



## FACULTY OF ADVOCATES

### **Response to the Scottish Civil Justice Council's Call for Evidence on Group Proceedings in Scotland**

#### **General Questions**

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

We agree with the introduction of opt-out group proceedings in Scotland. We agree that this will help to facilitate access to justice in Scotland. Our concern is that it must be ensured that appropriate safeguards are put in place to ensure that the interests of all parties are adequately protected.

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

We consider that it is important that concurrent jurisdictions should be avoided, so that parties are not able to 'forum shop.' If there is an existing suitable forum for a particular type of action we consider that this should continue to be utilised in order to ensure consistency in decision making. A key example is competition cases which currently proceed in the Competition Appeal Tribunal.

We consider that there may be other areas of litigation in which opt-out group procedure may seldom be utilised, but we do not consider that potential rarity of such actions should, as a matter of course, exempt such actions from opt-out group procedure. In particular, we considered whether personal injury, professional negligence and judicial review proceedings should be exempted, due to the usually inherently individual nature of those type of actions. On balance, we concurred that these areas should not be exempted and that any concerns could be addressed by the court at the permission stage. Thereafter, flexibility in procedure and judicial case management would allow the proceedings to be tailored to the individual circumstances of the particular litigation.

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

We consider that judicial reviews should not be excluded from group procedure (whether opt-in or opt-out). Please see answer to Question 2 above.

**Questions of Procedure**

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

We consider that the key aspect to opt-out proceedings is the certification / permission stage. The process in opt-out procedure must be more stringent than in opt-in procedure. In particular, we consider that the criteria in relation to the definition of the group should be strictly applied. In opt-in procedure the threshold is relatively low, however there is not the same need for the court to carefully scrutinise the group. For opt-out procedure we consider that more detailed judicial scrutiny of the potential group is required.

In addition to the potential group, we consider that at the permission stage, judicial scrutiny is required of the funding arrangements, adverse costs, the suitability of the case for group proceedings, the representative solicitor(s) and whether another action has already been litigated covering the subject matter of the cause.

We do not consider that the part of the permission process relating to the merits of the case requires to differ from opt-in procedure.

Further, we consider that careful judicial case management is required, with an emphasis placed on deadlines being complied with in order to ensure efficacy.

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

Please see answer to Question 4 above.

**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)?**

Proper advertising of the group proceedings is essential to ensure both full participation at the outset of the action and also full distribution of funds at the conclusion of the action.

Thereafter, we consider that the court should have oversight and approval of settlements in order to protect the rights of group members, particularly those who are not represented.

A particular feature of opt-out procedure could be the requirement for the personal data of potential group members (i.e. who have not responded/elected to be included in the proceedings) to be used during the litigation. We consider that any such disclosure of personal information would require to be subject to the usual GDPR rules and, as part of judicial case management, the judge may require to address this before disclosure of personal data can be allowed (whether in an identifiable or redacted format).

**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 have considered whether the funders of group litigation should be required to exhibit 'proof of funds' to demonstrate that they are able to satisfy any adverse costs award. On balance, we consider that this would be too prohibitive a requirement to place on funders, particularly as there is already a dearth of funders willing to fund group litigation in Scotland. We consider that funders are already scrupulous about the group actions they agree to fund under opt-in procedure and would continue to be so under opt-out procedure.

In any event, we consider that consideration of funding arrangements ought to be part of the certification process. Please see answer to Question 4 above.

**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?**

There are currently no voluntary nor compulsory pre-action protocols for opt-in group proceedings. The type of actions for which voluntary and compulsory protocols are currently applicable tend to be for very specific types of actions which have common features. We are concerned that a voluntary or compulsory protocol for opt-out group proceedings would necessarily require to be drafted very widely, which would impact on the effectiveness of the procedure. Accordingly, we consider that there should not be a compulsory pre-action protocol for opt-out group procedure. We consider that there could be some benefit to a voluntary pre-action protocol, for example in relation to pre-action disclosure.

## **Questions about Settlement and Distribution**

**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?**

In order to protect the interests of all parties, we consider that there should be judicial management of the distribution of the award. In particular, we consider that the judge should set a time limit for the settlement to be claimed by the group, as this may require to be tailored to the specific facts and circumstances of the case.

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

In order to protect the interests of all parties, we consider that there should be judicial approval of the settlement and judicial management of the distribution of the award. Please see the answer to Question 9 above.

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

In Scotland, the purpose of compensation is reparation, not punishment. We consider that it would be contrary to this purpose if any unclaimed funds were to be, for example, donated to a charitable cause. We consider that any unclaimed funds should be returned to the defender after the specified time limit.

### **Questions about Funding**

**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 consider that this question is more appropriately answered by actual and potential funders of group proceedings

**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 consider that the question of how group proceedings should be funded is more appropriately answered by actual and potential funders of group proceedings.

We consider that the safeguards we have referred to in the answers to the above questions, in particular case management and judicial oversight, should be put in place in relation to the funding arrangements.

**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)**

We consider that this question is more appropriately answered by actual and potential funders of group proceedings.

We consider that there are competing interests between the defender (who has an interest in the funding arrangement and in particular the ability of the funders to pay an award of adverse costs) and the funder who has a commercial interest in keeping the funding agreement confidential. On balance we consider that the court should have an oversight role in relation to the funding arrangements.

**Questions about Expenses**

**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 consider that there are a number of difficulties with the Taxation of Judicial Expenses Rules 2019 which are outside the scope of this consultation. At present (and to the knowledge of the writers) there have been no Accounts of Expenses for opt-in group proceedings which have gone through the auditor. We therefore do not have an evidence base for any specific concerns in relation to the applicability of the 2019 Rules to group proceedings. We do however remain concerned about the length of time taxation is currently taking and whether it remains realistic for there to only be one Auditor, rather than a team of Auditor(s).

**General Questions**

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

We consider that any aspects of substantive law which could be a barrier could, in more cases, be effectively dealt with at the permission stage. We refer to our answer to Question 4 above.

The exceptions to this are jurisdiction and limitation. We consider that jurisdiction for group proceedings should be limited to the Court of Session. We consider that this will allow for consistency of approach.

**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?**

If opt-out group proceedings are to be introduced in Scotland we consider that it is imperative that any new procedure is sufficiently resourced. At present, we are concerned that there are insufficient resources within the Scottish Courts and Tribunal Service and/or the judiciary to meet the demands of a new procedural route. The introduction of a procedure of this magnitude will require to be properly funded and resourced. It may be that a specific section of the Court requires to be dedicated to group actions, in the same way as commercial or family, to build further SCTS and judicial knowledge within that branch.