



Scottish
Civil Justice
Council

BUSINESS & REGULATORY IMPACT ASSESSMENT:

For the draft rules that accompany this consultation on:

Extending access to Protective Expenses Orders (PEOs)

PREPARED BY: The Secretariat to the Scottish Civil Justice Council (SCJC)

REGARDING: the draft rules that would support extending the availability of Environmental PEOs to the sheriff courts and to the Sheriff Appeal Court (SAC).

LAST UPDATED: 8 August 2025

Step 1 – POLICY BACKGROUND

Purpose and intended effect

Where the court grants an Environmental PEO an applicant will gain “cost protection” against an adverse award of expenses being made against them.

At present that option is limited to proceedings initiated within the Court of Session which then excludes anyone wishing to raise public interest proceedings under the Environmental Protection Act 1990. As those civil actions need to be initiated within the sheriff courts there is not the option to seek an Environmental PEO

Policy Objectives

The policy objectives when extending these PEOs beyond the Court of Session are:

- *To improve access to justice* – by widening the availability of costs protection against an adverse award of expenses in environmental cases.
- *To provide comparable rules* – by mirroring the general approach taken in the existing PEO Rules within the sheriff courts and the Sheriff Appeal Court.
- *To improve Aarhus compliance* – by addressing the Aarhus concern regarding the “type of cases” covered by the PEO rules, given the inability to seek an Environmental PEO outwith the Court of Session.

Rationale for this intervention

This change has the potential to raise the number of civil actions taken to protect the environment; by extending the availability of Environmental PEOs to include proceedings raised under the Environmental Protection Act 1990 in the sheriff court.

Consultation

Climate change and the protection of the environment are of increasing concern across all of civil society so a Public Consultation exercise will widen the range of feedback received.

Sectors and groups affected

Who is affected?

Those potential litigants who are contemplating initiating a civil action in the public interest, with the aim of protecting the environment

How are they affected?

The cost protection provided by a PEO will limit a litigant's financial exposure to any adverse award of expenses being made against them (*to the standard cap of £5,000*).

Options

Option 1 - Do Nothing

Under the do nothing option - the ability to seek a PEO would remain restricted to cases initiated in the Court of Session (for a judicial review or for a statutory appeal).

Option 2 – New Rules

Would extend the option to seek an Environmental PEO to relevant proceedings arising under the Environmental Protection Act 1990 in the:

- sheriff courts, and
- Sheriff Appeal Court.

Benefits

Benefits - Option 1 - Do Nothing

Nil

Benefits - Option 2 – New Rules

The expected benefits from extending the availability of Environmental PEOs are:

- *Improved Aarhus compliance* – as extending cost protection procedures to other courts will resolve the concern raised regarding the “type of cases” covered

- *Improved access to justice* – as extending the availability of cost protection would allow more cases to proceed in the public interest;
- *Improved comparability of rules* – as comparable cost protection procedures will be in place within the sheriff courts, the sheriff Appeal Court and the Court of Session; and
- *Improved data protection* – as on reading the rules a potential litigant will be reassured that their financial information can be treated as confidential

Costs

Costs - Option 1 - Do Nothing

NIL

Costs - Option 2 – New Rules

Lodging a motion is a cost effective method for making an application; and if that application for a PEO was to be rejected by the court then any expenses awarded cannot exceed £500.

Having the court making most of its PEO decisions on the papers is a cost effective method as it minimises the need to fix a hearing (*which would involve significant costs for parties*).

Step 2 – ASSESSMENT OF LIKELY IMPACTS – ON BUSINESS

What feedback has arisen from business engagement?

There has been consistent calls made by environmental NGOs and members of the public to extend the type of claims where the cost protection offered by a PEO can be sought.

Those calls for change has been reinforced by the ACCC classifying the current restricted coverage of PEOs as a non-compliance issue under article 9 (5) of the Aarhus convention.

How has that feedback fed into the development of this proposal?

The proposed extension of environmental PEOs to the sheriff courts and the Sheriff Appeal Court is seen as a ‘reasonable adjustment’ that falls within the remit of the Council; and can be progressed by the proposed implementation of these draft rules.

Step 3 – ASSESSMENT OF LIKELY IMPACTS – ON COMPETITION

To support initial screening for competition impacts, the Council uses the checklist of four questions recommended by the Competition and Markets Authority (CMA):

Will the measure directly or indirectly limit the number or range of suppliers?

NOT APPLICABLE

Will the measure limit the ability of suppliers to compete?

NOT APPLICABLE

Will the measure limit suppliers' incentives to compete vigorously?

NOT APPLICABLE

Will the measure limit the choices and information available to consumers?

NO – this proposed change will increase the level of information available to consumers, and provide new choices for initiating proceedings.

Step 4 – ASSESSMENT OF LIKELY IMPACTS – ON CONSUMERS

To support initial screening for consumer impacts, the Council mirrors the best practice¹ guidance from Scottish Government which uses the following six questions:

Does the policy affect the quality, availability or price of any goods or services in a market?

NO

Does the policy affect the essential services market, such as energy or water?

NOT APPLICABLE

Does the policy involve storage or increased use of consumer data?

NO

Does the policy increase opportunities for unscrupulous suppliers to target consumers?

NO

Does the policy impact the information available to consumers on either goods or services, or their rights in relation to these?

YES – this proposed change will increase the level of information available to consumers and provide new choices for initiating proceedings that will support consumers taking action with regard to their right to live in a healthy environment.

¹ <https://www.gov.scot/publications/business-regulatory-impact-assessment-bria-toolkit/>

Does the policy affect routes for consumers to seek advice or raise complaints on consumer issues?

NO – this proposed change supplements the existing routes for taking legal action

Test run of business forms

Does this proposal introduce new legal Forms that are materially different in style and content to the existing legal forms in general use?

NO – the existing route of lodging a motion will be used to apply for a PEO

Step 5 – ASSESSMENT OF LIKELY IMPACTS – DIGITAL

Digital Impact Test

Public services are increasingly being delivered online. To test for relevant opportunities the Council mirrors the best practice² guidance from Scottish Government and uses the following five questions:

Does the measure take account of changing digital technologies and markets?

YES – the ability for an applicant to lodge a motion, and for all parties to view that motion, is already covered within the functionality provided by Civil Online and ICMS.

Will the measure be applicable in a digital/online context?

NO – there is no current intention to automate these low volume transactions. All requests for a PEO will continue to be made by lodging a motion in existing proceedings.

Is there a possibility the measures could be circumvented by digital / online transactions?

NO

Alternatively will the measure only be applicable in a digital context and therefore may have an adverse impact on traditional or offline businesses?

NO

If the measure can be applied in an offline and online environment will this in itself have any adverse impact on incumbent operators?

NO

² <https://www.gov.scot/publications/business-regulatory-impact-assessment-bria-toolkit/>

Step 6 – ASSESSMENT OF LIKELY IMPACTS – ON REGULATIONS

Court Fees

Will the proposal require changes in *court fee* regulations?

YES – a fee exemption for Aarhus related cases is included within the Court of Session fees order. The expectation is that same provision for fee exemptions will be made available within both the sheriff Court fees order and the Sheriff Appeal Court fees order.

Legal Aid

Will the proposal require changes in *legal aid* regulations?

NO

Recovery of Costs Awarded

Will the proposal require changes in *judicial taxation* regulations?

NO

Enforcement and/or sanctions

Will compliance be enforced, and if so how?

NOT APPLICABLE – granting a PEO is a matter of judicial discretion

Are there sanctions for non-compliance?

NOT APPLICABLE – granting a PEO is a matter of judicial discretion

Step 7 – ASSESSMENT OF LIKELY IMPACTS – ENVIRONMENTAL PRINCIPLES

Following Brexit; there were five statutory principles for protecting the environment enshrined in section 15 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021³. In August 2023 the Scottish Government expanded on those principles by adding the statutory guidance to certain public bodies headed “Guiding Principles on the Environment”.

As a matter of best practice the SCJC does need to demonstrate that it has given “due regard” to those principles.

Has “protection of the environment” been integrated into this policy?

³ <https://www.legislation.gov.uk/asp/2021/4/contents>

YES – for many people the ability to secure the cost protection provided by a PEO would be a necessary prerequisite to commencing litigation to protect the environment

Will this proposal have significant effects on the environment?

YES – as gaining cost protection may a determinative factor in whether or not a person does exercise their right to protect the environment.

Note – since 2005 seeking cost protection via a Common law PEO has been an option available in any civil proceedings that are being progressed in any court in Scotland. In practice the Council is not aware of any sheriff court cases to date where that option had been sought.

Can any negative effects of this policy be avoided or reduced?

The negative effect is that the cap of £5,000 or the cross cap of £30,000 will be offset against the normal calculation of judicial expenses. As the normal “loser pays” principle is being disapplied the successful party can no longer recover the total amount of judicial expenses that would otherwise have been awarded by the court.

Can the positive effects of the policy be enhanced?

Where having cost protection was a prerequisite to someone initiating litigation then it may lead to a small % increase in the volume of cases initiated. That uplift in volumes could be enhanced by facilitating a greater public awareness of how costs protection can be sought.

Step 8 – ASSESSMENT OF LIKELY IMPACTS – PUBLIC PARTICIPATION

Under article 8 of the Aarhus Convention⁴ the Council has a duty to “strive” to promote public participation when making decisions on those rule changes that will have a “significant effect” on the environment.

Will this proposal have significant effects on the environment?

YES – as the ability to access the cost protection offered by an Environmental PEO may a determinative factor in someone being able to exercise their right to protect the environment.

Note – since 2005 it has been clear that seeking cost protection via a Common law PEO is a pragmatic option that is available in any proceedings and in any court in Scotland. In practice the Council is not aware of any sheriff court cases to date where that common law option had been sought.

Has effective public participation been promoted?

YES – by virtue of running this 3 month public consultation exercise, supplemented by engagement with some representative bodies.

⁴ As this UN Treaty has yet to be incorporated into Scots law its underlying treaty rights are not yet directly justiciable in Scotland. The Council awaits a future Scottish Government decision on that incorporation.

Is public participation being sought at an appropriate stage?

YES – given there are existing rules in place for seeking an Environmental PEO the Council chose to await preparation of these draft rules to cover the extension of that procedure beyond the Court of Session (rather than consult earlier on the policy positions alone).

Step 9 – ASSESSMENT OF LIKELY IMPACTS – WITH IMPLEMENTATION

Implementation Plan

What is the timescale for this proposal be implemented?

An indicative timeline would be 12 months from the opening date for this consultation:

- 3 months – to consult;
- 1 month – to upload and analyse the responses;
- 1 month - to prepare and publish the Consultation Analysis report;
- 2 months - to finalise the draft rules as consulted on;
- 1 month – to seek Councils approval of that SSI;
- 1 month – for the Court of Session to check, approve & enact that SSI; and
- 3 months – for familiarisation by users, and parliamentary scrutiny by the DPLRC.

How will this proposal be implemented?

The change will be enacted by Act of Sederunt and come into force from the commencement date set within that Scottish Statutory Instrument (SSI).

Monitoring

Will the resultant changes be monitored, and if so how?

YES - Qualitative Monitoring – for user feedback and media coverage on the rules in use.

Will the resultant changes be evaluated, and if so how?

YES - Quantitative Monitoring – using manual data collection as a check on the number of future motions for a PEO lodged in the sheriff courts and the Sheriff Appeal court.

Post Implementation Review

Will a post implementation review (PIR) need to be undertaken?

NO – providing the qualitative monitoring confirms the rules are operating as intended.

Note - A PIR would only be initiated if there was clear evidence of user dissatisfaction with the rules in use.