

Providing your response

If you have chosen to provide a separate written response, then please complete the first page of this Respondent Information Form and attach it to your response.

If you wish to include your responses within this Respondent Information Form, please insert your responses to each consultation question in the (expandable) boxes below:

Amending the Court of Session procedure

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 support extending the availability of Environmental Protective Expenses Orders to relevant proceedings falling within Article 9 of the Aarhus Convention. For small environmental charities and community organisations, exposure to an adverse award of expenses can make litigation practically impossible even where an environmental issue is important and there may be reasonable grounds for challenge.

The availability of meaningful costs protection is therefore important not simply once litigation has begun, but when an organisation is deciding whether it can responsibly contemplate proceedings at all.

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?

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?

Yes we agree

However, we encourage the Council to consider whether the rules should give greater recognition to the circumstances of small charities, community organisations and individuals for whom even liability of £5,000, in addition to the costs of obtaining their own legal advice and representation, may remain prohibitively expensive.

For a small environmental charity, £5,000 can represent a significant proportion of unrestricted funds. The fact that a maximum liability is known in advance does not necessarily mean that the proceedings are affordable.

We therefore particularly welcome the ability of the court to set a lower cap and would support rules and practice which make that a realistic and accessible option where an applicant has limited financial resources.

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?

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?

We agree that the requirement to provide terms of representation should be deleted as the requirement is unnecessary, duplicates existing tests on case merits and has been identified by the ACCC as incompatible with Aarhus principles. Disclosure may prejudice commercial negotiations on rates etc, and risks undermining the viability of pro bono or reduced-fee representation.

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?

We agree that the proposed deletion would achieve the purpose stated.

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?

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?

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?

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 agree with the proposal to delete “on cause shown” where it appears in Rule 58.10 (1) above and delete Rule 58A.10(2) in its entirety. Uncertainty over liability to interveners has been criticised by the ACCC for its chilling effect on access to justice.

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?

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?

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?

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)?

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?

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?

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 support the principle that PEO protection should include liability for expenses associated with an application to the Court of Session for permission to appeal to the UK Supreme Court.

It makes no sense for an environmental organisation which has relied upon a PEO when deciding whether litigation is affordable, to suddenly face an uncapped or materially different costs risk simply because an important point requires consideration on appeal. Appeal may otherwise be used to SLAPP or constrain action.

More generally, we support continuity of costs protection through relevant appeal proceedings for administrative purposes.

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?

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?

We appreciate the opportunity this consultation provides to raise awareness that PEOs are not the only constraint to access to justice. Some of the constraints occur before the courts are even involved, most notably the weaponisation of Freedom of Information request by the Government has proven to be a massive constraint. These are documented incidents where the Government has knowingly used FOI requests to purposely “wind down the clock” and push the ability of someone to take action outside of the three month time limit for a judicial review.

It is therefore our opinion that there are other things which the courts should look to do to support access to environmental justice, including allowing a relaxation of the “three month clock” in environmental matters, and/or only starting the clock once all information has been made public; much in a similar vein to the way legislation for proscription was changed in the Prescription (Scotland) Act 2018 in identifying the starting point of a prescriptive period.

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?

We agree that PEOs should be available for summary applications arising under the Environmental Protection Act 1990. These proceedings fall within Article 9(3) of the Aarhus Convention and must therefore be subject to a cost regime that ensures access to justice is not prohibitively expensive.

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?

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)?

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?

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

We agree that the ability to seek a PEO afresh or carry one forward should be available. Appeals form part of the overall cost system and must also meet Aarhus requirements. We contend that the appeal proceedings in *Open Seas vs Scottish Ministers* brought no new arguments to the dispute, such an approach may have been taken to delay or suppress the implications of Lord Braid's opinion and instances such as that would clearly comprise a situation where a PEO is needed to protect against an imbalance in resourcing.

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?

We agree that PEOs should be available for summary applications arising under the Environmental Protection Act 1990. These proceedings fall within Article 9(3) of the Aarhus Convention and must therefore be subject to a cost regime that ensures access to justice is not prohibitively expensive.

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?

Simple Procedure

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

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?

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?

The cross-cap has no basis in the Convention and would have a limiting effect on an organisation such as ours' ability to secure adequate representation. In environmental litigation, the inequality of arms lies principally with the claimant - this was well illustrated in our litigation in Open Seas vs Scottish Ministers where our legal support were a team of four, sat across from a team of 14 from Scottish Ministers. Restricting the ability of organisations such as ours to recover costs exacerbates that imbalance, and as such a default cross cap of £30,000 should not apply.

Equally a cross cap of £5,000 should not apply within Simple Procedure as this is still restrictive and potentially prohibitive to individuals and grassroots organisations wishing to bring forth litigation.

Other questions

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

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?

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?

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?

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

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?

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?