

Protective Expenses Orders: Investigation reveals why legal expenses regime needs reform

Briefing, November 2023

In October 2021, ERCS submitted a Freedom of Information request to the Scottish Courts and Tribunals Service as part of an investigation into the impact of Protective Expenses Orders, which are intended to reduce the cost of litigation for environmental cases. The information disclosed reveals how the current system for allocating court costs continues to act as a barrier to justice. Our analysis highlights the fundamental inadequacy of the PEO regime and the need to replace it with a fairer system.

Introduction

The Environmental Rights Centre for Scotland (ERCS) carries out advocacy work in policy and law reform to improve compliance with the Aarhus Convention on access to information, public participation, and access to justice on environmental matters.¹

This is the second of a two-part briefing on the use of Protective Expenses Orders (PEOs) in environmental cases. [Part one](#) introduced ERCS's Freedom of Information (FOI) request sent to the Scottish Courts and Tribunal Service (SCTS) and outlined how access to information remains a barrier to justice. In this briefing, we analyse the data supplied in response to our request for information, considering what it can tell us about Scotland's system for the allocation of legal costs, and why it needs to change.

ERCS's request for information

The [first part](#) of this briefing introduced the FOI request sent to the SCTS, where ERCS asked for:

- The number of PEOs applied for, and granted, by 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).

After submitting an appeal to the Scottish Information Commissioner, we received a partial response to our request for information. The full information was only received in February 2023, and we then asked the Commissioner to close our appeal.



PEOs in Scotland’s legal system

Judicial review proceedings in the Court of Session are the most common way to challenge breaches of environmental law in Scotland. However, the unsuccessful party in a judicial review is liable to pay their opponent’s legal expenses. This is known as the ‘loser pays principle’. An individual who raises a judicial review can expect to pay tens to hundreds of thousands of pounds in legal expenses if they lose (legal expenses can also be unaffordable even if they win).²

The PEO rules were introduced in 2013, and amended in 2015 and in 2018.³ Their purpose was to introduce certainty in respect of the liability to the other side in the circumstances where a case fails. However, the Aarhus Convention’s governing institutions have repeatedly ruled that the prohibitive cost of environmental litigation is in breach of the Convention’s access to justice requirements.⁴

What does the data tell us?

SCTS provided a list of all cases where an application for a PEO was made, alongside the decisions of the Court on whether to grant or refuse the application.⁵

| Case | Year | Details | PEO Result |
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| Marco McGinty and Another [2010] CSOH 5 | 2010 | The petitioner was a birdwatcher who objected to the Scottish Ministers' National Planning Framework 2, which designated a new clean coal fired power station and a container transshipment hub to be built near the area where the former frequently went birdwatching. | Granted - petitioner's liability limited up to £30,000. Respondent's liability limited to a solicitor and one senior counsel acting without a junior. |
| Road Sense v Scottish Ministers [2011] CSOH 10 | 2011 | The petitioners challenged a decision by the Scottish Ministers, which approved several schemes and orders in connection with the Aberdeen Western Peripheral Route. The petition was primarily concerned with the need for an environmental impact assessment in relation to the plan. | Granted - petitioner's liability limited up to £40,000. Respondent's liability limited up to the amount of petitioner's taxed expenses of a solicitor and a senior counsel without a junior. |
| Fife Council v Penny Uprichard [2011] CSIH 77 | 2013 | A resident of St. Andrews brought judicial review proceedings against Fife Council in objection to the council's Fife Structure Plan 2006 - 2026. The resident considered that, if implemented, the proposed policies would cause irreversible damage to the environment of St. Andrews. Both the Outer and the Inner Houses of the Court of Session rejected the petition, which eventually reached the UK Supreme Court. | Refused – the applicant failed to provide sufficient financial information. They revealed their income from investments and pension but did not reveal their capital. |
| The Newton Mearns Residents Flood Prevention Group for Cheviot Drive [2013] CSOH 68 | 2013 | A group of residents set up an association and brought judicial review proceedings in respect of two planning permission decisions of the local Council, both related to the construction of new housing in the area. | Refused - petitioner failed to demonstrate that the issue was one of public importance, one of the key conditions which need to be satisfied to grant a PEO. |



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| <i>The Newton Mearns Residents Flood Prevention Group for Cheviot Drive [2013] CSIH 70</i> | 2013 | Appeal arising from the 2013 Outer House decision above. | Refused - petitioner was found to have a private interest in the matter. Outer House opinion was reiterated. |
| <i>Carroll v Scottish Borders Council 2014 CSOH 30</i> | 2014 | The petitioner objected to the erection of two large land wind turbines based on the proposed proximity between the turbines and her house. The planned distance was 1km. | Granted - petitioner's liability limited up to £5,000. Respondent's liability limited up to £30,000. |
| <i>The John Muir Trust [2014] CSOH 172A</i> | 2014 | Challenge against a decision by the Scottish Ministers to grant consent for the erection of 67 wind turbines without a public inquiry. | Refused - the Court was not satisfied that, in the absence of a PEO, the proceedings would be prohibitively expensive for the petitioner. |
| <i>The John Muir Trust [2014] CSIH 33</i> | 2014 | Appeal arising from the 2014 Outer House decision above. | Refused – the Court was not satisfied that the petitioner could not proceed with the motion in the absence of a PEO. |
| <i>Friends of Loch Etive v Argyll and Bute Council [2014] CSOH 116</i> | 2014 | The petitioner was an organisation which objected to a decision by the Council to grant planning permission for a rainbow trout farm on Loch Etive. The organisation was set up by the owner of an estate which surrounds the loch. | Refused - the Court was not satisfied that the petitioner could not afford to proceed with the petition without a PEO. |
| <i>Hillhead Community Council v City of Glasgow Council [2015] CSOH 35</i> | 2015 | A community group opposed the decision of Glasgow City Council to make an order which was to introduce changes to parking permissions by allowing parking for non-residents in specific areas. | Granted - petitioner's liability limited up to £1,000. Respondent's liability limited up to £15,000. |
| <i>Gibson v Scottish Ministers [2015] CSOH 41</i> | 2015 | The petitioner objected to a planning permission to construct a wind farm which was to be located 4km away from the estate where they lived. | Refused - the Court was not satisfied that, given the assets available to the petitioner, that the lack of a PEO would pose a reasonable barrier to their case. |
| <i>Gibson v Scottish Ministers [2016] CSIH 10</i> | 2015 | Appeal arising from the 2015 Outer House decision above. | Granted - the Court overturned the decision of the Outer House. Petitioner's liability up to £5,000. Respondent's liability up to £30,000. |
| <i>Sustainable Shetland v The Scottish Ministers and another [2015] UKSC 4</i> | 2015 | Consent was granted for the development of a large windfarm in the Central Mainland of Shetland. Sustainable Shetland opposed this decision, and alleged that in granting the consent, the Scottish ministers had failed to consider EU legislation in respect of the protection of the Whimbrel, a migratory bird. | Granted - petitioner's liability limited up to £5,000. Respondent's liability limited up to £30,000. |
| <i>St Andrews Environmental Protection</i> | 2016 | The petitioner brought the proceedings against a decision by Fife Council to grant planning permission for a new school in St. Andrews. The petitioner sought the advancement of the environmental protection of St Andrews, and they noted in their submission that | Granted (the terms of the PEO have not been published). |



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| Association Ltd [2016] CSIH 22 | | the planning committee had recommended that the planning application be refused in the interest of protecting the countryside and the agricultural land of St Andrews. | |
| The Royal Society for the Protection of Birds v The Scottish Ministers [2016] CSOH 103 | 2016 | The RSPB objected to plans to construct wind farms due to the perceived impacts on certain protected migratory bird species. | Granted - petitioner's liability limited up to £5,000. Respondent's liability up to £30,000. |
| The Royal Society for the Protection of Birds v The Scottish Ministers [2017] CSIH 31 | 2017 | Appeal arising from 2016 Outer House decision above. | Granted. |
| Simon Byrom v City of Edinburgh Council [2017] CSOH 135 | 2017 | The petitioner challenged a decision by the City of Edinburgh Council in objection to a new development. The development was to be situated within the world heritage site and the Old Town Conservation area. One of the main concerns raised related to the air quality in the surrounding area. | Granted (the terms of the PEO have not been published). |
| Simon Byrom v City of Edinburgh Council [2018] CSIH 3 | 2018 | Appeal arising from 2017 Outer House decision above. | Refused (the reasons for refusal have not been published). |
| Jordanhill Community Council v Glasgow City Council [2018] CSOH 11 | 2018 | The petitioner sought the reduction of a planning permission as there had been significant changes made between the resolution of the planning committee to grant planning permission, and the grant of the planning permission in principle. | Granted - petitioner's liability limited up to £5,000. Respondent's liability limited up to £30,000. |
| No Kingsford Stadium Ltd v Aberdeen City Council [2019] CSOH 19 | 2019 | The petitioners alleged that the local authority made errors in law when interpreting the local development policy by not adhering to one of its objectives, the advancement of environmental protection and sustainable use of community spaces. | Granted (the terms of the PEO have not been published). |
| The Scottish Creel Fishermen's Federation v Scottish Ministers [2021] CSIH 68 | 2021 | The petitioners challenged a pilot project which had not been properly considered against the original guidance criteria of Marine Scotland's strategy regarding onshore fisheries. | Granted - petitioner's liability limited up to £5,000. Respondent's liability limited up to £30,000. |
| Trees for Life v Nature Scot [2021] CSOH 108 | 2021 | Trees for Life petitioned the Court against NatureScot's actions in granting licences for lethal control of beavers, without proper consideration of the necessity of the licences in each individual case. | Granted - petitioner's liability limited up to £5,000. Respondent's liability limited up to £30,000. |
| Open Seas v Scottish Ministers [2023] CSOH 39 | 2023 | The NGO Open Seas petitioned the Court over the Government's approach to marine licensing, specifically for practices such as scallop dredging and bottom trawling. | Granted (the terms of the PEO have not been published). |



Since the first PEO was granted in an environmental case in 2010, there have been twenty-three PEO applications made during environmental or planning disputes (which equates to ~ 1.7 applications per year). Fifteen PEOs were granted (just over one successful application per year), and eight applications were refused. Despite the regime being introduced more than a decade ago, PEOs have not been widely used.

The decision to grant or refuse a PEO ultimately rests with individual judges and their application of the PEO rules in each case. In some instances, the courts have set high caps (in *Road Sense* the petitioner's liability to the respondent was set at £40,000), while in others they have been lower (in *Hillhead Community Council* the petitioner's cap was set at £1,000). The average cap on the liability of the petitioner which has been set in PEOs is £10,000. The average cap on the respondent's liability is £28,300.

In the petition for judicial review by the John Muir Trust, PEO applications were refused by both the Outer and Inner Houses of the Court of Session, based on the Court's view that the organisation had significant financial capacity. Conversely, in the *Royal Society for the Protection of Birds'* petition, the RSPB's PEO application was successful, and their liability was limited to £5,000. Both petitions were brought by established environmental organisations and resulted in different outcomes. No reasoning has been published to explain why PEOs were granted in the latter case.

There is no guarantee that a person or organisation which applies for a PEO will be successful. This creates uncertainty for those who may be considering environmental litigation. Similarly, there is no guarantee that if a PEO application is successful, the caps will be set at a level that will make the litigation affordable.

What now?

The PEO regime fails to ensure that access to justice in environmental matters is 'not prohibitively expensive' as required by Article 9(4) of the Convention and should be replaced with 'Qualified One-way Cost Shifting' (QOCS).⁶

To meet Scotland's legal obligations under the Aarhus Convention, there must be a fundamental overhaul of judicial expenses.

QOCS were introduced for personal injury claims in Scotland and could be applied to environmental cases. If they were to be introduced in environmental judicial review proceedings, it would mean that in most cases a petitioner would not be liable for the expenses of any other parties if the judicial review were unsuccessful. However, the petitioner would still be able to claim their expenses from the respondent if the petition was successful. QOCS is a much simpler system, and its introduction would remove the need for an application for a PEO (which is itself expensive and time-consuming).



For more information on access to justice and compliance with the Aarhus Convention, please read our [Evaluation of the UK Action Plan](#).

For more information contact

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

² ERCS (2021) [Scotland's non-compliance with the Aarhus Convention on prohibitive expense: Recommendations for a plan of action on judicial expenses](#), p.9.

³ Act of Sederunt (Rules of the Court of Session Amendment) (Protective Expenses Orders in Environmental Appeals and Judicial Reviews) 2013 (SSI 2013/81), Act of Sederunt (Rules of the Court of Session 1994 Amendment) (No. 4) (Protective Expenses Orders) 2015 (SSI 2015/408), Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Protective Expenses Orders) 2018 (SSI 2018/348).

⁴ 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.

⁵ The table summarises all environmental or planning dispute cases involving an application for a PEO, based on data supplied by the SCTS. Some of this was already publicly available, and the remainder was acquired through our FOI request.

⁶ ERCS (2021) [Scotland's non-compliance with the Aarhus Convention on prohibitive expense: Recommendations for a plan of action on judicial expenses](#), p.10-11.