Scottish Civil Justice Council

PUBLIC CONSULTATION: on extending the availability of Protective Expenses Orders

15 August 2025

CONTENTS

The accompanying documents support the proposals made within this paper:

- *Draft Rules*
- *Business and Regulatory Impact Assessment (BRIA)*
- *Equalities Impact Assessment (EQIA)*
- *Respondent Information Form (RIF)*

SECTION 1: RESPONDING TO THIS CONSULTATION

1. In Scotland the ability to provide *costs protection* is met by the court granting a *Protective Expenses Order (PEO),* following an application made under either the common law or an application that is specific to environmental law. For that latter category the Council is proposing that the ability to lodge a motion for an *Environmental PEO* should be extended beyond the Court of Session to the sheriff courts; and the Sheriff Appeal Court.

2. Feedback on the accompanying draft rules that are needed to support that proposed extension of scope is now sought from members of the public, academics, businesses, community groups, non-governmental organisations, public bodies, the judiciary, the legal profession, court officials, and officials in the Scottish Legal Aid Board.

3. This consultation will be open for twelve weeks. Written responses are invited by **Friday 14 November 2025**.

4. To respond please email scjc@scotcourts.gov.uk with your response, along with a completed **Respondent Information Form.**

How will your response will be handled?

5. Your response will be handled in line with the information you provide within your Respondent Information Form. If you are content for your response to be published it will be uploaded to our website. If you ask for your response not to be published the Council will regard it as confidential and treat it accordingly.

6. All respondents should note that the Council is subject to the provisions of the Freedom of Information (Scotland) Act 2002. If a Freedom of Information (FOI) request is received about the responses to this consultation, any response (including those not published) may need to be made available in order for the Council to respond.

Why run a Public Consultation?

7. Climate change and the protection of the environment are of increasing concern across a broad range of civil society so seeking feedback via a Public Consultation is intended to secure the widest possible range of feedback on the availability and use of *Environmental PEOs*.

Who are we consulting with?

8. The Council would welcome responses from the following:

    General Public:

Litigants and potential litigants who may be seeking *cost protection* against an adverse award of expenses being made against them.
Those with a general interest in the protection of the environment.

Academics
Professor Tom Mullen, Glasgow University
Those having published articles on the protection of the environment who have an interest in the availability of *costs protection*.

Advice and Assistance:
Citizens Advice Scotland
Consumer Scotland
Those providing advice or assistance to any person or organisation that may be considering whether to seek a PEO when initiating a civil action.

Business Groups
CBI Scotland – Infrastructure Working Group
Federation of Small Businesses
Scottish Building Federation
Scottish Creel Fisherman
Scottish Renewables
Scottish Water
Scottish Whiskey Association
Those developers that have been involved in litigation where a motion for an *Environmental PEO* was considered.

Environmental groups:
Environmental Rights Centre for Scotland (ERCS)
Friends of the Earth Scotland
Greenpeace UK
John Muir Trust
Open Seas Trust
RSPB Scotland
Scottish Environment LINK
Sustainable Shetland
Trees for Life
Wildcat Haven Community Interest Company
Any other Non-Government Organisation (NGO).

Public Bodies:
Coalition of Scottish Local Authorities (COSLA)
Equalities and Human Rights Commission (EHRC) Scotland
Environmental Standards Scotland (ESS)
NatureScot
Information Commissioners Office (ICO) Scotland
Scottish Environmental Protection Agency (SEPA)
Scottish Human Rights Commission (SHRC)
Scottish Public Services Ombudsman

Judiciary:

Senators of the College of Justice
Sheriffs Principal
Sheriffs and Summary Sheriffs Association

Practitioners:
Faculty of Advocates
Scottish Association of Law Centres (SALC)
Society of Local Authority Solicitors
Society of Solicitor Advocates
Law Society of Scotland

Officials:
Scottish Courts and Tribunals Service
Scottish Legal Aid Board

9. To support the policy interests of Scottish Ministers, the Council has forwarded a copy of these consultation papers on to Scottish Government officials.

10. To support the policy interests of the Equalities, Human Rights and Civil Justice Committee (EHGRCJC) of the Scottish Parliament, the Council has forwarded a copy of these consultation papers on to the convenor, and to SPICe.

Comments and complaints

11. If you wish to provide any feedback to the Council on this consultation, or how it is being conducted, then please email scjc@scotcourts.gov.uk.

SECTION 2: EXECUTIVE SUMMARY

Purpose

12. To seek feedback on extending the availability of *Environmental PEOs* beyond the Court of Session to the sheriff courts; and the Sheriff Appeal Court.

Background

13. Any members of the public, community groups or national environmental bodies that may be considering whether or not to initiate a legal action in the public interest would need to ensure they have enough financial resources in place to meet the costs of securing their own legal representation, as well as the ability to meet the reasonable costs of their opponent should they lose.

14. In practice examples do arise where a potential litigant may only have limited resources available whereas their opponent may well be a large well-funded organisation or public body with access to both significant funds and legal expertise. Such imbalances of power create a David versus Goliath situation that can act as a brake on access to justice. Whenever a clear "inequality of arms" does exist then natural justice may require the courts to consider whether the provision of some form of *costs protection* would be appropriate.

Protective Expensive Orders (PEO's)

15. In Scotland the method used for seeking *costs protection* is to lodge a motion for a Protective Expenses Order (PEO). If that motion is granted the applicant gains protection against the financial risk of an adverse award of expenses being made against them. In practice their liability to pay an award of expenses to their opponent is usually capped at £5,000 if they lose; and if they win the expenses they would be able recover from that opponent would be limited to a cross cap of £30,000. There are 2 options available when seeking a PEO in Scotland:

    - *A COMMON LAW PEO* – a motion for this type of PEO can be lodged under the common law 'in any civil proceedings' that may be 'initiated in any court'; and

    - *AN ENVIRONMENTAL PEO* – in some Court of Session proceedings there is the option to lodge a more specific motion for an *Environmental PEO* under the procedure set out within RCS Chapter 58A.

The volume of cases:

16. Research published by the Council last year established that from 2005 to 2024 there were a total of 28 cases where a motion for a PEO was considered; and of those 28 cases: - 12 had sought 1 or more *Common Law PEOs* and 16 had sought 1 or more *Environmental PEOs*.

The existing rules

17. At present the existing *costs protection procedure* is limited to the Court of Session, and it does only support litigants seeking an *Environmental PEO* within a judicial review or a statutory appeal under:

    - *RCS Chapter 58A (Protective Expenses Orders in Environmental Appeals and Judicial Reviews).*

18. *Annex 1* –sets out a brief history for those rules; which took legal effect from March 2013 and were subsequently amended in 2015, 2018 and 2024.

The Policy Objectives

19. The policy objectives when proposing to extend the availability of *Environmental PEOs* beyond the Court of Session are:

    - *To improve access to justice* – by extending the availability of *costs protection* against an adverse award of expenses, as that can reduce financial risk for potential litigants and may lead to a wider range of cases being initiated.

    - *To provide comparable rules* – by mirroring the general approach taken in the existing PEO Rules across to the sheriff courts and the Sheriff Appeal Court.

    - *To improve Aarhus compliance* – by addressing the Aarhus concerns raised on the 'type of cases' covered by an *Environmental PEO*.

SECTION 3: GENERAL BACKGROUND

Meeting the Guiding Principles on the Environment[1]

20. In proposing these changes *best practice* requires the Council to give "*due regard"* to the *"significant effects"* that this *costs protection procedure* can have on the environment. That includes:
    - The opportunities to avoid or reduce any adverse effects; and
    - The opportunities to enhance the positive effects.

21. The following 3 paragraphs document how that requirement is met.

<u>Does this procedure have a "significant effect" on the environment?</u>

22. The answer is yes. Making provision for the availability of a *costs protection procedure* does have a positive and "significant effect" on the environment; as for

[1] *https://www.gov.scot/publications/scotlands-guiding-principles-environment-statutory-guidance/documents/*

some that assistance will be essential to exercising their right to protect the environment.

The opportunity to avoid or reduce adverse effects *(on the environment)*

23. In situations where the availability of *costs protection* was a determinative factor in a case proceeding to a conclusion; then in part the availability of this *procedure* will have made a small contribution to any environmental harm that was avoided.

The opportunity to enhance positive effects *(on the environment)*

24. Extending *Environmental PEOs* beyond the Court of Session will enable pursuers in a far wider range of proceedings to access *costs protection* when initiating an action to help protect the environment'. In situations where *costs protection* is granted it can potentially increase the number of environmental cases initiated in the courts.

What is expected under the Aarhus Convention?

25. Within the Aarhus Convention - article 8 *(refer annex 2)* sets out the general expectations on how a member state is to support "public participation" in its decision making. Running this Public Consultation exercise is the main option being used by the Council to support the public participating in the development of these proposed changes.

26. Within the Aarhus Convention - article 9 *(refer annex 3)* sets out the general expectations on how a member state can help to facilitate effective "access to justice". Article 9 (5) expects "appropriate assistance mechanisms" to be provided with the aim of actively helping to remove or reduce any financial barriers to achieving access to justice. The 3 key "assistance mechanisms' to be provided by signatories to the convention are:
    - The ability to access '*civil legal aid'*;
    - The ability to access '*exemptions from court fees'*; and
    - The ability to seek '*costs protection'* in environmental cases.

27. To deliver on that second bullet point - the Scottish Government introduced *fee exemptions* for Aarhus related cases with effect from July 2022. If approved, this proposed extension to the sheriff court and the Sheriff Appeal Court would be accompanied by that *fee exemption* scheme being extended to those courts.

28. To deliver on that third bullet point - the Court of Session introduced the current *costs protection* procedure (the PEO Rules) with effect from March 2013. If approved the extensions proposed within this paper will provide comparable *cost protection* procedures within the sheriff courts, and the Sheriff Appeal Court.

The proposed changes

29. The remainder of this paper is structured as follows:

- *Section 3* - provides readers with general background on PEOs;
- *Section 4* - narrates the proposed new procedure in the sheriff courts;
- *Section 5* – narrates the proposed new procedure in the Sheriff Appeal Court;
- *Section 6* – would amend the existing rules in the Court of Session;
- *Section 7* – considers other potential future rule changes; and
- *Section 8* – seeks feedback on 3 amendments the Council made last year.

30. The narrative for the proposals made in sections 4, 5 and 6 should be read in conjunction with the accompanying draft rules instrument.

SECTION 4: EXTENDING PEO'S TO THE SHERIFF COURTS

31. This section proposes the introduction of a *costs protection* procedure within the sheriff courts; which in general would mirror the Court of Session procedure.

What happens at present?

32. There is an existing ability to apply for a *Common law PEO* in any first instance proceedings progressed within the sheriff courts. To date the Council is not aware of any such applications being made. The planning assumption is that parties will continue to underutilise that alternative when seeking *costs protection*.

What is being proposed?

33. ***Proposal 1*** – is to enable potential litigants in the sheriff courts to seek an *Environmental PEO* when initiating a summary application under the Environmental Protection Act 1990 *(the 1990 Act)*[2]. That proposed change would be achieved by inserting a new Part LV into the Summary Application Rules:

    PART LV: Protective Expenses Orders:
    - *3.55.1 - Application and interpretation of this chapter*
    - *3.55.2 – Eligibility for protective expenses orders*
    - *3.55.3 - Applications for protective expenses orders*
    - *3.55.4 - Determination of applications*
    - *3.55.5 - Terms of protective expenses orders*
    - *3.55.6 - Expenses of applications*
    - *3.55.7 – expenses of interveners*

34. The policy intention is to support a motion for a PEO being sought across the range of "summary applications" that could be made under that 1990 Act:

Section of the 1990 Act	Nature of the 'summary application' that could be made to a sheriff

[2] https://www.legislation.gov.uk/ukpga/1990/43/contents

PART II – WASTE ON LAND	
s46 (7)	An appeal against a requirement to provide *"receptacles for household waste".*
s47 (7)	An appeal against a requirement to provide *"receptacles for commercial or industrial waste".*
s59 (2)	An appeal against a requirement for *"removal of waste unlawfully deposited".*
PART II A – CONTAMINATED LAND	
s78L (1)	An appeal against a *"remediation notice"* served by a local authority.
PART III – STAUTORY NUISANCE & CLEAN AIR	
s80 (3)	An appeal against an *"abatement notice"* served by a local authority.
s82 (1)	An application by a person *"aggrieved by the existence of a statutory nuisance".*
PART IV – LITTER etc.	
s91 (1)	An application by a person aggrieved by litter seeking a "*litter abatement order""* from the court.
s92 (4)	An appeal against a *"litter abatement notice"* that had been served by a principal litter authority.
s94 (7)	An appeal against a *"street litter control notice*" that had been served by a principal litter authority.
s94 (8)	An application by a principal litter authority that a person has failed or is failing to comply with a *"street litter control notice*".

SECTION 5: EXTENDING PEO'S TO THE SHERIFF APPEAL COURT

35. This section proposes the introduction of a *costs protection* procedure in the Sheriff Appeal Court; which in general would also replicate the approach taken within the Court of Session.

What happens at present?

36. There is an existing ability to apply for a *Common law PEO* in appellate proceedings in the Sheriff Appeal Court at present. To date the Council is not aware of any such applications being made. The planning assumption is that appellants and their legal representatives will continue to underutilise that alternative when seeking *costs protection*.

What is being proposed?

37. ***Proposal 2*** – would enable an appellant to carry forward an existing *Environmental PEO* when appealing a decision to the Sheriff Appeal Court, or to seek an *Environmental PEO* anew from that appellate court. That change can be achieved by inserting a new chapter 28A into the Sheriff Appeal Court Rules:

    SACR - Chapter 28A: Applications for Protective Expenses Orders
    - *28A.1 - Application and interpretation*
    - *28A.2 – Expenses protection in appeals from the sheriff court*
    - *28A.3 - Applications for protective expenses orders*
    - *28A.4 - Determination of applications*
    - *28A.5 - Terms of protective expenses orders*
    - *28A.6 - Expenses of applications*
    - *28A.7 - Expenses of interveners*

38. The scope set out in proposed rule 28A.1 is intended to support a PEO being considered in any appeal of a sheriffs decision regarding a "summary application" that was made under that 1990 Act:

Section of the 1990 Act	The 'summary applications' where a sheriffs decision could be appealed onwards to the Sheriff Appeal Court (SAC)
PART II – WASTE ON LAND	
s46 (7)	An appeal against a requirement to provide *"receptacles for household waste".*
s47 (7)	An appeal against a requirement to provide *"receptacles for commercial or industrial waste".*
s59 (2)	An appeal against a requirement for *"removal of waste unlawfully deposited".*
PART II A – CONTAMINATED LAND	
s78L (1)	An appeal against a *"remediation notice"* served by a local authority.
PART III – STAUTORY NUISANCE & CLEAN AIR	
s80 (3)	An appeal against an *"abatement notice"* served by a local authority.
s82 (1)	An application by a person *"aggrieved by the existence of a statutory nuisance".*
PART IV – LITTER etc.	
s91 (1)	An application by a person aggrieved by litter seeking a "*litter abatement order""* from the court.
s92 (4)	An appeal against a *"litter abatement notice"* that had been served by a principal litter authority.
s94 (7)	An appeal against a *"street litter control notice*" that had been served by a principal litter authority.
s94 (8)	An application by a principal litter authority that a person has failed or is failing to comply with a *"street litter control notice.*"

SECTION 6: AMENDING PEO PROCEDURE – IN THE COURT OF SESSION

39. In addition to the above proposals to extend the use of PEOs to the sheriff courts and the Sheriff Appeal Court this section summarises proposed changes to the existing ability to access *costs protection* within the Court of Session.

What happens at present?

40. The existing ability to seek an *Environmental PEO* within the Court of Session is provided for in:

    RCS - Chapter 58A - Protective Expenses Orders in Environmental Appeals and Judicial Reviews:
    - *58A.1 - Application and interpretation*
    - *58A.2 – Applications relating to requests for environmental information*
    - *58A.3 - Public participation in decisions on specific environmental activities*
    - *58A.4 – Contravention of the law relating to the environment*
    - *58A.5 - Applications for protective expenses orders*
    - *58A.6 - Determination of applications*
    - *58A.7 - Terms of protective expenses orders*
    - *58A.8 - Expenses of protection in reclaiming motions*
    - *58A.9 - Expenses of applications*
    - *58A.10 – Expenses of interveners*

41. The option to seek an *Environmental PEO* is limited to the "relevant proceedings" defined under the interpretation clause at RCS rule 58A.1.

What is being proposed?

42. ***Proposal 3*** – is to amend that definition of 'relevant proceedings' under rule 58A.1 so that in future it would also include proceedings progressed under the "Group Procedure" rules. That change could be achieved by inserting the following sentence into rule 58A.1:

    - *(c) - "Group proceedings under section 20 (1) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018".*

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43. ***Proposal 4*** – is to ensure that a PEO granted by an appeal sheriff within the Sheriff Appeal Court can be carried forward in any onwards appeal to the Inner House; and to confirm that the Court of Session also has the power to grant a PEO anew where one has not been carried forward from a lower court. That change can be achieved by inserting a new rule *58A.8A:*

    Expenses protection in appeals

    (1) Paragraph (2) applies where—

(a) a sheriff (or the Sheriff Appeal Court, as the case may be) has made a protective expenses order in relation to proceedings before them; and
(b)a decision in those proceedings is appealed.

(2) Subject to any review of the protective expenses order by the Court, the limits on the parties' liability in expenses set by the order include liability for expenses occasioned by the appeal.

(3) A party who would have been entitled to apply for a protective expenses order in proceedings in the lower courts which are appealed to the Court (whether or not the party did so apply) may apply for a protective expenses order in relation to the appeal.

(4) The application must be made, except on cause shown, no later than is reasonably practicable after the appeal has been marked."

SECTION 7 – THE POTENTIAL FUTURE RULE CHANGES

44. This section sets out 3 other options for change where the Council is seeking further feedback to inform its final policy decisions.

45. *Policy Consideration 1* – is to reconsider whether to retain the flexibility to increase the cost caps of £5,000 and £30,000 by exception.

46. Between 2013 and 2018 the cost caps of £5,000 and £30,000 were treated as "fixed maximum sums" which acted as a constraint on the exercise of judicial discretion by the courts. In 2018 the procedure was changed to the use of 'variable sums' by rewording RCS rule 58A.7 to read:

Terms of protective expenses orders

(1) A protective expenses order must—
(a)limit the applicant's liability in expenses to the respondent to the sum of £5,000, ***or such other sum as may be justified on cause shown****; and*
(b)limit the respondent's liability in expenses to the applicant to the sum of £30,000, ***or such other sum as may be justified on cause shown****.*

(2) Where the applicant is the respondent in proceedings mentioned in rule 58A.1(1)(a)—
(a)paragraph (1)(a) applies as if the reference to the applicant's liability in expenses to the respondent was a reference to the applicant's liability in expenses to the appellant; and
(b)paragraph (1)(b) applies as if the reference to the respondent's liability in expenses to the applicant was a reference to the appellant's liability in expenses to the applicant.

(3) In paragraph (1), "the respondent" means—
(a)all parties that lodge answers in an application to the supervisory jurisdiction of the court; and
(b)all respondents in an appeal under statute.

47. The inclusion of those two references **(in bold)** to "on cause shown" meant that, by exception, the judiciary could specify a higher cap on a case by case basis; in situations where a higher cap would be more appropriate to reflect the known financial circumstances of a party.

48. The Aarhus Convention Compliance Committee (ACCC) would prefer that the Council reverts back to the previous use of "fixed maximum sums" as that provides a more simplified approach. In practice that change could be achieved by simply omitting the phrase "…*or such other sum as may be justified on cause shown"* where it appears within rule 58A.7.

49. Adopting that option would address the concerns raised about the level of uncertainty that arises if a cap was to be increased unnecessarily. In reality such an upwards lift would only be contemplated if it was justified by the funds available to a party. In practice no *Environmental PEOs* have been granted with a cap above £5,000 since their introduction in 2013.

50. In the absence of any practical examples; this hypothetical example conveys one type of situation where an increased cap could be appropriate;

    - *Hypothetically - if a public fundraising exercise had been undertaken and only £25,000 of those funds remained when £30,000 (or more) was required to get that case to a conclusion then the "interests of justice" could be better served by the court increasing the normal £5,000 cap to £30,000 as that would see the £25,000 of funds raised from the public used for its intended purpose; and leave the party exposed to a maximum of £5,000 if they lost.*

51. For any 'unrepresented' member of the public contemplating taking legal action then reverting to the simplified approach of using "fixed maximum sums" could in theory reduce uncertainty for those who do not seek legal representation.

52. The adverse consequence of removing that ability to shift a cap upwards is that society then expects the party that was "successful in expenses" to simply absorb that monetary shortfall between that £5,000 cap and the calculation of the judicial expenses they might otherwise have been awarded.

53. The Council is seeking feedback on two possible options for rule 58A.7:
    - To continue to support the court increasing the caps upwards by exception; or
    - To revert to a simplified procedure using "fixed maximum sums" by omitting the above references to "on cause shown" from this rule.

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54. *Policy Consideration 2* – is to reconsider whether the requirement for an applicants terms of representation to be disclosed does assist the court.

55. RCS rule 58A.5 covers how an application for a PEO would be made; and paragraph 5 (3) (a) (ii) then requires the applicant to provide the court with an indication of the terms on which their legal representation is being provided:

> *58A.5 - Applications for protective expenses orders*
>
> *(1) A protective expenses order is applied for by motion.*
>
> *(2) Intimation of the motion and of the documents mentioned in paragraph (3) must be given to every other party not less than 14 days before the date of enrolment.*
>
> ***(3) The applicant must lodge with the motion—***

> ***(a) a statement setting out—***
>
> *(i) the grounds for seeking the order;*
> ***(ii) the terms on which the applicant is represented;***
> *(iii) an estimate of the expenses that the applicant will incur in relation to the proceedings;*
> *(iv) an estimate of the expenses of each other party for which the applicant may be liable in relation to the proceedings; and*
> *(v) in the case of an application for liability in expenses to be limited to an amount lower or, as the case may be, higher than a sum mentioned in rule 58A.7(1), the grounds on which the lower or higher amount is applied for; and*
>
> *(b) any documents or other materials on which the applicant seeks to rely.*
>
> *(4) A party opposing an application for a protective expenses order must lodge with the notice of opposition—*
>
> *(a) a statement setting out the grounds for opposing the application; and*
> *(b) any documents or other materials on which the party seeks to rely.*

56. That requirement was originally included to provide the court with sufficient information to address the Corner House principles[3]. In that context the existence of pro bono representation is seen as being a positive factor as it conveys that a lawyer has sufficient confidence in the merits of a case to voluntarily provide their own time. Whilst that informs the court on one factor it needs to consider it was not something that would be determinative of whether or not that PEO was granted.

57. The Aarhus Convention Compliance Committee (ACCC) is of the view that forcing an applicant to disclose pro bono representation could alter the opponents litigation strategy *(to the detriment of the applicant);* and over the longer term it could threaten the economic viability of those environmental lawyers who do represent clients in public interest cases on a pro-bono basis.

58. The Council is seeking feedback on two possible options regarding rule 58A.5:
    - Retain the existing requirement to provide information on the terms of representation; or
    - Withdraw that requirement by omitting clause (3) (a) (ii).

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59. *Policy Consideration 3* – is to reconsider whether having an applicant provide their best estimate of the expenses that could be awarded against them is essential to assist the court.

60. RCS rule 58A.5 covers how an application for a PEO is made. Paragraph 5 (3) (a) (iv) then requires the applicant to provide a best estimate of the likely expenses that might be awarded against them:

> *58A.5 - Applications for protective expenses orders*
>
> *(1) A protective expenses order is applied for by motion.*

[3] https://www.bailii.org/ew/cases/EWCA/Civ/2005/192.html

(2) Intimation of the motion and of the documents mentioned in paragraph (3) must be given to every other party not less than 14 days before the date of enrolment.

(3) The applicant must lodge with the motion—

(a) a statement setting out—

(i) the grounds for seeking the order;
(ii) the terms on which the applicant is represented;
(iii) an estimate of the expenses that the applicant will incur in relation to the proceedings;
(iv) an estimate of the expenses of each other party for which the applicant may be liable in relation to the proceedings; *and*
(v) in the case of an application for liability in expenses to be limited to an amount lower or, as the case may be, higher than a sum mentioned in rule 58A.7(1), the grounds on which the lower or higher amount is applied for; and

(b) any documents or other materials on which the applicant seeks to rely.

(4) A party opposing an application for a protective expenses order must lodge with the notice of opposition—

(a) a statement setting out the grounds for opposing the application; and
(b) any documents or other materials on which the party seeks to rely.

61. That requirement supports the court when making a summary decision on the papers as it ensures an estimate is to hand evidencing the claimants own view on their perceived exposure to expenses; along with any comment they may wish to make on why they would find that amount "prohibitively expensive". The policy assumption made in 2018 was that only having a respondent's view on that figure would be less informative, and waiting for them to supply that estimate could delay proceedings *(if they requested more than 14 days from receiving intimation of a PEO to prepare that estimate)***.** The opposing view of the Aarhus Convention Compliance Committee (ACCC) includes the following statements:
    - *"…preparing such an estimate entails additional work (and unnecessary cost) for the claimant"; and*
    - it is *"difficult to see what value it adds"*; and
    - *"…the other party would surely be better placed to provide its own estimate"*.

62. The Council is seeking feedback on the following options regarding rule 58A.5:
    - Retain the current rule requiring the applicant to provide an estimate;
    - Reword that rule so that the respondent provides that estimate; or
    - Omit rule 5 (3) (a) (iv) which means the court would need to fall back on any estimates provided within an objection when lodged.

SECTION 8: THE PREVIOUS AMENDMENTS MADE IN 2024

63. This section revisits 3 rule changes enacted by the Court of Session on 28 June 2024 which have been in force since 1 October 2024 by virtue of:
    The Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Protective Expenses Orders) 2024[4]*.*

[4] https://www.legislation.gov.uk/ssi/2024/196/contents/made

64. Within that statutory instrument the changes made have:
    - Provided the ability to request confidentiality of financial information;
    - Delivered procedural fairness in the appeals process; and
    - Clarified that any exposure to intervener's expenses would be minimal.

65. When making those 3 amendments the Council took a decision 'not to consult'; given that running this 2025 consultation would provide an opportunity to check for any feedback regarding the rules in use.

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1 - CONFIDENTIALITY

66. In most circumstances the court would make a decision on whether to grant a PEO on the papers rather than fix a hearing. If a public hearing was held there is a small data protection risk regarding the applicants' financial information being disclosed unnecessarily. To mitigate that risk the following amendments took effect from 1 October 2024:

    - *RULE 58A.5* - covers how someone applies for a PEO. With effect from 1 October 2024 the new clause (5) prompts the claimant to make a request for confidentiality when they lodge their motion for a PEO:

      *(5) The motion **may request that the court grant an order treating any of the information listed in paragraph (3) as confidential** and open only to the court and the parties to the proceedings*

    - *RULE 58A.6* – covers how the court decides whether to grant a PEO on the papers. With effect from 1 October 2024 the new clause (3) supports any hearing on an unopposed motion taking place in chambers:

      *(3) Where a motion includes a request for the court to grant an order under rule 58A.5 (5), **if the motion is starred, the hearing must take place in chambers**."*

67. Where any motion that comes before the court is opposed then open justice considerations may require a hearing to be fixed and, where a request for confidentiality was made, the court may consider making a "reporting restriction order". Hence the assessment made in December 2022 *(when instructing these rule changes)* was that adding the ability to request confidentiality may only have a "moderate effect" on the environment *(rather than a "significant effect").*

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2 – PROCEDURAL FAIRNESS

68. Historically the rules required a claimant to reapply for a PEO if they wished to lodge an appeal whereas an opponents PEO would be carried over. That had the unintended consequence of introducing a level of unfairness; and the Council concluded that maintaining that differential in approach could not be justified. To deliver a fairer procedure the amendments in force from 1 October 2024 were:

- *RULE 58A.8* – covers how a reclaiming motion is taken forward. With effect from 1 October 2024 paragraph (1) (b) and paragraph (3) were reworded to remove the previous qualifying statements. That then meant that Rule 58A.8 is now being applied to claimants and respondents in the same manner regardless of who lodged the reclaiming motion.

69. Those changes corrected a procedural unfairness within a rule that was otherwise working as intended. Hence the assessment made in December 2022 *(when instructing these rule changes)* that this change may only have a "moderate effect" on the environment *(rather than a "significant effect").*

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3 – INTERVENERS EXPENSES

70. Historically the PEO procedure was silent on whether an award of judicial expenses might be made in favour of someone granted *leave to intervene*. In practice there was case precedent from 2012 that confirmed that where an application for *leave to intervene* was made in a PEO related case, the default position was that costs "would not normally be awarded to or by" an intervener" *(except on cause shown).* Replicating that case precedent within the 'procedure' itself was seen as a mechanism to reinforce that existing working practice for any potential litigants who were unaware of that case precedent. Hence informational rule 58A.10 was added and it took legal effect from 1 October 2025:

> *58A.10 - Expenses of interveners*
>
> ***(1) Expenses are not to be awarded in favour of or against a relevant party, except on cause shown.***
>
> *(2) If the court decides expenses are to be awarded under paragraph (1), it may impose conditions on the payment of expenses.*
>
> *(3) In paragraph (1), "a relevant party" means a party who has—*
> *(a) been granted leave to intervene under rule 58.19(1)(b) or;*
> *(b) been refused or granted leave after a hearing under rule 58.19 (1)(c).".*

71. Given that new informational rule replicated existing publicly available information the assessment made in December 2022 *(when instructing these rule changes)* was that this change may only have a *"minimal effect"* on the environment *(rather than a "significant effect").*

THE BENEFITS ARISING

72. The benefits arising from the 3 amendments made are:

- *Improved Aarhus compliance* – these changes were aimed at resolving 3 of the Aarhus concerns that were raised in 2021 including: providing for the confidentiality of financial information *(para 102);* providing for procedural fairness on appeal *(para*

93) and the need to clarify that for those who act reasonably there is no material exposure to intervener's expenses *(para 105)*;

- *Improved access to justice* – as the clarifications provided will have in part mitigated the "chilling effect" that uncertainty can have;

- *Improved comparability of rules* – as having the option to request confidentiality is consistent with the approach taken across a number of other court procedures;

- *Improved data protection* – as on reading the rules a potential litigant should be reassured that their financial information can be treated as confidential; and

- *Improved procedural fairness* – as on reading the rules a potential litigant should be reassured that a PEO can be carried over regardless of who is appealing.

SECTION 9: THE CONSULTATION QUESTIONS

73. Given the proposals made within this paper; the Council would appreciate your feedback on the following questions:

Section 4 - Extending PEOs to the Sheriff Courts:

***Question 1* – Do you agree that the ability to seek a PEO should now be extended to the sheriff court for the summary applications that can arise under the Environmental Protection Act 1990? If not why not?**

***Question 2* – Do you have any concerns or suggested changes to the wording of the proposed cost protection rules as set out in the new Part LV of the Summary Application Rules?**

***Question 3* – Other than summary applications; are there other types of actions raised within the sheriff court where you think lodging a motion for an *Environmental PEO* should be an option? If so please provide examples?**

Section 5 - Extending PEOs to the Sheriff Appeal Court:

***Question 4* – Do you agree that the ability to seek a PEO afresh, or to have one carried forward, should be extended to the Sheriff Appeal Court? If not why not?**

***Question 5* – Do you have any concerns or suggested changes to the wording of the proposed rules as set out in the new SAC Chapter 28A?**

Section 6 - Amending PEOs in the Court of Session:

***Question 6* – Do you agree that the current ability to seek a PEO within the Court of Session should also be available within a multiparty action initiated under Group Procedure? If not why not?**

Section 7 – The potential future rule changes:

***Question 7*– Do you have a view on whether rule 58A.7 should continue to support the court increasing the caps upwards by exception, or whether that reference to "on cause shown" should be deleted so that this rule reverts to using "fixed maximum sums"?**

***Question 8* - Do you have a view on whether rule 58A.5 should continue to require applicants to provide information on the terms on which they are legally represented, or whether section (3) (a) (ii) should be withdrawn?**

***Question 9* - Do you have a view on whether rule 58A.5 should continue to require applicants to provide their own estimate of the likely expenses that could be awarded against them, or whether section (3) (a) (iv) should be withdrawn?**

***Question 10* – Do you have any other suggested improvements regarding the PEO Rules, over and above those already raised directly with the Council or indirectly via the compliance committee?**

Section 8 – Feedback on the previous amendments made in 2024:

***Question 11* – Do you agree with the rule change made that makes provision for confidentiality to be sought when lodging a motion for a PEO?**

***Question 12* – Do you agree with the rule change made that supports carrying a PEO over on appeal in the same manner regardless of who is appealing?**

***Question 13* – Do you agree it is useful for rule 58A.10 to replicate the information available from case precedent regarding intervener's expenses?**

SECTION 10: THE NEXT STEPS

74. Following the closing date for this consultation the next steps will be:

Responses - the individual responses will be uploaded to the consultation page of the website (where respondents have given permission);

Analysis of Responses – the secretariat will prepare an Analysis of Responses report to: summarise the feedback received; assess whether there

is a need to consult again; and clarify the suggested rule changes to be considered by the Council;

Consultation Response – once that analysis has been published, the secretariat will propose one or more rules instruments for consideration by the Council; and

Approval of the amendments – if approved by Council, those draft rules will then be proposed to the Court of Session for their consideration and approval.

75. Subject to approval and signing by the Court of Session, the next steps will be:

Advance Publication - each amending Act of Sederunt is laid in the Scottish Parliament and then published via legislation.gov.uk;

Scrutiny and Familiarisation - a reasonable time period is set between the date an instrument is made by the Court of Session and the date it comes into force to provide:

- Time for scrutiny by the Delegated Powers and Law Reform Committee (DPLRC) of the Scottish Parliament and
- Time for practitioners, court officials, and the judiciary etc. to familiarise themselves with the changes made and update their systems of work; and

Commencement – each amending Act of Sederunt comes into effect on the date set within that instrument.

Secretariat to the Scottish Civil Justice Council
August 2025

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GLOSSARY

The relevant terms used within this paper are:

Term	*Meaning*
Aarhus related case	Relevant proceedings that include a challenge to a decision, act or omission on grounds subject to the provisions of Article 6 of the Aarhus Convention. *That currently covers:* • *Applications to the supervisory jurisdiction of the court, including applications under section 45(b) (specific performance of a statutory duty) of the Court of Session Act 1988(20), and* • *Appeals under statute to the Court of Session.*
ACCC	Acronym for – Aarhus Convention Compliance Committee (ACCC).
Cause shown	A term in Scots Law that means - where a valid reason has been demonstrated to the satisfaction of the court.
CSIH	Acronym for – the Inner House of the Court of Session (CSIH).
CSOH	Acronym for – the Outer House of the Court of Session (CSOH).
Common Law PEO	An application made under the common law seeking *costs protection* in any civil proceedings.
Environmental PEO	An application under the *costs protection procedure* established by the PEO Rules. These PEO applications are applicable in civil proceedings taken in the public interest that impact on the environment.
Intervener	A term in Scots Law that means – a person or organisation, that is not a party to proceedings, that makes an application seeking *leave to intervene* in proceedings by way of a written submission to assist the court.
PEO	Acronym for – a Protective Expenses Order (PEO). Scotland uses an adversarial legal system, with the general principle for expenses being that "expenses follow success" *(which equates to "loser pays")*. In circumstances that result in a significant imbalance of power between the parties to a civil action, the court may consider making a PEO if it is in the "interests of justice" to do so.
PEO Rules	RCS Chapter 58A (Protective Expenses Orders in Environmental Appeals and Judicial Reviews). Chapter 58A was first enacted by the Act of Sederunt (Rules of the Court of Session Amendment) (Protective Expenses Orders in Environmental Appeals and Judicial Reviews) 2013: *https://www.legislation.gov.uk/ssi/2013/81/introduction/made* Those PEO rules have been amended 3 times (in 2015, 2018 and 2024).
SCTS	Acronym for – Scottish Courts and Tribunal Service.
UKSC	Acronym for – UK Supreme Court (UKSC).
UNECE	Acronym for – United Nations Economic Commission for Europe (UNECE).

ANNEX 1 – HISTORY OF THE EXISTING RULES

The Scottish Government ran a Public consultation on PEOs in 2011 and then lodged a rules request with the Council in 2012; which led on to the initial new rules required to implement *Environmental PEOs* in Scotland that came into force with effect from 25 March 2013:

Statutory Instrument	*SSI*	*W.E.F*	*Commentary*
Act of Sederunt (Rules of the Court of Session Amendment) (Protective Expenses Orders in Environmental Appeals and Judicial Reviews) 2013	2013/81	25.03.2013	New rules established a *costs protection procedure* within the Court of Session *(RCS: Chapter 58 A).*

In response to user experience, those 2013 rules have since been amended 3 times:

Statutory Instrument	*SSI*	*W.E.F*	*Commentary*
Act of Sederunt (Rules of the Court of Session 1994 Amendment) (No. 4) (Protective Expenses Orders) 2015	2015/408	11.01.2016	Extended the type of proceedings where a PEO could be sought.
Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Protective Expenses Orders) 2018	2018/348	10.12.2018	Amended Chapter 38 (Reclaiming). Chapter 58 A (PEOs) was completely rewritten with additions for: - Defining prohibitively expensive; - Simplifying the procedure by a shift away from mandatory hearings to making decisions on the papers; - Limiting expenses to £500 *(for the application stage);* and - Providing the flexibility for the £5k and £30k thresholds to be lifted or lowered on cause shown.
Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Protective Expenses Orders) 2018	2024/196	01.10.2024	Amended Chapter 58 A (PEOs): - To add the ability to request confidentiality; - To rectify a procedural unfairness on appeal; and - To insert a new informational rule to replicate case precedent on expenses being owed to or by an intervener.

NOTE – in addition to the procedure set out within these rules for seeking an Environmental PEO, the Courts can consider an applications for a Common law PEO.

ANNEX 2 – ARTICLE 8 OF THE AARHUS CONVENTION

The text of Article 8 (Public Participation) reads as follows:

Article 8: **Public Participation during the preparation of executive regulations and/or generally applicable legally binding normative agreements:**

Sentence 1 - Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment.

Sentence 2 - To this end, the following steps should be taken:

(a) Time-frames sufficient for effective participation should be fixed;
(b) Draft rules should be published or otherwise made publicly available; and
(c) The public should be given the opportunity to comment, directly or through representative consultative bodies.

Sentence 3 - The result of the public participation shall be taken into account as far as possible.

ANNEX 3 – ARTICLE 9 OF THE AARHUS CONVENTION

The text of Article 9 (Access to Justice) reads as follows:

Paragraph 1 - Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law. In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law. Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

Paragraph 2 - Each Party shall, within the framework of its national legislation, ensure that members of the public concerned:

(a) Having a sufficient interest or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Paragraph 3 - In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

Paragraph 4 - In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

Paragraph 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.