FACULTY OF ADVOCATES

Response to the Scottish Civil Justice Council's

Public Consultation on extending the availability of Protective Expenses Orders

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?**

Yes.

Environmental applications in the sheriff court should also qualify for PEOs. Environmental actions are not confined to judicial review or other applications to the Court of Session and nor should be the expenses protections associated with them be so confined. Furthermore, to do otherwise would be likely to be found not to comply with the UK's obligations in relation to the Aarhus Convention, given that those obligations apply to access to courts generally and not only the higher courts.

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?**

No. The proposed rules seem to us to be reasonable.

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?**

None specifically. 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.

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?**

Yes. Again, to do otherwise might be found not to comply with the UK's obligations in relation to the Aarhus Convention. Access to justice, under the Aarhus Convention, is required to be fair, equitable, timely *and not prohibitively expensive*. Scotland has already been determined (Report of the Compliance Committee on decision VII/8s of the Meeting of the Parties concerning compliance by the United Kingdom – October 2025) not to be compliant with the obligations under the Convention and it is important for the reputation of the Scottish justice system that those matters are resolved as quickly as possible.

***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?**

No. The proposed wording seems to us to be reasonable in the circumstances.

***Question 6* – do you agree that the current ability to seek a PEO within the Court of Session should also be available to a multiparty action initiated under Group Procedure? If not why not?**

This question is not simple. In theory, it is possible to see that it ought to be available.

In practice, however – particularly 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.

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.

***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"?**

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. However, it should perhaps be made clearer that the figures should be set at £5,000/£30,000 unless there is cause shown – ie 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.

***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?**

We disagree with the requirement to provide such information in all cases. 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. 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.

***Question 9* - do you have a view on whether rule 58A.5 should continue to require applicants to provide an estimate of the likely expenses that could be awarded against them, or whether section (3) (a) (iv) should be withdrawn?**

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. 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.

***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?**

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.

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.

***Question 11* – do you agree with the rule change made that makes provision for confidentiality to be sought within a motion for a PEO?**

Yes. Again, 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.

***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?**

Yes. 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.

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

Yes, 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. 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.