



## **Consultation on the Review of Fees in the Scottish Civil Courts**

### **Fees of solicitors**

#### **Response by the Association of British Insurers**

1. The Association of British Insurers (ABI) is the voice of the insurance and long term savings industry. In Scotland, the insurance and long term savings industry supports more than 23,000 jobs representing £2.7 billion in GVA to the economy. Around one in four of the UK's life assurance roles are located in Scotland helping to make Edinburgh the UK's biggest employment centre for life and pensions jobs while Stirling is 7th. In general insurance the Glasgow city region supports more than 10,000 jobs contributing more than £1 billion in GVA to the local economy. Glasgow city centre is home to 23 major insurers which represents the highest concentration of insurance and long-term savings jobs in the UK outside central London.
2. The ABI welcomes the opportunity to contribute to this consultation. Claims are on the increase in Scotland. Data from the Department for Work and Pensions (DWP)<sup>1</sup> shows that between 2011 and 2016 the number of compensation claims in Scotland increased by 16.6%. With this increase in claims comes an increase in the use of lawyers in Scotland.
3. The Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill is currently making its way through Scottish Parliament. This Bill, when it becomes law, will radically alter expenses and fees in Scotland, introducing qualified one-way costs shifting (QOCS) and allowing solicitors to enter into damages based agreements (DBAs) from which the Bill as currently drafted permits solicitors to take a cut (to a currently unknown percentage) of a claimant's damages, including future losses up to £1,000,000.

#### **Executive Summary**

4. We welcome the opportunity to contribute to this consultation. Having considered the implementation of the Table of Fees in Scotland, and its intended benefits of bringing certainty and proportionality to the costs of litigation, the ABI notes the following points:
  - The volume of claims is increasing in Scotland, and is expected to increase further following the introduction of QOCS and DBAs
  - The principle of proportionality has been eroded over time
  - Expenses in Scotland are disproportionate to the level of damages paid
  - The proposed Review coincides with significant planned changes to the law related to the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill – the exact outcome and impact of which is currently unknown
  - Amendment to the Table of Fees is required to ensure that recoverable fees are proportionate to the level of damages involved

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<sup>1</sup> Obtained by DWF solicitors under a Freedom of Information request

- The current expenses system leads to a clear disparity between fees that can be recovered pre-litigation and for litigated cases, particularly in relation to low value personal injury claims involving damages of £25,000 and less
- Fixed costs should apply to both pre-litigation and litigated up to a value of £25,000
- Adjacent jurisdictions are actively reducing the costs in damages claims. Any increase in claims costs in Scotland will add to the upward pressure on insurance premiums, and could make the cost of compulsory insurance in Scotland disproportionately expensive. The current system has failed to encourage appropriate behaviours and has encouraged litigation.

### Consultation Questions

- 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.**
5. Insurers are principally involved in litigation as a defender in personal injury and damages actions on behalf of their customers, and we will therefore concentrate on personal injury matters when answering the consultation questions.
  6. The current Table of Fees requires amendment to ensure that recoverable fees are proportionate to the level of damages involved in cases.
  7. The mandatory Personal Injury Pre Action Protocol has introduced much needed and successful reform to fees paid by the introduction of a fixed scale fee mechanism to help ensure solicitors' fees are better aligned to the level of damages. However, this has in turn lead to a disparity in fees paid in pre-litigation and litigated cases.
  8. The current Table of Fees leads to reward of inefficiency and discourages the early settlement of claims, leading only to benefit claimant lawyers. Early and efficient resolution of claims would be encouraged by the introduction of fixed recoverable fees for both pre-litigation and litigated cases up to a value of £25,000. This would also lead to predictability for all parties involved in litigation.
  9. We note that data provided by the Forum of Scottish Claims Managers demonstrates the problem with proportionality of expenses in low value personal injury claims, particularly at the lower end of damages, with recent data obtained by the Forum demonstrating that for cases with a damages value under £5,000, for every £1 of damages paid, £1.73 was paid in expenses/fees<sup>2</sup>.
  10. It should be noted that in England and Wales, the Government have announced their intention to introduce further personal injury reforms, with the small claims track (SCT) limit for road traffic cases to be raised to £5,000 and for all other personal injury cases to £2,000, which will lead to legal fees for these claims not being recoverable. Instead these cases will proceed via a specially designed Portal with safeguards in place to assist claimants.
  11. In addition, the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill, which is currently making its way through Scottish Parliament, seeks to increase

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<sup>2</sup> Data obtained by the Forum of Scottish Claims Managers

access to justice by introducing qualified one-way costs shifting (QOCS) and damages based agreements (DBAs), vastly decreasing situations in which pursuers would become at risk of an adverse expenses award to circumstances involving fraud and misconduct.

12. When similar reforms were introduced in England and Wales it was done alongside the introduction of the Claims Portal and fixed recoverable costs for cases up to a value of £25,000. In Lord Justice Jackson's most recent Review of costs in England and Wales he recommended the extension of fixed costs to all cases in the current fast track, which are not already captured by fixed costs, and the introduction of a new intermediate track, for cases up to a value of £100,000 for which fixed recoverable costs will apply<sup>3</sup>.
  13. We propose the introduction of fixed fees in Scotland for cases up to a value of £25,000. Once implemented consideration should be given to the extension of fixed fees for personal injury cases up to a value of £100,000, as is being done in England and Wales (where damages values are comparatively lower than in Scotland). Failure to reform expenses and fees in Scotland is likely to lead to undesirable practices, including cold calling and nuisance texts, which is already a significant problem in Scotland.
  14. An increase in claims volumes will inevitably increase claims costs, which in turn could impact consumers by way of increased insurance premiums and could make the cost of compulsory insurance in Scotland disproportionately expensive. The current system has failed to encourage appropriate behaviours and has encouraged litigation.
- 2) Are amendments required to the Table 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.**
15. Yes, fees as currently claimed are disproportionate to the level of damages involved in cases, as explored in detail above.
  16. The mandatory Pre-Action Protocol for personal injury claims has resulted in a much more streamlined pre-litigation process, with more work carried out pre-litigation. This, combined with more automated processes for various litigation phases, has resulted in a need for fixed fees for both pre-litigation and litigated cases, but particularly for litigated cases where there is a marked disparity in fees claimed.
  17. The advantages of a fixed fee regime for cases up to a value of £25,000 include:
    - The promotion of early resolution of claims
    - Reduces judicial time taken up with cost assessments
    - Drives efficiencies for both pursuers and defenders
    - Provides pursuers and defenders with certainty and predictability of fees
    - Improves proportionality

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<sup>3</sup> <https://www.judiciary.gov.uk/publications/review-of-civil-litigation-costs-supplemental-report-fixed-recoverable-costs/>



**3) Are amendments required to the Table of Fees to reflect changes in practice and/or procedure? If yes, please detail the amendments proposed.**

18. Yes – see answers above.

19. Changes anticipated as a result of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill will alter the civil litigation landscape in Scotland. With the introduction of QOCS and DBAs in Scotland, together with the mandatory Pre-Action Protocol for personal injury cases, fixed fees should be introduced for all personal injury claims, both pre-litigation and litigated claims, up to a value of at least £25,000, before being considered for cases of greater value, up to £100,000.

**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.**

20. Yes, as above we consider there should be a holistic review of fees and expenses in Scotland, and the introduction of fixed fees for cases up to a value of £25,000 in order to increase proportionality and better reflect the way in which cases are funded and run in Scotland.

**5) Is it necessary to consider any additions proposed and provide any evidence you may have to support your proposal.**

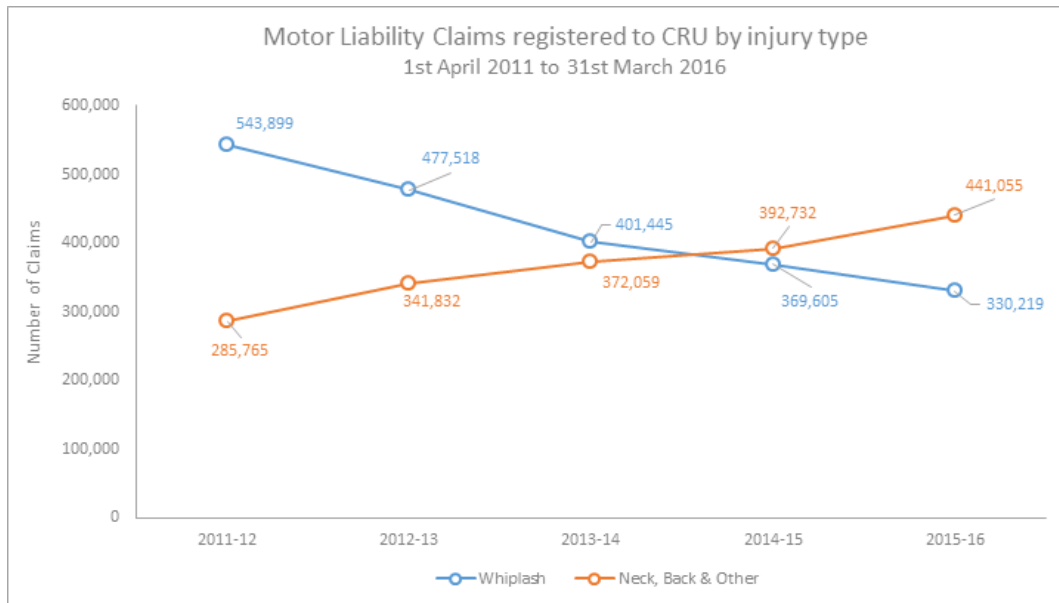
21. No, we consider that rather than focus on altering individual elements of the current fee structure there should be a total overhaul of the way fees/expenses are calculated for personal injury cases of a value up to £25,000.

## **APPENDIX 1**

### **The experience from another jurisdiction**

1. One reason for the contrast in PI claims between Scotland and England and Wales is reforms which were implemented in the latter jurisdiction which removed the majority of money damages claims from the scope of civil legal aid. Legal aid was replaced in England and Wales by an insurance-based funding scheme, with the use of Conditional Fee Agreements (CFAs) underpinned by After the Event (ATE) insurance. The rationale for this change was to increase access to justice for all individuals.
2. It should be noted that although the objective to increase access to justice was broadly achieved in England and Wales, there were undesirable consequences; namely a rise in the number of spurious claims coupled with increasingly disproportionate legal costs. These undesirable consequences were in part addressed through the implementation of the civil provisions in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) and the introduction of fixed recoverable costs for the majority of personal injury claims below £25,000. These reforms were implemented following a review of civil litigation costs by Lord Justice Jackson.
3. However, the LASPO reforms were not entirely effective, and there is an opportunity to learn from that experience to improve the reform of civil litigation in Scotland and indeed create a better civil justice system than that which exists in England & Wales. The LASPO reforms lead to a significant initial increase in road traffic accident (RTA) claims. Although these reforms did tackle the cost of individual claims, it did not have a discernible impact on claims frequency. The total number of claims submitted to the Compensation Recovery Unit (CRU) in 2015/16 decreased by only 0.3% from the immediate Post-LASPO period of 2013/14, and in fact increased by 1.2% from the previous year. The number of car accidents has reduced, vehicle and road safety has improved, while the volume of soft tissue injury claims remains static which makes no logical sense. In addition the number of claims registered with the CRU labelled as “whiplash” has decreased in recent years, but has been coupled with a corresponding sharp increase in the number of soft tissue injury claims for neck and back injuries, as evidenced by the graph below:

**Exhibit 2: Motor accident claims by injury type registered to the Compensation Recovery Unit (CRU)**



4. In addition to the LASPO Act, recent further reforms to the Civil Justice system in England and Wales have been announced which include increasing the Small Claims Track limit for road traffic claims to £5,000 and all other personal injury claims to £2,000 as well as implementing a fixed tariff capping whiplash compensation payments. The UK Government estimates that these reforms will lead to savings of approximately £1 billion, which will be passed on to consumers in the form of lower motor insurance premiums.
5. The LASPO and other reforms in England and Wales included the banning of referral fees which are paid by solicitors to CMCs and other agents in return for personal injury claims data. This ban has made England and Wales a less commercially viable jurisdiction and conversely Scotland has become a more attractive jurisdiction for CMCs to operate in with defenders seeing an increase in claims volumes.