

CONSULTING AGAIN – ON THE EXTENSION OF PEO's

Purpose

1. To confirm that it is appropriate to “consult again” on the PEO Rules.

Background

2. At the August 2025 meeting the Council considered its plan for achieving compliance with the Aarhus Convention. The secretariat was asked to explore options to shorten the timeline (if possible) which included:

“Reconsidering whether there is a need to consult again in 2026.”

3. At that meeting the Council agreed an updated paper that covered “*The ‘Consultation Process’ used by the SCJC*”. Within that publication the paragraphs of most relevance to answering the above question are:

Deciding “to consult again”

*Para 14 - Where a previous consultation or other engagement exercise has met the public participation requirement, **it is not always necessary to consult again on the draft rules needed to implement those changes. It becomes necessary where a material change that had not previously been consulted on is included.***

Para 15 - Where a decision is made to consult again on the same policy area then:

- *The list of consultees should include relevant respondents to any previous*
- *consultation exercise; and*
- *If appropriate the parties from relevant case precedent.*

Choosing what is to be consulted on

Para 18 - “The choices made around WHAT should be consulted on do influence WHEN that consultation should take place within the policy cycle:

CONSULT EARLY ON THE SUGGESTED POLICY POSITIONS – seeking early feedback on the suggested policy positions can help the Council to define more settled policy positions: prior to instructing the preparation of draft rules to implement those positions.

CONSULT LATER ON THE AGREED POLICY AND THE DRAFT RULES – preparing draft rules first and then seeking feedback on their workability can better support implementation. The downside is the time for drafting can delay external views being sought; and the ability to influence the overall direction of travel can be lower by that point in the policy cycle.”

4. The Councils statutory function under the 2013 Act states that we “*may*” rather than “*must*” consult. Hence the current wording used within the Consultation Process document reflects a judgement call being made on whether “to consult again” that flows directly from the expectations set under domestic law.

5. The following table compares the wording considered applicable to running a fair consultation under the ‘domestic law’ of the *UK (the Gunning Principles)* and the expectations set under ‘international law’ (*by Article 8 of the Aarhus Convention*):

Key Question	DOMESTIC LAW	INTERNATIONAL LAW
<i>WHICH - statutory instruments must we consult on?</i>	The requirement to consult arises if a draft rules instrument would have a “material effect” on an existing court procedure (in any area of civil law) or an instrument that would introduce an entirely new court procedure.	The requirement to consult arises if a draft rules instruments “may” have a significant effect on the environment.
	<i>Public participation under the Gunning principles</i>	<i>Public participation under Article 8 of the Aarhus Convention</i>
<i>WHEN - should we run a consultation?</i>	Consult when proposals are at a formative stage, and before final decisions are made.	Strive to promote effective public participation at an appropriate stage, and while options are still open.
<i>WHAT – level of information should we consult on?</i>	Provide enough information for intelligent consideration and the provision of a meaningful response.	The public should be given the opportunity to comment, directly ...
		...or through representative consultative bodies.
		Draft rules should be published or otherwise made publicly available.
<i>HOW - long should we consult for?</i>	Allow sufficient time for respondents to consider the proposals made and provide their feedback.	Time-frames sufficient for effective participation should be fixed.
<i>HOW – should we record and convey the outcomes from the feedback received?</i>	Conscientiously take the consultation responses into account when making the final decision.	The result of the public participation shall be ‘taken into account’ as far as possible.

6. The key difference that arises under international law is that if the changes being made within a draft rules instrument “may” have a significant effect on the environment then:

- **“Draft rules should be published or otherwise made publicly available”.**

Conclusions

7. To prompt discussion on the policy options, the 2025 Public Consultation was based on a version of rules specifically drafted *“for consultation purposes only”*.
8. The usual next step in process is to draft a finalised version of the rules that are specifically drafted *“for implementation purposes”*. As the content of this particular instrument “would” (rather than “may”) have a significant effect on the environment the Council must “consult again” in order to comply with international law. In fulfilling that obligation to “consult again” there are 2 potential options:
- *Option 1* – is running 1 x full 2026 Public Consultation exercise on a rules instrument that covers the implementation of all desired rule changes; or

- *Option 2* - is to split that need for public participation into its 2 component parts by running 1 x targeted consultation on the straightforward changes, followed by 1 x full Public Consultation on the more significant changes:
 - *Instrument 1* – could progress the straightforward changes to the existing PEO rules as consulted on and supported by the responses to the 2025 Public Consultation. The article 8 public participation requirements would be met by first circulating that particular instrument to “representative consultative bodies” for comment on its acceptability and / or any suggested changes; and
 - *Instrument 2* – the materially significant change to the procedure will be implementing the extension of the “type of claims” covered. It is that aspect that requires the Council to “consult again” via a 2026 Public Consultation exercise on the draft rules to implement that change.

Recommendations

9. It is recommended the Council notes that:

- Some of the changes consulted on in 2025 could be progressed now by seeking feedback from representative bodies before proposing a 1st instrument to the Court of Session for approval; and
- As the extension of PEOs to other court fora will have a “significant effect” on the environment the Council must “consult again” in 2026 on the specific “draft rules” that will implement that material change.

10. In addition, the Council should note that:

- The secretariat intends to reword paragraphs 14, 15 and 18 of “*The ‘consultation process used by the SCJC’*” publication to be more specific on “the need to consult again”; and
- An updated version of that document will be circulated to members for approval by correspondence (*in due course*).

Secretariat to the Scottish Civil Justice Council
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