Scottish Civil Justice Council

**FOR DISCUSSION**

**This paper 4.2A provides members with a copy of the finalised Consultation Analysis report**

***(as uploaded to the SCJC website on the 3 December 2025)***

# CONSULTATION ANALYSIS: on extending the availability of PEOs

Issued: 3 December 2025

**CONTENTS**

## SECTION 1 - INTRODUCTION

### Purpose

1. To analyse the 11 responses received on the following policy question:
   - Should the Council extend the ability to access *Environmental Protective Expenses Orders (PEOs*) to a wider range of court procedures?

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### Timing

2. This Public Consultation was opened on 18 August 2025 and ran for a 12-week period to a closing date of 14 November 2025. An extension to 28 November 2025 was then granted for 2 respondents.

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### Background

*Mitigating the risk of "an adverse award of expenses":*

3. As Scotland operates an adversarial justice system then any potential litigant thinking about raising civil proceedings in the public interest would need to ensure that they do have sufficient funding in place to cover a) the costs of their own legal team and b) the risk that (*if they were to lose their case)* an adverse award of expenses could be made against them *(as they would then be liable to cover some of the costs of their opponents legal team).*

4. If that potential litigant was unable to acquire sufficient funding or unwilling to take on both of those financial risks, they may well choose not to litigate unless they can access some means of '*costs protection'* to significantly reduce their exposure to those financial risks.

*Seeking cost protection (as one option to mitigate risk)*

5. If cases are raised in the public interest, then it is possible to seek such *cost protection* from the courts if the five Corner House principles are met:
   - The issues raised are of' general public importance';
   - The public interest requires that those issues should be resolved;
   - The applicant has no private interest in the outcome of the case;
   - Having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order; and
   - If the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

6. In practice an applicant seeking such costs protection would need to lodge a motion for a *Protective Expenses Order (PEO)* using 1 of the 2 options available:

    - *A COMMON LAW PEO* – these motions can be lodged under the common law 'in any civil proceedings' that may be 'initiated in any court'; and

    - *AN ENVIRONMENTAL PEO* – these motions are specific to actions related to 'the protection of the environment' and can be lodged under the *Protective Expenses Order Rules (as set out in RCS Chapter 58A).*

*The current policy problem:*

7. The core problem that arises is the structural limitations on the ability to access *cost protection* in an environmental case as:
    - A motion for an *Environmental PEO* option can only be sought in the Court of Session *(for a Judicial Review or a statutory appeal);* and
    - There is a wide range of primary legislation and regulations that mandate a specific court or court procedure that proceedings must be raised under, and that removes the option of lodging a motion for an *Environmental PEO.*

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## Why was this consultation undertaken?

8. Having concluded that the current scope is too restrictive the Council is of the view that the option to lodge a motion seeking an *Environmental PEO* should now be provided for in all court fora. Hence the draft rules prepared for the purposes of this consultation set out one potential way of taking that change forward.

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## The responses received

9. A press release was issued on 18 August 2025 to highlight the opening of this Public Consultation and to support wider engagement 38 organisations and individuals[1] were then directly emailed a copy of those consultation documents.

10. The consultation period closed 14 weeks later with 11 responses received:

| NUMBER OF RESPONSES | | | | |
|---|---|---|---|---|
| CATEGORY | RESPONDENT | Organisations | Individuals | TOTAL |
| Practitioners | Faculty of Advocates<br>Law Society of Scotland<br>Law Firms | 1<br>1<br>1 | | 3 |
| Officials | Scottish Courts and Tribunals Service (SCTS)<br>Environmental Standards Scotland (ESS) | 1<br>1 | | 2 |
| Organisation | Scottish Environment LINK<br>Environmental Rights Centre for Scotland (ERCS) | 1<br>1 | | 4 |

[1] *as listed in section 1 of the consultation paper*

| | | | | |
|---|---|---|---|---|
| | Open Seas Trust<br>Our Seas Coalition | 1<br>1 | | |
| Other | General Public<br>Professor Tom Mullen | | 1<br>1 | 2 |
| | ***TOTAL*** | **9** | **2** | **11** |

11. In line with the permissions given by each respondent; readers can view 10 of those 11 responses via the consultation page on the Councils website'. https://www.scottishciviljusticecouncil.gov.uk/consultations/scjc-consultations

12. The majority of responses were received from those likely to lodge a motion for a PEO rather than a public body or business likely to oppose such a motion. The Council does recognise that imbalance does gives rise to a "potential for bias" when interpreting the feedback received.

## The policy objectives

13. The Consultation Paper narrated the policy objectives as follows:

- *"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*."

14. 1 respondent suggested those objectives should have conveyed a much firmer public commitment to deliver "full Aarhus compliance:

> *R8 - "It is disappointing to see that the third policy objectives of the proposal is merely to improve Aarhus compliance and not to achieve full compliance with the Aarhus Convention. environmental PEOs were first introduced in 2013 under RCS Chapter 58A. Amendments were made in 2015, 2018 and 2024 yet the PEO regime is not fully Aarhus-compliant. There seems to be no good reason why, 12 years after environmental PEOs were first introduced, that the rules governing them should not be fully Aarhus-compliant. Nor is any reason given in the consultation paper why full compliance is not being proposed. Therefore, I recommend, therefore, that the rules be revised so as to address all of the concerns raised by the governing body of the Aarhus Convention (Decision VII/8s concerning United Kingdom)."*

## SECTION 2 – RESPONSES TO THE CONSULTATION QUESTIONS

15. This consultation covered 5 key areas of potential change and sought feedback via the 13 consultation questions that follow:

### ***PROPOSAL 1 – 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?**

| RESPONDENT | Responded to Q1 | Should we extend PEOs to summary applications under the 1990 Act |
|---|---|---|
| R1 | yes | yes |
| R2 | yes | yes |
| R3 | yes | yes |
| R4 | yes | yes |
| R5 | yes | yes |
| R6 | yes | yes |
| R7 | yes | Yes – but go further |
| R8 | yes | yes |
| R9 | Supports RI | yes |
| R10 | yes | yes |
| R11 | yes | yes |

16. All 11 respondents supported *cost protection* being made available across the range of *summary applications* that can be directed to the sheriff courts under the Environmental Protection Act 1990 *(refer annex 1)*:

> *R1 - "We agree that the ability to seek a PEO should be extended to proceedings under Sections 82(1) and 91(1) of the Environmental Protection Act 1990… The introduction of a PEO application process may help ensure such proceedings are not prohibitively expensive."*
>
> *R4 - "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."*
>
> *R8 - "…extending PEO procedure to the sheriff court and Sheriff Appeal Court is likely to have a significant effect" on the environment by providing opportunities both to avoid or reduce adverse environmental effects and to enhance positive environmental effects by increasing the number of environmental cases in the courts. I do not think there are any substantial adverse effects likely if these changes are made."*

17. 1 respondent commented on the level of expenses they incurred when progressing a *summary application* under the 1990 Act:

> *R4 - "… my own case… 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…"*

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### ***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?**

| RESPONDENT | Responded to Q2 | Any concerns or suggested changes to the draft rules |
|---|---|---|
| R1 | yes | no |
| R2 | yes | Concerns re digitisation / stick with standard motion procedure |
| R3 | yes | no |
| R4 | yes | no |
| R5 | no | no |
| R6 | yes | no |
| R7 | yes | no |
| R8 | yes | no |
| R9 | Supports RI | no |
| R10 | yes | no |
| R11 | yes | RCS rules should be made fully compliant before they are mirrored |

18. 1 respondent asked for the rules to be aligned with the current sheriff court *motion procedure* as that could better support digitisation of that procedure:

*R2 – "We believe it would be worthwhile to explore whether existing standard motion procedures in the SAC and sheriff courts could be adapted to support the policy intent. This would align with approaches taken with, for example, summary applications, where motions and minutes follow the Ordinary Cause Rules 1993 (Chapters 14 and 15). Using standard procedures would likely reduce confusion, benefiting court users."*

19. 1 respondent reinforced the prerequisite need for the existing Court of Session rules to be made fully compliant with the Convention before they are mirrored across to any other court procedures:

*R11 – "…extending rules which have already been found to be non-compliant by the ACCC may not be an optimal solution, as it risks perpetuating existing barriers to justice and further negative ACCC opinion."*

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<u>Other sheriff court actions</u>

### ***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?**

| RESPONDENT | Responded to Q3 | Are there other types of action where a PEO should be an option? |
|---|---|---|
| R1 | yes | s28 – Land Reform (S) Act 2023 / commission research |
| R2 | no | - |

| | | |
|---|---|---|
| R3 | yes | - |
| R4 | no | - |
| R5 | yes | SLAPPs |
| R6 | yes | commission research |
| R7 | yes | - |
| R8 | yes | all common law proceedings /commission research |
| R9 | Supports RI | s28 – Land Reform (S) Act 2023 / commission research |
| R10 | yes | - |
| R11 | yes | s 75 - Local Government (Scotland) Act 1973<br>appeals under the Civic Government (Scotland) Act 1982 |

20. 4 respondents flagged other specific types of action where the ability to access an *Environmental PEO* may also be appropriate:

> *R1 - "Private nuisance actions are within the scope of Article 9 of the Aarhus Convention. Their exclusion from the PEO rules is one of the reasons why the PEO rules are non-compliant"*
>
> *R1 - "…summary applications made under Section 28 of the Land Reform (Scotland) Act 2003 in relation to the extent of access rights and rights of way."*
>
> *R5 - "…we suggest that consideration should be given to exploring the widest possible extent of environmental PEOs across the justice system in Scotland as cases concerning the environment extend beyond simply summary applications. This could also include instances where a defender seeks a PEO in an environmental case which could be classified as a Strategic Litigation Against Public Participation (SLAPP)."*
>
> *R11 – "…actions under section 75 of the Local Government (Scotland) Act 1973 (where a local authority intends to dispose of an environmental common good asset" and" appeals under the Civic Government (Scotland) Act 1982, which turn on the waste management operation of a licenced premises."*

21. 4 respondents suggested the Council should 'commission research' to better identify all categories of cases that may fall within the ambit of article 9 (3):

> *R1 - "We recommend that the SCJC carries out or **commissions research** in order to identify further actions within the scope of Article 9".*
>
> *R6 - "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."*
>
> *R8 - One option would be to "…try to identify all types of action which fall within the scope of the Convention and then to list them specifically in the rules, as is done by proposed Rule 28A.1. for the sheriff court which lists a number of proceedings under Environmental Protection Act 1990."*

22. Rather than commission research, 2 respondents suggested using a form of words that would enable a PEO to be sought in any case that falls within the spirt of the Aarhus convention:

> *R8 - "The alternative would be to employ a general form of words such as that used in Rule 58A.1 for the Court of Session: "relevant proceedings which include a challenge to an act or omission on the grounds that it contravenes the law relating to the environment"(without the*

*restriction of relevant proceedings to applications to the supervisory jurisdiction and to appeals under statute which currently appear in Rule 58A.1). Those words are wide enough to encompass all types of action which might be brought to protect the environment whether based on statute of common law."*

*R10 – "Provided that the rules cover all statutory appeals under environmental legislation, that would bear to be good enough. That is perhaps best achieved with a general definition of environmental proceedings rather than reference to specific statutory provisions to permit the court some flexibility."*

*R11 – "…would prefer that the rules refer to the broad definitions given in the Convention. It may be helpful to have regard to the definition of 'environmental information' in the regulation 2 of the Environmental Information (Scotland) Regulations 2004, or of 'environmental protection' in s45 of the UK Withdrawal from the European Union (Continuity)(Scotland) Act 2021."*

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## ***PROPOSAL 2 – 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?**

| RESPONDENT | Responded to Q4 | Should PEOs be extended to the Sheriff Appeal Court? |
|---|---|---|
| R1 | yes | yes |
| R2 | yes | yes |
| R3 | yes | yes |
| R4 | yes | yes |
| R5 | yes | yes |
| R6 | yes | yes |
| R7 | yes | yes |
| R8 | yes | yes |
| R9 | Supports RI | yes |
| R10 | yes | yes |
| R11 | yes | yes |

23. All 11 respondents support extension of PEOs to the Sheriff Appeal Court.

24. That said there is an implied prerequisite that the Court of Session rules first need to be made fully compliant with the Convention before they are mirrored across to the Sheriff Appeal Court Rules:

*R1 - "We agree that the ability to seek a PEO afresh, or to have one carried forward, should be extended to the Sheriff Appeal Court."*

*R1 - "The ACCC has explained that "When assessing the costs related to procedures for access to justice in the light of the standard set by article 9, paragraph 4, of the Convention, **the Committee considers the cost system as a whole and in a systemic manner**".*

25. 1 respondent provided a practical example for the Council to consider:

*R6 - "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."*

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### *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?

| RESPONDENT | Responded to Q5 | Any concerns or suggested changes to the draft rules? |
|---|---|---|
| R1 | Yes | no |
| R2 | yes | Concerns re digitisation / stick with standard motion procedure |
| R3 | yes | no |
| R4 | yes | no |
| R5 | yes | Should provide financial update if appealing |
| R6 | yes | no |
| R7 | yes | no |
| R8 | yes | no |
| R9 | Supports RI | no |
| R10 | yes | no |
| R11 | yes | no |

26. 1 respondent asked for the rules to be aligned with the current motion procedure used by the Sheriff Appeal Court, to better support the digitisation of that process:

*R2 – "We believe it would be worthwhile to explore whether existing standard motion procedures in the SAC and sheriff courts could be adapted to support the policy intent. This would align with approaches taken with, for example, summary applications, where motions and minutes follow the Ordinary Cause Rules 1993 (Chapters 14 and 15). Using standard procedures would likely reduce confusion, benefiting court users."*

27. 1 respondent suggested that it might be helpful for an update on the applicant's financial position to be provided to the court when appealing:

*R5 - "We would also suggest consideration should be given to requiring the applicant to provide up-to-date details regarding their finances at the time of appeal."*

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## ***PROPOSAL 3 – 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?

| RESPONDENT | Responded to Q6 | Should PEOs be an option in a multi-party action? |
|---|---|---|
| R1 | yes | yes |
| R2 | no | - |
| R3 | yes | yes |

| | | |
|---|---|---|
| R4 | yes | yes |
| R5 | yes | yes |
| R6 | yes | yes |
| R7 | yes | yes - with comment on |
| R8 | yes | yes |
| R9 | Supports RI | yes |
| R10 | yes | Possibly – but it may be unworkable in practice |
| R11 | yes | |

Group Procedure

28. 9 respondents support PEOs being made available in multi-party actions:

*R1 - "We agree that the ability to seek a PEO in the Court of Session should be extended within multiparty actions initiated under group procedure."*

*R6 - "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."*

*R11 – "…supports extending the availability of PEOs to group proceedings, recognising that cost certainty is essential for enabling public interest litigation."*

29. 1 respondent took the view that, whilst such an extension may be fine in theory it is unlikely to work in practice:

*R10 – "…when one has regard to the nature of the group proceedings that have been brought to date – it is difficult to think of an example of group proceedings where (i) the group members would not be seeking a financial remedy, and (ii) the pursuer's funding arrangements would make it viable for them to do it if the ability to recover expenses was removed from them (or at least subject to a pretty low cap). The funding arrangements are, it is understood, usually premised on a potentially significant expenses recovery from the defenders which would be prevented on the assumption that a PEO would have a cap for both parties."*

*R10 – "The use of such orders would require group members to fund (or to be funding) the group litigation themselves, which simply does not happen in practice. It may also at least appear to cut across the policy decision that led to group proceedings being permitted in the first place."*

30. 1 respondent noted the practical considerations that would arise:

*R5 - "We note that in cases of community groups, courts do examine the prohibitive costs that potentially deter legal action in the absence of a PEO."*

*R5 - "We would highlight that any extension of PEOs to multi-party actions could potentially result in individuals who have the means to afford legal action independently being covered by a PEO."*

*R5 - "…if rule 58A.5 were to be retained and the availability of PEOs were to be extended to Group Procedure, consideration would need to be given to how rule 58.5A (3)(a)(ii) interacts with rule 26A.7(2)(f) on group proceedings. The latter rule sets out, non-exclusively, certain matters which a Lord Ordinary is to consider when deciding whether an applicant is a suitable*

*person to be the representative party in group proceedings. Those matters include…f) the demonstration of sufficient competence by the applicant to litigate the claims properly, including financial resources to meet any expenses awards (the details of funding arrangements do not require to be disclosed)."*

*R5 - "…the requirement imposed by rule 58.5A(3)(a)(ii) might be at odds with the above wording. Indeed, it is arguable that consideration (f) is at odds with an application for a PEO – although it may be that a PEO, if granted, would be viewed as meeting the "financial resources" requirement. That might, however, raise an issue as regards the timing of the application and its determination, and the process in which it is made – bearing in mind that the Court's view is that the application for permission to be the Representative Party is a separate process from the group proceedings."*

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## ***PROPOSAL 4 – AMENDING JUDICIAL DISCRETION WHEN SETTING CAPS***

The ability to shift the caps upwards

***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"?**

| RESPONDENT | Responded to Q7 | Should we revert to using fixed maximum sums? |
|---|---|---|
| R1 | yes | Yes – make it a fixed maximum sum |
| R2 | no | - |
| R3 | yes | Yes – make it a fixed maximum sum |
| R4 | yes | Yes – make it a fixed maximum sum |
| R5 | yes | Yes – make it a fixed maximum sum |
| R6 | yes | Yes – make it a fixed maximum sum |
| R7 | yes | No – retain current approach |
| R8 | yes | Yes – make it a fixed maximum sum |
| R9 | Supports RI | Yes – make it a fixed maximum sum |
| R10 | yes | No – retain current approach |
| R11 | yes | Yes – make it a fixed maximum sum |

31.8 respondents were in favour of removing the ability to shift caps upwards:

*R8 - "I recommend that draft rule be amended to provide that the £5,000 limit is a maximum and can be varied only by decreasing it. the current rule undermines certainty for applicants in the estimation of their expenses as they cannot be sure that their liability will exceed £5000. The discretion to increase the cap tends to undermine the purpose of PEOs which is to provide predictability of the cost of litigation."*

*R5 - "We consider that the phrase "on cause shown" is a vague term and we would, on balance, support removing this phrase and reverting to a fixed maximum sum."*

*R6 - "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."*

*R11 – "…remove 'on cause shown' entirely and maintain fixed maximum cost caps to ensure certainty and compliance with the Convention."*

32. 2 respondents support retention of the status quo:

*R5 - "We consider it appropriate that the ability of the court to review the amount granted on a case-by-case basis should remain, as this ensures flexibility and retains court discretion. This flexibility can enable parties to settle pragmatically and amicably."*

*R7 - "We would support the current approach. The "on cause shown" qualification is one that is well-understood in the Scottish legal profession and that offers a degree of important flexibility when dealing with complex and highly fact sensitive situations."*

*R10 – "Discretion is key in these matters so that judges are able to respond to the circumstances before them. It should therefore remain possible to vary the figures."*

*R10 – "… it should perhaps be made clearer that the figures should be set at £5,000/£30,000 unless there is cause shown – i.e. the presumption should be those figures rather than them just being seen as a suggestion as is sometimes the case. That would perhaps add at least a level of certainty to the applications, allowing more informed advice to be given in advance about the likely level of any cap. As things currently stand, the court regularly moves from the default figures and that can make it difficult for a pursuer or petitioner to be able to say to the court that they can or cannot proceed with the action if the cap is set/ not set at a particular level. That will remain a relevant consideration for the court in most cases."*

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## ***PROPOSAL 5 – AMENDING INFORMATION PROVIDED WHEN APPLYING***

Providing the terms of representation

### ***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?**

| RESPONDENT | Responded to Q8 | Should we be asking applicants for their terms of representation? |
|---|---|---|
| R1 | yes | No – delete section (3) (a) (ii) |
| R2 | no | - |
| R3 | yes | No – delete section (3) (a) (ii) |
| R4 | yes | No – delete section (3) (a) (ii) |
| R5 | yes | No – delete section (3) (a) (ii) |
| R6 | no | - |
| R7 | yes | Yes – stick with current approach |
| R8 | yes | No – delete section (3) (a) (ii) |
| R9 | Supports RI | No – delete section (3) (a) (ii) |
| R10 | yes | No – there's no good reason for disclosing to other side |
| R11 | yes | no |

33. 8 respondents thought that any requirement to provide the *terms of representation* was unnecessary and should be withdrawn:

*R1 - "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."*

*R4 - "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".*

*R6 – "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."*

*R8 - "This is an obligation beyond what is normally imposed on the parties in civil litigation Some litigants may have good reason not to disclose the 'terms of representation' and the requirement might discourage them for litigation. The benefits of having such a rule do not seem to outweigh the possible disadvantage of a deterrent effect. As it creates a potential obstacle to litigation without a compelling justification, I do not think this proposal is Aarhus-compliant."*

*R10 – "There is no reason the funding arrangements of the legal team should have to be disclosed to the other side. It is tactically disadvantageous (particularly for petitioners) to require litigants to do so and may skew the basis on which the proceedings are brought/ managed."*

*R10 – "The general rule is that no litigant is entitled to know how the other is funding their case, and there is no good reason that a litigant should be required to give up that confidential information simply because it is a case in which a PEO is sought."*

*R11 – "…requiring people to disclose how they are paying for legal representation—such as whether they're receiving free or discounted legal help—can discourage them from applying for cost protection. In practice, this means that individuals or groups trying to challenge environmental decisions might feel exposed or uncomfortable sharing sensitive financial details."*

34. 1 respondent supported retention of the status quo:

*R7 - "We consider that applicants should continue to require to provide this information. Given the potential impact that a PEO will have upon the other party's ability to recover costs in the event they are successful, this is an important balancing measure. There are already provisions in the existing and proposed rules to protect the confidentiality of any such information and, if appropriate, the court could put additional protections in place in this regard, such as confidentiality rings to further limit access."*

*R7 - "…we also consider that applicants should be required to disclose any agreed or proposed funding arrangements in relation to the proceedings the application relates to. This is required (as is information on the terms on which the applicant is represented) to allow the court to carry out a meaningful assessment of whether the proceedings are or are not "prohibitively expensive"."*

<u>Providing estimates of expenses</u>

***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?**

| RESPONDENT | Responded to Q9 | Should we be asking applicants to estimate expenses? |
|---|---|---|
| R1 | yes | No - delete section (3) (a) (iv) |
| R2 | no | - |
| R3 | yes | No - delete section (3) (a) (iv) |
| R4 | yes | No - delete section (3) (a) (iv) |
| R5 | yes | No - delete section (3) (a) (iv) |
| R6 | yes | No - delete section (3) (a) (iv) |
| R7 | yes | Yes – stick with current approach |
| R8 | yes | No - delete section (3) (a) (iv) |
| R9 | Supports RI | No - delete section (3) (a) (iv) |
| R10 | yes | Yes – need to have an estimate of some kind |
| R11 | yes | No - delete section (3) (a) (iv) |

35. 8 respondents thought that requiring an applicant to estimate the expenses of their opponent created an unnecessary burden that should be withdrawn:

*R4 - "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."*

*R4 - "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."*

*R5 - "We further consider that predicting the costs of the other parties can be difficult and involves further work for those representing the applicant."*

*R6 - "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."*

*R8 - "This rule requires the applicant to engage in a somewhat speculative exercise on the basis of incomplete information. As well as being a difficult exercise, it creates a significant amount of additional work for the applicant which may delay litigation and will be reflected in increased legal fees. As it creates a potential obstacle to litigation without a compelling justification, I do not think this proposal is Aarhus-compliant."*

36. 2 respondents supported retention of the status quo:

*R7 - "We consider that applicants should continue to require to provide this information. It provides important context that will feed into the assessment of whether proceedings are or are not "prohibitively expensive". This is information that the other party(ies) should be given an opportunity to review and challenge."*

*R10 – "There should require to be an estimate of some kind, but it needs to be a realistic estimate with some kind of oversight from a law accountant."*

*R10 – "Often the courts (and counsel) will not have a feel for the overall costs of a case without the estimate being provided. Similarly, the courts can be somewhat removed from the*

*realistic costs of litigation and a proper foundation for figures is required, particularly when considering whether the litigation is prohibitively expensive and whether a litigant would be acting reasonably in not continuing with the litigation if an order is not pronounced."*

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## PROPOSAL 6 – ANY OTHER 'SUGGESTED IMPROVEMENTS'

### *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?

| RESPONDENT | Responded to Q10 | Any other suggested improvements? |
|---|---|---|
| R1 | yes | £500 for application is prohibitive for some / leave to appeal to UKSC |
| R2 | no | |
| R3 | yes | Carry PEO forward – for leave to appeal to UKSC |
| R4 | yes | £500 for application is prohibitive for some |
| R5 | yes | Carry PEO forward – for leave to appeal to UKSC |
| R6 | yes | Carry PEO forward – for leave to appeal to UKSC |
| R7 | yes | Add rules for *Common Law PEO*s |
| R8 | yes | Carry PEO forward – for leave to appeal to UKSC |
| R9 | Supports RI | £500 for application is prohibitive for some /leave to appeal to UKSC |
| R10 | yes | state that fees are not payable within the PEO when granted |
| R11 | yes | |

<u>Removing the £500 liability in expenses (for the application stage)</u>

37. 3 respondents recommended that an applicant should have "no liability for expenses" when they make an application for a PEO:

*R1 - "The ability to increase the £500 liability limit on exceptional cause shown will introduce unnecessary uncertainty into the PEO application process. If the £500 cap on liability is retained, the wording "other than on exceptional cause shown" should be deleted from draft rule 3.55.6(2)."*

*R4 - "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."*

38. 1 respondent sought clarification of how the £500 sum had been arrived at:

*R4 - "£500 is an arbitrary sum which will be prohibitively expensive for some PEO applicants."*

*R4 - "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."*

<u>Stating that court fees are not payable within the PEO itself</u>

39. To improve the predictability of expenses for applicants 1 respondent suggested including a standard form of words to the effect "that no court frees are payable" within every PEO granted by the court:

*R10 – "It should perhaps be made clear that a PEO can also contain an order that court fees are not payable. Court fees otherwise remain an insuperable barrier for a large number of litigants. Therefore, even with an expenses cap set at zero (which would be unusual), many litigants would not be able to proceed with a multi-day hearing because of the level of court fees that would require to be paid by both parties."*

*R10 – "There have been (unpublished) decisions of the Court of Session where PEOs have included a waiver of court fees, and other decisions suggesting that is not something the courts should be entertaining. The fees are – and will continue to be – a barrier to justice for some litigants. The courts should not only be available to the wealthy and to businesses. The matter should be put beyond doubt. It should, in the first instance, be a matter for the Scottish Government to specify (or at least provide options) in subordinate legislation rather to be left to the discretion of individual judges who are in any event bound by the parameters of the legislation insofar as it relates to court fees."*

Carrying forward of PEOs (when seeking leave to appeal to the UK Supreme Court)

40. 6 respondents suggested that if a PEO had been granted it should automatically be carried forward if seeking *leave to appeal* to the UK Supreme Court:

*R1 - "In its 15 April 2025 opinion in Wildcat Haven Community Interest Company v The Scottish Ministers, the Inner House decided that a PEO granted in a petition for judicial review did not cover an application for permission to appeal to the UK Supreme Court ('UKSC')."*

*R1 - "…the ACCC has found that when considering compliance with Article 9(4), it considers the cost system "as a whole and in a systemic manner". The PEO rules should be amended to ensure that PEOs carry over to applications for permission to appeal to the UKSC by default."*

*R5 - "At present, rule 58A does not extend to the situation where a party seeks permission from the Inner House of the Court of Session for leave to appeal to the Supreme Court, and we suggest that the Rules are revisited to address this."*

*R6 - "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."*

Removing the £30,000 cross cap

41. 3 respondents suggested that, given that granting a PEO would confirm that an inequality of arms does exist, there should be no limit placed on the ability of a PEO applicant who wins a case from recovering expenses from their opponent:

*R1 - "Granting a PEO without a cross-cap does not provide carte blanche for a litigant to incur unreasonable and excessive costs. Civil litigants in Scotland are subject to the ordinary rules and principles governing the recovery of expenses in litigation. The conduct of the parties during litigation is one of the factors which a court may take into account when assessing the parties' liability for expenses at the conclusion of litigation. It is very unlikely that any unnecessary or exorbitant expenses incurred by one of the parties would be recoverable at the conclusion of litigation."*

*R4 - "Cross-caps act as a barrier against PEO applicants obtaining quality legal representation and are problematic for maintaining equality of arms in litigation."*

> *R4 - "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."*
>
> *R8 - "…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. The £30,000 cross-cap potentially prevents public interest litigants from recovering their full litigation costs and this may well be a deterrent to litigation. It also puts the defender in an action in a better position than he would be in when defending other types of litigation. Clearly, if the applicant's liability to the respondent is limited to £5,000 and the respondent's liability to the applicant is not capped, there is a substantial asymmetry between the two sides of the litigation. Whilst some will consider this unfair, it is worth noting that creating a substantial asymmetry is inherent to the concept of the PEOs and its rationale is to address other inequalities in litigation."*

42. I respondent noted the differential that can and does arise in the scale of the legal representation provided by each side:

> *R6 - "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 where 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."*

Using a standardised application form

43. 3 respondents suggested that it would be beneficial for the motion for a PEO to be accompanied by a standardised application form:

> *R1 - "It would assist applicants to fully understand the information and documents which need provided as part of a PEO application, as well as the manner in which PEO applications are made."*
>
> *R1 - "A standardised PEO application form would assist legal representatives. It would likely be of particular benefit to any PEO applicants without legal representation."*
>
> *R1 - "A standardised PEO application form would help conserve judicial resources. It would help ensure the courts receive all of the necessary information they need to determine PEO applications efficiently."*
>
> *R6 - "A form would improve clarity for litigants, reduce procedural errors and conserve judicial resources."*

Providing a new procedure (to cover *Common law PEOs*)

44. 1 respondent suggested the preparation of rules for *Common Law PEOs*, as one pragmatic way to increase the use of that alternative option:

> *R7 - "…we would suggest that it may be useful to for court rules to be drafted to replace the current common law PEO rules. This would help to make the law on the availability of costs protection more accessible, particularly to non-lawyers."*

Adopting Qualified One-way Cost Shifting (QOCS)

45. 3 respondents suggested that replacing PEOs with QOCS would provide a fairer and more efficient way of providing full *cost protection* in environmental cases:

*R1 - "We recommend that the PEO regime in the Court of Session and the proposed PEO regime for the sheriff courts and Sheriff Appeal Court are **replaced entirely** with a system of qualified one-way cost shifting ('QOCS') for litigation which falls with the scope of Article 9 of the Aarhus Convention."*

*R1 - "The PEO regime fails to ensure that environmental litigation is not prohibitively expensive. Even with a PEO, legal proceedings remain unaffordable for many individuals and NGOs."*

*R1 - "QOCS were introduced for personal injury litigation in Scotland and could be introduced in environmental litigation. The arguments accepted by the Scottish Government for the introduction of QOCS in personal injury cases apply also to most Aarhus cases, namely the imbalance of power and resources between the parties.". As noted in the Jackson Review, QOCS puts parties who are in an asymmetric relationship (such as the parties in almost all Aarhus-type litigation) onto a more equal footing, ensuring that litigants are not denied access to justice because of the prospect of potential liability."*

*R1 - "If QOCS were introduced in environmental judicial review proceedings, for example, it would mean that in most cases a petitioner would not be liable for the expenses of any other parties if the judicial review was unsuccessful. However, the petitioner would still be able to claim their expenses from the respondent if the petition was successful."*

*R1 – "QOCS would be much simpler than the current and proposed PEO regimes in the court rules."*

*R11 – "…introduce a system based on the qualified one-way costs shifting now used for personal injury claims, with clear criteria for when costs may be awarded."*

46. 1 respondent then noted the benefits available from adopting QOCS:

*R1 – "…remove the need for PEO applications. PEO applications are inherently expensive and time-consuming – contrary to their stated aim of improving access to justice."*

*R1 – "… avoid satellite litigation over disputed PEO applications."*

*R1 – "…conserve judicial resources" as "the courts would no longer have to consider and determine PEO applications, nor would they have to deal with any disputes arising from PEO applications."*

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## VIEWS IN THE 3 AMENDMENTS MADE IN 2024

<u>Providing for the confidentiality of financial information</u>

### *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?

| RESPONDENT | Responded to Q11 | Any comments made on how confidentiality is being provided for? |
|---|---|---|
| R1 | yes | no |
| R2 | no | - |
| R3 | yes | no |
| R4 | yes | no |
| R5 | yes | yes |

| | | |
|---|---|---|
| R6 | yes | no |
| R7 | yes | Yes – to facilitate the "open justice" principles |
| R8 | yes | no |
| R9 | Supports RI | no |
| R10 | yes | yes |
| R11 | yes | yes |

47. 3 respondents provided comment on how confidentiality is provided for:

> *R5 - "Yes, we consider it appropriate that these provisions should be sought as this will enable sensitive documents, such as bank statements, to be processed in the knowledge that they are subject to confidentiality."*
>
> *R5 - "Consideration should be given to mirroring the arrangements in place in England in relation to the disclosure of finances, whereby financial particulars are disclosed between parties."*
>
> *R7 - "We agree that it should be open to a party to seek to have such a motion dealt with in a way that protects the confidentiality of the information provided."*
>
> *R11 – "… supports the rule change that allows applicants to request confidentiality when lodging a motion for a PEO. This is a positive step that helps protect sensitive financial information and may encourage greater participation in environmental litigation, particularly from individuals and groups with limited resources.*
>
> *R11 – "…has concerns about the uncertainty surrounding whether confidentiality requests will be granted. The current approach requires a specific motion to be made, rather than treating confidentiality as the default starting point. This lack of assurance may deter applicants from seeking a PEO."*

48. Whilst accepting that a reasonable level of information should be provided, 1 respondent did query whether the disclosure of "very private information" was essential to the court making its decision:

> *R10 – "…whilst it is appreciated that the court will want to be put in a position to consider the likely overall costs and the affordability of those costs. That does not mean, however, that litigants should be expected to make public very private information, which, in the vast majority of cases, will be wholly unrelated and irrelevant to the subject matter of the underlying dispute."*

49. 1 respondent commented on the need to strike the right balance between keeping information confidential and alignment with the principles of open justice:

> *R7 - "However, as a matter of principle, such applications should also always be dealt with by the court in accordance with Open Justice principles. The court should adopt an approach to the motion that only restricts Open Justice to the extent necessary to serve the purpose in question. This is particularly important to ensure that the court's approach to PEO applications is made public to the extent possible so that those seeking and opposing such applications can understand how future applications are likely to be dealt with, thus promoting transparency of decision-making and enhancing legal certainty."*

<u>Confirming the ability to carry forward a PEO when appealing</u>

***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?**

| RESPONDENT | Responded to Q12 | Any comments on how PEOs are being carried forward with appeals? |
|---|---|---|
| R1 | yes | no |
| R2 | no | - |
| R3 | yes | no |
| R4 | yes | no |
| R5 | no | - |
| R6 | no | - |
| R7 | yes | no |
| R8 | yes | no |
| R9 | Supports RI | no |
| R10 | yes | yes |
| R11 | yes | yes |

50. Given the change made in 2024, the reasons why PEOs must be carried forward with an appeal were reinforced by 2 respondents:

> *R10 – "If the nature of a case suggests that a PEO is appropriate, that is unlikely to change if and when the case goes to an appeal. The important nature of a large number of these cases suggests that appeals are likely. It is a waste of court time and resource to require litigants to reargue the matter. The PEO should simply carry over, subject always to the right of a party to move for it to be recalled or varied on cause shown."*
>
> *R11 – "This improves procedural fairness and aligns with Aarhus requirements."*

51. The absence of any negative comments in response to this question implies the rule change made in 2024 has successfully removed the previous unfairness from the appeals process. That assumption is reinforced by the fact the ACCC has welcomed this change within their 2025 Compliance Report.

<u>Providing improved clarity on the treatment of interveners expenses</u>

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

| RESPONDENT | Responded to Q13 | Any comments on how interveners expenses are being dealt with? |
|---|---|---|
| R1 | yes | no |
| R2 | no | - |
| R3 | yes | no |
| R4 | yes | no |
| R5 | no | - |
| R6 | no | - |
| R7 | yes | no |
| R8 | yes | no |
| R9 | Supports RI | no |
| R10 | yes | yes |
| R11 | yes | yes |

52. 2 respondents suggested that the rule as amended in 2024 could benefit from the removal of any reference to "on cause shown":

> *R4 - "I suggest that the wording "except on cause shown" is deleted..." to "… ensure that a PEO applicant faces no liability to pay expenses to interveners. This would remove another level of uncertainty/disincentive."*
>
> *R6 - "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."*

53. 2 respondents commented on the handling of "public interest interventions" in general:

> *R10 – "…the default rule should normally be than an intervener bears their own expenses, but it ought to be possible to move away from that default if the intervener becomes the de facto litigant on one side or another."*
>
> *R10 – "A minute of intervention should perhaps be required to include an application for an order from the court, when granting the minute, related to expenses so as to place the matter beyond doubt. It would also remove any concern on the part of those seeking to make public interest interventions (which would be of assistance to the court) that might dissuade such applications being made."*
>
> *R11 – ",,,concerned that the current rules only apply to a narrow category of 'relevant parties'—specifically those granted leave to intervene in the public interest. This excludes other types of interveners, such as statutory bodies or parties deemed 'directly affected', who may still be able to claim expenses against a PEO applicant."*

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## SECTION 3 – CONCLUSIONS

54. This section outlines the conclusions reached from analysis of the responses:

### *Feedback on proposal 1 –* to *extend Environmental PEOs to the sheriff courts*

*55.* All 11 respondents to question 1 support extending the availability of *Environmental PEOs* to the sheriff courts. Of those,1 respondent wanted the existing motion procedure retained, 3 suggested other actions where a PEO should apply and 3 suggested going further to cover all actions falling within the spirit of the Convention.

*56.* The Council should now consider that feedback and instruct draft rules to put its final decisions on extending access to PEOs into effect. In line with the public participation expectations feedback would need to be sought on the finalised wording of that next set of rules *(given they are "for implementation purposes").*

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### *Feedback on proposal 2 -* to *extend Environmental PEOs to the Sheriff Appeal Court:*

*57.* All 11 respondents to question 4 support extending the availability of *Environmental PEOs* to the sheriff courts, with 1 wanting the existing motion procedure to be retained.

*58.* The Council should now consider that feedback and instruct draft rules to put its final decisions on extending access to PEOs into effect. In line with the public participation expectations feedback would need to be sought on the finalised wording of that next set of rules *(given they are "for implementation purposes").*

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***The feedback on proposal 3 - to extend RCS CH58A to other Court of Session procedures:***

59. 9 respondents to question 6 were in favour of *Environmental PEOs* being made available in multi-party actions, 1 suggested that in practice that may be unworkable and 1 thought that should be a matter of judicial discretion. Before it considers the policy arguments both for and against making any change, the Council should await the responses to the current *Call for Evidence* that has been published by the Group Procedure Working Group.

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***The feedback on proposal 4 - to amend the ability to shift cost caps upwards***

60. 8 respondents to question 7 were in favour of reverting to the use of "fixed maximum sums", 3 preferred the status quo, and 1 did not comment. In practice that potential change could be achieved relatively simply by the withdrawal of all references to exceptions being made "on cause shown" within the "cost capping" rule in each court fora. The Council should now consider the policy arguments both for and against making that change and decide how it wishes to proceed.

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***The feedback on proposal 5 - to reconsider the information an applicant is required to provide***

<u>Terms of Representation</u>

61. 8 respondents to question 8 were in favour of withdrawing the requirement to disclose the terms of representation, 1 supported the status quo and 2 did not comment. In practice that potential change could be achieved by the deletion of section (3) (a) (ii) from the existing PEO Rules. The Council should now consider the policy arguments both for and against and decide how it wishes to proceed.

<u>Estimating Expenses</u>

62. 8 respondents to question 9 were in favour of withdrawing the requirement to estimate their opponents expenses, 2 supported the status quo and 1 did not comment. In practice that change could be achieved by the deletion of section

(3) (a) (iv) from the existing PEO Rules. The Council should now consider the policy arguments both for and against and decide how it wishes to proceed.

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***The feedback from the "open question" – on other suggestions for improvement of the existing procedure***

63. The 'open question' (Q10) generated a range of suggestions that were specific to the existing court procedure used for *Environmental PEOs*. The Council should now commission a 'proportionate' level of research so that a considered position can be taken on the following suggestions:

    ***Removing the £500 liability in expenses*** *(for the application stage)* - given that 2 respondents recommended that a PEO applicant should have "no liability for expenses" at all when making an application for a PEO.

    ***Stating that court fees are not payable within each PEO –*** given that 1 respondent suggested inserting a form of words within every interlocutor granting a PEO to confirm that no court fees are payable, as that would help to reduce the level of uncertainty experienced by applicants.

    ***Carrying forward a PEO when seeking leave to appeal to the UKSC*** - *g*iven that 3 respondents suggested that a PEO should carry forward to any application for *leave to appeal* a case onwards to the UK Supreme Court.

    ***Removing the £30,000 cross cap*** – given that 3 respondents suggested the complete withdrawal of any limits on the ability of a PEO applicant to recover some of their expenses from an unsuccessful opponent.

    ***Using a standardised application form*** - given that 2 respondents suggested introducing a standardised application form.

    ***Adopting Qualified One-way Cost Shifting (QOCS)*** - given that 2 respondents were of the view that QOCS would be a fairer and easier way of providing *cost protection* in environmental cases.

64. The following 2 suggestions go beyond the scope set for this consultation, as they relate to the presence or absence of a procedure for *Common Law PEOs*:

    ***Providing a procedure for Common law PEOs*** - 1 respondent suggested the preparation of a new court procedure to cover *Common Law PEOs* as a means to potentially increase the use of that option:

    > *R7 – "Finally, while we recognise that the current consultation is concerned with environmental PEOs and Aarhus compliance specifically, we would suggest that it may be useful to for court rules to be drafted to replace the current common law PEO rules. This would help to make the law on the availability of costs protection more accessible, particularly to non-lawyers."*

    ***Undertaking a comprehensive review*** *(to cover Common law PEOs and Environmental PEOs)* - 1 respondent suggested that the Scottish Government

and/or the SCJC should take a more strategic view given the international law obligations and the common law principles on access to justice:

> *R8 – "There is good reason to see Lord Reed's remarks in UNISON (when taken together with his remarks in AXA quoted) above as generally applicable and as laying down the approach that public authorities should follow when making policy decisions on access to justice. Specifically, they should consider the value of access to justice not merely as a moral or political value (which it certainly is) but also as a legal value which must be respected. Thus, although it is clearly essential to consider the requirements of the Aarhus Convention when reforming PEOs in environmental cases,* ***it is also necessary to consider the common law principles*** *as well."*
>
> *R8 – "I recommend" that "the Scottish Government and the SCJC undertake a comprehensive review of PEOs (not restricted to environmental cases) which considers them in the round in the light both of the UK's international law obligations and the common law principles of access to justice."*

65. At some future point the Council should consider commissioning a proportionate level of research on those 2 suggestions, consider the merits and decide how it may wish to proceed.

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## SECTION 10: THE NEXT STEPS

66. Following the publication of this analysis the next steps will be:

> *Consultation Analysis* – the Council will consider the content of this report when it meets on 8 December 2025 and take a view on how to proceed.
>
> *Consultation Response* – a draft Consultation Response report will be prepared for consideration and approval by Council members in early 2026. The subsequent publication of that report will convey the final policy decisions taken and the drafting instructions issued.

**Secretariat to the Scottish Civil Justice Council**
**December 2025**

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*Consultation Paper + Draft Rules + BRIA+ EQIA*
*https://www.scottishciviljusticecouncil.gov.uk/consultations/scjc-consultations/extending-the-availability-of-protective-expenses-orders*

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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.<br><br>*That currently covers:*<br>• *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*<br>• *Appeals under statute to the Court of Session.* |
| ACCC | Acronym for – Aarhus Convention Compliance Committee (ACCC). |
| Cause shown | A term in Scots Law that equates to saying – "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*<br><br>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 – THE "SUMMARY APPLICATIONS" ARISING UNDER THE 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.*" |