

**POLICY NOTE**  
**ACT OF SEDERUNT (RULES OF THE COURT OF SESSION 1994**  
**AMENDMENT) (GROUP PROCEEDINGS) 2020**  
**S.S.I. 2020/208**

**Introduction**

1. This Policy Note is published to accompany the Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Group Proceedings) 2020 made by the Court of Session on 8th July 2020. The Policy Note has been prepared by the Scottish Civil Justice Council Secretariat to set out the Council's policy behind the rules. It does not form part of the rules.

**Policy Objectives**

2. The objective of the Act of Sederunt is to provide court rules to implement Part 4 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018. The new rules regulate procedure for group proceedings cases coming before the Court of Session. The rules framework encompasses only the essential procedural elements that are required to enable group proceedings to operate effectively in the court.
3. The rules have been designed to encourage the expeditious progress of group proceedings cases and make the most efficient use of time spent in court. The emphasis is placed on judicial case management and the rules provide broad powers to enable the court to tailor the procedure in response to the unique circumstances and complexity of individual cases.
4. In developing court rules, the Scottish Civil Justice Council has complied with its duty under section 2 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 to have regard to the following guiding principles<sup>1</sup> when carrying out its functions:

*Compatibility with SCJC guiding principles*

5.

Principle	Compatibility
<i>The civil justice system should be fair, accessible and efficient</i>	The rules aim to provide clarity in the regulation of a new civil procedure - group proceedings, which is to be available in the Court of Session. The rules are intended to be fair and accessible to court

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<sup>1</sup> Section 2(3) of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013.

*Rules relating to practice and procedure should be as clear and easy to understand as possible*

*Practice and procedure should, where appropriate, be similar in all civil courts*

*Methods of resolving disputes which do not involve the courts should, where appropriate, be promoted*

users and create efficient operational practices.

The policy intention that the rules be as clear and easy to understand as possible has been a relevant consideration by Council when developing the rules.

The rules relate to new procedures which are only to be available in the Court of Session. However, where possible, the rules have been aligned with existing Court of Session procedures and their procedural principles will be familiar to court users.

There is no scope within the context of these rules to promote methods of resolving disputes outwith the courts. However, the Council intends to consider the potential for introduction of a pre-action protocol under the powers set out in section 21(2)(b) of the Act.

6. Since this is a new form of procedure in Scotland, the Council anticipates that in due course, the procedural framework will be modified in light of feedback and operational experience.

## **Background**

7. The Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018<sup>2</sup> ('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 Scotland<sup>3</sup> and implements the recommendations of the Rt. Hon Lord Gill's Report of the Scottish Civil Courts Review<sup>4</sup> relating to group procedure.
8. 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 people with the same or similar rights, to have their case determined by

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<sup>2</sup> [Part 4 of the Civil Litigation \(Expenses and Group Proceedings\) \(Scotland\) Act 2018](#)

<sup>3</sup> <http://www.gov.scot/About/Review/taylor-review/Report>

<sup>4</sup> <http://www.scotcourts.gov.uk/about-the-scottish-court-service/the-scottish-civil-courts-reform>

means of a single representative court process, thereby avoiding the need for each member of the group to commence separate court proceedings. The Act provides that the new group procedure is available only in the Court of Session. Sections 20-22 of the Act provide the framework within which the new court rules add the necessary procedural detail.

9. In designing the new procedural framework, the Council's intention was 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 create an efficient, flexible and accessible system regulating group proceedings.

### **The Procedural Framework**

10. The new rules provide a procedural regime to regulate how new group proceedings cases will progress through the court. The rules framework and policy is described in the following paragraphs.

#### *Scope*

11. The Act provides that court rules may specify the nature of proceedings which may be brought under Part 4. 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 proceedings<sup>5</sup>.
12. At this time, the Council's focus has been to develop court rules for ordinary actions initiated by summons which it is anticipated will form the bulk of group proceedings actions coming before the court. Whilst the new court rules do not extend to judicial review proceedings, in due course, the Council intends to consider whether the rules regime can be modified to incorporate these case types.

#### *Opt-in or opt-out procedure*

13. The Act provides that group procedure can take the form of either an 'opt-in' or 'opt-out' regime, or a combination of both.
14. 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

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<sup>5</sup> Section 21(2)(d) of the Act.

a settlement and their claims would not be extinguished should the representative action be abandoned.

15. 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.
16. In its Annual Programme 2019-20, the Council listed the development of the secondary legislation necessary to support implementation of the Act as a high priority. In this context, the Council considered the potential practical and procedural aspects pertaining to implementation of each of the different regimes. Given the Council's public commitment to expedite this work, along with the greater familiarity of many stakeholders with "opt-in" proceedings, it was agreed to prioritise the development of an "opt-in" system at this time. The Council has agreed to consider developing an "opt-out" system in the future.
17. The Council noted that a significant benefit of the chosen approach is that it presents an opportunity for the court to gain experience in dealing with what is anticipated to be more straightforward group procedure cases initially under 'opt-in' than would be the case under 'opt-out'. It is considered that the benefit of this experience can be taken forward when considering the development of an 'opt-out' regime in future.

### *Structure*

18. The rules introduce a new chapter 26A for incorporation into the Rules of the Court of Session 1994. Where appropriate, the rules utilise existing procedural provision by application of relevant chapters, e.g. chapter 23 motions and chapter 28 procedural roll. The rules focus on only the essential procedural elements which have been deemed necessary for group proceedings to operate effectively in the court. Where possible the rules avoid being unduly prescriptive and permit the court discretion to manage cases with flexibility in the individual circumstances of the case.
19. As noted previously, it is anticipated that elements of the procedure will be refined and modified in time and in light of operational experience.

## **Rules provisions**

### Part 1 General Provisions

20. This part provides rules relating to interpretation, disapplication of certain rules, general procedure and motions.

## Part 2 - Representative Party

### *Application to be a Representative Party*

21. The Act<sup>6</sup> 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. In developing a process for regulating such an appointment, the Council has considered various issues surrounding the role, functions and appointment of a representative party in group procedure.

22. The rules provide that an application to be appointed as a representative party is to be made by motion in a new prescribed Form 26A.5. The procedures set out in Chapter 23 Rules of the Court of Session 1994 will apply, to include intimation and enrolment by email. The new Form sets out the information required by the court in order to determine the application and permits an application for permission to bring group proceedings to be made at the same time. In such a situation, the rules require that the motion should be accompanied by a copy of the summons and supporting papers. The rules provide for intimation, service, advertisement, answers and related hearings as may be required.

23. The rules also provide a mechanism regulating the procedure for the court's determination of competing applications.

### *Determination of an application for a person to be a representative party*

24. An applicant may be authorised to be a representative party when the court is satisfied that the applicant is a suitable person. The rules prescribe a number of matters which the court will consider in determining whether or not the applicant is a suitable person – among others, these aspects include consideration of the abilities/expertise of the applicant, and the applicant's own interest in the proceedings. Permission granted endures until the proceedings finish or until permission is withdrawn.

### *Replacement of a representative party*

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<sup>6</sup> [Section 20\(4\) Civil Litigation \(E&GP\)\(S\) Act 2018](#)

25. The Council noted a number of possible scenarios which could give rise to a requirement for a representative party in a case to be replaced. For example an application by a representative party seeking to withdraw and be replaced by a new person or an application by a group member seeking to replace a representative party. Due to the variety of circumstances which could give rise to such an application, it was agreed that the rules would not prescribe a 'cut-off' point for the making of an application.
26. The rules therefore provide a mechanism for handling applications for replacement of a representative party and include provision for intimation/ service/advertisement of the application and for the lodging of answers and fixing of a hearing as may be required.

### Part 3 - Permission to bring Group Proceedings

#### *Application for Permission*

27. The rules provide that an application for permission to bring group proceedings is made by motion in a new prescribed Form (Form 26A.9). The rules provide for intimation, service, advertisement, answers and related hearings as required.

#### *The permission stage*

28. The rules provide for circumstances whereby permission to bring proceedings may be refused and include among others, that the criteria set out in section 20(6)(a) or (b) (or both (a) and (b)) of the Act have not been met, it has not been demonstrated that:– there is a prima facie case, that it is a more efficient administration of justice for the claims to be brought as group proceedings rather than by separate proceedings, or that the proposed proceedings have any real prospects of success. Where permission is refused the Lord Ordinary must give reasons for the decision.

#### *Grant of Permission*

29. When granting permission, the rules provide that the Lord Ordinary must make an order which among other matters: states the name and designation of the representative party, defines the group and the issues, requires the lodging of a group register by the representative party, specifies how a person can become a group member and a timescale for doing so, specifies how a person can withdraw their claim. The order granting permission must be advertised within 7 days of the date the court gives permission, and thereafter during the period when persons may join the proceedings as the Lord Ordinary thinks fit.

30. The rules also provide for appeals against the granting or refusing of permission to bring group proceedings (including the granting subject to conditions or only on particular grounds) to be made by reclaiming motion, for which leave is not required.

#### Part 4 – Opt-in Procedure

##### *Opt-in proceedings - notices*

31. A person wishing to opt-in to a group proceedings case will require to take steps in order to become a member of the group. This is done by giving written notice to the representative party (or a person who has applied or is to apply to be a representative party), either before proceedings are raised or within the time period specified by the court when it made the order granting permission to bring group proceedings. A new form of notice (Form 26A.14-A) has been prescribed for this purpose. The rules permit the notice to be sent electronically to the representative party (or the person who has applied or is to apply to be a representative party) when that person has consented and has provided an email address for this purpose. Amongst other matters, the Form requires a prospective group member to confirm their consent to be bound by any interlocutors pronounced in the case. This may include interlocutors pronounced prior to their joining the group proceedings.

32. A similar form (Form 26A.14-B) is prescribed for a person who wants to withdraw from the group.

##### *Opt-in Procedure: Group Register*

33. The Council considered that the setting up and maintenance of a group register for cases brought under group proceedings would be a key part of the new procedural framework. In developing proposals, the Council considered how this aspect of group procedure operates in other jurisdictions and what type of information would need to be captured in a group register.

34. The rules provide for the completion by the representative party of a group register in a new Form 26A.15 which includes information required by the court in dealing with the case. The representative party must lodge the group register with the court together with the application for permission to bring proceedings and, at the same time, serve the group register on the defender.

35. 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. The representative party is responsible for maintaining the group register throughout the course of the proceedings.

36. The rules therefore require the representative party to lodge a revised group register with the court whenever membership changes are made either by the addition or withdrawal of members of the group. At the same time, a revised register must be served on the defender and changes notified to all group members. The group register may be lodged/shared electronically with the court/parties. The rules also require the group register to be considered at all court hearings in the proceedings.

*Opt-in proceedings – late application*

37. In developing the practical aspects of the rules regime, the Council considered it would be necessary to specify a latest point in the proceedings after which no new claims may be brought. The Council considered that the allowance of proof in the cause would be the appropriate latest point. The Council agreed though that the rules should provide discretion enabling the court to consider 'late' applications to join the group. The Court may grant an application where cause is shown after giving the defender an opportunity of being heard and on such conditions, if any, as to related expenses.

38. The rules therefore provide that when a person has sent an opt-in notice to the representative party and wishes to join the group proceedings after the time period specified by the court has elapsed, the representative party can make an application to the court by motion in new prescribed Form 26A.16. The rules provide for intimation, service, advertisement, answers and related hearings as required.

*Opt-in proceedings – late withdrawal, and withdrawal leading to less than two pursuers*

39. The Council also considered that it would be appropriate to make similar flexible provision enabling the court to consider an application for 'late' withdrawal from the proceedings by a group member. The rules provide that when a group member sends a notice to the representative party advising they wish to withdraw from the group following the commencement of a proof, the representative party will require to make an application to the court by motion in Form 26A.17. An application will also need to be made where a group member seeks to withdraw and where such withdrawal would result in there being less than 2 pursuers in the proceedings. The rules provide for intimation, service, advertisement, answers and related hearings as required. The Court may grant an application after giving the defender an opportunity of being heard and on such conditions, if any, as to related expenses.



## Part 5 – Commencement of Group Proceedings

40. In developing the procedural framework, the Council recognised that there was a need to provide clarity within the rules on persons' individual membership status during the course of the proceedings in a case. The rules therefore provide 'deemed commencement' provisions which are linked to the procedure for opting in of an individual group member to the group register.
41. These provisions provide clarity in relation to potential questions arising about when proceedings are commenced by individual group members whose claims are brought in a group proceeding case. When recording a person as a group member in the group register, the representative party certifies that the proceedings are brought within the statutory limitation period.

## Part 6 - Summonses and Defences

### *Summons in group proceedings actions*

42. The rules prescribe a new form of summons for raising a group proceedings case (Form 13.2-AA) and specify a number of matters which must be incorporated within the summons. The stages which must be completed before proceedings may be brought, namely the authorisation of a person as a representative party and permission for the bringing of the proceedings, are included in the summons for these proceedings. The summons also includes: the conclusions for the orders sought, the identity of the parties and the matters from which the action arises, any special capacity regarding the bringing of the action, a summary of the circumstances out of which the action arises and the grounds on which the action proceeds. The summons is to have appended to it, a schedule listing the documents founded on or adopted as incorporated in the summons, which is also to be lodged as an inventory of productions.

### *Defences*

43. The rules make provision for the lodging of defences along with a schedule listing the documents founded on or adopted as incorporated in the defences, which must be lodged as an inventory of productions.

## Part 7 - Procedure

44. The Council considered that a key feature of an effective procedural regime would be for the court rules to incorporate broad case management powers

that would facilitate judicial discretion and flexibility in progressing cases. The Council has therefore drawn elements from existing Court of Session case management models to achieve this aim and considers that the resulting procedural framework will provide an effective means of regulating the new group proceedings.

45. The rules provide for:

- fixing a preliminary hearing;
- fixing a case management hearing;
- procedure at a case management hearing;
- fixing of debates;
- fixing of pre-proof hearings as required.

#### *Preliminary hearing*

46. The rules provide for a preliminary hearing to take place within 14 days after defences have been lodged. This is a key stage in the procedure where the court will be addressed by parties and will decide how best to deal with proceedings going forward. The court is to determine the extent of any further specification of the claims and defences which may be required at this stage of the proceedings and may make orders on a range of matters including: detailed written pleadings, statement of facts, amendment of pleadings, disclosure of witnesses and recovery of documents, expert evidence and affidavits. The rules provide flexibility on time periods for compliance with any order and a wide discretion for the court to make orders to secure the efficient determination of the proceedings.

47. The preliminary hearing, taken together with the powers in Rule 26A.3 and the case management powers are intended to meet the aim of ensuring the litigation proceeds as efficiently as possible for the benefit of the group members, the parties and the court.

#### *Case management hearing*

48. The rules provide for the fixing of a case management hearing and for a number of matters which parties must undertake prior to such a hearing. This includes: the lodging of statements of proposals for further procedure which set out any issues for proof or debate along with the estimated duration of the

proof/debate, witness lists identifying matters which will be spoken to, reports of skilled persons and notes of arguments on preliminary pleas and related authorities.

49. At the case management hearing, the court must consider a number of matters arising. Included among these matters are: determining whether the case will be assigned to proof or debate (this may include on all of the claims or some of the claims, and all of the issues or some of the issues (whether of fact or law) as the case may be), making orders relating to written arguments, the nature of evidence to be adduced and the timetable for service of affidavits as may be required, making any directions relating to the evidential status of such affidavits, making directions pertaining to joint minutes of agreement and remits to persons of skill. The rules also provide a wide discretionary power to make such other order as the Lord Ordinary thinks fit.

#### *Debates*

50. The rules make provision for the assigning of debates and the lodging of related preliminary pleas and written arguments. The rules apply the provisions of chapter 28<sup>7</sup> (procedure roll) to debate hearings.

#### *Pre-proof hearing*

51. The rules provide that at least 2 days before the pre-proof hearing, parties must lodge an estimated timetable for the conduct of the proof and a note of issues which are to be addressed prior to the proof.

#### *Lodging of productions for proof*

52. The rules provide for the lodging of productions which, for documents not previously lodged, is to be not less than 7 days prior to the proof unless an earlier date is specified by the court.

#### Part 8 - Withdrawal from Group Proceedings

53. The Council recognised that there may be reasons arising during the course of a case whereby an individual group member may wish to withdraw from the group proceedings. The rules therefore provide a procedural mechanism to regulate such occasions.

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<sup>7</sup> With the exception of rule 28.1(3)(d) which is not to apply.

54. 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. A new form has been prescribed for this purpose (Form 26A.14-B). The rules provide a 'deemed withdrawal' provision for a person who withdraws their consent to their claim being brought in the group proceedings.

## Part 9 – Orders of the Court

### *Power to make orders*

55. The rules provide the court with a general discretionary power to make orders on the court's instance or on the motion of parties. This rule is designed to provide maximum flexibility to the court to secure the fair and efficient determination of the proceedings.

### *Effect of an interlocutor given in group proceedings*

56. The rules provide that group members are bound by interlocutors pronounced by the court during their membership of the group or prior to a person joining the group (unless otherwise ordered by the court).

### *Failure to comply with rule or order of Lord Ordinary*

57. The rules provide the court with powers of sanction for failure by a party to comply with the rules or any order pronounced during the proceedings; amongst the sanctions are: dismissal of the claim or an award of expenses.

## Part 10 - Settlement

### *Settlement of proceedings*

58. In developing the proposed policy approach to settlement of group proceedings claims, the Council considered the rules in place across a number of other jurisdictions<sup>8</sup> as well as a number of practical issues arising. The Council considered the Scottish Law Commission Report which proposed that judicial approval should not be required in respect of class action settlements<sup>9</sup>. The Council noted that the SLC's views were not followed in other jurisdictions where class action procedure has been considered and that the advantages accruing from the court approval of class action settlements had been judicially recognised and endorsed in these places.

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<sup>8</sup> Australia, Ontario, British Columbia and the United States

<sup>9</sup> SLC report Rec 19, para 4.92

59. In developing rules proposals, the Council initially considered that a system including judicial approval of a settlement agreement and the provision of notice of that settlement to all of the group members may have utility under the new procedural framework. The Council noted however that there is no precedent in other civil court proceedings in Scotland for such procedure and that as noted previously, the SLC took an opposing view to its utility. Having considered these issues alongside some of the feedback from the consultation on this aspect of the proposed rules framework, the Council concluded that in all the circumstances, wider consultation on the matter of settlement would be needed.

60. The Council noted however that any settlement proposal will require to safeguard the interests of group members. The rules therefore impose a duty upon the representative party to consult with group members on the terms of any proposed settlement before any damages in connection with the proceedings may be distributed.

61. The Council noted that further consideration on the policy for settlement of proceedings would be beneficial in due course.

#### *Consequential Amendments*

62. Paragraphs 2(2) to (4) and (6) of the rules make consequential amendments to the Rules of the Court of Session relating to signature of documents, caveats, the summons Form and reclaiming motions for group proceedings cases to ensure the proper functioning of the new court rules.

#### *Forms*

63. New Forms are inserted into the appendix to the Rules of the Court of Session, and Form 13.7 is amended, by paragraph 2(7) of the Act of Sederunt.

#### **Consideration of Related Policy Issues**

64. In developing the procedural framework, the Council considered a number of other policy issues arising but which give rise to no rules provision under the current rules framework. As noted previously, the Council anticipates that the framework will be modified in light of feedback and operational experience and that the matters described in the following paragraphs may be considered in future.

### *Remit /Transfer in to group proceedings of additional claims*

65. The Council 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.
66. When developing a proposed mechanism for regulating the 'opt-in' procedure, the Council considered that an important aspect of the procedure would be the need for individual group members to satisfy the court that there are no other ongoing court proceedings relating to their claim. The Form of notice therefore requires a prospective group member to confirm a statement to this effect. In the context of this principle, the Council considered the complex practicalities arising in the question of how ongoing cases could potentially be remitted to a group proceedings case in implementation of section 21(2)(h) and (i) of the Act.
67. Given the complexities of incorporating a mechanism regulating the transfer/remit of additional claims into an ongoing group proceedings case against the overarching principle that the rules will only provide for essential procedural elements at this time, the Council has made no bespoke rules provision.
68. It is intended that the appropriate procedure for any such application will be determined at the discretion of the court, utilising the case management powers provided in the rules and based on the individual circumstances of the case. The Council anticipates that this matter could be reconsidered if required and in light of operational experience.

### *Pre-action Protocol*

69. The Council noted that the power provided under section 21(2)(b) of the Act, would permit the introduction of a pre-action protocol for group proceedings. The Council considered that a protocol would be a beneficial addition to the overall group proceedings regime and that this could be considered at an appropriate time.

### *Fees and expenses*

70. The issue of current fees and expenses regimes was considered by the Council during policy development. Questions about the intended judicial expenses and fees structure were also raised by respondents to the consultation. The Council concluded that in relation to the system of cost recovery for group proceedings, until there is related operational experience

and data available from the Scottish Courts and Tribunals Service, the cost of servicing the new procedure will remain unknown. In this regard, it will not be possible to agree policy on new fees provision in the absence of that information. The position is the same regarding potential changes to existing tables of solicitor's fees. The Council therefore intends to programme a future review of these aspects by its Costs and Funding Committee.

71. Pending such review, the Council noted that in the 'opt-in' scheme provided for under the rules framework, the court will be entitled to determine the liability of each group member for payment of a share of any taxed expenses incurred by the representative party in a case (and will be entitled to make such a determination before or after the conclusion of the action). In awarding expenses in group proceedings, the court will retain its discretion to apply the general rule that expenses follow success.

#### *Modification of the sheriff court privative limit*

72. The Act provides a power under section 21(2)(g) that court rules may dis-apply or modify the sheriff court privative limit. The Council concluded that were it to consider exercising this power, detailed policy would require to be developed and the matter would require wider consultation. If in due course, the Council determine that this matter should be progressed, the work needed will require to be considered alongside the Council's other business priorities and planned for appropriately.

### **Consultation**

73. The underlying law was consulted upon during the progress of the Scottish Government Bill<sup>10</sup>. The Council conducted a targeted consultation seeking views on the proposed procedural framework and scope of the rules regime.

74. Eighteen responses to the consultation were received and feedback on the proposals was generally very supportive. Analysis of the consultation responses elicited some helpful suggestions which were taken forward in revisions to the procedural framework and which have contributed to making the resulting rules instrument a better product.

75. On 3 July 2020, the Scottish Civil Justice Council approved a draft rules instrument and submitted it to the Court of Session for consideration.

**Scottish Civil Justice Council Secretariat**  
**09 July 2020**

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<sup>10</sup> <http://www.gov.scot/Publications/2015/01/9932>