

**UKELA (UK ENVIRONMENTAL LAW ASSOCIATION) RESPONSE TO THE
SCOTTISH CIVIL JUSTICE COUNCIL CONSULTATION ON EXTENDING
THE AVAILABILITY OF COSTS PROTECTION IN ENVIRONMENTAL CASES**

1. UKELA (UK Environmental Law Association) comprises over 2,000 academics, barristers, solicitors and consultants in the public and private sectors involved in the practice, study and formulation of environmental law. Its primary purpose is to make better law for the environment.
2. This document responds to the Scottish Civil Justice Council (SCJC) consultation on extending the availability of costs protection in environmental cases. It has been prepared by the UKELA Scotland with input from other UKELA specialist groups. It does not seek to represent the views and opinions of all UKELA members, but has been drawn together from a range of its members.

CONSULTATION BACKGROUND¹

3. This consultation² seeks views on amendments to existing rules on PEOs (Protective Expenses Orders) in the Court of Session, a proposed amendment to widen the types of cases where an application can be made for a PEO in the Court of Session, and the introduction of rules in the Sheriff Appeal Court and the Sheriff Court. Together, the SCJC suggests that this would amount to a considerable extension of the PEO regime.

¹ This background is to provide some context to readers.

² [Extension of Protective Expenses Orders 2026](#)

PRELIMINARY POINTS

4. As a preliminary point UKELA notes that the terminology of PEOs does not help. The primary purpose of the provisions of the Aarhus Convention 1998 is to prevent proceedings being prohibitively expensive. It is not merely to protect against expenses. In fact, the experience of many UKELA members is that the concern about costs in legal proceedings is not expenses at all but the prohibitive nature of being liable for the opponent's costs under the 'loser pays principle'. A more appropriate term would be a Prohibitive Expense Order (PEO) or possibly a Protective Costs Order (PCO); although it is recognised that the approach taken in Scotland has through reference to "expenses" is widely used as the technical term whereas in England and Wales there is reference to "costs". This point is returned to in answer to Q.36 covering the draft Equality Impact Assessment (EQIA).
5. The terminology point is important because, as the consultation rightly points out, applications for an environmental PEO are uncommon. The judge and all the parties must be clear from the start what the PEO is for and why it is being made. This should help address some argument and complaint about whether or not a PEO should be granted. Also, in the interests of openness, transparency and clarity the correct term should also help explain its purpose to the wider society; placing front and centre its primary purpose. In the circumstances, UKELA recommends re-phrasing the order as a Prohibitive Expense Order (PEO)
6. Finally, protection against prohibitive expense should apply in all judicial proceedings where relevant environmental matters are at issue. Appropriate rules should therefore be introduced to cover not only the Court of Session, Sheriff Court and Sheriff Appeal Court but also the Land Court, and apply to all potentially relevant forms of proceedings. Some UKELA members consider that a more effective way to comply with Article 9 of the Aarhus Convention 1998 is adopt qualified one-way costs shifting: see e.g. the proposals discussed at paragraph 65 and 66 of the Report of the Compliance Committee on decision

VII/8s of the Meeting of the Parties concerning compliance by the United Kingdom (13 November 2025)³.

CONSULTATION QUESTIONS

Q1. 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?

7. Yes

Q2. 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?

8. Yes. However, the SCJC, the Courts and the Government must acknowledge that the application of the Aarhus Convention 1998 has wide scope and broad purpose: see e.g. the recent draft decisions of the Aarhus Convention 8th Meeting of the Parties⁴ which sets out the various areas of non-compliance with the Convention by the UK. In the circumstances, the inclusive nature of the SCJC proposal is welcome and attempts to exclude a PEO on technical provisions should be avoided.

Q3. 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?

9. Yes. However, to be clear the fixed maximum cap of £5,000 is applied to the applicant's cost liability in relation to an order sought by a defendant or

³ [ECE.MP.PP.2025.66.E.pdf](#)

⁴ [Eighth session of the Meeting of the Parties to the Aarhus Convention | UNECE](#)

interested party. It is not the maximum cap applied to the defendant or interested party's cost liability.

Q4. 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?

10. Yes.

Q5. Do you agree that the requirement to provide terms of representation should be deleted? If not, why not?

11. Yes. This was discussed at paragraph 100 the Aarhus Convention Compliance Committee (ACCC) Report on the UK of October 2021:

“100. The Committee notes, however, that Chapter 58A.5 (3) (ii) requires the applicant to provide information about the terms on which the applicant is represented.⁷⁰ The Party concerned states that this is to enable the court to have the broadest possible understanding of the circumstances of an application and applicants.⁷¹ The Committee does not see why this information should be required in order to apply for a PEO. This could require disclosure concerning pro bono representation and threaten the economic viability of environmental lawyers representing clients in public interest cases in the mid- to long-term.”⁵

Q6. 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?

⁵ [ECE_MP.PP_2021_59_E.pdf](#)

12. Agreed. No other comment.

Q7. 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?

13. UKELA does not directly bring proceedings.

14. Although some UKELA members practising in England and Wales have experienced the provision of financial information unduly complicated and onerous with litigation opponents making detailed and irrelevant submissions as to why costs protection should not apply and using the process as a means to increase costs and delay with unnecessary satellite litigation.

Q8. Do you agree that the requirement for an applicant to estimate their opponents' expenses should be deleted? If not, why not?

15. Yes. paragraph 101 the Aarhus Convention Compliance Committee (ACCC) Report on the UK of October 2021⁶.

Q9. 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?

16. Yes.

⁶ [ECE MP.PP 2021 59 E.pdf](#)

Q10. 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?

17. Yes.

Q11. 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?

18. Yes

Q12. 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?

19. Yes.

Q13. 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?.

20. Yes.

Q14. 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)?

21. It is arguable that the Inner House will have the power to review the cap in any event, and if so the text is unnecessary and can be omitted.

22. If the wording is to be retained “subject to any review of the protective expenses order by the Inner House” it should be made clear that it is to improve access to

justice in environmental cases and so it should be absolutely clear that the Inner House review is to either reduce the costs cap applicant's cost liability under the cap or increase the cross-cap for which the defendant may be liable (if e.g. the proceedings are unusually complex or protracted and it is likely that the applicant's own legal costs will exceed the cross-cap).

Q15. 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?

23. Yes but with the clarity suggested in the answer to Q14. Thus, to improve access to environmental justice and not erode it.

Q16. 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?

24. Yes.

Q17. 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?

25. Yes. Although the draft rules appear unclear as presently drafted.

26. At draft rule 58A.8B(3) it appears to suggest that the provision applies to both an application for permission to appeal to the Inner House or to the Supreme Court. This is because it refers in brackets to "(but did not make a successful application)".

27. To be clear, in UKELA's view the Act of Sederunt (Rules of the Court of Session 1994, Sheriff Appeal Court Rules 2021 and Sheriff Court Rules Amendment) (Protective Expenses Orders) 2026 is unlikely to apply to any proceedings in the UKSC. As such, any application for permission to the UKSC should include an application for costs protection for the UKSC to grant when granting permission. This would be covered by the Supreme Court Rules 2024.

Q18. 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?

28. Subject to the comments above; yes, this is agreed.

Q19. 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?

29. No.

Q20. 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?

30. Yes. All courts where environmental cases can be heard should be covered by rules that ensure that the obligation under the Aarhus Convention 1998 to avoid prohibitive expense can be met.

Q21. 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?

31. Yes.

Q22. 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)?

32. Yes.

Q.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?

33. No, it is unnecessary to state the circumstances the Sheriff Appeal Court may exercise its power under rule 28A.2(3). Doing so would over-complicate matters and an unnecessarily impact on the discretion of the court found within the rule.

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

34. No.

Q25. 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?

35. Yes.

Q26. 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?

36. Yes

Q27. Do you consider that a rule in relation to PEOs should be introduced in Simple Procedure?

37. Yes.

Q28. Do you have a view on whether the default cap of £5,000 should apply in an application for a PEO within Simple Procedure?

38. Given the sort of cases that Simple Procedure applies to, it is arguable that there should nil costs cap on an applicant's costs. This would be consistent with the principle of Simple Procedure a speedy, inexpensive and informal way to resolve disputes while meeting the Aarhus Convention 1998 obligations. It is very likely that due to the often-complex nature of environmental proceedings the Simple Procedure will not be applicable.

Q29. 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?

39. UKELA does not agree that a £5,000 cross-cap should apply in Simple Procedure. It is also unclear why a £30,000 cross-cap should apply.

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

40. No.

Q.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?

41. Yes. This is because the primary purpose of Article 9 of the Aarhus Convention 1998 is to prevent legal proceedings being prohibitively expensive. If any party is prevented from engaging in legal proceedings due to the genuine risk that those proceedings may be prohibitively expensive then costs protection should be available.

Q.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?

42. The approach suggested above in Q10 of “no expenses due to or by” is appropriate for all interveners.

Q.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?

43. No.

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

44. No.

Q35. 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?

45. UKELA does not consider that the discussion of delay caused the commencement of court proceedings on page 3 of the draft BRIA is relevant to the question of impact by the introduction to the amendments to the PEO regime. There may or may not be delay caused by the commencement of legal proceedings, but this will not be caused by extending the PEO provisions to help secure fair, equitable and not prohibitively expensive access to justice.

Q36. 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?

46. UKELA's concern raised as a preliminary point above as to inaccurate legal terminology would help address the concern raised in the draft EQIA and that the term 'protective expenses order' does not properly reflect the purpose of the cost protection available under the provisions. As explained above. UKELA recommends that a more appropriate term is either 'Prohibitive Expense Order' or a 'Protective Costs Order'.

47. In terms of translation and the general presentation of papers, a judge will be familiar and experienced in dealing with litigants in person and applicants who may use English as a second language. Further, UKELA acknowledges that most PEO applications will be considered on the papers. However, there should be recognition that a PEO application may be made by a litigant in person

because they cannot afford legal representation⁷. This should not place them at a disadvantage in any way. For instance, simply because the applicant has not referred to correct legal rules or approaches should not be a reason for refusing a PEO. Having regard to the wide scope and broad purpose of the Convention, if the Court considers that, arguably, Article 9 of the Convention applies, it should grant a PEO.

UKELA Scotland
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Contact: info@ukela.org

Registered charity 299498, company limited by guarantee in England 2133283.
Regd office: c/o Norose Company Sec. Services Ltd: 3 More London Riverside, London SE1 2AQ, UK
www.ukela.org President: Right Hon Sir Keith Lindblom

⁷ This underlines the point or purpose of the order which is to protect against adverse cost risk that arises regardless of whether the applicant has legal representation.