



**Scottish Civil Justice Council**

**SCJC Working Group: Consultation on Group Proceedings**

**A response by the Association of Personal Injury Lawyers**

**April 2020**

## **Introduction**

We welcome the opportunity to respond to the Scottish Civil Justice Council consultation on the proposals for court rules for the new group procedure introduced by the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018. We welcome that a new group procedure will be established, as the current rules allowing for test cases to be brought mean that interested parties and their representatives, who are not able to be joined as parties to the action are not kept up to date and not able to access information about the case. While there are issues with some of the proposals which must be addressed, we believe that overall, the new group procedure would be preferable to the current system of test cases, as it will ensure increased communication, and for all those affected by the litigation to be kept “in the loop” and to have greater control over the case.

We answer the questions below on the assumption that the qualified one way costs shifting provisions apply to group proceedings.

**Consultation question 1: Do you have any comments about the approach taken as to the scope of the group proceedings regime? Do you agree with the approach? If not, please provide comments.**

We agree with the approach taken as to the scope of the group proceedings regime.

**Consultation question 2: Do you have any comments about the approach taken to the opt-in/opt-out procedure? Do you agree with the approach? If not, please provide comments.**

The approach taken must be an “opt-in” procedure. We fail to see how an “opt-out” procedure could work on a practical basis.

**Consultation Question 3: Do you have any comments on the proposed procedures and rules provisions for the appointment of a representative party?**

We are happy with the proposed procedures and rules provisions for the appointment of a representative party. We assume that reference to Rule 23 of the Rules of the Court of Session includes motions by email. We would expect the e motion procedure to be adopted in this process.

The rules also need to be clear on the rights and responsibilities of those who have been instructed by group members, but are not the representative party. It is highly likely that

before the group proceedings take place, most or at least some of the group members will have instructed their own legal representative. There needs to be clarity on the ability for other solicitors to advise group members, and what the role that other legal professionals who are not the representative party will be. In order for the new group procedure to be successful, and for it to provide benefits where the current system does not, there must be effective communication between the group members, the representative party, and other legal professionals who are not the representative party. While it is appreciated that only the representative party will have the responsibility for running the case, other legal professionals instructed by group members should be kept up to date and informed, so that they are able to continue to advise their clients.

**Consultation Question 4: Do you have any comments on the proposed procedures and rules provisions regulating applications for permission to bring group proceedings for related hearings?**

We believe that the maximum of 30 minutes for a hearing is not compatible with access to justice, or with the rest of the court rules, even where there is provision for this time to be extended. Any group proceedings, by their very nature, will not be straight forward, and it will most likely not be possible to hear the issues in a 30 minute time slot. We appreciate that hearings should not be permitted to go on indefinitely, but elsewhere in the rules there is a requirement for parties to state how long they believe the motion will take to determine, and then there is liaison with the Keepers Office, which helps to manage the length of time allocated to that particular hearing. This approach should be mirrored in these rules – there should not be a blanket maximum hearing time of 30 minutes.

**Consultation Question 5: Do you have any comments on the proposed procedures and rules provisions regulating the granting of permission to bring group proceedings?**

We are satisfied with the rules provisions regulating the granting of permission to bring group proceedings.

**Consultation Question 6: Do you have any comments on the proposed procedures and rules provisions regulating appeals against the granting/refusal of permission to bring group proceedings?**

We believe that the rules provisions should provide for appeals, but not restrict appeals only to points of law. There will be other reasons that an appeal may be sought.

**Consultation Question 7: Do you have any comments on the proposed procedures and rules provisions regulating the group register?**

We are happy with the proposed rules regarding the regulation of the group register, save for the points we raise at question 8 below.

**Consultation Question 8: Do you have any comments on the proposed procedures and rules provisions regulating the opting-in to a group proceedings case?**

There must be reassurance to those that are opting-in to the group procedure – who we assume will then be a party to the proceedings, by virtue of their opting in - about the extent to which their data is kept and shared between the other parties. Otherwise, some who would wish to be group members may be put off from joining the action for fear that their sensitive information such as medical records/history is to be shared between everyone in the group action. It must be made clear that consent will be sought from those opting-in if

anything beyond the information in the notice is to be shared. Those opting in should be able to control/restrict the distribution of their sensitive information.

The rules must not be drafted in such a way that will put people off joining the group action because they fear for their privacy. This will be counter-productive.

**Consultation Question 9: Do you have any comments on the proposed procedures and rules provisions regulating a person's withdrawal from a group proceedings case?**

There must be a distinction drawn between those in an individual case who abandon their case and therefore expose themselves to costs risks as per the QOCS rules, and those who withdraw from a group proceedings case – where there should not be such exposure to costs risks. There is a difference between a person abandoning their individual case late on in proceedings, and a person deciding that they no longer want to be part of a group action, because they disagree with a group decision. The person in the group action will not have had control over the case, or over the direction that the group is going, and it is unfair for them to be penalised in costs in the same manner as an individual who has abandoned their case, if they decide that they would prefer to bring their own action. The QOCS rules on abandonment should not apply where a person withdraws from a group proceedings case.

**Consultation Question 10: Do you have any comments on the proposed approach on the transfer/remit of cases within the group proceedings regime? Do you agree with the proposed approach? If not, please provide reasons.**

We agree with the proposed approach.

**Consultation Question 11: Do you have any comments on the proposals for rules regulating the fixing of a debate in a group proceedings case?**

We also suggest that a note of argument should be lodged alongside the motion requesting a fixing of a debate.

**Consultation Question 12: Do you have any comments on the proposals for rules regulating the case - management of group proceedings claims?**

We assume that at paragraph 72, the reference to “in which case it will be no less than 16 weeks from the date on which the application for debate has been determined / disposed of” should read “in which case it will be no less than 16 weeks from the date on which the debate has been determined/disposed of”.

**Consultation Question 13: Do you have any comments on the proposal for a rule conferring a discretionary power on the court for making orders in a group proceedings case?**

We do not have any comments.

**Consultation Question 14: Do you have any comments on the proposal on the effect of an interlocutor pronounced in a group proceedings case?**

We do not have any comments.

**Consultation Question 15: Do you have any comments on the proposed procedures and rules provisions for the replacement of a representative party in a group proceedings case?**

The rules are vague as to whether the representative party should inform all other parties/group members that they, the representative party, are being replaced. It should be made clear that it is the representative party's responsibility to do this.

We also reiterate our comments from question 3, that the rules also need to be clear on the rights and responsibilities of those who have been instructed by group members, but are not the representative party.

**Consultation Question 16: Do you have any comments on the proposed approach to rules provisions for the discontinuance, abandonment and settlement of proceedings in a group proceedings case?**

We await the draft rules to comment further on this. We do, however, question the strength of the proposed rules in requiring the representative party to inform the group members that they will be seeking court approval to discontinue/abandon/settle the case. While the consultation mentions that the rules will provide that in the majority of cases will require a form of notice to inform group members of court approval, this will be discretionary. We welcome judicial approval, but we do not believe that the representative party should be entitled to discontinue or abandon the case without informing the group members. It is also important that other legal representatives are kept informed and up to date on the development of the case, so that if abandonment etc. is considered, they are in a position to properly advise their clients and if necessary, arrange an appearance at court.

**Consultation Question 17: Do you have any comments about the proposed structure/chronology of the rules?**

Again, we await the draft rules to comment further.

**Consultation Question 18: Do you have any further comments on any aspect of the proposed rules framework regulating group proceedings cases?**

We have no further comments at this time, but look forward to reviewing the draft rules once published.

**About APIL**

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation which has worked for 30 years to help injured people gain the access to justice they need, and to which they are entitled. We have more than 3,000 members who are committed to supporting the association's aims, and all are signed up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives, paralegals and some academics.

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