

Consultation Response

Call for Evidence –
Group Procedure

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Introduction

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Our Civil Justice Committee welcomes the opportunity to consider and respond to the SCJC Call for Evidence – Group Procedure. The Committee have the following comments to put forward for consideration.

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

The Civil Justice Committee expressed divided opinions on the introduction of opt-out group proceedings.

Some members of the Committee (representing Defenders) consider that it is premature to introduce opt-out group procedure principally because the current rules governing opt-in procedure are still relatively new in Scotland.

Group proceedings were introduced in primary legislation by the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (“the 2018 Act”). It was noted that the 2018 Act requires a review of the operations of opt-in procedure, which members of the Committee believe was scheduled to commence in 2025. However, it is understood that this review has not yet been completed. As such, it was suggested that a comprehensive review of opt-in procedure should be undertaken before any consideration is given to opt-out procedure. This is on the basis that the rules governing opt-in procedure may be amended following the review and any such changes would likely have implications for future rules governing opt-out procedure.

Furthermore, it is understood that there is an ongoing review of opt-out procedure in England and Wales currently available in the Competition Appeal Tribunal. Members of the Committee, who are opposed to the introduction of opt-out procedure in Scotland, consider that it may be sensible to await the outcome of this review, as it could have a bearing on any rules introduced in Scotland.

In summary, those on the Committee who are against the introduction of opt-out procedure in Scotland feel that it is premature and believe it is important to allow



opt-in procedure to become more established and to be thoroughly reviewed before introducing opt-out.

On the other hand, a member of the Committee (representing Pursuers), was in favour of introducing opt-out group proceedings. It was noted the 2018 Act has been in place for 8 years and, therefore, opt-out proceedings should be introduced in accordance with the legislation as a matter of principle. Those in favour of introducing opt-out procedure in Scotland observed that England and Wales have opt-out procedure beyond the Competition Appeal Tribunal as Representative Party Actions in England are, de facto, opt-out proceedings. Therefore, if such procedure exists in England, then arguably opt-out procedure should be implemented in Scotland as a matter of principle. In response to the suggestion that Scotland should wait until the outcome of the review in England and Wales before considering opt-out procedure, it was noted that Scotland has adopted a different approach to England and Wales in the way in which opt-in cases are conducted. Therefore, it was argued that we should not be overly cautious about waiting until the review in England and Wales is completed before considering opt-out procedure because Scotland is already operating differently in the sphere of opt-in.

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

Those on the Committee in favour of introducing opt-out group procedure observed that it would perhaps be difficult to bring group proceedings in cases where the claimant requires to prove the extent of their losses or injuries, such as in personal injury actions.

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

The Civil Justice Committee had no strong views but, on balance, they thought that it would be difficult to apply group procedure to judicial reviews in Scotland. This is because a petition for judicial review must generally be lodged with the Court within three months which makes its application to group proceedings problematic. Doing so would arguably delay the process and undermine the purpose of the Judicial Review Rules.

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

The Civil Justice Committee acknowledged the difficulties with the current rules for opt-in procedure and recognised the need for their review and likely amendment. Once this review has been completed, the Committee considered



that focus and thought should then shift to rules governing opt-out proceedings, if such rules are to be introduced, as the outcome of the review would inform any future new set of rules or amendments.

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

The Civil Justice Committee thought that there needs to be a review of the current certification process for opt-in group procedure, as that review would determine how the certification process for opt-out procedure should operate.

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 Civil Justice Committee agreed that protecting the rights of group members in opt-out procedure is a fundamental issue which needs to be carefully considered should opt-out group proceedings be introduced. The Committee did not go as far as to suggest specific procedural steps, but agreed that the rules will require to be very specific as to how people become group members in opt-out procedure and how it is they are notified that they are part of an action. Clarity will also be required in any new rules about the extent to which group members are personally liable for any award of adverse costs made in favour of the Defender, given that many group members may not have chosen to be part of the action.

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)

The Committee was divided in its view on this question.

Should opt-out procedure be introduced, members of the Committee (who represent Defenders) commented that, from a Defenders point of view, there should be transparency on funding and more disclosure by the Pursuer as to how proceedings are funded. For example, if an adverse award of expenses is made against the Pursuer, the Defenders should be aware from the outset whether there is a realistic prospect of recovering those expenses.

On the other hand, those who represent Pursuers argued that there is enough transparency at present around funding and no further measures should be



introduced. It was noted that discussions around funding are already addressed before the court in opt-in procedure, as the court must currently consider whether the representative party in group proceedings can meet an adverse costs award. Accordingly, it is already incumbent on the Pursuer to confirm to the Court whether funding is available to meet any potential liability. It was suggested that the current approach strikes a reasonable balance, and that no additional measures are necessary in opt-out procedure as such requirements do not apply in any other civil actions.

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?

The Civil Justice Committee had no strong views on this question. They noted that the purpose of pre-action protocols is to avoid unnecessary litigations by encouraging parties to narrow issues in dispute, thereby promoting settlement. It was observed that pre-action protocols could, in principle, apply to group proceedings as there is a risk that parties could raise proceedings prematurely. However, the Committee thought that this was unlikely, and it was suggested that pre-action protocols may be better suited to cases where there are individual negotiations between the parties.

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 Civil Justice Committee agreed that if a case is resolved by a decision of the court in group proceedings, that would also involve the court making a determination on distribution.

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

It was noted that, in England, the successful party requires to apply to the court for an assessment order even though the case has settled extra-judicially. Taking this into account, the Civil Justice Committee considered that something similar could be introduced in Scotland.



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

If opt-out proceedings were to be introduced, and a case were resolved either extra-judicially or by order of the court, it was suggested that claimants could be given a specific period of time, for example 6 months, to claim their award, failing which the payment would lapse. Any unclaimed damages could, thereafter, either be divided amongst the claimants who have already come forward to receive their award, or the funds returned to the Defender. This would likely be a matter for negotiation.

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)?

Those on the Committee who represent Defenders agreed that, from a Defenders perspective, the main issue for funding of group proceedings in Scotland is the lack of transparency from Pursuers about how the representative party is funding the litigation.

On the other hand, those on the Committee who represent Pursuers noted that a significant problem is the limited pool of funders available to fund group proceedings. It was observed that if further measures were introduced requiring more disclosure about funding arrangements in opt-out procedure and the balance is shifted too much towards transparency, then funders may be unwilling to fund group proceedings.

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?

A member of the Civil Justice Committee observed that there could be regulation of litigation funders.

However, it was noted that there are already fairly robust protections in place for group members in relation to funding arrangements. In particular, group members are already protected in the current opt-in proceedings by the existing rules on speculative fee arrangements and the rules about the maximum percentage that can be taken from any claimants' damages in respect of fees. It is presumed that these rules would also apply to opt-out group proceedings.



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)

The views of the Civil Justice Committee were divided on this question.

As discussed already at question 7, members of the Committee representing Defenders agreed that there should be more disclosure of funding arrangements, particularly in opt-out procedure as the potential exposure of the defender is harder to determine. It was acknowledged that Defenders have argued for greater transparency in the current opt-in procedure and this is a matter for the court at present. On the other hand, members of the Committee representing Pursuers believe that there is currently enough transparency of funding arrangements and that introducing greater disclosure could potentially defer funders from financing group proceedings.

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)?

The Civil Justice Committee agreed that there would need to be a new set of rules which cover expenses for group proceedings (either opt-in or opt-out) as the current taxation rules are not fit for purpose as they are not designed for group proceedings.

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

The Civil Justice Committee noted that if opt-out proceedings were to be introduced then arguably the Prescription and Limitation (Scotland) Act 1973 would require to be amended. This supports the view of those committee members who believe that it is premature to introduce new rules about opt-out procedure.



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?

Some members of the Civil Justice Committee noted that it may be prudent to consider the experiences of other jurisdictions that currently have an opt-out regime, with a view to identifying best practices that could shape the potential regime in Scotland.

For further information, please contact:

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