

Scottish Civil Justice Council - Call for Evidence - Group Procedure

Response by Usman Tariq KC

1. I am a Council Member of the Scottish Civil Justice Council. However, this response is provided in my personal capacity to assist the Group Procedure Working Group. I seek to highlight a potential limitation in the current procedures relating to group proceedings in Scotland based on issues that have arisen in my practice. This response is directed to question 17 of the Call for Evidence which is: *“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?”*.
2. I wish to highlight that the current group proceedings procedure does not appear to accommodate situations where urgent and *ex parte* interim orders are required to restrain ongoing conduct that is harming all group members, such as an ongoing data breach. Although this might appear to be a relatively narrow issue, it is one that is likely to arise – and indeed has arisen – in cases that would otherwise be suitable to raise as group proceedings.
3. I will use an example to illustrate this limitation. There is a large data breach in which the personal information of thousands of individuals is published on the internet. The information might be financial records such as bank details or sensitive medical records. The information is published by a defender domiciled in Scotland. An appropriately framed interim order may prevent the defender from publishing the personal information on the internet and disclosing that information to anyone else pending determination of the substantive action.
4. The victims of the data breach will want their personal information removed from the internet as quickly as possible. A pursuer could raise an action based on data protection legislation and the common law right to privacy. The pursuer may seek an interim interdict to have their personal information removed from the internet

pending determination of the substantive action. The pursuer may seek such an order on an urgent and *ex parte* basis.

5. The need for an interim order before the defender has notice of the action can be an important protective measure for the pursuer. Without an interim order in place, a defender may take steps to defeat the objective of the pursuer's action by transferring the personal information to another person furth of this jurisdiction or transferring control of the website to another person furth of this jurisdiction. In that scenario, an order from the Scottish court would not lead to the removal of the personal information from the internet. The pursuer is left to consider potential actions in other jurisdictions. This pattern might repeat itself in another jurisdiction. Therefore, a pursuer affected by such a data breach is likely to be advised to seek an interim order quickly, and possibly on an *ex parte* basis, against a defender domiciled in Scotland.
6. In this scenario, there are two options for those affected by the data breach. All of them can raise individual actions in the Scottish court relating to the breach of their rights and seek interim orders on an *ex parte* basis. This could lead to a large number of near-identical actions being raised in the Scottish court which is inefficient, uneconomical and disruptive to the court administration.
7. Furthermore, the scope of any order in an action raised by an individual pursuer would only extend to the personal information of that pursuer. The pursuer would not be entitled to seek orders in relation to alleged breaches of the rights of others. The defender could comply with the court's order by removing the personal information of the individual pursuer from the internet but keeping the personal information of thousands of other victims on the internet.
8. Alternatively, those affected might consider combining their claims in group proceedings. The purpose of the group proceedings procedure in the Court of Session is to make it possible for justiciable issues affecting two or more persons to be determined by means of a single representative court process, thereby avoiding the need for each member of the group to commence separate proceedings. There are obvious benefits to raising a claim arising from a large data

breach as group proceedings. This broadens access to justice by allowing multi-litigants the opportunity to bring an action at a lower cost than individual cases. The more streamlined approach benefits both users and the court. In this scenario, there is a likelihood that the claims give rise to common or similar issues of fact or law and the adoption of the group proceedings procedure is preferable to any other available procedure for the fair, economic and expeditious determination of the common issues.

9. However, there is an immediate concern about the suitability of the group proceedings procedure in a large data breach where interim orders might be required as a protective measure for the reasons described at paragraph 5 above. In my view, the current group proceedings procedure does not appear to accommodate situations where urgent and *ex parte* interim orders are required.
10. Part 5 of Chapter 26A governs commencement of group proceedings. Two matters require certification by the court at the outset: (a) the proposed representative party must be authorised by the court; and (b) group proceedings may be brought only with the court's permission. The group proceedings have not been raised until these applications have been determined (*Mackay v Nissan Motor Co Ltd* 2025 S.C. 349, [16]; and Court of Session Practice Note No. 2 of 2020, [8]). If the applications are granted, the substantive action is given its own separate process number and the summons is then served and defences lodged.
11. In my view, there are two difficulties for those contemplating combining their claims in group proceedings.
12. First, it does not seem possible to seek an *ex parte* order, even where that order is needed to prevent a defender from taking the steps noted in paragraph 5 above to defeat the objective of the action. The defender is quite properly involved in the certification process. However, service of the group register on a malignant defender might be all the notice needed for the defender to transfer control of the personal information or website furth of this jurisdiction.

13. Second, even if the defender did not take such steps, certification is no mere formality and can prove to be one of the most contentious phases of a multi-party action (*Mackay v Nissan Motor Co Ltd* 2025 S.C. 349, [71]; and *Bridgehouse v Bayerische Motoren Werke AG* 2024 SC 270, [16]). The process can take months. Any necessary interim orders cannot be sought on behalf of the group as there is no substantive process in which to seek interim orders. In this scenario, the personal information of all those affected might remain on the internet for many months. The alternative of raising individual actions to obtain interim orders is not effective as those orders will only relate to the individual pursuers.
14. I have illustrated these concerns with an example of a large data breach. However, the need for interim orders can arise in many types of action that might otherwise be suitable as group proceedings. For example, a person might make available to the public on a website a large number of television programmes, films and music. There will be many copyright owners with individual claims. The copyright owners may wish to combine to take action against the website operator. Interim orders might be required *ex parte* seeking to take down the infringing content pending determination of the substantive action. The current rules for group proceedings would not facilitate an *ex parte* application of this nature.
15. There might be tenants across a large housing estate who experience systemic failures, such as damp and mould, unsafe heating systems and fire safety non-compliance. Their landlord is the same with the same contractual repairing obligations and statutory duties. The tenants may wish to combine to take action against the landlord. Interim orders might be required on an urgent basis to compel urgent remedial works in each of the tenant's properties or to prevent eviction proceedings linked to disputed arrears. The current rules for group proceedings would not facilitate a quick determination of an application of this nature, as certification may take many months.
16. I have prepared this response to highlight a potential limitation in the current procedures relating to group proceedings in Scotland which means that the procedure cannot be utilised to its full potential. There also appears to be an absence of suitable alternative options where a large number of individuals are all

affected by the same act and wish to take urgent, effective and efficient action on an *ex parte* basis as a protective measure pending determination of the substantive action. I invite the Working Group to consider whether it is possible to amend the group proceedings procedure to accommodate urgent and *ex parte* applications for interim orders prior to certification.

A handwritten signature in black ink, appearing to read 'Usman Tariq', with a stylized flourish at the end.

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