



Scottish
Civil Justice
Council

EQUALITY IMPACT ASSESSMENT:

This is a draft EQIA.

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: proposed amendments to the existing 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 June 2026

Step 1 – POLICY BACKGROUND

How does this policy support the public sector equality duty?

The Council does not provide front line public services. It provides ‘functions of a public nature’ so in proposing draft court procedure rules for consideration by the Court of Session, we do give ‘due regard’ to the general equality duties under the Equalities Act 2010:

Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act.

Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it.

Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Purpose and intended effect (of these proposed changes)

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 made available in 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) in an environmental action have been available since March 2013. A PEO limits a litigant's liability to an adverse award of expenses being made 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 in 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 in future.

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* – as addressing the concerns that fall within the remit of the SCJC, from the reports of the Aarhus Convention Compliance Committee, will enable 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. 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 (under 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 (under 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 that is 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 a 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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What research has influenced the development of this policy?

Judicial Decision Making

To date the courts have published judgments in over 30 civil actions where there had been one or more motions for a PEO considered. The decisions taken in those cases has been summarised in the following 3 research reports issued by the Council:

- Research on the type of cases seeking a Protective Expenses Order¹.
- Research on the cost caps used in practice: within Protective Expenses Orders².
- Research on the incidence of interveners³.

Business Levels

The transaction volumes are very low. On average motions for either a common law PEO or an environmental PEO have been granted in around 1 to 2 cases per annum⁴. Even with the scope extended the yearly volumes are likely to remain in single figures for some time.

Technology

The ability for an applicant to lodge a motion, and for all parties to view that motion and its supporting documents online, is provided for within the existing functionality of the Civil Online system provided by the SCTS.

Applications can be readily made by lodging a motion within existing proceedings.

Deprivation

The Council is aware of some past academic research from 2005⁵ which indicated that environmental harms may disproportionately affect some Scottish communities affected by poverty, particularly those in former industrial areas. Further research is required to better understand how those issues might impact on access to justice.

¹ https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/publications/scjc-publications/20240930---research-on-the-type-of-cases-seeking-a-peo.pdf?sfvrsn=f459d1da_1

² https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/publications/scjc-publications/research-on-the-cost-caps-used-in-practice.pdf?sfvrsn=ef272688_1

³ https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/publications/scjc-publications/scjc---research-on-the-incidence-of-interveners.pdf?sfvrsn=a34ad15a_1

⁴ *In the 20 years from 2005 to 2025 there were a total of 28 cases where 1 or more motions for a PEO was considered by the courts; which equates to an average of 1.4 p.a.)*

⁵ Investigating environmental justice in Scotland: links between measures of environmental quality and social deprivation (Mar 2005, SNIFFER)

How has feedback from equality groups helped to shape this policy?

The SCJC has consulted generally in the past on the broad issue of PEOs and the Aarhus Convention. No specific feedback was received on the impacts of the PEO Rules on those with protected characteristics.

This latest consultation again seeks views from those with experience of, or information on, protected characteristics within the meaning of the Equalities Act 2010 so that the SCJC can best understand any impacts specific to those who have protected characteristics when seeking, or responding to, an application for a PEO.

Step 2 – ASSESSMENT OF LIKELY EQUALITY IMPACTS

When considering equality impacts, it is important to note the differing roles of the organisations that support the judiciary:

- *The “rule making” function* – sits with the Scottish Civil Justice Council (SCJC). The SCJC is responsible for making reasonable adjustments within the draft rules, so that those court procedures anticipate the needs of those with protected characteristics.
- *The “service delivery” function* - sits with the Scottish Courts and Tribunal Service (SCTS). It delivers the frontline services, including digital services (*websites, video platform, telephone platform, helpdesks etc.*) to support the rules in use. They make the reasonable adjustments required within the front-line services provided by the courts.

To reflect that difference, this EQIA is narrated from the Council’s perspective so that it is focused on those impacts that arise directly from the draft rules.

IMPACTS APPLICABLE TO ALL COURT USERS & AS WELL AS ALL THOSE WITH PROTECTED CHARACTERISTICS	DEPRIVATION There is some limited past academic research ⁶ that did suggest environmental harms may disproportionately affect Scottish communities affected by poverty, particularly those in former industrial areas. Those communities may wish to utilise these cost protection rules to challenge environmental decision making within their area but there is no evidence to suggest that within such communities those with protected characteristics face an added barrier. Further research would assist. DIGITISATION In practice, the existing motions procedure within each existing court procedure is used with the application uploaded to an
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⁶ Investigating environmental justice in Scotland: links between measures of environmental quality and social deprivation (Mar 2005, SNIFFER)

	electronic case file. Using the Civil Online portal provided by the SCTS the parties already have access to the option of viewing all of the content within that case file online. As these rules do not generate any system changes, this policy intervention does not have digital impacts. LEGAL TERMINOLOGY Providing legal certainty often dictates the use of complicated legal terminology. That in turn can make court procedures difficult to understand for both party litigants and represented parties; and that gap can be problematic for those with more complex communication needs. <u>Negative impacts – terminology:</u> - Those with communication difficulties will already have a sense of separation from other people involved in legal proceedings, which is then heightened where the use of complex legal language and legal processes hinders their understanding and ability to participate in a case. <u>Reasonable adjustments - in court rules:</u> <i>Usability</i> – working within that constraint of providing for legal certainty, the <i>draft rules</i> have been written succinctly, to enable them to be as easy to use and understand as possible (relative to other court procedures). <u>Reasonable adjustments - in working practices:</u> <i>Participation</i> – the way these rules are used in court is underpinned by the existing duty on the judiciary to ensure the effective participation of parties within court proceedings.
AGE	No significant impacts identified.
DISABILITY	No significant impacts identified.
GENDER	No significant impacts identified.
REASSIGNMENT	
MARRIAGE & CIVIL PARTNERSHIP	No significant impacts identified.
PREGNANCY & MATERNITY	No significant impacts identified.
RACE	TRANSLATION For those who use English as a second language, or do not understand English at all, there is added complexity if using an interpreter to understand the requirements within the rules or to participate in any hearing that was fixed. That act of translating can add time and cost to proceedings. However, courts are used to the use of interpreters where required.

	<u><i>Positive Impacts – translation:</i></u> As the court expects to consider most motions for a PEO on the papers it is expected there will be a minimal need for an interpreter to be required within a courtroom to determine a PEO application
RELIGION & BELIEF	No significant impacts identified.
SEX	No significant impacts identified.
SEXUAL ORIENTATION	No significant impacts identified.