

ANNEX C CONSULTATION QUESTIONNAIRE

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

Yes, but there should be guidance available, other than that produced by superior courts, on how this should be assessed. The decision will clearly depend to some extent on the resources of the person or organisation initiating the legal challenge or appeal, but assumptions should not be made that reasonably well- endowed organisations or individuals should prejudice their other activities or assets in order to undertake a judicial review or statutory appeal on environmental issues. The applicant's legal costs for the principal court action and any subsequent appeal will remain the major financial disincentive to a legal challenge or appeal, even with the improved PEO provisions.

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?

It is difficult, if not impossible to assess the prospects of success, unless the proposed action and/or sought for remedy is clearly and unequivocally frivolous or incompetent. We consider that only in exceptional cases should the prospects winning the case inform the decision on a PEO. The major legal costs noted in (1) above that would be incurred in pursuing a qualifying case, even if successful, provide sufficient safeguard against initiating a frivolous action,. In a case brought by the authors of this response, the cost of the action including an appeal was over £100,000 and would have been more had the action been unsuccessful. As it was, the actual cost when expenses were recovered from the respondent was over £30,000. The potential costs would have been greater if an interested party had not withdrawn halfway through the proceedings,

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

No, but subject to the issues raised in response to question 5

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

In regard to clause (2) "On the motion of the applicant the court must, except on cause shown, limit the applicant's total liability in expenses, in so far as occasioned by the application, to the sum of £5000."

It is unclear what "cause" might affect this decision. It is submitted that the total expenses for all applicants for Judicial Review or Statutory Appeal on environmental matters should not exceed £5000. .

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

We agree with the provision that a protective expenses order granted at the initial stages of an action should apply to any further proceedings *initiated by the respondent* in the Inner House. We do not agree that a further PEO application should be required for an applicant's appeal. In our experience, under the current arrangements, consideration of this necessitated a pre-trial or rehearsal of the applicant's case. Successful appeals against public authorities are statistically rare and even more so at appeal. If the merits of the case and likelihood of success were to be assessed, without the opportunity to question the appellants and respondents, there is little prospect that justice would be seen to be done. We submit that any process of assessing the merits of the case which is not transparent could encourage a sense of grievance by one or other of the parties. The assessment of the prospects of success should play no part in any consideration of awarding a PEO to a party that has been judged eligible for such an order at the earlier stage of the proceedings. Decisions on PEO's for Inner House actions, taken in camera, could be seen by applicants as being, in effect, a process of giving or refusing leave to appeal. Success in such appeals is relatively rare, but this should not be a determining factor in granting a PEO.

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

No

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

It should be noted that in relation to prospective Rule 58A(7), bearing in mind that one or more third parties can enter the action that each can receive expenses if the action is unsuccessful. The liability for expenses following an unsuccessful outcome of an action is a major deterrent in environmental actions. The proposed amendments to the rules, while welcome in themselves, will not affect the major affordability deterrent to actions subject to these rules - the legal and court fees incurred.

This response has submitted by STEPAL who's Judicial Review of a Fife Council This response has been submitted by STEPAL who's Judicial Review of a Fife planning decision, determined in 2016 at the reclaiming motion stage, resulted in a successful outcome. The ability to initiate a Judicial Appeal involved the raising by public donation of over £100,000 and an a final legal bill of over £30,000. This required an exceptional fund-raising effort and personal contributions which could not have been possible in a less resourceful or committed community.