THE LAW REFORM COMMISSION OF HONG KONG

CLASS ACTIONS SUB-COMMITTEE

CONSULTATION PAPER ON CLASS ACTIONS
EXECUTIVE SUMMARY

OVERVIEW

The first chapter sets out the present rules for representative action procedures and their inadequacies as revealed in their application to a range of different types of potential mass litigation cases. Chapter 2 examines the law on representative and class action proceedings in other jurisdictions whilst Chapter 3 sets out the arguments for and against the introduction of a class action regime. Chapter 4 turns to the procedural options of adopting an opt-in or opt-out model for class actions. Chapter 5 examines the treatment of public law cases under the class action regime while Chapter 6 deals with the issue of the choice of plaintiff and avoidance of potential abuse. Chapter 7 looks at the handling of class actions involving parties from other jurisdictions and Chapter 8 sets out the funding model for the class actions regime. The sub-committee's recommendations on procedural details are set out in Chapter 9, while Chapter 10 contains a summary of all our recommendations and an invitation to comment.

Chapter 1 The current rule on representative proceedings in Hong Kong

1. In Hong Kong, the sole machinery for dealing with multi-party proceedings is provided by Order 15, rule 12 of the Rules of the High Court (Cap 4A) (RHC) which provides:

> *"Where numerous persons have the same interest in any proceedings … the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them."*

According to Order 15, rule 12(2), the Court is also empowered, on the application of the plaintiffs, to appoint a defendant to act as representative of the other defendants being sued. A judgment or order given in representative proceedings will be binding on all persons so represented.

2. The defects of the current provisions have been summarised by the Chief Justice's Working Party on Civil Justice Reform as follows:

> *"The limitations of these provisions are self-evident. While they are helpful and merit retention in the context of cases involving a relatively small number of parties closely concerned in the same proceedings for such cases, they are inadequate as a framework for dealing with large-scale multi-party situations. … Without rules designed to deal specifically with group litigation, the courts in England and Wales and in Hong Kong have had to proceed on*

an ad hoc basis, giving such directions as appear appropriate and seeking, so far as possible, agreement among parties or potential parties to be bound by the outcome of test cases. Such limited expedients have met with varying degree of success."[1]

3. According to the landmark case of *Markt & Co Ltd v Knight Steamship Co Ltd*,[2] the "same interest" requirement means that all class members have to show identical issues of fact and law. The implication is that they have to prove (a) the same contract between all plaintiff class members and the defendant, (b) the same defence (if any) pleaded by the defendant against all the plaintiff class members, and (c) the same relief claimed by the plaintiff class members.

Developments that facilitate representative actions

4. The application in the *Markt* decision of the "same interest" requirement meant that few actions could be brought under the representative actions rule. As a result, the courts sought ways to relax the requirements in various cases so as to make it easier to bring representative proceedings by (a) changing from the "same interest" test to the "common ingredient" test, (b) making the existence of separate contracts no longer a hindrance to establishing the requisite "same interest" element, (c) allowing separate defences against different class members to be raised, and (d) allowing damages to be awarded in representative actions.

5. Apart from the relaxation of the "same interest" requirement, there are other developments that could facilitate the commencement of representative actions:

(i) formation of sub-classes;

(ii) class description rather than identification;

(iii) assessment of relative benefits of representative action; and

(iv) no need to have express consent of the class.

6. While acknowledging the judicial endeavour to counter-balance the strictness imposed by the *Markt* decision, Professor Rachael Mulheron believes that a full regime of multi-party litigation is more desirable so as to enable efficient, well-defined and workable access to justice. A full regime, in her opinion, provides statutory protection and a number of benefits and advantages that the representative procedure does not in the following areas: conduct of proceedings, protecting representative claimant, costs and lawyers' fees, disposal of the case, etc. We are of the view that even with the adoption of a more liberal view by the court of Order 15, rule 12 of the RHC, there remains a substantial degree of uncertainty in using the current representative action procedure. We agree with Professor Mulheron that a comprehensive regime for class action litigation is more desirable.

Recommendation 1

We believe that there is a good case for the introduction of a comprehensive regime for multi-party litigation so as to enable efficient,

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1 Chief Justice's Working Party on Civil Justice Reform, *Civil Justice Reform Interim Report and Consultative Paper* (2001), paras 385 to 387 at 148-9.

2 [1910] 2 KB 1021 (CA).

well-defined and workable access to justice, and would welcome public views as to whether such a regime should be introduced.

Chapter 2 The law on representative proceedings and class action regimes in other jurisdictions

7. We have looked at the law on representative proceedings and class actions in a number of jurisdictions: Australia, Canada, England and Wales, Germany, Ireland, Japan, the People's Republic of China (the Mainland), New Zealand, Singapore, South Africa, Taiwan and the United States of America. We have included reference to law reform proposals in some jurisdictions which have not yet introduced a class action regime, notably Ireland and South Africa. These summaries of the class action regimes in other jurisdictions are intended to serve as a background against which the recommendations in later chapters may be considered.

Australia: federal regime

8. In Australia, only two jurisdictions have specific legislation on representative proceedings: the Commonwealth and Victoria. In 1988, the Australian Law Reform Commission published its proposals for a class action regime. The Commission's proposals were in large part implemented with the enactment of Part IVA of the Federal Court of Australia Act 1976 (Cth) as inserted by the Federal Court of Australia Amendment Act 1991 No 181 (section 3).

9. Part 4A (Group Proceeding) of the Supreme Court Act 1986 governs the conduct of class proceedings in the state of Victoria, Australia. The provisions of Part 4A are substantially the same as those of Part IVA of the Federal Court of Australia Act 1976. The discussion in this chapter focuses on the federal regime.

Canada

10. Two common law jurisdictions in Canada have class proceedings regimes: Ontario and British Columbia. There are also proposals to extend such regimes to the Federal Court of Canada, Alberta and Manitoba. These existing and proposed regimes are mainly based on the Uniform Class Proceedings Act, adopted by the Uniform Law Conference of Canada in 1996. Hence, the regime in British Columbia (the Class Proceedings Act, RSBC 1996, c50) is broadly the same as that in Ontario. The discussion in this chapter focuses on the Class Proceedings Act 1992 in Ontario.

England and Wales

11. Section III of Part 19 of the Civil Procedure Rules (CPR) introduced the concept of the "Group Litigation Order" (GLO). It was added to the CPR by rule 9 of the Civil Procedure (Amendment) Rules 2000 (SI 2000 No 221), and came into force on 2 May 2000, implementing the recommendations in Lord Woolf's final report on Access to Justice. Rules 19.10 to 19.15 of section III are designed to achieve the objectives stated in the report, and are supplemented by Practice Direction 19B. Nonetheless, these rules and the practice direction cannot be regarded as a comprehensive regime of court

procedures for conducting group actions as other provisions of the CPR also affect group litigation. These rules, however, establish a framework for case management and provide flexibility for the court to deal with group litigation. A GLO differs fundamentally from a class action in that a GLO involves not a single suit but a number of distinct suits which are administered together.

Germany

12. A cardinal principle of the German civil justice system is that a litigant must come before the court individually so as to benefit from or be bound by the court's decision. Thus, Germany has traditionally been unwilling to adopt any form of mass litigation, and does not have the Anglo-American type of "class action" or "group action".

13. It is, however, possible for a large group of people to be joined as plaintiffs or defendants in an action under sections 59 to 63 of the German Code of Civil Procedure (*Zivilprozessordnung*). There is also a trend to legislate to facilitate "interest-group complaints" (*Verbandsklagen*) asserted by recognised consumer and environmental "interest groups" (*Verbände*) on behalf of their members and the common interests with which they are associated.

Ireland

14. There are two principal ways to pursue privately driven multi-party litigation in Ireland: (1) representative actions and (2) test cases. In view of the deficiencies of the existing representative actions and the test case approach, the Irish Law Reform Commission recommended introducing a formal procedural structure to be set out in the Rules of Superior Courts to deal with instances of multi-party litigation (the Multi-Party Action). The Commission's recommendations have not yet been implemented by legislation.

Japan

15. The Japanese civil procedure system has its origin in the German system. As a general rule, civil law does not distinguish group rights from individual rights. Thus, it is inherently difficult to embrace the notion of a class action in civil law countries. Against this backdrop, Japan has not legislated for class actions. As a compromise, the original "representative action" mechanism (also known as the appointed party system), established in 1926, was strengthened in the 1996 amendments to the Code of Civil Procedure. The Japanese representative action has its roots in the English equity courts (specifically the bill of peace), despite the German origin of the Japanese civil procedure system.

New Zealand

16. Unlike Australia and Canada, New Zealand does not have specific legislation devoted to class actions. Rule 78 of the New Zealand High Court Rules nonetheless amounts to a simplified version of Hong Kong's order 15 rule 12 in Hong Kong. The Rules Committee of the Ministry of Justice of New Zealand is now working on the

introduction of class action procedures to New Zealand. A draft bill has been prepared and considered by the Rules Committee but is not yet public at this stage.

People's Republic of China (the Mainland)

17. Matters concerning the institution of class actions are provided for under the Civil Procedure Law of the PRC (中華人民共和國民事訴訟法) and the Opinion of the Supreme People's Court on the Several Questions Concerning the Application of the "Civil Procedure Law of the PRC" (最高人民法院關於適用〈中華人民共和國民事訴訟法〉若干問題的意見).

Singapore

18. Like New Zealand, there is no Australian or Canadian style legislation on class actions in Singapore. Order 15 Rule 12 of the Rules of Court made under the Supreme Court of Judicature Act (Cap 322), which is identical to the Hong Kong Order 15, Rule 12, governs representative proceedings. The Committee to Develop the Singapore Legal Sector considered that the scope of the existing rule of representative proceedings was limited. The Committee was of the view that class actions could be used as a tool to enhance access to justice. The Government has accepted in principle the Committee's recommendations.

South Africa

19. The South African Law Commission recommended enacting new legislation for class actions and submitted the Commission's report on class action and public interest actions to the Minister for Justice and Constitutional Development in September 1998. The report has not yet been implemented.

Taiwan

20. A group litigation system in Taiwan was provided for in the Taiwan Code of Civil Procedure following its amendment in 2003. The system comprises of charitable associations acting under the representative party system (Article 44-1 of the Taiwan Code of Civil Procedure) (TCCP), the joining-in representative party system (Article 44-2 of the TCCP) and the association's suit for injunction relief (Article 44-3 of the TCCP).

United States of America: federal regime

21. Rule 23 of the US Federal Rules of Civil Procedure, which governs class actions in federal courts, dates back to 1938, and has operated in its present form since 1966.

Chapter 3 The need for the introduction of a class action regime

22. In considering the need for the introduction of a class action regime in Hong Kong, we bear in mind the following overall policy objectives:

(a) the civil justice process should be made more accessible to plaintiffs who are able to bring deserving claims.

(b) the civil justice process should facilitate the binding resolution of civil disputes and thereby eliminate the need to revisit issues or claims in separate proceedings. This principle embodies the idea that defendants should not have to spend money or face adverse publicity as a result of a multitude of potential legal actions.

(c) the civil justice system should promote judicial efficiency. A court could certify a class action to give all persons affected an opportunity to be heard and to produce a uniform and binding judgment.

Benefit to plaintiffs

23. *Improved access to justice* Access to justice is regarded as the "*cornerstone of class proceedings*". A class action regime can:

(a) arm the substantive law with teeth.

(b) overcome cost-related hurdles - A single plaintiff's claim may not be economically viable to pursue because of the costs involved, but the aggregate claims of the plaintiff class may become substantial enough to justify the potential costs.

(c) narrow down the disparity between the parties, especially when a plaintiff is a single litigant or consumer claiming against a governmental body or a wealthy multinational corporation which is backed by an insurance company, with the benefit of tax deductibility for expenses incurred in defending the claim.

(d) help overcome other barriers to the commencement of legal proceedings (apart from economic ones), such as fear of sanctions from employers or others in a position to take reprisals; fear of involvement in the legal system; and ignorance of their legal rights.

Benefit to defendants

24. *Avoiding multiple related lawsuits* A class action regime can spare defendants repetitive proceedings involving similar (or even identical) issues by resolving those issues in one single trial.

25. *Finality of disputes and early opportunity of closure* It could lead to finality and class-wide resolution of disputes, preferably through settlement, because rulings or settlement agreements on common issues bind all class members.

26. *Negotiated certification* The certification process of a class action regime can provide defence counsel with the chance of influencing the nature of the class,

limiting the claims and establishing an expeditious and cost-effective way for resolving the claims of the class members.

Benefit to society

27. *Increased judicial economy* A class action regime can enable the court to deal with claims involving common issues of fact or law within a single proceeding, instead of determining the claims individually. This collective approach will save scarce judicial resources from being used for repetitive proceedings involving similar or identical issues.

28. *Enhancement of justice* First, greater access to justice can be attained, and society will be more just. Secondly, different or even inconsistent rulings on similar or identical claims brought by plaintiffs in separate actions can be avoided. Thirdly, judges in class actions can, by way of case management, reduce areas of dispute and increase the likelihood of reaching a fair and equitable ruling.

29. *Deterrence of wrongdoing (behaviour modification)* A class action regime can have the effect of deterring potential wrongdoers, such as corporations or governmental bodies, from committing wrongful acts, and prompting them to have a stronger sense of obligation to the public. This is achieved by making it feasible for victims to recover damages from wrongdoers who were previously insulated from having to account for their wrongs because of economic and other barriers to individual proceedings.

Benefit to plaintiffs, defendants and the courts

30. *Principle and consistency* A class action regime can provide another advantage to plaintiffs, defendants and the courts: procedural certainty at the outset. Before advising his clients, a lawyer needs to evaluate whether commencing a class action is appropriate for the circumstances. A set of concrete rules on class actions can facilitate lawyers' evaluation. In addition, a class action regime can enhance consistency of rulings on similar or identical claims.

Potential risks of class action regime

31. *Risk of promoting unnecessary litigation* There is concern that unnecessary litigation may be encouraged if a class action regime were introduced in Hong Kong which, unlike some other legal cultures, is not a litigious society. There could be social costs involved for corporations, for example, in having to take out additional insurance to cover the risk of class litigation.

32. *Risk of bringing unmeritorious legal proceedings* Some opponents assert that a class action regime will prompt many proceedings which lack merit.

33. *Risk of benefiting entrepreneurial lawyers* The third potential risk of introducing a class action regime is to benefit persons not intended to benefit at the expense of the class members, ie entrepreneurial lawyers. Plaintiffs' lawyers may launch an action in the hope of obtaining huge fees for relatively little work by reaching a quick settlement.

34. *Risk of insufficient protection of the class members' interests* The risk stems from the fact that class members typically play a small role in the litigation. If the representative plaintiff is not actively instructing the class counsel, this "clientless" litigation may lead plaintiff lawyers to engage in questionable practices, serving their own financial ends rather than the interests of class members.

Other concerns

35. *American experience* We have been mindful of the risks inherent in the US class action. As the local consumer market is substantially smaller than its US counterpart, however, it is likely that there will be fewer class actions and the size of the class in any action is likely to be smaller. Moreover, there are some features of the US legal system which are not shared by the Hong Kong system, such as exemplary, punitive or treble damages, juries in civil trials, contingency fees and parties bearing their own costs.

36. In making our recommendations, we take note of the fact that the US legal system is different to that in Hong Kong and that the use of the class action has given rise to litigation on a scale which Hong Kong can ill afford as a community. Accordingly, we believe that the law and practice in other common law jurisdictions, such as Canada and Australia, provides more appropriate precedents for reform in Hong Kong.

37. *Time needed to dispose of class actions proceedings* It is difficult to generalise and state an average time for the disposition of class action proceedings as compared with non-group proceedings. The length of time cases take to reach the certification hearing is a cause for concern. Limited empirical studies reveal that class actions tend to consume more judicial resources than typical civil cases. But it is suggested that the class actions procedure provides net benefit to the court in processing claims on a group basis. If separately recoverable claims are to be litigated individually, hearings would be duplicated and there would be greater overall use of judicial resources.

Mediation and arbitration

38. Our attention has been drawn to the growth in alternative dispute resolution (ADR) mechanisms, led by a desire to avoid the costs and delays of litigation processes and adoption of new techniques involving ADR and ombudsman mechanisms.

39. Class actions seeking damages usually consist of two parts. The first part deals with the determination of the applicable legal principles that have to be applied to the individual cases and, where appropriate, also deals with the determination of the issue of liability of the defendant. The second part of the litigation deals with the application of those legal principles to individual cases and, where appropriate, the assessment of the quantum of damages to be paid to the individual class members. ADR procedures are especially useful to the second part of the class action litigation.

40. We are of the view that the use of ADR could promote cost-effective dispute resolution of class actions if this can be done in a controlled manner. Full exploitation and adoption of ADR techniques such as meditation and arbitration on both an interim and final basis in class action proceedings, in the light of the relevant experience in overseas jurisdictions, should be further considered in greater detail in Hong Kong.

Our conclusions

41. We have carefully considered the potential risks of bringing in a class action regime. We consider that there is a convincing case for reform of the existing procedures governing multi-party actions in Hong Kong, so that the policy objectives set out at the start of this chapter can be better achieved. In our view, appropriate reforms could enhance access to justice and offer people without means an avenue to redress wrongs.

Recommendation 2

We consider that the principle of equal access to justice, that is founded on the concepts of fairness, expedition and cost effectiveness, should guide any change to the present system for mass litigation. Thus guided, we are satisfied that, a good case has been made out for consideration to be given to the establishment of a general procedural framework for class actions in Hong Kong courts, bearing in mind the need for caution that litigation should not thereby be unduly promoted. We believe that in any system for class actions it is crucial that there are appropriate procedures for filtering out cases that are clearly not viable and that appropriate rules should be in place to assure fairness, expedition and cost effectiveness. In addition, Alternative Dispute Resolution techniques such as mediation and arbitration, on both an interim and final basis, should be fully utilised.

Chapter 4 Opt-in v Opt-out

42. Under an "opt-out" scheme, persons who hold claims concerning questions (of law or fact) which are raised in the class proceedings are bound as members of the class and their rights will be subjected to any judgments made in the class proceeding unless they take an affirmative step to indicate that they wish to be excluded from the action and from the effect of the resulting judgment. The "opt-out" approach has been adopted in jurisdictions such as Australia, the United States, Quebec and British Columbia. In contrast, under the "opt-in" approach, a potential class member must expressly opt into the class proceeding by taking a prescribed step within the stipulated period. A person will not be bound by the judgment or settlement unless he has opted in to the proceedings.

43. The arguments for and against the opt-out approach are summarised by Professor Mulheron as follows:

For	Against
(a) defendants are unlikely to have to deal with any claims other than those made in the class action, and if they do, then they can know more precisely how many class members they may face in subsequent individual	(a) it is objectionable that a person can pursue an action on behalf of others without an express mandate; (b) a person is required to take a positive step to disassociate from litigation which he/she has

For	Against
proceedings; (b) the opt-out regime enhances access to legal remedies for those who are disadvantaged either socially, intellectually or psychologically and who would be unable for one reason or another to take the positive step of including themselves in the proceedings; (c) increased efficiency and the avoidance of multiplicity of proceedings to the benefit of all concerned; (d) access to justice is the basic rationale for class actions, and inclusiveness in the class should be promoted (ie, the vulnerable should be swept in); (e) safeguards can prevent "roping in" (eg, adequate notice explaining opt-out rights, permission to opt out late in the action, and other procedural requirements); (f) for each class member, the goal of individual choice whether or not to pursue a remedy can be achieved if the decision for the class member is whether to continue proceedings rather than commence them; (g) opting out more effectively ensures that defendants are assessed for the full measure of the damages they have caused rather than escaping that consequence simply because a number of class members do not take steps to opt in; (h) the meaning of silence is equivocal, and does not necessarily indicate indifference or lack of interest, so class members should not be denied	done little or nothing to promote; (c) class actions may be raised by busy-bodies, encouraged by unprincipled entrepreneurial lawyers; (d) absent class members may know about the litigation too late to opt out, in which case they are bound by the result, whether or not they want to be; (e) unfairness to defendants is increased by creating an unmanageably large group in which the members are not identified by name and it is very difficult to undertake negotiations for a settlement; (f) it is unattractive for a court to enforce claims against the defending party at the instance of plaintiffs who are entirely passive and may have no desire to prosecute the claim; (g) opt-out regimes create potential for the general *res judicata* effect of the class action judgment to be undermined by individual class members exercising their right of exclusion; (h) to the extent that class members exercised opt-out rights for the purpose of prosecuting their individual suits, the desired economies would suffer and the risk of inconsistent decisions would increase; (i) opt-out regimes do not cure the fact that persons will not want to engage in litigation because they are timid, ignorant, unfamiliar with business or legal matters, or do not understand the notice – the same persons who would not opt in may also opt out, which can undermine the purpose of

For	Against
whatever benefits are secured by the class action by failing to act at an early stage of the action – fairer for the silent to be considered part of the class than not.	inclusive class membership.

Our recommendations

44. In a comparative study covering the major class action systems in a number of jurisdictions it was found that the degree of participation under opt-in systems was lower than that found under opt-out systems. The opt-out procedure overcomes the difficulties of identifying and naming all class members affected by the defendant's misconduct and achieves the closure of issues between the parties. We propose that the class action regime in Hong Kong should adopt an "opt-out" approach unless there are strong reasons to depart from this in the interests of justice. We consider, however, that discretion should be vested in the court to depart from the opt-out regime where there are strong reasons for doing so. The essential justification must be that justice could not otherwise be attained. However, we have reservations as to whether an opt-out regime is appropriate for public law litigation or the handling of class actions involving parties from other jurisdictions. Instead, we consider that the default position for multi-party litigation in those situations should be the opt-in model, so that only those persons who have expressly consented to be bound by a decision in the class action will be treated as parties to that judgment.

45. We think it important to fashion a framework of principles within which judicial discretion may be exercised. This framework of principles should take account of the extent to which the members of the class might be prejudiced by being bound by a judgment given in an action which may not have come to their attention. Practical difficulties might make the giving of individual notice to all members impossible, impracticable or unaffordable. An applicant wishing to depart from the default opt-out position will have the burden of proof to show that the exceptional circumstances of the case dictate that only a different notice requirement will serve the interests of justice and the proper administration of justice.

Recommendation 3

We recommend that, subject to discretionary powers vested in the court to order otherwise in the interests of justice and the proper administration of justice, the new class action regime should adopt an opt-out approach. In other words, once the court certifies a case suitable for a class action, the members of the class, as defined in the order of court, would be automatically considered to be bound by the litigation, unless within the time limits and in the manner prescribed by the court order a member opts out.

This recommendation has been made on the basis of the information and discussion contained in this chapter. We would welcome views on whether the opt-out approach should be the default approach, subject to the powers of the court to order otherwise upon showing of strong grounds and, if not, what should be the proper approach.

Chapter 5 The treatment of public law cases

46. In this Chapter, we consider whether, in light of the special features of public law litigation in Hong Kong, including in particular the unique constitutional position prevailing under the Basic Law, the adoption of a class action regime such as we have proposed in Recommendations 1 to 3 is suitable, either generally or with modifications, for public law cases. We put forward, for public discussion, four possible options for class actions in public law litigation.

47. A challenge to the substantive or procedural lawfulness of an enactment or a decision, action or failure to act in relation to the exercise of a public function is made by way of an application for judicial review pursuant to section 21K(1) of the High Court Ordinance (Cap 4) and order 53 of the Rules of the High Court. In many situations, a public law decision on an application for judicial review may have wider ramifications beyond the individual applicant's case. By way of example, a challenge to the constitutionality of primary legislation will, if successful, generally result in a declaration of inconsistency with the Basic Law. Similarly, a challenge to the lawfulness of a Government policy or a judicial review seeking to enforce a legitimate expectation generated by a representation made by the Government will generally have consequences for a larger group of persons than the individual applicant in the judicial review. It is therefore pertinent to examine whether a class action regime, and in particular whether an opt-out model of such a regime, is appropriate in the context of public law litigation generally and in Hong Kong in particular.

48. In jurisdictions which have a class action procedure, it is available in the context of both private and public law litigation. Certain features of public law litigation call for special attention to be given to the procedural rules governing multi-party situations. One such feature is the fact that, in public law litigation, although there may be issues of law and/or facts which are common to the group, the individual circumstances of each claimant's case may be highly material to the outcome of the administrative decision-making process. However, the individual circumstances of each case might have an important bearing on the outcome of the administrative decision, notwithstanding the existence of one or more common issues sufficient to justify the use of the class action procedure.

Possible alternative approaches

49. In light of the special constitutional position in Hong Kong, it is difficult to draw direct assistance from the experience of other jurisdictions in relation to public law class actions. To deal with our particular constitutional situation, we have considered the following four options for the treatment of public law cases in a class action regime:

Option 1: Public law cases should be excluded from the general class action regime and dealt with separately, leaving the class action regime for private law cases only;

Option 2: The court should be given the discretion in a public law case to adopt either the opt-in or opt-out procedure, with no presumption in favour of the opt-out procedure (as is proposed in our Recommendations 1 to 3);

Option 3: Public law cases should follow the same opt-out model that we are recommending for general application (Recommendations 1 to 3), with additional certification criteria to be put in place to filter out public law cases that are not suitable for class action proceedings; and

Option 4: Public law cases should adopt an opt-in model, so that only those persons who have expressly consented to be bound by a decision in a class action will be treated as parties to that judgment.

Conclusions

50. We believe there is a clear need to devise procedures to cater for group litigation in public law cases. We further believe that the present separation between public law and private law cases should be maintained. At present, public law cases are initiated in the Court of First Instance of the High Court and are governed by Section 21K(1) of the High Court Ordinance and Order 53 of the Rules of the High Court. We recommend that there be no change to this basic system and that any group litigation regime should be built upon it. The minimum which should be achieved by any such regime should be to give the court discretion to devise suitable machinery for a multi-party public law action, by way of test cases or the resolution of issues generic to all the claimants, in the light of the experience of the Group Litigation Order in England and class actions elsewhere. We do not favour such a piecemeal approach.

51. We have not yet reached any firm conclusion on the various issues raised in this chapter and would welcome the community's views before we consider these questions further.

Chapter 6 Choice of plaintiff and avoidance of potential abuse

52. We consider that where there is a risk in a class action that the successful defendant will not be able to recover his costs from an impecunious plaintiff acting as the class representative, appropriate protection should be put into place against such unsuccessful claims. To avoid abuse of the process of the court and to ensure that those put at risk of litigation should be fairly protected, we believe that procedural safeguards should be established.

53. It is a general feature of all class action regimes that if the class loses, the class members enjoy specific and unilateral costs immunity. This immunity is statutorily provided in Australia, Ontario and British Columbia. However costs are generally awarded against the representative plaintiff in an unsuccessful class action. In such circumstances, there is a strong incentive on the part of the class members to structure class action proceedings so as to avoid wealthy class members paying adverse costs. If the defendant wins the action (or wins the certification battle at the outset), and obtains an award of costs in its favour, it can easily be confronted with significant legal costs, which cannot be recovered.

54. There are four ways in which the indigent representative claimant issue can be handled, either within the class action regime itself or by recourse to the usual civil procedural rules.

Reliance on vexatious/abusive rules of court

55. Deliberately choosing a "straw" claimant with no financial means could be construed as vexatious and abusive conduct, thereby bringing the proceedings to a halt on that basis. It is always open to a court to draw that inference or impose such an obligation if the sense of frustration of the defendant sufficiently convinces the court that a "straw plaintiff" is being used to shield more financially viable class members from costs orders. However, we have come to the view that the usual vexatious/abusive provisions of the court rules and the principles distilled from case law are not sufficiently effective because they are not aimed at tackling the problem of impecunious class representatives.

The representative certification criterion

56. One of the certification criteria in any opt-out class action regime is the "*adequacy of the representative claimant*". This has been held to include that the representative claimant has the ability to satisfy any adverse costs order that might be awarded against it. If the representative claimant has no means of proving to the court that it can do that, then certification of the class action may be disallowed (or at least with that particular representative claimant).

Funding proof at certification

57. We are of the view that a new Hong Kong class action regime should also contain an explicit provision that the representative must prove to the satisfaction of the court that suitable funding and costs-protection arrangements (on the part of the representative claimant and/or his lawyers) have been made for the litigation.

Security for costs

58. Another option is to empower the courts to order security for costs so as to prevent impecunious plaintiffs from being intentionally put forward as the lead plaintiffs and to protect defendants from unmeritorious claims. Overseas law reform agencies held different views on whether the defendant should have a general right to make an application for security for costs.

Conclusions

59. We are satisfied that, on balance, the security for costs mechanism would provide a reasonable filtering process which could effectively prevent class members with sound financial capability from deliberately selecting impecunious plaintiffs to act as the class representatives, thereby abusing the process.

60. The new Hong Kong class action statute could include a provision similar to section 33ZG of the FCA Act to empower the court to order security for costs in appropriate cases. Alternatively, the representative claimant's financial standing could properly form part of the "adequacy of the representative" certification criterion. Furthermore, the ability of the representative claimant (and its legal representatives) to

fund the action and to meet any adverse costs award could be made part of the certification scrutiny to which the court will subject the action at the outset.

Recommendation 4

(1) We recommend that appropriate requirements for adequacy of representation should be stipulated to prevent class members with sound financial capability from deliberately selecting impecunious plaintiffs to act as the class representatives, and thereby abusing the court process.

(2) At the same time, truly impecunious litigants should have access to funding.

(3) To avoid abuse of the process of the court and to ensure that those put at risk of litigation should not suffer unfairly, we recommend that in appropriate cases, the representative plaintiffs should be ordered by the court to pay security for costs in accordance with the established principles for making such orders and by way of a provision similar to section 33ZG of the Federal Court of Australia Act 1976 to empower the court to order security for costs in appropriate cases.

Chapter 7 Handling of class actions involving parties from other jurisdictions

61. We envisage that parties in class actions commenced in Hong Kong may straddle across a number of jurisdictions (eg mainland China, Hong Kong and a third jurisdiction). Problems associated with class actions involving parties from other jurisdictions include forum shopping, duplication of proceedings and the *res judicata* effects of a judgment on foreign or extra-territorial class members.

62. Class actions may be brought by plaintiffs in any one of many jurisdictions – locally, nationally or internationally, but even where due notice *is* given to the foreign class members, difficulties in respect of the recognition and enforcement of a class action judgment in another jurisdiction may arise.

Recognition and enforcement of Hong Kong class action judgments by Mainland courts

63. In so far as a class action commenced in Hong Kong may include members from both Hong Kong and the Mainland, we have considered the following questions:

(a) whether the courts in the Mainland will have legal reservations in recognising and/or enforcing judgments given in Hong Kong and other common law jurisdictions where an opt-out model for class actions is followed;

(b) whether it would be feasible in future to expand the scope of mutual legal assistance to include judgments in class actions so that there can be mutual

recognition and reciprocal enforcement of Mainland and Hong Kong class action judgments; and

(c) whether there are any provisions in PRC law which may impinge on the mutual recognition and enforcement of class action judgments between the Mainland and HKSAR if an opt-out class action regime is adopted in Hong Kong and, if so, whether there are any procedural safeguards which could address the PRC law objections.

64. We note that although the "Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned" (the REJ Arrangement) provides for the enforcement of Hong Kong civil judgments in the Mainland, the enforcement of class action judgments in the Mainland is outside its scope. It is doubtful if the scope of the REJ Arrangement will be extended to cover judgments in respect of class actions in the foreseeable future.

65. Furthermore, it is difficult to predict whether the Mainland, when it enters into the reciprocal recognition and enforcement agreement with a common law jurisdiction (such as Hong Kong), would insist on applying PRC law when determining the procedural rights of litigating parties. There is also a potential risk that the Mainland courts would regard the award of counsel's fees as contradicting the basic principle of PRC law that litigants are responsible for their own lawyers' fees and, consequently, refuse to recognise and enforce the judgment altogether. Finally, the exact parameters of the *ordre public* doctrine have yet to emerge so that it is not possible to predict whether enforcement of certain kinds of class action judgments may or may not be contrary to the PRC's public interests.

Possible solution

66. *Discretion to transfer class action proceedings* It is possible that the Hong Kong class action regime legislation could allow the court in the interests of justice to order a transfer of the proceedings or a stay of proceedings on the basis of the inappropriateness of Hong Kong as the litigation forum. In Australia, an application may be made for an order to transfer a proceeding under section 5(2)(b)(iii) of the Jurisdiction of Courts (Cross-vesting) Act of the state concerned.

67. *Excluding foreign class members* An alternative approach is to exclude foreign class members, if the court regards this as appropriate. For example, the Supreme Court of Victoria may of its own motion exclude persons from the group.

68. *Sub-classing of class members from other jurisdictions* Instead of excluding any party from another jurisdiction, we suggest that procedural/case management techniques should be identified to streamline the litigation process. Foreign class members participating in the class action in Hong Kong could be required to form their own sub-class with their own representative claimant. In that way, separate notice requirements could be applied to that representative in respect of members of the sub-class, and if separate legal issues arise that are common to that sub-class alone, they can be accommodated, but dealt with separately from the main class action (even by separate hearing).

69. *Opt-in requirement* As a means of controlling or limiting foreign class members, and of ensuring that due process concerns are met as regards those foreign class members, non-residents may participate in the proceedings by opting in, for example, the British Columbia Class Proceedings Act. Opting in signified that the foreign class members submitted to the jurisdiction of the British Columbia court.

Our recommendations

70. We are not in favour of adopting a rigid exclusionary rule. If plaintiffs from other jurisdictions are excluded from class action proceedings in Hong Kong, then the judgment of those proceedings will only bind class members who are resident in Hong Kong. Depending on the court's interpretation of what amounts to "resident" in Hong Kong and whether future plaintiffs would be caught by this definition, future plaintiffs in other jurisdictions may be barred from commencing fresh legal proceedings on the same subject matter of the class action proceedings. If litigants from other jurisdictions were excluded from a class, then it would be difficult for the court to deal with the common issue of the class action. In principle, the court should allow as many members of the class as possible to have the benefit of the class action. We also note that an opt-out procedure for class actions involving parties from other jurisdictions would be expensive.

71. We consider that, in contrast to the opt-out regime we recommended in Chapter 4 for class actions in general, the default position for any class members residing in a jurisdiction outside Hong Kong should be that they must opt in to the class action proceedings commenced in Hong Kong in order to be bound by, or to benefit from, a judgment on the common issues. Practically speaking, such a requirement ensures that the class representative (and his lawyers) knows who the class members from other jurisdictions are. To assist potential parties from other jurisdictions, class action proceedings commenced in Hong Kong could be publicised on a website. An on-line class action database should be set up in Hong Kong.

72. Reflecting the fact that the opt-in procedure we propose for class members from other jurisdictions runs counter to the opt-out approach favoured as the general default position, there should be flexibility to the court to allow appropriate procedures to be applied in the light of the particular circumstances of each case upon application. The flexibility of the court would be exercised within a principled framework and the principles would have to be stated.

Class actions involving defendants from other jurisdictions

73. Where a defendant is from a jurisdiction outside Hong Kong, the current rules on service of proceedings outside Hong Kong as set out in order 11 of the Rules of High Court, as well as the case law on the rule of *forum non conveniens,* should be equally applicable and sufficient to control class actions with defendants outside Hong Kong.

74. Each separate plaintiff in a given action who wishes to pursue a cause of action against defendants abroad requires separate leave, although this may be applied for in one application. In the context of class action proceedings, this requirement may pose difficulties in proving that each class member has a cause of action against the foreign defendant. There is a need to relax the legal restriction so as to allow an application for service outside the jurisdiction without the need to show each claim of the members in a class action falls within the ambit of order 11 rule 1(1). As long as the

representative plaintiff can make out a case for a grant of leave, an order could be made for service outside jurisdiction.

The common law doctrine of *forum non conveniens*

75. Apart from any statutory provisions, the common law has developed the doctrine of *forum non conveniens* to deal with the situation where either the plaintiffs seeking access to justice in the local court or the defendants resisting claims before the local court are from another jurisdiction. We are of the view that the application of the existing rules relating to *forum non conveniens* are sufficient to deal with the situation.

Recommendation 5

(1) We recommend that where class action proceedings involve parties from a jurisdiction or jurisdictions outside Hong Kong, an opt-in procedure should be adopted as the default position, but that this default rule should be accompanied by a discretion vested in the court to adopt an opt-out procedure for the entire class of foreign plaintiffs or for defined sub-classes, in the light of the particular circumstances of each case upon application.

(2) Where defendants are from a jurisdiction or jurisdictions outside Hong Kong, we recommend that the current rules on service of proceedings outside Hong Kong as set out in order 11 of the Rules of the High Court (with minor adaptation) should be applicable.

(3) We recommend that, in appropriate circumstances, the court may stay class action proceedings involving plaintiffs from other jurisdictions in reliance on the common law rule of forum non conveniens, if it is clearly inappropriate to exercise jurisdiction and if a court elsewhere has jurisdiction which is clearly more appropriate to resolve the dispute.

(4) To assist potential foreign parties to consider whether to join in class action proceedings commenced in Hong Kong, we propose that information on those proceedings should be publicised on a website.

Chapter 8 Funding models for the class actions regime

76. It is clear that the costs of litigation are a crucial issue in class action proceedings. It is generally accepted that if a suitable funding model could not be found which allows plaintiffs with limited funds to take proceedings, little could be achieved by a class action regime.

77. The additional procedural requirements of class actions increase substantially the costs incurred by the representative plaintiff and render a class action a considerably more expensive form of litigation than individual proceedings. The general rule that "costs follow success", if applied unchanged to a class actions regime, would constitute a major obstacle to commencing a class action. Plaintiffs will face the prospect of being liable for their own legal costs and a significant portion of the costs incurred by

the defendant should their cases fail. This potential liability for large amount of costs has the practical effect of deterring many individuals from taking legal actions, even though they have meritorious claims.

Costs-shifting measures in other jurisdictions

78. To overcome the costs barrier, measures have been introduced in other jurisdictions to shift the costs burden from the representative plaintiffs to the defendant, the class members, the class lawyers or to an external funding source. We are of the view that because of the exceptional circumstances in which costs could be transferred to the successful defendant and the narrow scope for the exercise of judicial discretion, this does not provide a solution to the general problem of funding class actions and we do not propose its adoption in Hong Kong. Given the reluctance of class members to contribute voluntarily to the costs of the representative plaintiffs, we do not think that transferring the financial burden to the class members is likely to provide the necessary funding for class action litigation.

79. In the context of class actions, mechanisms for transferring the financial risks inherent in litigation from the representative plaintiff to the class lawyers are provided for in the agreements as to the lawyers' fees. The Law Reform Commission of Hong Kong considered the issue of conditional fees in a report published in July 2007. The report noted that, if conditional fees were allowed in Hong Kong, an unsuccessful claimant who had a conditional fee arrangement would be relieved from paying his own lawyers, but would still be liable to pay the defendant's legal fees unless he had obtained after-the-event insurance (ATE insurance) to cover these costs. Since it was doubtful that ATE insurance would be available at an affordable premium and on a long-term basis in Hong Kong, the report concluded that the current conditions were not appropriate for the introduction of conditional fees.

80. We suggest that this issue should be re-examined in the class action context. We have proposed in Recommendation 4(3) that, in appropriate cases, the representative plaintiffs should be ordered by the court to pay security for costs in accordance with the established principles for making such orders. So long as the appropriate financial requirements for adequacy of representation are satisfied, there may be scope for the prospective claimants to seek private funding by way of contingency fee arrangements. However, we agree with the suggestion of the Civil Justice Council in England and Wales that further research should be conducted to ascertain whether contingency fees could improve access to justice in the resolution of civil disputes generally.

Other alternative sources of funding

81. *Conditional legal aid fund* In its report on *Conditional Fees*, the LRC recommended establishing a Conditional Legal Aid Fund ("CLAF") which would combine conditional fees and legal aid. The fund would take a proportion of the money received by a successful plaintiff to meet claims on the fund by unsuccessful plaintiffs. The initial funding would have to be provided by the Government. An applicant would have to satisfy the fund, as in the case of legal aid, that he had an apparently good case. A new administrative body would be set up to administer the CLAF and to screen applications for the use of conditional fees, brief out cases to private lawyers, finance the litigation, and pay the opponent's legal costs should the litigation prove unsuccessful. The report recommended that the CLAF should be permitted to engage the private

lawyers it instructs on a conditional fee basis, while the CLAF should be permitted to charge the client on a contingency fee basis.

82. Neither the Government nor the legal profession will be willing to provide the necessary initial funding. It is unlikely that the Commission's recommendations on CLAF will be taken forward. We do not recommend the establishment of a CLAF to cover class action proceedings in Hong Kong.

83. *Legal aid* Consideration may be given to whether the existing legal aid regime should be expanded to finance class actions in the light of overseas experience. We have consulted the Director of Legal Aid ("DLA") and explored the possibility of extending legal aid to class action proceedings commenced in Hong Kong. He made it clear that the current statutory framework only allowed the granting of legal aid on an individual basis. It would be necessary to amend the Legal Aid Ordinance (Cap 91) if changes were to be made to the individual-based legal aid scheme.

Recommendation 6

We recommend that in class action proceedings involving legally aided plaintiffs:

(1) A legally aided person should not lose his legal aid funding by agreeing to act as representative plaintiff in a class action, but he should only be funded or protected to the same extent as he would be if he were pursuing a personal, as opposed to a class, action;

(2) If a legally aided person becomes a representative plaintiff in a class action, that part of the total common fund costs which would be attributable to the aided person if he were pursuing the action on a personal basis should be disaggregated.

We recommend that, if the Legal Aid Ordinance is amended to accommodate legal aid for class actions, mechanisms should be devised to ensure that those who are not legally aided should share equitably in the costs.

84. *Class action fund* A further means of funding class litigation is by the establishment of a class action fund (CAF). Such a special fund would be entitled to make discretionary grants. That discretion might extend to the financial resources of applicants and there might be a means test on applications or the exaction of a financial contribution such as a proportion of the proceeds of a successful action. The principal advantage of such a fund is that it would be entitled (although not bound) to assist all class litigants (not only impecunious plaintiffs, as with legal aid) to bring actions for any kind of remedy. The two Canadian jurisdictions of Quebec and Ontario have set up special funds to finance class actions.

85. *Litigation funding companies* Third party funding of litigation has increasingly been allowed in Australia, Canada and England and Wales. Litigation Funding Companies (LFCs) have been described as:

> *"… commercial entities that contract with one or more potential litigants... The LFC pays the costs of the litigation and accepts the risk of paying the other party's costs if the case fails. In return, the LFC has control of the action and,*

if the case succeeds, is paid a share of the proceeds (usually after reimbursement of costs)."[3]

Traditionally, where the costs are calculated as a proportion of the amount recovered, they offend the common law rule against maintenance and champerty. This common law rule continues to apply in Hong Kong generally. If LFCs were to be allowed in Hong Kong, changes would have to be made to the rule.

86. We believe that appropriate controls would need to be imposed on the operation of LFCs in class actions to avoid the risk that LFCs seek to obtain excess proceeds (and perhaps legal costs) from the parties by settling out of court. The involvement of LFCs in private litigation is a recent phenomenon and there is an ongoing debate both in the UK and Australia on the proper form of controls to be applied. The Consultation Paper has considered various aspects of a possible regulatory regime for LFCs.

87. Most recent jurisprudence suggests that access to justice is now a paramount concern and the court has sufficient means at its disposal to protect its processes from abuse. If properly managed in Hong Kong, we believe that LFCs would enhance access to justice for a wide range of people, especially when the legal costs are likely to exceed the amount of a single litigant's claim. Adequate supervisory measures would need to be in place before litigation funding was allowed. These might include a check-list for lawful LFCs, requirements for disclosure of the funding arrangements, and adequate protection of the independence of the lawyers involved. We would welcome the community's views as to whether LFCs should be recognised in Hong Kong and, if so, what are the appropriate forms of control and regulation to prevent abuse.

The way forward: existing sectorial funds

88. Each of the options discussed above for funding class action proceedings presents difficulties: public funding would be needed for a general expansion of legal aid to class action proceedings, or to establish a class action fund, and the introduction of LFCs would have considerable ramifications and should be treated with caution.

89. In the light of these difficulties, we think that a better alternative would be to look at specific sectors where there are already funding mechanisms in place, with the aim of applying the new class action regime to one or more of these sectors first to test out its operation. We discuss below a number of such funds, both existing and proposed. We have not yet reached any firm conclusion on the preferred option and would welcome the community's views on this.

90. *The SFC's Investor Compensation Fund* We have considered the feasibility of expanding the coverage of the existing Securities and Futures Commission's Investor Compensation Fund (ICF) to fund class actions in the securities field. To use the ICF to fund class actions would change its purpose and alter its nature considerably and require primary legislation. We have reservations about recommending the ICF as a possible class action funding model for the financial sector and, in any event, it cannot provide an immediate solution.

91. *Hong Kong Association of Minority Shareholders* Mr David Webb has proposed setting up the Hong Kong Association of Minority Shareholders (HAMS) to

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[3] Law Council of Australia, *Submission to Standing Committee of Attorney-General, in response to Litigation Funding in Australia*, 14 September 2006, at para 2.

exercise shareholders' rights on members' behalf in quasi-class actions and to deter shareholder abuse. The establishment of a fund along the lines of HAMS would present considerable difficulties. The proposal has already been rejected by the Standing Committee on Company Law Reform and would be likely to be strongly opposed by some sectors in the community. We do not therefore think that a fund modelled on HAMS would be likely to provide a solution in the short term to the funding of class actions in the financial sector.

92. *The Consumer Legal Action Fund* The Consumer Council's Consumer Legal Action Fund (the Fund) is a trust fund set up in November 1994 to give greater consumer access to legal remedies by providing financial support and legal assistance. Legal assistance may be in the form of advice, assistance and representation by a solicitor and counsel. If the consumers' legal action is unsuccessful, they need not make any payment other than the application fees. The Fund pays for all their costs and expenses. If the legal action is successful, a contribution to be calculated is to be paid to the Fund.

93. We are of the view that consumer claims are peculiarly suitable for class action litigation and priority should be given to funding class action litigation in this area. Consideration should be given to expanding the scope of the Fund to provide legal assistance in class action proceedings. But, given the focus of the Fund on consumer claims, it would not extend to public law cases and other forms of public funding would be required to meet the financial needs in those cases.

Conclusions

94. Our starting point is that little could be achieved by a class action regime unless suitable means can be found to fund plaintiffs who are of limited means. We recommend that, in the short term, the introduction of funding for class action proceedings in Hong Kong should proceed on a sectorial basis. Our general intention is to take a step by step approach, leading to the establishment of a general class actions fund in the long term.

95. We think that the various options complement one another and may be said to serve different parts of the litigation market. On one hand, public funding should be available where there is a public interest in litigating issues with significant legal implications, even though the chances of success are no better than even. At the other end of the spectrum, the LFCs would be likely only to invest in those cases where the chances of success are high and in such circumstances there is little need for public funding. In relation to all the suggested modes of funding where public money is involved the policy concern should be the same and a merits test should be rigorously applied.

96. Depending on the operation and performance of these sectorial funding arrangements, adjustments could be made to the non-sectorial options. It should be pointed out that if a public class action fund is established, then the sectorial litigation funding arrangements may not be necessary. Otherwise, the various options (albeit with varying scope of operation) are generally compatible and could be implemented together.

FUNDING OPTIONS OF A CLASS ACTION REGIME

Options	Source of funding	Legislation required	Compatibility with other options		Scope of operation	Public interest consideration
			Mutually exclusive	Cumulative		
EXTENSION OF LEGAL AID	public	to change the individual-based eligibility criteria	No	Yes	all those eligible to legal aid	significant
CLASS ACTIONS FUND (CAF)	initial public funding	to establish CAF	HAMS	Yes	open to all class action applicants	significant
LITIGATION FUNDING COMPANY (LFC)	private	to recognise and regulate LFCs	No	Yes	cases with high level of commercial viability	not significant
HAMS PROPOSAL	private	to impose levy on stock transactions	CAF	No	only for HAMS members	not significant
CONSUMER LEGAL ACTION FUND	initial public funding	No	CAF	No	only for consumer claims	significant

Recommendation 7

(1) It is generally accepted that if a suitable funding model for plaintiffs of limited means could not be found, little could be achieved by a class action regime. In view of the general rule in Hong Kong that the costs of litigation would follow the event (in other words, the loser pays the costs of the litigation, subject to the discretion of the court to be exercised in accordance with the facts of the case), we have considered the alternatives of transferring the financial burden of group litigation to the following groups: defendants, the class members and the lawyers representing the class. With the exception of conditional fee arrangements (which warrant further study in the light of the security for costs mechanism that we have proposed for class action proceedings in Recommendation 4(3)), we do not find any of these to be viable or practical in the light of overseas experience and local conditions.

(2) We therefore suggest that, in the light of the conditions in Hong Kong, the extension of the ordinary legal aid and supplementary legal aid schemes to class action proceedings might be more suitable. The extension should be made subject to the Director of Legal Aid's residual discretion to refuse legal aid to prevent class members who are outside the financial eligibility limits for legal aid from benefiting.

Our general intention is to take a step by step approach, leading to the establishment of a general class actions fund (ie a special public fund which can make discretionary grants to all eligible class action plaintiffs and which in return the representative plaintiffs must reimburse from proceeds recovered from the defendants) in the long term.

(3) Given the complexity and the difficulties of introducing a comprehensive funding mechanism in Hong Kong, we propose that, in the short term, a better alternative would be to look at specific sectors where there are already funding mechanisms in place, with the aim of applying the new class action regime to one or more of these sectors first to test out its operation. We have considered the possibility of setting up a securities –related litigation fund based on the proposed model of the Hong Kong Association of Minority Shareholders (HAMS) but have come to the view that it would not be likely to provide a solution in the short term. We have discussed the possibility of the extension of the Consumer Legal Action Fund (the Fund) to class action litigation in consumer claims. On the basis of the present framework of a trust fund providing financial support and legal assistance for aggrieved consumers to obtain legal remedies, we propose that the Fund's resources should be increased to enhance the availability of funding to class action proceedings in consumer claims. If the scope of the Fund were to be expanded to cover class actions, it would be important to devise mechanisms to ensure that members of the class action who are not assisted by the Fund should share equitably in the costs of the proceedings. We have not yet reached any firm conclusion on the preferred option and would welcome the community's views on this.

(4) We have considered the option of involving private litigation funding companies (LFCs) (ie commercial entities that contract with the potential litigants. The LFCs pay the costs of the litigation and accept the risk of paying the other party's costs if the case fails. In return the LFCs are paid a share of the proceeds recovered from successful cases). This is likely to be a controversial issue on which we have not yet reached a final conclusion and we would welcome the community's views. If LFCs were to be allowed in Hong Kong, legislation would be necessary to recognise and regulate LFCs, as well as to clarify what activities are approved in commercial third party funding of litigation.

Chapter 9 Detailed procedural proposals

97. We recommended earlier in this paper that a new court procedure for class actions should be introduced in Hong Kong. We have proposed that at the outset the court must consider, with reference to prescribed criteria, whether a case is appropriate for the class action procedure. The class certification requirements and rules for the litigation process require further study. Procedural safeguards will have to be put in place to tackle possible abuse of the process. The procedure adopted for class actions will need to reflect the concerns and discussion relating to the four main issues (ie the treatment of public law cases, avoidance of potential abuse by plaintiffs, handling of class actions involving parties from other jurisdictions and the funding of class actions regime) that we have considered. The court should be given more case management power and a high degree of flexibility in determining the most appropriate approach in particular cases.

Models of certification criteria

98. A certification stage is an essential element of any class actions mechanism, which should take place as early as possible in the litigation and which should be applied rigorously by the court. Rigorous application will require the representative party to satisfy the court of the following certification criteria:

(a) There are a minimum number of identifiable claimants (the "numerosity" criterion);

(b) The claim is not merely justiciable (discloses a genuine cause of action) but has legal merit (ie certification requires the court to conduct a preliminary merits test) (the "merits" criterion);

(c) There is sufficient commonality of interest and remedy among members of the class (the "commonality" criterion);

(d) The class action is the most appropriate legal vehicle to resolve the issues in dispute (the "superiority" criterion); and

(e) The representative party of a class action takes the action forward on behalf of all the group members: he should have the standing and ability to represent the interests of the class of claimants both properly and adequately (the "representative" criterion).

99. We have set out in some detail the different models for each element of the certification requirements in each of the four jurisdictions examined (paras 9.6-9.9). We invite public comments on the appropriate certification requirements to be adopted in Hong Kong.

Legislation to implement a class action procedure in Hong Kong

100. Overseas experience shows that it may be preferable to introduce reform through statutory enactment rather than subsidiary legislation. If the recommendations in this paper are accepted and are to be implemented, there will be a need to pass enabling legislation and make changes to the rules pursuant to that enabling legislation. We set out below the areas that any future legislation will have to cover.[4]

101. *General matters* The legislation should cover the definition, nature and type of class actions, the suspension of any applicable limitation period relating to members of a represented class, as well as any other matter relating or incidental to the proper management and conduct of class action proceedings. Where an opt-out approach is adopted for the generic class action regime, provisions will have to be made for (a) fair, reasonable and adequate notice to be given to the class members of the class action and (b) a fair, reasonable and adequate period of time ("cut-off date") in which class members can elect to opt out of the represented class for the purpose of the class action proceedings.

102. *Changes to Order 15 of the RHC* We have considered whether the existing rules for representative proceedings provided by order 15 of the Rules of the High Court (RHC) should be retained. We are of the view that most probably a self-contained order of the RHC on the general procedural framework for class actions in Hong Kong would be needed.

103. To implement our Recommendation 2 on appropriate procedures for filtering out cases that are clearly not viable, class action proceedings may not continue as collective proceedings unless certified by a court in accordance with rules set out in the RHC. For the purpose of certification, provisions will have to be made for when certification is to take place, the criteria applicable to certification and which courts may certify proceedings as class action proceedings.

104. *Treatment of public law cases* We have not yet reached any firm conclusion on the various issues raised in relation to the alternative approaches for the treatment of group litigation in public law cases. The necessary legislative changes would depend on which of the four alternative approaches is adopted after public consultation.

105. *Choice of plaintiff and avoidance of potential abuse* Pursuant to our Recommendation 4, an explicit certification requirement should be that the representative plaintiff must prove to the satisfaction of the court that suitable funding and costs-protection arrangements (on the part of the representative claimant and/or his lawyers) have been made for the class action litigation, similarly to the adequacy of class counsel requirement under rule 23(g) of the Federal Rules of Civil Procedure of the USA.

[4] The list of topics is not intended to be exhaustive Details of the provisions to be included in the class action regime will need to be further considered in the light of the public consultation.

106. Furthermore, to implement our Recommendation 4(3), a provision should be enacted along the lines of section 33ZG of the Federal Court of Australia Act 1976 to empower the court to order the representative plaintiffs to pay security for costs in accordance with the established principles for making such orders in appropriate cases.

107. *Handling of parties from other jurisdictions* Recommendation 5 deals with the handling of parties from other jurisdictions. To accommodate class actions involving parties from jurisdictions outside Hong Kong, the legislation should provide for our proposals in Recommendation 5 (1) to (4).

108. *Legal aid in possible class action proceedings* In Chapter 8, we have set out the arguments for and against changes to the individual-based legal aid scheme. If the granting of legal aid to the representative plaintiff in class action proceedings is to be accommodated, it is clear that amendments will have to be made to the current statutory framework of the Legal Aid Ordinance (Cap 91). We also recommend that if the Legal Aid Ordinance is to be amended to accommodate legal aid for class actions, mechanisms should be devised to ensure that those who are not legally aided should share equitably in the costs.

109. *Funding options for class actions* We have discussed and recommended a package of viable options for funding class actions in Hong Kong in Chapter 8. There is a need to put the funding mechanism on a sound legal basis and legislation will therefore be needed to implement whichever proposals are accepted by the community in respect of:

(a) establishing a class action fund;

(b) expanding the scope of the Consumer Legal Action Fund to provide legal assistance in class action proceedings;

(c) recognising and regulating litigation funding companies.

110. *Case management powers* We believe that the procedure adopted for class actions should reflect the experience gained from the implementation of the Civil Justice Reform report's proposals for express case management powers. Depending on operational experience, features which facilitate active case management (such as case management conferences and alternative dispute resolution procedures) may be useful and can be incorporated into the class action procedural rules.

111. *Jurisdiction to hear class action cases* Consideration must be given to which courts should be authorised to hear class actions. We regard it as advisable to defer the extension of the jurisdiction of the lower courts to hear class actions until such time as the procedure has been in operation in the Court of First Instance for five years or more and a body of case law has been established. In due course, consideration could be given to extending the jurisdiction to hear class actions to the District Court. The Small Claims Tribunal should not be empowered to hear class actions.

Recommendation 8

(1) We recommend that the provisions for introducing a new court procedure for class actions should be made by primary legislation in Hong Kong, thus enabling those elements of reform which may affect substantive law to be debated fully and implemented in a way that would preclude ultra vires challenges. The detailed design of the legislative provisions to be adopted in class action litigation should be

further studied if there is public endorsement for the introduction of a class action regime in this consultation exercise.

(2) We recommend that to implement our recommendation for appropriate procedures to filter out cases that are clearly not viable, class action proceedings should not be allowed to continue as collective proceedings unless certified by a court in accordance with rules set out in the Rules of the High Court.

(3) We recommend that the existing rule for representative actions under Order 15, rule 12, of the Rules of the High Court should be replaced by a generic collective action procedure to be set out in a self-contained Order of the Rules of the High Court.

(4) Depending on the operational experience gained from the implementation of the recommendations in the report of the Chief Justice's Working Party on Civil Justice Reform, we propose that features which facilitate active case management should be incorporated into the class action procedural rules.

(5) We propose that the extension of the District Court jurisdiction to hear class actions should be deferred for a period of at least five years until a body of case law of the Court of First Instance on the new procedures has been established.

(6) We recommend that District Court judges should be given the power to transfer appropriate class action cases (on the ground of complexity) to the Court of First Instance.

(7) We recommend that the Small Claims Tribunal should not be empowered to hear class action proceedings.

Chapter 10 Summary of recommendations and invitation to comment

112. The consultation paper is lengthy and raises complex issues. To try to simplify the consultation process for readers, we have set out below a series of specific questions to which we would particularly welcome a response. We would also, of course, welcome views on any other aspects of the paper which you wish to make. In case you do not have sufficient time, or you do not wish to respond to all the questions, we have marked the most important questions with an asterisk (*).

Comprehensive scheme for multi-party litigation or not (Recommendations 1 and 2)
(following paras 1.35 and 3.60)

1. * *Do you agree that a comprehensive scheme for multi-party litigation should be introduced in Hong Kong?*

2. *Do you agree with the sub-committee that fairness, expedition and cost effectiveness should guide any change in procedure for multi-party litigation?*

Opt-in or opt-out (Recommendation 3) (following para 4.17)

*3. * Do you agree that the proposed class action regime should adopt an "opt-out" approach (in other words, all the members of the class are automatically bound by the litigation, unless they specifically opt out)?*

Public law cases (following para 5.16)

*4. * Which of these four options do you think should be adopted in Hong Kong for dealing with public law cases under the proposed class action regime?*

Prevention of abuse of process (Recommendation 4) (following para 6.48)

5. Do you agree that appropriate measures should be established to prevent class members with sound financial capability from abusing the class action procedure by deliberately selecting impecunious plaintiffs to act as the class representatives?

6. If so, do you agree that:

(a) provision should be made for truly impecunious litigants to obtain funding under the new class actions regime; and

(b) the court should be given the power to order the representative plaintiffs to pay security for costs in specified circumstances?

Class actions involving parties from other jurisdictions (Recommendation 5) (following para 7.50)

7. If class action proceedings involve parties from jurisdictions outside Hong Kong, do you agree that:

**(a) the default position should be an "opt-in" procedure (in other words, class members will not be bound by the litigation unless they specifically opt into it), with the court able to apply an "opt-out" procedure to foreign plaintiffs in a particular case where an application is made for this approach to be adopted;*

(b) the current rules for service of proceedings outside Hong Kong set out in Order 11 of the Rules of the High Court (with minor adaptation) should apply; and

(c) the court should be able to stay the class action proceedings on the grounds of forum non conveniens if it would be inappropriate for the court to exercise jurisdiction and if a court elsewhere has more appropriate jurisdiction to resolve the dispute?

Funding models for the proposed class action regime (Recommendation 6) (following para 8.54)

8. Do you agree that:

(a) A legally aided person who agrees to act as representative plaintiff in a class action should only be funded or protected to the extent allowed by the Legal Aid Ordinance;

(b) If a representative plaintiff in a class action is a legally aided person, the part of the total common fund costs which would have been attributable to the aided person if he had pursued the action on a personal basis should be disaggregated; and

(c) If the Legal Aid Ordinance is amended to accommodate legal aid for class actions, those who are not legally aided should share equitably in the costs?

Recommendation 7 (following para 8.158)

9. Do you agree that the ordinary legal aid and supplementary legal aid schemes should be extended to class action proceedings, with the Director of Legal Aid allowed to refuse legal aid to prevent class members who are outside the financial eligibility limits for legal aid from benefiting?*

10. Do you agree that the eventual aim should be the establishment of a class actions fund? This would make discretionary grants to all eligible class action plaintiffs and the representative plaintiffs would have to reimburse the class actions fund from proceeds recovered from the defendants.*

11. Do you agree that the scope of legal and financial assistance of the Consumer Legal Action Fund should be extended to class action litigation in consumer claims?

12. Should the funding of class actions by private litigation funding companies be recognised and regulated?*

Detailed procedural proposals (Recommendation 8) (following para 9.36)

13. Do you agree that, if a class actions regime is introduced in Hong Kong, it should be established by legislation?

14. Do you agree that class actions should only be allowed to proceed if they have been certified by the court as complying with rules to be set out in the Rules of the High Court?*

15. Should the existing rule for representative actions under Order 15 rule 12 of the Rules of the High Court be replaced by a new collective action procedure to be set out in the Rules of the High Court?

16. Do you agree that provisions to facilitate active case management by the court should be incorporated into the class action procedural rules?

17. Do you agree that class actions should not be heard in the District Court for at least five years after the new regime has been introduced?

18. Should District Court judges be given the power to transfer complex class actions to the Court of First Instance?

19. Do you agree that the Small Claims Tribunal should not able to hear class action proceedings?