

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.

Aviva welcome the opportunity to respond to the consultation. At times in our response, we will refer to information and data gathered by the Forum of Scottish Claims Managers (FSCM) – this is because data on Aviva cases is included within the FSCM studies.

Our answers will predominantly relate to Personal Injury matters (unless otherwise stated) as that constitutes our experience in the main.

Yes, the current Tables of Fees require amendment in our opinion, to ensure that recoverable fees are proportionate to the level of Damages involved.

There is a clear gulf between fees that can be recovered Pre-Litigation and after Litigation, with a knock on effect on the affordability of access to justice, particularly on low value personal injury claims. (£25,000 Damages or less)

This is because the mandatory [Personal Injury Pre-Action Protocol](#) deals (successfully in our opinion) with proportionality by connecting the fee being paid directly to the level of damages through the use of a fixed scale fee mechanism.

However, for Litigated cases, the current Tables of Fees do not take proportionality into account (although can be modified by the Auditor) because the starting point is proposition that recovery should be in line with the work done by the solicitor on the case. This approach offers little predictability of the cost of litigation to the parties.

Lord Justice Jackson¹ said of 'hourly rate' remuneration in England & Wales that:

“Remuneration on a time basis rewards inefficiency. Unrestrained costs shifting drives parties to leave no stone unturned: the more costs mount up, the more determined each party becomes to ensure that the other party pays them. The result is inevitable - a civil justice system which is exorbitantly expensive.”

The current Tables of Fees have no mechanism to guard against inefficiency or the prolonging of cases to recover higher fees. This means that valuable court resources may be expended on a case unnecessarily, but the only mechanism to address any inefficiency comes at the end when asking the Auditor to assess the fees and decide upon arguments over recoverability of individual component parts.

¹ <https://www.judiciary.gov.uk/wp-content/uploads/2016/01/fixedcostslecture-1.pdf>

This does not promote early dispute resolution.

Early dispute resolution could be facilitated if the cost of litigation was able to be predicted by the parties from the outset with scale or fixed fees – economics of a case would be in sharp focus.

The issue is also being compounded by current legislation - in the recent case of ***Ian Douglas Graham v Paul Farrell [2017] SC EDIN 75***² (following the 2015 case of ***Tallo v Clark 2015SCEDIN47***³ there is an issue where Simple Procedure claims do not mean Simple Procedure expenses. Despite the case settling by offer and acceptance of a tender, the expenses were left unrestricted because the Defender had stated a defence and then settled the case - Section 81(5) of the Courts Reform (Scotland) Act 2014⁴ refers.

This runs entirely contradictory to predictability and proportionality and actively discourages early settlement – if a Defender considers they have a Defence, the practical implications are that they must run that defence and lose to secure fixed expenses, rather than settle a case on economics early and face an unrestricted and unknown outlay far greater than if the case had run to Proof.

The Tables of Fees 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 would refer you to the **Appendix** of the **Forum of Scottish Claim Managers** consultation response for evidence that proportionality of judicial expenses does not presently exist on low value Personal Injury claims and that costs regularly exceed damages 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 and the 'Part 36 offers' system (pre-litigation tenders in effect) to encourage correct and equitable behaviours and early resolution of disputes.

² <http://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2017scedin75.pdf?sfvrsn=0>

³ <https://www.scotcourts.gov.uk/search-judgments/judgment?id=dcd0dda6-8980-69d2-b500-ff0000d74aa7>

⁴ <https://www.legislation.gov.uk/asp/2014/18/section/81>

England & Wales is not the only neighbouring jurisdiction to have fixed fees for lower value litigated cases – Northern Ireland has had fixed or scale fees since the *County Court Rules (Northern Ireland) 1981* came into force.

There may be some opinion that fixed or scale fees for cases under £25,000 is too radical a step, however, Simple Procedure is on the horizon for Personal Injury claims as is the Scottish Civil Justice Council's own work by the Rules Rewrite Committee laying a basis for a future which could include online dispute resolution and our opinion is that fixed or scale fees could assist much of this work to succeed and correct anomalies such as the one highlighted in the ***Graham v Farrell*** case.

If radical steps are not taken to revise our method of rewarding Solicitors for litigation, we are attracting undesirable practices to become more prevalent in Scotland - cold calling for example.

An extra layer of reward encourages things like referral fees, which in turn attracts 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. £1.34 (*£1.73 for ASPIC cases) being spent on Expenses for every £1 of Damages on claims of less than £5,000 is not sustainable and these costs are ultimately borne by the consumer through their insurance premiums.

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, therefore much 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 set out in the traditional table of fees 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 achieve the aims or correct the gulf between Pre-Litigation and Litigated fees. We must change now to make the system fit for purpose in the changing landscape.

As evidenced by the tables included by **FSCM** in their **Appendix**, proportionality does not presently exist and we would support the **FSCM** proposal for a scale fee based system as the only way this can be properly corrected.

We accept that such a proposal may not properly reflect the work done on an individual case, but we believe that not only would 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:

- early pro-active dispute resolution would be built in
- greater certainty of 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](#).

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 in earlier answers, 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 **FSCM Appendix**.

FSCM Appendix (reproduced here to aid the reader)

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