MORTON FRASER MACROBERTS LLP

Scottish Civil Justice Council

Response to Call for Evidence on Opt-Out Group Procedure

On behalf of Morton Fraser MacRoberts LLP

Morton Fraser MacRoberts LLP (MFMac) is an independent full-service law firm with lawyers in corporate & commercial, real estate, litigation, construction & projects and private client services. MFMac has offices in Edinburgh and Glasgow and employs over 250 practising lawyers. We have over 35 teams and 75 individual rankings across both major independent legal directories, including for our expertise in commercial litigation, property litigation, construction law (including disputes) and mediation. In 2025, MFMac was named Scotland Law Firm of the Year by Chambers.

We consent to publication of this response by SCJC.

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

We are not in favour of the introduction of opt-out group proceedings as part of any immediate reforms to Part 4 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (the "2018 Act") and Chapter 26A of the Rules of the Court of Session.

In our view, before considering the introduction of opt-out proceedings, priority should be given to reforming to the existing framework around opt-in proceedings. We accept the policy justification for the existence of group proceedings and, in our view, facilitating proper access to justice and the fair and efficient management of proceedings requires that such proceedings are governed by clear and detailed procedural rules, in order that they can properly guide the Court.

We consider that the rules that currently govern opt-in proceedings do not implement sufficient safeguards around the initiation and management of group proceedings by a representative party. Proceedings of this nature which will frequently be extremely complex and high-value and require the representative party to be sufficiently prepared to act independently and manage competing interests, including on occasion the interests of their own legal advisers.[1]

Those challenges are likely to be a reality in many, if not most, group proceedings regardless of how detailed any procedural rules or guidance may be. However, we consider that the consequences of those problems are likely to be acutely felt in the course of opt-out proceedings compared to opt-in proceedings, given the nature of open-ended classes, case management demands, the higher value of total damages claimed (if not aggregate damages) and all parties' expenses involved with such proceedings. With that in mind, we consider that it is essential that reform is prioritised in relation to the existing rules for opt-in proceedings, before opt-out proceedings are considered as suitable for introduction. We expand on those issues in this response to the consultation.

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

It is clear that some types of claims are better suited to resolution by way of group proceedings, and some are far less so because they are inherently unlikely to raise the substantially similar issues of fact and/or law such that it would be efficient and fair for them to be disposed of together, and for a

[1] The particular features of group proceedings are likely to give rise to complex legal considerations, both in relation to the initiation/certification of proceedings and in their management by a representative party, including in fora where settled and detailed rules govern proceedings (such as the Competition Appeal Tribunal). By way of example, we refer to: (1) the recent decision of the Supreme Court in *Evans v Barclays Bank Plc & others* [2025] UKSC 48 addressing the circumstances that should inform the CAT's approach to certification of proceedings on an opt-in or opt-out basis, overturning the Court of Appeal which itself had overturned the CAT's decision at first instance; and (2) the dispute between the class representative and their litigation funder which arose in the CAT proceedings of *Merricks v Mastercard* about whether the Tribunal should approve the terms of settlement ([2025] CAT 28).

representative party to be appointed. An example of claims that would generally be unsuitable for resolution via group proceedings would be actions concerning allegations of clinical negligence, where the nature of loss and harm are likely to be highly individualised, leading to substantial variation between proposed group members on a range of issues. In addition, there is not an obvious lacuna that requires to be filled by having opt-out group proceedings as they can be dealt with adequately under opt-in proceedings if necessary. With that in mind, we consider that personal injury claims generally would not be well-suited to resolution by way of opt-out group proceedings.

In addition, for reasons expanded upon in response to question 3, we do not consider that group procedure (whether opt-in or opt-out) apply to judicial review proceedings in Scotland.

We also note that group proceedings may not be raised under section 11 of the Court of Session Act 1988 (jury actions) and we propose that exclusion is maintained in relation to both opt-in and opt-out proceedings.

However, beyond that, in our view it is not necessary to exclude certain types of case from group procedure (whether opt-in or opt-out), provided that there are adequate safeguards built into court rules to ensure that the Court will only permit only claims to proceed under group procedure where it is clear that they are suited to that procedure. The position in respect of opt-in procedure is that the Court has the discretion to certify proceedings or not in accordance with the rules: s. 20(8)(b) defines "opt out proceedings" as group proceedings which are brought on behalf of a group each member of which has "a claim which is of a description specified by the Court as being eligible to be brought in the proceedings" and if domiciled in Scotland the member has not given notice that the member does not consent or if outside of Scotland has given express consent.

It is clear from the variety of group proceedings certified in the Court of Session since the 2018 Act came into effect that a broad range of cases might conceivably be suitable to be dealt with via group procedure. That includes cases involving personal injury and historic child abuse; cases of that nature might often be considered unsuitable for group proceedings but the precise legal and factual issues in scope were considered sufficiently similar to allow the cases to be allowed to continue under group procedure.

It is also notable that the Outer House refused an application to bring group proceedings in respect of seventeen claims that concerned hernia mesh products. Permission was refused partially on the basis that the pursuers had not established that there was sufficient commonality among the claims and that, relatedly, it would not be more efficient to have the cases dealt with as group proceedings.[2] In our view, that demonstrates that it is appropriate for the Court to have the discretionary power to grant or refuse permission for group proceedings according to the facts and circumstances in the relevant proceedings before the Court.

Our comments apply in relation to both opt-in and opt-out group proceedings. If opt-out proceedings are introduced, our view is that some types of proceedings will clearly be even less suitable for those proceedings (such as personal injury claims), although we consider that the Court will be well-placed to refuse permission in each case as necessary.

Finally, we note that the High Court of England and Wales has, in general, taken quite a restrictive approach to the claims that can proceed despite the fact that there is no restriction on the types of claims that may be raised as (the equivalent to) group proceedings.

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

We do not consider that group procedure (whether opt-in or opt-out) should apply to judicial review in Scotland.

Section 27A of the Court of Session Act 1988 requires applications for judicial review to be raised within three months of the decision giving rise to the application. We consider there would be significant

[2] *Donnelly v Johnson & Johnson Medical Limited* [2025] CSOH 77.

difficulty in practice of recruiting group members (for opt-in proceedings), organising a group of claimants and representative party and preparing the application within this time frame.

Judicial review procedure, as set out in chapter 58 of the Rules of the Court of Session, provides a restricted timetable and timescale for the judicial review process. In terms of these rules, a substantive hearing should take place no later than 12 weeks following the grant of permission to proceed, making the entire procedure no longer than around 20 or 21 weeks. This procedure is designed for efficient disposal of judicial review proceedings and, given the complexities involved in group proceedings generally, the judicial review procedure is not adequate or appropriate to deal with group proceedings.

We do not consider that there is a practical need for group proceedings to be extended to judicial review. If judicial review leads to e.g. reduction of a decision, this will affect all of those subject to the decision, regardless of whether they are a party to the judicial review proceedings or not. We also do not consider that there is a need to create a group and appoint a representative party as detailed in the group proceedings rules. A party may bring a judicial review application if it has sufficient interest in the decision subject to review. A group can have such a sufficient interest already (for instance, a trade union, public interest group etc.) without this needing formalised and approved by the Court.

We also do not see a benefit in terms of access to justice if group proceedings were to be extended to include judicial review. There is already established law on protective expenses orders in judicial reviews in order to provide access to justice for matters of public importance. It is also rare for a judicial review to seek the award of damages, without which a claim would be unattractive to litigation funders.

We do not understand judicial review to be subject, at least to any substantial extent, to group proceedings in other jurisdictions.

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

In our opinion, it would be necessary for opt-out proceedings to be governed by substantially different procedure than those that apply to opt-in proceedings. Notionally, opt-out proceedings are often likely to involve much larger groups of parties that claim an entitlement to damages, and cases proceeding under opt-out procedure would often involve significantly larger sums of money (even if the aggregate value of individual claims is low). Different issues would foreseeably arise in opt-out proceedings as opposed to opt-in proceedings; those issues are both practical and substantive. We address a range of issues in further detail in response to specific questions below.

At this stage, we note if opt-out procedure is introduced, the role of the group register will have to be reconsidered for those actions. In the case of opt-out proceedings, we suggest that (in the place of the group register), it should be necessary for a proposed representative party to (1) describe the proposed group and any sub-groups, and (2) estimate the number of group (or sub-group) members and explain the basis for that estimate. We note that would reflect the approach taken to initiating collective proceedings (the equivalent of group proceedings) in the Competition Appeal Tribunal. As a matter of practice in that forum, an applicant for opt-out proceedings tends to support their assessment of the nature of a group with an expert report; we suggest that the same practical approach should be taken in Scotland if opt-out proceedings are introduced and that should be reflected in any rules or guidance issued on proceedings.

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

The certification process should be considered in relation to its two constituent parts: (1) certification of a Representative Party according to any criteria that may be proscribed by the rules; and (2) certification of the claims as suitable for group proceedings on the basis that they raise sufficiently similar issues of fact and law that it is appropriate to consider the pursuers' claims together. The distinct nature of those issues is reflected in the requirement to bring two applications at the outset of proceedings, which we suggest should be maintained.

Certification of a representative party

In our opinion it is necessary to implement clear requirements as to the requirements on an applicant to demonstrate their suitability for certification prospectively as a representative party. That is true in respect of any opt-out group proceedings that might be introduced, although we consider that, for the same reasons, it is important that the current rules in relation to the certification of a representative party are also clarified.

When an applicant seeks certification to act as a representative party, they are only obliged to lodge and serve, in addition to the summons and group register, "all relevant documents in the applicant's possession which are necessary for the court to determine whether or not to give permission" (RCS r. 26A.5(7)(c)). That may not require the applicant to produce anything at all, if they do not have anything already in their possession that would serve to demonstrate their suitability. We consider that it is inherently unlikely that most applicants would have much material that would fall to be disclosed, save for information to demonstrate their identity, solvency, and lack of immediate conflict (such as records to show they have never been employed by the prospective defender). That provision does not require the applicant to produce, for example, an affidavit in which they specify why they should be certified as a representative party, because that would not be a document in their possession when the application is made. It is of course open to the applicant to do so, but absent any obligation in the rules, we see no reason why a prospective representative party would proactively open themselves to scrutiny where that is not strictly required.

Thereafter, the certification criteria currently applicable to opt-in proceedings are set out in RCS 26A.7, in terms of which an applicant may be certified only where they have satisfied the Lord Ordinary that the applicant is a suitable person who can act in that capacity should such authorisation be given.

The matters which are to be considered by the Lord Ordinary when assessing the prospective representative party's suitability are as follows:

(a) the special abilities and relevant expertise of the applicant;
(b) the applicant's own interest in the proceedings;
(c) whether there would be any potential benefit to the applicant, financial or otherwise, should the application be authorised;
(d) confirmation that the applicant is independent from the defender;
(e) demonstration that the applicant would act fairly and adequately in the interests of the group members as a whole, and that the applicant's own interests do not conflict with those of the group whom the applicant seeks to represent; and
(f) the demonstration of sufficient competence by the applicant to litigate the claims properly, including financial resources to meet any expenses awards (the details of funding arrangements do not require to be disclosed).

The Lord Ordinary may refuse the application if they are not satisfied that the applicant is a suitable person to act in that capacity. However, the nature of the test applied by the Court is whether any factors are present that point to the unsuitability of a proposed representative party.[3]

We do not suggest that the Court has erred in its application of the rules but we consider that the current framing and structure of the rules does not provide sufficient protection against a set of a circumstances in which an unsuitable individual is certified as a Representative Party simply because there is no evidence at the outset of proceedings to demonstrate that they are not, in fact, suitable to act as such. The onus is effectively on the party opposing certification to demonstrate a lack of suitability which gives rise to significant practical challenges because, as matters stand, there is effectively no requirement on a prospective representative party to lead any evidence as to why they are a suitable candidate. There is, as a practical result of the rules, an extremely low hurdle for a proposed representative party to overcome, when in our submission the responsibilities on a representative party are onerous such that it is reasonable to expect an applicant to be capable of proving their ability to manage proceedings in the interests of all of the group members, whether that is on an opt-in or an opt-out basis.

Opt-out group proceedings will naturally lead to a large number of group members. The class representative will need to be someone who can deal with the case management issues that will stem

[3] *Mackay v Nissan Motor Co Ltd and others* [2025] CSIH 14, per the Lord President (Pentland) at [82].

from representing a large and open-ended group in high-value and complex litigation. Even when individuals are *prima facie* well-qualified, scrutiny of their application may reveal that they will not represent the group properly should certification be granted. In support of that position we refer to the Competition Appeal Tribunal's refusal to allow an individual to raise collective proceedings on the basis that she had not demonstrated sufficient independence or robustness to enable her to represent the class adequately.[4] The proposed class representative was not unqualified on the legal issues in dispute, but after scrutiny of the evidence had been led by the applicant, the Tribunal was not convinced that she had a suitably strong understanding of her duties to the class members, particularly in relation to how competing interests (those of funders, solicitors and class members) would be managed in accordance with the terms of the litigation funding agreement.

We submit that entirely similar issues, such as how to manage conflicts of interest, are likely to present themselves to a representative party in group proceedings (both opt-in and opt-out). It is accordingly necessary to implement robust safeguards at the certification stage. That would in practice facilitate the proper conduct of proceedings after certification has been granted, consistent with the overall policy objectives that justify the introduction of group proceedings in the first place. As matters stand the rules, in our view, do not effectively prevent the certification of an unsuitable representative party.

We also note that the *Reifa* action, noted above, makes it clear (albeit in CAT collective proceedings) that one of the many interests to be managed by a representative party may the interest of their own instructing solicitors, given the potential benefit to that party of any particular outcome achieved, such as settlement.

In this particular respect we consider that the certification rules would benefit from reform both in relation to opt-in proceedings and that it is specifically considered in relation to any rules that might be introduced for opt-out proceedings. The Court was satisfied with the fact that a proposed Representative Party was supported by a legal team in the *Nissan* proceedings in the Inner House.[5] However, in circumstances where there is limited scope for defenders and the Court to scrutinise substantive evidence about the applicant's own ability to manage the proceedings, we do not consider that sits squarely with the Court's approach in *Thompsons Solicitors Scotland v James Finlay (Kenya) Limited*. In that case, the Court refused to grant an application for a firm of solicitors to act as a representative party based on concerns about funding arrangements, success fees and the "*apparent blurring of the distinction between a party and its advisors, and the improbable consequence that the applicant would be issuing instructions, as representative party, to itself on matters relating to the progress of the group proceedings*".[6]

Under the current rules, it is not clear whether it is sufficient for a representative party to simply claim that they are supported by a legal team, considering that on the other hand it seems to be entirely unsuitable for a law firm to take such an active role in the conduct of the litigation that it threatens to usurp the independence of the representative party. We consider that the most suitable way to resolve that tension is to oblige a representative party to satisfy the Court as to their independence and ability to manage the litigation (including potential conflicts) as a necessary condition of obtaining certification, which should be reflected in the rules.

Again, we consider that issues we have responded on above are of particularly important conditions for the purpose of considering opt-out proceedings, although we also consider the same comments apply to opt-in proceedings.

By way of a practical proposal, we suggest that consideration is given to framing (or re-framing) rules for group procedure to oblige the proposed Representative Party to satisfy the Court as to their suitability for certification, under reference to each of the factors set out in RCS 26A.7, and for the proposed representative party to present a position with evidential support that is capable of scrutiny at the stage of applying for certification.

[4] *Christine Riefa Class Representative Limited v Apple Inc. & Others* [2025] CAT 5.
[5] *Mackay v Nissan Motor Co Ltd and others* at [82].
[6] [2022] CSOH 12 at paragraph 26.

Certification of the proceedings

Generally, the question of whether permission should be granted for the cases to proceed as group proceedings (i.e. whether the claims raise sufficiently similar issues of fact and law) should not necessarily depend on whether the proceedings are sought to be raised on an opt-in or an opt-out basis. It should be up to a prospective representative party to seek to raise an action either on an opt-in or an opt-out basis and to prepare their case accordingly. We suggest that if opt-out group proceedings are introduced, distinct criteria should apply to certification depending on whether the proposed representative party is seeking to initiate the action on an opt-in or opt-out basis.

We consider that it would be necessary for more rigorous duties to be imposed on a prospective representative party seeking certification on an opt-out basis than is currently the case for opt-in proceedings, that they must satisfy at the stage of applying for certification. Generally it should be incumbent on the representative party to demonstrate why it is necessary, fair or reasonable for the proceedings to proceed on an opt-out as opposed to an opt-in basis if permission is granted. It should also be incumbent on the representative party to provide detail at the outset of any action as to the likely size of the class, any subclasses, the estimated total value of the claim and aggregate value of claims, supported by expert evidence; we consider that information is entirely necessary to inform any basis of opposition and the Court's approach to the fair disposal of the claims.

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)?

We propose that it must be compulsory for the representative party, as a condition of certification for opt-out proceedings, to demonstrate to the Court that they are prepared to disseminate information about the nature of the case to the public in such a manner that is appropriate and proportionate to the nature of the case. In opt-out proceedings, that should specifically include information about the basis for a claim, the definition of the 'group' as proposed by the applicant, and funding arrangements.

In practical terms we expect that the representative party (following certification) would usually achieve that by way of publication on a website. We suggest that it would be beneficial for the Court to have the power to order the representative party to publish a particular type of information about the claim via those means.

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)

We have answered this in our response to questions 12-14.

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?

We do not consider that it is strictly necessary for a pre-action protocol to be implemented in group proceedings in Scotland.

If a pre-action protocol is implemented, we suggest that it might generally reflect portions of paragraph 10 of Practice Note 1/2017 (Commercial Actions), in that it might be a means of allowing the parties to clarify the issues in dispute at an early stage.

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 must have the power to specify how an award is distributed, timescales for distribution and the treatment of any residual balance in the event that the full award is not claimed by the class. We suggest that it should be incumbent on a representative party to make submissions to the Court as to how an award should be distributed in opt-out proceedings, rather than seeking a global award on behalf of the class.

We note that in other jurisdictions, for example Australia, the relevant court has the power to award specific types of aggregated damages to group members (formula-based or lump sum aggregate damages). We propose that a similar approach should be considered in rules governing group proceedings in Scotland, which would be consistent with the Court's general ability to determine quantum in the event of contradictory evidence presented by parties.

We note that under section 22 of the 2018 Act, the Scottish Ministers may by regulations make further provision on the assessment, apportionment and distribution of damages in connection with group proceedings, including the appointment of person to give advice about those matters. We suggest that these powers are brought into force and that any rules governing the Court's ability to approve distribution of an award should include the power specifically to appoint independent persons to advise the representative party or assist the Court itself, as appropriate.

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

In terms of RCS 26A.30, the Representative Party must consult with the group members on the terms of any proposed settlement of opt-in proceedings before any damages may be distributed.

In our view, if opt-out proceedings are introduced, RCS 26A should mandate that settlement of any opt-out proceedings is subject to the approval of the Court.

While that would be a departure from general practice that settlement is (usually) a matter for parties with which the Court does not interfere, we consider that a departure is justified in the context of group proceedings. That is particularly the case for opt-out group proceedings, which might involve a large base of claims with relatively low individual value, but where the potential share of settlement funds are far more significant for other parties, e.g. funders.

It may often be the case that a settlement is uncontroversial (where, for example, it only involves one of several defenders or if an opt-out class size is relatively small). However, it is entirely conceivable that a representative party might agree settlement terms with defenders that are disproportionately favourable to settlers and/or litigation funders, at the broad expense of the class. Furthermore, we would suggest that it is not possible to easily replicate the procedural safeguard that currently exists in relation to opt-in proceedings (at RCS 26A.30) in rules governing opt-out proceedings, given the practical difficulties that will arise in achieving meaningful discussing with an open-ended group of pursuers; if the Court is given more formal oversight powers, that will facilitate the representative party's service in the interest of all parties including group members.

It would be helpful to consider an approach that is consistent with the rules governing opt-out collective proceedings in the Competition Appeal Tribunal, which require settling parties to apply to the Tribunal for approval of the settlement terms. The Tribunal will only approve the settlement if it is satisfied that the settlement terms are "just and reasonable", taking account of all relevant circumstances, specifically including (a) the value of the settlement and its treatment of expenses, (b) the likelihood of a judgment being obtained for a significantly higher value, (c) the views of parties' legal and expert advisers, (d) the number of people likely to be entitled to a share of the settlement, and (e) the treatment of any unclaimed settlement sums will be addressed by 'clawback' provisions. If opt-out group proceedings are introduced in Scotland, our opinion is that the Court should have similar powers and duties when it comes to the oversight and approval of collective settlements.

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

Our view is that unclaimed awards or settlement sums should be distributed to a fund in the same way as in collective proceedings in the CAT. In those cases the Tribunal may award undistributed damages to the Access to Justice Foundation, which is consistent with the general principle that group proceedings should facilitate access to justice. ATJF is the sole-nominated body to receive this money. It has the ability to make grants aimed at increasing free legal advice, support and representation in the UK.

We note from the legal press that ATJF is making a £3.9million award of funding in support of free legal advice organisations in Scotland and consider that is a clear indication of the tangible benefits of such an approach.

The SCJC may wish to conduct its own analysis of whether the Foundation, or another party, should be the sole beneficiary of unclaimed awards or whether the Court should have a broader discretion to distribute unclaimed awards among other parties depending on the circumstances. Another option is to stipulate a time frame for claiming payment, failing which unclaimed sums are not paid by defenders.

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)?

While the representative party is required to demonstrate that they have the financial resources to meet any awards when making a group proceedings application in opt-in procedure we consider that the rules do not establish sufficient safeguards in their current form.

The issues in opt-in proceedings are the lack of transparency and the current rule that the litigation funding arrangement does not need to be disclosed.

There is a material risk for defenders in group proceedings that they are unable to assess the likelihood of recovering their judicial expense if they are successful, which are likely to be extensive in all the circumstances. Currently, there is a concern that one funder is supporting several different group proceedings and there is limited information about the financial stability of that funder. There is provision under section 10 of the 2018 Act for parties who receive financial assistance from another person, who is not a party to the proceedings, to disclose the identity of the person and the nature of the assistance being given. We note that the provision is prospective, but we suggest that it would be beneficial to either bring the provision into effect or to implement equivalent provisions around group proceedings.

We refer to our proposal set out above that the representative party should be obliged to publish the funding agreement; while we have made that proposal under reference to the representative party's ability to manage conflicts of interest, we consider that there is a further benefit in enabling other parties to understand their potential exposure in relation to expenses.

We are not aware of any limitations in the number of funders to fund group proceedings in Scotland.

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?

Our view is that the most likely available funding for opt-out proceedings will be third-party litigation funding. Safeguards should be implemented to enable the Court to ensure any funding arrangements are in the best interests of the group members. We refer to our prior answers, including on the duties that should be imposed on a prospective representative party when they are seeking certification of the 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)?

We are of the view that there should be disclosure of funding arrangements.

Litigation funding agreements between a representative party and their funder are often likely to include (1) conditions determining when the representative party may agree to bind the group members to settlement terms, and (2) conditions that would effectively enable the funder to withdraw funding in certain circumstances. It is necessary for the Court and defenders in group proceedings to ensure that a representative party, and their funder, would be able to satisfy any adverse award of expenses.

It is also necessary for the defenders to understand whether they require to exercise their right to seek caution for expenses, and the terms of provisions of that nature will inform that decision.

As regards the first of those points (settlement terms), it is necessary that all parties, and the Court itself, is able to understand how and when a representative party may be bound to consider or accept certain settlement terms. Management of a potential conflict of interests between funders and class members is an important part of a prospective representative party's ability to conduct proceedings independently, so it is necessary that the terms of funding agreements are made available at the outset of proceedings. In addition to that, it is important that when parties are negotiating settlements (and the Court is approving the same), they are cognisant of whether any given settlement terms would fall to primarily benefit funders or group members.

As regards the second point (withdrawal of funding), it is essential that all parties and the Court can understand the circumstances in which a representative party may be unable to conduct litigation any further, and meet an adverse award of expenses already incurred. Given the significant expenses that defenders can expect to incur in group proceedings (whether opt-in or opt-out, but particularly for opt-out proceedings), any withdrawal of funding during litigation would present very significant challenges for all parties and parties must be able to exercise their right to seek appropriate protection from the Court.

We do not object to the general principle that redactions to documents may be justified before they are published.

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)?

We are of the view that changes should be considered to the current rules around recovery of expenses.

The 2019 rules are not designed for group proceedings. The recoverable unit rate was most recently increased in June 2023, to £18.00. There is a significant divergence between the expenses that a successful party could expect to recover in terms of those rules, and the expenses that any party could realistically expect to incur by participating in proceedings. While that may be true for many actions (especially commercial actions), the problem is likely to be of particular significance in the context of group proceedings given the likely importance and value of any litigation of that nature.

We note that the Court would have the discretion to award an additional charge under reference to the heads specified in rule 5.2. However, we consider that it is appropriate for an uplift to be granted as an exception rather than the norm, and justified by the particular characteristics of the case. In our view, the availability of an additional fee should not be considered as a suitable substitute for rules designed for group proceedings.

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

In the event that opt-out group proceedings are introduced, it will be necessary to specifically consider how the law of prescription will operate in relation to those claims. Assessing whether any portion of a claim is time-barred is generally possible in opt-in proceedings (even if it is challenging) because there is an identifiable group of pursuers with particular circumstances that the tests set out in the Prescription and Limitation (Scotland) Act 1973 can be applied.

The position is more complex with opt-out proceedings because there is, effectively, an open-ended group of pursuers. The combined effect of section 6 and section 11 of the 1973 Act would create significant practical difficulties for opt-out group proceedings where arguments can be made about the beginning of a prescriptive period that require evidence from group members, for example in cases that depend on allegations of fraudulent or negligent misrepresentation, unlawful means conspiracy or breach of contract.

With that in mind, in our view the operation of the law around negative prescription would be a barrier to group proceedings working effectively. In our view, the logical consequence of those concerns is that opt-out group proceedings, if introduced, would only be an appropriate procedure for cases in which there is limited scope for prescription arguments that require evidence from group members (or a sample group) - for example, cases where different 'sub-groups' have clearly identifiable prescriptive periods by virtue of being in an identical factual position, or follow-on actions for damages.

We consider that amendments would be necessary to the 1973 Act to address opt-out group proceedings, if introduced.

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?

We refer you to our answers above, in particular our answer to question one for our general comments on the necessity of changes to the current regime around opt-in group proceedings. As above, we consider that it is necessary to implement reforms to the opt-in group proceedings regime before considering the introduction of opt-out group proceedings.

Morton Fraser MacRoberts LLP
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