Consultation on Draft Court Rules in relation to Protective Expenses Orders

Analysis of Responses

October 2017

Contents

1. Introduction

1.1 The Scottish Civil Justice Council ("the Council") conducted a Consultation on Draft Court Rules in Relation to Protective Expenses Orders ("PEOs") during the period from 28 March 2017 to 23 June 2017.

1.2 The background to the consultation exercise is set out in the consultation paper, and is not repeated here. Broadly, however, the purpose is to consider whether, and to what extent, Chapter 58A (Protective Expenses Orders in Environmental Appeals and Judicial Reviews) of the Rules of the Court of Session ought to be amended in order properly to reflect the obligations contained in the Aarhus Convention[1] ("the Convention").

1.3 Following the decisions in *R (on the application of Edwards) v Environment Agency* ("*Edwards*")[2], in particular, the Council has observed that:

> *"Having compared the rules with those decisions, it is the view of the SCJC that the language of the rules may be at odds with the courts' interpretation of the Aarhus Convention."*[3]

1.4 A draft Act of Sederunt was prepared for this purpose, and annexed to the consultation paper for comment.

1.5 The purpose of this report is to provide an analysis of the key issues arising from the responses to the consultation questions, in order to assist the Council in its consideration of possible changes to the existing rules of court.

---

[1] UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters dated 25 June 1998

[2] *R (on the application of Edwards) v Environment Agency* [2010] UKSC 57, [2011] 1 WLR 79 and [2013] UKSC 78, [2014] 1 WLR 55

[3] Consultation paper, p 7, para 10

2. Overview of Consultation Responses

2.1 Fifteen consultation responses were received, of which 14 were submitted on behalf of organisations, and 1 was submitted by an individual. The consultation respondents are identified in the Annex to this report.

2.2 For ease of reference, consultation respondents will be referred to throughout the remainder of this report as "consultees", rather than "respondents", in order to avoid confusion with respondents in respect of the PEO applications and reclaiming motions under discussion.

2.3 The consultees may be grouped into the following general categories:

Category	**Responses**
Legal profession, professional bodies and academics	5
Environmental groups	4
Local authorities	3
Government and other public bodies	2
Individuals	1
Total	15

2.4 Due to the nature of the responses, and the relatively small sample of consultees, however, it is not thought that any meaningful conclusions can be drawn from detailed analysis of the source of particular responses (eg 'environmental groups' or otherwise). Some observations have been made in this regard, where particular trends have been identified, but these are generally acknowledged to carry little weight.

2.5 A minority of consultees have provided detailed and lengthy narrative responses incorporating, but not limited to, the specific consultation questions posed. Where broader observations have been made, which are pertinent to the purpose of the consultation, these are set out alongside responses to consultation question 7 ('any other comments on the proposals'). Likewise, where responses to specific questions

appear to raise discrete issues, which would be dealt with more conveniently elsewhere, these issues are also noted alongside responses to question 7.

2.6 Where the citation of authority is considered necessary to a proper understanding of any particular response, such references are contained in footnotes to the main text of this report. Otherwise, reference should be made to the full terms of individual responses, and any fuller citation of authority contained therein. Any such citation of authority in this report, which does not form part of the original consultation responses, is indicated in square brackets.

2.7 With regard to the consultation exercise itself, it is convenient to observe at the outset that some consultees expressed concerns that the scope appeared to be unduly narrow. The creation of a single, comprehensive costs protection regime, including sheriff court actions, statutory environmental protection applications, nuisance and other private law claims potentially falling within the scope of the Convention, had not been addressed. The existence of two regimes governing PEOs in environmental cases (ie the Convention and, separately, the common law), in particular, seemed unsatisfactory and unnecessary.[4] Moreover, the possibility of increase to an applicant's limitation of liability under a PEO (see draft rule 58A.7(2), cf current rule 58A.4(2)) represented 'a significant change' upon which views ought specifically to have been invited.

2.8 A broader consultation in respect of costs protection for environmental litigation in Scotland was suggested, therefore, now or in the future.

[4] See, eg, Mullen, *Protective expenses orders and public interest litigation in Scotland,* 2015 Edin LR 36; Mullen, *Public interest litigation in Scotland,* 2015 JR 363

3. Detailed analysis of responses

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

Summary of proposals

3.1.1 The preferred approach of the Council is to omit any definition of 'prohibitively expensive' from the rules. The existing definition in rule 58A.1(2) is said to be subjective and, therefore, 'at odds' with the courts' interpretation of the Convention.

Analysis of responses

3.1.2 All consultees offered substantive comments in response to this question. Overall, however, consultees were fairly evenly divided as to whether or not the rules should contain a definition of 'prohibitively expensive'.

3.1.3 A narrow majority of consultees (eight) indicated that there was no need to define 'prohibitively expensive', generally on the basis that the matter would be governed by existing case law. Many observed that a prescriptive definition was unlikely to be sufficiently flexible to reflect emerging case law, albeit one consultee expressed some concern as to the residual scope for argument in respect of the effect of future cases.

3.1.4 One consultee within the majority called for separate 'guidance' to be made available in respect of the relevant factors in the assessment of 'prohibitively expensive'.

3.1.5 A further point of clarification arises, with regard to the majority view, to the extent that one consultee (who is taken to form part of the majority) purported to 'agree' that the rules *should* define 'prohibitively expensive'. Some difficulty may have arisen from the wording of the question, which sought positive agreement to a negative proposition ('do you agree…should not define'). In any event, the consultee expressly relied upon the same principle of statutory interpretation as did the Council in support of its proposal to the contrary.[5] Accordingly, and in the absence

[5] Consultation paper, p 7, para 12

of any indication to the contrary, it has been assumed that the response was intended to indicate agreement that the rules should *not* seek to define the concept.

3.1.6 The remaining consultees (seven) indicated that some definition ought to be contained within the rules, although a range of views was expressed as to the precise nature of any such definition. The consultees differed as to whether a comprehensive definition, or some less prescriptive formulation, ought to be provided. In addition, some views were expressed as to the proper test to be applied, in terms of the proper construction of the relevant case law. To the extent that such views were not directly relevant to the question posed, however, they have not been reproduced.

3.1.7 Amongst those consultees who advocated the definition of 'prohibitively expensive' within the rules, to a greater or lesser degree, many perceived a general need for clarity and consistency in the application of the *Edwards* test. Thus, one consultee suggested that the formulation adopted in *Edwards* should be 'integrated' into the rules. Another observed that, either it should not be difficult to reflect the courts' reasoning in a statutory definition, or any such difficulty was itself indicative of the need for a clear definition.

3.1.8 Another consultee perceived a 'significant divergence of opinion' amongst existing decisions of the Court of Session, all of which sought to apply *Edwards*[6], which was said to lead to an unacceptable level of uncertainty and significant expense for parties. Whilst the same consultee conceded that an appropriate balance had to be struck between adopting an 'overly prescriptive' definition, and leaving the concept 'too loosely defined', no specific suggestions were made as to how such a balance might be achieved.

3.1.9 Similarly, another consultee apprehended 'extensive opportunity for legal debate', in the absence of any definition, based on direct experience of unsuccessful PEO

[6] [*RSPB v Scottish Ministers*, Lord Jones, 12 May 2015; *John Muir Trust v Scottish Ministers & Ors* [2014] CSOH 172A and [2016] CSIH 33; *Gibson v Scottish Ministers* [2015] CSOH 41, [2016] CSIH 10 and [2016] CSIH 31**]**

applications.[7] A suitable definition ought to be derived, given the existence of authoritative rulings, rather than simply left out.

3.1.10 The same consultee expressed related concerns that there may be a discrepancy between the interpretation of 'prohibitively expensive' by members of the judiciary and the legal profession on the one hand, and by ordinary members of the public on the other. It was suggested that the cost of proceedings had to be reasonable for the particular applicant[8], and a simple definition such as whether proceedings were 'too expensive for most people' could be sufficient to capture the combined objective and subjective elements of the test.

3.1.11 One consultee suggested that the rules should provide a clear and non-exhaustive 'framework' of the relevant matters to be considered, in the interests of clarity for applicants and decision makers. There may be little difference between this view, and the view noted above (amongst those of the majority) in respect of the need for similar 'guidance'. Indeed, none of the consultees appears to have founded upon any formal distinction between rules and guidance, in terms of the relative status of such instruments or otherwise, in order to justify a preferred approach.

3.1.12 One consultee criticised the particular focus in the draft rules on prohibitive expense 'for the applicant'[9], which was said to remain excessively subjective, and to omit the objective limb of the 'two stage test' formulated in *Edwards*. This approach was deemed to be more likely to cause confusion than simply setting out the (subjective and objective) test in full, particularly where it was perceived that the objective limb had not been applied consistently in practice.[10] Similar observations were made by another consultee, who expressly agreed with the Council's own view that the approach adopted in the *current* rules was overly subjective, and required to be corrected.

---

[7] *John Muir Trust, Petr* [2014] CSOH 172A

[8] See, eg, current rule 58A.1(2):

[9] Draft rules 58A.2(4), 58A.3(4)(c) and 58A.4(4)(b)

[10] *Gibson v Scottish Ministers* [2016] CSIH 10, cf *John Muir Trust, Petr* [2014] CSOH 172A

3.1.13 Both consultees suggested that the proper test had been adequately reproduced elsewhere, particularly in the Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland) 2017.[11] The specified criteria could be amended from time to time, and would confine the judges' task to the application of the relevant factors. It was suggested anecdotally that such an approach might avoid the need for detailed submissions by counsel, at significant cost to the parties, in cases where members of the judiciary were unfamiliar with the Convention and relative case law.

3.1.14 Ultimately, all of the 'environmental group' consultees sought clarification of the meaning of 'prohibitively expensive', whether by definition within the rules (three), or by separate guidance (one). The 'legal' and 'local authority' consultees were fairly evenly split; 'government and other public bodies' and 'individuals' all agreed with the Council's proposals.

3.1.15 A table indicating these trends, *quantum valeat,* is shown below:

Category	**Agree**	**Disagree**	**Total**
Legal profession, professional bodies and academics	3	2	5
Environmental groups	1	3	4
Local authorities	1	2	3
Government and other public bodies	2	0	2
Individuals	1	0	1
Total	8	7	15

[11] [Regulation 6 of the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013/81, as inserted by regulation 3(6) of the Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland) 2017/27, provides as follows:
"6. – Determination of prohibitive expense
Proceedings are to be considered prohibitively expensive for the purpose of these Regulations if, having regard to any court fee an applicant is liable to pay, their likely costs either –
(a) exceed the financial means of the applicant; or
(b) are objectively unreasonable having regard to –
(i) the situation of the parties;
(ii) whether the applicant has a reasonable prospect of success;
(iii) the importance of what is at stake for the applicant;
(iv) the importance of what is at stake for the environment;
(v) the complexity of the relevant law and procedure; and whether the case is frivolous."]

3.2 ***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?***

Summary of proposals

3.2.1 The existing rules provide that the court may refuse to make a PEO if it considers that the applicant has 'no real prospect of success' (rules 58A.2(5), 58A.2A(5), and 58A.2B(5)), the implication being that prospects of success is a distinct issue. The Council proposes that the rules should not draw any such distinction on the basis that, according to *Edwards*, prospects of success are merely a factor to be taken into account in determining whether proceedings are 'prohibitively expensive'.

3.2.2 Similar considerations were said potentially to apply to the factors set out in rule 58A.5(1) to be taken into account in determining such applications, which included consideration of 'the need to ensure that it is not prohibitively expensive for the applicant to continue with the proceedings' (rule 58A.5(1)(a)).

Analysis of responses

3.2.3 All consultees offered substantive comments in response to this question. To some extent, however, the responses addressed two different senses in which the rules might be said to 'distinguish' prospects of success.

3.2.4 Strictly speaking, the question was directed only at whether the rules should 'distinguish' prospects of success *from whether or not the proceedings are 'prohibitively expensive'*. In that context, no consultees appeared to support the view that prospects of success should form a distinct, preliminary question to be addressed prior to consideration of whether proceedings are 'prohibitively expensive'. Many consultees acknowledged that prospects of success are merely one of a number of relevant factors to be taken into account, according to *Edwards*, in the determination of whether proceedings are 'prohibitively expensive'.

3.2.5 Some consultees expressed particular concerns with regard to the likely detrimental effects for applicants of any such preliminary assessment. Thus, two consultees rejected the idea of a 'two stage approach' or 'dual hurdle' being imposed. Such an approach risked devoting considerable time and costs to a preliminary hearing on the merits, and inhibiting access to justice, particularly for individuals (who may have relatively little power, resources and influence) seeking to vindicate environmental rights against corporate and public sector entities. Therefore, such an approach would run contrary to the aims and spirit of the Convention and PEO regime.

3.2.6 In any event, the likely involvement of counsel and agents in proceedings before the Court of Session was identified, by one such consultee, as a factor rendering it less likely that proceedings would be raised with no prospects of success.

3.2.7 Another consultee expressed the general concern that any preliminary assessment of prospects created a real risk of influencing the ultimate disposal of the case.

3.2.8 Another consultee expressed the related concern that any assessment of prospects of success was difficult, if not impossible, unless the proceedings were clearly frivolous or incompetent. In the present context, the costs inherent in qualifying proceedings provided a sufficient safeguard against the raising of frivolous actions. Therefore, decisions in respect of PEOs ought to be informed by consideration of prospects only in exceptional circumstances.

3.2.9 Separately, a number of consultees expressed views as to whether the rules should 'distinguish' prospects of success *within any definition of 'prohibitively expensive'*, as it may come to be framed within the rules. Thus, many consultees considered that prospects of success ought to be identified as a distinct factor within the 'prohibitively expensive' test. One such consultee, for example, reiterated the suggestion that prospects of success ought to be included within 'a clear framework' of relevant matters.

3.2.10 Another consultee, notwithstanding express disagreement with the premise of the question, did not appear to argue that prospects of success were entirely distinct from whether or not proceedings were 'prohibitively expensive'. Rather, the general concern was to ensure that they would be seen to receive 'particular attention', apparently as a deterrent to illegitimate environmental claims, such as challenges to the merits of planning decisions. To that extent, the consultee is taken to ascribe to a similar view, that prospects of success ought somehow to be identified as a distinct factor in the determination of whether proceedings are 'prohibitively expensive'.

3.2.11 Another consultee considered that the 'safest' approach to ensuring the proper assessment of the merits of a claim was for the 'prohibitively expensive' test, as formulated in *Edwards*, to be set out in the rules in full. Yet again, the approach adopted in the Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland) 2017[12] was commended as an example. The relevant factors were not, however, accurately expressed in the existing rule 58A.5(1): specifically, there was some overlap between whether proceedings were 'prohibitively expensive' (58A.5(1)(a)), and 'the extent to which the applicant would benefit (financially or otherwise) if successful in the proceedings to which the order would apply' (58A.5(1)(b)); the remaining factors (58A.1(c), (d) and (e)) were not relevant at all.

3.2.12 One consultee observed, more generally, that the issues were inextricably linked, and that greater protection against 'prohibitively expensive' proceedings ought to be afforded to claims with greater merit.

3.2.13 Some consultees, in addition, raised discrete issues concerning the relevance of prospects of success in the wider procedural context applicable to environmental proceedings. Some consultees identified that prospects of success may have been addressed already at the permission stage of judicial review proceedings, in which case further consideration may be unnecessary.[13] Notwithstanding express

[12] See n 11, *supra*.

[13] [Court of Session Act 1988, section 27B (Requirement for permission): "(1) No proceedings may be taken in respect of an application to the supervisory jurisdiction of the Court unless the Court has granted permission for the application to proceed."]

disagreement with the premise of the question, one such consultee appeared, in effect to *agree* that the rules should not distinguish prospects of success as a distinct barrier to proceedings, on the basis that 'consideration of 'prohibitively expensive' should not include prospects of success' at all.

3.2.14 Where no such permission stage or similar sift applied, such as in statutory appeal proceedings, another such consultee acknowledged that prospects of success might require greater 'focus' at the PEO application stage.

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

Summary of proposals

3.3.1 The Council observes that the determination of PEO applications could be 'protracted and expensive', which could have a deterrent effect due to the exposure of applicants to potentially significant costs and adverse expenses.

3.3.2 A 'simplified and accelerated' procedure is, therefore, proposed, including a presumption against oral hearings, in terms of draft rule 58A.6.

Analysis of responses

3.3.3 All but two consultees offered substantive comments in response to this question. Most consultees expressed general agreement with the proposals, broadly for the reasons set out in the consultation paper. One consultee welcomed the proposals, particularly in light of judicial *dicta* to the effect that current arrangements for disposal of such applications were unsatisfactory.[14] Another expressed the view that a simplified and accelerated procedure was 'extremely important', particularly in order to ensure access to justice for third party interveners, without undue delay to the resolution of matters between the parties.

3.3.4 One consultee indicated anecdotal evidence to the effect that costs in the region of £20,000 could be incurred in applying for a PEO under the current regime: 'an unacceptable state of affairs, which strikes at the heart of the rationale for PEOs'. Nonetheless, another consultee suggested that further consideration ought to be given to the proposed, accelerated procedure.

3.3.5 A structured, written application process was proposed, in which information of a prescribed type and amount would be provided to the court, perhaps by way of standard forms, together with a practice note providing clear guidance on the

[14] *John Muir Trust, Petr* [2014] CSOH 172A, Lord Philip at para 25; *Gibson v Scottish Ministers* [2016] CSIH 10, Lord Menzies at para 71; *and Carroll v Scottish Borders Council* [2014] CSOH 30, Lord Drummond Young at para 25.

process and any pre-action protocol that may be required. A limited duration hearing, in respect of any matters not addressed sufficiently in the papers, was also suggested. These proposals were expressly supported by two other consultees.

3.3.6 The same consultee suggested the appointment of a designated judge, to determine PEO applications, in the interests of consistency and developing expertise. The publication of all such decisions was also called for, particularly if applications were to be made routinely in chambers, in order to assist potential future litigants and their advisors in the assessment of prospects of securing costs protection. Both proposals were expressly supported by two other consultees, one of whom expressed particular concern that the requirements of mandatory publication under article 9(4) of the Convention were not being met.[15] The rules ought to require publication of decisions 'as standard', in order to allow assessment of the operation of the PEO regime in practice.

3.3.7 Two consultees suggested that parties ought to be afforded the opportunity to exchange notes of argument, and to respond to any factual points of dispute arising in the application process, such as in respect of an applicant's financial resources/accounts. Another observed that behavioural adjustment on the part of practitioners would be necessary, in order to ensure that all relevant material was contained within the papers, and that oral hearings could be avoided in the majority of cases. Provision for judges to request oral hearings, if required, was noted as a safeguard.

3.3.8 In a similar vein, however, another consultee cautioned that it was often the process of drafting, exchanging and responding to written submissions that led to increased time and costs being incurred. This factor was said to merit careful consideration in the drafting of any predominantly written procedures.

3.3.9 The same consultee expressed a related concern that oral hearings may be preferable in some cases to expedite matters, where anomalies or missing information was

[15] [Aarhus Convention, article 9(4): "…Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible."]

apparent from the written PEO application. Whilst forensic analysis was not required, some testing could be justified and ought to be permitted,[16] allowing an opportunity for applicants to respond.

3.3.10 Although overlapping to some extent with the definitional issues encountered in response to earlier questions, one consultee called for draft rule 58A.6, in particular, to specify the relevant factors to be taken into account, in order to minimise resort to case law. It was considered preferable to create procedural rules that were largely 'self-contained' and gave litigants as much guidance as possible.

3.3.11 One consultee disagreed entirely with the proposed presumption against oral hearings, suggesting instead that hearings ought to be capable of being focussed sufficiently by the prior lodging of notes of arguments.

3.3.12 Another consultee called for a right of review of any refusal of a PEO 'on the papers', akin to that provided at the permission stage of judicial review proceedings, as the corollary of any presumption against oral hearings.

3.3.13 More generally, one consultee expressed reservations about residual delays, in the determination of PEO applications and underlying substantive proceedings in the Outer House, where similar provision was not made to expedite procedures in respect of PEOs in the Inner House. It was observed that the greatest delays could be incurred in the disposal of reclaiming motions solely against determinations of PEO applications. Relevant factors were said to include: the prescribed procedure; judicial availability; and the suspension of ongoing procedure in the Outer House, including the inability to fix any future hearing dates, pending disposal of the Inner House proceedings. Particular reference was made to the potential adverse effects on developer-litigants, for example, insofar as the delays and uncertainty in judicial review proceedings could be fatal to underlying projects.

3.3.14 Thus, it was suggested that either similar provision for expedited proceedings had to be made in the Inner House, or it ought to be possible, at least, to fix substantive

[16] Cf. *Gibson v Scottish Ministers* [2016] CSIH 10

hearing dates in the Outer House, notwithstanding any reclaiming motion pending in respect of a PEO only.

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

Summary of proposals

3.4.1 The Council proposes that an applicant's liability in adverse expenses, in the event of an unsuccessful PEO application, should be capped at £500, unless the court is satisfied that there are grounds justifying removal of the cap.

3.4.2 Draft rule 58A.9 makes provision for such a cap.

Analysis of responses

3.4.3 Of the twelve consultees who offered substantive comments in response to this question, ten were generally supportive of the proposed cap.

3.4.4 Of the two consultees who did not support the proposed cap, one observed that it would appear to be inconsistent with any refusal of a PEO application, and so reasonable recovery of costs ought to remain a matter for the court's discretion. Any cap ought, at least, to reflect the reasonable costs of the work involved.

3.4.5 The other consultee went further, and suggested that an applicant should not be liable for the expenses of an unsuccessful application at all. The proposed cap appeared to be arbitrary, and of doubtful deterrent effect against unmeritorious applications. The cost of making a PEO application, and the general lack of available funding for environmental litigation in Scotland, already served as a significant deterrent to potential applicants. In any event, the permitted recovery would be insignificant to respondents, although an increased cap was not supported. The likely effect in either case was merely 'tokenistic'. Another consultee echoed doubts as to the general prospects of recovery of such awards, but favoured the proposed cap combined with a degree of flexibility to depart from it 'on cause shown'.

3.4.6 Amongst the majority of consultees who were supportive of the proposed cap, one consultee observed that the proposal brought 'a much needed degree of fairness' to the process. Another 'welcomed' the proposal in the interests of certainty, observing

that it would remove the current 'vulnerability' of applicants to considerable expense. Another observed that the risk of substantial costs being incurred would be removed to a large extent by the determination of applications largely 'on the papers' and, therefore, the proposed cap was not objectionable.

3.4.7 Half of the majority consultees, however, expressed concern at the prospect of the cap being disapplied 'on cause shown'. (It may be observed that these consultees included some of both the 'environmental' and 'legal' (3:2) consultees.) One such consultee considered that the test was simply unclear. Others suggested that the existence of such an exception could encourage objections, substantially removing the intended effect to avoid applications being 'prohibitively expensive'. It was suggested that the proposed exception ought to be removed or, at least, to require exceptional circumstances, 'special cause', or a similar, more stringent test. One consultee suggested that prospects of success might also be relevant, so that the cap would not apply where claims had little or no prospects of success.

3.4.8 Further observations were made in respect of discrete procedural issues. Two consultees suggested that parties could be encouraged to reach agreement in respect of expenses, prior to any PEO application being made, either by way of the rules or a separate pre-action protocol. Where an applicant failed to seek agreement, and the application was subsequently unopposed, the respondent's liability in expenses could be restricted or excluded.

3.4.9 Another consultee queried the most appropriate timing of PEO applications in view of the proposed cap, in order to minimise the amount of work and costs incurred by respondents in respect of the proceedings as a whole, prior to such applications being determined. Subject to consideration of the impact of any relevant permission stage or requirement for leave in judicial review or appeal proceedings, it was suggested that applications could be called for at the outset, immediately upon the raising of proceedings.

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

Summary of proposals

3.5.1 The Council proposes changes in respect of the effect, on appeal, of PEOs granted at first instance.

3.5.2 Where *respondents* seek to pursue a substantive reclaiming motion, it is proposed that the original PEO should have 'continued effect', and would apply 'in relation to the totality of first instance and appeal proceedings'. Where *applicants* seek to pursue a substantive reclaiming motion, however, it is proposed that a fresh PEO application should have to be made in respect of the appeal proceedings.

3.5.3 Draft rule 58A.8 makes such provision in respect of reclaiming motions.

Analysis of responses

3.5.4 Three consultees offered no comments in response to this question, and four others indicated general support for the proposals with little by way of additional substantive comment.

3.5.5 The proposals were observed generally to be consistent with logic, the Convention requirements, and the underlying public interest. One such consultee observed, in particular, that a fresh PEO application in respect of an applicant's reclaiming motion would provide an opportunity to reassess prospects of success in light of the decision at first instance. Equally, the continued effect of a PEO in respect of a respondent's reclaiming motion would protect against the risk of such an appeal being used to circumvent the effect of an existing order.

3.5.6 Three other consultees indicated broad support for the proposals, subject only to clarification of particular issues. One such consultee recognised the benefit of the proposed continuing effect of PEOs, which removed the need for an additional procedural step, but sought to clarify the scope for 'review' by the Inner House in

such cases (draft rule 58A.8(2)). A general difficulty was perceived in assessing, at the outset, whether a PEO would be appropriate in relation to all subsequent stages of proceedings. Such a review ought, therefore, to take account of previously incurred costs, and any other material changes in the parties' circumstances.

3.5.7 Another such consultee called for consideration of whether provision should be made for the respondent's 'cross cap' to be 'extended' (ie increased) upon reclaiming, under reference to the varying power contained in draft rule 58A.7(2).

3.5.8 The third such consultee, whilst indicating that the draft proposals were reasonable, suggested that detailed consideration was required in respect of the operation of 'caps' and 'cross caps' on appeal in practice. No indication was given, however, of the particular 'issues' that may have been contemplated.

3.5.9 To that extent, at least, a two thirds majority of consultees may be taken to support the proposals, expressly or by implication due to lack of adverse comment.

3.5.10 The remaining one third of consultees adopted more complex positions in respect of the draft proposals, particularly with regard to the 'continued effect' of PEOs. That being so, the responses are set out largely in turn below.

3.5.11 Two consultees expressed the view that PEOs should have no automatic continuing effect whatsoever, on the basis that the appropriate limits would have to be subject to review in the circumstances of any reclaiming motion. One such consultee suggested simply that it would not be 'reasonable' for the limits applicable at first instance to remain unchanged, yet include appeal proceedings.

3.5.12 The other such consultee observed that the same criteria had to be applied, at first instance and on appeal, to determine whether proceedings were 'prohibitively expensive'. However, that did not mean that the court was obliged to make the same order in both cases, or that any order made at first instance would extend automatically to any appeal. Such an assessment had to take account of any costs

already incurred.[17] The objective elements of the assessment, such as public interest or complexity of proceedings, could also differ at each stage. Any limits fixed in respect of first instance proceedings might not be sufficient to allow recovery of an applicant's expenses on appeal. It was not inconceivable, for example, that relative caps of £5,000 and £60,000 could be appropriate to allow adequate recovery in complex environmental cases.

3.5.13 Moreover, the proposed restriction of the 'continued effect' of PEOs to appeals by respondents, and to the extent of original PEO limits only, was said to be 'inherently unfair', having regard to the requirements of the Convention.[18] The requirement of fairness applied in respect of the position of the applicant only. The same consultee observed that the additional time and expense incurred in considering the position afresh would, to some extent, be mitigated by the adoption of an otherwise simplified and accelerated procedure.

3.5.14 Another consultee expressed similar concerns that, if PEOs were to have continued effect, the limits ought not to remain 'static' (cf draft rule 58A.8(2)). The additional costs that may be incurred by the parties ought to be 'integrated' into any PEO that may be 'carried over' on appeal. Otherwise, the restriction of an applicant's ability, in particular, to recover such expenses risked creating inequality of arms between the parties.

3.5.15 Accordingly, it was suggested that PEOs should have continued effect 'as standard', regardless of whether it was the applicant or respondent who reclaimed. In that event, however, it was suggested that a respondent's 'cross cap' should be doubled automatically, to allow adequate recovery of an applicant's increased costs. An applicant ought, also, to have the opportunity to apply for an increased cross cap 'on cause shown', to allow for any additional outlays that may be necessary to maintain equality of arms. Any simultaneous 'automatic doubling' of the applicant's cap was

[17] *R (on the application of Edwards) v Environment Agency (C-260/11) EU:C:2013:221*, [2013] 1 WLR 2914, paras 44 – 45.

[18] [Aarhus Convention, article 9(4): "…the procedures referred to…shall…be fair, equitable, timely and not prohibitively expensive".]

not, however, supported. The applicant's cap would have been set at a level affordable to the particular applicant, which was unlikely to change as the case progressed. The proposed requirement for a fresh PEO application was, specifically, rejected on the basis that it would increase the likelihood of proceedings being 'prohibitively expensive'. Such a requirement would involve additional costs to applicants, following upon significant expenditure at first instance.

3.5.16 Thus, three consultees were agreed, at least, to the extent that the original limits of PEOs ought not to apply automatically on reclaiming, albeit to differing ends.

3.5.17 Another consultee agreed with the proposed 'continued effect' of PEOs in respondents' appeals, but rejected the proposed requirement for a fresh PEO application in respect of applicants' appeals. Any such application, at least under current arrangements, would involve a rehearsal of an applicant's case and consideration of its merits. Where a party had been found entitled to a PEO at an earlier stage of proceedings, however, prospects of success ought not to be a relevant consideration. That was particularly so, in the interests of transparency, having regard to the statistical rarity of successful claims against public authorities. Moreover, any consideration of prospects of success at that stage, particularly where applications were likely to be determined in chambers, could be viewed by applicants as functioning, in effect, as a requirement for leave to appeal. Accordingly, prospects of success ought not to be a determining factor.

3.5.18 Another consultee expressed uncertainty as to the intended 'continued effect' of draft rule 58A.8(2), in terms of whether equivalent limits were envisaged to apply separately at first instance and on appeal, or whether the original limits would apply to the totality of first instance and reclaiming proceedings combined. The proposal was supported on the presumption of the former, and not the latter, intention. Thus, a separate and equivalent 'cross cap' ought to apply in respect of a respondent's liability, on a respondent's appeal, as applied at first instance.[19] Otherwise, the

[19] [cf draft rule 58A.8(2): "*the limits*…*include* liability for expenses occasioned by the reclaiming motion" (emphasis added).]

purpose of the PEO could be nullified as a result of costs already incurred at first instance.

3.5.19 The composition of the two thirds majority view, broadly deemed to be supportive of the draft proposals, is set out in the table below:

Category	**Majority**	**Minority**	**Total**
Legal profession, professional bodies and academics	5	0	5
Environmental groups	0	4	4
Local authorities	2	1	3
Government and other public bodies	2	0	2
Individuals	1	0	1
Total	10	5	15

3.5.20 Notably, all of the 'environmental' consultees, and one 'local authority' consultee formed the minority, which expressed some degree of discontent with the proposals as they stand.

3.6 ***Do you have any comments on the draft amendment to rule 38.16?***

Summary of proposals

3.6.1 Where the *only* issue subject to appeal in any reclaiming motion is the determination of a PEO application, an accelerated procedure is proposed whereby it will be presumed that the appeal will be determined 'on the papers' without an oral hearing.

3.6.2 A draft amendment to the existing rule 38.16 in respect of reclaiming motions is proposed in order to achieve this end.

Analysis of responses

3.6.3 Of the nine consultees who provided substantive comments in response to this question, all but one indicated general support for the proposals, in order to reduce the time and costs otherwise associated with the hearing of such reclaiming motions.

3.6.4 One consultee noted that the proposed approach would be fair, subject to the court exercising discretion to convene a hearing, if necessary. Others emphasised the relevance, in this context, of views expressed in connection with expedited first instance proceedings, including the need for formalised written processes, specialist judges, and mandatory publication of decisions.

3.6.5 Another consultee highlighted the need to reflect any proposed reform in existing guidance in respect of Inner House procedure. Any presumption against oral hearings ought, in particular, to be reflected in the existing guidance in respect of notes of argument, which anticipated oral hearings taking place. If appeals were to be determined without a hearing, the parties might also require an opportunity to exchange draft notes of argument at an earlier stage.[20]

3.6.6 The sole consultee who disagreed with the proposed presumption against oral hearings did so on the basis that, as highlighted in respect of applications at first

[20] [See, eg, Court of Session Practice Note No. 3 of 2011 (Causes in the Inner House), paras 83 – 89.]

instance, any hearings ought to be capable of being focussed sufficiently by the lodging of notes of argument in advance.

3.6.7 The remaining six consultees may be taken to support the proposals, by implication due to lack of adverse comment.

3.7 ***Do you have any other comments on the proposals contained in this paper?***

3.7.1 Five consultees (one third) offered no further substantive comments. The additional comments of the remaining consultees are set out below, insofar as not captured elsewhere. For ease of reference, however, given the varied nature of the responses, which represent the views of only a small number (often one) of consultees in any given case, the issues raised are presented in summary form only.

3.7.2 A number of suggestions were made in respect of possible changes to the draft rules, which are currently under consideration:

(i) *Removal of power to increase applicant's cap:*

An applicant's liability ought not to be subject to increase (draft rule 58A.7(2)), subject to provision for differing limits to apply in respect of different types of applicants (see, eg, the Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland) 2017). [21] The proposed change removed certainty and predictability, was likely to deter legitimate claims, and ought to be removed.

Similar 'hybrid' caps had been introduced in England and Wales, and were now the subject of judicial review proceedings.[22] Anecdotally, individual applicants had been deterred from bringing representative claims (eg on behalf of unincorporated associations), due to the requirement to submit their personal finances to scrutiny, and the risk of significant liability in adverse expenses.

---

[21] [The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013/81, as amended by the Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland) 2017/27 provides (regulation 3) that:
"(2) […] in an Aarhus Convention case, the court shall order that any costs recoverable from an applicant shall not exceed £5,000 where the applicant is an individual and £10,000 where the applicant is a legal person or an individual applying in the name of a legal entity or unincorporated association. (3) The court may *decrease* the amount specified in paragraph (2) if it is satisfied that not doing so would make the costs of the proceedings prohibitively expensive for the applicant." (emphasis added)]

[22] *RSPB & others v Lord Chancellor & others* (CO/1011/2017); See, for example, Rule 8(5) of the Civil Procedure (Amendment) Rules 2017/9522, inserting new provisions into Section VII of Part 45 of the Civil Procedure Rules relating to costs limits in Aarhus Convention claims.

One consultee, however, expressly welcomed the greater flexibility offered by the possibility of variation (and increase) of the applicable limits.

(ii) *Removal/replacement of respondents' cross-caps:*

The provisions in respect of 'cross caps', which were relevant to whether or not proceedings were 'prohibitively expensive', should be removed from the PEO regime altogether (ie draft rule 58A.7(1)(b) should be deleted). Such reciprocal caps lacked any legal basis in the Convention, or the implementing Public Participation Directive[23], neither of which were concerned with the legal costs of *respondents* in environmental litigation.

There was almost always an asymmetric relationship between the parties to Convention cases, which PEOs were designed to address. The prevailing limit of £30,000 was apparently arbitrary. There was a risk that it would prevent the recovery of expenditure sufficient to secure effective legal representation, and thereby create inequality of arms. In any event, applicants were subject to the ordinary principles governing the recovery of expenses in civil litigation in Scotland. There was no need for duplication of the 'disciplinary' effect of these rules by capping the recovery of costs.

Instead, the 'default' limits (per draft rule 58A.7(1)) ought to be replaced with 'qualified one-way costs shifting'. Thus, applicants who qualified for PEOs would face no liability whatsoever in respect of unsuccessful claims, but respondents would remain liable for applicants' costs in respect of successful claims.

Such a simple apportionment of costs would put parties on a more equal footing in environmental litigation.

[23] [Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC]

(iii) *Exclusion of liability for costs of third party interveners*:

The potential deterrent effect of liability in expenses to third party interveners was unlikely to be affected by the proposed changes to the rules. There was a concern that third parties might intervene solely to deter applicants from pursuing such proceedings.

Thus, applicants' exposure to potential liability in respect of the expenses of interested parties ought to be excluded.

To similar effect, where a PEO was refused, consideration ought to be given to barring third parties from entering the process, in order to minimise the time and costs incurred by the applicant. Otherwise, such interventions could have a 'chilling effect' on the raising of environmental proceedings.

(iv) *Other suggested procedural reforms*:

- It was necessary for applicants to have the opportunity to respond to any opposition to the granting of PEOs, in order to contest matters of factual dispute. Draft rule 58A.5 ought to be amended accordingly.

- Where a PEO application was opposed, unsuccessfully, solely on the basis that the claim did not fall within the scope of the Convention, an applicant's expenses ought to be indemnified.

- Procedural timetables, such as those issued in respect of Inner House proceedings, ought to be used to give fair notice of the steps to be followed in cases where PEOs might apply.

- The imposition of requirements in respect of 'standing' and 'permission', similar to those applicable to judicial review, ought to be considered in all cases where PEOs might apply. Sufficient interest in the main proceedings was a prerequisite to the granting of a PEO; otherwise, the

court should not adopt an unduly restrictive approach in relation to environmental challenges.

- A broader range of 'default' PEO limits ought to be provided for (eg higher limits in respect of national environmental organisations, and lower limits in respect of community councils representing under-resourced communities).

  Indeed, one consultee noted that an 'exceptional fundraising effort' had been required in at least one judicial review of a local authority planning decision[24], which was unlikely to be replicated in less well-resourced communities.

- The prevailing level of court fees was relevant to whether proceedings were 'prohibitively expensive'. Such fees ought, therefore, to play a part in determining the appropriate limits on liability. Provision ought, also, to be made for PEO applicants to be exempted from payment.

- Cost estimates provided by the parties in connection with a PEO application should be (or, at least, be presumed to be) binding, in order to protect applicants from subsequent recovery of additional costs. Any such costs would, necessarily, alter the position in respect of whether proceedings were 'prohibitively expensive'. Any such provision could be restricted to cases in which PEOs had been refused on the basis of cost estimates.

- Any financial information provided by applicants, in support of PEO applications, ought to be confidential to the court and parties' legal advisors. There were clear privacy implications associated with providing such information, and explicit provision should be made in the rules or accompanying guidance for applicants to be afforded confidentiality.

[24] [*St Andrews Environmental Protection Association Limited v Fife Council* 2016 SLT 979, [2016] CSIH 22]

- Applicants ought not to be required to disclose the terms upon which they were legally represented (eg *pro bono*), and draft rule 58A.5(3)(ii) to this effect ought to be removed. More favourable treatment might be afforded to applicants whose lawyers were working *pro bono*, which could be detrimental to access to justice and the economic viability of representation in environmental cases.

3.7.3 Further general observations were made, in respect of the perceived effects of the PEO regime:

(i) *Deterrent effect of costs in the recovery of environmental information:*

The consultation was welcomed from the perspective of enforcement and promotion of the Environmental Information (Scotland) Regulations 2004, as derived from the Convention. None of the decisions issued by the Scottish Information Commissioner thereunder, from January 2005, had been the subject of appeal by applicants. Some 151 decisions had been issued in the last three years alone. The cost of appealing was likely to be a major deterrent factor, and the proposed rules provided greater access to justice in that context.

Indeed, one consultee cited direct personal experience of such a deterrent effect, notwithstanding the merits of a case, and the prohibitive anticipated expense (anecdotally c. £50,000) of such appeals to the Court of Session. The recovery of information was said to be a basic requirement of vindicating other environmental rights, and the prohibitive cost of doing so represented a continuing failure of Scots law to comply with the Convention.

(ii) *Deterrent effect of applicant's own costs:*

A critical problem with the PEO regime was that it offered no assistance to applicants in respect of their own costs, in the event of an unsuccessful claim.

In addition to the requirement that proceedings ought not to be 'prohibitively expensive' in terms of article 9(4) of the Convention, article 9(5) required consideration of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.[25]

Scotland had been found not to comply with either obligation, in terms of recent progress reviews by the Aarhus Convention Compliance Committee.[26] Such 'ongoing, systemic failure to meet international obligations' was a strong argument in support of change.

3.7.4 Finally, it has not been considered useful to reproduce, to any detailed extent, the anecdotal evidence of consultees as to the level of costs incurred in particular environmental cases. Reference may be made to the terms of individual responses in this regard.

[25] [Aarhus Convention, article 9(5): "In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice."]

[26] See, most recently, Aarhus Convention Compliance Committee, *Second progress review of the implementation of decision V/9n on compliance by the United Kingdom with its obligations under the Convention* (February 2017), para 107: ["The Committee accordingly finds that the Party concerned has not yet fulfilled the requirements of decision V/9n paragraph 8(a), (b) and (d) with respect to Scotland…"]

4 Conclusions

4.1 Overall, consultees were broadly supportive of the need for increased costs protection for applicants in environmental cases, and for changes to be made to the rules of court to that effect, in order to ensure compliance with the Convention.

4.2 One consultee was 'encouraged by the nature and content of this consultation', which brought Scotland closer to compliance with the Convention. Another consultee observed that the proposed changes would 'go some considerable way to making the procedure more accessible for members of the public'. Another indicated support for the proposals to 'strengthen the protection available to members of the public wishing to challenge decisions impacting on the environment'.

4.3 Notwithstanding the differing views of consultees as to the precise mechanism by which to do so, the overwhelming concern was generally to ensure sufficient clarity and guidance as to the applicable test, and relevant factors, in the determination of PEO applications. It was broadly accepted that the purpose was to transpose, to a greater or lesser degree, the effect of the decisions in *Edwards* in relation to such applications. There was broad consensus, in particular, that prospects of success ought not to form a separate barrier to applications.

4.4 The proposed move to simplified and accelerated procedures was widely supported, subject to ensuring that savings in time and costs of oral hearings were not simply expended elsewhere in the increased preparation of written applications. In addition, the introduction of expedited procedures should not prejudice the ability of parties and the court to engage effectively with the issues in particular cases.

4.5 There was general support for the adverse expenses of unsuccessful PEO applications to be capped at a low level, subject to sufficient safeguards against such a cap becoming a matter of routine dispute or disapplication.

4.6 Any provision for PEOs to have continuing effect in relation to reclaiming motions was likely to require consideration of the circumstances on appeal, and the potential

unintended consequence that proceedings would be 'prohibitively expensive' as a result of any continuing restriction on recovery of costs by applicants.

4.7 It is hoped that the foregoing analysis of responses will be of some assistance to the Council, in its further consideration of possible changes to the rules of court.

4.8 In the wider context, the Council may also wish to have regard to the analysis of responses to the Scottish Government's related consultation in respect of environmental justice in Scotland, including the observations in respect of PEOs contained therein.[27]

Jacqueline Fordyce

***for* the Scottish Courts and Tribunals Service (on behalf of the Scottish Civil Justice Council)**

October 2017

[27] [*Developments in environmental justice in Scotland – Consultation analysis and Scottish Government response*, September 2017: http://www.gov.scot/Resource/0052/00525265.pdf.]

Annex – List of Consultation Respondents ("consultees")

1. St Andrews Environmental Protection Association Ltd ("STEPAL")
2. Aberdeenshire Council
3. Faculty of Advocates
4. John Muir Trust
5. Glasgow City Council
6. Society of Solicitor Advocates
7. RSPB Scotland
8. Scottish Information Commissioner
9. East Ayrshire Council
10. Law Society of Scotland
11. Scottish Environment Link Legal Governance Subgroup
12. School of Law, University of Glasgow
13. Scottish Government
14. Respondent details withheld
15. MacRoberts