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Ìrean Àrainneachdail na h-Alba

Scottish Civil Justice Council
By e-mail: [REDACTED]

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Subject: Environmental Standards Scotland's response to the Scottish Civil Justice Council's consultation on the extension of Protective Expenses Orders

Environmental Standards Scotland (ESS) welcomes the opportunity to comment on the Scottish Civil Justice Council's (SCJC) consultation on the extension of Protective Expenses Orders (PEOs) in environmental cases.

A key requirement of the Aarhus Convention ('the Convention') is that access to justice in environmental matters must not be prohibitively expensive. In Scotland, PEOs are the principal mechanism used to limit the financial risks associated with such litigation. However, the Aarhus Convention Compliance Committee (ACCC) has repeatedly concluded that aspects of the current PEO regime do not comply with the Convention's requirements.

In 2025, ESS responded to a previous SCJC consultation on extending the availability of PEOs¹. In that response, ESS supported extending access to PEOs beyond their existing scope and highlighted a number of concerns previously identified by the ACCC, including the range of proceedings covered by the PEO regime, the ability to increase cost caps 'on cause shown', requirements relating to disclosure of representation arrangements and estimates of

¹ <https://environmentalstandards.scot/our-work/our-analytical-work/response-to-scottish-civil-justice-council-consultation/>

opponents' expenses, and the treatment of intervener expenses. ESS also raised a separate concern regarding the scope of cost protection available to different categories of interveners.

ESS has reviewed the current consultation and welcomes a number of the proposed reforms, including:

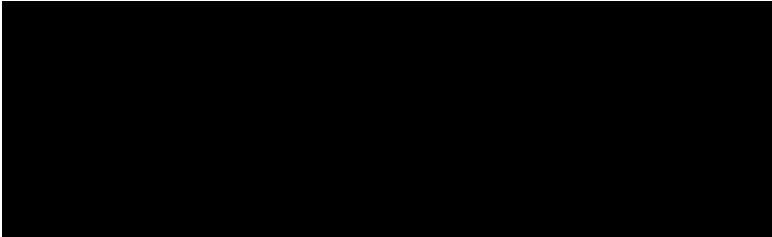
- extending the availability of PEOs across a broader range of proceedings within the scope of Article 9 of the Convention
- extending costs protection to the Sheriff Court and Sheriff Appeal Court
- establishing a fixed maximum applicant costs cap of £5,000, with the ability to reduce but not increase that figure
- removing the requirement for applicants to disclose the terms on which they are represented
- removing the requirement for applicants to estimate their opponents' expenses
- clarifying that costs caps are inclusive of court fees
- removing the existing discretion to alter cost caps for expenses against interveners 'on cause shown'

Taken collectively, these proposals represent a positive step towards improving access to environmental justice and addressing a number of the issues previously identified by the ACCC.

However, while the proposed changes to the treatment of intervener expenses appear to address concerns previously identified by the ACCC, ESS remains unclear whether all relevant categories of intervener benefit from equivalent protection under the proposed rules. In particular, certain interveners, including statutory interveners, may not fall within the categories protected by the current drafting. ESS invites the SCJC to consider this issue further as it finalises the proposed rules.

In summary, ESS welcomes the progress reflected in the consultation and the steps taken to develop proposals intended to improve compliance with the Convention. ESS will continue to monitor developments in this area, including the finalisation and implementation of any new rules, as part of its ongoing interest in access to environmental justice.

Yours sincerely,



Mark Roberts
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