



**Scottish
Civil Justice
Council**

SCJC Working Group: Consultation on Group Proceedings

APRIL 2020

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SECTION 1: RESPONDING TO THIS CONSULTATION PAPER

Written responses to this consultation paper are invited by **23 April 2020**.

Please use the consultation questionnaire to make comments or clearly indicate in your response which questions or parts of the consultation paper you are commenting on.

Due to current government health restrictions in place, the SCJC Secretariat staff are working from home. In this respect, **please send your response by email only to scjc@scotcourts.gov.uk**.

If you have any queries please contact the SCJC Secretariat: 07732355145

How your response will be treated

This is an informal targeted consultation. In this respect, responses will not be published on the SCJC website.

The SCJC is subject to the provisions of the Freedom of Information (Scotland) Act 2002. If the SCJC receives a FOI request about the responses to this consultation, information may have to be made available under the request.

What happens next?

Following the closing date, responses will be analysed and considered along with any other available evidence to help the SCJC reach a view on the detail of the group proceedings procedural regime.

Feedback

If you have any comments about how this consultation exercise has been conducted, please send them **by email only** to scjc@scotcourts.gov.uk.

SECTION 2: INTRODUCTION AND BACKGROUND

Introduction

1. The Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018¹ ('the Act') received Royal Assent on 5 June 2018. The Act takes forward many of the recommendations of Sheriff Principal James Taylor's Review of Expenses and Funding of Civil Litigation in Scotland² and implements the recommendations of the Rt. Hon Lord Gill's Report of the Scottish Civil Courts Review³ relating to group procedure.
2. Part 4 of the Act introduces a special procedure known as 'group procedure' in Scotland. These proceedings are similar to what is known as 'multi-party actions' or 'class actions' in other jurisdictions. The purpose of the new group procedure is to make it possible for a justiciable issue 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 court proceedings. The new group procedure will be available only in the Court of Session. Sections 20-22 of the Act provide the framework within which court rules will add the necessary procedural detail.
3. This consultation seeks views on proposals for a procedural regime to regulate group proceedings in the Court of Session. The underlying law was consulted upon during the progress of the Scottish Government Bill⁴ and views are now sought on the proposed procedural framework in order to assist the Council with development of related court rules.

Background

Group Proceedings – key elements

4. Part 4 of the Act changes the law to permit a group procedure to be developed for Scotland. The key features of the procedure are:
 - a person may bring group proceedings on behalf of two or more persons each of whom has a separate claim which may be the subject of civil proceedings, and those claims are the same as, or similar or related to, each other;
 - group proceedings are only available in the Court of Session;
 - group proceedings may be brought only with the permission of the court;

¹ [Part 4 of the Civil Litigation \(Expenses and Group Proceedings\) \(Scotland\) Act 2018](#)

² <http://www.gov.scot/About/Review/taylor-review/Report>

³ <http://www.scotcourts.gov.uk/about-the-scottish-court-service/the-scottish-civil-courts-reform>

⁴ <http://www.gov.scot/Publications/2015/01/9932>

- the Act confers power upon the Court of Session to make rules for group proceedings by Act of Sederunt;
- The Act provides that court rules may provide for group proceedings to be brought as—
 - (a) opt-in⁵ proceedings,
 - (b) opt-out⁶ proceedings, or
 - (c) either opt-in proceedings or opt-out proceedings.

SECTION 3: THE SCOTTISH CIVIL JUSTICE COUNCIL WORKING GROUP

5. The Scottish Civil Justice Council was established on 28 May 2013⁷. As well as developing rules for the civil courts, the Council has responsibility for keeping the civil justice system under review and making recommendations for its improvement.
6. The Act confers powers on the Council for preparation of court rules regulating practice and procedure in group proceedings. As group procedure is a new policy area for the Council it has established a Working Group to take forward the development of court rules required to implement Part 4 of the Act.
7. The Working Group's remit is: *“To expedite the consideration of the secondary legislation and other matters required to facilitate implementation of Part 4 of the Civil Litigation (Expenses & Group Proceedings)(Scotland) Act 2018 and to make proposals for draft rules for consideration by the Scottish Civil Justice Council.”*
8. Membership of the working group is constituted by individuals with relevant expertise in the field:
 - Lord Armstrong (Chairman)
 - Ian Dickson (Scottish Legal Aid Board)
 - Thomas Docherty, Which? (Council member)
 - Walter Drummond-Murray (Scottish Government)
 - Elena Fry, solicitor (Council and Committee member)

⁵ ‘Opt-in’ means that the class of pursuers is identified where there are a number of people seeking redress and members must opt in to the claim before or during the proceedings (normally by a specific cut-off point). The determination in the case will be adopted for all individuals that have opted-in to the action.

⁶ ‘Opt-out’ means that the class of pursuers is not necessarily identifiable at the start of the proceedings. Consequently, a detailed description of the group is agreed or approved by the court and steps taken to publicise the proceedings so that pursuers can be identified and advised of their right to opt out. Those whose claims fall within the class but who do not actively opt out of the proceedings may have their rights determined without having participated in the proceedings.

⁷ [Section 1 Scottish Civil Justice Council and Criminal Legal Assistance Act 2013.](#)

- Diane Machin (Offices of Court of Session)
 - Robert Milligan Q.C.
 - Stewart Mullan, law accountant (Committee member)
9. In developing the proposed procedural framework, the working group has considered existing procedures in the Court of Session, equivalent procedures in other jurisdictions including in England and Wales, Australia, Ontario, British Columbia and the United States, as well as the procedural model and court rules which were prepared by the Scottish Law Commission report on multi-party actions⁸.
10. The rules will be designed to encourage the expeditious progress of group proceedings cases and make the most efficient use of time spent in court. The emphasis will be placed on judicial case management and the rules will provide broad powers to enable the court to tailor the procedure in response to the circumstances and complexity of individual cases.
11. In taking forward its remit and in designing the new procedure, the Working Group's intention is to produce straightforward rules encompassing only the **essential** procedural elements required to enable group proceedings to operate effectively in the court. It is intended that the rules should be easily understood and create an efficient, flexible and accessible system regulating group proceedings.
12. The proposed rules framework containing these essential elements is described in this consultation document and consultees are invited to provide feedback on these key proposals.
13. Since this is a new form of procedure in Scotland, the Working Group anticipates that in due course, the procedural framework will be extended in light of feedback and operational experience.

SECTION 4: THE GROUP PROCEEDINGS REGIME

Scope

14. The Act provides that court rules may specify the nature of proceedings which may be brought under Part 4. This provides an opportunity for consideration to be made about those types of claims which are apt for the new procedure under the court rules to apply. The explanatory notes to the Act advise that group procedure is intended to be available for both private law and public law (judicial review) proceedings. The court rules may provide that certain specified types of claims may not be made in group proceedings⁹.

⁸ [Scottish Law Commission Report on Multi-Party Actions \(Scot Law Com No. 154\), which was presented to Parliament in July 1996](#)

⁹ Section 21(2)(d) of the Act.

15. In relation to judicial review procedure, recent events saw a petition for judicial review being raised by 79 petitioners¹⁰. As it is already possible under the current rules of court for judicial review proceedings to be raised by a group of persons, the proposed approach is that the new group procedure will not extend to actions subject to petition procedure. Focus will be given, at this stage, to developing court rules for ordinary actions proceeding by way of summons.

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

Opt-in or opt-out procedure

17. The Act provides that group procedure can take the form of either an 'opt-in' or 'opt-out' regime, or a combination of both.

18. Under an opt-in model, the court's determination of the issue in question extends only to individuals who have subscribed to the representative process. A successful outcome in the proceedings could not be relied upon by a non-subscriber. Equally, non-subscribers would not be bound to accept a settlement and their claims would not be extinguished should the representative action be abandoned.

19. Under an 'opt-out' model the court determines at the outset, the class of persons whose claims are to be determined in the representative proceedings. Unless they choose to opt out, every member of the defined class will share in the benefit of a successful outcome, but will also be bound by any settlement or adverse outcome.

20. The Working Group has considered the practical and procedural issues surrounding both regimes. With the exception of one 'opt-out' model which was introduced for competition law claims in the UK Competition Appeal Tribunal in 2015, all other group proceedings which are currently in place in the UK are 'opt-in' procedures.

21. Members noted too that in a response to the Convenor of the Justice Committee dated 22nd February 2018 concerning proposed stage 2 amendments¹¹ to the then Bill, the Lord President stated:

'Any extension of the Group Proceedings provisions of the Bill to permit the adoption of an 'opt-out' model should be approached with considerable caution. The practical and legal challenges presented by an 'opt-out' model are significantly greater than those presented by an 'opt-in' model. One example is the potential extra-territorial effect of orders granted in opt-out proceedings, particularly when a deemed member of a group

¹⁰ Joanna Cherry QC MP and others for judicial review challenging the Prime Minister's advice to the Queen on the prorogation of Parliament.

¹¹ The proposed amendments sought new provision to be made, introducing opt-out procedure, whereby the court must specify the proceedings as opt-in proceedings or opt-out proceedings. The Bill was silent on the issue when introduced in the Scottish Parliament.

would otherwise have had the option of raising proceedings in a different jurisdiction. I would urge the Committee to satisfy itself that all such issues have been adequately addressed before adopting amendments 13 to 15.'

22. The Working Group considers that at the present time, an 'opt-out' regime will be too complex for introduction in Scotland whereas the introduction of an 'opt-in' procedure will be a comparatively straightforward exercise.
23. A significant benefit of this approach would be that it presents an opportunity for the court to gain experience in dealing with more straightforward group procedure cases. It is anticipated that the benefit of this experience could be taken forward when considering an 'opt-out' option in the future.
24. **Consultation question 2: Do you have any comments about the approach taken to the opt-in/opt-out procedure? Do you agree with the approach? If not, please provide comments.**

SECTION 5: THE GROUP PROCEEDINGS RULES FRAMEWORK

Structure and chronology

25. The rules will provide for a broadly chronological structure within a new chapter of the Rules of the Court of Session. Where appropriate, the rules will utilise existing procedural provision by cross-reference to relevant chapters, e.g. chapter 23 motions. The aim is to keep the body of the rules as short as possible and focused on only the **essential** procedural elements necessary for group proceedings to operate effectively in the court. Where possible the rules will avoid being unduly prescriptive and will permit the court's discretion to manage cases with flexibility in the individual circumstances of the case.
26. It is anticipated that elements of the procedure will be refined and expanded in time and in light of operational experience.

Appointment of a Representative Party

27. The Act¹² provides that there will only be one representative party acting in a group proceedings case and that the representative party will take forward the action on behalf of the members of the group.
28. The Working Group discussed various issues surrounding the role, functions and appointment of a representative party in group procedure.

¹² [Section 20\(4\) Civil Litigation \(E&GP\)\(S\) Act 2018](#)

29. It is proposed that the rules will provide that an application to be appointed as a representative party will be made by motion and that chapter 23 RCS (motions) will apply.

30. The rules will prescribe a new form setting out the relevant information which will be required by the court in order to determine the application. The information required is:

- the full name, address and designation of the applicant;
- whether or not the applicant is a member of the group on whose behalf the proceedings are to be brought;
- where not a member of the group, the capacity in which the applicant is applying;
- a statement setting out the reasons why the applicant considers that authorisation under section 20(3)(b) of the Act should be given;
- a description of the group of persons upon whose behalf proceedings are to be brought;
- the steps taken by the applicant to identify and notify all potential members of the group about the group proceedings; and
- details of any previous application for such authorisation which relates to any extent to the same matter (including, in particular, the outcome of such application).

31. Where application for permission to bring proceedings is being made at the same time as an application to be appointed as representative party, the rules will provide that the motion should be accompanied by a copy of the summons.

32. On the question of who may be appointed as a representative party, it was noted that the rules in England and Wales provide for a certification process whereby the representative party must comply with certain criteria prior to raising a group proceedings case¹³.

33. The Working Group propose that the new rules will incorporate an appropriate suitability test, of which the court must be satisfied, before granting an application for appointment as a representative party. That the test will be based on particular qualities of the applicant required for the effective conduct of a case, e.g. special abilities and relevant expertise, and availability of litigation funding.

¹³ [Part 19 - PARTIES AND GROUP LITIGATION - Civil Procedure Rules](#) and supplementary Practice Direction 19B.

34. The Working Group considered the potential that competing parties may seek to be appointed as a representative party in a case. It is noted that in practice, pursuers' firms usually agree to one firm taking the lead in a case. It is proposed that where there are competing claims for appointment as the representative party, the rules will allow the court to authorise an applicant to be a representative party. It is proposed that this may be either with, or without, a hearing being assigned to determine the applications, dependent upon the circumstances of the case. Any hearing assigned will take place upon a period of notice of 7 days.
35. The rules will provide that the court may refuse an application if it is of the opinion that the applicant is an unsuitable person to act in the capacity of a representative party (whether generally or in the proceedings concerned), or it is of the opinion that it would be contrary to the efficient administration of justice to grant the application.
36. The rules will provide that permission granted will endure until the case concludes or until permission is withdrawn.
37. ***Consultation Question 3: Do you have any comments on the proposed procedures and rules provisions for the appointment of a representative party?***

Application for permission to bring group proceedings

38. In developing rules proposals for the permission stages of group procedure, the Working Group has drawn from the procedural model for leave to appeal set out in chapter 41 RCS.
39. It is proposed that the rules will provide:
- that an application for bringing group proceedings is to be made by motion – a new form will be prescribed for this purpose. The form will, *inter alia*, include a statement setting out the indicative aggregate value of the claim. The applicant will require to lodge all documents necessary to enable the court to determine the application. In this regard, the application will require to be accompanied by a list of persons who have consented to being members of the group on whose behalf group proceedings are proposed to be brought. This is on the basis that the court will require information about potential members of the group in order to determine the application;
 - that the court will consider and make such orders for intimation, service, advertisement and the lodging of answers under appropriate timescales as required;

- that a person, upon whom the application has been served, is to lodge answers on the question of permission within 14 days after the date of service of the application;
- rules regulating applications to dispense with or adjust any time periods within these provisions;
- that a sist may be granted on cause shown and for a maximum period of 28 days, and the period may be renewed;
- that within 7 days of the court granting a sist for legal aid, the representative party will require to intimate this fact to the Scottish Legal Aid Board;
- that where application for permission to bring proceedings is being made at the same time as an application to be appointed as representative party, the motions should be accompanied by a copy of the summons;
- that the court must consider within a period of 14 days from the end of the period for lodging answers whether the application for permission should be granted (including subject to conditions or only on particular grounds) or refused;
- where the court is considering refusing an application for permission or granting it subject to conditions, a hearing will be assigned.

40. In relation to a hearing on the question of permission, the rules will provide for :

- a period of notice of 7 days prior to a hearing;
- a maximum of 30 minutes for a hearing (extendable on cause shown); and
- that the court must provide written reasons for the decisions taken at or following the hearing. Incorporating these provisions at this stage is intended to streamline the permission process.

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

Granting permission

42. It is proposed that the rules will prescribe a number of matters which must be included in a court order granting permission to bring group proceedings. These will include:

- the name and designation of the representative party;
- a requirement that the representative party lodge the group register (which is a list containing details of all those persons who have provided consent to form part of the group) with the court by a specified date;
- specifying the manner in which group members may opt-in to the proceedings including the latest point in proceedings which they may do so;
- specifying the manner in which a group member may withdraw their consent to being bound by the group proceedings; and
- the actions to be taken by the representative party in connection with the proceedings.

43. The Working Group considers that it will be necessary to specify a point in the proceedings after which no new claims may be brought. The rules will, however, provide the court with wide case management powers and will require the court to consider the group register at each hearing in the case. It is considered that these provisions combined will provide sufficient regulation and enable any 'late' applications to be considered effectively.

44. The Working Group also considers that it may be necessary to specify a point in the proceedings after which a group member may not withdraw from the group proceedings. It is proposed that an appropriate stage would be following the commencement of a diet of proof. However, this is a matter which remains under active consideration as there may be legal issues which would not allow for the introduction of such a restriction. Consultees' views are welcomed on this point.

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

Permission stage: appeals

46. It is proposed that the rules will provide for appeal, on a point of law, by reclaiming motion - by the representative party against the refusal of permission to bring group proceedings or by the defender against the giving of permission to bring group proceedings.

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

The Group Register

48. The Working Group considers that procedural provision for the setting up and maintenance of a group register for cases brought under group proceedings will be required as part of the procedural framework. In developing proposals for how this could operate under the new group proceedings regime, the Working Group considered how this aspect of procedure operates in other jurisdictions and also what type of information will need to be captured in a group register.
49. As noted in paragraph 41, it is proposed that when the court grants permission for the raising of a group proceeding, a group register in a specified format is to be lodged with the court. The group register will be prepared by the representative party and should contain all known pursuers.
50. A new court form will be prescribed for this purpose and will set out the minimum information which will be required by the court in dealing with the case i.e. name, address, date of birth, date claim prescribes, unique reference /identifying number. The Working Group is considering how the new group register form could be capable of being adapted to include any other relevant information set out in the court order granting permission to bring group proceedings. This is on the basis that it is anticipated that additional information may be required depending on the individual circumstances of a case.
51. The group register will form part of the court process as in any other civil case and the court copy of the group register will be the official record at any given time.
52. The representative party will be responsible for maintaining the group register throughout the course of the proceedings.
53. The rules will provide that:
- the group register must be lodged with the court within 21 days of the date the court order granting permission to bring group proceedings was given and at the same time intimated to the defender;
 - when changes are made to the group register, the representative party must lodge an amended group register with the court and at the same time, intimate a revised copy of the group register to the defender as soon as possible within 21 days of the change;
 - the group register may be lodged/shared electronically with the court/parties;
 - the court is to consider the group register at each hearing of the case; and

- the rules will also contain ‘deemed commencement of proceedings’ provisions linked to the procedure concerning the group register. These provisions will provide clarity and support prospective questions concerning the prescription and limitation of individual claims forming part of the group during the course of a group proceeding case.

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

Group register notices

Opting In to a group proceedings case

55. It is proposed that persons wishing to opt-in to a group proceedings case will require to take specified steps in order to become a member of the group by giving written notice to the representative party. On joining a group proceedings case, a new group member will require to confirm that they consent to being bound by the judgment of the court in the proceedings.

56. The Working Group is also considering whether it would be appropriate for the rules to include a provision that on joining a group proceeding, a group member will require to confirm that they agree to be bound by any interlocutors previously pronounced in the case.

57. It is proposed that the rules will prescribe a form of written notice which a prospective group member will send to the representative party. The rules will permit the notice to be sent to the representative party electronically (with prior consent). The notice will include:

- the full name, designation, address, date of birth and contact details of the pursuer;
- some details setting out the person’s claim(s) which confirms that they are a member of the group;
- a statement to the effect that the person consents to the representative party bringing proceedings on the person’s behalf;
- confirmation that the person has not brought legal proceedings about the claim(s);
- confirmation that the person agrees to sharing of data, relevant to the person’s participation in the case, with the court and parties in the action;

- confirmation that the person consents to be bound by the judgment of the court in the proceedings; and
- subject to a final decision on the matter, confirmation that the person agrees to be bound by any interlocutors pronounced in the case prior to their joining the group proceedings.

58. As noted above, a person will require to make a declaration to the effect that there are no other court actions ongoing in relation to the subject matter of the claim. This is a matter about which the representative party will wish to be satisfied prior to accepting the individual onto the group register (in the same way as one would when raising any other civil case).

59. As previously noted, when granting an order for permission to bring group proceedings, the rules will enable the court to specify a cut-off point for people opting-in to the group proceedings, based on the individual circumstances of the case. In this regard, the rules will also provide that any person wishing to join the group proceedings after a specified cut-off point, will require to make an application do so by motion.

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

Withdrawing from group proceedings case

61. It is proposed that the rules will provide that a member in a group proceedings case may provide notice that they withdraw their consent to their claim being brought in the proceedings by providing written notice to the representative party. It is proposed that a notice of withdrawal may be given at any point up to the commencement of a diet of proof in the case. As noted previously in paragraph 44, legal issues relating to this proposal are under consideration.

62. A new form of notice will be prescribed for this purpose and will contain:

- the full name, designation, address, date of birth and contact details of the pursuer;
- some details setting out the person's claim(s) which confirms that they are a member of the group;
- a statement to the effect that the person withdraws consents for the representative party bringing proceedings (or continuing proceedings) on the person's behalf;

- confirmation that the person agrees to sharing of data, relevant to the person's participation in the case, with the court and parties in the action; and
- confirmation that the person consents to be bound by any judgment of the court made in the proceedings during the period of time in which the person had consented to be a member of the group.

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

Remit /Transfer in to group proceedings of additional claims

64. The Working Group considered section 21(2)(h) and (i) of the Act which enables court rules for group proceedings to make provision about additional claims/transfer of claims made in other civil proceedings and for the exclusion of claims /transfer of claims to other civil proceedings.

65. When developing policy proposals for rules regulating the opt-in procedure and related form of notice, the Working Group considered that any individual joining a group proceedings case would need to satisfy the court that there are no other ongoing court proceedings relating to the subject matter of the claim. In this context, the Working Group considered the practicalities of how ongoing cases could potentially be remitted to a group proceedings case.

66. Having considered the complex practicalities arising alongside the principle that the rules will only provide for essential procedural elements at this time, the Working Group propose that there will be no bespoke rules provision made relating to the transfer/remit of additional claims into an ongoing group proceedings case.

67. Should an individual make an application seeking to transfer/remit a case to an ongoing group proceedings case, the appropriate procedure will be left to the court's discretion to be determined utilising the court's case management powers and based on the individual circumstances of the case. It is anticipated that this issue could be reconsidered if required and in light of operational experience.

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

Debates

69. The rules will provide a procedure for lodging a note of preliminary pleas and for making an application to appoint a case to debate. It is proposed that a motion

requesting the fixing of a debate in a case will require to be lodged within 28 days of the date on which the closed record is lodged in process.

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

Case Management

71. The Working Group proposes that the rules will provide broad case management powers to enable judicial discretion and flexibility in progressing individual cases. Having discussed a number of procedural models, it was agreed that drawing elements from existing Court of Session case management models will provide the most effective means of regulating the new group proceedings.

72. In this respect the rules will provide:

- for the fixing of a case management hearing no less than 16 weeks from the lodging of the Closed Record. (This timescale is subject to the determination of any debate, in which case it will be no less than 16 weeks from the date on which the application for debate has been determined / disposed of);
- for lodging of statements of proposals for further procedure (and intimation to parties) no later than 14 weeks from the lodging of the Closed Record (and as above, subject to the determination / disposal of any application for a debate). As a minimum this will include: the issues for proof, lists of witnesses, information/applications relating to any child/vulnerable witness, lists of any expert reports, documents, statements shared and estimated time required for proof;
- for procedure at a case management hearing; and
- for the issuing of a pre-proof timetable.

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

Power to make orders

74. The rules will include a wide discretionary power for the court to make orders necessary to ensure the efficient progress of the case.

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

Effect of an interlocutor

76. The rules framework will provide for group members to be bound by interlocutors pronounced during the period when individual group membership endures. This proposal could potentially be extended to include interlocutors pronounced prior to the person joining the group. This will depend on the Working Group considering feedback on this issue as described in paragraphs 55-59.

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

Replacement of a representative party

78. The Working Group noted a number of possible scenarios which could give rise to a requirement for a representative party in a case to be replaced. Due to the variety of circumstances which could give rise to such an application, it was agreed that the rules should **not** prescribe a 'cut-off' point for the making an application.

79. The rules will provide:

- that an application to replace a representative party will be made by motion and can be made by the representative party, a party or group member;
- that the replaced representative party may or may not be a member of the group;
- that the court may consider the application without a hearing, may require further information from parties, or may fix a hearing for attendance of parties if so required;
- an application will not be granted unless the court is satisfied that the best interests of the group members are met; and
- that the court may make any order it thinks fit.

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

Discontinuance, abandonment and settlement of proceedings

81. In developing the proposed approach to settlement of group proceedings claims, the Working Group considered the rules in place across a number of other jurisdictions¹⁴ as well as a number of practical issues arising.
82. Group members will be bound by a group proceedings judgment, whether favourable to the group or not. In other jurisdictions, group members are protected under a requirement that the representative party obtain judicial approval of any settlement agreement. The aim of the requirement is for the court to ensure that members' interests have been served by the settlement and this judicial safeguard protects absent group members. In this way the court's discretionary powers can counter the control which the representative party otherwise exerts over the cessation of the litigation.
83. The following paragraphs consider the two elements in the process utilised across the focus jurisdictions. These are:
- judicial approval of any settlement agreement; and
 - notice of the settlement to all of the group members.

Judicial approval

84. In conventional civil litigation, the pursuer is entitled to abandon or settle the action at any time before the final decree or judgment is pronounced, without obtaining the prior approval of the court. The ethos of group procedure differs in that the representative party will conduct the litigation both on his own behalf and on behalf of all the other members of the case who have opted in. In this regard, in any application for approval of a settlement agreement there may be numerous interests – the representative party seeking the court's approval; group members opposed to the settlement; other group members; the defender; and group proceedings lawyers. In this regard it is argued that it is wrong for the representative party to be entirely free to abandon or settle the litigation as they wish.
85. A requirement for judicial approval of any settlement agreement is a mechanism which can be utilised to achieve this aim. In considering any settlement proposal, the court will be primarily concerned with safeguarding the interests of the absent group members through an analysis of the fairness and reasonableness of the settlement as it relates to those interests. A court approved settlement will also shield the defender from further litigation about issues subject to the settlement and pertaining to persons who opted-in to the proceedings.

¹⁴ Australia, Ontario, British Columbia and the United States

86. The Working Group noted that the Scottish Law Commission Report considered that judicial approval should not be required in respect of class action settlements¹⁵. The SLC's views were not followed in other jurisdictions where class action procedure has been considered and the advantages accruing from the court approval of class action settlements have been judicially recognised and endorsed in Australia, British Columbia, Ontario and the United States.
87. The Working Group considers that as a matter of principle, the representative party must be prevented from using the group proceedings to improve their own bargaining position in order to settle their own individual claim on terms more favourable than for the other group members. Having considered this principle and the issues arising, the Working Group concluded that it would be appropriate to align the procedural regime with the approach taken in the focus jurisdictions. It is proposed therefore that the group proceedings regime will incorporate rules requiring the representative party to obtain court approval of proposed abandonment or settlement of a claim in order to prevent prejudice to other group members.
88. The appropriate level of detail which the court will require in order to consider the settlement terms is likely to vary widely depending on the individual circumstances of the case. For example, in some cases there may be specific aspects of an agreement which parties would seek to keep confidential. It is intended that the court will utilise its discretionary power to make orders (see paragraph 71) where any such questions arise.

Notice to group members

89. In taking forward the above approach, it is necessary to consider whether notice must be given to all group members where an application is made for court approval of a settlement agreement. The Working Group examined some differing approaches to this issue across other jurisdictions¹⁶.
90. The different approaches gave rise to the question of what factors are guiding the courts' discretion. The Working Group noted that there is no statutory guidance in the focus jurisdictions by which the courts should exercise their discretion in approving settlement agreements. It noted that the likely duration and costs of class actions – if they were to continue to judgment – has been held to be a particularly relevant factor

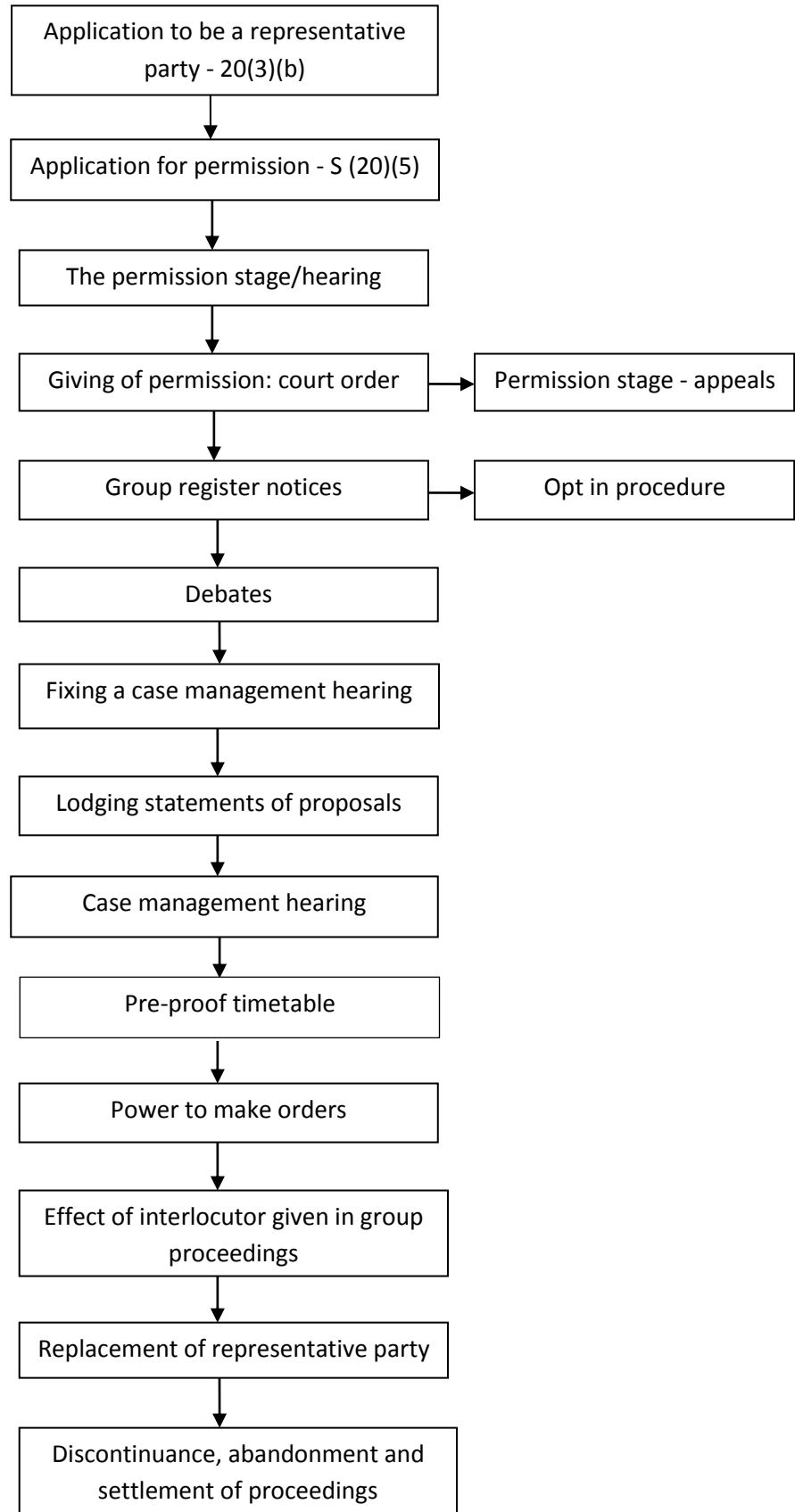
¹⁵ SLC report Rec 19, para 4.92

¹⁶ In the United States, the court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement. In Australia, notice is mandatory unless court considers it "just" to dispense with the notice. Despite that caveat, notice will usually be mandated on the basis that such notice is a "key element" which protects interests of members of a particular class, so that class members are provided with an opportunity to voice objections or concerns. In Canada, the position is less strict, requiring only that court must consider whether notice of settlement should be given before court approval is granted. Ontario Superior Court of Justice has approved of the developed practice of giving notice of an intended settlement and hearing representations by objectors and intervenors before granting approval, but legislation is silent on this matter.

when deciding whether to grant judicial approval to a settlement agreement or not (across the focus jurisdictions of Australia, the US and Canada). The fact that full-scale litigation might outlive many of the class members involved has also been particularly pertinent.

91. As a matter of principle, the Working Group considers that a form of notice will be appropriate in the majority of group proceedings cases coming before the court. In this regard, it is proposed that a rule will be prescribed to provide for such notice but with a discretionary power to dispense with notice if the court so determines. How notice is to be effected in a case will be a decision left to the discretion of the court based on the individual circumstances of the case.
92. ***Consultation Question 16: Do you have any comments on the proposed approach to rules provisions for the discontinuance, abandonment and settlement of proceedings in a group proceedings case?***
93. ***Consultation Question 17: Do you have any comments about the proposed structure/chronology of the rules?***
94. ***Consultation Question 18: Do you have any further comments on any aspect of the proposed rules framework regulating group proceedings cases?***

SECTION 6: DIAGRAM - GROUP PROCEEDINGS FRAMEWORK



SECTION 7: NEXT STEPS

Following the consultation period, responses will be analysed and draft rules will be prepared, taking account of the responses received.

The draft rules will be considered by the Working Group and when approved, submitted for consideration to the Council.

ANNEX A

Consultation question 1:

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

Consultation question 2:

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

Consultation Question 3:

Do you have any comments on the proposed procedures and rules provisions for the appointment of a representative party?

Consultation Question 4:

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

Consultation Question 5:

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

Consultation Question 6:

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

Consultation Question 7:

Do you have any comments on the proposed procedures and rules provisions regulating the group register?

Consultation Question 8:

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

Consultation Question 9:

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

Consultation Question 10:

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

Consultation Question 11:

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

Consultation Question 12:

Do you have any comments on the proposals for rules regulating the case - management of group proceedings claims?

Consultation Question 13:

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

Consultation Question 14:

Do you have any comments on the proposal on the effect of an interlocutor pronounced in a group proceedings case?

Consultation Question 15:

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

Consultation Question 16:

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

Consultation Question 17:

Do you have any comments about the proposed structure/chronology of the rules?

Consultation Question 18:

Do you have any further comments on any aspect of the proposed rules framework regulating group proceedings cases?