



## 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?**

We do not consider that the introduction of opt-out group proceedings in Scotland is appropriate at this time. Opt-out procedures focus on automatically aggregating persons into claims irrespective of whether they individually give their permission to do so. The introduction of an opt-out mechanism (beyond competition claims) would significantly shift the balance of the Scottish litigation framework. Such an approach may result in potentially increasing exposure to large scale claims for defenders, particularly publicly funded or publicly regulated bodies with existing funding challenges without a clear evidential basis or adequate safeguards.

We therefore consider the existing opt-in model should be retained unless robust evidence demonstrates that opt-out proceedings are necessary, proportionate, and supported by comprehensive procedural controls.

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

As stated above, we do not consider opt-out an appropriate model at this stage. Opt-in group proceedings are still at a relatively early stage in their development within Scotland and it is understood that to date no such proceedings have reached a final conclusion in the courts. If an opt-out regime was nevertheless introduced, certain categories should be expressly excluded due to complexity, public interest implications, or risk of disproportionate burdens on public bodies, including but not limited to:

- Environmental, regulatory, and statutory compliance disputes
- Claims involving essential public services (e.g. water, wastewater, general utilities)
- Claims where liability depends materially on individual circumstances .

These exclusions reflect the same concerns about complexity, proportionality, and risk highlighted in Question 1. Perhaps at this juncture, the public sector ought to be excluded from any changes to the rules on group procedure to ensure it is exempt from the unknown effects of opt-out.



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

Group procedure—opt-in or opt-out—is considered unsuitable for judicial review. Judicial review focuses on the legality of public decision making rather than the determination of individual claims. Extending group procedure to this new approach risks distorting that function, increasing scale and complexity, and diverting public bodies' scarce resources.

**Questions of procedure**

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

If opt-out were introduced, substantially stronger safeguards than those applicable to opt-in actions ought to be required, including but not limited to:

- stricter certification tests;
- enhanced scrutiny of representatives;
- mandatory early case management;
- clearer notice/communication obligations;
- stricter settlement approval requirements; and
- enhanced oversight of costs and funding.

These safeguards build upon the same central themes of proportionality and transparency developed throughout the remainder of our responses.



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

Certification would become a central safeguard in any opt-out regime. It would need to impose materially higher thresholds than opt-in proceedings, including:

- demonstrating that opt-out is the most appropriate and proportionate procedure;
- clear predominance of common issues;
- robust governance and independence from funder control
- rigorous scrutiny of representative adequacy and independence;
- early disclosure of funding and communication plans; and
- an explicit proportionality test with discretion for the court to refuse certification even if the basic criteria are met.

**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)?**

Key protections would include:

- precise class definition rules;
- representative party should have full facts about claim in order to act in the best interests of the “class”;
- mandatory and accessible notice requirements;
- transparency around funding and costs;
- proportionality oversight throughout;
- strict and effective case management controls;
- rigorous settlement scrutiny;
- clear mechanisms for individuals to opt-out or challenge inclusion.

Many of these safeguards echo the certification and case management protections referenced in our earlier answers.



**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)**

If opt-out proceedings were introduced, essential protections for defenders would include:

- proof of the representative's financial adequacy and ability to meet adverse costs;
- judicial oversight of funding (particularly so for third party funding arrangements);
- ongoing proportionality controls to consider if the burden remains justified as the case develops;
- early and active case management;
- heightened scrutiny of settlement proposals.

These mirror the concerns already noted regarding fairness, cost exposure and transparency covered elsewhere in our response.

**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?**

Compulsory pre action protocols would appear helpful in both opt-in and opt-out actions. They may help to facilitate early engagement, narrow the issues and enhance transparency.

Failure to comply could allow the court to:

- sist proceedings;
- impose expenses penalties;
- take compliance into account when assessing suitability for group procedure; and
- require enhanced early case management where deficiencies risk expansion of issues.



### **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?**

The court should have a supervisory role over any distribution of an award and the ability to intervene to ensure fairness, transparency, and proportionality particularly where absent class members are involved and where public bodies may be adversely affected.

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

The court should play a central supervisory role in approving both settlement amounts and proposed distribution arrangements. Calculations defining sums paid and fees due should be assessed on completion of distribution. Further consideration should be given to developing robust principles around granting what is “fair and reasonable” amounts to funders and law firms to try and avoid commercial conflicts between litigation funders, claimant law firms and the funded parties. This is vital for the same reasons as outlined in question 9.

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

A principled and transparent framework is required, including:

- Priority to class members -with unclaimed sums reverting to defender(s) as a default position.
- Judicial oversight – to ensure fairness and proportionality.



## 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)?**

Key challenges include:

- transparency and oversight of third party funding having regard to the lack of regulation around third party funders;
- ensuring the representative has sufficient, independent financial capacity;
- inherent risk of disproportionate cost exposure for public bodies;
- need for ongoing proportionality assessment ensuring meaningful benefits for class members;
- interactions between funding structures and settlement dynamics. Likely funder profits should be considered in light of benefits to class members.

### **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?**

Any opt-out model would require a transparent, court-supervised funding framework, including:

- mandatory disclosure and judicial scrutiny of all funding arrangements;
- robust tests of representative financial sufficiency and independence;
- controls to prevent funder influence on litigation or settlement decisions;
- limits on deductions from damages;
- continuous proportionality oversight; and
- clear, court approved communication obligations to class members.

These protections align with the concerns set out in Questions 7 and 12.



**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)?**

Full and early disclosure to the court is essential, with proportionate confidentiality protections only for genuinely sensitive commercial information.

Transparency must not be undermined. Key terms affecting fairness, proportionality, deductions or funder influence must always be visible to the court and where appropriate, defenders.

Clear notice to class members should explain funding arrangements that may affect their rights including the identity and address of the relevant funder.

**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)?**

Targeted reforms may be required to address the distinctive pressures of group proceedings, including:

- enhanced scrutiny of funder related costs;
- clearer proportionality principles;
- measures to prevent disproportionate cost exposure for public bodies;
- clarification on treatment of common vs individual issues;
- transparency obligations during taxation.

These reflect wider themes of proportionality and cost control.



## General questions

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

Barriers include:

- individualised duties/liability frameworks;
- statutory regimes not designed for collective enforcement;
- differing limitation and accrual rules;
- remedies requiring individual assessment;
- limited judicial authority on group procedure principles;
- incompatibility with public law challenges such as judicial review.

Many of these issues reinforce concerns already noted regarding certification, proportionality, and suitability.

### **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?**

Key overarching themes include:

- the need for clearer judicial guidance within the existing opt-in model;
- proportionality and active case management as core safeguards;
- addressing substantive law constraints before expanding to opt-out;
- maintaining clear constitutional boundaries for public law challenges;
- ensuring a coherent, transparent framework for funding, certification, settlement and communication.