Law Society of Scotland

Consultation Response

Extending the availability of Protective Expenses Orders

November 2025

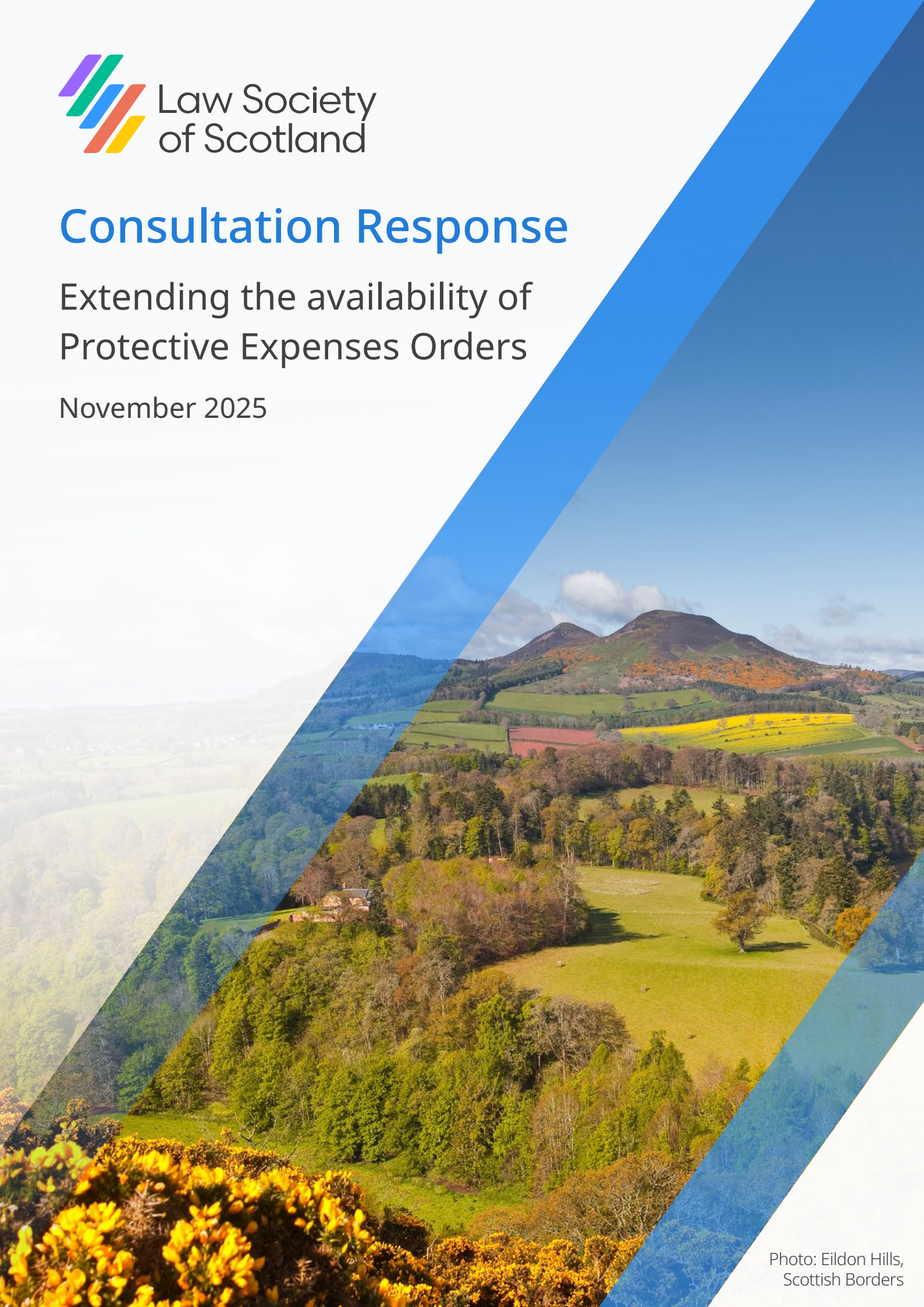

Photo: Eildon Hills, Scottish Borders

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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Environmental Law sub-committee, Access to Justice and Civil Justice Committees welcome the opportunity to consider and respond to the Scottish Civil Justice Council consultation: *Extending the availability of Protective Expenses Orders*.[1] The committees have the following comments to put forward for consideration.

Questions

Section 4 - Extending PEOs to the Sheriff Courts:

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?

We consider that there is no reason that the ability to seek a protective expense order (PEO) should not be extended to the applications in question.

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?

We have no comments.

[1] Extending the availability of Protective Expenses Orders

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?

We note that Article 9 of the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention), which the United Kingdom is a party to, requires parties to ensure the public have as wide as possible access to justice in relation to environmental issues.[2] As such, we suggest that consideration should be given to exploring the widest possible extent of environmental PEOs across the justice system in Scotland as cases concerning the environment extend beyond simply summary applications. This could also include instances where a defender seeks a PEO in an environmental case which could be classified as a Strategic Litigation Against Public Participation (SLAPP).

Section 5 - Extending PEOs to the Sheriff Appeal Court:

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?

Currently a PEO that is heard in the Outer House of the Court of Session carries through on appeal to the Inner House. We would suggest consideration should be given to replicating this model as widely as possible, including for Sheriff Courts and Sheriff Appeal Courts. We would also suggest consideration should be given to requiring the applicant to provide up-to-date details regarding their finances at the time of appeal.

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?

We refer to our answer to question 4.

[2] Convention on access to information, public participation in decision-making and access to justice in environmental matters

Section 6 - Amending PEOs in the Court of Session: Public Consultation - on extending the availability of PEOs

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

We note that in cases of community groups, courts do examine the prohibitive costs that potentially deter legal action in the absence of a PEO.

We would highlight that any extension of PEOs to multi-party actions could potentially result in individuals who have the means to afford legal action independently being covered by a PEO.

Section 7 – The potential future rule changes:

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"?

We consider that the phrase "on cause shown" is a vague term and we would, on balance, support removing this phrase and reverting to a fixed maximum sum.

We consider it appropriate that the ability of the court to review the amount granted on a case-by-case basis should remain, as this ensures flexibility and retains court discretion. This flexibility can enable parties to settle pragmatically and amicably.

Consideration should be given to mirroring the arrangements in place in England in relation to the disclosure of finances, whereby financial particulars are disclosed between parties.

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 note that, in paragraph 169 of its report concerning both Scotland and the United Kingdom's compliance with the Aarhus Convention, the Aarhus Convention Compliance Committee (ACCC) highlighted that it was unclear why this requirement existed, and that it could require disclosure of pro bono representation and threaten the economic viability of environmental lawyers

representing clients in public interest cases.[3] As such we suggest that this requirement should be removed from the Rules.

We would further highlight that if rule 58A.5 were to be retained and the availability of PEOs were to be extended to Group Procedure, consideration would need to be given to how rule 58.5A (3)(a)(ii) interacts with rule 26A.7(2)(f) on group proceedings. The latter rule sets out, non-exclusively, certain matters which a Lord Ordinary is to consider when deciding whether an applicant is a suitable person to be the representative party in group proceedings. Those matters include:

> *"...f) the demonstration of sufficient competence by the applicant to litigate the claims properly, including financial resources to meet any expenses awards (the details of funding arrangements do not require to be disclosed)..."*[4]

We would highlight that the requirement imposed by rule 58.5A(3)(a)(ii) might be at odds with the above wording. Indeed, it is arguable that consideration (f) is at odds with an application for a PEO – although it may be that a PEO, if granted, would be viewed as meeting the "financial resources" requirement. That might, however, raise an issue as regards the timing of the application and its determination, and the process in which it is made – bearing in mind that the Court's view is that the application for permission to be the Representative Party is a separate process from the group proceedings.

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

We would highlight that rule 58A.5 is at odds with the findings of the ACCC, specifically paragraphs 174 to 177 of their compliance report.[5] We further consider that predicting the costs of the other parties can be difficult and involves further work for those representing the applicant.

[3] Paragraph 169, Report of the Compliance Committee on compliance by the United Kingdom of Great Britain and Northern Ireland
[4] Rule 26A.7(2)(f) Chapter 26a group procedure
[5] Paragraphs 174-177, Report of the Compliance Committee on compliance by the United Kingdom of Great Britain and Northern Ireland

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?

At present, rule 58A does not extend to the situation where a party seeks permission from the Inner House of the Court of Session for leave to appeal to the Supreme Court, and we suggest that the Rules are revisited to address this.

Section 8 – Feedback on the previous amendments made in 2024:

Question 11 – Do you agree with the rule change made that makes provision for confidentiality to be sought when lodging a motion for a PEO?

Yes, we consider it appropriate that these provisions should be sought as this will enable sensitive documents, such as bank statements, to be processed in the knowledge that they are subject to confidentiality.

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?

We have no comments.

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

We have no comments.

For further information, please contact:

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