

ERCS response to the Scottish Civil Justice Council consultation on extending the availability of Protective Expenses Orders

15 September 2026

About ERCS

The Environmental Rights Centre for Scotland (ERCS) is an environmental law charity. We advocate for policy and law reform to improve environmental rights and compliance with the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

Introduction

The Environmental Rights Centre for Scotland welcomes most of the changes proposed by the Scottish Civil Justice Council ('the SCJC') in its June 2026 consultation paper on extending the availability of Protective Expenses Orders ('PEOs').

We have some concerns regarding the proposals which would allow for the terms of PEOs to be varied mid-litigation to the detriment of a party which benefits from a PEO. These would undermine the certainty which PEOs are supposed to provide.

The PEO regime which this consultation seeks to amend is flawed and should be replaced entirely.

PEOs are discretionary and can only be obtained after an application process which is usually contested and creates satellite litigation and additional costs. Even with a PEO, legal proceedings remain unaffordable for many individuals and NGOs.

We recommend that the PEO regime is replaced with a system of qualified one-way cost shifting.

If the PEO regime is to be retained, we recommend that automatic expenses protection is introduced. Failing that, a standardised PEO application form should be introduced.

Replace the PEO regime with qualified one-way cost shifting

We propose that the SCJC replaces the PEO regime with a system of qualified one-way cost shifting ('QOCS') for litigation which falls within the scope of Article 9 of the Aarhus Convention.

QOCS were introduced for personal injury litigation in Scotland and could be introduced in environmental litigation. The arguments which justified the introduction of QOCS in personal



injury cases apply also to most Aarhus cases, namely the imbalance of power and resources between the parties.

QOCS would be much simpler to understand and administer than the PEO regime.

The introduction of QOCS would remove the need for PEO applications. PEO applications are inherently expensive and time-consuming – contrary to their stated aim of improving access to justice.

The introduction of QOCS would avoid satellite litigation over disputed PEO applications.

The introduction of QOCS would conserve judicial resources. If the PEO regime was replaced with QOCS then the courts would no longer have to consider and determine PEO applications, nor would they have to deal with disputes arising from PEO applications.

Introduce automatic expenses protection

The PEO regime is discretionary. A litigant must apply to the court for a PEO and await the determination of their application.

If the PEO regime is to be retained, our view is that the rules should be changes so that PEOs are granted automatically in all Aarhus cases.

The PEO regime enables opponents to dispute whether a PEO application should be granted. There is little to disincentivise opponents from disputing PEO applications. In most cases where a PEO is applied for the PEO applicant is unlikely to continue the litigation without a PEO, which is a strong incentive for opponents to dispute PEO applications. These disputes create unnecessary and expensive satellite litigation.

Two recent examples of environmental judicial reviews involving contested PEO applications which required expensive and unnecessary satellite litigation for their determination are discussed on our website in the 21 August 2026 article, '[Protective expenses orders granted in two ERCS Law Service cases](#)'.

Until the date on which a PEO is granted, the only protection a PEO applicant has against liability for expenses is a discretionary £500 cap on liability in expenses in so far as occasioned by the PEO application.¹ That discretionary £500 cap applies only to expenses “in so far as occasioned by the (PEO) application”.²

¹ Court of Session Rule 58A.9.(2).

² *Ibid.*



There is no guarantee as to the stage in litigation when a PEO application will be determined. By the time a PEO application is granted, a PEO applicant's opponents may have incurred significant expenses – for example through taking legal advice, entering the litigation, drafting answers and disputing whether permission should be granted. There is a significant financial risk for litigants until such time as a PEO application is determined, because their expenses liability is near open-ended until a PEO is granted.

The equivalent rules which apply in Northern Ireland demonstrate how a system of granting PEOs automatically could work.

The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 effectively mean that in a case where a litigant states in their court papers that their case is an Aarhus Convention case, they are automatically granted costs protection.

The default Aarhus cost caps in Northern Ireland may only be changed on an application brought by the party which benefits from the caps³ – and they may only be varied by a court in favour of the party which benefits from the caps.⁴

The only opportunity provided to opponents to challenge Aarhus costs protection in Northern Ireland is where there is a dispute as to whether a case is an Aarhus Convention case.⁵

The automatic approach to costs protection which is adopted in Northern Ireland is much simpler, avoids satellite litigation and promotes access to justice far more effectively than the Scottish PEO regime.

If the PEO system is to be retained, we recommend that the rules contained in the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 are adopted in Scotland to create automatic costs protection in Aarhus cases.

Introduce a standardised PEO application form

If the discretionary nature of the PEO regime is to be retained, then a standardised PEO application form should be adopted.

This would have several benefits. It would assist applicants to fully understand the information and documents which need provided as part of a PEO application, as well as the manner in which PEO applications are made.

³ The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013, Regulation 3(6).

⁴ *Ibid*, Regulation 3(3) and 3(5).

⁵ *Ibid*, Regulation 4.



A standardised PEO application form would assist legal representatives. It would likely be of particular benefit to any PEO applicants without legal representation.

A standardised PEO application form would help conserve judicial resources. It would help ensure the courts receive all of the necessary information they need to determine PEO applications efficiently.

Consultation Questions

Question 1 – Do you agree that, other than in group proceedings, a party should be able to apply for an Environmental PEO in any relevant proceedings that fall within Article 9 of the Aarhus Convention within the Court of Session? If not, why not?

The justification for excluding group proceedings is unclear in the consultation paper.

We welcome the statement at paragraph 40 of the consultation paper that the SCJC’s “Group Procedure Working Group will separately consider that interaction between group procedure and the cost protection provided by a PEO”.

Question 2 - Do you agree that the amendments proposed to be made to RCS rule 58A.1 will achieve the purpose of extending the potential to apply for a PEO in all civil proceedings in the Court of Session within the scope of Article 9 of the Aarhus Convention, other than group proceedings?

Yes.

Question 3 – Do you agree with the cost cap for the applicant being a fixed maximum sum of £5,000 which the court may decrease but not increase? If not, why not?

Yes, albeit the fixed maximum sum of £5,000 should be significantly reduced to a more affordable level. The sum of £5,000 is prohibitively expensive for many.

Our view is that the court should not have the power to increase the cost cap for the applicant. This is necessary to increase certainty for PEO applicants.



Question 4 – Do you agree that the proposed draft wording of Rule 58A.5 achieves the purpose of providing judicial discretion to lower the cap, where it is reasonable to do so?

Yes.

Question 5 – Do you agree that the requirement to provide terms of representation should be deleted? If not, why not?

Yes. We welcome the proposed change to delete the requirement to provide terms of representation.

There is no evidence to suggest that disclosure of this information provides any practical value for making decisions on whether to grant or refuse a PEO application. There has been no reasonable explanation so far as to why terms of representation should be included in the information provided in PEO applications.

This information ought to be treated as confidential in all circumstances. The disclosure of information related to, for example, pro bono representation, may have a negative effect on environmental lawyers in the long-term.

Question 6 – Do you agree that the proposed deletions to Rule 58A.5 (3) achieves the purpose of no longer requiring the applicant to provide terms of representation, or do you have any other comment on that Rule?

Yes.

Question 8 – Do you agree that the requirement for an applicant to estimate their opponents' expenses should be deleted? If not, why not?

Yes. We welcome the proposed deletion of the requirement for the applicant to estimate their opponent's expenses.

We have previously expressed our view that this requirement creates undue administrative and financial burden on applicants, especially if they cannot compile the information themselves and require assistance to do so.

It also creates a risk that an applicant may underestimate their adverse expenses. The result of this may be that a PEO application is refused on the basis that proceedings are not deemed



prohibitively expensive. However, the applicant's expenses may increase above the estimate as the case progresses.

Question 9 – Do you agree that the draft wording proposed re Rule 58A.5 (3) achieves that purpose, or do you have any other comment on that Rule?

Yes.

Question 10 – do you agree that where a public interest intervention is allowed that it should be on a “no expenses due to or by” basis? If not, why not?

Yes.

Question 11 – Do you agree that the draft wording proposed re Rule 58A.10 achieves that purpose, or do you have any other comment on that Rule?

Yes.

Question 12 – do you agree that rule 58A.7 of the Court of Session should be amended to make it clear that the cap granted by the court is inclusive of court fees? If not, why not?

Yes. We welcome this proposed change because it will increase certainty for all parties involved in Aarhus cases.

The Aarhus Convention Compliance Committee has explained that court fees must be included within the costs protection regime since it is the entire costs of proceedings that must be considered when ensuring that proceedings are not prohibitively expensive under article 9(4) of the Convention.⁶

⁶ As noted by the SCJC in '[Update on the Aarhus Concerns for Scotland](#)', 30 September 2024, page 11.



Question 13 – Do you agree that the draft wording proposed re Rule 58A.7 achieves that purpose, or do you have any other comment on that Rule?

Yes.

Question 14 - Do you consider the existing ability of the Inner House to review the cap should be maintained within the rules or do you consider that the words “Subject to any review of the protective expenses order by the Inner House” should be omitted from draft RCS 58A.8 (2A)?

The ability of the Inner House to review the caps should be maintained but only to allow for the caps to be reviewed on an application from the party which benefits from the PEO and for the caps to be varied in the interests of that party (i.e. to lower the cost cap and/or to increase the cross cap).

Question 15 - If you consider the power of review should remain, do you consider the circumstances in which the Inner House would exercise its power of review should be stated within the rule, and if so, in what circumstances would you consider it appropriate for the Inner House to review an existing PEO?

See our response to Q14 above.

Question 16 - Do you consider draft rule 58A.8A(3) should be enacted, and if so, do you consider the circumstances in which the Inner House would exercise its power of review should be stated within the rule, and if so, in what circumstances would you consider it appropriate for the Inner House to review an existing PEO?

No. We do not agree that the draft rule 58A.8A(3) should be enacted.

The wording used in draft rule 58A.8A(3) would create uncertainty for parties with a PEO. It provides that a PEO may be review by a court “on its own motion or on the motion of a party to the appeal”.

Draft rule 58A.8A(3) should be amended so that the power of review of a PEO may only be exercised on motion of the party which benefits from the PEO and which allows for the caps to



be varied in the interests of that party (i.e. to lower the cost cap and/or to increase the cross cap).

Question 17 - Do you agree that a PEO should include any liability for expenses in terms of an application to the Court of Session for leave to appeal to the UKSC? If not, why not?

Yes.

It is essential that the adverse expenses protection provided by a PEO applies to all stages of a case, to provide certainty to the party which benefits from the PEO.

Question 18 - Do you agree that the draft wording proposed re Rule 58A.8B achieves that purpose, or do you have any other comment on that proposed rule?

Yes.

We recommend that the reference made to the powers of review by the Inner House at draft rule 58A.8B(2) is amended so that the caps may be reviewed only on an application from the party which benefits from the PEO and which allows for the caps to be varied in the interests of that party only (i.e. to lower the cost cap and/or to increase the cross cap).

Question 20 - Do you agree that the ability to seek a PEO, or to have it carried forward, should be extended to the Sheriff Appeal Court? If not, why not?

Yes.

Question 21 - Do you agree that the draft wording of Chapter 28A achieves the purpose of extending an existing PEO to an appeal before the Sheriff Appeal Court, or allowing the Sheriff Appeal Court to make such an order?

Yes.



Question 22 - Do you have a view on whether provision should be made allowing the Sheriff Appeal Court to review a protective expenses order, in terms of draft rule 28A.2 (3)?

The Sheriff Appeal Court should be allowed to review a PEO only in circumstances where the review is requested by the party which benefits from the PEO and the caps should only be variable in the interests of that party only (i.e. to lower the cost cap and/or to increase the cross cap).

Question 23 - If you consider draft rule 28A.2(3) should remain, do you consider the circumstances in which the Sheriff Appeal Court would exercise its power of review should be stated within the rule, and if so, in what circumstances would you consider it would be appropriate for the Sheriff Appeal Court to review an existing PEO?

See our response to Q22 above.

Question 25 - Do you agree that the ability to seek a PEO, should be extended to the Sheriff Court, where the litigation is within Article 9 of the Aarhus Convention? If not, why not?

Yes.

We welcome this proposed change. In order to achieve compliance with the Aarhus Convention, the option to apply for a PEO must be extended to nuisance litigation and all other litigation which falls within the remit of Article 9, regardless of the forum where the litigation is heard.

Question 26 – Do you agree that the draft wording of each of the new rules/chapters achieves the purpose of extending the ability to apply for a PEO in proceedings under Article 9 of the Aarhus Convention?

Yes.



Question 27 - Do you consider that a rule in relation to PEOs should be introduced in Simple Procedure?

Yes. We are of the view that rules on PEOs should be introduced in all litigation which falls within the remit of Article 9 of the Aarhus Convention.

Question 28 - Do you have a view on whether the default cap of £5,000 should apply in an application for a PEO within Simple Procedure?

We would support significantly lower caps in all litigation which falls within the remit of Article 9 of the Aarhus Convention. The sum of £5,000 is prohibitively expensive for many.

Question 29 - Do you have a view on whether a cross cap of £5,000 should apply within Simple Procedure? Or alternatively do you have a view on the whether the default cross cap of £30,000 should apply?

Our view is that cross-caps should not be a feature of any of the PEO rules.

Cross-caps act as a barrier against PEO applicants obtaining quality legal representation and are problematic for maintaining equality of arms in litigation. The £30,000 default cross-cap limit is arbitrary – and a £5,000 cross-cap would be equally arbitrary. Many cases require expenditure above this amount for a petitioner to be able to secure effective legal representation.

We refer to our [6 November 2025 response to the SCJC's previous PEO consultation](#) on this point regarding the need to remove cross-caps from the PEO regime.⁷

Question 30 - Do you have any other comment on each of the proposed new Chapters, Part or rules for the sheriff court?

No.

⁷ See pages 7-8.



Question 31 - In each of the draft rules referred to above, do you consider that that rule should allow a PEO application to be made by a party other than a pursuer, petitioner or statutory appellant?

No.

Question 32- Do you consider this is the correct approach to the expenses of interveners in the Sheriff Appeal Court and the rules listed above in the Sheriff Court? Do you have any other comment on those draft rules?

Yes.

Interveners' expenses must be included in the cost cap to ensure certainty for all the parties involved in litigation and particularly those which benefit from a PEO.

Question 33 - Have you experienced any situations where the court may have awarded expenses against a party, but was unable to do so because of a PEO?

No.

Question 34 - Do you have any experience of concerns in the conduct of litigation where a PEO was granted?

No.

Question 35 - Are you aware of any business impacts the Council should take into consideration, over and above those we have listed in the draft Business and Regulatory Impact Assessment (BRIA) that accompanies this consultation?

No.



Question 36 - Are you aware of any equality impacts on those with protected characteristics that the Council should take into consideration, over and above those we have listed in the draft Equality Impact Assessment (EQIA) that accompanies this consultation?

No.