



Scottish
Civil Justice
Council

RESPONDENT INFORMATION FORM

For the PUBLIC CONSULTATION on extending the availability of PEOS

Please note **this form must be completed** and returned with your response.

Are you responding as an individual or an organisation?

☐ INDIVIDUAL

☒ ORGANISATION

Your details:

Your full name or your organisation's name:

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Your views on the publication of your response

Please indicate your preferences with regard to the publication of your response:

☒ Publish response with name

☐ Publish response only (without name)

☐ Do not publish response

Providing your response

If you have chosen to provide a separate written response, then please complete the first page of this Respondent Information Form and attach it to your response.

If you wish to include your responses within this Respondent Information Form, please insert your responses to each consultation question in the (expandable) boxes below:

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?

We agree that PEOs should be available for summary applications arising under the Environmental Protection Act 1990. These proceedings fall within Article 9(3) of the Aarhus Convention and must therefore be subject to a cost regime that ensures access to justice is not prohibitively expensive.

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?

We recommend the following amendments:

1. Remove the requirement to disclose the terms of legal representation 3(a)(ii).

This requirement is unnecessary, duplicates existing tests on case merits and has been identified by the ACCC as incompatible with Aarhus principles. Disclosure may prejudice commercial negotiations on rates etc, and risks undermining the viability of pro bono or reduced-fee representation.

2. Remove the cross-cap limiting applicants' ability to recover their own expenses

The cross-cap has no basis in the Convention and would have a limiting effect on an organisation such as ours' ability to secure adequate representation. In environmental litigation, the inequality of arms lies principally with the claimant - this was well illustrated in our litigation in *Open Seas vs Scottish Ministers* where our legal support were a team of four, sat across from a team of 14 from Scottish Ministers. Restricting the ability of organisations such as ours to recover costs exacerbates that imbalance.

3. Remove liability for expenses of the PEO application (rule 3.55.6).

The proposed £500 application fee cap appears arbitrary and may itself be prohibitive for individuals or grassroots organisations. We would recommend removing it and making the application free of charge entirely.

4. Remove liability for interveners' expenses (rule 3.55.7).

The phrase "except on cause shown" should be deleted. Uncertainty over liability to interveners has been criticised by the ACCC for its chilling effect on access to justice.

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?

To ensure Aarhus compliance, PEOs should be available in all proceedings falling within Article 9(3), including private nuisance actions and other environmental claims. We recommend that the Council conduct or commission work to identify all relevant categories of case.

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?

We agree that the ability to seek a PEO afresh or carry one forward should be available. Appeals form part of the overall cost system and must also meet Aarhus requirements. We contend that the appeal proceedings in *Open Seas vs Scottish Ministers* brought no new arguments to the dispute, such an approach may have been taken to delay or suppress the implications of Lord Braid's opinion and instances such as that would clearly comprise a situation where a PEO is needed to protect against an imbalance in resourcing.

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?

Our comments mirror those provided under Question 2. The same problematic features appear in Chapter 28A and the same amendments are required in order to align the regime with Aarhus.

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 to a multiparty action initiated under Group Procedure? If not why not?

We support extending PEO availability to multiparty actions initiated under group procedure. Clearly the number of parties affected by a situation does not relate to the ability of those groups to afford proceedings. Many environmental challenges raise issues affecting multiple parties, and collective proceedings offer efficiencies that should be facilitated rather than financially deterred.

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”?

We support removing the ability to increase the £5,000 cap. The cap should be a fixed maximum that can only be reduced. We also support removal of the cross-cap for the reasons stated above. Increasing the cap is incompatible with ACCC findings that £5,000 represents the upper limit of what can reasonably be imposed on claimants in Aarhus cases.

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 an estimate of the likely expenses that could be awarded against them, or whether section (3) (a) (iv) should be withdrawn?

This requirement should be removed. In our experience these costs are not easily estimated, and the process of estimating them may be weaponised by one party to underestimate actual costs, creating a risk that PEOs are refused even where real cost exposure would be prohibitive. The requirement adds complexity, expense and uncertainty.

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?

We recommend:

1. Automatic carry-over of PEOs to applications for permission to appeal to the UK Supreme Court.

Following recent case law, the rules should be amended to ensure default carry-over. Access to the UKSC should not be inhibited by cost uncertainty and litigating the validity of a PEO.

2. Adoption of a standardised PEO application form.

A form would improve clarity for litigants, reduce procedural errors and conserve judicial resources.

Section 8 - Confirming the 3 amendments made in 2024:

Question 11 – do you agree with the rule change made that makes provision for confidentiality to be sought within a motion for a PEO?

We welcome the 2024 rule changes on confidentiality, carry-over on appeal and clarification around interveners. However, we note in particular that the most recent ACCC findings make clear that these changes, while positive, do not achieve full compliance - more is therefore needed. We welcome this consultation as an opportunity to address those areas where more is still needed.

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 that it is useful for rule 58A.10 to replicate the information from case precedent regarding intervener’s expenses?