Public Consultation - on extending the availability of PEOs

Introduction

I offer this response for consideration from the perspective of a private individual, having 60 years of practical and professional involvement in environmental issues. That experience spans work in the public sector as a Chief Officer in three local authorities, in the private sector as a consultant and in the Third sector, latterly as the Chairman of Aberdeenshire Environmental Forum (AEF). I was Chairman of the Scottish Centre of the Chartered Institution of Wastes Management (CIWM) and for a number of years, their nominated advisor on waste and other related environmental issues to Scottish Government(SG), Convention of Scottish Local Authorities (CoSLA), SEPA (Scottish Environment Protection Agency), ZWS (Zero Waste Scotland) and Keep Scotland Beautiful (KSB).

Of particular relevance to this consultation, I was the named applicant on behalf of AEF, in a summary application to Aberdeen Sheriff Court for a Litter Abatement Order in terms of S89 of EPA90.

That application was refused with costs awarded to the defendant local authority. The details of this case were included by another party, within a submission to the Aarhus Convention Compliance Committee.

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?***

YES - I agree that the ability to seek a PEO should be extended to proceedings under the Environmental Protection Act 1990.

I am of the view that such proceedings are within the scope of Article 9(3) of the Aarhus Convention because they are judicial procedures to challenge acts and omissions which contravene provisions of national laws relating to the environment. Such proceedings must therefore not be prohibitively expensive.

In my own case, taken in 2017/18, highlighted in the introduction above, was believed at the outset, to be a relatively straightforward Summary Application to the Sheriff Court for Litter Abatement Order, (based on our reading of the published Guidance from KSB). It subsequently required six appearances in the Court, accompanied by legal representation. The legal representation provided, in the main, pro bono, was estimated to cost as much as £40,000. "Costs" claimed against me were a five figure sum, amounting to more than AEF had in their reserves. An out-of-court settlement was agreed which effectively cleared out the AEF bank account. As a direct consequence, AEF – a voluntary body established some 30 years earlier by local authority elected members, to be an 'Environmental conscience' for the Council, was disbanded and their many good works in the community, lost.

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?***

3.55.3 Applications for protective expenses orders

I recommend that draft rule 3.55.3.(4)(a)(ii) (the requirement to disclose the terms of representation for a PEO applicant) be deleted.

I do not see what value this provides to the case/evidence under consideration. The facts of the case are the facts of the case, irrespective of who presents them.

Additionally, I suggest that draft rule 3.55.3.(4)(a)(iv) (the requirement for a PEO applicant to estimate their liability for adverse expenses) is deleted.

I do not see how a member of the public, as an applicant, could reasonably/practicably, determine that. As such, it creates a further a unnecessary burden and disincentive to applications.

3.55.5 Terms of protective expenses orders

Draft rule 3.55.5 currently sets out that, if a PEO is awarded, it is to include a default £5,000 cap on a PEO applicant's adverse liability and a £30,000 'cross-cap' which limits an applicant's ability to recover their expenses from the respondent. These caps can be varied up or down 'on cause shown'.

These proposals act to create a further level of uncertainty for applicants. In accordance with the spirit of the Aarhus Convention, applicants should not be held liable for the defendant's costs/expenses and no limit should be placed on the applicant's ability to recover their costs.

3.55.6 Expenses of application

Draft rule 3.55.6 indicates that a PEO applicant will be liable for up to £500 in expenses so far as occasioned by their PEO application, and that limit may be increased "on exceptional cause shown".

Similarly, for the reasons highlighted above a PEO applicant should have no liability for any expenses relating to their PEO application.

£500 is an arbitrary sum which will be prohibitively expensive for some PEO applicants. There is no explanation in the consultation document as to how the £500 figure was arrived at. There is no evidence that the SCJC has considered its affordability for litigants.

The ability to increase the £500 liability limit on exceptional cause shown will introduce unnecessary uncertainty into the PEO application process.

3.55.7 Expenses of interveners

Draft rule 3.55.7 indicates that a PEO applicant will not be liable to pay expenses to interveners, except on cause shown.

I suggest that the wording "except on cause shown" is deleted from draft rule 3.55.7(1) and that draft rule 3.55.7(2) is deleted. This would ensure that a PEO applicant faces no liability to pay expenses to interveners.

This would remove **another** level of uncertainty/disincentive.

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?***

No response

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?***

Yes

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?***

YES see response to Q2 above

28A.3. Applications for protective expenses orders

Draft rule 28A.3.(3)(a)(ii) (the requirement to disclose the terms of representation for a PEO applicant) should be deleted.

Draft rule 28A.3.(3)(a)(iv) (the requirement for a PEO applicant to estimate their liability for adverse expenses) should be deleted.

Draft rule 28A.5(1)(b) should be deleted so that PEOs do not impose a limit on the ability of a PEO applicant to recover their expenses from their opponent.

28A.6. Expenses of application

Draft rule 28A.6 indicates that a PEO applicant will be liable for up to £500 in expenses so far as occasioned by their PEO application, and that limit may be increased "on exceptional cause shown".

This is another unnecessary disincentive to pursuing a case and should be deleted on the basis that a PEO applicant should have no liability for any expenses relating to their application.

28A.7 - Expenses of interveners

Draft rule 28A.7 indicates that a PEO applicant will not be liable to pay expenses to interveners, except on cause shown.

A PEO applicant should have no liability to pay expenses to interveners. This creates yet another level of uncertainty.

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?***

Yes

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"?***

Cross-caps act as a barrier against PEO applicants obtaining quality legal representation and are problematic for maintaining equality of arms in litigation. The £30,000 default cross-cap limit is arbitrary. Many cases require expenditure above this amount for a petitioner to be able to secure effective legal representation.

In my own case referred to above, the costs were estimated to be in the vicinity of £40,000. This level of cost prevented us from pursuing appeals against the original judgement and against the subsequent award of defendant,s costs.

Cross-caps lack any legal basis in the Aarhus Convention. The ACCC has found that the requirements of prohibitive expense and fairness apply to the claimant, not the respondent.

Comments in the consultation document

The 'hypothetical example' provided at paragraph 50 of the consultation document of a situation where a PEO cap above £5,000 could be appropriate demonstrates an important misunderstanding around the financial liabilities of a PEO applicant. It states that:

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.

This example fails to consider the liability of a PEO applicant to pay their own legal representatives. In the above example, the PEO applicant would have no funds left to pay those costs. The PEO applicant in that example would face liability to pay £5,000 in adverse expenses, plus their own legal fees. It is very likely in that situation that the litigation would be prohibitively expensive for the PEO applicant.

Additionally, where is the common fairness in the example, to increase the amount of liability, just because the applicant has gained popular and financial support for the case.

Regarding the statement at paragraph 52 of the consultation document that, "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".

The absorption of any such shortfalls seems unlikely to cause significant problems for most public bodies and such shortfalls are reasonable in light of the need to ensure that the PEO system is compliant with the requirements of the Aarhus Convention.

In our own case, we claimed costs incurred on the basis we believed, irrespective of the judgement, we had clearly demonstrated that our

application was justified. During the deliberations, the Sheriff commented that the defendants had made no application for costs and asked them if they wished to do so.

The judgement was in favour of the public authority defendant who submitted their schedule of 'costs' based on 'Judicial Expenses' calculations. We were of the view that those Judicial Expenses were in excess of any actual 'costs' incurred, as the authority had used in-house legal services. We asked for a breakdown of 'actual costs' as against the higher rates of 'Judicial Expenses' and were refused. At that point we had exhausted the good will of our generous, pro bono legal team. Following further pro bono, specialist legal/financial advice, were unable to support an appeal and reached an out-of-court settlement equal to the balance of our voluntary bodies remaining funds.

It could have been argued that as the case had been handled by the Council's in-house legal team within existing budgets, there was no additional, actual 'cost' to the council in defending the case and our settlement, paid to them, reduced their departmental operational costs as an unexpected income.

This is a practical example of the impact of some of the proposals contained within the consultation and just how access to environmental justice appears to be loaded against the public. Proof of that lies in the number of cases taken.

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?***

Rule 58A.5(3)(a)(ii) should be deleted for reasons stated previously

The ACCC has stated that:

The Committee does not see why this information should be required in order to apply for a PEO. This could require disclosure concerning pro bono representation and threaten the economic viability of environmental lawyers representing clients in public interest cases in the mid- to long-term.

The existence of pro bono representation is seen as 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.

The statement in the consultation document that information about the terms of a PEO applicant's representation is, "not something that would be determinative of whether or not that PEO was granted", is further evidence that Rule 58A.5(3)(a)(ii) is an unnecessary requirement which should be removed.

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?

Rule 58A.5(3)(a)(iv) should be deleted.

Our case is an example of the impracticability of this. At the outset, no one envisaged the need for six court appearances. At one point, the Sheriff commented on the time taken on a case about cleaning the streets. He said " I can do a murder trial in two days"

Similarly, requiring an applicant to provide their own estimate of their likely adverse expenses, is not practicable and makes the application process more burdensome. Making an accurate estimate is difficult and requires significant time and preparation. It will likely incur additional legal fees for PEO applicants.

The proposal to reword Rule 58A.5(3)(a)(iv) in a manner which requires the respondent to provide the estimate carries a similar risk of underestimation.

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?**

Some of the proposals appear to me to exacerbate the 'equality of arms' concept. The views of the ACCC in such matters should be incorporated into the proposals as comprehensively as possible.

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?***

Yes

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?***

Yes

Question 13 – ***Do you agree it is useful for rule 58A.10 to replicate the information available from case precedent regarding intervener's expenses?*** No response.