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Scottish Civil Justice Council
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Edinburgh
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Sent by email: SCJC@scotcourts.gov.uk

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Dear Sir or Madam

SCJC call for evidence on group procedure

This response is sent on behalf of the Association for General Counsel and Company Secretaries in the UK FTSE 100, generally known as GC100. There are currently over 130 individual members of the group, representing over 85 companies from across the FTSE 100. Please note, as a matter of formality, that the views expressed in this response do not necessarily reflect those of each and every individual member of GC100 or their employing companies.

GC100 welcomes the opportunity to respond to this call for evidence, which has been drawn up by the Litigation and Disputes working group of GC100 consisting of senior litigation lawyers working for FTSE 100 companies. Indeed, GC100 members are deeply committed to ensuring meaningful access to justice and facilitating effective redress where consumer harm has been suffered. For GC100, this means providing mechanisms that: (a) secure the resolution of good faith disputes fairly and at proportionate cost; and (b) deliver the maximum possible share of any damages or compensation to injured parties. The second element of this definition is key, as access to justice should be measured by the outcome it produces or is likely to produce for injured parties.

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

GC100 does not support introducing opt-out group proceedings. Experience in other jurisdictions demonstrates that an opt-out regime is not an effective or efficient method of delivering consumer redress or access to justice. Furthermore, it abstracts money from the national economy for the benefit of overseas persons and disincentivises inward investment.

As an initial point, GC100 notes that the SCJC is still considering the results of its review of the current opt-in procedure. GC100 understands that this review is currently limited to a targeted consultation of law firms that have been involved in the existing procedure. GC100 suggests that a constructive next step would be to seek views of the pursuers and defenders involved. In addition, as no opt-in action has reached the stage of substantive issues being determined, GC100 believes that any review at this stage is unlikely to provide adequate data to enable the SCJC to make an informed decision on such fundamental future changes.

GC100 also notes that the Department of Business and Trade (DBT) is currently conducting a review of the rules governing the Competition Appeal Tribunal's (CAT) opt-out procedure. This is the only existing UK example of opt-out actions. It would be prudent for the SCJC to await a full review of the opt-in procedure, plus the outcome of DBT's review into the CAT opt-out procedure, before proceeding with its own opt-out rules.

Furthermore, GC100 is concerned that an opt-out regime in Scotland would reproduce the many issues that have arisen in relation to proceedings in the CAT. The CAT regime has failed to provide meaningful access to justice or consumer redress, while imposing significant costs on UK businesses with little, if any, benefit to consumers. This is due to:

- *Low certification threshold and lack of credible mechanism for dismissing weak claims early.*
  The regime's permissive certification decisions have led to a proliferation of unmeritorious claims, often driven by litigation funders and claimant law firms rather than genuine consumer grievances. Approximately 95% of claims that have reached certification stage have been certified to proceed to a full trial (either immediately or on a second attempt, excluding carriage disputes where only one claim is certified). Further, claimants are often allowed to rely upon untested theoretical claims to achieve certification. Even where a claim has no merit, a defendant's only options for avoiding the distraction and cost of protracted litigation will be either expending millions of pounds on expert analysis in the hope of disproving the claim or submitting to a coercive settlement. Neither serves the interests of justice.

- *High litigation costs even before certification.*
  Legal fees of £1.5 to £2 million per party just to reach certification are not uncommon, with full defence costs being much higher. For example, BT's defence in the *Le Patourel* claim cost over £26 million. Incurring such high costs (which can equal the costs of complex commercial litigation all the way to trial) for what is a preliminary stage, is undesirable: it imposes a barrier to meritorious claims that cannot justify such significant upfront investment, inflates the cost of pursuing opt-out actions and is disproportionate for a step that is only preliminary.

- *Inadequate safeguards against disproportionate returns for litigation funders and claimant lawyers.*
  Settlement sums and damages awards in the CAT generally have disproportionately advantaged funders, with little going to class members. For example, claimants in the group litigation against the Post Office only received approximately 20% of the settlement payout, and an estimated 35% of the £200 million settlement amount in the *Merricks* case was allocated to the funder, an amount the funder challenged as being inadequate. Funders often contract to obtain returns on their invested capital of 300% to 400%, and in some cases, even higher returns.

- *Minimal take-up rates by claimant classes.*
  Take up rates for damages by claimant classes have been extremely low, often below 2%. In the *Merricks* settlement, the sum actually paid to claimants was only a little over 1.4% of the original purported quantum of the claim. This raises legitimate questions about the real purpose of the regime, or at least the difference between the expectation when the regime was set up and the reality in practice.

- *Inflation of quantum and exclusion of smaller claimant classes.*
  The need to make claims "fundable" leads to inflated quantum and excludes smaller classes genuinely seeking redress as their claims do not offer sufficient profit to funders. Funders prefer the highest value claims because of the settlement pressure they exert and the significant returns on investment they offer, even if the subject matter has proven unworthy of the attention of regulators.

- *Lack of transparency and regulation of litigation funders.*
  Many funders are overseas entities with non-UK investors whose identities are often unclear. Funders are not subject to anti-money laundering controls, creating a risk of litigation funding being used as a route to launder criminal proceeds. The code of conduct to which funders may agree is voluntary, does not specify minimum content for litigation funding agreements (LFAs), places no obligation on funders to use clear and unambiguous language in LFAs, is silent on the conflicts of interest which may arise in a funding relationship and on the establishment of systems to monitor and mitigate those conflicts, and places no obligation on funders to act honestly and transparently. Despite being, in effect, a lender, funders are not subject to capital adequacy requirements or other regulation by the UK's financial services regulators. Finally, funders can choose to open and close the fund without consumers having an opportunity to object, potentially leaving them without a funder in the midst of an action.

- *Deficiencies in consumer interest and distribution mechanisms.*
  Claimant classes are often unaware of, or uninterested in, their entitlements. This means that a tiny fraction (less than 2% in some cases) of the damages awarded or agreed in a settlement are taken up by consumers. This is striking when compared to the sums paid to lawyers and funders. It is true that opt-in mechanisms suffer from a low take-up at the start of proceedings, but there is no reason to believe that that problem is resolved by the use of an 'opt-out' mechanism – the lack of interest remains a problem regardless of when class members are invited to register. This raises questions about whether an opt-out regime is really in the public interest, or whether its inherent flaws get overlooked in favour of theoretical access to justice arguments.

The SCJC should carefully consider whether an opt-out regime can ever provide the best mechanism for resolving disputes, given the behaviours it incentivises.

If the SCJC is keen for such a procedure to be introduced, it might first consider conducting a pilot covering a discrete area of law; ideally one in which there is not currently, for example, a specialist court or a free redress scheme (like the Financial Ombudsman Service). The rules governing the pilot ought to include protections (discussed further below).

GC100 acknowledges the need for a mechanism for collective claims that allows consumers to join an action at no cost and with minimal ongoing involvement. However, it considers that this ought to nevertheless require them, at the very least, to register an interest. This would encourage a focus on actual consumer harm, allow the true value of the claims to be established early, and address the issue identified above of claimant lawyers/funders manufacturing claims for their own profit.

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

As set out in its response to Q1, GC100 does not believe that opt-out group proceedings are capable of properly providing access to justice. In addition:

- There are some types of claims that are particularly unsuitable for opt-out group proceedings, like family law disputes and defamation disputes.
- There are preferable forms of redress in certain areas of law, for instance where an ombudsman or other free-to-consumer redress service is available.

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

It is unlikely that group actions would be appropriate for judicial review in Scotland. Judicial review is designed to address the legality of decisions made by public bodies, and a single claimant is sufficient to challenge and overturn a questionable decision. In addition, compensation is not typically awarded in judicial review proceedings.

If a public body's decision is subsequently quashed and this affects a wider group of individuals who may wish to seek compensation, those individuals could pursue a separate collective claim. Such claims would be brought on grounds such as breach of statutory duty, tort, or under the Human Rights Act 1998.

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

- *Evidence-based certification.*
  The certification stage for opt-out proceedings must be underpinned by robust evidential requirements. Courts should require reliable proof of: (i) commonality of issues across the class; (ii) accurate class composition and size; (iii) merits of the claims; and (iv) necessity of opt-out procedure for access to justice.

- *Enhanced notice requirements and communication.*
  Opt-out proceedings automatically bind class members unless they actively opt out. Therefore, courts should mandate detailed, multi-channel notice protocols. Notices must clearly explain rights, deadlines and implications, ensuring compliance with due process and maximising awareness and participation.

- *Early case management and strike-out powers.*
  Courts must actively manage opt-out cases, with the authority to strike out weak or unmeritorious claims or, for example, claims that are time barred at an early stage, to avoid parties incurring substantial costs for unmeritorious claims.

- *Judicial oversight of funding, settlement, and distribution.*
  Mandatory disclosure of funding arrangements should be required, as, for example, recommended in the European Parliament's recent report and as required by the Representative Actions Directive in the case of representative actions. Judicial review of settlement terms and

distribution schemes is essential to protect absent class members and maintain proportionality in costs and outcomes.

- *Focus on alternative redress mechanisms.*
  Courts should consider whether alternative, cost-effective redress mechanisms, such as ombudsman schemes or sectoral redress programmes, may be more appropriate than opt-out litigation in certain cases.

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

Certification should act as a filter for unmeritorious claims. The certification process should, therefore, be robust and evidence based. Courts should require credible evidence of:

- Common issues across the class.
- Accurate class composition and size.
- The realistic value of the claim and what this would mean for recovery per potential class member.
- Scrutiny of litigation funding agreements and proportionality of costs and benefits. Where the economics of the claim do not work because the amounts to be paid to the funder are too high or likely redress delivered is too low, then the court should be prepared to refuse certification.
- Adequacy of the proposed class representative.
- Necessity of opt-out procedure for access to justice.

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 fact that many members of a claimant class do not know about the proceedings or may not in fact wish to pursue a claim is a powerful reason for not introducing an opt-out procedure. If such a procedure is introduced, it will require robust safeguards to protect absent class members, many of whom may be unaware of their participation.

In addition to the need for a robust certification regime (discussed in Q5 above) and scrutiny of funding arrangements (discussed below), GC100 considers that the following procedural steps are essential:

- *Clear, accessible, multi-channel notice.*
  The court should mandate comprehensive notice protocols using multiple channels (for example, by post, email and online platforms) to inform group members about the nature of the claim, inclusion criteria and their right to opt out. Notices must be clear, accessible and explain rights, deadlines and implications in plain language.

- *Simple opt-out mechanisms.*
  Straightforward opt-out options, such as online portals or freepost forms, should be provided to ensure group members can easily exercise their right to opt out.

- *Judicial oversight of governance.*
  The class representative must be required to satisfy the court that good governance is in place to protect the interests of class members.

- *Judicial approval of settlements and distribution plans.*
    - All settlements and distribution plans should be subject to judicial approval to ensure fairness and proportionality.
    - Courts should scrutinise settlement terms and distribution schemes to protect absent class members and maintain proportionality in costs and outcomes.

- *Judicial oversight of proposed class representatives (PCR).*
  Class members have limited ability to challenge the appointment of a PCR, and recent CAT cases (*Riefa, Rowntree*) show that PCRs are sometimes selected by claimant lawyers and funders and inserted late into proceedings. Introducing specific eligibility rules, such as requirements for prior career or track record, would help ensure PCRs are suitable for the role.

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)?
Yes. To protect defenders in opt-out proceedings while preserving access to justice, GC100 recommends the following measures:

- *Mandatory, demonstrable adverse-costs protection at certification.*
  Require the PCR to evidence after the event insurance or equivalent adverse-costs cover that is sufficient to meet realistic defence costs, including disclosure and expert evidence, before certification, with the court empowered to refuse or condition certification if cover is inadequate. This will allow the courts to exercise close supervision of costs and funding and limit uncertainty created by *PACCAR* on the enforceability of LFAs.

- *Funding transparency and capital adequacy.*
  Compel full, non-redacted disclosure to the court and, where appropriate, parties of key LFA terms, including returns, priorities of payment, termination rights and source of funds, and require funders to meet case specific capital adequacy standards. This will give defenders visibility of the financial arrangements underpinning the claim, which may influence settlement strategy, and will help defenders evaluate the risk of being unable to recover costs, whether because the funder terminates the agreement without notice or lacks sufficient resources to satisfy an adverse expenses award. Courts should decline certification where LFAs are imbalanced or conceal material information.

- *Security for costs and non-party costs orders.*
  Where adverse costs cover is uncertain or funders are offshore/special purpose vehicles, permit security for costs against the representative or funder and reinforce the availability of non-party costs orders to ensure defendants can recover where claims fail. (Costs control and non-party liability are already recognised features of competition litigation practice.)

- *Funding payments subordinated to consumer redress.*
  Prohibit interim payments to funders out of settlement proceeds ahead of distribution plans and final outcomes, save in exceptional, court-approved circumstances.

- *Early case-management powers to limit unnecessary defence spend.*
  Strengthen powers for early dismissal/strike-out/debate, ensuring disclosure is proportionate to a value of the claim that is estimated realistically to take account of ultimate likely uptake of any eventual award (including expert-led models only where strictly necessary), and tight cost-budgeting to prevent escalation in complex multi-party cases.

- *Ongoing case management.*
  Ensure that defenders are not left with poor claims hanging over them for years.

- *Automatic sists where parallel statutory or regulatory redress is underway.*
  Introduce automatic or presumptive sists of collective proceedings where a regulator-mandated redress scheme (as the CAT has done with FCA motor finance claims) is in train or where large volumes of parallel complaints are being handled by the Financial Ombudsman Service or similar regulatory body, to avoid premature litigation costs and duplication.

- *Preventing speculative claims post-PACCAR.*
  Given *PACCAR*'s impact and ongoing appellate scrutiny of revised LFAs, certification should include a proportionality test weighing likely consumer returns against defence costs, with courts empowered to refuse certification where funding terms or case merits would be likely to render consumer net recoveries de minimis.

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?

Pre-action protocols are essential for group proceedings to promote early resolution, manage disputes proportionately and reduce unnecessary costs. GC100 strongly supports their introduction in Scotland's group claims framework.

Voluntary vs compulsory

- Pre-action protocols should be compulsory. The Civil Justice Council's recent review in England and Wales recommends mandatory protocols for all multi-track business cases to enhance cost efficiency and avoid tactical delays.
- Scotland already employs mandatory pre-action protocols in personal injury actions with positive effect; this demonstrates both practical viability and clear benefits.

Core elements of a group pre-action protocol

- Early exchange: Require clear, concise letters summarising the claim, factual basis, proposed remedy and supporting evidence.
- Disclosure and transparency: Ensure exchange of relevant documents and data before proceedings begin, especially where multiple claimants are involved.
- Alternative dispute resolution (ADR): Encourage mediation or other ADR channels before litigation.
- Issue narrowing: After disclosure and ADR, require the parties to refine the contested issues and

streamline litigation.

- Express requirement on alternative redress:
    - Pre-action protocols should include an express requirement that a prospective claimant state whether any alternative, out-of-court mechanism for redress is available to them, whether it has been pursued and, if not, why.
    - Failure to make such disclosure, or unreasonably not pursue any available alternative mechanism, should be penalised in costs.
    - This proposal is intended to reduce inappropriate and/or duplicative litigation.

Sanctions for non-compliance
Courts should have power to sanction non-compliance by reducing recoverable costs or awarding expenses against defaulting parties, as is the case under the Scottish Compulsory Pre-Action Protocol for personal injury.

The courts should have powers to stay or strike out funded claims where claimants have unreasonably failed to consider and/or engage with out-of-court redress mechanisms. These measures incentivise compliance and preserve procedural integrity.

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 play a central and active role in approving the distribution of any award in opt-out group proceedings.

Experience in the collective actions regime in England and Wales demonstrates that, without robust judicial oversight, there is a significant risk that settlement sums and damages awards disproportionately benefit litigation funders and claimant lawyers, with little meaningful recovery for class members.

The court should, therefore, be empowered to scrutinise the proportion of the award allocated to class members and the mechanisms for notifying and paying claimants and the repayment of unclaimed funds.

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 scrutinise the proportion of the settlement allocated to group members, the mechanisms for notifying and paying claimants, and the treatment of unclaimed funds. Approval should only be granted where the settlement avoids disproportionate benefit to funders or lawyers and genuinely delivers consumer redress. Enhanced judicial scrutiny at this stage is critical to maintaining the integrity of the regime and public confidence in collective proceedings.

Question 11: Do you have any views on how unclaimed damages awards or settlement sums should be distributed?
Unclaimed damages awards or settlement sums in opt-out group proceedings should, in principle, revert to the defender rather than being allocated to funders, lawyers or cy-près distributions. This

approach is consistent with the compensatory principle underpinning civil litigation, which aims to restore claimants to the position they would have been in but for the wrongdoing.

Where collective actions are genuinely brought in the interests of class members and sufficient opportunity is afforded for those members to claim funds, there is no justification for unclaimed amounts to be paid to anyone else. The court should be slow to approve settlement terms that disrupt this principle. Reversion of unclaimed funds to defenders helps ensure that the regime prioritises consumer redress rather than cross-subsidising other parties at the defender's expense.

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)?

- *Prohibitively high costs and reliance on litigation funding.*
  Group proceedings are extremely expensive to prosecute and defend. The costs involved, often running into millions of pounds even before trial, make third-party litigation funding a practical necessity. This reliance on external funding increases the risk profile of claims and, in turn, the returns demanded by funders. As a result, the amount ultimately available for class members is significantly reduced, which may deter future classes from pursuing claims.

- *Limited access and inflated claims.*
  Because funders require a sufficiently high quantum to justify their investment, only large-scale claims are viable. This leads to two negative outcomes: (i) inflation of the quantum claimed to ensure "fundability"; and (ii) exclusion of smaller, but potentially meritorious, claims that cannot attract funding. The regime is, therefore, not affordable or accessible to a diverse range of classes.

- *Disproportionate returns for funders and lawyers.*
  There is little correlation between aggregate damages recovered and the actual redress received by class members. Litigation funders and claimant lawyers are often the primary financial beneficiaries of collective actions, with class members receiving only a small proportion of any settlement or award. A recent example is claimants in the group litigation against the Post Office only receiving approximately 20% of the settlement payout, with the remainder covering legal fees or being paid to litigation funders. This undermines the presumed objective of opt-out actions of delivering meaningful consumer redress.

- *Lack of competition and transparency in funding.*
  There is limited competition among funders, and the balance of negotiating power typically favours funders over claimants. Funding agreements are often opaque, with class members and defenders having limited visibility over their terms. This lack of transparency can lead to unfair or disproportionate arrangements.

- *Insufficient regulation of funders.*
  Litigation funders are essentially unregulated lenders, without capital adequacy requirements or regulatory supervision. This exposes both claimants and defenders from the risks associated with underfunded or opportunistic claims.

- *Conflicts of interest and disputes.*
  The very nature of opt-out claims means that the usual relationship between lawyer and client is largely absent. Claimant lawyers are likely to have a closer relationship with their funder than with their notional clients. This means that the risk of conflicts is inherent in these relationships. One high-profile example is the recent conflict in the BHP litigation, in which the senior partner on the case removed himself over concerns that the hedge funder was inappropriately involved in the firm's operations and cases. These conflicts can sometimes result in costly and distracting satellite litigation. There is a need for effective mechanisms to resolve such disputes without eroding the value of settlements or awards.

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?

The introduction of an Access to Justice Fund, as proposed by the Civil Justice Council, could provide seed funding for meritorious but underfunded claims. A hybrid model combining public funding for early-stage case development with private funding for litigation could improve access.

However, any alternative funding model must include safeguards to prevent abuse. Public or hybrid funding mechanisms could unintentionally incentivise litigation without sufficient merit. Any public funding must include merit screening and cost recovery mechanisms to avoid incentivising weak claims.

In the absence of such a fund, there is a role for litigation funding, with appropriate guardrails. Those guardrails might include:

- *Transparency and court oversight.*
  All funding agreements should be disclosed in full (with minimal redaction) to the court and, where appropriate, to class members. The court should have the power to scrutinise and, if necessary, refuse certification of claims where the terms of the funding agreement are imbalanced or unfair.

- *Template or standardised funding agreements.*
  The court should consider codifying acceptable funding agreement terms, possibly through a template LFA as a starting point for funded claims. Claims subject to LFAs that depart too significantly from the standard should not be certified.

- *Limits on funder influence.*
  Strict limits (and, in some cases, prohibitions) should be placed on provisions that allow funders to obstruct genuine attempts to settle or otherwise influence the conduct and outcome of proceedings to the detriment of class members.

- *Dispute resolution mechanisms.*
  Effective mechanisms should be in place to resolve disputes between funders, class representatives and class members, so that litigation costs are not eroded by satellite disputes.

- *Protection against excessive returns.*
  The court should have the power to cap funder returns and ensure that the majority of any award or settlement is distributed to class members, not funders or lawyers.

- *Adequate adverse costs cover.*
  There should be a requirement for sufficient adverse costs insurance or guarantees to protect both class members and defendants from the risk of unrecoverable costs if the claim fails.

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)?
Transparency around funding arrangements is essential to the integrity and fairness of group proceedings, whether opt-in or opt-out. The experience of recent collective actions demonstrates that funding agreements can have a significant impact on the conduct and outcome of proceedings, the distribution of damages and the interests of class members. GC100's suggestions in this respect are set out above.

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)?
If opt-out proceedings were to be introduced, it would be critical to introduce a costs process that requires costs budgets to be approved at the earliest possible stage of litigation. Early scrutiny of costs would enable the court to actively manage anticipated costs and ensure they remain proportionate. This is particularly important in group actions, where individual claimants do not have the opportunity to challenge or scrutinise costs, unlike in non-group proceedings.

Failure to robustly manage costs would significantly exacerbate the issues identified elsewhere in this response. In such circumstances, a greater proportion of claimant lawyers' fees could be deducted from settlement payments or judgment sums, as defenders would not be liable for costs later deemed disproportionate.

In addition, any assessment of proportionality must be grounded in a realistic estimate of the damages ultimately payable. Experience in other jurisdictions shows that the number of claimants who actually claim funds is often far lower than the initial projections provided by claimant lawyers at the outset of proceedings.

Question 16: Are there any aspects of substantive law which could be a barrier to group proceedings working effectively?
and
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?
Designing an opt-out regime requires careful consideration of its broader economic and policy implications. Experience from England and Wales highlights several concerns that Scotland should address before adopting such a model, as follows:

- *Economic impact of third-party funded actions.*
  The growth of third-party funded opt-out collective actions has significant economic

consequences. Many major litigation funders operating in the UK are owned or controlled by entities incorporated overseas, with capital provided by non-UK investors. Likewise, a number of claimant law firms active in this space are affiliates of US firms. As a result, when funded claims conclude, whether by award or settlement, a substantial proportion of the proceeds leave the UK economy. This diverts resources away from domestic reinvestment and necessarily impacts economic growth.

- *Consequences for UK businesses.*
  Large-scale payouts to resolve claims, particularly where the majority of funds do not reach consumers, have knock-on effects for businesses and society. These include:
  - Reduced returns to shareholders.
  - Increased prices for consumers.
  - Lower pay for employees.
  - Diminished charitable contributions by major corporates.

  Beyond these direct financial impacts, a litigation-heavy environment creates a disincentive to invest. Investors able to do so may redirect capital to jurisdictions that do not impose comparable risks. A pervasive litigation culture also affects corporate risk appetite, discouraging innovation and responsible risk-taking, both essential for long-term economic growth.

- *Alternative routes for redress.*
  To mitigate these risks, Scotland should consider embedding alternative mechanisms for consumer redress within its framework. Voluntary redress schemes, introduced under the Consumer Rights Act 2015, allow businesses to establish Competition and Markets Authority (CMA)-approved schemes to compensate affected consumers without litigation. Expanding regulatory powers, such as enabling the CMA or other bodies to issue directions for redress, could further reduce reliance on private opt-out actions. These approaches promote efficiency, reduce costs and avoid the systemic drawbacks of mass-funded litigation.

- *Absorbing court resources.*
  Experience in other jurisdictions demonstrates that opt-out actions significantly increase the administrative burden on the court system, driven by additional procedural layers and frequent interim applications. This added complexity risks diverting already limited judicial resources away from other priorities, while delivering most of the benefit to claimant lawyers and litigation funders.

Conclusion

GC100 does not support the introduction of opt-out group proceedings in Scotland, as experience abroad shows that they do not deliver effective consumer redress or improve access to justice. Such regimes also divert substantial funds overseas and risk discouraging inward investment.

If an opt-out regime is to be introduced, it must seek to strike a balance between access to justice and economic sustainability. Without safeguards, Scotland risks replicating a model that channels significant settlement funds overseas, creates disincentives for investment and innovation, and fails to deliver meaningful consumer benefit. Incorporating robust alternative redress mechanisms and addressing the economic implications of third-party funding should be central to any Scottish opt-out

framework.

Thank you for the opportunity to share GC100's views on the call for evidence. Please do not hesitate to get in touch should you wish to discuss the response in more detail.

Yours faithfully,

Amanda Cantwell and Liga Dugdale
GC100 Joint Secretaries