

RESEARCH ON INTERVENERS EXPENSES

Purpose

1. To agree the attached research report (**Paper 2.3A**) as suitable for publication.

Background

2. In 2021 the Aarhus Convention Compliance Committee (ACCC) set out a range of concerns regarding Scotland's compliance with the Aarhus Convention at paragraphs 82 to 113 of the following report:

“Report of the Compliance Committee on compliance by the United Kingdom of Great Britain and Northern Ireland – Part I”.

https://unece.org/sites/default/files/2024-03/ECE_MP.PP_2021_59_E.pdf

3. At paragraph 91 they expressed a general concern about a lack of data:

“Given the lack of data on how the 2018 PEO rules are being applied in practice, the Committee invites the Party concerned, in its progress reports in the next intersessional period, to provide up-to-data on...”

4. At paragraph 105-106 they expressed a specific concern about a perceived risk of expenses being awarded “to or by” an intervener:

105. The Party concerned has confirmed that the costs of interveners are not included in the costs caps and that there is no special provision within the costs regime for interveners.

106. The Committee finds that the failure of the costs caps to cover any costs that may be payable to interveners does not meet the requirements of paragraph 2 (a), (b) and (d) of decision VI/8k

The publication of research reports to close the information gap:

5. To reduce that general information gap two research reports were published in 2024 to cover the ‘cost caps used in practice’ and ‘the type of claims covered’:

- Research on the cost caps used in practice (Aug 2024, SCJC)
https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/publications/scjc-publications/research-on-the-cost-caps-used-in-practice.pdf?sfvrsn=ef272688_1
- Research on the type of cases seeking a PEO (Sep 2024, SCJC)
https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/publications/scjc-publications/20240930--research-on-the-type-of-cases-seeking-a-peo.pdf?sfvrsn=f459d1da_1

6. The attached **paper 2.3A** now adds a research report on ‘interveners’ to that list:

- Research on the incidence of interveners in cases seeking a PEO (Aug 2025, SCJC)

In practice

7. An intervener is someone that seeks leave from the court to submit a written submission of 5,000 words for the specific purpose of assisting the court (*rather than the parties*) so normally they would incur minimal costs in generating a report of that size. As that submission is made in the public interest it would be incongruous to try to recover the cost of generating that report from the parties.
8. The general rule is that “*interveners should bear their own costs*”; which underpins the courts default position that “*expenses are not normally due to or by an intervener*”. The reason for including the word “normally” is that on rare occasions the court may (*by exception*) want to use expenses as a sanction, although that has yet to happen in practice within a PEO related case. A hypothetical example of where it might be appropriate would be:
 - If any one party had acted unreasonably in response to a written submission made by an intervener; or
 - If the court is of the view that an intervener had sought leave for the sole purpose of delaying proceedings; or was otherwise acting in their own private interest rather than the public interest.

Conclusions

9. This research confirms that since 2013:
 - No applications for *leave to intervene* were made within any of the 16 cases that had sought an *Environmental PEO* under RCS Chapter 58.A;
 - Out of the 12 cases that sought a *Common Law PEO* there was only 1 where a ‘*public interest intervener*’ was granted ‘*leave to intervene*’ and made a written submission; and
 - The reported judgment in that case succinctly conveys to any readers how the court reached the decisions made; including why the court considered it to be inappropriate to award expenses.
10. In terms of ‘risk management’:
 - The case precedent within that 2012 judgment should provide sufficient certainty for any potential litigant seeking assurance by reading the rules; and
 - For those who do not seek legal advice adding an informational rule (RCS 58A.10) should mean that any remaining uncertainty has been put beyond doubt with effect from 1 October 2024.
11. In terms of ‘striving to promote public participation’ in environmental decisions:
 - Inserting RCS 58A.10 into the PEO rules has replicated information from case precedent that was readily available in the public domain; and

- When instructing that rule change in 2022 that proposed change was assessed as having a “minimal effect” on the environment given it replicated information already available to those who knew where to look.

Recommendation:

12. It is recommended that the Council:

- **Notes the content of this research report (*Paper 2.3A*) and approves it as suitable for online publication; and**
- **Considers instructing further research on the differences between a third party and an intervener with a view to improving public awareness.**

**Secretariat to the Scottish Civil Justice Council
August 2025**