Scottish
Civil Justice
Council

# Consultation on Draft Court Rules in Relation to Protective Expenses Orders

## CONTENTS

## RESPONDING TO THIS CONSULTATION PAPER

We are inviting written responses to this consultation paper by Friday 23 June 2017.

Please send your response with the completed Respondent Information Form (see "How we will treat your response" below) to:

scjc@scotcourts.gov.uk

or

Mandy Williams
Scottish Civil Justice Council
Parliament House
Edinburgh
EH1 1RQ

If you have any queries, please contact Mandy Williams on 0131 240 6769.

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

This consultation, and all other Scottish Civil Justice Council (SCJC) consultation exercises, can be found on the consultation web pages of the SCJC website at: http://www.scottishciviljusticecouncil.gov.uk/consultations

### How we will treat your response

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. **Please complete and return the Respondent Information Form with your response (at Annex B) as this will ensure that we treat your response appropriately**. If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly.

However, all respondents should be aware that the SCJC is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Where respondents have given permission for their response to be made public (see the Respondent Information Form at Annex B) and after we have checked that they contain no potentially defamatory material, responses will be made available to the public on the SCJC website.

**What happens next?**

Following the closing date, all responses will be analysed and considered along with any other available evidence to help the SCJC reach a view on draft rules for protective expenses orders. It is intended to publish a consultation report on the SCJC website, following the meeting of the SCJC on 02 October 2017.

**Feedback**

If you have any comments about how this consultation exercise has been conducted, please send them to:

**Name:**
Mandy Williams

**Address:**
Scottish Civil Justice Council
Parliament House
Edinburgh
EH1 1RQ

0131 240 6769

**E-mail:**
scjc@scotcourts.gov.uk

## SECTION 1 INTRODUCTION AND BACKGROUND

1. The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention) is a United Nations Economic Commission for Europe convention signed on 25 June 1998. The requirements imposed on contracting parties include requirements relating to the means by which members of the public can challenge-
    - the response to requests for environmental information,
    - decisions relating to proposed activities impacting on the environment, and
    - contraventions of national law relating to the environment.

2. These include a requirement that the procedures involved should not be prohibitively expensive. The objective is to give the public wide access to justice so that it can play an active role in the preservation, protection and improvement of the environment. The European Union is a party to the Aarhus Convention and these requirements have in part been incorporated into, and repeated in, EU Law.

3. On 25 March 2013 the Rules of the Court of Session were amended by the introduction of a new chapter of rules - Chapter 58A. These rules, as subsequently amended, can be seen at Annex D. The rules were designed to achieve compliance with the "not prohibitively expensive" requirement in so far as the requirement arose under EU law in the context of either a judicial review or a statutory appeal. This was achieved by allowing the petitioner or the appellant in the proceedings to apply by motion for a Protective Expenses Order (PEO) at an early stage in the proceedings.

4. The rules required the court to grant a PEO when satisfied, both that the proceedings were prohibitively expensive for the applicant, and also that the proceedings in question, and the applicant's interest, brought the proceedings within the scope of the rules. The test prescribed in the rules for determining if proceedings were prohibitively expensive, and the factors that required to be taken into account in determining applications are discussed below.

5. If granted, a PEO would operate-
    - to cap the applicant's potential liability in expenses to the respondent at £5,000, or less on cause shown, and
    - to cap the respondent's potential liability to the applicant at £30,000, or more on cause shown.

6. In September 2015, the SCJC considered a request from the Scottish Government proposing changes to the Rules of the Court of Session in relation to PEOs. This was approved and in 2016 the rules in Chapter 58A were substantially amended. The amendments were concerned only with the scope of the rules, the purpose being to ensure that the criteria imposed by the rules, in so far as relating to the type of proceedings in which an application could be made, and the applicant's interest, more closely reflected the scope of the "not prohibitively expensive" requirement in the Aarhus Convention.

7. Since that time, the SCJC has undertaken a further review of the rules focusing on the prescribed test, and the procedure by which applications are determined. In

light of that review the SCJC is considering whether to submit a revised version of Chapter 58A to the Court of Session for approval. Draft rules were considered by the SCJC at its meeting in October 2016 and the SCJC agreed to consult on the proposals prior to considering the draft rules further.

## SECTION 2 DISCUSSION OF PROPOSALS AND CONSULTATION QUESTIONS

### Discussion of Proposals

8. For the purposes of this consultation, a draft Act of Sederunt has been prepared and is produced at Annex E.

The test

9. In December 2010, in the case of R (on the application of Edwards and another) v Environment Agency and others, the Supreme Court decided to seek a preliminary ruling from the Court of Justice of the European Union (CJEU). The questions posed included how a domestic court should go about determining whether the cost of litigation is prohibitively expensive, and in particular whether that question should be decided on an objective basis, on a subjective basis, or on some combination of the two.

10. The CJEU issued its preliminary ruling in April 2013. Taking that ruling into account, the Supreme Court proceeded to issue its own judgment in December 2013. Chapter 58A therefore predated both decisions. Having compared the rules with those decisions, it is the view of the SCJC that the language of the rules may be at odds with the courts' interpretation of the Aarhus Convention.

11. Rule 58A.1(2) defines 'prohibitively expensive' for the purposes of the rules, providing that "proceedings are prohibitively expensive for an applicant if the applicant could not reasonably proceed with them in the absence of such an order". This bears to be a subjective approach under which what is prohibitively expensive depends on the circumstances of the particular applicant. However, the Edwards case makes clear that the test is not purely subjective and that, where the 'not prohibitively expensive' requirement is engaged, the cost of proceedings must not exceed the financial resources of the person concerned nor appear to be objectively unreasonable.

12. It would be possible to attempt to redefine 'prohibitively expensive' so as better to reflect how it has been interpreted by the CJEU and the Supreme Court. However, the SCJC considers that the preferred approach is to omit any definition. It is a principle of statutory interpretation that, where legislation is enacted to give effect to Community Law, terms used in the legislation must be construed in accordance with that law. Given that the CJEU and the Supreme Court have ruled on the meaning of 'prohibitively expensive', the inclusion of a definition in the rules appears unnecessary, and potentially confusing.

**Question 1: Do you agree that the rules should not define 'prohibitively expensive'?**

13. This approach would also allow for the omission of other provisions of the existing rules. The rules presently provide that the court may refuse to make a protective expenses order if it considers that the applicant has no real prospect of success. The implication is that the question of prospects of success is distinct from the question of whether or not the proceedings are prohibitively expensive. However,

it appears clear from the decisions in Edwards that prospects of success is one of the factors that the court has to take into account in determining whether or not proceedings are prohibitively expensive. Presenting the two issues as distinct questions may therefore be unhelpful. The same considerations appear to apply to the list of circumstances to be taken into account in determining applications that is currently set out in rule 58A.5(1). These also appear unnecessary and potentially unhelpful.

**Question 2: Do you agree that the rules should not distinguish the question of prospects of success from the question of whether or not the proceedings are prohibitively expensive?**

The procedure

14. A PEO is applied for by motion in the proceedings. The current rules in Chapter 58A specify the information that requires to be included in the motion, and the documents that require to accompany the motion. In other respects a PEO application is in theory subject to the standard procedure for the disposal of motions.

15. It has nevertheless become apparent that the procedure actually adopted in determining PEO applications can be protracted and expensive – involving lengthy hearings, hearings being continued, and calls for written arguments. The SCJC considers that this is inappropriate in the context of an application for expenses protection.

16. Where a PEO is granted the applicant's potential liability in expenses in relation to the entirety of the proceedings will generally be capped at £5000. However, in the course of an opposed PEO application each party may incur expenses well in excess of that figure, with the unsuccessful party potentially being liable for the other party's expenses. In addition to the implications for their own costs, applicants therefore have to expose themselves to the risk of incurring a very substantial liability in expenses before it is determined whether or not they are going to have the benefit of expenses protection. This has the potential to have a deterrent effect which may undermine the very rationale for the introduction of PEOs.

17. The SCJC proposes two measures to avoid this. The first involves a simplified and accelerated procedure for the determination of PEO applications under which there would be a presumption against there being any hearing to consider the application. Applications would instead be determined by the court based solely on consideration of the papers, including statements setting out the grounds for seeking the order and the grounds for opposing it. This is designed to have the effect of significantly reducing the expenses that are incurred by the parties in connection with PEO applications. This provision is contained in draft rule 58A.6.

**Question 3: Do you have any comments on draft rule 58A.6 for the determination of an application?**

18. The second measure involves restricting an applicant's liability in expenses in the event that the application is unsuccessful. The SCJC propose that, in that situation, the applicant's liability in expenses, in so far as relating to the PEO application, should generally be capped at £500 unless the court is satisfied that there are grounds for removing that cap. This provision is contained in draft rule 58A.9.

**Question 4: Do you have any comments on draft rule 58A.9 for the expenses of the application?**

Appeals

19. There are two respects in which the draft rules would bring about changes in relation to appeals from the Outer House to the Inner House.

20. The first concerns expenses protection for the purpose of appeals when a PEO has been granted in the first instance proceedings. Where, in that situation, there is an appeal at the instance of the applicant's opponent, the SCJC propose that the PEO previously granted should have continued effect for the purpose of the appeal. The effect would be that the applicant would not have to apply for a fresh PEO for the appeal, and the limits on the parties' liability in expenses set by the original PEO would apply in relation to the totality of the first instance and appeal proceedings. This provision is contained in draft rule 58A.8.

21. However, where a PEO is granted in first instance proceedings and it is the applicant who appeals, the original PEO would not have continuing effect for the purposes of the appeal. If the original applicant wants expenses protection for the purpose of the appeal as well, he or she would therefore require to apply for a further PEO, in which event the outcome of the first instance proceedings would be one of the factors taken into account in the application of the 'prohibitively expensive' test.

**Question 5: Do you have any comments on draft rule 58A.8 for expenses protection in reclaiming motions?**

22. The second change is in relation to appeals against the determination of PEO applications. The concerns about the expenses involved in PEO applications apply equally, or to an even greater extent, where the Inner House is asked to review a decision to grant or refuse a PEO application. In order both to reduce those expenses, and to accelerate the procedure, it is therefore proposed that, when the only issue in the appeal is the determination of a PEO application, there should be a presumption that there will be no hearing and that the appeal will be determined in chambers based on consideration of the papers, including the grounds of appeal and answers. This change would be achieved by amending rule of court 38.16, as shown in paragraph 2(2) of the draft Act of Sederunt.

**Question 6: Do you have any comments on the draft amendment to rule 38.16?**

**Question 7: Do you have any other comments on the proposals contained in this paper?**

**Summary of Consultation Questions**

1. **Do you agree that the rules should not define 'prohibitively expensive'?**

2. **Do you agree that the rules should not distinguish the question of prospects of success from the question of whether or not the proceedings are prohibitively expensive?**

3. **Do you have any comments on draft rule 58A.6 for the determination of an application?**

4. **Do you have any comments on draft rule 58A.9 for the expenses of the application?**

5. **Do you have any comments on draft rule 58A.8 for expenses protection in reclaiming motions?**

6. **Do you have any comments on the draft amendment to rule 38.16?**

7. **Do you have any other comments on the proposals contained in this paper?**

## SECTION 3 NEXT STEPS

23. Following the consultation period, responses will be analysed and it is intended that draft rules will be further considered in light of the responses received when the SCJC meets on Monday 02 October 2017.

24. All responses will be published on the SCJC website unless the respondent has asked that their response be treated as confidential. The SCJC will publish a report on this consultation along with the approved rules in due course.