



Scottish
Civil Justice
Council

BUSINESS & REGULATORY IMPACT ASSESSMENT (BRIA)

The general purpose in preparing any BRIA is to assist the Council in:

- Assessing the costs, benefits and risks of a proposed procedural change that will be implemented within an enactment, practice note, direction or guidance etc.
- Clarifying the potential impact that a proposed procedural change may have on the public, private or third sector or regulators.

This is a draft BRIA.

It has been prepared to support our consultation on the proposed draft rules on:

Extending access to Protective Expenses Orders (PEOs)

Following this consultation, it will be refreshed to reflect the feedback from respondents.

PREPARED BY: The Secretariat to the Scottish Civil Justice Council (SCJC)

REGARDING: the proposal to provide amended rules of court to introduce a scheme of protective expenses orders (PEOs) in most civil actions in Scotland, to implement part of the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention for short).

LAST UPDATED: **2 Jun 2026**

Step 1 – POLICY BACKGROUND

Purpose and intended effect.

The UK is a signatory to the Aarhus Convention which provides procedural rights to participate in, obtain information on and challenge certain environmental proposals and decisions. These three aspects are often referred to as the three pillars of the Aarhus Convention.

In terms of the third pillar (that is access to justice) the Aarhus Convention provides rights to challenge environmental decision making, which should be a way that is not prohibitively expensive. As part of the compliance mechanism to the Aarhus Convention, the Aarhus

Convention Compliance Committee has made a series of observations as to whether the court rules in Scotland fully implement Article 9 of the Aarhus Convention. In December 2025, the SCJC considered a new approach to Aarhus compliance, and agreed a further consultation should take place in 2026 to propose new rules with the aim of resolving all outstanding issues.

Court rules providing that an applicant can obtain a Protective Expenses Order (PEO) have been available since 2013. A PEO limits a litigant's liability of an adverse award of expenses against them in the event of losing the case, with a reciprocal cap as to the extent to which, in the event of success, the party benefitting from the PEO is able to recover expenses. However, those rules are limited to certain types of action in the Court of Session.

There is no equivalent rule for applicants seeking a PEO if proceedings are brought on an environmental case in the Court of Session in actions other than judicial review or certain statutory appeals, nor in actions in the Sheriff Appeal Court or the Sheriff Court.

These draft rules will improve access to justice by extending the type of actions, and the courts, where a PEO can be applied for.

Policy Objectives

The policy objectives of proposing to extend PEOs to other actions in the Court of Session, and actions in the Sheriff Appeal court and Sheriff Court are:

- *To improve Aarhus compliance* – by addressing the concerns that fall within the remit of the SCJC, from the reports of the Aarhus Convention Compliance Committee, enabling the SCJC to comply with its international obligations.
- *To improve access to justice* – as widening the ability to apply for a PEO is likely to improve access to justice for those bringing an environmental dispute before the courts.
- *To provide comparable rules* – as developing a fully Aarhus compliant set of rules in the Court of Session and then replicating that approach across the Sheriff Courts and the Sheriff Appeal Court aligns with the SCJC guiding principle for having similar rules, where appropriate, in all courts.

The rationale for this intervention

The SCJC has carefully considered reports from the Aarhus Convention Compliance Committee. It is mindful of its statutory functions under section 2 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013, and the guiding principles found in section 2(3) when exercising those statutory functions.

In that regard:

- The extension of PEOs to other courts and other types of action within the Court of Session promotes the civil justice system as being fair and accessible (section 2 (3)(a)).
- Having similar rules in the Court of Session, Sheriff Appeal Court and Sheriff Court allows for similar rules in all civil courts (section 2 (3) (c)).

Consultation

Climate change and the protection of the environment are of increasing concern across civil society. The decision to seek further information by running a full Public Consultation will help to capture the widest possible range of public feedback, to support the SCJC taking evidence-based policy decisions.

Sectors and groups affected.

Consumers

- *Potential litigants* – any person or body that may be contemplating initiating a civil action concerning an environmental matter, covered by Article 9 of the Aarhus Convention. The outcome sought where the court does grant a PEO is to limit the applicant's financial exposure to an adverse award of expenses to a maximum of £5,000 (if the court applies the standard cost cap).

Businesses

- *Potential defendants* - any person or body that may be the subject of a legal challenge in a civil action concerning an environmental matter covered by Article 9 of the Aarhus Convention. A legal challenge is likely to add cost and delay to the delivery of a proposed project or policy change. Further, if a PEO is granted, it will significantly limit the level of legal expenses which would have otherwise been recoverable in the event of the defender being successful.

Judiciary and staff

- *Judicial Office Holders* – will need to be provided with an awareness of the broadened scope, the procedural changes made, and the potential for an increase in the volume of environmental cases.
 - *Court Officials* - will need to be provided with an awareness of the broadened scope, the procedural changes made, and the potential for an increase in the volume of environmental cases.
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Options

Option 1 - do nothing

Under the do-nothing option - the ability to seek an environmental PEO would remain restricted to judicial review and statutory appeals in the Court of Session where the action engages Article 9 of the Aarhus Convention.

Option 2 – new rules

The proposed amendments to the terms of the rules, and extension of the types of action and courts covered by the rules, would achieve compliance with the Aarhus Convention (insofar as the remit of the SCJC is concerned). That is by extending the option to seek an environmental PEO to all proceedings within the scope of Article 9 of the Aarhus Convention

within the Sheriff Courts, and the Sheriff Appeal Court, and to other types of proceedings in the Court of Session (excluding group proceedings).

Benefits

Benefits - option 1 - do nothing

Nil

Benefits - option 2 – new rules

The benefits sought from extending the availability of environmental PEOs are:

- *Improved Aarhus compliance* – as extending cost protection procedures to other courts and changing the terms of those rules will resolve all issues highlighted by the Aarhus Convention Compliance Committee.
 - *Improved access to justice* – as extending the availability of cost protection will improve access to the courts in matters covered by Article 9 of the Aarhus Convention.
 - *Improved comparability of rules* – as in general the same rule to obtain a PEO is proposed across the Court of Session, Sheriff Appeal Court and Sheriff Court.
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Costs

Costs - option 1 - do nothing

NIL

Costs - option 2 – new rules

For consumers / court users:

- The procedure for obtaining a PEO has been designed to be cost effective.
- There is a limit on expenses that can be awarded if the PEO application is refused (limited to £500).
- Parties are encouraged to provide the court with sufficient information to allow applications to be determined on the papers, avoiding the associated costs of a hearing.

For businesses:

- Normally a defendant that successfully defends a claim made against them is entitled to recover their judicial expenses, subject to the usual rules regarding taxation and reasonableness. If a PEO is granted the ability to recover expenses is limited to the capped amount expressed within that PEO. That means that despite being successful in the action, a business may need to absorb a significant gap between the normal level of judicial expenses otherwise recovered and the cap set within the PEO.
- The numbers of PEOs granted to date in terms of the rules have been low, at 1-2 per annum. It is not anticipated these new rules would result in a significant rise in the numbers of PEOs granted each year. That said, any one court challenge to an environmental decision or policy (falling within the terms of Article 9 of the Aarhus

Convention) could be potentially significant. It may include a challenge to a nationally significant infrastructure policy. Whilst such a challenge may not ultimately be successful, the commencement of court proceedings is likely to have delayed that project. On the other hand, the UK is a signatory to an international convention providing procedural rights to challenge certain environmental decisions and, as such, the SCJC is mindful of the UK's international obligations. The SCJC intends to consider research on how such environmental challenges might be best dealt with by the court system.

Step 2 – ASSESSMENT OF LIKELY IMPACTS – ON BUSINESS

The perspective will differ depending on whether a business is the party seeking cost protection to be able to progress environmental proceedings, or the party looking to defend against the challenge made in those proceedings.

For a business in the latter situation any motion lodged for a PEO has the potential to be contentious, given it will limit the expenses otherwise payable if they were to win:

- If an environmental PEO is not granted - the losing party remains fully liable to pay the recoverable judicial expenses incurred by their opponent.
- If an environmental PEO is granted - the losing party is only liable to pay up to a maximum of £5,000 (or the cap determined by the court) towards the judicial expenses incurred by their opponent.

It is understood that in some environmental actions falling within Article 9 of the Convention, the terms of the PEO have in some cases been agreed directly between the parties.

What feedback has arisen from business engagement?

Our 2025 Public Consultation provided a recent opportunity for businesses to engage with these proposed changes. This 2026 Public Consultation now provides a second opportunity, and we would value having further feedback from the business community.

In the absence of strong views to the contrary, the effect of these proposed rule changes is to extend the availability of cost protection to include any civil action concerning an environmental matter that is covered by Article 9 of the Aarhus Convention.

Step 3 – ASSESSMENT OF LIKELY IMPACTS – ON COMPETITION

To support initial screening for competition impacts, the Council uses the checklist of four questions recommended by the Competition and Markets Authority (CMA):

Will the measure directly or indirectly limit the number or range of suppliers?

NOT APPLICABLE

Will the measure limit the ability of suppliers to compete?

NOT APPLICABLE

Will the measure limit suppliers' incentives to compete vigorously?

NOT APPLICABLE

Will the measure limit the choices and information available to consumers?

NO – the proposed change does the opposite. It allows for a PEO to be applied for in a wider range of types of court actions and courts.

Step 4 – ASSESSMENT OF LIKELY IMPACTS – ON CONSUMERS

To support initial screening for consumer impacts, the Council mirrors the best practice¹ guidance from Scottish Government which uses the following six questions:

Does the policy affect the quality, availability or price of any goods or services in a market?

NO

Does the policy affect the essential services market, such as energy or water?

NOT APPLICABLE

Does the policy involve storage or increased use of consumer data?

NO – the same data is held on the case file.

Does the policy increase opportunities for unscrupulous suppliers to target consumers?

NO – the grant or refusal of a PEO is a matter for judicial discretion.

Does the policy impact the information available to consumers on either goods or services, or their rights in relation to these?

YES - the proposed new rules increase the ability to apply for a PEO in a wider range of types of court action, and a wider range of courts.

Does the policy affect routes for consumers to seek advice or raise complaints on consumer issues?

NO – this proposed change supplements the existing routes for taking legal action.

What feedback has arisen from consumers?

Environmental NGOs and members of the public have made calls to extend the type of actions where a PEO can be sought in terms of the rules.

¹ <https://www.gov.scot/publications/business-regulatory-impact-assessment-bria-toolkit/>

How has that feedback fed into the development of this proposal?

Extending the scope to allow for environmental PEOs in the Sheriff Courts and the Sheriff Appeal Court can be progressed by these proposed amendments to the rules.

Previous consultation responses to the issue of PEOs have been carefully considered, as has the Aarhus Convention Compliance Committee's assessment of previous and existing rules of court on PEOs.

Test run of business forms.

Does this proposal introduce new legal Forms that are materially different in style and content to the existing legal forms in general use?

NO – In most types of civil actions, a PEO would be applied for by lodging a motion, although in some types of action (such as Simple Procedure) a form would be used.

Step 5 – ASSESSMENT OF LIKELY IMPACTS – DIGITAL

Digital Impact Test

Public services are increasingly being delivered online. To test for relevant opportunities the Council mirrors the best practice² guidance from Scottish Government and uses the following five questions:

Does the measure take account of changing digital technologies and markets?

YES – the ability for an applicant to lodge a motion, and for all parties to view that motion online, is already covered within the functionality provided within the Civil Online system hosted by the SCTS. That portal allows the parties to a case to view an electronic case file that contains all of the documents lodged within a given civil action.

Will the measure be applicable in a digital/online context?

NO – given the low transaction volumes requests for a PEO will continue to be made by lodging a motion within existing proceedings. Changing to the provision and use of an online application form is not considered to be the most efficient procedure, although it is recognised that a form is appropriate where applicants are likely to be representing themselves (such as in Simple Procedure).

Is there a possibility the measures could be circumvented by digital / online transactions?

NO

² <https://www.gov.scot/publications/business-regulatory-impact-assessment-bria-toolkit/>

Alternatively, will the measure only be applicable in a digital context and therefore may have an adverse impact on traditional or offline businesses?

NO

If the measure can be applied in an offline and online environment will this in itself have any adverse impact on incumbent operators?

NO

Step 6 – ASSESSMENT OF LIKELY IMPACTS – ON REGULATIONS

Court Fees

Will the proposal require changes in court fee regulations?

YES – the fee exemption regime for cases covered by Article 9 of the Aarhus Convention is provided for within section 7³ of the Court of Session etc. Fees Order 2026. If these proposed rule changes are supported there is an expectation the Scottish Ministers will wish to consider replicating that regime for fees within the Sheriff Appeal Court and Sheriff Court.

Legal Aid

Will the proposal require changes in legal aid regulations?

NO. Any issues relative to legal aid and the Aarhus Convention are matters for the Scottish Ministers.

Recovery of Costs Awarded

Will the proposal require changes in judicial taxation regulations?

NOT APPLICABLE – the cap and cross caps within the cost protection regime (the PEO Rules) run in parallel with the separate approach taken to the determination of judicial expenses under the Taxation of Judicial Expenses Rules 2019⁴. Where a paying party has had cost protection provided by way of a PEO, they are only liable to pay whichever of those two amounts is the lower.

Enforcement and/or sanctions

Will compliance be enforced and, if so, how?

NOT APPLICABLE – granting or refusing a PEO is a matter of judicial discretion.

³ <https://www.legislation.gov.uk/ssi/2026/80/article/7/made>

⁴ <https://www.legislation.gov.uk/ssi/2019/75/contents>

Are there sanctions for non-compliance?

NOT APPLICABLE – granting or refusing a PEO is a matter of judicial discretion.

Step 7 – ASSESSMENT OF LIKELY IMPACTS – ENVIRONMENTAL PRINCIPLES

Following Brexit, the 5 statutory principles for protecting the environment were enshrined in section 15 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021.⁵

In August 2023, the Scottish Government expanded on those principles by adding the statutory guidance headed “Guiding Principles on the Environment”.

Has “protection of the environment” been integrated into this policy?

For those with cases that fall to be covered by Article 9 of the Aarhus Convention, extending this option to secure cost protection to other courts will assist some in commencing litigation regarding the environment.

Will this proposal have significant effects on the environment?

POTENTIALLY – in circumstances where the option to access cost protection was a determinative factor in a person determining whether to continue with court proceedings, and the decision then reached by the court had a practical impact on the environment.

Can any negative effects of this policy be avoided or reduced?

YES - The SCJC is mindful of the negative effect that any court challenge may have given it can cause a delay in the implementation of a policy or project. Hence it is considering wider research into whether environmental cases are being dealt with as efficiently as possible.

Can the positive effects of the policy be enhanced?

Yes - Having clear, consistent, and understandable procedures in place for PEO applications, will provide improved certainty for potential litigants across all court fora.

Step 8 – ASSESSMENT OF LIKELY IMPACTS – PUBLIC PARTICIPATION

Article 8 of the Aarhus Convention includes a duty to “strive” to promote public participation when making decisions on rule changes.

Will this proposal have significant effects on the environment?

POTENTIALLY – in circumstances where the option to access cost protection was a determinative factor in a person determining whether to continue with court proceedings, and the decision then reached by the court had a practical impact on the environment.

Has effective public participation been promoted?

⁵ <https://www.legislation.gov.uk/asp/2021/4/contents>

YES – the draft rules are being fully consulted on.

Is public participation being sought at an appropriate stage?

YES

- Policy Formation – the SCJC is aware of both the views of wider civic society (particularly environmental organisations) regarding the PEO rules and the reports from the Aarhus Convention Compliance Committee highlighting issues with existing rules.
- Policy Implementation – a set of draft rules is available, forming part of this consultation.

Step 9 – ASSESSMENT OF LIKELY IMPACTS – WITH IMPLEMENTATION

Implementation Plan

What is the likely timescale for implementation?

Subject to the availability of specialist drafting lawyers, the following bullet points suggest an indicative timeline of at least 12 months from the date the 2026 consultation opens:

- 3 months - to provide respondents sufficient time to provide informed responses.
- 1 month - to review the responses received & publish the Consultation Analysis.
- 1 month - to consider the policy positions & publish the Consultation Response.
- 2 months - to update & finalise the draft rules to reflect the Consultation Response.
- 1 month - to seek final approval of those draft rules from the Council.
- 1 month - for the Court of Session to check, approve & enact the Act of Sederunt
- 3 months - for familiarisation by users & parliamentary scrutiny by the DPLRC⁶.

It should be noted that the actual timeline will vary depending on the volume of responses to be analysed and the complexity of any legal points arising within those responses.

How will this proposal be implemented?

The change will come into force from the commencement date set in the Act of Sederunt.

Monitoring

Will the resultant changes be monitored and, if so, how?

YES - Qualitative Monitoring – for feedback received via the open invitation to email the SCJC on any civil issue, any published court decisions on the rules in use, and any other academic or other comment on the rules.

YES - Quantitative Monitoring – the ICMS software changes⁷ made in 2024 facilitate reporting volumes on all motions for a PEO lodged in the Court of Session. The expectation is that the same approach to reporting within ICMS can be extended to the Sheriff Appeal Court, and the sheriff courts.

⁶ The Delegated Powers and Law Reform Committee (of the Scottish Parliament)

⁷ The working assumption is that the drop-down menus used to record the nature of the motions lodged in the Court of Session will be replicated within the data entry screens used by sheriff courts and SAC staff.

Post Implementation Review

Will a post implementation review (PIR) need to be undertaken?

NO – providing the qualitative monitoring confirms the rules are operating as intended.

A PIR would only be initiated if there was unmistakable evidence of user dissatisfaction or judicial criticism of the rules once the rules were implemented.