



Law Society  
of Scotland

# Consultation Response

## Draft Rules for Protective Expenses Orders

23 June 2017



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Environmental Law Sub-committee welcomes the opportunity to consider and respond to the Scottish Civil Justice Council's consultation on draft rules for Protective Expenses Orders. The Sub-committee has the following comments to put forward for consideration.

## Response to Questions

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

No. It is important that a consistent approach is adopted by the Judges in the Court of Session as to how 'prohibitively expensive' is defined and applied, and for both the subjective and objective tests to be properly considered. This is also important for all parties concerned (not just petitioners/applicants) so that there is clarity in the approach the Court would take. The approach taken in *Edwards v Environment Agency (C-260/11)* at the Supreme Court and CJEU (EU:C:2013:221) should be integrated into the Rules for clarity.

### **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?**

Given the changes to Court of Session procedure in September 2015 so that an applicant now has to obtain the permission of the Court to proceed with a judicial review and where the Court now checks that the petitioner/applicant has interest and the case has a real prospect of success, prospects of success need not be such a focus at the PEO stage. It is acknowledged that however that there will be other types of court applications (eg statutory appeals) that may not have the same sifting process for prospects of success, and so the amount of consideration given to prospects of success may be different in those circumstances.

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

This seems a fair approach and one that helps reduce cost and Court time.

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

This is an important proposed introduction that removes the vulnerability of a petitioner/applicant to considerable expense if their PEO application is unsuccessful and on the basis of trying to give certainty of costs exposure to a petitioner/applicant should be welcomed. Consideration should also be given to whether a PEO application should be made at the same time as a petition/appeal is lodged and prior to Answers requiring to be lodged so as to restrict the costs incurred by respondent parties. Therefore there may need to be a re-think of the sequencing of the petition/appeal being lodged, answers being lodged and permission granted, so as to remove the amount of work and cost required by all prior to a PEO being determined.

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

Consideration needs to be given as to whether the cross-cap from the Outer House should be extended, and reference should be made to the varying provisions of Rule 58 A.7(2).

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

The idea of a PEO appeal being dealt with in chambers (as is the case in the way that PEOs are sometimes dealt with at the Supreme Court) seems a fair approach and again one that would help reduce cost and Court time, albeit the Court should have a discretion to call a hearing if it considers one to be required in the circumstances.

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

Consideration should be given to the Rules extending to the Sheriff Courts for environmental cases (such as applications under the Environmental Protection Act 1990) and to their application in nuisance cases (in whatever court) given the Aarhus Compliance Committee's decisions that some nuisance actions fall within the scope of the Convention.



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