General Questions

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

Opt-out proceedings ought to be introduced, as envisaged by the Act, without further delay. It has been the will of Parliament for 7.5 Years that Scottish citizens should have access to justice via Opt Out Group Proceedings. That parliamentary will has been withering on the vine. No reason has been given as to why an act of sederunt has not been brought forward introducing Opt Out Proceedings. The will of Parliament should have been obtempered several years ago.

There is de facto Opt Out proceedings in E&W – Representative Party Actions [CPR 19.8]. Scottish citizens should have the same right of access to justice as those in E&W.

Opt-in proceedings have now been in operation for a sufficient period of time to observe the rules in practice and implement lessons learned in the development of opt-out proceedings.

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

There are no areas of litigation which are inherently unsuitable for opt-out group proceedings. Opt-out procedure lends itself best to mass wrongs where the loss, injury and damage across the group of claimants is homogenous and therefore damages are homogenous. Cases at the other end of the spectrum, with significant variation in loss, injury and damage, may not be suitable for opt-out procedure, but the scope of opt-out proceedings should not be shaped with reference to particular areas of litigation.

Exempting any areas of litigation limits the potential of opt-out procedure to maximise the efficient progression of claims in the event of mass wrongs. It opens the door to disputes about whether a case falls within a particular litigation area, rather than a focus on whether the case is otherwise amenable to being progressed under an opt-out regime.

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

No comment.

Questions of procedure

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

Opt-out proceedings should build on lessons learned through the operation of opt-in proceedings. Since the introduction of the opt-in rules, issues with the rules and court procedures have been identified – see attached views previously submitted.

To avoid the most prevalent issues, opt-out procedure should involve a joint application to appoint a representative party and bring group proceedings. It should also be clear on what is required to demonstrate that a case ought to proceed under opt-out procedure, with rules maintaining the fair balance between access to justice and avoiding vexatious litigation. Current opt-in rules are unclear on these points.

Opt-out proceedings may merit more direction in the rules and oversight by the court on matters such as the appointment and ongoing performance of the representative party. It is important that scrutiny comes from the court, rather than being in a form open to opportunistic abuse by other parties to the action, but the nature of opt-out proceedings demands the highest level of attention to protecting the interests of group members.

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

The certification process should be largely similar to the present opt-in procedure, albeit with ambiguities and known problematic rules altered as above. The process should enable unsuitable proposed claims or proposed representative parties to be filtered out as efficiently as possible, without obstructing claims with merit and suitable for opt-out procedure. Clarity in any criteria to be applied will be critical.

The bar to establish a stateable case, which may be taken forward, should not be overly onerous. The standard should be far less than the standard required at a procedural case. No other Scottish civil procedure requires a level of evidential proof before a claim can pass the signet. The certification process requires to prevent vexatious litigation but should not act as an unreasonable barrier for pursuers.

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)?

Procedure must be developed to ensure that opt-out group members cannot be responsible for a share of defenders' costs in an unsuccessful case that they did not know was being raised on their behalf.

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)

Defenders also require protection from adverse costs but that currently exists in their right seek caution. Opt-out procedure should not require further provision on this point.

Protection from vexatious litigation should be provided in the certification process but, again, no further protection than under opt-in proceedings should be required.

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?

Not all subject matters will be suitable for a protocol, and it is important that opt-out procedure can be flexible to accommodate different areas of litigation. However, a voluntary protocol could provide pre-litigation direction and cut through the time and expense of litigation where parties have a genuine interest in engaging in the claims process. A voluntary protocol could also provide direction on what ought to matter in the early stages of proceedings to keep focus on the real and substantive issues. Any such protocol would require to be framed around the real and substantive issues rather than providing for arbitrary procedure which detracts from the substance of the litigation.

Questions about settlement and distribution

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?

It is appropriate for the court to consider distribution if the court has resolved the case. If the court has reached a decision on quantum then it follows that they should offer direction on distribution. This removes any risk of conflicts or in reaching agreement on distribution. It also introduces an appropriate level of protection for group members as distribution is determined by an independent party.

In the usual fashion, if liability is denied, it should be for the court to resolve the question of liability first. Following a positive finding in respect of liability, the court should then turn to quantum and address the question of compensation per eligible group member. The court ought to be able to confirm the maximum potential number of eligible persons, providing certainty on maximum potential liability. The court should designate a period in which group members require to claim compensation and make provision for how this requires to be done.

Question 10 – If the case is resolved by a settlement, what role should the

court have in approving the settlement amount and its distribution?

Parties should have the ability to reach a potential settlement without the involvement of the court. However, at the point settlement is agreed in principle, the court should have a role to play in in approving this.

Approval of the potential settlement offers protection for group members and defenders. The court should be able to reject a wholly inappropriate settlement proposal, or amend aspects which may be problematic.

The approach to distribution may depend on whether the settlement reached in principle is calculated on a per pursuer or whole claim basis. The court should have the power to approve a proposed distribution or to make orders as necessary to facilitate fair distribution, including setting times limits for group members to claim compensation.

In cases where success fees are in operation, it may assist for the court to satisfy itself and state that the capped statutory maximum will not be exceeded in the distribution of funds. While those representing group members are bound by these statutory maximum success fees in any event, this would increase trust and transparency in the settlement and distribution process.

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

The procedure should be developed to avoid unclaimed damages where possible, such as by following the approaches to approval and administration of awards/settlements noted above. The aim should be to avoid the kind of problems which have been seen in England and Wales.

Through the authorisation or orders made by the court in relation to distribution of an award or settlement, the maximum potential compensation sum payable by the defender should be known. This sum should be ring fenced, such as being held by a third party in an escrow account or in some other manner which secures the funds for payment. Once the time limit to claim has passed, funds can then be transferred on for distribution. Return of unclaimed damages should be a nominal exercise rather than a complex series of returns.

Questions about funding

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)?

There is already a very small pool of funders prepared to fund Scottish Group Proceedings. The current opt-in procedure has risked discouraging the interest of funders further due to ambiguities in the rules leaving open the possibility of commercially confidential information requiring to be disclosed. Litigation funding is essential to enable access to justice for consumers. Any changes to opt-in rules or the development of opt-out rules should be careful not to dissuade potential funders.

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 court should be satisfied that there is funding in place and that ex facie the funder can meet adverse expense awards. However, as the court has correctly determined to date in relation to opt-in proceedings, there should be no need provide details of relationship between the funder and the Representative Party which is not required in any other litigation

If there is a concern about the ability of the funder to meet adverse costs the defender has the ability to seek caution

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)?

As noted above, confidentiality around funding arrangements should be maintained and disclosure should not require the details of any agreement. The existence of an agreement and an indemnity from the funder ought to be sufficient.

On the rare occasion that further disclosure may be merited, or should a different view on general disclosure by taken, documents should be lodged

in a process similar to the lodging of productions in a confidential envelope. The funder should be entitled to the same protection of commercially confidential information as would be afford to a party to the litigation.

Questions about expenses

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)?

Changes to the rules are essential. There should be clear rules to show how the work to advance the action is taxed. The work undertaken (often not by agents for the representative party) to obtain evidence (precognitions, medical evidence etc.) and instructions from individual group members must also be paid. Rules are presently lacking on this point, leading to uncertainty for all involved.

Clarity on expenses would also assist in quantifying the risk of adverse expenses at different stages of a claim. This may remove some of the speculation around adequacy of funding as well.

General questions

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

The wide power of the court to make orders as needed to progress the action should prevent any aspects of substantive law from being a barrier to group proceedings working effectively.

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 enclose a copy of our previous response on the opt-in rules.

It is imperative that challenges encountered with opt-in rules and procedures result in changes to the current regime and also inform a potential opt-out regime.

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Graeme Welsh
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15th May 2025

Dear Mr Welsh,

Review of RCS Chapter 26A

Thank you for your correspondence of 13th March 2025 asking for our views on the practice and procedure associated with group proceedings in the Court of Session.

The solicitors and court department team involved with the NOx Emissions, James Finlay (Kenya) Ltd, and Celtic PLC group proceedings have discussed our experiences and prepared the following summary of views.

Our overarching view is that the procedure for group proceedings has done precisely what it was introduced to do in that it has made it possible to pursue important groups of claims which would have been administratively impossible without the introduction of Group Procedure. There are some features of the rules and practice which have, in our experience, presented some problems – our detailed responses to the questions posed address these matters – but we consider that for the most part the rules and practice work well.

Question 1: Are there parts of the rules that do not work well in practice and could be redrafted to make procedural improvements? If so, can you provide specifics on this, and detail what your suggested changes are?

1.1 Dual Application Process

While there are two distinct questions of the suitability of the representative party and the suitability of the cause for group proceedings, the operation of the dual application process provided for by current practice can be burdensome.

In practice the applications are prepared, lodged, served and heard at the same time. Proceedings cannot begin without both applications succeeding. There are however two court processes created at application stage, necessitating two almost identical initial motions and duplication of the documents (in particular the group register and draft summons) to be lodged. This duplication of documents and processes continues in the service of the applications and in any pre-permission motions to vary or sist the timetable of the applications.

We have found this process to cause an unnecessary administrative burden. We would suggest that the applications could be dealt with under a single court process with the applications being enrolled together, requiring only one copy of the draft summons, one copy of the group register and one inventory of documents to support the applications. Should matters require to be separated out in any way, the wide power of the court to make orders should be capable of dealing with any situation arising. From our experience of the current rules, a single court process or even a single application process to address both authorisation of the representative party and permission for group proceedings would be more efficient for all parties.

1.2 Determination of Application to be a Representative Party (Rule 26A.7)

It is our experience that this rule has been difficult to interpret and has accordingly caused procedural delay in some cases. Judgements issued to date support the position that the matters listed are simply matters to be considered by the Lord Ordinary, rather than a checklist to be satisfied. However, the matter is not settled and has recently been considered by the Inner House.

It is our view that the spirit of the primary legislation is to increase access to justice in group litigation situations, and accordingly the rules should not impose too high a bar on the ordinary person attempting to pursue litigation. Regardless of the intention of listing the various considerations at RCS 26A.7(2) it would be helpful if the rule were to be clearer on any absolute requirement compared to a matter which the Lord Ordinary must consider but may then disregard as irrelevant to suitability in the particular case. On the assumption that the interpretation applied by the court to date is correct, we would suggest that the rule could be amended to state that suitability is the

applicable test and that no factor listed is intended as an automatic bar to the authorisation of an applicant.

The potentially high barrier to litigation set by RCS 26A.7(1)(f) is of particular concern. We would suggest that the reference to financial resources to meet expenses awards adds nothing in respect of the suitability of a potential representative party and should be removed. The current wording of RCS 26A.7(1)(f) creates a potentially insurmountable and disproportionate hurdle to commencing group proceedings. Litigation funding in Scotland remains in its relative infancy compared to other jurisdictions. It is contrary to the purpose of the Group Proceedings to exclude the average group of claimants, when they would not have faced a financial hurdle to commencing more traditional proceedings. We assume that this rule attempts to balance protection of defenders' interests in respect of the unrecoverable costs of vexatious claims with the efficiency of group proceedings, but we do not consider it is necessary to achieve this balance. Sufficient protection is afforded by all group members being jointly and severally liable for defenders' costs and there remains the usual mechanism of seeking caution where the criteria are satisfied. We consider that these existing protections are proportionate but appear to have been overlooked by the rule. In relation to personal injury cases, the rule also ignores the norms and effect of Qualified One Way Cost Shifting and imposes a burden on would be pursuers which is at odds with the general approach to litigation of personal injury claims in Scotland.

1.3 Permission for Group Proceedings (Rule 26.11)

There has also been a lack of clarity and connected procedural delay as a result of difficulty interpreting what is required to establish that RCS 26A.11(5)(b) and (d) do not apply. What is required to establish that there is a prima facie case is presumably less than required to demonstrate real prospects of success. Depending on the interpretation of what is required, these rules can either overlap or prove contradictory. The phrase "real prospects of success" also causes us concern as we have seen attempts from defenders to impose a standard of relevancy and specification akin to that expected at the stage of a debate.

It is our view that a single, and low, test ought to be applied if there is to be any consideration of the merits of the case at the stage of granting permission. There is of course an interest in preventing vexatious litigation, but we consider that it would be unfair to expect the representative party to be capable of

producing draft pleadings of a standard which meets the relevancy and specification required for a debate, before there has been any opportunity to consider defences, adjust pleadings or recover documents.

In cases of the type suitable for Group Proceedings, there is often an inequality of information between the pursuers and defenders at the outset. This has been demonstrated in the NOx emissions cases where there has been a significant focus on document recovery, and subsequent adjustment, post-permission stage. A group of pursuers can have a relevant and stateable case which they ought to be able to pursue, but require access to matters such as technical documentation, which are in the defenders' hands only, before it is possible to formulate pleadings which stand up to a level of scrutiny which would ordinarily come at a later stage of litigation. While the NOx emissions claims have, so far, been granted permission to proceed, it has not been without lengthy argument.

The importance of allowing time for litigation processes to balance out an inequality of information, was also demonstrated in the Celtic PLC group proceedings. This case turned on whether Celtic Football Club was vicariously responsible for acts of volunteers at Celtic Boys Club, which was a separate and free-standing legal persona to the football club. The extent to which the football club financed and exercised control over the Boys Club were key issues to determining the dispute. The football club maintained the Boys Club was an entirely separate entity. [redacted] hat vital evidence was not available in the public at the time proceedings were issued. Had there been too high a bar set in demonstrating prospects at the outset, access to justice would have been denied.

While there is a lack of clarity to this aspect of the rule, and the potential for the bar to be set too high, there are concerns about access to justice. The interpretation of "prima facie case" and "real prospects of success" have been heard by the Inner House, but we consider that the rule could be made clearer on the intended standard.

1.4 Procedural Delay – Potential Time Bar Implications

Taking the rules at face value, there should be a relatively short period between the service of the application and a decision on permission. However, in practice, there can be significant delay between commencing group proceedings (as defined at RCS 26A.18) and a final decision that the substantive case can proceed.

A combination of factors stemming from the rules themselves and the practice which has developed have led to situations in which over a year has passed between service of the applications and finality on the question of permission. The issues set out at 1.2 and 1.3 contribute to the possibility of delay. For a period of time, there were also significant delays in fixing hearings but we have noted that this has improved recently.

The difficulty posed by delay is the possibility that the applications may end up being refused, on a potentially remediable basis such as the particular representative party proposed requiring to be substituted, in which time claims have prescribed and the time bar protection of the initial service is lost. In practice, the court have seemed willing to substitute the representative party and find ways to avoid a fresh application when this has arisen.

We are concerned that the lack of clarity described at 1.2 and 1.3 draws out the process and when the potential to force a case into time bar is considered, incentivises appeal. It seems to be an anomaly of Group Proceedings that a defender can, as a matter of strategy, draw out the initial stages and put the pursuers in a position whereby it is possible to lose the time bar protection of the initial commencement of proceedings.

We consider that this type of risk can be mitigated against to some extent if the issues noted at 1.2 and 1.3 are addressed. However, amendment of the rules or a Practice Note to enshrine the common sense approach which seems to be taken to matters such as putting forward an alternative applicant for representative party, without fresh applications, would further reduce the risk. Of course, if there is no suitable representative party or the matter is inherently unsuitable for Group Proceedings, we accept that the application would fail and time bar protection would be lost. However, it is our view that the rules and practice should not allow a situation in which the opportunity for the substantive case to proceed timeously, can be lost on a remediable point of the application process, and as a consequence of delay in reaching a final decision on permission.

Question 2: Are the rules missing or lacking detail in any area of procedure? If so, could you provide specific examples on this and detail what your suggested changes are please?

2.1 Subsuming Claims Raised Outside of Group Proceedings

The rules are silent on any mechanism by which pursuers who have raised connected actions prior to the commencement of Group Proceedings may join the Group Register. There are a number of situations in which this may arise, including when an individual action has been raised by those unaware Group Proceedings are in contemplation, or when an action is raised before a larger group of claims becomes known.

At present, there seems to be no mechanism for the pursuers of individual actions to join the Group Proceedings without first abandoning the initial action. In many cases, there would be time bar implications to doing so, particularly in the case of a prescriptive period in respect of which there can be no discretion. The solution to this has been to sist connected actions, but that appears to us to be a clumsier process than otherwise envisioned.

It would be helpful if a procedure could be established to enable a claim, raised separately in Scotland, to be subsumed by the Group Proceedings where the pursuer's claim would come within the definition of the group.

2.2 Concluding Group Proceedings

Whist we appreciate that the conclusion of all forms of actions will differ and it is therefore difficult to be perspective on how this part of the process is best managed, we do consider that brief guidance would be useful to all parties, and indeed the court. For example, we would welcome confirmation that only one Joint Minute should be required and also specification of the process to remove cases from the group and allow them to proceed as individual actions, should a group member wish to do so.

Question 3: In your experience, are there any aspects of the rules that work well, and should not be changed?

3.1 Commencement of Proceedings

The rules are very clear, at RCS 26A.18, as to the date of commencement proceedings. Tying this date to the initial service of the group register, and having a specific rule to make this clear, provides certainty for any matters of prescription or limitation.

The procedural steps needed ahead of the initial service of the register are relatively simple and tend to result in relatively quick service. We consider this works well and ensures there are no delays at a particularly critical point from a time bar perspective.

Similarly, the ability to add new group members to the action simply by lodging and intimating an updated register works very efficiently and with no doubt as to when an individual joined the action.

3.2 Flexibility and Wide Power of the Court

The rules provide for the Lord Ordinary to have a wide discretion to make orders as needed to deal with the circumstances which arise, particularly in terms of RCS 26A.27. In our experience, this power has been exercised to deal with a variety of novel situations, from issues with service to document recovery and further procedure. It is our view that the flexibility provided for in the rules is hugely effective for handling the array of case types and group sizes which may arise.

As a firm, we have handled mass litigations prior to Group Proceedings and the efficiency which can now be achieved when utilising the case management process and power of the court to make orders set out in the rules is a dramatic improvement on the pre-Chapter 26A position.

Question 4: Do you have any views on the Practice Note (No. 2 of 2020) and would find it useful to have any additional or alternative information provided?

Generally, the Practice Note has provided very helpful clarification on the practical administration of the procedure.

4.1 Additional Information

In terms of the issues covered in the Practice Note, the one point on which we consider additional clarification may be helpful is the question of service and lodging of applications. It is not entirely clear if, at the same time the applications are lodged with the court seeking an order for service, they also require to be sent to the defender, or if this is done only after the order for service has been issued.

As noted at 1.4 above, direction in a Practice Note could supplement the rules to enshrine a sensible process which avoids applications for permission failing, potentially after the expiry of the relevant prescriptive period, on a remediable point such as the particular individual suitable to be the representative party.

4.2 Approach to Litigation

At paragraph 28 of the Practice Note, reference is made to the possibility of "taking forward a test case or cases". It is our understanding that this is at odds with the model underlying the introduction of Group Proceedings in Scotland. It is not efficient for the court to hear a test case or test cases from start to finish, rather than focussing on issues which will be determinative for the group. The "Australian model" of identifying a list of issues applicable to all group members and dealing with them sequentially is the model for which the Scottish court has already indicated a preference and around which we understand the rules to have developed. Under this model, the common issues are either determined in favour of the pursuers, so as to have effect across the whole group (or sub-group if applicable), or proceedings will fail. This model is efficient and provides certainty for a whole group of claims. We do not consider that it is appropriate for the "test cases" model to be referenced in the Practice Note as this detracts from the core premise of having a procedure for group actions. To proceed with test cases reflects the flawed, piecemeal approach to group litigation which was adopted prior to any formal Group Proceedings procedure. An example of the "common issues" approach working is in the James Finlay (Kenya) Ltd proceedings, where an early proof on jurisdiction and forum non conveniens was possible to determine this issue for the whole group.

We are grateful to have been given an opportunity to share our experience and views on the rules and practice. Should we be able to offer any further assistance please do not hesitate to contact us.

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Yours faithfully

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