

ANNEX B CONSULTATION QUESTIONNAIRE

1. Are amendments required to the Tables of Fees to ensure that fees recoverable are proportionate?

If yes, please detail the amendments proposed and provide any evidence you may have to support your proposal.

Yes, we believe that the current Tables of Fees does require amendment to ensure that the fees recovered are proportionate to the value of Damages involved.

There is currently no consistency between fees that can be recovered Pre-Litigation and after Litigation, causing a clear impact on the affordability of access to justice, particularly on low value personal injury claims. (£25,000 Damages or less)

This inconsistency is because the mandatory Personal Injury Pre-Action Protocol addresses proportionality by aligning the fees being paid to the level of damages agreed through the use of a fixed scale fee mechanism, On Litigated cases however, the current Tables of Fees does not address proportionality as the fees are calculated on a 'work done by the solicitor' basis.

The current Tables of Fees could be argued to reward inefficiency and unnecessary prolonging of cases to recover higher fees whilst utilising valuable court resources not only through the life of the case, but also when it comes to assessment of fees with parties frequently looking to the Auditor to decide upon recoverability of individual component parts of the fees where agreement cannot be reached.

The current Tables of Fees also offers far less predictability on the cost of litigation to all parties, when compared to a fixed scale fee model.

We believe that the current approach does not aid early dispute resolution which could be remedied if the cost of litigation could be easily predicted by the parties from the outset with scale or fixed fees – the economics of a given case would be in sharp focus.

The Tables of Fees does contain a block fee for pre-litigation work, but in our view, this does not go far enough – only a fully scale or fixed fee can remedy the current issues and practical problems.

We have included an **Appendix** to our response that contains the findings of two sets of data collection undertaken by the Forum of Scottish Claim Managers for litigated Personal Injury claims.

The data demonstrates that proportionality of judicial expenses does not presently exist on low value Personal Injury claims:

- **Table 1** contains the data collected up to May 2015 and is derived from the data of 12,304 litigated cases

- **Table 2** contains data collected since the launch of the All Scotland Personal Injury Sheriff Court and is derived from the data of 2,650 litigated cases

Both data sets show that costs exceed damages more often than not and the lower the band of damages, the greater the disproportionality of cost.

Qualified One-way Costs Shifting (QOCS) is currently being considered by the Scottish Parliament as part of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill which if implemented, will undoubtedly increase access to justice and the affordability for Pursuers since they would only be at risks for an adverse award of expenses in certain circumstances e.g. fraud or misconduct of the litigation.

When QOCS was introduced in England & Wales, it was done alongside a system of fixed fees to ensure proportionality and predictability for all parties as well as encourage correct and equitable behaviours and early resolution of disputes.

It is also of note that Northern Ireland has had fixed or scale fees since the *County Court Rules (Northern Ireland) 1981* came into force.

If action is not taken to revise the method of rewarding Solicitors, we could be attracting undesirable practices to become more prevalent in Scotland such as cold calling, as there would be a layer of reward and referral fees which would encourage the same practices the Scottish Government is attempting to tackle as being detrimental to society.

We would propose that a scale or fixed fee method of calculating Fees on cases where the damages are £25,000 or less – this could build on the basis of the existing Protocol fee structure with an added component or components to take account of the stages of litigation as the case progresses.

2. Are amendments required to the Tables of Fees to ensure that they better reflect the work being undertaken?

If yes, please detail the amendments proposed and provide any evidence you may have to support your proposal.

Yes, as we now have Compulsory Pre-Action Protocols in place for Personal Injury, so most of the work in narrowing the areas of dispute should already have been carried out Pre-Litigation.

Additionally, we now have greater use of technology in obtaining and drafting precognitions, statements, motions and even Statements of Valuation where much of the time consuming manual elements have been removed, streamlined or simply made into a more cost efficient process.

As outlined in our answer to Question 1, our opinion is that amending entries in the Tables of Fees will not go far enough to address these changes or the mismatch between Pre-Litigation and Litigated fees. We must ensure the system is fit for purpose in the changing landscape.

The tables included in the **Appendix** evidence that there is currently no proportionality in the judicial expenses being paid relative to the damages agreed and we would advocate a change to a scale fee based system where there is a direct correlation between the damages being paid and the judicial expenses.

We believe that overall proper recovery of costs be achieved via 'swings and roundabouts' in that some cases would mean higher cost recovery compared to work expended to balance out with cases where lower cost recovery takes place.

In our view, the clear advantages would outweigh the disadvantages:

- Promote early pro-active dispute resolution
- greater certainty on the cost of litigation for all
- a system that is fit for purpose through future changes to the Civil Justice system.

We believe this is even more important when QOCS, DBAs and Success fees will be changing the landscape as part of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill.

Any proposed scale fee could incorporate stages, so if a case reaches a certain stage or milestone in litigation before it settles, then an added element of fee could be recovered – this is in successful operation in England and Wales at the moment.

In addition to all the other highlighted benefits, such a system also promotes narrowing of the issues between parties to the extent that court hearings are shorter saving valuable court time and resources.

3. Are amendments required to the Tables of Fees to reflect changes in practice and/or procedure?

If yes, please detail the amendments proposed.

Yes – previous answers refer.

There is now a clear mismatch between Pre-litigation fees which work on a fixed scale basis and the way litigated fees work with the Tables of Fees.

As previously discussed, Simple Procedure for Personal Injury claims alongside QOCS, DBAs and Success fees will be changing the civil litigation landscape and it is vital that the approach to litigated fees is amended to encourage settlement, affordability and proportionality that the increased access to justice will bring.

4. Is there a requirement for a general modification of the level of fees provided for in the Tables of Fees?

If yes, please specify the modification proposed and the circumstances justifying the modification and provide any evidence you may have to support your proposal.

Yes, please see our earlier answers. In our view, there is a need for wholesale change.

5. Is it necessary to consider any additional fees that are not currently included in the Tables of Fees?

If yes, please detail the additions proposed and provide any evidence you may have to support your proposal.

No. We believe the focus should be on altering the dynamics of how litigated fees work in practice in Scotland rather than adding in additional components – this would only serve to compound the proportionality problems as highlighted in the **Appendix**.

Appendix

Table 1

FSCM Data up to May 2015 (the older data)

	No. of Cases	Costs exceed Damages	Ratio	Average Damages	Average Costs	£X Legal costs for every £1 Damages
<i>Sample size = 12,304 cases</i>						
Damages under £5,000	7,522	5,074	67.46%	£2,874.50	£3,858.64	£1.34
Damages under £10,000	10,028	6,095	60.78%	£3,966.53	£4,666.80	£1.18
Damages under £15,000	10,694	6,197	57.95%	£4,517.79	£4,944.06	£1.09
Damages under £20,000	11,037	6,230	56.45%	£4,943.83	£5,138.01	£1.04
Damages under £25,000	11,232	6,232	55.48%	£5,273.52	£5,227.83	£0.99

Table 2

FSCM new data, since September 2015 - ASPIC launched on 22 Sept 2015

	No. of Cases	Costs exceed Damages	Ratio	Average Damages	Average Costs	£X Legal costs for every £1 Damages
<i>Sample size = 2,650 cases</i>						
Damages under £5,000	1,731	1,079	62.33%	£2,348.10	£4,064.11	£1.73
Damages under £10,000	2,253	1,271	56.41%	£3,566.57	£4,152.69	£1.16
Damages under £15,000	2,388	1,282	53.69%	£4,011.03	£4,355.44	£1.09
Damages under £20,000	2,467	1,283	52.01%	£4,403.04	£4,492.52	£1.02
Damages under £25,000	2,507	1,282	51.14%	£4,668.52	£4,557.56	£0.98