

Consultation Response

Extension of Protective Expenses Orders (PEOs)

August 2026

Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Environmental Law and Access to Justice sub-committees and Civil Justice Committee welcome the opportunity to consider and respond to the Scottish Civil Justice Council consultation: *Extension of Protective Expenses Orders (PEOs)*.¹ We have the following comments to put forward for consideration.

Questions

Concern A - The type of claims covered

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?

Yes, we consider this proposal appropriate.

As we stated in our previous response to the Scottish Civil Justice Council's consultation on *Extending the availability of Protective Expenses Orders*², we note that Article 9 of the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ("the Aarhus Convention"), which the United Kingdom is a party to, requires parties to ensure the public have as wide as possible access to justice in relation to environmental issues.³ As such, we suggest that consideration should be given to exploring the widest possible extent of environmental PEOs across the justice system in Scotland, including allowing for parties to apply for an environmental PEO for any relevant proceedings that fall within Article 9 of the Aarhus

¹ [Extension of Protective Expenses Orders \(PEOs\)](#)

² [Extending the availability of Protective Expenses Orders](#)

³ Article 9, [Convention on access to information, public participation in decision-making and access to justice in environmental matters](#)

Convention. We highlight that this exploration should include consideration of the Scottish Land Court as a further place where Aarhus litigation might arise.

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, we consider that this will achieve the purpose.

Concern B - The levels of the cost caps

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?

On balance, we consider this proposal appropriate.

We highlight that in exceptional circumstances it may be appropriate to enable the court to increase the maximum sum of £5,000, assuming all appropriate tests of reasonableness are passed.

We highlight that in such circumstances, it would be appropriate for the court to consider aspects related to the human rights of defenders and interested parties, such as under Article 1, Protocol 1 of the European Convention on Human Rights (ECHR)⁴ and Article 8 of the ECHR.⁵

Whilst we consider this proposal appropriate, we highlight that- should it not be taken forward- a potential alternative approach would be to clarify that the cost cap is without prejudice to separate provisions in terms of wasted expenses orders and orders occasioned by vexatious behaviour by legal representatives. We consider that this discourages “bad faith” litigation practises whilst ensuring that the consequences fall on legal representatives rather than those seeking to bring an action, preserving access to environmental justice.

We also note that a cap of £5,000 is the highest maximum sum considered acceptable by the Aarhus Convention Compliance Committee (ACCC).⁶ We

⁴ [Guide on Article 1 of Protocol No. 1 – Protection of property](#)

⁵ [European Convention on Human Rights - Article 8](#) | [European Union Agency for Fundamental Rights](#)

⁶ Paragraph 90, [Report of the Compliance Committee on compliance by the United Kingdom of Great Britain and Northern Ireland](#)

highlight that the ACCC has already stated that Scotland is not compliant with the United Kingdom's obligations under the Aarhus Convention in its report.⁷

Question 4 – Do you agree that the proposed draft wording of Rule 58A.7 achieves the purpose of providing judicial discretion to lower the cap, where it is reasonable to do so?

Yes, we consider that the proposed wording achieves this.

Concern C (i) - The application procedure – terms of representation

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

Yes, we consider this requirement appropriate and refer to our previous response to question 8 of the Scottish Civil Justice Council's consultation on *Extending the availability of Protective Expenses Orders*.⁸

We note that, in paragraph 100 of its report concerning both Scotland and the United Kingdom's compliance with the Aarhus Convention, the ACCC highlighted that it was unclear why this requirement existed, and that it could require disclosure of pro bono representation and threaten the economic viability of environmental lawyers representing clients in public interest cases.⁹

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, we consider that these deletions achieve this.

⁷ [Report of the Compliance Committee on compliance by the United Kingdom of Great Britain and Northern Ireland](#)

⁸ [Extending the availability of Protective Expenses Orders](#)

⁹ [Report of the Compliance Committee on compliance by the United Kingdom of Great Britain and Northern Ireland](#)

Concern C (ii) - The application procedure – confidentiality of information

Question 7 – are you aware of any difficulties with the handling or provision of financial information provided as part of an application for a PEO? If so, was this after the 2024 amendments to the rules?

No, we are unaware of any challenges concerning the handling or provision of financial information.

Concern C (iii) - The application procedure – estimating expenses

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 consider this appropriate and again highlight our answer to question 9 of the Scottish Civil Justice Council's consultation on *Extending the availability of Protective Expenses Orders*.¹⁰

We would highlight that rule 58A.5 is at odds with the findings of the ACCC, specifically paragraphs 101 of their compliance report.¹¹ We further consider that predicting the costs of the other parties can be difficult and involves further work for those representing the applicant.

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, we consider that the draft wording achieves this purpose.

Concern D – Interveners

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?

We consider this proposal appropriate. We highlight the need for balance with effective case management.

¹⁰ [Extending the availability of Protective Expenses Orders](#)

¹¹ [Report of the Compliance Committee on compliance by the United Kingdom of Great Britain and Northern Ireland](#)

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, we consider that the draft wording achieves this purpose.

Concern E - Court Fees

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?

We stress the importance of ensuring that the court “links up” with other regimes currently in use across the Scottish judicial system.

We would appreciate greater clarity on the specific form of amendment the Scottish Civil Justice Council envisions being made to rule 58A.7.

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, we consider that the draft wording achieves this purpose.

Reclaiming Motions

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)?

We have no strong view on whether the Inner House should retain this ability. We highlight that should it be retained, consideration should be given to restricting the review to occur 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 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?

We refer to our answer to question 15.

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?

We highlight that the wording used in draft rule 58A.8A(3) could create uncertainty for parties with a PEO, as it provides that a PEO may be reviewed by a court “on its own motion or on the motion of a party to the appeal”. Such uncertainty may preserve barriers to groups seeking a PEO and limit access to justice.

Onwards appeals to the UK Supreme Court

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, we consider this proposal appropriate in line with our previous comments regarding the desirability of extending the scope of PEOs in so far as is possible, in alignment with Article 9 of the Aarhus Convention.

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 agree with the proposed wording.

General Observations

Question 19 – in addition to the proposals already covered within questions 1 to 16 above, do you have any other concerns or suggested changes to the wording of the rules provided within RCS Chapter 58A as amended?

Yes, we consider this proposal appropriate.

Establishing a Sheriff Appeal Court procedure

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, we consider this proposal appropriate. As we stated in our previous response, we note that Article 9 of the Aarhus Convention requires parties to ensure the public have as wide as possible access to justice in relation to environmental issues.¹² As such, we suggest that consideration should be given to exploring the widest possible extent of environmental PEOs across the justice system in Scotland. This includes bringing the Sheriff Appeal Court into scope of PEOs.

We highlight that currently a PEO heard in the Outer House of the Court of Session carries through on appeal to the Inner House. Thus, extending this model to the Sheriff Appeal Court would align with the existing regime in place and maintain consistency.

We also suggest consideration should be given to requiring the applicant to provide up-to-date details regarding their finances at the time of appeal.

Question 21 – Do you agree that the draft wording of Chapter 28 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?

We have no comments.

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)?

Yes, we consider that the draft wording achieves this purpose.

¹² Article 9, [Convention on access to information, public participation in decision-making and access to justice in environmental matters](#)

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?

We have no comments.

Question 24 - Do you have any other comment on the proposed new chapter for the Sheriff Appeal Court?

We have no comments.

Establishing a sheriff court procedure

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 consider this proposal appropriate in line with our previous comments regarding the desirability of extending the scope of PEOs in so far as is possible, in alignment with Article 9 of the Aarhus Convention.

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, we consider that the draft wording achieves this purpose.

Simple Procedure

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

Yes, we consider this proposal appropriate in line with our previous comments regarding the desirability of extending the scope of PEOs in so far as is possible, in alignment with 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 have no specific comments on the default cap. We consider that further analysis should be done on this point, in order to ensure that the cap is proportionate, based on the parameters of simple procedure.

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?

We refer to our answer to question 28.

Other questions

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

We have no comments.

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?

We highlight our previous comments regarding the desirability of extending the scope of PEOs in so far as is possible. This includes extending the right to allow a PEO application to be made by a party other than a pursuer, petitioner or statutory appellant.

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?

We highlight our answer to question 20. We consider it advantageous and important to maintain consistency, and thus support mirroring the established practise for the Court of Session.

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, we are unaware of any such instances.

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

No, we are unaware of any such instances.

Impact Assessments

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, we are unaware of any such impacts.

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, we are unaware of any such impacts.



For further information, please contact:

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