About Aviva

1. Aviva provides peace of mind for more than 33 million people across the world, protecting their families and possessions by providing insurance, savings and investment products.

2. More than 16 million customers rely on us in the UK. In 2016 Aviva dealt with approximately 815,000 claims paying out £2.2 billion.

3. Aviva are an important contributor to the Scottish economy employing approximately 3,000 people in Scotland in key locations for our UK General Insurance business in Perth, Bishopbriggs and Glasgow.

4. We are also committed to addressing the issue of the UK’s compensation culture which affects both the safety and wallets of motorists in Britain through our ‘Road to Reform’ campaign: https://www.aviva.co.uk/car-insurance/motor-advice/road-reform/

Whether the Bill will achieve the policy aim of improving access to justice by creating a more accessible, affordable and equitable civil justice system

5. We support the aim of access to justice for all parties and are committed to paying genuine claims quickly as we believe that is the right thing to do for our customers and injured claimants alike. We want to see the cost of civil court actions being more predictable, affordable and equitable resulting in a fair and balanced civil justice system however, “equality of arms” must mean a system that has equality for all parties at its core and must safeguard against unintended consequences or an imbalance or unfairness.

6. In Sheriff Principal Taylor’s 2013 Review of the Expenses and Funding of Civil Litigation, (of which the recommendations form the basis for this Bill) he concluded that Scotland had an access to justice issue because between 2008 and 2011, the number of compensation claims registered in Scotland with the Department of Work and Pensions Compensation Recovery Unit had increased by only 7%, while in England and Wales it rose by 23%. However, DWP statistics published under Freedom of Information show that between 2011 and 2016 the number of compensation claims in Scotland increased by 16.6% whereas in England and Wales the volume actually decreased (albeit from a much, much higher base) by 4.5%. This challenges a key assumption underpinning Sheriff Principal Taylor’s recommendations and demonstrates that Scotland does not have a problem with access to justice for personal injury claims.

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1 All compensation claims have to be registered by law with the DWP Compensation Recovery Unit
2 Obtained by DWF Solicitors
7. The Civil Justice system has also fundamentally changed since Sheriff Principal Taylor’s recommendations. A Compulsory Protocol\(^3\) for injury claims came into existence in November 2016 (where only a voluntary arrangement existed before) with a focus on attempting to settle injury claims without the need for the Courts to intervene alongside fixed fees to promote settlement.

8. The measures contained within the Bill will, in our opinion, actively undermine the Compulsory Protocol by providing little or no incentive for an injured claimant or their solicitors to agree an early settlement. Instead, the provisions in the Bill providing for success fees and damages based agreements will make expensive litigation a more attractive prospect for the solicitors whilst Qualified One-way Costs Shifting (QOCS) without adequate safeguards in place, provide no incentive for an injured claimant or their solicitors to try to achieve settlement without the need for litigation. This will create an unintended consequence that the volume and cost of litigation in Scotland will increase and consequently, in our view, it will take longer for an injured claimant to obtain their damages.

9. It is worthy of mention that when QOCS was introduced in England and Wales, it was done along with two other mechanisms to safeguard against unintended consequences:

   a) Fixed fees on litigated cases – to provide no financial incentive to an injured claimant’s solicitor to prolong an injured person’s case longer than necessary

   b) Fundamental dishonesty\(^4\) – Section 57 of the Criminal Justice and Courts Act 2015 strikes out an injured person’s entire claim and removes the QOCS protection if they are found to be fundamentally dishonest – this has the practical effect of deterring spurious claims.

10. The introduction of QOCS in Scotland without such safeguards, not only undermines the Compulsory Protocol and its aims, but would also make Scotland a far more expensive jurisdiction – the cost of which is ultimately borne by the consumers and businesses of Scotland through their insurance premiums.

11. Like the Association of British Insurers (ABI), we are surprised and concerned that the Bill excludes the regulation of Claims Management Companies (CMCs). One outcome of the Bill as currently drafted is that CMCs will not only continue to operate without any regulation in Scotland, but we are likely to see an increase in their operations and intensity of activity including nuisance calls encouraging people to raise personal injury claims. This concern is particularly pertinent in light of the strengthening of CMC regulation in England and Wales. This Bill will make Scotland a more attractive market for CMCs, undermining Scottish Government action to tackle nuisance calls, which are a greater problem in Scotland than in any other part of the UK.


The specific provisions in the Bill which:

(i) regulate success fee agreements (sometimes called ‘no win, no fee’ agreements) in personal injury and other civil actions, including by allowing for a cap on any fee payable under such agreements

12. Success fee agreements are ultimately an issue between pursuers and their agents. Defenders are not liable to pay or contribute towards success fees. However, we note and endorse the comments of the ABI regarding risk of damages inflation associated with success fee arrangements, which will simply add to the overall cost of claims.

(ii) allow solicitors to enforce damages based agreements (a form of ‘no win, no fee’ agreement, where the fee is calculated as a percentage of the damages recovered)

13. Like success fee agreements, Damages Based Agreements (DBAs) are a contract between a pursuer and their solicitor or other agents but we are concerned about the effect they have on civil litigation in Scotland.

14. The Bill as currently drafted allows DBAs to affect an injured person’s future losses and a share of those future losses to be paid to the solicitor or other funder – in our view, this creates a situation permeated by potential conflict of interest.

15. Such a situation means that an injured person has put forward a claim on the basis that they require to recover payment for such future losses to meet their future care needs or a shortfall in future earnings, however, if that money is recovered and paid out under a DBA then there could indeed be a real shortfall to meet the injured person’s needs.

16. It would follow that an injured person’s representatives could feel obliged to overstate the injured person’s claim to try to recover more than is actually required to ensure that the DBA recovery does not have this impact – this is fundamentally flawed and an inherent conflict of interest.

17. This would be compounded in any future legislation to allow Periodical Payment Orders where settlement of a catastrophically injured person’s claim includes a provision to pay for their care annually, creating an even more fundamental conflict of interest.

(iii) introduce ‘qualified one way costs shifting’, which means that a pursuer who acts appropriately in bringing a personal injury action or appeal will not have to pay the defender’s legal expenses even if the action is unsuccessful

18. The Policy Memorandum to the Bill states that the policy objective will contribute to the realisation of the Scottish Government’s Purpose and National Outcome 1 “on living in a Scotland that is the most attractive place for doing business in Europe”. We endorse the view of the ABI that the introduction of QOCS as currently proposed in this Bill may have the opposite effect for insurers making it
more expensive and less attractive to write insurance in Scotland compared to other parts of the UK or Europe. It would also increase costs to consumers and businesses in increased insurance premiums.

19. The introduction of QOCS means that in an unsuccessful personal injury action, a pursuer would not be liable for the defender’s costs. In practical terms, this removes a natural safeguard of litigation that were a party to lose a court case, then they face having to pay the expenses of the other party.

20. If no additional safeguards are put in place, this could lead to a dramatic increase in spurious or unmeritorious claims being brought in the Scottish Courts. At the moment, the potential cost consequences means that a pursuer requires to be properly advised by their solicitor of the risks involved and if a case has little or no merit, then they fall away.

21. QOCS in terms of the current drafting of the Bill will not provide a mechanism to take stock of the merits of a claim allied to the economics of proceeding with an action – a solicitor acting for such a claimant will have to, at best, self-regulate their activities to only support clients who have claims with merit or at worst, continue to support claims that they have judged themselves to have little or no merit.

22. The consequences in our opinion are that if unmeritorious or spurious claims do not rise because the solicitor profession are self-regulating, then instead, there could be an overwhelming rise in complaints to the Scottish Legal Complaints Commission by unhappy clients because solicitors are not pursuing these claims and/or a consequent rise in the number of party litigants pursuing actions with no legal representation.

23. We would highlight again our views in paragraphs 7. to 10. that for QOCS to achieve the stated aim and work effectively, there needs to be adequate safeguards put in place to complement the Compulsory Protocol rather than undermine it and safeguard against the unintended consequences QOCS can drive.

Alan Rogerson
Senior Claims Manager
Aviva Insurance Ltd
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