Albany House
58 Albany Street
EDINBURGH
EH1 3QR
Telephone: 0131 557 1545
Facsimile: 0131 525 8653
www.clydeco.com

bethany.mckenzie@clydeco.com
0131 525 8574

(Emailed)
Scottish Civil Justice Council
Parliament House
11 Parliament Square
Edinburgh
EH1 1QR

Ref:
COS-GP14&15-24

Date:
4 August 2025

Dear Scottish Civil Justice Council

Review of Group Procedure Rules

1. We refer to your letter of 21 May 2025 inviting our views on practice and procedure associated with group proceedings in the Court of Session. This response reflects our own views as a firm, and not the views of our clients.

2. Our firm has been directly involved in 3 sets of group proceedings to date. Those are GP14&15/24, GP1/22 and GP1/22.

3. We have addressed the questions identified in your letter below. Overall, our view is that it is important that Scotland has effective rules to manage group procedure. Our comments are intended constructively towards that end. Our view is that in some respects the current rules ought to be redrafted to ensure that they are functional.

   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 provide specifics on this, and detail what your suggested changes are.

4. Our view is that there are parts of the rules that do not work well in practice. Our concerns are primarily focused on the permission stage of group proceedings. We consider the representative party must be in a position to provide instructions in all respects for all members of the group. We consider parties should be required to present the court with proposed issues to be addressed in the action when seeking permission for group proceedings. We also consider that Group Register should be sufficiently detailed to inform the court of the basis of individuals involvement in the group proceedings.

   Appointment of the representative party

5. We have fundamental concerns about the function and utility of a representative party in group proceedings. The model of group proceedings which is being used may be appropriate for large scale class actions. However, it is not helpful when the court is faced with lower volume cohorts of claims, where each individual has suffered an individual injury, or there is some other specific individual factor to their case.

6. Under section 20(9) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 "… the representative party may (a) make claims on behalf of the members of the group, (b) … do anything else in relation to those claims that the members would have been able to do had the members made the claims in other civil proceedings." The Act therefore envisions that the role of the representative party is to conduct the proceedings on behalf of the group. It is for that reason that their suitability is important.

7. Allied to this, in group proceedings, there is a single conclusion for damages which applies to all members of the group. There is no method inherent in the Act or the Rules whereby defenders can seek to settle particular claims within the cohort.

8. We consider that for the representative party role to function as the Act intended it is necessary for a representative party to be the sole provider of instructions to their agents such that the representative party binds the rest of the group.

9. An example of the importance of this arises in respect of settlement. The rules mean that the representative party can instruct settlement collectively on behalf of all members of the group. Under 26A.30 a representative party must consult with the group members on the terms of any proposed settlement before damages are distributed, but that consultation does not require specific instructions to be obtained in respect of each individual. This is presumably to be expected under group proceedings. We are aware however that in at least one of the group proceedings to date in Scotland, instructions on settlement proposals have not been taken from the representative party but from individual members of the group themselves. This, it appears to us, defeats part of the purpose of group proceedings or, at the least, indicates that the proceedings should not have been raised under group procedure

10. For the most part, we have no difficulty with the wording of Court of Session rule 26A.7 on "determination of an application by a person to be a representative party". Our only comment is to suggest removal of "(the details of funding arrangements do not require to be disclosed)" where that appears at 26A.7. (2)(f). A connected point is that section 10 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 should be brought into force to require claimants to disclose any "financial assistance" and to enable awards of expenses against funders who have a financial interest in the outcome of proceedings and any intermediaries. The other words in that sub-sub section "demonstration of sufficient competence by the applicant to litigate the claims properly, including financial resources to meet any expenses awards" only make sense with disclosure of funding arrangements.

11. We therefore suggest that part of the test for permission to raise an action under group procedure should be whether the representative party will instruct, in all respects, on behalf of all individual

members of the group. If the answer to this question is “no” then that should be taken by the court as an indication that group procedure should not be permitted for that group.

Permission for Group Proceedings

12. We appreciate that part of the test on permission for group proceedings is set in an Act of the Scottish Parliament and that the SCJC (or, rather, the Court of Session) does not have power to change that part. That said, under section 23 of the Act in issue, the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, Scottish Ministers must review and report on the operation of group proceedings - also explaining whether any modifications are to be made to the Act and, if not, why not - as soon as practicable after 31 July 2025. Therefore, we consider now is an appropriate time to comment not only on the rules that the Court of Session has power to change but also on certain parts of the Act.

13. The Act provides, at section 20(6) that -

> “The Court may give permission (for group proceedings) -
>
> (a) only if it considers that all of the claims made in the proceedings raise issues (whether of fact or law) which are the same as, or similar or related to, each other;
> (b) only if it is satisfied that the representative party has made all reasonable efforts to identify and notify all potential members of the group about the proceedings, and
> (c) in accordance with provision made in an act of sederunt under section 21(1).”

14. By act of sederunt under section 21(1), court rules are added at Court of Session rule 26A.11 (5) that –

> “The circumstances in which permission to bring proceedings to which this Chapter applies may be refused by the Lord Ordinary are as follows - (a) the criteria set out in section 20(6)(a) or (b) (or both (a) and (b)) of the Act have not been met; (b) it has not been demonstrated that there is a prima facie case; (c) it has not been demonstrated that it is a more efficient administration of justice for the claims to be brought as group proceedings rather than by separate individual proceedings; (d) it has not been demonstrated that the proposed proceedings have any real prospects of success.”

15. On plain reading, these words in primary legislation and in the act of sederunt do not sit well together. The statutory words at section 20(6)(a) and (b) *must*, on the face of the statute, be met before group proceedings *may* be permitted. This is mandated by use in those subsections of the words “only if”. The act of sederunt and, thereby, Court of Session rule 26A.11 (5) approaches the issue of permission not, as in the primary legislation, from the perspective of conditions that must be fulfilled before permission may be granted but from the opposite perspective of outlining “circumstances” in which permission may be refused. Use of the discretionary wording “may be refused” in rule 26A.11 (5) suggests, absent knowledge of, and the potential for argument on, the hierarchy of legislation, that permission may be granted even where the “only if” criteria are not met.

16. Even if the primary legislation is, correctly, taken to override the secondary legislation, such that permission cannot be granted unless the section 6(a) and (b) tests are met, the current wording of rule 26A.11 (5) suggests that permission may be granted even where there is no prima facie case, it would not be more efficient for group proceedings rather than individual cases, and there is no real prospect of success.

17. The framing of the test in the Act that proceedings must raise issues that are "the same as, or similar, or related to, each other" is imprecise. It offers no guidance as to the extent of uniformity that is required across a cohort of claims. At the permission stage the court has limited information before it to assess the extent of commonality amongst the members of the group. That is unsatisfactory as the extent of commonality must be the key issue in whether actions can be resolved in the format of group proceedings.

18. We suggest that the task on behalf of claimants in potential group proceedings should, at the very outset, be to frame justiciable issues for the court to address. We suggest such issues should be framed as questions for the court. The defender should be allowed, prior to the hearing at permission stage, to put counter issues. Where counter issues are put, the court should be required to consider those together with the issues at the permission stage in the context of determining the question of permission.

19. Approval by the court of the justiciable issues and counter issues, and thereby permission for group proceedings on them, should depend on whether - (1) the issues and counter issues as framed are indeed justiciable, (2) answers to the issues and counter issues as framed would resolve the claims of all (or at least a significant portion) the group members, and (3) the issues and counter issues as framed are few enough in number as to be amenable to effective resolution in group proceedings.

20. We consider that placing the focus at the outset on the questions the court is being asked to address will enable the court to make a more informed decision about whether or not group procedure is the appropriate forum for an action.

21. Further plain reading of rule 26A.11 (5) reveals additional potential for confusion. A "prima facie" case is presumably a case that, on its face on first impression, is valid for consideration. The impressionistic nature of "prima face" does not sit well with the wording in the rule that "it has not been demonstrated that" there is a prima facie case. A prima facie case either exists or it does not. No demonstration beyond the face of the written case should be needed.

22. Reference in rule 26A.11(5) to potential refusal of group proceedings where "it has not been demonstrated that the proposed proceedings have any real prospects of success", in addition to the potential for refusal absent a prima facie case, adds yet further to the potential for confusion at the permission stage of group proceedings. If there is no prima facie case, then there surely must be no real prospects of success. If demonstration of real prospects of success may be taken as a higher bar test than prima facie case, it is unclear why it is necessary to include the lower bar test in the same criteria. The point remains, of course, that the current wording of rule 26A.11 (5)

suggests that permission may be granted even where there is no prima facie case and no real prospects of success.

23. We consider that it is important that conditions are placed upon permission for group proceedings to ensure that unmeritorious claims are not allowed to progress. We are not convinced that the current wording of the Act and Rules achieve that aim. For example, the courts do not consider matters such as prescription or limitation at a preliminary stage.

24. In *Mackay v Nissan* [2025] 2025 SLT 629 the Inner House characterised the test under the rules and Act as requiring the application of a commonality test, a merits assessment and a superiority test. The inner house grouped together the prima facie test and that of real prospects of success and dealt with both together. We consider that more appropriately reflects the key issues that ought to be addressed by the court. On that basis we would suggest that the rules be amended to require that all three elements of those tests are met, as follows:

> "In granting permission to bring proceedings to which this Chapter applies the Lord Ordinary must be satisfied that (a) the criteria set out in section 20(6)(a) or (b) (or both (a) and (b)) of the Act has been met; (b) the representative party presents a prima facie case; (c) the representative party has demonstrated that it is a more efficient administration of justice for the claims to be brought as group proceedings rather than by separate individual proceedings.

25. One further point of note on the rules as currently drafted is that the case law has made evident that the bar is low for pursuers to establish that claims ought to be allowed to proceed at this preliminary stage. This trend may deter defenders in future cases from opposing applications for permission to bring group proceedings. However, absent opposition to permission, such future defenders might be taken to have tacitly accepted that the proceedings then brought by the representative party have a prima facie case on behalf of the group and have real prospects of success. In order to protect their position defenders may consider it necessary to oppose applications for permission in the knowledge that permission may well be granted, at cost to the defenders, to ensure they can preserve later arguments on the appropriateness of the proceedings, their management and expenses. Clarification in the rules that a failure to oppose applications for permission does not imply acceptance that the claim meets the criteria under the rules may be helpful.

<u>Group Register</u>

26. We consider the Group Register to be a centrally important document. Indeed that is reflected in Practice Note No. 2 of 2020 in which the Lord President states in paragraph 9 *"It is crucial to the parties and all group members that this (the Group Register) operates well, particularly with regard to prescription and limitation matters, so its administration by the representative party, or agent for the representative party, in accordance with the rules is key to the success of the procedure."*

27. In our view the current court rules provide insufficient guidance as to the level of detail that ought to be contained within the Group Register. Form 26A.15 indicates that the register only requires to

contain the name, address and date of birth of each group member. There is a further column indicated for additional information, but the suggested additional information is simply a reference or serial number for each pursuer. The form provides no indication that the group register ought to provide information about why the individual group members are appropriately contained within the group. It is acknowledged that such information may differ depending on the subject matter of the action. For example, in a product liability claim relevant information may be confirmation of the product received and date of receipt of the product. Alternatively in an employment claim relevant information may be confirmation of the group member's dates of employment. Our view is that in order for the group register to perform the key function that the Lord President has identified, it must contain sufficient information to enable the court to, at least on the face of it, understand the basis upon which each individual group member has been included within the group. We consider that Form 26A.15 should be amended to include a column titled 'Basis of inclusion in group".

28. We also consider that the rules as currently framed make it inappropriately easy for group members to be added to or removed from the group register. Under 26A.15(2) where membership of the group changes following either the withdrawal or addition of a new group member, the representative party simply requires to serve a revised group register on the defender and lodge that with the General Department. It is only after a proof has been allowed that, under 26A.16, a representative party requires to make an application by motion to add a group member to the group register. An understanding of the population of the group register is fundamental to parties ability to conduct proceedings, including in respect of framing issues for the court, undertaking investigations and potentially engaging in settlement negotiations. It does not assist in the efficient administration of the action if the group can fluctuate up until a proof has been fixed. It is acknowledged that in some circumstances it may be necessary for the group to change and there ought to be facility for that within the rules, but our view is that in those circumstances it would be appropriate for the representative party to apply by motion to have the register amended, with an explanation as to why that is required.

Question 2: Are the rules missing or lacking detail in any area of procedure? If so, provide specifics on this and detail of your suggested changes.

29. We have previously provided our view that there ought to be rules requiring the framing of issues for the court at the permission stage. Our view is that such framing of issues, we suggest in the form of questions for the court to address for the group, would assist in the court in assessing the appropriateness of group proceedings. It would also enable the action to be focused on the key areas of dispute at an early stage.

30. Our view is that the rules are lacking in detail in respect of expenses. There are currently no bespoke rules at all on expenses in group proceedings. Our view is that group proceedings constitute one action, brought by the representative party, which would give rise to a singular account of expenses. An award of expenses is made for or against the representative party. It is for that reason that a factor the court is required to consider in assessing the suitability of a representative party is their financial resources to meet any expenses awards. Indeed that view also reflects the purpose of the Act which was to increase access to justice by enabling a cost-effective way of managing a large cohort of claims. If that is the court's intention, that ought to be

reflected within the rules. It is our experience that agents acting on behalf of representative parties have sought to recover expenses on a block fee basis on behalf of each of the group members.

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

31. The rules clearly envision proactive case management to progress actions, and there is significant flexibility afforded to the Lord Ordinary to make orders appropriate to the circumstances of specific proceedings, to ensure they are progressed efficiently. We consider that to be a real strength within the rules. We do however note that the degree of flexibility does give rise to the risk in variation as to the extent and approach to case management of group proceedings. We therefore suggest that it may be useful for additional guidance to be issued to indicate to those managing such claims how case management can be employed most expeditiously.

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?

32. We have already provided our comment on the Practice Note's discussion of the importance of the group register at paragraph 9. We entirely agree with the Lord President's view that a comprehensive and accurate group register is crucial.

33. In paragraph 16 the Practice Note states that in respect of applications to be a representative party, averments in the application should address the matters identified under rule 26A.7(2) in detail. The Practice Note specifically states that it will not be enough merely to repeat the wording of the rule and full supporting documentation must be lodged. We agree with those statements as contained in the Practice Note, but acknowledge that they do not appear to sit easily with recent decisions from the Inner House addressing the test for applications for a representative party. In *McKay* the Inner House stated that where there was a lack of factors pointing against unsuitability, it is difficult to see what more an applicant can be expected to do in order to demonstrate suitability. Our view is that the rules are clear that it is for the representative party to establish their suitability and that in doing so they should provide detailed reasons and supporting documentation to enable the court to fully assess the position.

34. In paragraph 19 of the Practice Direction it is noted that pleadings in traditional form are not normally required or encouraged in a group proceedings action, and that the default position is that pleadings should be in an abbreviated form. Our view is that group proceedings are often claims of significant complexity, both in fact and in law. On that basis we do not consider that as a generality they benefit from abbreviated pleadings. We consider that in order for group proceedings to progress most expeditiously, and for parties to have clarity as to each other's positions, the traditional form of written pleadings would be preferable. We acknowledge that the court's preference for abbreviated pleadings arises from the Commercial Court rules, but in such claims there are pre-action requirements which are not contained in the Group Procedure rules and in our experience have not been complied with by agents raising group proceedings. It has not therefore been the case in our experience that the focus and refinement of each parties' positions pre-action anticipated by the Commercial Court rules is achieved in this type of proceedings. We should note that in seeking full

written pleadings we acknowledge that a judicious approach still requires to be taken to pleadings to ensure they are not unnecessary lengthy or containing superfluous material.

35. Similarly we note that in paragraph 29 of the Practice Direction it is suggested that adjustment of the pleadings will not always be necessary and it should not be assumed that an order allowing a period of adjustment will be made. Our view is that it is difficult to envisage a situation in any group proceedings where a period of adjustment is likely not to be required.

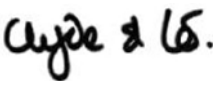
Concluding Remarks

36. We remain in favour of Scotland having an effective group procedure. Our suggestions made above aim towards Scotland achieving that.

37. We are strongly against implementation of "opt-out proceedings" until the operation of the current "opt-in proceedings" is improved as outlined above, including by the introduction of bespoke rules on expenses for group procedure.

38. In all of this and on a policy level, we consider it is important to bear in mind the cost of group proceedings to the economy. On that point, we refer to the study published in June 2025 by the European Centre for International Political Economy on "The Impact of Increased Mass Litigation in the UK", link **here**. It is important for there to be a careful weighing of the benefits of group proceedings, including in respect of access to justice, against their broader economic costs. The effectiveness of the court rules on group proceedings factors into that balancing exercise.

Yours faithfully



Clyde & Co (Scotland) LLP