FACULTY OF ADVOCATES

Response to Scottish Civil Justice Council's

Consultation on the extension of Protective Expenses Orders (PEOs)

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 agree with this.

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 – the proposed amendments achieve this 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?

No – the court ought to retain its discretion to increase the £5,000 cap in appropriate cases. It is not uncommon for environmental challenges to be crowdfunded, and the court should be able to take account of the level of a party's financial resources in each case in determining the cap to be applied.

We would also comment that the default cap of £5,000 for petitioners/appellants is already quite low, especially when compared with the default cap of £30,000 for respondents.

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 – however, for the reasons discussed above, we do not agree that the rule should be altered in this way.

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 – in practice, few applications include details of the legal team's fees, and there is no good reason why the funding arrangements of the petitioner's/appellant's legal team should have to be disclosed to the other side.

The general rule is that no litigant is entitled to know how the other side is funding their case and we do not consider that the rule should be any different in a case in which a PEO is sought.

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 agree that the proposed deletion achieves this purpose and have no other comments to make.

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?

We are not aware of any such difficulties.

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 – in practice, the petitioner/appellant will often simply state that their opponents' expenses are expected to be approximately the same as their own, or provide a notional figure.

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 agree the proposed deletion achieves this purpose and have no other comments to make.

Concern D – Interveners

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

Yes – a public interest intervention should be cost neutral for all parties.

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 agree the proposed deletion achieves this purpose and have no other comments to make.

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?

Yes – however, we would observe that where a PEO is granted and the petitioner/appellant is unsuccessful, such that their costs are capped at £5,000, if court dues are paid from this sum, in practice, the respondent could receive nothing (or next to nothing) towards their legal costs despite being successful, which we consider is unfair.

To ensure that the respondent recovers something towards their own costs, we wonder if provision might be made for the possible reduction in court fees in such instances, rather than the full standard fees being paid out of the £5,000 cap.

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 proposed wording achieves this purpose and would otherwise refer to our comments above at Question 12.

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 consider that the Inner House should retain the ability to review a PEO – the court's discretion should not be interfered with.

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?

No – the court's discretion should not be limited in this way.

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 consider that draft rule 58A.8A(3) should be enacted but that the rule should not specify the circumstances in which the Inner House is able to exercise its power of review.

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 agree with this.

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 the proposed wording achieves this purpose and have no other comments to make.

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?

The only other comments we would wish to make concern the level of the standard caps in PEOs.

In our view, the difference between the standard caps to be applied for the petitioner/appellant on the one hand and the respondent on the other is unfair. Whilst in most cases, the respondent can be expected to have the greater resources, this will not be true in all cases. In particular, we would note that local authorities often have quite limited budgets. In our view, the discrepancy between the standard caps may influence a respondent's decision to defend a challenge.

Further, we consider that the standard cap to be applied for the petitioner/appellant is too low. As set out above, if a PEO is granted and the petitioner/appellant is unsuccessful, if the court dues are also paid out of their £5,000, the respondent will often recover nothing towards their costs despite having been successful.

The standard £5,000 cap has not been increased since the PEO rules were introduced over a decade ago and is not reflective of the costs which are now involved in a legal challenge.

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 agree that a litigant should be able to seek a PEO in the Sheriff Appeal Court and that a PEO should be carried forward where this has been granted in the Sheriff Court.

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?

Yes – we agree that the draft rules achieve this purpose.

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 agree that the Sheriff Appeal Court should have the ability to review a PEO.

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?

No – we don't consider that the Sheriff Appeal Court's ability to review a PEO should be limited in this way.

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

No – the proposed rules appear appropriate and are in line with the Court of Session rules.

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 agree that PEOs should be available in the Sheriff Court where litigation falls within the scope of Article 9.

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.

Simple Procedure

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

Given the type of cases which are brought under simple procedure, we think it is unlikely that a rule in relation to PEOs is required. In this respect, simple procedure is unlikely to be used for public interest litigation or environmental proceedings (for which PEOs have been developed). In the absence of there being any known issues, we don't consider that 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?

As set out above, we are unclear that there is a need for PEOs in simple procedure. If PEOs are introduced in simple procedure, however, it may be appropriate to reduce the default cap of £5,000 given the usual rules which apply to expenses in simple procedure (which are linked to the value of the claim).

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?

As above, we don't see that PEOs are required in simple procedure, however, if PEOs are introduced, we think it would be disproportionate for the usual cross cap of £30,000 to apply. A cross cap of £5,000 would in our view be more appropriate subject to our comments above at Question 28 concerning how the PEO caps would interact with the usual rules which apply to simple procedure expenses.

Other questions

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

No.

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?

Yes – as a matter of principle, we don't see why a defender / respondent ought not to be able to apply for a PEO if it is a type of case in which a PEO would otherwise be available.

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 consider that the same approach to interveners' expenses should be taken in the Sheriff Court/Sheriff Appeal Court as the Court of Session – i.e., on a no expenses due to or by basis.

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 – however, we were slightly unsure as to what this question was getting at. A PEO does not prevent the court from making an award of expenses against a party.

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

No – however, we can envisage circumstances in which a petitioner/appellant who has the benefit of a PEO seeks to conduct litigation in such a way so as to incur additional expense for the other parties by, for example, taking an appeal which has negligible prospects of success, or by serving a specification of documents.

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.

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.