

DRAFT



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

ORGANISATION

### Your details:

Your full name or your organisation's name:

**Scottish Retail Consortium**

Phone number:

Address:

Postcode:

Email Address:

### Your views on the publication of your response

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

Publish response with name

Publish response only (without name)

Do not publish response



## Providing your response

If you have chosen to provide a separate written response, then please complete the first page of this Respondent Information Form and attach it to your response.

If you wish to include your responses within this Respondent Information Form, please insert your responses to each consultation question in the (expandable) boxes below:

### General Questions

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

##### **Introduction**

This response is submitted on behalf of the members of the Scottish Retail Consortium (SRC) and is intended to reflect the interests and views of the Scottish retail sector.

##### **Context**

As consumer facing businesses, retailers are inevitably exposed to the risk of litigation by customers, and where the same issue affects many of them, it can take the form of group claims. Examples include claims relating to product liability, unfair contract terms, data breaches and competition law infringements. The Scottish retail sector is highly competitive, generally operating with low margins. This benefits consumers by pushing down prices but means some retailers are particularly exposed to the financial impact of group litigation.

For these reasons, our members have a substantial interest in this proposal and can provide a valuable perspective.

##### **Summary**

The SRC has concerns over the proposed introduction of opt-out group proceedings. We and our members believe it will lead to an increase in the number of unmeritorious claims being issued and settled which may harm the interests of Scottish retail businesses and consumers.

##### **Harmful consequences**

More specifically, we believe that introducing opt-out group proceedings may give rise to the following harms:-

1. Scottish courts will spend more time and resource managing unmeritorious legal claims.



2. A substantial proportion of unmeritorious claims will be settled via large payments by Scottish businesses (including retailers), which will harm retailers, their consumers and make Scotland a less attractive place to do business.
3. The likely increase in the involvement and influence of litigation funders could be prejudicial to pursuers.

Further detail on these issues is set out below.

### **Proliferation of unmeritorious claims**

Moving to an opt out model for group litigation will inevitably lead to a large increase in pursuer numbers and expenses incurred and, if the claim has merit, the compensation payable. This could lead to more unmeritorious claims being issued, because unscrupulous pursuers will be aware that this change increases pressure on defenders to settle unmeritorious claims (for reasons detailed below).

### **Impact on Scottish courts**

This means Scottish courts are likely to spend more time and resource on unmeritorious claims which is an inefficient use of resources and could make it more difficult for pursuers with strong legal cases to gain access to justice. This challenge is exacerbated by the large number of pursuers inevitably involved in opt out claims.

### **Increased pressure to settle unmeritorious claims**

The outcome of litigation is uncertain even when the defender is reasonably confident that it will successfully defend the claim. Furthermore, even in a best-case outcome a successful defender will not be able to recover all expenses incurred and may have to wait many years before recovering a proportion of expenses incurred. These are factors in favour of settlement of weaker claims and must be considered by defenders.

Opt out claims, because of the very large number of pursuers involved, greatly increases the saliency of these factors. Expenses will be much higher, and even in a best-case scenario for the defender, the short fall between expenses incurred and expenses recovered will be greater. The cash flow impact of the time lag between incurring and recovering expenses in a successful case will also be increased.

The value of compensation payable to the pursuers should they win will be much larger, possibly by many orders of magnitude.

These factors will greatly increase the pressure on business, including retailers who operate in a low margin environment, to settle unmeritorious claims and will make such settlements more likely.



### **Consequences of settlement of such claims**

Increased settlement payments of this type could have a significant detrimental effect on retailer defenders, most of which operate with low margins. In some cases, it could undermine the financial viability of retail companies leading to redundancies, store closures and even insolvencies. This is likely to cause real harm to retail sector workers and the towns and communities in which the retailer operates.

Ultimately, it may also result in costs being passed on to consumers in the form of higher retail prices.

### **Role of litigation funders**

We appreciate that litigation funders play an important role in providing access to justice, including by removing pursuers' exposure to pay expenses via 'no win no fee' arrangements.

It should be noted, however, that there are potential risks in their increasing involvement in group litigation. Funders are private sector entities who are engaged in a commercial activity and who must act in the best interests of owners/shareholders. It is important that any expansion of opt out group litigation does not increase the control of funders in a way which could harm the interests of pursuers.

### **Question 2 – Are there areas of litigation which should be exempted from optout group proceedings, in your view?**

If opt out group litigation is introduced, we believe that certain types of claim should be excluded because it will not provide an effective redress mechanism for consumers. In particular, we suggest excluding:-

1. areas of litigation in which each claim has its own specific fact-pattern in relation to the damage caused or suffered, such as product liability or data breach claims. The same product defect or data breach incident does not cause the same level of distress or material damage to each affected individual (and in some cases may give rise to no harm, and therefore no claim).
2. large, speculative claims with no more than minimal individual loss - i.e. those which are inherently of low value or relate to minor errors such as small pricing errors, delivery delays or product returns.
3. claims which are governed by a pre-existing consumer protection framework such as CMA enforcement or ADR schemes.



4. claims which can already be heard at the Competition Appeals Tribunal, because introducing a parallel opt-out route risks duplicating or conflicting with CAT jurisdiction.

In relation to category 1, we believe there is a risk that law firms acting for a very large number of pursuers may be unable to provide each of them with personalised legal advice and services, given the differences between them.

The Solicitors Regulation Authority, which regulates solicitors in England and Wales, has expressed concerns over the ability of solicitors acting for pursuers/claimants in group litigation claims to fulfil their regulatory duties. We refer to their discussion paper 'How can the high-volume consumer claims market work better for consumers?' published on-line at the URL below:-

<https://www.sra.org.uk/sra/consultations/discussion-papers/high-volume-consumer-claims-market-consumers/>

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

We have no comment on this Question,

**Questions of procedure**

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



We have no specific procedural suggestions, but we believe it is important that enhanced safeguards are put in place for pursuers in opt-out proceedings, because they will automatically be included in claims which they have not signed up to. See also our comments on Question 5.

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

We consider that a robust certification process is very important for opt-out group proceedings. This should be designed to operate in a way which excludes unmeritorious claims from being issued on an opt out basis (our concerns on this are set out in the response to Question 1).

This will help prevent abuse of opt out proceedings by unscrupulous pursuers, preserve judicial resources and protect consumers and businesses.

**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)?**

The SRC believes that priority should be given to ensuring that group members are made aware of funding arrangements since most are unlikely to have any direct involvement in the litigation.

Deductions from damages or settlement payments should be strictly controlled by the court to protect pursuers/consumers against unfair arrangements.



**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)**

We recommend establishing a process to help protect defenders/respondents from the financial and reputational risk created by an opt out regime. This should include:-

- providing transparency on the ability of any pursuer group or funder to meet expenses awards made against them in the litigation;
- a merits-based test on the claim itself at an early stage, and
- at an early stage, and certainly prior to the disclosure process; protection from parallel claims in other overlapping courts (e.g. the CAT).

**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?**

We support the introduction of pre-action protocols to be introduced for group proceedings in Scotland (opt in or opt out). These should be compulsory as this will help to ensure that:-

- only well-founded and properly evidenced claims can be raised as a class action; and
- opportunities for early settlement are fully explored.

**Questions about settlement and distribution**

**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 believe there should be substantial judicial oversight of distribution of any award to ensure fair distribution and uptake of awards, given that many pursuers will not be aware of the claim and their participation in it.



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

Our position on this question is the same as for Question 9.

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

There should be judicial oversight on distribution of unclaimed awards or settlement sums, enabled by reporting and accountability. Our strong view is that 'excess' funds should never revert to the funder or pursuers firm, because this may undermine the integrity of the regime.

**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)?**



A key concern for us is the risk of conflicts of interest arising between funder and pursuers.

**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?**

Broadly speaking we believe that transparency on funding arrangements is the best protection against conflicts of interests. This should cover transparency on:-

- the source(s) of funding;
- the terms of funding agreements, particularly in so far as they relate to the level of control and influence the funder is granted over the litigation, including on strategy and settlement decision; and
- how adverse expenses awards will be managed.

**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)?**



See our response to Question 13 above.

**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)?**

We have no comments on this Question.

**General questions**

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



We have no comments on this Question.

**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 have no comments on this Question.