This response is made on behalf of the Society of the Solicitor Advocates. The Society has a membership which potentially has an interest on each side of questions concerning PEOs. These Orders create potentially challenging issues. From the perspective of the Applicant, a PEO may be essential if the requirements for access to justice are to be met. If in receipt of a claim which is accompanied by a PEO the opposing party may face an opponent with little to lose and an ability to extend the written or oral proceedings without fear of financial consequence (unlike other litigants).

ANNEX C CONSULTATION QUESTIONNAIRE

1. Do you agree that the rules should not define 'prohibitively expensive'?

While there are arguments both ways on balance it appears appropriate to leave the definition aside and allow that matter to be governed by the case law. The only downside to be borne in mind is that this may lead to the potential for further argument depending on how the issue is interpreted in future cases.

2. Do you agree that the rules should not distinguish the question of prospects of success from the question of whether or not the proceedings are prohibitively expensive?

No. In the interest of achieving an appropriate balance between the potentially conflicting interests mentioned above, it may be important to assure participants that particular attention is being paid to the prospects of success. That can be especially important in the most likely arena for the deployment of PEOs i.e. environmental challenges to planning decisions. There is well established case-law stressing that many such challenges, although apparently focussing on legal and similar errors, are in fact illegitimate challenges to the merits of a decision which legislation has given to the particular decision-maker. The majority of such challenges accordingly fail. Focus on propsects may therefore be of assistance in maintaining a balance.

3. Do you have any comments on draft rule 58A.6 for the determination of an application?

We have no adverse comments on the suggestion that in general such an application should be determined on the papers. Behavioural adjustment will be required by practitioners to the need to contain all relevant material in a written response given that in the majority of cases no oral hearing is anticipated. The ability of the Judge to require an oral hearing in any particular case will no doubt provide a safeguard.

4. Do you have any comments on draft rule 58A.9 for the expenses of the application?

The risks of substantial costs being incurred in the conduct of a PEO application itself is a recognised flaw in the current process. To a large extent that risk is removed by the primary approach of dealing with these matters in writing rather than what might previously have been a lengthy oral hearing. That being so, we have no adverse comments on the proposed standard limit for the expenses of an unsuccessful application. The recoverability of such an award may in many circumstances in any event be debateable. The ability to alter that figure on cause shown allows for a degree of flexibility.

5. Do you have any comments on draft rule 58A.8 for expenses protection in reclaiming motions?

The logic of requiring a party with a PEO to seek a fresh PEO if unsuccessful at first instance is clear. If our comments on "prospects of success" remaining an identified factor are accepted, this will also assist as again, in many circumstances, it will be plain that the first instance decision has adequately reviewed the matter and the justification for yet another challenge is more limited than was the case at first instance.

The extension of the existing PEO to cover an opponent's reclaiming motion involves more balanced arguments. However, in the round, and against the risk of a reclaiming motion being used as a means to make the protection ineffectual, we agree with the proposal.

6. Do you have any comments on the draft amendment to rule 38.16?

This question raises issues of more procedural complexity than other questions. Under the Rules governing reclaiming motions (and the Guidance which accompanies those rules) by the time of a Procedural Hearing both Grounds of Appeal and Answers and Note of Argument will have been produced. These Notes will have been produced pursuant to Guidance which, read short, anticipates these being used as a skeleton for the conduct of an oral hearing (the length of which is then to be determined at the Procedural Hearing). It will be necessary to ensure that any proposed reform is accompanied by alterations in the Guidance so that in the case of an appeal against a decision on a PEO which is, in effect, to be determined in writing (absent any other order by the Court) the parties are directed to reflect that in the Notes - which will in most cases then be their final say. There may potentially be the need for arrangements for the advance exchange of Notes of Argument so that comments made by the other party can be picked up and responded to before a final version is lodged (given there will in most cases be no subsequent opportunity for alteration).

7. Do you have any other comments on the proposals contained in this paper?

It is notable that the Court is proposed to be given greater flexibility by enabling either or both of the sums of £5,000 and £30,000 to be varied - presumably in either direction. Previously the general approach was that the ceiling for a Claimant's expenses would be £5,000. Flexibility is to be welcomed because in some cases it may be apparent that a different figure may be capable of being imposed without infringing the "not prohibitively expensive " targets.