

Consultation on Draft Court Rules in Relation to Protective Expenses Orders

Scottish Environment LINK, Legal Governance Subgroup Response

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Scottish Environment LINK is the forum for Scotland's voluntary environment organisations. It has over 35 member bodies which represent a wide range of environmental interests with the common goal of contributing to a more environmentally sustainable society. LINK assists communication between member bodies, government and its agencies and other sectors within civic society. Acting at local, national and international levels, LINK aims to ensure that the environment is fully recognised in the development of policy and legislation affecting Scotland.

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Introduction

This response is made on behalf of the SE LINK Legal Governance Subgroup. It concerns the availability of legal aid for environmental litigation in Scotland, and focuses on Scotland's obligations under the Aarhus Convention in relation to the costs of environmental litigation.

We are encouraged by the nature and content of this consultation – which (subject to our comments below) is well reasoned and contains a number of proposals which, if implemented, will bring Scotland closer towards compliance with the Aarhus Convention. There is a stark difference between the SCJC's consultation and the regressive nature of similar consultations which have occurred recently in relation to the protective costs order rules in England and Wales, and Northern Ireland.

Scotland's Compliance record with the Aarhus Convention

Environmental litigation in Scotland is carried out mainly by judicial review, which is very expensive. Expenses often run into six figures.¹ Expenses follow success, and whilst environmental litigants can apply for a 'Protective Expenses Order' (PEO),

¹ E.g. in *McGinty and Another* [2010] CSOH 5, the petitioner's potential liability was stated as £80,000 for his own legal expenses, and a potential £90,000 liability for the expenses of the respondent were he to be unsuccessful (para 4 of the judgement). McGinty was unemployed and in receipt of jobseekers allowance. More recently, the John Muir Trust had to pay expenses of £120,000 to the Scottish Government and SSE following judicial review in the Outer House (where the John Muir Trust was successful), and an appeal to the Inner House (in addition to two unsuccessful PEO applications) – *The John Muir Trust v The Scottish Ministers and SSE Generation Limited and SSE Renewables Developments (UK) Limited* [2016] CSIH 61. See <http://thirdforcenews.org.uk/tfn-news/huge-legal-costs-could-cripple-campaigning-charities>.

very few of these have been granted under the statutory regime which was created in 2014 and extended in 2016.²

Furthermore, there are a number of structural problems with the PEO system which limit their ability to meet Scotland's obligations under the Aarhus Convention: they require an application and hearing which is costly to prepare for and contest, and any appeals require a repeat PEO application because PEOs cover only one stage in the proceedings. Most critically however – PEOs are designed to reduce the uncertainty of open-ended costs liability to the other side by capping costs liability in the event that the litigation is unsuccessful - they offer no assistance to a litigant for their own legal expenses in the event that his/her case is unsuccessful.

The Aarhus Convention Compliance Committee – the body established under the Convention for reviewing Parties' compliance – found in February 2017 that Scotland does not comply with the Article 9(4) requirement that environmental litigation is 'not prohibitively expensive', or the Article 9(5) obligation to consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.³

The Committee's 2017 finding was a 'second progress review', following decision V/9n of the meeting of the parties in 2014, and the first progress review in 2015.

Decision V/9n found that Scotland was not compliant with Article 9(4) and 9(5).⁴ It recommended that the Party "take urgent action" to:

(a) Further review its system for allocating costs in all court procedures subject to article 9, and undertake practical and legislative measures to ensure that the allocation of costs in all such cases is fair and equitable and not prohibitively expensive;

*(b) Further consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice;*⁵

The Compliance Committee's first progress review in 2015 came to the same conclusion on Scotland's failure to comply with Article 9(4) and 9(5) as the second progress review.⁶

² Act of Sederunt (Rules of the Court of Session Amendment) (Protective Expenses Orders in Environmental Appeals and Judicial Reviews) 2013 (SSI 2013/81), as amended by Act of Sederunt (Rules of the Court of Session 1994 Amendment) (No. 4) (Protective Expenses Orders) 2015 (SSI 2015/408).

³ Aarhus Convention Compliance Committee, '[Second progress review of the implementation of decision V/9n on compliance by the United Kingdom with its obligations under the Convention](#)' (2017), para 107.

⁴ '[Decision V/9n of the Meeting of the Parties on compliance by the United Kingdom with its obligations under the Convention](#)' (ECE/MP.PP/2014/2/Add.1), para 2(a-b).

⁵ Ibid, para 8.

⁶ Aarhus Convention Compliance Committee, '[First progress review of the implementation of decision V/9n on compliance by the United Kingdom with its obligations under the Convention](#)' (2015), para 33.

The 2017 finding is therefore the latest in a series of reviews of Scotland's compliance with the Aarhus Convention, all of which have found Scotland to be non-compliant with Article 9(4) and 9(5).

Scotland does not comply with its access to justice obligations under the Aarhus Convention – and it has not complied since the UK ratified the Convention in 2005.

Environmental litigation in Scotland is prohibitively expensive. This ongoing, systemic failure to meet international legal obligations is a strong argument for change.

Consultation Questions

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

No.

The current definition of 'prohibitively expensive' in the rules is overly 'subjective' (i.e. it focusses on the resources of the particular applicant); whereas the *Edwards* case requires an assessment to be made that is both objective and subjective.⁷ We support the reasoning in the consultation document that the over-emphasis on the subjective approach in the rules requires corrected.

However, we do not agree that the correct approach is to remove the definition entirely. Anecdotal evidence suggests that members of the judiciary which deal with PEO applications are often unfamiliar with the Aarhus Convention and the definition of 'prohibitively expensive'. We are therefore concerned that removing the definition entirely would continue to require advocates to conduct detailed explanations of these features in PEO applications (at significant cost). This point relates to our answer to question three and the need for judicial specialisation in relation to PEO applications.

Our preferred approach to definition is instead to adopt a similar approach to the costs order rules in Northern Ireland.⁸ The 2017 NI costs rules adopt the *Edwards* formulation.⁹ The advantage of this approach is that this allows the judge in question to simply identify the relevant criteria for assessing prohibitive expense. These criteria can be amended as caselaw develops.

We recommend that the rules should defined prohibitively expensive – and that the rules reproduced the criteria set out in *Edwards* (in a manner similar to the NI costs rules).

⁷ *R (on the application of Edwards and another (Appellant)) v Environment Agency and others (Respondents) (No 2)* [2013] UKSC 78, para 23.

⁸ The Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland) 2017.

⁹ See Regulation 6.

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?

Yes.

The current rules appear to give preference to an applicant's prospects of success. The UKSC's decisions in *Edwards* confirms that this is only one of a range of factors which should be taken into account in determining whether proceedings are prohibitively expensive.¹⁰

Judicial review procedure already requires an assessment of the prospects of success at the permission stage. Section 27B(2)(b) of the Court of Session Act 1988 provides that a court will only grant permission to proceed where it is satisfied that the application has, "a real prospect of success".

The prospects of success hurdle has therefore been cleared by the time a PEO application is made. A further assessment of the prospects of success in a PEO application is unnecessary.

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

We support the reasoning behind this proposal – and support the move to a simplified, written PEO application procedure in principle.

PEO applications require considerable preparation and are often orally contested – making proceedings considerably more expensive. Anecdotal evidence suggests that the current process of applying for PEOs can cost ~£20,000. This is an unacceptable state of affairs which strikes at the heart of the rationale for PEOs.

We support the Faculty of Advocates' response to this question, and we endorse their recommendations that there should be:

- A formalised application process which uses standard forms requiring prescribed information;
- A practice note and clear guidance for applicants on the application process and use of forms;
- A short oral hearing if necessary to determine any unaddressed issues;
- A designated judge to determine PEO applications;
- All decisions on PEO applications must be published.

In relation to this final point on the publication of decision relating to PEOs – we are concerned that there is no mandatory publication scheme in place, and that the current approach to the publication of such decisions is irregular.

¹⁰ Ibid.

It is essential that decisions on PEO applications are published for the purposes of establishing the basis on which individual decisions are being made, and assessing how the PEO system is working as a whole in relation to the objectives of PEOs and the relevant legal obligations.

The publication of such decisions is mandatory under the Aarhus Convention. Article 9(4) requires that (in relation to Aarhus-type litigation),

Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

The current irregular system of publication does not meet this requirement.

We recommend that PEO decisions are published as standard, and that the rules are amended to require this.

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

We support the rationale for this proposal and the principle of capping a PEO applicant's potential liability to the other side during applications, which will make the system more accessible for the public.

We make two points in relation to draft rule 58A.9:

A. We are unclear how the valuation of the proposed £500 cap was arrived at, it appears to be arbitrary. It is doubtful that a potential liability of £500 will have a significant deterrence or disciplinary effect on applicants, if that is the intention. A £500 cap will also not provide any significant recovery of expenses for the opponents of a PEO application.

Given the expensive nature of the PEO application process and the lack of available alternative funding for environmental litigation in Scotland (see our May 2017 response to the Scottish Legal Aid Review),¹¹ potential PEO applicants face a high degree of deterrence notwithstanding any liability for their opponents' costs in the application process.

A £500 cap is unlikely to be any more than tokenistic in terms of its deterrence effect and actual recovery of expenses for opponents of PEO applications (and we would not support any increase to the level of this proposed cap) - we see no reason for the provision of this cap in PEO applications.

¹¹ Scottish Environment LINK, Legal Governance Subgroup Response to the Legal Aid Review (May 2017), available at <http://www.gov.scot/Resource/0052/00521015.pdf>.

We recommend that the cap is removed – and that a PEO applicant should not be liable for their opponents’ costs where a PEO application is unsuccessful.

B. The provision “except on cause shown” (draft rule 58A.9.(2)) creates the opportunity for a party which opposes the limitation of a PEO applicant’s liability to circumvent the proposed £500 cap.

The wording appears to create a low threshold which may encourage objections by a PEO applicant’s opponents to the proposed £500 cap. If this were the case in practice, PEO applicants would remain exposed to significant liability for their opponents’ costs at the PEO application stage - and it is unlikely that draft rule 58A.9 would have its intended effect on reducing the prohibitively expensive nature of the PEO application process.

We recommend that “except on cause shown” be removed from draft rule 58A.9.(2).

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

We support the general direction of change in draft rule 58A.8 which would allow for PEO awards to ‘carry-over’ during appeals (i.e. the petitioner retains a PEO for the appeal in the Inner House), where the respondent appeals.

It is important that the additional expenses implications of the appeal are fully considered and integrated into any carry-overs – the costs of each party will obviously increase as an appeal progresses and is heard. However, draft rule 58A.8.(2) appears to imply that the limits of the original PEO award set in the Outer House remain static when a PEO is carried over.

This is problematic for a petitioner with a PEO on appeal, because their ability to recover their expenses is restricted by the ‘cross-cap’ (i.e. the amount which a petitioner can recover – currently set at a default level of £30,000) which is set in their initial PEO award. If a cross-cap remains static while the petitioner’s costs increase, the likely result is that the petitioner’s ability to pay for their legal representation decreases - creating an increased imbalance in equality of arms between the parties to the detriment of the petitioner.

We disagree with the proposal that the limits on the parties’ liability in expenses set by the original PEO should not have continuing effect for the purposes of the appeal where it is the applicant which appeals; and that the original applicant will have to apply for a further PEO in such circumstances. Requiring a further PEO application at this stage would require further expense by the applicant, at a time when the applicant has already expended significant resources in the original PEO application and proceedings in the Outer House – and such a requirement will increase the likelihood of proceedings being ‘prohibitively expensive’ for the applicant.

We recommend that a provision be added to automatically double cross-caps on appeal – to reflect the increase in the petitioner’s costs on appeal, and to allow petitioners to better recover their costs in the event that their case is successful.

We would not support any simultaneous automatic doubling of the cap which governs the petitioner’s liability (currently set at a default level of £5,000). This cap is set at the outset at the level which the petitioner can afford without proceedings being prohibitively expensive for them, and this is unlikely to change as the case progresses.

We recommend that a party with a PEO which has carried-over on appeal be given the opportunity to apply to the court ‘on cause shown’ for their cross cap to be increased, to allow for any increase in relative outlays necessary for the appeal and to ensure that equality of arms is maintained during the appeal.

We recommend that PEO awards should carry over to proceedings in the Inner House as standard, regardless of whether the petitioner or respondent is appealing the original decision.

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

Similarly to our comments on question 3 in relation to draft rule 58A.6 above, we support this move as part of a greater shift towards dealing with PEO applications on the papers, avoiding expensive hearings.

We recommend that appeals concerning PEO applications be governed by the same arrangements specified above in our response to question 3 (i.e. utilising a formalised written process, specialised judges, mandatory publication of decisions, etc.).

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

We have several further comments on the proposals:

A. Amend draft rule 58A.5 to allow for a PEO applicant to respond to any submissions raised by a party which opposes their PEO application.

Draft rule 58A.5 does not appear to allow a PEO applicant to respond to any submissions raised by a party opposing their PEO application. It is essential that

they are given the opportunity to respond to contest claims made by their opponents which may be inaccurate or untrue.

We recommend that draft rule 58A.5 is amended to allow a PEO applicant to respond to any submissions from a party opposing a PEO.

B. Remove the provision in draft rule 58.A.7(2) to increase applicants' adverse liability and instead retain the current position in relation to the default caps governing adverse liability.

Chapter 58A.4(1) currently caps the applicant's liability in expenses to the respondent to the sum of £5,000. Chapter 58A.4(2) makes provision for that sum to be reduced on cause shown by the applicant.

Draft rule 58.A.7(2) would make a significant change to this position. It would allow for a court to increase a PEO applicants' liability above the levels of the default caps 'on cause shown' - i.e. it would allow for a court to raise an applicant's adverse liability exposure above £5,000.

We are concerned that this proposal was not specifically highlighted in the consultation document to allow proper public consideration of the impacts of such a significant change, and for the views of the public to be canvassed on such a move. It is likely that this change will be apparent only to those with prior experience of the existing PEO rules.

The ECJ stated clearly in case C-530/11, *Commission v UK*, that claimants must have prior certainty in relation to costs protection:

*...where the relevant provision is designed to create rights for individuals, the legal situation must be sufficiently precise and clear, and the persons concerned must be put in a position to know the full extent of their rights and, where appropriate, to be able to rely on them before the national courts...*¹²

Rule 58A.7(2) would remove the prior confidence enjoyed by petitioners that their liability will be capped at a maximum of £5,000. This change will likely deter legitimate claims from proceeding. It will create considerable uncertainty in respect of cost protection.

We recommend that rule 58A.7(2) is removed and that the current position is retained in relation to the variation of the default caps.

¹² Case C-530/11, *Commission v UK* (2014) ECLI:EU:C:2014:67, para 34.

C. Remove draft rule 58A.5(3)(ii).

It is unclear why the terms on which a PEO applicant is represented (e.g. requiring applicants to disclose that their lawyers are acting on a pro bono basis) is relevant to the PEO application process.

We would be highly concerned by this if the intention of this rule is to provide a more favourable treatment to applicants whose lawyers are working pro bono.

Lawyers should not be expected to work for free in cases of important public interest. A rule favouring pro bono representation would likely be harmful to the (already limited) economic viability of the few environmental legal specialists working in the interest of those unable to afford litigation. Potential litigants may also struggle to find an adequately qualified lawyer who will represent them pro bono.

Reliance upon goodwill and charity is highly limited in providing comprehensive access to justice, as required by the Convention.

We recommend that draft rule 58.5(3)(ii) is removed.

D. Expenses estimates given by the respondent (and any interested parties) during the PEO application process should be binding.

This estimate of expenses is the level of expenses which the court uses in assessing whether the proceedings are 'prohibitively expensive'. If the expenses increase above this estimate during litigation, then they should not be recoverable as this will change the prohibitively expensive calculation.

This change would protect against drawn-out appeals. This is particularly important where a PEO has been refused. It would protect petitioners from a situation where they have been refused a PEO at the outset on the basis of the proceedings not being prohibitively expensive, yet this situation changes as the case progresses and the expenses increase beyond initial estimates.

We recommend that provision is made in the rules for expenses estimates given by the respondent (and any interested parties) during the PEO application process to be binding, and act as a cap on their ability to recover expenses.

E. Remove 'reciprocal cross-caps' from the PEO regime.

PEOs lack any legal basis in the Aarhus Convention, create an inequality of arms contrary to the purposes of the Convention and they are based on fundamentally flawed reasoning. We recommend that cross-caps are removed from the PEO system.

i. Lack of legal basis in the Aarhus Convention and creation of inequality of arms

The Aarhus Convention Compliance Committee (ACCC) takes a ‘holistic’ approach to the issue of costs in relation to Article 9(4).¹³ This includes a consideration of all the costs of proceedings in Aarhus cases, which includes the applicant’s own costs. Considering the effects of reciprocal cost caps is therefore critical in relation to the issue of prohibitive expense.

The ACCC is clear that the imposition of reciprocal cost caps as part of the PCO system in the UK raises equality of arms issues in litigation:

*The Committee also notes the limiting effect of reciprocal cost caps... it is essential that, where costs are concerned, the equality of arms between parties to a case should be secured, entailing that claimants should in practice not have to rely on pro bono or junior legal counsel.*¹⁴

In Aarhus-type cases, there is almost always an asymmetric relationship between the parties involved. Often these cases have poorly-resourced individuals, community groups or NGOs litigating against public bodies or well-funded private entities. Reciprocal cost caps act as a barrier against applicants obtaining quality legal representation and are problematic for maintaining equality of arms in litigation.

They lack any legal basis in the Aarhus Convention or the Public Participation Directive, neither instrument refers to the legal costs of the respondent in environmental litigation. The ACCC has repeatedly held that the requirements of prohibitive expense and fairness apply to the claimant, not the respondent.¹⁵

ii. The reasoning behind cross-caps is fundamentally flawed

The reasons for introducing cross-caps, as stated by the consultation document which recommended and preceded their introduction, were as follows:

*As well as creating a more level playing field ensuring the petitioner does not run up excessive costs, this would encourage the petitioner to minimise the overall costs of a case.*¹⁶

*The cross-cap is designed to reflect a reasonable limit for bringing a judicial review or first instance statutory review, and that public resources are not unlimited. A cross-cap would also discourage a pursuer from running up excessive legal costs on their own side.*¹⁷

¹³ ACCC, ‘[Findings and Recommendations of the Aarhus Convention Compliance Committee with regard to Communication ACCC/C/2008/33 Concerning Compliance by the United Kingdom](#)’, ECE/MP.PP/C.1/2010/6/Add.3, para. 128.

¹⁴ ACCC, ‘Findings and recommendations with regard to communication ACCC/C/2008/33 concerning compliance by the United Kingdom of Great Britain and Northern Ireland’ (2011) ECE/MP.PP/C.1/2010/6/Add.3, para 132.

¹⁵ See Communication C27, paragraph 45.

¹⁶ Scottish Government, ‘[Legal Challenges to Decisions by Public Authorities under the Public Participation Directive 2003/35/EC: A Consultation](#)’ (2012), para 37.

¹⁷ Ibid, para 38.

This reasoning (to ‘level the playing field’ and ‘avoid a petitioner running up exorbitant litigation costs’) has several problematic features.

First, as discussed, the playing field in environmental litigation is uneven from the outset *to the detriment of Aarhus-type litigants*. PEOs are necessary to address the inequality of resources which exist between parties in environmental litigation. The notion of an uneven playing field which exists between public bodies and environmental litigants, to the detriment of public bodies, is unsupported by the evidence.

Second, granting a PEO to a petitioner does not provide *carte blanche* for the petitioner to run up excessive costs. Civil litigants in Scotland are subject to the ordinary rules and principles governing the recovery of expenses in litigation (which apply regardless of whether (s)he has been awarded a PEO). The conduct of the parties during litigation is one of the factors which a court may take into account when assessing the award of expenses at the conclusion of litigation, and therefore any unnecessary or exorbitant expense could be addressed and discounted at that stage.¹⁸

If cross-caps were removed, a petitioner with a PEO would not be able to run up and recover excessive costs from its opponent(s). The ‘disciplinary’ intention behind cross-caps is misplaced, and constitutes an unnecessary duplication of the ordinary rules of expenses in civil litigation.

Third, the limit of £30,000 was set at an apparently arbitrary level, with no reasoning provided to support this estimate. As discussed above, it serves to create an inequality of arms between parties – as some cases may require expenditure above this amount for a petitioner to be able to secure effective legal representation.

The reasoning behind cross-caps is fundamentally flawed. They constitute an unnecessary duplication of the disciplinary effect created by the normal expenses rules on petitioners’ expenses throughout litigation and they are set at an arbitrary level – serving to increase the inequality in arms between parties which are often unmatched from the outset (to the detriment of petitioners).

We recommend that reciprocal cross-caps are removed from the PEO regime (i.e. that draft rule 58A.7.(1)(b) be deleted).

F. Replace the system of default caps with qualified one way costs shifting.

Our preference to the system of default costs caps set out in draft rule 58A.7.(1) is that the capping system is replaced with a system of ‘Qualified One Way Costs Shifting’ (QOCS).

¹⁸ See Charles Hennessy, *Civil Procedure and Practice* (4th Edn., Greens, 2014), p305 and chapter 21 generally.

Under a QOCS system, where an applicant qualifies for protection for a PEO, they then face no liability for the respondent's legal costs if their claim is unsuccessful, whereas respondents will generally be ordered to pay the costs of successful applicants. This would be a much simpler, and more AC-compliant system of apportioning costs in environmental litigation.

As noted by the Jackson Review, QOCS has the effect of putting parties who are in an asymmetric relationship (such as the parties in almost all Aarhus-type litigation) onto a more equal footing, ensuring that litigants are not denied access to justice because of the prospect of incurring liability for costs beyond their means.¹⁹

We recommend that draft rule 58A.7.(1) is replaced with provision for QOCS.

G. Remove the exposure of Aarhus-type litigants to liability for the expenses of interested parties.

Aarhus-type litigants should not face liability for three sets of expenses (i.e. their own, the respondent's and interested parties') in the event that their case is unsuccessful. We are concerned that interested parties intervene in Aarhus-type cases for the sole purpose of deterring such litigation by adding the threat of extra liability for expenses.

We recommend that provision is made in the rules so that PEO applicants face no liability for the expenses of any interested parties which intervene.

H. Limited scope of consultation - need for expenses protection in environmental litigation more broadly

We note our concern that the scope of this consultation is limited in terms of creating a system comprehensive expenses protection which brings Scotland into compliance with its Article 9 obligations.

For example, the consultation does not cover Sheriff Court actions, nuisance claims or any type of private law claim – despite such claims falling within the scope of the Aarhus Convention. The ACCC has mentioned the lack of costs protection in relation to private law claims as a feature of the Scottish system which is non-compliant with the Aarhus Convention.²⁰

We recommend that the situation for costs protection for environmental litigation more broadly in Scotland is reviewed to ensure that all Aarhus-type proceedings are not prohibitively expensive.

¹⁹ Rupert Jackson, 'Review of Civil Litigation Costs: Final Report' (2009), p89.

²⁰ Aarhus Convention Compliance Committee, '[Second progress review of the implementation of decision V/9n on compliance by the United Kingdom with its obligations under the Convention](#)' (2017), para 106.

I. Introduce a provision to waive court fees for PEO applicants

As mentioned above, the ACCC takes a 'holistic' approach to the issue of costs in relation to Article 9(4) – which is inclusive of court fees. The cost of court fees (which have been subject to recent increases) should play a part in determining the level of the limitation of liability.

We recommend that the rules are amend to exempt PEO applicants from paying court fees.

J. Explicit confidentiality for financial information provided by PEO applicants

There are clear privacy implications from the provision of financial information necessary in PEO applications. The rules (and any accompanying practice notes or guidance) should clearly state that all financial information provided in relation to PEO applications remains confidential to the court and the parties' legal advisers.

We recommend that a provision is added to the draft rules which explicitly provides for the confidentiality of all financial information provided by PEO applicants.