

Institution: Queen Mary University of London (QMUL)
Unit of Assessment: Law (C20)
Title of case study: Reforming English Civil Procedure: Class Actions and Third Party Funding
<p>1. Summary of the impact (indicative maximum 100 words)</p> <p>Professor Rachael Mulheron's research at QMUL develops an optimal model for a system of class actions, and a model of 'soft regulation' for third party funding. It has had a significant impact in setting the agenda for the reform of the law of civil procedure in England and Wales in ways which will make civil litigation cheaper and more accessible for individual consumers and small-to-medium size businesses seeking redress from large corporations. Mulheron's work has influenced government policy, as well as judges, lawyers and counsel, and official law reform bodies in the UK and several other jurisdictions. In particular, as a result of her work, law reform bodies and government departments have changed their thinking on how best to approach class actions, which allow multiple claimants with the same cause of action to consolidate their actions against large defendants, and obtain an effective legal remedy at manageable cost.</p>
<p>2. Underpinning research (indicative maximum 500 words)</p> <p>Rachael Mulheron is Britain's leading scholar in the field of class actions, the procedure by which multiple parties with common legal grievances can initiate common legal action. In a number of works published since she joined Queen Mary in 2004, she has analysed the attempts made by common law jurisdictions to develop a useful class action regime and demonstrated what an 'optimal' class action regime would look like. Her aim has been particularly to help the United Kingdom - which has a relatively undeveloped system of class actions - to reform its law. In her 2004 book, <i>The Class Action in Common Law Legal Systems</i>, she critiques the English procedure relating to multi-party proceedings, which rejects an 'opt-out' class action procedure (under which a class of persons can be described as represented by a named claimant at the outset of litigation) in favour of a more modest combination of traditional representative proceedings and an 'opt-in' group litigation order (which requires all those represented to take a positive step to be included). In this work, and her subsequent books and articles, she has set out a case for a 'best practice' opt-out class action for England and Wales. Subsequent work includes her books, <i>The Modern Cy-Près Doctrine: Applications and Implications</i> (2006) (regarding how to deal with unclaimed damages in class actions), <i>Medical Negligence: Non-Patient and Third Party Claims</i> (2010) (reflecting that such claims have often given rise to class actions elsewhere), and a number of her articles in leading peer-reviewed journals (listed below). These works are recognised as leading their field. Mulheron has also written influential work on the topic of 'soft regulation' for third party funding in England and Wales. In 2008, she co-authored (as lead author) an article ('Third Party Funding of Litigation: A Changing Landscape') which undertook a comparative analysis of third party funding in Commonwealth jurisdictions, and which advocated a checklist of factors which should govern 'soft regulation' of the industry. Her works published before 2008 were submitted for Queen Mary's RAE 2008 submission; and her major works published since form part of the 2014 REF submission.</p>
<p>3. References to the research (indicative maximum of six references)</p> <ul style="list-style-type: none"> • <i>The Class Action in Common Law Legal Systems: A Comparative Perspective</i> (Hart Publishing, Oxford, 2004). • <i>The Modern Cy-Près Doctrine: Applications and Implications</i> (Routledge Cavendish, 2006). • 'From Representative Rule to Class Action: Steps rather than Leaps' (2005) 24 <i>Civil Justice Quarterly</i> (CJQ) 424–449. • 'Some Difficulties with Group Litigation Orders—and Why a Class Action is Superior' (2005) 24 <i>Civil Justice Quarterly</i> 40–68. • 'Justice Enhanced: Framing an Opt-out Class Action for England' (2007) 70 <i>Modern Law Review</i> 550–580. • 'Third Party Funding of Litigation: A Changing Landscape' (2008) 27 <i>CJQ</i> 312–341. • 'Cy-Près Damages Distributions in England: A New Era for Consumer Redress' (2009) 20 <i>European</i>

Business Law Review 307–342.

4. Details of the impact (indicative maximum 750 words)

Mulheron's work has had direct impacts on the ongoing process of reforming civil procedure in England in a number of areas, in ways which will make civil litigation cheaper and more accessible for individual consumers and small-to-medium size businesses seeking redress from large corporations. In an era of high legal costs, the significance of her work is considerable. The introduction of class actions and contingency fees, and the appropriate regulation of third party funding, will make a big financial difference to individual consumers and small businesses. Mulheron's work has also had a very wide reach; her work has influenced both judges and law reform bodies in a number of other jurisdictions worldwide.

Shaping policy on class actions

Mulheron has argued for a comprehensive, generic opt-out system to be developed for England and Wales where there is currently no generic class action regime. Her published work, described above, has engaged directly in the debates over how to reform civil procedure, and has set the agenda for policy making in governmental circles. Influenced by her research and reports, the last government undertook to introduce a limited 'opt-out' system, which only failed thanks to sudden calling of a general election. At present, the coalition government is continuing to explore the options for reform.

As a result of her research, Mulheron was commissioned by the Civil Justice Council of England and Wales (CJC) to produce a report giving evidence of the need for a new class action regime. Her *Reform of Collective Redress in England and Wales: a Perspective of Need* (Feb 2008) informed the CJC's influential report *Improving Access to Justice Through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions: Final Report* (November 2008). Mulheron was a contributing author of the report. As the Ministry of Justice (MOJ) noted in its response dated July 2009, the 'main evidence of a need for reform in the report is extracted from a paper written by Rachael Mulheron'.

Although the MOJ rejected the overall recommendation of the CJC (which had adopted Mulheron's proposals for a *generic* opt-out system), it accepted the need for a *sectional* opt-out system, as and where a specific need was proven. This was highly significant, since it was the first occasion on which there has been a clear political commitment to enacting an opt-out class action: previous efforts at reform had favoured the opt-in approach, rather than the opt-out approach advocate by Mulheron. This consultation process was followed by the drafting of the Financial Services Bill 2010, cl. 18-25, which contained a collective actions regime for financial services claims in which actions could proceed either on an opt-in or an opt-out basis. In October 2009 - March 2010, Mulheron was a member of the rules-drafting committee, to draft court rules underpinning the newly-proposed opt-out regime. The Bill proceeded through the House of Commons and through two readings in the Lords, but the 2010 general election put a stop to further progress. However, reform in this area of civil procedure is continuing, and Mulheron is at the heart of the process. The rules she helped draft - which are suitable for any sectoral opt-out system - have been completed, tabled before the Civil Procedure Rules Committee, and will be introduced, once a legislative regime containing an opt-out class action is enacted. Mulheron also exerts an influence on policy making through membership of the CJC, (appointed May 2009 for three years, re-appointed May 2012 for another three years).

As a result of her comparative analysis of class actions in overseas jurisdictions, Mulheron was commissioned by the Department of Business, Enterprise and Regulatory Reform (BERR) in 2008 to write a report on *Competition Law Cases under the Opt-out regimes of Australia, Canada and Portugal*. The report was described by the Chief executive of the Civil Justice Council as an 'amazing piece of work'. In September 2011, she was contacted by BERR's successor Department, the Department of Business, Innovation and Skills to discuss how to take forward the reforms discussed in her 2008 paper. She met with BIS policy officials on numerous occasions during the drafting of a consultation paper, *Private Actions in Competition Law: A Consultation on Options for Reform*. Her work was repeatedly cited in the paper, and in the accompanying Impact Assessment. In anticipation that the proposals will become law, she was asked to lead a seminar at the Competition Appeal Tribunal designed to inform judges of the key certification criteria in competition law opt-out class actions. Her formal response to the Consultation has been referred by BIS to Parliamentary Counsel, and BIS has commissioned further memos of advice for assistance with drafting of the relevant legislation.

The reach of Mulheron's work on the evolving law of class actions is not limited to England and Wales, but has influenced judges and official law reform bodies in Canada, South Africa, Australia, New Zealand, Hong Kong, Ireland and Belgium. She advised the Hong Kong Law Commission, and her work has been cited both in its consultation paper on *Class Actions* (November 2009) and in its final report (May 2012). Her work has also been cited by the Victorian Law Reform Commission (*Civil Justice Review*, 2008) and the New Zealand Rules Committee's October 2008 paper, *Class Actions for New Zealand (Second Consultation Paper)*. Her work on class actions has also been cited by judges in a number of jurisdictions (see section 5 for citations). Mulheron has also acted as an expert witness in the *Worldwide Air Cargo Cartel Class Action* litigation in Toronto (on the issue whether an Ontario court can bind a foreign class member who has not opted out of the Ontario class action). Counsel's questions during her three-hour cross-examination focused primarily on her publications.

Shaping policy on costs regimes and the funding of litigation

Mulheron's work on class actions reform in England has also focused on the costs regime that ought to apply to class actions litigation, and how such litigation could, and should, be funded, were an opt-out action to be introduced. Her work in this area has been cited by Sir Rupert Jackson in the interim and final report of his *Review of Civil Litigation Costs* (2009-10). She was commissioned by the EU-funded European Consumers' Assn, BEUC, to produce a report, *Costs and Funding of Collective Actions: Realities and Possibilities* (February 2011), to assist with that organisation's lobbying of the European Parliament in taking forward the 2011 consultation, 'Towards a more coherent European approach to collective redress'.

Mulheron's 2008 article 'Third Party Funding of Litigation: A Changing Landscape' has also had a measurable impact on policy. In July 2011, she was appointed to the CJC's working group on litigation funding. It developed a *Code for Litigation Funding* whose recommendation for 'soft regulation' was based, in part, on her published work. Her defence of that Code, at the Westminster Third Party Forum in November 2012, attracted media interest (eg, 'CJC Member Rules out Mandatory Litigation Funding Code' (*Law Society Gazette*, 29/11/12); 'Pressure Groups and Litigation Funders Clash over State Regulation' (*Solicitors' Journal*, 29/11/12). In September 2013, Professor Mulheron was nominated as the CJC 'peer reviewer' to discuss and review a series of proposed amendments to the *Code for Litigation Funding*.

5. Sources to corroborate the impact (indicative maximum of 10 references)

Websites:

Professor Mulheron's contributions to collective redress reform (via production of reports, and membership of rules-drafting committees) are shown at: www.judiciary.gov.uk/about-the-judiciary/advisory-bodies/cjc/collective-action-reform

Her contribution to third party funding reform, via membership of the Working Party which drafted the Code of Conduct for Litigation Funders of England and Wales, is detailed at: www.judiciary.gov.uk/about-the-judiciary/advisory-bodies/cjc/third-party-funding

The opt-out class action which has been drafted, as per Prof Mulheron's recommendations/advice to Govt, is contained in Sch 7 of the Consumer Rights' Bill 2013, 'Private Actions in Competition Law', available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/206367/bis-19-925-draft-consumer-rights-bill.pdf

Individuals who may be approached, re confirmation of some or all aspects of this law reform work, include:

- from the judiciary, a judge of the High Court of England and Wales;
- from the government public service, a former Assistant Director, Competition Policy, Department for Business, Innovation and Skills;
- from the Civil Justice Council of England and Wales: Secretary to the Civil Justice Council of England and Wales (who may also solicit the views of the head of civil justice for England and Wales, and Chair of the CJC, if desired);
- from legal practice: European Counsel, Hausfelds LLP; and

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–from the third party funding industry: Chairman, Harbour Litigation Funding, and Chair of the CJC Working Party on Litigation Funding.

Judicial citations: *Koh v Treasure Resort Pte Ltd* [2013] SGCA 52 (Singapore CA); *Children's Resource Centre Trustees v Pioneer Food (Pty) Ltd* [2012] ZASCA 182 (SC South Africa); *Banque de Montreal c Marcotte* [2012] QCCA 1396 (Quebec CA); *Children's Resource Centre Trustees v Pioneer Food (Pty) Ltd* [2011] ZAWCHC 102 (Western Cape HC); *Dow Chemical Co v Ring* [2010] NLCA 20 (Nfld and Labrador CA); *Stieber c Joseph Elie Itee* [2009] QCCS 2498 (Quebec SC); *Metzler Investment GMBH v Gildan Activewear Inc* (Ontario SCJ, 6 Aug 2009); *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2008] EWCA Civ 1086; *Houghton v Saunders* [2008] NZHC 1569 (NZ High Court); *Option Consommateurs c Novopharm Ltd* [2008] QCCA 949 (Quebec CA); *Dikranian c Quebec (Procureur General)* [2008] QCCS 6, [30] (Quebec SC); *Dugal v Manulife Financial Corp* [2011] ONSC 1785 (Ont SCJ) [24].