

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

The Scottish Government agrees it should be left to the court to determine whether proceedings are “prohibitively expensive” in accordance with case law on what this means and in light of the facts and circumstances of the case.)

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?

The Scottish Government also agrees that presenting the question of prospects of success as distinct from the question of whether or not the proceedings are prohibitively expensive may be unhelpful, given that the *Edwards* cases make clear that “prospects of success” is one of the factors which the court has to take into account in determining whether or not the proceedings are “prohibitively expensive”.

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

The Scottish Government supports a simplified and accelerated procedure for the determination of PEO applications and one which minimises costs for an unsuccessful applicant. The Scottish Government therefore supports a presumption against there being any hearing to consider the application, with determination of the application by the court being based solely on consideration of the papers.

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

The Scottish Government supports the proposal to cap an applicant’s liability in expenses for an application for a PEO to £500 where the application is refused, except on cause shown.

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

The Scottish Government can see benefits to the proposal that a PEO should continue to operate in relation to a reclaiming motion taken at the instance of an applicant’s opponent. It may be advantageous to remove an additional step from the process. Nevertheless, the Scottish Government considers that it would be difficult for the court to assess at the outset of proceedings whether a PEO is appropriate in relation to all subsequent stages, particularly as the court must ordinarily take into account costs previously incurred. In addition, the circumstances of either or both of the parties could change in the time between the original hearing granting the PEO and an appeal. As such, the Scottish Government would welcome confirmation that previously incurred costs and any change in the parties’ circumstances can be taken into account by the Inner House when exercising its “review power” under proposed rule 58A.8(2).

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

The Scottish Government supports the proposal to amend the Court of Session rules to create a presumption that where the only issue in an appeal is the determination of a PEO application, there will be no hearing.

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

The Scottish Government is supportive of the proposals strengthen the protection available to members of the public wishing to challenge decisions impacting upon the environment.