

Protective Expenses Orders: access to information remains a barrier to justice

Briefing, November 2022

In October 2021, ERCS submitted a Freedom of Information request to the Scottish Courts and Tribunals Service to investigate the impact of Protective Expenses Orders – which are intended to reduce the cost of litigation for environmental cases. A year later, after an initial refusal and subsequent appeal, we are still in the dark about how they are really working.

Introduction

The Environmental Rights Centre for Scotland (ERCS) carries out advocacy in policy and law reform¹ to improve environmental rights and compliance with the Aarhus Convention on access to information, public participation in decision-making, and access to justice on environmental matters.²

This is the first of a two-part briefing on Protective Expenses Orders (PEOs) in environmental cases. Our legal system is meant to give anyone with a genuine claim the opportunity to enforce their environmental rights. Yet the cost of litigation is the greatest barrier to access to justice.

PEOs were introduced to reduce the cost of litigation. Here we outline the barriers ERCS has encountered in trying to access information about them and how it illustrates the lack of transparency and inefficacy of the current system.

Background

Environmental cases heard in the Court of Session – Scotland’s top civil court - are subject to legal fees which are unaffordable for many people. An individual bringing a judicial review can expect to pay tens of thousands of pounds for their legal representation. A PEO regime was introduced in 2013 with the intention of capping these costs, but the Aarhus Convention’s governing institutions have repeatedly ruled they are not fit for purpose, stating that they ‘introduce legal uncertainty and could have a chilling effect’.³

The Convention requires that court procedures for environmental cases are ‘fair, equitable, and not prohibitively expensive.’ In October 2021, the Convention’s governing institutions requested the publication of a UK Action Plan to address areas of non-compliance, and the Government now has until October 2024 to meet the Convention’s access to justice requirements.⁴ ERCS’s evaluation of Scotland’s contribution to the UK Action Plan identified significant shortcomings and sets out actions to ensure full compliance with the governing institution’s recommendations.⁵



Review of Protective Expenses Orders

One of the Scottish Government's actions was to request the Scottish Civil Justice Council (SCJC) to review the PEO regime by March 2023. This is a welcome step. However, ERCS is concerned that the process lacks transparency and will not involve public participation (in contravention of Article 8 of the Convention). The SCJC has previously amended PEO rules in ways which were subsequently found to be non-compliant with the Convention.

ERCS has written to the Minister of Community Safety to express concerns at the lack of transparency and participation requirements.⁶ ERCS has also raised concerns directly with the SCJC – they have not responded.

ERCS's request for information

ERCS submitted a Freedom of Information (FOI) request in October 2021 asking the Scottish Courts and Tribunals Service for:

- **The number of PEOs applied for, and granted, in the Court of Session; and**
- **The written decisions relating to every PEO application (including the terms under which a PEO was granted or the reasons for any refusal.**

Transparency is a legal requirement. Article 9(4) of the Convention requires that relevant court decisions must be made in writing and publicly accessible. These questions are fundamental to understand how the PEO system works in practice, and the SCJC cannot make a reasonable assessment about their efficacy without this information. Yet our FOI request was refused.

What now?

After requesting the Scottish Courts and Tribunals Service to review their refusal and submitting an appeal to the Scottish Information Commissioner, ERCS finally received a partial response to our request. However, the lengthy delay and the limited information disclosed highlights the lack of transparency in our legal system and underscores the inefficacy of the PEO regime.

Once ERCS has received the full answers to our FOI request we will provide an analysis of the findings. The eNGO sector has long argued that the PEO regime should be overhauled and replaced with qualified one way cost shifting.⁷ We expect that full disclosure will add additional weight to our call to fix the PEO regime so that it is affordable for all of us to uphold our right to a healthy environment.

For more information contact

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¹ For more information read our Advocacy Manifesto (Dec 2021) [An enforceable human right to a healthy environment](#) or one-page [Summary of recommendations](#)

² United Nations Economic Commission for Europe (1998) [Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters](#)

³ Aarhus Convention Compliance Committee (Aug 2021) [Report of the Compliance Committee on compliance by the United Kingdom of Great Britain and Northern Ireland – part 1, p.12](#)

⁴ MoP (Oct 2021) [Decision VII/8s concerning compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention.](#)

⁵ Environmental Rights Centre for Scotland (July 2022) [Evaluation of Scotland’s action plan on access to environmental justice](#)

⁶ Environmental Rights Centre for Scotland (Aug 2022) [Letter to Ministers on Aarhus non-compliance](#)

⁷ See Environmental Rights Centre for Scotland (Nov 2021) [Recommendations for a plan of action on judicial expenses](#)