. To protect the interests of the represented class of claimants any settlement agreed by the representative claimant and the defendant(s) must be approved by the court within a 'Fairness Hearing' before it can bind the represented class of claimants. In approving a settlement or giving judgment on a collective claim the court should take account of a number of issues in order to ensure that the represented class are given adequate opportunity claim their share of the settlement or judgment.**

Accepted in principle. Possible exceptions would be for consideration on a sector by sector basis (see paras 44–46).

**9. There should be full costs shifting.**

Accepted in principle– subject to the usual judicial discretion on costs. Any exceptions would be for consideration on a sector by sector basis (see paras 49–50).

**10. Unallocated damages from an aggregate award should be distributed by a trustee of the award according to general trust law principles. In appropriate cases such a cy-près distribution could be made to a Foundation or Trust.**

For consideration sector by sector (see paras 36–39).

**11. While most elements of a new collective action could be introduced by the Civil Procedure Rule Committee, it is desirable that any new action be introduced by primary legislation.**

Accepted – the Government agrees that any new right of action will require primary legislation, but (as noted above) not with the creation of a single generic right of action (see paras 14–16).

## Collective Actions – Glossary of Terms

### Types of action

**Class Action:** a synonym for collective or representative action commonly used to describe such actions in the US system. Most apt to describe actions brought on behalf of defined class, but without all members of the class being identified to the court. It may be possible for class members to opt out and bring separate actions or class membership may be compulsory.

**Collective Action:** a general term for any civil litigation seeking to secure collective redress. See also representative action etc.

**Collective redress:** the securing of compensation, by whatever means, for a number of persons who have suffered the same or similar wrong. Compensation might be secured through civil litigation, regulatory action or otherwise.

**Follow-on Action:** a civil action brought, after an adverse finding in administrative proceedings by a regulatory body. Under the Competition Act 1998, such actions may be brought against a defendant who has been found to have breached the provisions of the 1998 Act or article 81/82 of the EC Treaty.

**Group action:** another term for collective action, most apt to describe actions where all persons for whom the claim is brought are identified to the court.

**Group litigation order (GLO):** a sophisticated case management order under the CPR which permits multiple joining of parties whose legal actions have a common legal or factual basis. Each action managed in this way remains a traditional unitary action.

**Representative action:** generally used as synonym for collective action, most apt and commonly used to describe the situation where a **representative body** or person (also sometimes known as an **ideological claimant**) has the right to bring an action on behalf of a class or group of which it is not itself a member. The only current example in this country is the follow-on representative action that can be brought under the Competition Act 1998.

The term can also apply to **representative party actions** where one member of a class can pursue an action on behalf of others with a common interest who are not before the court, as under CPR 19.6 in England and Wales.

## Damages

**Aggregated damages:** a means of assessing compensatory damages that does not require proof of the individual loss suffered by each member of the represented class. Damages are assessed either as a average amount for the estimated number of class members or on the basis that the represented class is a single entity i.e. a global award is made.

**Compensatory damages:** Amount of money adequate to compensate a claimant for loss suffered as a result of the wrongful actions of the defendant, designed to restore claimants to the position they would have been in but for the wrong. They can include amounts for actual financial losses incurred or anticipated in future, and amounts to compensate for non-quantifiable losses such as pain and suffering.

**Restitutionary damages:** Also known as an **account of profits** or, colloquially, **profit-stripping**. A measure of damages designed to restore wrongdoers (defendants) to the position they would have been in but for their wrongful action. This alternative measure of damages may arise where the defendant is unjustly enriched, where there has been mistake or frustration where the defendant has made a profit after breach. This form of damages is relatively unusual – unless there are exceptional circumstances, courts will award compensatory damages for breach of contract etc.

## Other Terms Used

**Alternative dispute resolution (ADR):** a collective term describing non-court based methods of dispute resolution such as arbitration, mediation, neutral evaluation, expert determination and related methods.

**Binding Precedent:** a binding precedent (also mandatory precedent or binding authority) is a precedent which must be followed by all lower courts. It is usually created by the decision of a higher court.

**Cy-près Distribution:** a traditional means of distributing assets held in trust where the terms of the trust can no longer be fulfilled and which has been used analogously in some jurisdictions as a means to distribute unclaimed damages or unclaimed settlement awards in representative actions.

**Res Judicata:** "a matter [already] judged". A case in which there has been a final judgment and is no longer subject to appeal. The term is also used to refer to the doctrine meant to bar (or preclude) re-litigation of such cases between the same parties. In this latter usage, the term is synonymous with "preclusion."

**Opt-in:** the requirement in a collective action that individual litigants actively elect to take part in the litigation as members of the represented group. An individual who does not opt-in does not benefit from the outcome of the collective action, although that may constitute a precedent that would be relevant if the individual later brought a separate claim.

**Opt-out:** the requirement that individual litigants, who fall within the definition of the represented class, actively elect not to take part in the collective action. Failure to opt-out makes the outcome of the collective action binding on the individual. So, under the principle of *res judicata*, they cannot subsequently bring their own claim.

**Sector:** a discrete area of economic or social activity, within which particular issues, including specific types of legal claim, may arise. Different departments will be responsible for Government policy in relation to different sectors, and the relevant department would be responsible for considering and taking forward proposals to allow collective actions within that sector. Examples of sectors include consumer protection, intellectual property, employment rights and competition law.

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