



**Scottish
Civil Justice
Council**

CONSULTATION RESPONSE: on extending the availability of Protective Expenses Orders

Issued: 20 January 2026

CONTENTS

	<u>Page</u>
SECTION 1 - INTRODUCTION	3
SECTION 2 - THE POLICY DECISIONS TAKEN	4
SECTION 3 - THE NEXT STEPS	8
<i>Bibliography</i>	10
<i>Glossary</i>	12
 <i>Annexes:</i>	
- <i>Annex 1 – Confidentiality of Financial Information</i>	13

SECTION 1 - INTRODUCTION

Purpose

1. The purpose of this paper is to set out the policy decisions made by the Scottish Civil Justice Council at the 8 December 2025 meeting.

Background

2. Extending the availability of PEOs beyond the Court of Session was proposed in the 3-month [Public Consultation](#) the Council ran from August to November 2025. The [Consultation Analysis](#) was published in December 2025.
3. That consultation proposed the introduction of rules that would allow applications for a PEO in summary applications made under the Environmental Protection Act 1990, along with any onwards appeal of such decisions to the Sheriff Appeal Court. It also sought feedback on extending the availability of PEOs in the Court of Session to include cases under the rules on Group Procedure
4. Having considered further what is required to comply with the Aarhus Convention, the Council considers that:
 - It is appropriate to extend the rules allowing PEOs to be applied for to all actions raised as a summary application or a statutory appeal in the sheriff courts, where the subject matter concerns an alleged act or omission contravening the law relating to the environment, together with any onward appeals of such decisions to the Sheriff Appeal Court.
 - It is also appropriate to now extend the rules allowing PEOs to be applied for to all cases where the subject matter concerns an alleged act or omission contravening the law relating to the environment in the following types of procedure: ordinary cause, simple procedure, summary cause, and any onward appeals of such decisions to the Sheriff Appeal Court.
 - Further changes are required to the existing rules within the Court of Session both in terms of the scope of the ability to apply for a PEO, and in relation to the wording of the existing PEO rules.
5. Section 2 of this paper sets out the detail of the policy positions adopted and the Councils rationale for adopting those positions. A public consultation on draft rules to implement those changes will now take place during 2026.

The responses received (to the 2025 consultation)

6. A [press release](#) was issued in August 2025 to highlight the commencement of the 2025 [Public Consultation](#). In addition, 38 organisations and individuals¹ who had participated in previous consultations, or were identified as having a potential interest, were directly emailed a copy of the consultation documents. The consultation period closed 14 weeks later with 11 responses received:

NUMBER OF RESPONSES				
CATEGORY	RESPONDENT	Organisations	Individuals	TOTAL
Practitioners	Faculty of Advocates	1		3
	Law Society of Scotland	1		
	Law Firms	1		
Officials	Scottish Courts and Tribunals Service (SCTS)	1		2
	Environmental Standards Scotland (ESS)	1		
Organisation	Scottish Environment LINK	1		4
	Environmental Rights Centre for Scotland (ERCS)	1		
	Open Seas Trust	1		
	Our Seas Coalition	1		
Other	General Public		1	2
	Professor Tom Mullen		1	
	TOTAL	9	2	11

7. In line with the permissions given by each respondent; readers can view 10 of those 11 responses via the consultation page on the Councils website:
<https://www.scottishciviljusticecouncil.gov.uk/consultations/scjc-consultations>

SECTION 2 – THE POLICY DECISIONS TAKEN

8. In conjunction with the feedback summarised within the [Consultation Analysis](#) report, members considered a paper on Aarhus Strategy at the December 2025 meeting. In general terms, the Council considers RCS Chapter 58A needs to be amended to first deal with issues regarding the current wording of that chapter, and thereafter to allow for an application for a PEO to be made within the rules covering civil actions in the Sheriff Court and any onwards appeals to the Sheriff Appeal Court.
9. To implement those changes the 3 key areas for consultation are as follows.

¹ as listed in section 1 of the consultation paper

DELIVERABLE 1

Changes proposed to the Rules of the Court of Session

10. The Council considers the following points arise in relation to RCS Chapter 58A.

Concern A - The type of claims covered:

11. The Council will now consult on rules extending the availability of Environmental PEOs as far as practicable for cases in the Court of Session. That consultation will not cover PEOs in Group Procedure. That is because the Council's Working Group on Group Procedure will in due course consult specifically on PEOs in Group Procedure, as part of its wider consultation on Group Procedure.

Concern B - The levels of the cost caps:

12. The Council noted the concerns raised by the Aarhus Compliance Committee as to the phrase "on cause shown" and the ability of the court to increase the cap in a PEO. Council members considered it may be preferable to use a less legal term, which would be more accessible to lay persons. Subject to drafting, a suitable phrase might be "such other lower sum as may be justified" (or similar). The Council also considered the question of the maximum cap that should be made by the court.

13. The Council agreed to consult on rules to underpin the following policy positions:

- That if a PEO is granted, the maximum cap will be £5,000 but with the ability for the court to lower that figure through judicial discretion;
 - That the phrase "on cause shown" and the ability to shift the cap upwards will be omitted; and
 - That a suitable alternative phrase should be used to allow for the judicial discretion to determine where a £5,000 cap can be lowered, if the court considers it reasonable to do so.
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Concern C (i) - The application procedure – terms of representation:

14. The Council considered the terms of the existing rule which requires an applicant for a PEO to provide the terms on which they are represented.

15. The Council noted that there may not be a need for the court always to have this information provided in an application. As such, a rule requiring a mandatory disclosure of the terms of representation may be unnecessary.
 16. The Council agreed to consult on an amended rule to underpin the following policy position:
 - Removal of the requirement to provide ‘terms of representation’ when lodging a motion for a PEO.
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Concern C (ii) - The application procedure – confidentiality of information:

17. In 2024, RCS rules 58A.5 and 58A.6 were amended. Annex 1 sets out the changes made which allow an applicant to request that any information provided is kept confidential. If the court made such an order, any breach could constitute a contempt of court, where the court has inherent powers to impose punishment.
 18. Whilst the Compliance Committee had welcomed those changes within its 2025 Compliance Report it has raised queries as to how the rule operates, although their exact point of concern is not yet clear. Council members noted the rules as amended in 2024 allow an applicant to request that their information is kept confidential, that in an adversarial system that party is obliged to provide relevant information to their opponent, and that there is no information suggesting that practical difficulties have arisen.
 19. Posing a relevant question within the 2026 consultation will help to identify whether there are any problems arising with the courts current working practices and, if so, how those problems should be addressed.
 20. Accordingly, the Council agreed to consult as to whether there are any issues with the maintenance of confidential financial information before the court.
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Concern C (iii) - The application procedure – estimating expenses:

21. Using estimates is fraught with difficulties. Council members noted that the natural tendency of parties is to overestimate rather than underestimate potential costs and liabilities. The court’s focus is on the ability to pay. The Council noted that in practice the requirements of the “prohibitively expensive” test might be met without an applicant requiring to provide detailed estimates of liability. For applicants in that position, it is unlikely that estimates of their opponent’s expenses add to the courts understanding of the issues.
22. That said, in cases where the issue may be more finely balanced, the applicant can still choose to provide any information that might assist the court in understanding why (without a PEO being granted) the costs and potential

liabilities would be prohibitively expensive to the applicant. Accordingly, it may be unnecessary to have as a mandatory rule that estimates of an opponent's expenses must be provided, whilst still allowing such information to be submitted, particularly in Sheriff Court cases where the risks of expenses awards are not as high as in Court of Session cases.

23. The Council agreed to consult on an amended rule to underpin the following policy position:

- That the PEO rules would not require an applicant to provide estimates of their opponent's expenses.

Concern D – Interveners:

24. This matter concerns interventions in judicial review actions. RCS 58A.10 (2) sets out that expenses in interventions will not be awarded in favour or against a relevant party, except on cause shown. That rule was intended to provide a safeguard whereby the court could impose expenses as a sanction for unreasonable conduct. Council members considered, in practice, that if an intervention has been allowed the court is likely to already have considered whether the intervention is likely to assist the court, and whether there is any unreasonable element to the proposed submission.

25. The Council agreed to consult on an amended rule to underpin the following policy position:

- Removing the potential for an award of expenses to be made “on cause shown”.

Concern E - Court Fees:

26. Whilst all practitioners and officials in Scotland would be aware that court fees are a valid outlay and can be included when seeking expenses the same cannot be said for those who are unrepresented.

27. The Council agreed to consult on an amended rule to underpin the following policy position:

- A rewording of the cost capping rule so that it is clear, including to unrepresented parties, that the £5,000 cap is “inclusive of any court fees” incurred.

Onwards appeals to the UK Supreme Court

28. The Council previously amended RCS rule 58A.8 in 2024. This rule concerns PEOs for reclaiming motions (appeals). The amendments make it clear that a PEO will be carried over to proceedings in the Inner House as standard, regardless of which party appeals.
29. Subsequent to the amendment of that rule, in *Wildcat Community Interest Co Ltd v Scottish Ministers* [2025] CSIH 10 the Inner House was asked to consider an application for ‘leave’ to appeal’ to the UK Supreme Court. That judgment confirmed that a PEO made under the current rules does not extend to an application for leave to appeal to the UKSC. The view taken by the Council was that the rules should be amended to make provision for a PEO granted in the Court of Session to include any application for leave to appeal to the UKSC
30. The Council agreed to consult on extending the availability of PEOs to include:
- The ability to carry forward the cost protection provided by a PEO to any application made for *leave to appeal* to the UK Supreme Court.
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DELIVERABLE 2

Extending a compliant RCS CH 58A to the sheriff courts

31. The Council agreed that new rules should be introduced within each type of Sheriff Court Rules allowing the possibility of applying for a PEO, so far as possible, in all types of Sheriff Court action where that action concerns a relevant challenge to an act or omission regarding the law relating to the environment.
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DELIVERABLE 3

Extending a compliant RCS CH 58A to the Sheriff Appeal Court

32. The Council agreed that a new chapter should be added into the Sheriff Appeal Court Rules to enable a PEO to be carried forward, or applied for, when appealing a decision taken by a Sheriff in an action that concerns a relevant challenge to an act or omission regarding the law relating to the environment.
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SECTION 3 – THE NEXT STEPS

33. Following the publication of this report the implementation plan is:
- MAR 2026 - 3 months - to prepare the next set of draft rules
 - APR 2026 – 1 month - to finalise the consultation documents for issue
 - MAY 2026 - 1 month - for consideration & approval by the Council
 - JUN 2026 – 1 month – for publication of the consultation

Consultation Response – on extending the availability of PEOs

- SEP 2026 – 3 months – for respondents to prepare & lodge their response
- OCT 2026 – 1 month - to prepare & publish the Consultation Analysis
- NOV 2026 – 1 month - to prepare & publish the Consultation Response
- DEC 2026 – 1 month - for consideration & approval by Council
- JAN 2027 – 1 month - for consideration & approval by the Court of Session
- APR 2027 – 3 months - for familiarisation, parliamentary scrutiny & commencement

34. That indicative timeline reflects the following next steps for the Council:

DRAFT RULES – the drafting lawyers will prepare ‘draft rules’ to support the implementation of the changes set out in this paper.

PUBLIC CONSULTATION – once those draft rules are available the Council will finalise and approve the Consultation Paper and relevant impact assessments for issue. The consultation will open, after the Scottish Elections have taken place, and run for 12 weeks.

CONSULTATION ANALYSIS – a summary of the feedback from respondents will be published online within 4 weeks of the consultation closing.

CONSULTATION RESPONSE – a summary of the decisions taken by the Council will be published online within 8 weeks of that consultation closing.

APPROVAL – the draft rules will be submitted for consideration and approval by members of the Council.

35. Once those rules have been considered and finalised by the Council they will be proposed to the Court of Session for its consideration and approval:

PUBLICATION – subject to approval by the Court of Session, the amending Act of Sederunt is made, laid with the Scottish Parliament and published online via legislation.gov.uk

COMMENCEMENT – the Councils standard working assumption is that rule changes come into force 3 months after the date an Act of Sederunt is made.

**Secretariat to the Scottish Civil Justice Council
January 2026**

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Aarhus Convention (Jun 1998, UNECE)

<https://unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>

Aarhus Convention Implementation guide (2014, UNECE)

https://unece.org/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

Aarhus Convention Meetings of the Parties

<https://unece.org/env/pp/aarhus-convention/mop>

- Decision VII/8s

<https://unece.org/env/pp/cc/decision-vii8s-concerning-united-kingdom>

Aarhus Convention Compliance Committee

<https://unece.org/env/pp/cc>

- 2021 ACCC Compliance Report (Oct 2021, UNECE) - Final version

https://unece.org/sites/default/files/2024-03/ECE_MP.PP_2021_59_E.pdf

- 2025 ACCC Compliance Report (Sep 2025, UNECE)

Latest draft - as uploaded on 8 Sep 2025

https://unece.org/sites/default/files/2025-10/VII.8s_UK_report_MOP8_advance_unedited.pdf

Existing Rules:

Act of Sederunt (Rules of the Court of Session Amendment) (Protective Expenses Orders in Environmental Appeals and Judicial Reviews) 2013

<https://www.legislation.gov.uk/ssi/2013/81/contents/made>

Act of Sederunt (Rules of the Court of Session 1994 Amendment) (No. 4) (Protective Expenses Orders) 2015

<https://www.legislation.gov.uk/ssi/2015/408/contents/made>

Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Protective Expenses Orders) 2018

<https://www.legislation.gov.uk/ssi/2018/348/contents/made>

Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Protective Expenses Orders) 2024

<https://www.legislation.gov.uk/ssi/2024/196/contents/made>

BIBLIOGRAPHY...continued

Consultation

Public Consultation: on extending the availability of Protective Expenses Orders
(Aug 2025, SCJC)

Consultation Paper + Draft Rules + BRIA+ EQIA

<https://www.scottishciviljusticecouncil.gov.uk/consultations/scjc-consultations/extending-the-availability-of-protective-expenses-orders>

Consultation Analysis: on the proposals to extend the availability of PEOs
(Dec 2025, SCJC)

https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/consultations/scjc-consultations/extending-the-availability-of-peos/consultation-analysis---on-extending-access-to-peos.pdf?sfvrsn=17b05817_1

Consultation Response: on extending the availability of Protective Expenses Orders
(Jan 2026, SCJC)

<https://www.scottishciviljusticecouncil.gov.uk/consultations/scjc-consultations>

GLOSSARY

The relevant terms used within this policy paper are:

Term	Meaning
Aarhus related case	<p>Relevant proceedings that include a challenge to a decision, act or omission on grounds subject to the provisions of Article 6 of the Aarhus Convention.</p> <p><i>That currently covers:</i></p> <ul style="list-style-type: none"> • <i>Applications to the supervisory jurisdiction of the court, including applications under section 45(b) (specific performance of a statutory duty) of the Court of Session Act 1988(20), and</i> • <i>Appeals under statute to the Court of Session.</i>
ACCC	Acronym for – Aarhus Convention Compliance Committee (ACCC).
Cause shown	A term in Scots Law that equates to saying – “where a valid reason has been demonstrated to the satisfaction of the court”.
CSIH	Acronym for – the Inner House of the Court of Session (CSIH).
CSOH	Acronym for – the Outer House of the Court of Session (CSOH).
Common Law PEO	An application made under the common law seeking <i>costs protection</i> in any civil proceedings.
Environmental PEO	An application under the <i>costs protection procedure</i> established by the PEO Rules. These PEO applications are applicable in civil proceedings taken in the public interest that impact on the environment.
Intervener	A term in Scots Law that means – a person or organisation, that is not a party to proceedings, that makes an application seeking <i>leave to intervene</i> in proceedings by way of a written submission to assist the court.
PEO	Acronym for – a Protective Expenses Order (PEO). Scotland uses an adversarial legal system, with the general principle for expenses being that “expenses follow success” (<i>which equates to “loser pays”</i>). In circumstances that result in a significant imbalance of power between the parties to a civil action, the court may consider making a PEO if it is in the “interests of justice” to do so.
PEO Rules	<p>RCS Chapter 58A (Protective Expenses Orders in Environmental Appeals and Judicial Reviews). Chapter 58A was first enacted by the Act of Sederunt (Rules of the Court of Session Amendment) (Protective Expenses Orders in Environmental Appeals and Judicial Reviews) 2013: https://www.legislation.gov.uk/ssi/2013/81/introduction/made</p> <p>Those PEO rules have been amended 3 times (in 2015, 2018 and 2024).</p>
SCTS	Acronym for – Scottish Courts and Tribunal Service.
UKSC	Acronym for – UK Supreme Court (UKSC).
UNECE	Acronym for – United Nations Economic Commission for Europe (UNECE).

ANNEX 1 – CONFIDENTIALITY OF FINANCIAL INFORMATION

To protect the confidentiality of the financial information provided by an applicant rules 58A.5 and 58A.6 were amended with effect from 1 October 2024, by inserting the 2 paragraphs highlighted in **bold**:

RCS 58A.5 - Applications for protective expenses orders

- (1) *A protective expenses order is applied for by motion.*
- (2) *Intimation of the motion and of the documents mentioned in paragraph (3) must be given to every other party not less than 14 days before the date of enrolment.*
- (3) *The applicant must lodge with the motion—*
 - (a) *a statement setting out—*
 - (i) *the grounds for seeking the order;*
 - (ii) *the terms on which the applicant is represented;*
 - (iii) *an estimate of the expenses that the applicant will incur in relation to the proceedings;*
 - (iv) *an estimate of the expenses of each other party for which the applicant may be liable in relation to the proceedings; and*
 - (v) *in the case of an application for liability in expenses to be limited to an amount lower or, as the case may be, higher than a sum mentioned in rule 58A.7(1), the grounds on which the lower or higher amount is applied for; and*
 - (b) *any documents or other materials on which the applicant seeks to rely.*
- (4) *A party opposing an application for a protective expenses order must lodge with the notice of opposition—*
 - (a) *a statement setting out the grounds for opposing the application; and*
 - (b) *any documents or other materials on which the party seeks to rely.*
- (5) The motion may request that the court grant an order treating any of the information listed in paragraph (3) as confidential and open only to the court and the parties to the proceedings.”**

RCS 58A.6 - Determination of applications

- (1) *Unless the Lord Ordinary or, as the case may be, the procedural judge otherwise directs—*
 - (a) *an application for a protective expenses order is to be determined in chambers without appearance;*
 - (b) *the motion is not to be starred; and*
 - (c) *rule 23.4(6) (opposition to motions) is disapplied.*
- (2) *Unless granting an unopposed application, the Lord Ordinary or, as the case may be, the procedural judge must give brief reasons in writing.*
- (3) Where a motion includes a request for the court to grant an order under rule 58A.5(5), if the motion is starred, the hearing must take place in chambers.”**