Scottish Civil Justice Council

RESPONDENT INFORMATION FORM

For the call for evidence on group procedure.

Please note **this form must be completed** and returned with your response.

Are you responding as an individual or an organisation?

	INDIVIDUAL
Yes	ORGANISATION

Your details:

Your full name or your organisation's name:

Clyde & Co

Phone number: Any follow-up to this response should, in the first instance, be directed to us to the email address below.

Address:

We operate in Scotland from offices in Edinburgh, Glasgow and Aberdeen. Any follow-up to this response should, in the first instance, be directed to us to the email address below.

Postcode:

Please see above.

Email Address:

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Your views on the publication of your response

Please indicate your preferences with regard to the publication of your response:

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In the following, questions as put by the Scottish Civil Justice Council are in bold black font. Answers from Clyde & Co are in bold blue font.

General Questions

Question 1 - What are your views on the introduction of opt-out group proceedings in accordance with Part 4 of the Act?

We wish to emphasise two points in answer to this question. These are -

(1) It is currently premature to consider introducing opt-out group proceedings in Scotland, and
(2) There is no sufficiently cogent or fully developed policy basis for the introduction of opt-out group proceedings in Scotland, especially not on a widescale basis.

(1) Prematurity

1.1 By requirement of section 23 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (and the fact that opt-in group proceedings were introduced from 31 July 2020), Scottish Ministers are required "*as soon as practicable*" from 31 July 2025 to review the operation of group proceedings in Scotland and to lay before the Scottish Parliament a report on that review. This report "*must, in particular, contain information about the effect of the operation of* (group proceedings) *on access to justice and the administration of Scottish courts.*" It appears self-evident that Scottish Ministers will need to consult in the context of this review. Until this consultation, review and report, we consider it premature for opt-out group proceedings to be introduced in Scotland. We consider that opt-in group proceedings have only just started to "bed in" in Scotland and, even then, only in the context of early procedure in such actions. Experience of the relatively new procedure should be developed as fully as possible before the review. It is very useful that the Scottish Civil Justice Council (SCJC) has already started research into the operation of the current opt-in rules. This research, and this current SCJC consultation, do not, though, obviate the need for Scottish Government to meet their statutory obligation to review and report on the operation of group proceedings in policy terms and to do so as soon as practicable from 31 July 2025.

1.2 As explained in the letter from Clyde & Co to the Scottish Civil Justice Council (SCJC) of 4 August 2025 (in response to the letter from SCJC to Bethany McKenzie, Clyde & Co, of 21 May 2025), we consider that in some respects the current rules on opt-in group proceedings ought to be redrafted to ensure that they are functional. We incorporate the terms of that letter into this response for the sake of brevity. We consider that opt-in group procedure should be put, in all respects, into fully functional form before further consideration is given to introducing opt-out group proceedings.

1.3 Opt-out "collective actions" have been a feature of the laws of England & Wales for around ten years now but only in certain "consumer" matters in the context of "competition law". Of considerable note for present purposes is the fact that the UK Government is currently reviewing the regime on this, link here, a call for evidence having taken place in 2025. We consider it premature to consider introducing opt-out group proceedings in Scotland until the current UK Government review is at a stage where lessons from the English / Welsh experience so far in such proceedings can be learned. The fact that opt-out collective actions are limited at present in England & Wales to certain matters of consumer / competition law, and the fact of an ongoing review on that, are, of themselves, pointers towards it being premature

to consider wide-scale implementation of opt-out group proceedings in Scotland at this time.

1.4 There is emerging evidence of a worrying impact, or potential impact, of "class actions" on innovation and growth in the UK. On 18 September 2025, a paper published by the Institute of Economic Affairs, link here, concluded, *inter alia*, that "*proliferation of* (class action) *cases could cost* (the) *UK economy up to £18bn, diverting resources away from innovation and undermining growth*". We anticipate that this paper will be considered by the UK Government in the context of their present review of collective actions in England & Wales. The scale of potential financial impact and the fact of the UK Government review strongly suggests that Scotland should not rush to extend group proceedings to include opt-out at this time.

1.5 Recommendation 164 of the Report of the Scottish Civil Courts Review (September 2009) [link to volume 2 here] is "*It will be necessary to amend the legislation relating to prescription and limitation to take account of a group litigation procedure which permits opting out*". We agree on this necessity if opt-out group procedure is to be introduced. Ordinarily, primary legislation would be needed to change the current primary legislation on prescription and limitation. We appreciate, though, that section 22 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 purports to permit Scottish Ministers to modify "*any enactment*" by regulations in the context, *inter alia*, of "*prescriptive or limitation periods in relation to claims brought in group proceedings*". We consider that Scottish Ministers should first consult on any proposed regulations to change primary Scottish legislation for the purposes of opt-out group proceedings. Points of legal competency and / or legal effect could arise in that regard, or at least important points of functioning and / or practicality. Absent change to the current primary Scottish legislation on prescription and limitation, it is premature to consider introducing opt-out proceedings in Scotland.

(2) No sufficiently cogent or fully developed policy basis

2.1 In their "Multi-Party Actions Report" (July 1996), link here, the Scottish Law Commission (SLC) did not favour opt-out procedure. Notable extracts from this report on this include -

> "*4.51 Our provisional view. We said in the Discussion Paper that the primary consideration appeared to us to be the preservation of the liberty of the individual to participate in litigation only if he or she wishes to do so: a person should not be required to dissociate himself or herself from a litigation which he has done little or nothing to promote. Litigation, as a means of resolving a dispute, should be undertaken only as a last resort, after mature consideration of the advantages and disadvantages of doing so. Our preference accordingly was for an opt-in procedure.*"
>
> "*4.54 Our concluded view. This is an important issue … Having considered carefully the views of respondents - the majority of whom agreed with our provisional view - we remain of the view that an opt-in scheme is preferable…*"
>
> "*4.55 Our recommendation. We confirm our provisional view and recommend … Persons, other than the representative party, who wish to be group members, should be required, within a prescribed period and in a prescribed manner, to elect to be members of the group.*"

2.2 We accept that the Report of the Scottish Civil Courts Review (September 2009) [link provided at 1.5, above] thought that opt-out procedure might be suited to certain cases but it is worth noting recommendation 163 of that report - "*163. It should be for the court to decide whether in the particular circumstances of a case an opt-in or an opt-out model would be appropriate*" (emphasis added). If opt-out procedure is to be introduced in any respect, further policy work is needed in advance to guide practitioners on the circumstances in which the court is likely to consider opt-in or opt-out procedure preferable. This point goes to prematurity of opt-out procedure at this time, as well as to the policy point.

2.3 On policy, we should also, of course, consider the debates at the Scottish Parliament during the passage of what became the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 -

2.3.1 **In the stage one debate in the chamber of the Scottish Parliament, link here, the Scottish Government minister in charge of the Bill advised that "*… we have not ruled out considering an opt-out procedure at a later date, once group proceedings have bedded in."* Speaking on behalf of the justice committee of the Scottish Parliament, an MSP noted "*The committee recognises the Government's pragmatic reasons for starting with an opt-in approach. However, given the strong evidence from Which? on the benefits of an opt-out approach for low-value consumer claims, the committee considers that there could be advantages in the court deciding whether proceedings are to be opt in or opt out."* An MSP member of the justice committee observed "*I am convinced that there are practical issues around introducing a new area of Scots law such as this. There needs to be an opportunity for the legal system to build up experience of group proceedings. An opt-in is better for introducing something entirely new to Scots law … If there is a commitment to post-legislative scrutiny, which the convener of our committee suggested, perhaps an evaluation of opt-out procedure could be undertaken then."***

2.3.2 At stage two, the justice committee voted, by the thinnest of majorities (6:5) in favour of the legislation enabling both opt-in and opt-out actions, subject to rules of court being introduced for each, with the decision on opt-in or opt-out in cases suited to group procedure at the discretion of the court.

2.3.3 At the stage three debate on amendments in the chamber of the Scottish Parliament, link here, the Scottish Government minister in charge of the Bill explained "*At stage 2, the Justice Committee voted by majority to support amendments to section 17 that were lodged by Liam McArthur, which had the bill specify that group proceedings should be either opt-in or opt-out proceedings. The intention was that the type of proceedings that would be used in each particular case would be specified by the court*." The minister then outlined concerns around simultaneous introduction of opt-in and opt-out, also noting that "*Our concerns are shared by the Lord President, who wrote to the Justice Committee prior to stage 2 to ensure that members were aware of the complexities of the opt-out procedure. He noted that the practical and legal challenges that could be presented by an opt-out model are significantly greater than those that could be presented by an opt-in model*." The minister continued - "*My amendments in group 8* (later agreed to by the Scottish Parliament) *would permit the Scottish Civil Justice Council to develop separately the rules for the opt-in and opt-out procedures, while not preventing it from developing those rules concurrently. In other words, the Scottish Civil Justice Council will decide how best to timetable drafting of the rules. Indeed, it would be open to the SCJC, as the independent rule-making body, to decide to proceed with opt-out rules*

***first. However, the key issue is that it is the Scottish Civil Justice Council that will determine its own programme of work. It is clear, therefore, that there will be a duty on it to provide rules for both procedures*.” The minister then explained, though, that further amendment was necessary in the context of opt-out proceedings, with the following section then included in the Bill (as now enacted) -**

> **“*22. Group proceedings: further provision***
>
> ***(1) The Scottish Ministers may by regulations make further provision in connection with group proceedings.***
> ***(2) Regulations under subsection (1) may, in particular, make provision for or about—***
> ***(a) circumstances in which a person is domiciled in Scotland for the purposes of section 20 (8) (b)* (on opt-out proceedings),**
> ***(b) prescriptive or limitation periods in relation to claims brought in group proceedings,***
> ***(c) the assessment, apportionment and distribution of damages in connection with such proceedings, including the appointment of persons to give advice about those matters.***
> ***(3) Regulations under subsection (1) may modify any enactment*.”**

The minister noted the remarkableness of amendment at (the final) stage 3 to permit such significant changes to Scots law (including to primary legislation) by later ministerial regulations.

Liam McArthur, who was universally acknowledged in the chamber as the MSP who had “*spearheaded*” the inclusion of opt-out proceedings responded -

“*I somehow feel a bit responsible for this group of amendments. The minister’s speech started to sound a bit like the hokey cokey. I am sure that the Parliament is desperate for me to elucidate the justification behind the opt-out approach, and it is probably worthwhile for me to do so … As I said at stage 2, enabling group proceedings under Scots law is a big step forward in expanding consumer protection. However, to limit ourselves to an opt-in model would have represented a missed opportunity. As Which? pointed out to the committee, breaches of consumer law often have a relatively small impact on a large number of people, so the cumulative impact is high but the incentive for any one individual to participate in court proceedings is low. To properly widen access to justice in that area, therefore, the availability of an opt-out procedure is essential. It should and will be left to the discretion of the court, taking into consideration the nature and circumstances of the case. I fully accept that there will be instances when it will be problematic and inappropriate for an opt-out to proceed. That is why it should only ever be an option. However, as experience south of the border shows, although an opt-in model was introduced in the Competition Act 1998, it was not until the opt-out became available under the Consumer Rights Act 2015 that real advances were made … I thank the minister again for her constructive approach. I also thank my committee colleagues who supported the amendment at stage 2, and particularly the team at Which? for their perseverance on the issue and on behalf of consumer rights*.”

2.4 We wish to draw out the following points from our analysis at 2.3, above, of the Scottish parliamentary proceedings and the present position on the possible introduction of opt-out procedure in Scotland -

2.4.1 The introduction of opt-out procedure to the legislation was contentious and

carried by the thinnest of majorities.

2.4.2 Scottish Government position was initially against inclusion of opt-out in the legislation.

2.4.3 There is work to be done on Scottish Government's part, including, as we see it, policy and consultation work, for significant (and quite possibly contentious) regulations before opt-out proceedings may be introduced.

2.4.4 The high water-mark of policy justification for opt-out proceedings, as at 2018, was limited to large scale but low individual value consumer claims.

2.4.5 Scottish Government is to conduct a five-year review of group proceedings. We consider that that would be a suitable opportunity to review, in policy terms, whether there is a cogent and fully developed policy basis for the introduction of opt-out proceedings in Scotland, especially given recent developments in England & Wales that may ultimately cast doubt on the "*real advances*" policy justification referred to in the Scottish Parliament.

2.4.6 The "*hokey cokey*" analogy is apt when reflecting on the litigation in the English case *Evans v Barclays Bank plc and others* (link here). *Evans* - (a) tried for opt-out, (b) was first told, judicially, to re-file as opt-in, then (c) told, judicially, that opt-out would be allowed, then (d) told, judicially and on a final basis, that opt-out was not to be allowed. Before Scotland thinks of opening the potential for "hokey cokey" as between out and in, or in and out, Scotland should first make opt-in fully and properly functional.

Question 2 - Are there areas of litigation which should be exempted from opt-out group proceedings, in your view?

We consider that this question approaches the issue from the wrong angle. Rather than asking whether there are areas of litigation which should be exempted from opt-out, we consider that there should be cogent and fully developed policy reasons for any areas of litigation being competent for opt-out. The high water-mark of policy justification for opt-out proceedings, as at 2018, was limited to large scale but low individual value consumer claims and that justification may now be (or be about to be) superseded by UK Government consideration, at least in some respects.

That said, a number of problems would arise in including any form of personal injury litigation where damages would ordinarily be calculated on an individual basis in opt-out proceedings. Specific issues arise in relation to litigation involving non-recent abuse where claimants may, for very understandable reasons, take many years to come forward to report abuse.

Question 3 - Should group procedure (whether opt-in or opt-out) apply to judicial reviews in Scotland?

No. We have neither seen - nor can we think of any - policy justification for this. On the contrary, with outcomes in judicial reviews binary (the decision either stands as lawfully made or falls as unlawfully made) and with a three-month default deadline for challenges to decisions being made, we consider that there are very good reasons why group procedure is not suited to judicial review. There is no cogent reason why additional parties with standing would materially alter the outcome of a judicial review.

Questions of procedure

Question 4 - How should court procedures for opt-out proceedings differ from those which already apply to opt-in actions?

Numerous points on the current court rules for opt-in actions are made in the letter from

Clyde & Co to the Scottish Civil Justice Council (SCJC) of 4 August 2025 (in response to the letter from SCJC to Bethany McKenzie, Clyde & Co, of 21 May 2025). Until the opt-in rules are functional in all respects, we consider it premature to even begin to develop potential court rules for opt-out proceedings.

Question 5 - How do you think the certification process for opt-out group proceedings should operate?

For the reasons given in our other answers, we consider it premature to consider this level of detail at this time.

At a high level of generality, it would be necessary for the individual claims involved in any group proceeding to have a much closer degree of connection than has been the case with opt-in proceedings to date. Further detailed consideration of the characteristics and qualities of the representative party would also be required.

Question 6 - What procedural steps are required to protect the rights of the group members in opt-out group proceedings (many of whom may not know that they are part of group proceedings)?

We have no comment to make on this at this time.

Question 7 – Are there any particular measures that should apply to opt-out group procedure for the protection of defenders or respondents, in your view? (e.g. in relation to the ability of a group representative to meet adverse awards of expenses).

Funding arrangements for the pursuit of group proceedings should be compulsorily disclosed, with a check at an early stage on the ability of a group representative to meet adverse awards of expenses. This answer is, of course, without prejudice to our primary position that it is premature for opt-out procedure to be introduced at this time and that there is currently no sufficiently cogent or fully developed policy basis for any such introduction, especially not on a widescale basis.

Question 8 - Should pre-action protocols be a requirement in group proceedings in Scotland (opt-in or opt-out). If so, should these be voluntary or compulsory, and what should happen if they are not complied with?

In principle, we are in favour of compulsory pre-action protocols in Scotland, including in relation to group proceedings. There should be repercussions in expenses for non-compliance.

<u>Questions about settlement and distribution</u>

Question 9 - If the case is resolved by a decision of the court, what role should the court have in approving the distribution of the award?

We have no points of our own to make on this but refer instead to -

- Recommendation 165 of the Report of the Scottish Civil Courts Review (September 2009) [link provided at 1.5, above] - "*It will also be necessary to confer powers on the court to make an aggregate or global award of damages and for the disposal of any undistributed residue of an aggregate award.*"
- Scottish Ministers' purported delegated power to make regulations on, *inter alia*, "*the assessment, apportionment and distribution of damages in connection with such proceedings* (opt-out proceedings)*, including the appointment of persons*

to give advice about those matters."

Question 10 - If the case is resolved by a settlement, what role should the court have in approving the settlement amount and its distribution?

We refer to our answer 9, above.

Question 11 - Do you have any views on how unclaimed damages awards or settlement sums should be distributed?

We refer to our answer 9, above.

Questions about funding

Question 12 - What do you regard as being the main issues for the funding of group proceedings in Scotland (whether opt-in or opt-out)?

We have no comment to make on this question.

Question 13 - How do you think that opt-out group proceedings should be funded and what protection measures should be put in place for group members regarding those funding arrangements, in your view?

We have no comment to make on this question.

Question 14 - What are your views on disclosure of funding arrangements and confidentiality around funding documents which are lodged with the court (whether opt-out or opt-in)?

Disclosure of funding arrangements in all Scottish civil litigation and in all respects should be compulsory for a number of reasons. These reasons, in a wider context than just group proceedings, include issues around additional fees, Qualified One-way Costs Shifting (QOCS) in a Damages-Based (success fee) Agreement (DBA) context, and questions of lump sum damages as against damages by periodical payment order (PPO, noting, though, that court-imposable PPOs are not yet competent in Scotland). In the specific context of group proceedings, we refer to the points made on funding in the letter from Clyde & Co to the Scottish Civil Justice Council (SCJC) of 4 August 2025 (in response to the letter from SCJC to Bethany McKenzie, Clyde & Co, of 21 May 2025) [which points insofar as relating to funding are, in principle, as applicable to opt-out as to opt-in].

Questions about expenses

Question 15 - Do you have any views on whether there should be changes to the Taxation of Judicial Expenses Rules 2019 for group proceedings? (opt-in or opt-out).

Yes. Bespoke expenses rules for group proceedings should have been introduced before opt-in proceedings were implemented. Such rules should be drafted, consulted upon, then finalised and implemented now, and before any consideration of introducing opt-out procedure.

General questions

Question 16 - Are there any aspects of substantive law which could be a barrier to group proceedings working effectively?

We think that we have covered such aspects of substantive law as need be covered at present in our other answers to this consultation.

Question 17 - Are there any other points which you feel are relevant to:

- **The procedures relating to the current opt-in regime; or**
- **May inform and shape a potential opt-out regime in Scotland?**

We think that we have covered all points that need to be covered at present in our other answers to this consultation.