Scottish Civil Justice Council

CONSULTATION ANALYSIS: on the proposals made to extend the availability of PEOs

Issued: - Working draft - as at 24 Nov 2025 – pending the 2 responses due to come in from ESS + Faculty

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SECTION 1 - INTRODUCTION

Purpose

1. To analyse the 11 responses received on the proposals made to extend the ability to access Protective Expenses Orders (PEOs) into other court procedures

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Timing

2. This consultation was opened on 18 August 2025 for 12 weeks; with a closing date of 14 November 2025.

3. That closing date was extended to 28 November 2025 for 2 respondents.

Background

The need for citizens to mitigate risk:

4. Scotland operates an adversarial justice system, so for any member of the public thinking about raising civil proceedings in the public interest, there is a need to ensure that they do have sufficient funding in place to cover the costs of their own legal team. In addition, they would also need to ensure that *(if they lost)* they would have sufficient funds in place to cover the risk of 'an adverse award of expenses' being made against them.

5. In situations where that potential litigant was unable to acquire sufficient resources and is unwilling to take on both of those financial risks they may well choose not to litigate, unless they could access an accessible form of *costs protection* to mitigate that risk.

Seeking cost protection (as one option to mitigate risk)

6. Where a case has been raised in the public interest then it is possible to seek *cost protection* from the courts subject to meeting certain criteria.

7. In practice, an applicant would need to lodge a motion seeking a Protective Expenses Order (PEO) using 1 of the 2 options that are 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'.

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

The policy problem:

8. The core policy problem that arises is one of 'scope' as at present:
   - 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
   - A range of primary legislation, and regulations, do mandate a different court or court procedure that proceedings must be raised under, and that procedure may exclude the option of lodging a motion for an *Environmental PEO.*

Why was this consultation undertaken?

9. Having assessed the current scope as too restrictive, the Council concluded that in future potential litigants should have the ability to lodge a motion seeking an *Environmental PEO's* in all court fora. The draft rules prepared to support this consultation had provided one option for taking that change forward

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The responses received

10. The Council issued a press release on 18 August 2025 to highlight the opening of this consultation, with 38 organisations and individuals[1] then emailed a copy of the consultation pack.

11. The consultation closed with 11 responses received:

NUMBER OF RESPONSES				
CATEGORY	RESPONDENT	Organisations	Individuals	COMBINED TOTAL
Practitioners	Faculty of Advocates Law Society of Scotland Law Firms	1 1 1		3
Officials	Scottish Courts and Tribunals Service (SCTS) Environmental Standards Scotland (ESS)	1 1		2
Organisation	Scottish Environment LINK Environmental Rights Centre for Scotland (ERCS) Open Seas Trust Our Seas Coalition	1 1 1 1		4
Other	General Public Professor Tom Mullen		1 1	2
	TOTAL	**9**	**2**	**11**

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

12. In line with the permissions given; readers of this report can view 10 of those 11 responses online via the consultation pages on the Councils website'. https://www.scottishciviljusticecouncil.gov.uk/consultations/scjc-consultations

13. Most responses were received from those likely to lodge a motion for a PEO, rather than the public bodies or businesses that might choose to oppose such a motion. Hence readers should note the *"potential for bias"* when interpreting the comments made.

The policy objectives

14. 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*."

15. 1 respondent suggested the Council should go further and make a 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

16. The scope set for this consultation was to seek feedback on 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		
R11		

17. All 11 respondents support *cost protection* being made available for all of the *summary applications* that can be made to the sheriff courts under the Environmental Protection Act 1990:

> *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."*

18. 1 respondent articulated the consequences of progressing a *summary application* under the 1990 Act without *cost protection:*

> *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…"*

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	
R2	yes	Concerns re digitisation / stick with standard motion procedure
R3	yes	

R4	yes	
R5	no	
R6	yes	
R7	yes	
R8	yes	
R9	Supports RI	
R10		
R11		

19. 1 respondent thought the rules should be aligned with the current motion procedure as used within the sheriff court, particularly as that would better support the future 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."*

Other sheriff court actions

***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	Sec 28 – Land Reform (S) Act 2023
R2	no	
R3	yes	
R4	no	
R5	yes	SLAPPs
R6	yes	commission research
R7	yes	
R8	yes	all common law proceedings
R9	Supports RI	
R10		
R11		

20. 4 respondents suggested other types of action where the ability to access an *Environmental PEO* would add value:

> *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)."***

21. 3 respondents suggested that the Council should commission research as a mechanism to identify all relevant categories of cases falling within 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. 1 respondent suggested that it would be better to use a form of words that enables a PEO to be sought in any case falling within the spirt of the 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."*

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		

R11		

23. All 11 respondents support the extension of PEOs to the Sheriff Appeal Court, with an implied prerequisite that the Court of Session rules must be compliant with the Convention before being mirrored within the Sheriff Appeal Court:

> *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**".*

24. 1 respondent provided a practical example for the Council to take into consideration:

> *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."*

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	
R2	yes	Concerns re digitisation / stick with standard motion procedure
R3	yes	
R4	yes	
R5	yes	
R6	yes	
R7	yes	
R8	yes	
R9	Supports RI	
R10		
R11		

25. 1 respondent thought the rules should be aligned with the current motion procedure used by the Sheriff Appeal Court, particularly as that would 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."*

26. 1 respondent suggested that an update on the applicants financial position should be provided 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."

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 detailed comment
R8	yes	yes
R9	Supports RI	
R10		
R11		

Group Procedure

27. 2 respondents supported 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."

28. 1 respondent added further detail on some of the practical considerations the Council would need to address (if proceeding):

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."

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	
R5	yes	Yes – make it a fixed maximum sum
R6	yes	Yes – make it a fixed maximum sum
R7	yes	No – stick with current approach
R8	yes	Yes – make it a fixed maximum sum
R9	Supports RI	
R10		
R11		

29.3 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.

30. 2 respondents expressed an opposing view

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."

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	
R10		
R11		

31. 5 respondents thought that requiring an applicant to provide their 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."

32. 1 respondent expressed an opposing view:

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	
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	
R10		
R11		

33. 5 respondents thought that requiring an applicant to estimate their own expenses, as well as the expenses of their opponent, placed an unnecessary burden onto applicants for a PEO and 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."

34. 1 respondent expressed an opposing view:

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."

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	
R2	no	
R3	yes	Carry PEO forward – for leave to appeal to UKSC
R4	yes	
R5	yes	Carry PEO forward – for leave to appeal to UKSC
R6	yes	
R7	yes	Add rules for Common Law PEOs
R8	yes	Carry PEO forward – for leave to appeal to UKSC
R9	Supports RI	
R10		
R11		

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

35. 2 respondents recommended that a PEO applicant should have "no liability for expenses" when making 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"*

36. 1 respondent queried how that £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."*

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

37. 3 respondents suggested that a PEO should be carried forward when applying for *leave to appeal* their case onwards 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

38. 3 respondents suggested the complete withdrawal of any limits on the ability of a PEO applicant to recover expenses from an 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."

39. I respondent commented on the mismatches that can arise within proceedings:

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."

<u>Using a standardised application form</u>

40. 2 respondents suggested introducing 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."

<u>Providing a new procedure (to cover Common law PEOs)</u>

41. 1 respondent suggested the preparation of rules that cover Common Law PEOs, as that could increase the use of that 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)

42. 1 respondent suggested that replacing PEOs with QOCS would be a fairer and easier way of providing *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.16"*
>
> *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."*

43. That respondent suggested the benefits of adopting QOCS were that it could:

> *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."*

VIEWS IN THE 3 AMENDMENTS MADE IN 2024

Providing for the confidentiality of financial information

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	
R10		
R11		

44. 2 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.*

45. 1 respondent commented that the right balance needs to be struck between keeping information confidential and alignment with open justice principles:

> *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	
R10		
R11		

46. There was no further comment made, which would imply that the rules as amended in the 2024 Act of Sederunt have successfully removed the previous unfairness from the appeals process. That view is reinforced by the fact this change was also welcomed in the 2025 ACCC Compliance Report.

Providing clarity on the treatment of interveners expenses

***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	N0
R9	Supports RI	
R10		
R11		

47. 2 respondents suggested that the rule as amended in 2024 would benefit from removal of the reference made 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."*

SECTION 3 – CONCLUSIONS

48. This section sets out the conclusions reached from analysing the feedback received from all 11 respondents:

Feedback on proposal 1 which would extend Environmental PEOs to the sheriff courts

49. All 11 respondents are supportive of extending the availability of Environmental PEOs to the sheriff courts.

50. The Council should now instruct the drafting of finalised rules that could put that change into effect. As a matter of best practice public feedback would then need to be sought on the wording of that next set of draft rules as they are being

prepared "for implementation purposes". That would be achieved by consulting again in 2026 *(in line with the public participation expectations under Article 8 of the Aarhus Convention)*

Feedback on proposal 2 which would extend Environmental PEOs to the Sheriff Appeal Court:

51. All 11 respondents are supportive of extending the availability of Environmental PEOs to the sheriff courts.

52. The Council should now instruct the drafting of finalised rules that could put that change into effect. As a matter of best practice public feedback would then need to be sought on the wording of that next set of draft rules as they are being prepared "for implementation purposes". That would be achieved by consulting again in 2026 *(in line with the public participation expectations under Article 8 of the Aarhus Convention)*

The feedback on proposal 3 which would extend RCS CH58A to other Court of Session procedures:

53. X respondents were in favour of Environmental PEOS being made available in multi-party actions, and X respondents wanted to go further and extend Environmental PEOS to all cases in the Court of Session

54. The Council should now consider the policy arguments for and against making either or both of those changes, and then decide how it wishes to proceed.

The feedback on proposal 4 which was to amend the ability to shift cost caps upwards

55. X respondents were in favour of reverting to the use of "fixed maximum sums", and in practice that 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).

56. The Council should now consider the policy arguments that can be made both for and against making that change and then decide how it wishes to proceed.

The feedback on proposal 5 which was to reconsider the categories of information that an applicant is required to provide

Terms of Representation

57. X respondents were in favour of withdrawing the requirement to disclose the terms of representation. That could be achieved relatively simply by the deletion of section (3) (a) (ii) from the existing PEO Rules as used in the Court of Session; particularly as applicants can respond orally to a reasonable query made as part of judicial case management.

58. The Council should now consider the policy arguments that can be made both for and against making that change and then decide how it wishes to proceed.

Estimating Expenses

59. X respondents were in favour of withdrawing the requirement to disclose the terms of representation. That could be achieved relatively simply by the deletion of section (3) (a) (iv) from the existing PEO Rules as used in the Court of Session; particularly as applicants can respond orally to a reasonable query made as part of judicial case management.

60. The Council should now consider the policy arguments that can be made both for and against making that change and then decide how it wishes to proceed.

The feedback from the "open question" which sought any other suggestions for improvement of the procedure

61. The Council opted to include an 'open question' within this consultation:

> *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?

62. That generated a range of suggestions specific to the procedure for seeking an *Environmental PEO* which will require the Council to commission a 'proportionate' level of research (in house or outsourced) before taking a decision:

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" when making an application for a PEO:

Carrying forward PEOs *(if seeking leave to appeal to the UK Supreme Court) - g*iven that 3 respondents suggested that a PEO should be carried forward when applying 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 expenses from an 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 1 respondent suggested replacing PEOs with QOCS, as a fairer and easier way of providing *cost protection* in environmental cases:

63. There were 2 additional suggestions that relate to the approach taken to *Common Law PEOs* and go well beyond the scope set for this consultation:

Providing a procedure for Common law PEOs - 1 respondent suggested the preparation of a new court procedure to cover Common Law PEOs as that could 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 the SCJC should take a more strategic view of *cost protection* 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"*

SECTION 10: THE NEXT STEPS

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

Consultation Analysis – the Council will consider the content of this report at its next scheduled meeting on 8 December 2025, which will enable it to consider its likely responses

Consultation Response – the secretariat will prepare a draft Consultation Response report will for consideration by Council members at their next

scheduled meeting. The consequent publication of that report will record the policy decisions taken and provide an update on the next steps that will follow on from drafting instructions being issued.

Secretariat to the Scottish Civil Justice Council
December 2025

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https://unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf

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https://unece.org/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

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https://unece.org/env/pp/aarhus-convention/mop

- Decision VII/8s
  https://unece.org/env/pp/cc/decision-vii8s-concerning-united-kingdom

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https://unece.org/env/pp/cc

- 2021 ACCC Compliance Report *(Oct 2021, UNECE)* - *Final version*
  https://unece.org/sites/default/files/2024-03/ECE_MP.PP_2021_59_E.pdf

- 2025 ACCC Compliance Report *(Sep 2025, UNECE)*
  Latest draft - as uploaded on 8 Sep 2025
  https://unece.org/sites/default/files/2025-10/VII.8s_UK_report_MOP8_advance_unedited.pdf

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Consultation

Public Consultation: on extending the availability of Protective Expenses Orders *(Aug 2025, SCJC)*
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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Existing Rules:

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/contents/made

Act of Sederunt (Rules of the Court of Session 1994 Amendment) (No. 4) (Protective Expenses Orders) 2015
https://www.legislation.gov.uk/ssi/2015/408/contents/made

Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Protective Expenses Orders) 2018
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https://www.gov.uk/government/publications/independent-review-into-legal-challenges-against-nationally-significant-infrastructure-projects/independent-review-into-legal-challenges-against-nationally-significant-infrastructure-projects

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https://assets.publishing.service.gov.uk/media/671f9e884fdbe4653d6ecb68/nationally-significant-infrastructure-projects-call-for-evidence.pdf

GLOSSARY

The relevant terms used within this paper are:

Term	*Meaning*
Aarhus related case	Relevant proceedings that include a challenge to a decision, act or omission on grounds subject to the provisions of Article 6 of the Aarhus Convention. *That currently covers:* • *Applications to the supervisory jurisdiction of the court, including applications under section 45(b) (specific performance of a statutory duty) of the Court of Session Act 1988(20), and* • *Appeals under statute to the Court of Session.*
ACCC	Acronym for – Aarhus Convention Compliance Committee (ACCC).
Cause shown	A term in Scots Law – that in layman's terms would equate 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 being that "expenses follow success" *(which equates to "loser pays")*. In circumstances that result in a significant imbalance of power between the parties to a civil action, the court may consider making a PEO if it is in the "interests of justice" to do so.
PEO Rules	RCS Chapter 58A (Protective Expenses Orders in Environmental Appeals and Judicial Reviews). Chapter 58A was first enacted by the Act of Sederunt (Rules of the Court of Session Amendment) (Protective Expenses Orders in Environmental Appeals and Judicial Reviews) 2013: *https://www.legislation.gov.uk/ssi/2013/81/introduction/made* Those PEO rules have been amended 3 times (in 2015, 2018 and 2024).
SCTS	Acronym for – Scottish Courts and Tribunal Service.
UKSC	Acronym for – UK Supreme Court (UKSC).
UNECE	Acronym for – United Nations Economic Commission for Europe (UNECE).