ANNEX C CONSULTATION QUESTIONNAIRE

1. Do you agree that the rules should not define 'prohibitively expensive'?

Yes. The concept of 'prohibitively expensive' is likely to be dynamic and shaped by the jurisprudence of the CJEU. The Faculty considers that avoiding a prescriptive definition offers flexibility and affords parties the opportunity to rely on emerging jurisprudence.

2. Do you agree that the rules should not distinguish the question of prospects of success from the question of whether or not the proceedings are prohibitively expensive?

Yes. The Faculty considers that a two stage approach would be counter intuitive to the underlying aim of the PEO regime, since there is otherwise the potential for considerable time and cost to be devoted to a hearing on the merits of the case, at the outset. In addition, the Faculty observes that, since the underlying court proceedings are before the Court of Session and will likely involve Counsel and agents, it is less likely that the proceedings would have no prospects of success.

3. Do you have any comments on draft rule 58A.6 for the determination of an application?

In principle, the Faculty endorses the rationale of a simplified procedure for the determination of a PEO. In particular, the Faculty recognises that without a simplified or accelerated procedure, there is the potential for considerable expense to be incurred at the outset of proceedings, which would be counter-productive to the effect of a PEO. However, the Faculty is of the view that further consideration should be given to the proposed procedure and thus the draft rules. In particular, the Faculty suggests that the following matters should be considered:

- Provision for a structured, written application process, in which certain prescribed information is provided to the Court. The Faculty suggests that such a process could rely on standard application forms for applicants and respondents and could prescribe the type and amount of information to be provided to the Court, at the outset;

- A Practice Note to address matters such as: the process for bringing an application, the information (and the amount of information) required and any pre-action protocol to be followed;

- Clear guidance for applicants intending to bring an application (in accordance with the foregoing suggestions);

- Provision for a limited duration oral hearing if issues are unaddressed following the paper application stage (suggested at bullet one, above).

- Provision for the appointment of a designated judge to determine PEOs, in order to develop expertise and consistency in the manner in which applications are disposed of;

- Provision for the publication of judicial decisions in relation to the grant or refusal of PEOs. If the rules are to provide for judicial decisions normally being made in chambers, it is important that the reasons for the decision are promulgated so that future potential litigants can be properly advised on the prospects of being awarded a PEO.

We comment on the application of timescales at answer 7.

4. Do you have any comments on draft rule 58A.9 for the expenses of the application?

The Faculty considers that the test of 'on cause shown' should be replaced with a more stringent test, such as 'on special cause' or 'in exceptional circumstances'.

Consideration should also be given to whether provision should be made, either in rule 59A.9 or in a pre-action protocol: (i) for requiring the applicant to attempt to obtain agreement from the respondent in relation to expenses prior to bringing any application for a PEO; and (ii) for limiting or excluding the respondent's liability in the expense occasioned by an application if it is subsequently unopposed and the applicant has not first attempted to obtain such agreement.

5. Do you have any comments on draft rule 58A.8 for expenses protection in reclaiming motions?

It is not clear from the proposed draft rule 58.A.8(2) whether, in the event of a decision of the Lord Ordinary being reclaimed by the respondent, the limits previously set by the Outer House continue to apply in relation to the reclaiming motion, albeit separately in relation to any expenses incurred in relation to the reclaiming motion (which is presumably what is intended) or whether each party's total liability in expenses for both the Outer House proceedings and any reclaiming motion, are limited to the amounts previously set by the Lord Ordinary (which is presumably not what is intended).

The Faculty considers that as regards the respondent's liability (only): (i) there should be a separate limit – of an equivalent level of cap as in proceedings at first instance; and (ii) the rules should provide for that. Appeals are an intrinsic part of the litigation process. Without a two stage cap – as we suggest in this answer – there is the further potential that the purpose of a PEO would be nullified, given the potential costs involved in proceedings at first instance, alone.

6. Do you have any comments on the draft amendment to rule 38.16?

No.

7. Do you have any other comments on the proposals contained in this paper?

The Faculty welcomes the opportunity to respond to this consultation. The Faculty recognises the importance of access to justice: this being one of the core values underpinning the regime for Protective Expenses Order ("PEO").

In addition to the foregoing observations, we have the following comments:

- In order to regulate matters and to provide fair notice to all parties, consideration should be given to the issuing of a timetable of steps for parties to comply with, in cases where a PEO may apply. The timetable issued in appeals to the Inner House may offer some guidance as to format;

- Consideration should be given, generally, to adopting a procedure which is similar to that now applicable in Judicial Review petitions. For example, applying a test of standing and a procedure for determining permission (akin to such procedure in Judicial Review cases) may be appropriate in cases where a PEO is sought. The Faculty recognises that this may impact upon certain of the draft rules;

- In relation to standing, sufficient interest in the main proceedings will undoubtedly be a pre-requisite for the granting of any PEO. Whether or not an applicant has sufficient interest will be for the Court to determine, but in relation to environmental challenges the approach taken should not be unduly restrictive.

- The Faculty observes that the amount of the current (and proposed) cap was introduced some years ago. With reference to this, the cost of court fees (which are subject to increases), and the applicant's liability to meet these, should play a part in determining the level of the limitation of liability. Consideration should be given to exempting a PEO applicant from having to meet the liability of court fees;

- Consideration should also be given to indemnifying an applicant's expenses in circumstances where the application is opposed solely on the basis of not coming within the "Aarhus regime", but where the Court determines that it does.