CIVIL LEGAL AID AND LEGAL EXPENSES INSURANCE:

AN ANALYSIS

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By

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ABSTRACT

Modern civil legal aid, has its roots in the post war United Kingdom, being a fundamental component of the welfare state, recognised as such by the political parties of the time. The provision of civil legal aid today is a different animal and does not share the same values as the 'old' scheme. This analysis will assess the evolution of civil legal aid, its success and failure, and consider the changes it has undergone and the forces behind those changes in dictating its current profile as a limited and franchised public services provision.

Legal expenses insurance, unlike civil legal aid, is a relative newcomer as a provider of access to civil justice. The scepticism that accompanied its arrival in this country, some 20 years ago, has dissipated. Insurers battled with the problems of adverse selection, European regulation and the public perception of their product, all of which have influenced market penetration. The position of legal expenses insurance within the civil justice system has begun to strengthen and is now openly recognised and supported by the legal establishment. A key objective of this analysis is to consider the rise of the legal expenses insurance market in the United Kingdom. This analysis seeks to assess the history of legal expenses insurance and evaluate its current position as a viable addition, or possible alternative, to State funded civil legal aid.

Therefore, it becomes necessary for this study to consider the position of comparative European jurisdictions. In addition, the role and reaction of the legal practitioner situated amidst such significant and fundamental change is solicited and evaluated since they have, at once, fought change and yet accepted it in equal measure.

Finally, this analysis explores the future position of civil legal aid and legal expenses insurance. It considers the survival of the former, growth of the latter and the dynamics of the State and private sectors working together to mould a new model for the provision of access to civil justice in the United Kingdom.
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INTRODUCTION

This Study has a single central theme. That is, the rise of legal expenses insurance in the United Kingdom since it first arrived on its shores in the early 1970's. In order to properly debate this theme it is vital to locate it within the context of the historical development of civil legal aid and to examine its current position. As a result, this study is of two very different mechanisms for the delivery of civil legal aid. There are, of course, certain principles and a consistency of values common to both in achieving that end. Each provides the litigant with legal services, assesses the merits of any application for assistance and, where appropriate to do so, funds the litigation. However, statutory civil legal aid is an historical creature that has been viewed as a cornerstone of this country’s welfare state, albeit significantly remodeled in recent years. The other, legal expenses insurance, is a private sector creature of fortune. It has developed and grown by fulfilling a perceived need left by the steady reduction in eligibility for state-funded legal aid.

This analysis attempts to break down each legal service delivery system into its component parts in order to assess accurately and comprehensively their relative positions in the United Kingdom today. To achieve this, the study is divided into four sections.

Part One considers in detail the principles upon which civil legal aid was founded in 1949, the basis of eligibility and the mechanisms available for protecting the legal aid fund. These sections of the study are important to its central theme since the rise of legal expenses insurance is inextricably linked to the limitations and failures of statutory civil legal aid. Civil legal aid was not created in a vacuum. It followed a system of aid for the poor that had developed ad hoc and was far from satisfactory. With cross party support, a comprehensive set of statutory measures were put in place in 1949 which, it was perceived, would deliver access to justice for many millions of people in England and Wales to whom it had previously been denied. Significantly, the middle classes of this country were to be included amongst those 'enfranchised' by the new civil legal aid scheme.
By the 1990's it was evident that despite the laudable principles upon which it was founded, the civil legal aid scheme was failing. It was dogged by cumbersome administration, rising cost to the taxpayer, lack of focus and rapidly declining eligibility as the blunt instrument of the means test was used to define, ever more narrowly, those members of society able to benefit under the scheme. The taxpayer was being asked to subsidise a scheme that grew more expensive year on year and one in respect of which most taxpayers could take no advantage. The inequity of this situation was unsustainable. The civil legal aid scheme was failing the middle classes of this country who were at the same time, being enticed by the private provision offered by legal expenses insurers.

The previous Lord Chancellor, Lord Mackay, to his credit, embarked upon a quest for change and rationalization of the civil legal aid provision in the teeth of criticism from many legal aid practitioners and a number of academics opposed to the proposed changes. Part One of this study details the success and failures of the civil legal aid scheme and the reasons behind Lord Mackay's attack on eligibility. The link between the failures of civil legal aid and the emergence of legal expenses insurance is firmly indicated, as is the need for the middle class taxpayer to have some form of insurance (either state or private) should they suffer a civil legal dispute. The taxpayer's reluctance to pay a premium for no cover under the civil legal aid scheme gave Lord Mackay a clear platform for reform.

Part Two explores civil legal aid and the role of the practitioner. The concluding chapter of this section considers in particular the concept of franchising. Once more, such analysis assists the central theme of this study since the practitioner's perception of statutory civil legal aid has been important in respect of their attitude to reform and to the legal expenses insurance industry. In particular the requirements of the Legal Aid Board, with regard to franchising, display interesting similarities to those of legal expenses insurers considered later in the study.

If the civil legal aid scheme is to survive, in whatever form, it must represent value for money. In this respect, there was grave cause for concern from assisted person and practitioner alike, let alone from those not eligible to benefit under the scheme. Part Two addresses these concerns and
considers the service provided to the assisted person. Is this a second rate service provided by cut-price junior lawyers, or is that charge unjust and apocryphal?

Conversely, why are so many lawyers willing to undertake civil legal aid work if the profits in so doing are as slight as alleged? Furthermore, this section considers the practitioner's defence of the legal aid system that has seemingly failed to provide either a proper service to its clients or just reward to its practitioners.

In an attempt to deliver a value for money product, franchising was introduced. By design, franchising is intended to eradicate the failures and inefficiencies of the past system and to deliver a focused and efficient quality of service under contract with the Legal Aid Board. This is a major shift away from the principles upon which legal aid was founded and is akin to the existing relationship between practitioners and insurers within the legal expenses insurance industry.

This part of the study assesses the concept of franchising, the inherent problems of quality control, targeting need via appropriate distribution channels and the fear and potential pitfalls for the franchisee practitioner. Whilst in the short term, larger practices have emerged victorious over their smaller rivals, if continuation as a franchisee is, in the future, to be determined by cost alone, the long term prospects are less bright. The prospect of the Legal Aid Board driving down proposed franchisee costs in ignorance of the practice's previous investment is a real cause for concern. Finally, a comparison is drawn between the development of contracted services under a franchise and as between practitioner and insurer. In the case of the former there has been a conscious attempt to move forward by consent which is absent in respect of the latter. Insurers regulate and control the practices they use with the ultimate sanction of removal from their panel. However, in each case there is a shared goal, that of a practical solution to the problem of cost effective access to civil justice.
The Third Part of this study, in equal detail to Part One, is expressly concerned with the emergence of legal expenses insurance, product specification, purchase and use, the practitioner's experience and European regulation. Part Three considers the definition of legal expenses insurance and the types of such insurance currently available in the United Kingdom. Its historical development is also detailed along with the role of the practitioner and the importance of the risk control mechanisms employed by the insurers, including a merit test. The insurers have had the unenviable task of trying to grow their business whilst at the same time avoiding adverse selection. This has not been an easy ride and mistakes have been made, particularly in the stand-alone market, which have had a profound effect on the future development of the industry. These effects are discussed along with the emerging solution of the add-on product.

The legal expenses insurance industry has long been in need of establishment support. Until very recently, there was a marked reluctance to provide collective support. This deeply frustrated the insurers and depressed the growth of their market. This part of the study tracks the reaction of the establishment in the guises of the Lord Chancellor's Department, The Law Society and the Legal Aid Board, to the emergence of the legal expenses market.

This section contains a detailed product comparison study of the current market and an analysis of purchase and use, which includes original data in respect of the claims experience of one of the leading insurers. It is important for this study to evaluate the extent to which the public shares the insurer's contention that legal expenses insurance provides an affordable 'gateway' to civil justice. Again, the writer draws on information taken from a professional sample study, commissioned by his employer at the time, and undertaken with his assistance.

Chapter 9 of this section, by way of the writer's original sample study, aims to assess and analyse the solicitors' experience since their observations in undertaking work for insurers and the Legal Aid Board alike, are an important contribution to this study. The study shows practitioners to be
highly practical and generally in favour of the rising legal expenses insurance market. The solicitor's concerns are discussed drawing on material from the sample study.

Finally in Part Three, the effect of European regulation on the legal expenses insurance industry is considered. The European Directive and its regulations are assessed in detail along with its extent and application. In particular, the regulations concerning conflicts of interest are studied closely since it is within these regulations that the insured has been granted freedom of choice of lawyer. For many reasons, it was this requirement which rocked the legal expenses insurance industry on its heels at its introduction. The problem with variable legal costs in the United Kingdom was singularly troublesome in this regard and left it on an uneven playing field compared to its European counterparts such as Germany. The use of panel solicitors is detailed along with the attitude of the insurers, the Department of Trade and Industry and the Insurance Ombudsman to such panels. The insurance industry's interpretation of freedom of choice of lawyer is carefully scrutinised.

Part Four attempts to draw comparisons in respect of this country's position and that of a number of its European neighbours. Following this comparative study, the impact of a change of government on the existing situation is considered along with the anticipated model for a future integrated delivery of civil legal services between the private sector and the State.

In 1997, gross premium income for the United Kingdom legal expenses insurance market was just over £100 million. The number of risks covered, according to Association of British Insurers, was around 12 million. While the market for traditional legal expenses insurance in the United Kingdom is growing, the potential for modernising this form of insurance is obvious from examining the success of legal expenses insurance in Germany.

The gross premium income of legal expenses insurance in Germany for 1997 was almost 5 billion deutschmarks (£1.7 billion). Some 50 per cent of the population have legal expenses insurance compared with between 10-20 per cent in the United Kingdom. For this reason alone it is necessary for this study to examine a selection of European countries by way of contrast to the position of the
United Kingdom. Germany is considered along with the Netherlands, which has a strong civil legal scheme similar to our own and France since it was the birthplace of legal expenses insurance.

The assessment of these countries experiences in the legal expenses insurance market is important, since it enables the United Kingdom to consider the future potential and growth of its own market. It is significant that Germany's success, in particular, is seen as being due to early specialisation of the insurance companies in legal expenses, the benefits of lawyer's fixed fees, restricted legal aid provision and the absence of conditional fee arrangements.

The effect of the new Government is assessed in this part of the study since conditional fee arrangements are due to be extended in 1999 amidst other changes afoot which could have a significant effect on the legal expenses market. Lord Woolf's proposals for the reform of civil procedure include fixing costs according to the claim value. Although there has been some delay in implementing his proposals and doubts over the viability of fixed fees, it is likely some element of greater predictability will be part of the reforms. The safety net of civil legal aid is slowly being removed but only to be replaced by the fall back of conditional fees. The public debate on conditional fees in place of much of the existing civil legal aid scheme has raised public awareness of the insurance industry's role in financing litigation. The market is changing and the potential for the insurers is there.

Generally, this study contains the writer's own original research particularly with regard to the legal expenses insurance industry. The research was drawn from the writer's personal experience and knowledge of the industry. The writer was employed from 1986 – 1995 as a senior legal advisor to the Legal Protection Group Limited (a wholly owned subsidiary of The Royal and Sun Alliance Insurance Company Limited) and thereafter within a firm of solicitors dealing with legal expenses insurers as clients. The writer is currently employed as General Manager of Legal Services for Abbey Legal Protection Limited.

This study is current up to the summer of 1998.
PART ONE
Chapter 1

An Historical Sketch

The creation of statutory civil legal aid in the United Kingdom after the Second World War was a major social reform. Analysis of the driving forces behind its creation in 1949 are significant to this study since its development was largely due to the recognised failure of the charity-based system that preceded it. Arguably, legal expenses insurance has developed similarly as a result of the failures of the existing civil legal aid system. Consideration of the principles upon which civil legal aid was based in 1949 is also useful to this study since modern civil legal aid has shifted markedly in respect of those members of our society which it is intended to assist.

1.1 The Requirement Of Legal Aid For The Poor

"Where there is no legal protection there is in effect no law. In so far as citizens are precluded from access to the courts, the rules of the law which they would like to invoke are for them as good as non-existent."1

It is largely upon this premise that the provision of civil legal aid for the financially disadvantaged developed from early roots in England and Wales. For, in pure jurisprudential terms, mankind will inherently set itself standards or codes of conduct, for a number of reasons whether moral, social, national or religious. Obedience to such are then prescribed by the law. Arguably it follows, in theory, that:

"...inability to consult or to be represented by a lawyer may amount to the same thing as being deprived of the security of the law. Legal aid is the method adopted to ensure that no one is debarred from professional advice and help because of lack of funds."2

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1 Cohn E.J. "Legal Aid For the Poor: A Study in Comparative Law and Legal Reform" (1943) 59 LQR, Part 1 250,251.
It has been argued that the extent to which the State is willing to grant legal protection to its subjects can be measured by the extent to which legal assistance is provided by the State. Therefore:

"...the question whether legal aid should be granted in a few exceptional cases and as a matter of charity only, or whether it should be claimed as a matter of right by anybody who is financially unable to secure it himself, goes therefore to the foundations of the law." 

The need for legal assistance in one form or another has long been recognised and is perhaps as old as the practice of the law itself. Historically, lawyers have counselled and represented the poorest of folk, before the courts without charge, regarding it as a necessary charity. The history of legal aid in England and Wales as a charity based system dates back to the ninth century and continued in varying forms until the development of the welfare state after the Second World War.

Arguably, the existing charitable system was inflexible, of limited availability, arbitrary and not recognised by many of its users as charitable, due to the frequent requirement of a deposit. It became increasingly evident that only some level of state involvement in the legal aid scheme could provide a more socially acceptable working model.

E. J. Cohn writing in 1943 succinctly described the argument for a state system of legal aid:

"There is an astounding contrast between the fact that the law is state-created and state-administered on the one hand and the fact that the State has divested itself of all powers with regard to the granting of legal aid on the other hand."

And against the system of charity, he wrote:

"All grants depend on the number of volunteers from the two branches of the profession prepared to render assistance free of charge. If no volunteers are forthcoming, no aid can be provided."

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"Cohn, supra n.1 251.
Ibid.
For a general view of such charitable legal work see for example, Egerton, R., 'Historical Aspects of Legal Aid' (1945) 61 IQR at p 87 and Maguire J., 'Poverty and Civil Litigation' (1923) 36 Harv L. Rev. 361.
Cohn E.J., 'Legal Aid for the Poor: A Study in Comparative Law and Legal Reform' (1943) 59 IQR Part 1 250,251.
granted. If an insufficient number of volunteers is available, insufficient facilities of legal aid will exist."

The ineffectiveness of the present system had been exposed at a time when litigation generally was increasing. The cost of litigation also increased and yet there was no state provision for those who could not pay. The value of granting people rights where there was no realistic possibility of enforcing them was called into question.

Those against state assistance in accessing the right to justice argued that an increase in the availability of legal aid for the poor in litigation might make people more litigious. This was countered with an assertion that, if this resulted in a greater amount of justice being dispensed, it was to be applauded as alleviating the currently unsatisfactory state of legal aid.

After the First World War there was increasing support for state intervention and assistance in many social aspects. During the decade of the 1940's there was widespread agreement between social commentators and politicians that legal aid was a service which a modern state owed to its citizens as a matter of principle. It was part of the protection of that citizen's individuality, part of the contemporary conception of the relation between the citizen and the State. The law was made for the protection of all citizens, rich and poor alike. It was the duty of the State to make its machinery work alike for the rich and poor.

As poverty was a social state for which the burden of relief rested with the whole of society, legal aid was a means that in certain circumstances could, in part, alleviate the consequences of poverty. For this reason, it was argued, it should be a burden on the entire community, not on the shoulders of one charitably orientated group.

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8 See for example: Report of the Committee to the Secretary of State for Scotland, Cmd.5435, 1937.
State support for a comprehensive legal aid scheme was therefore as much a product of its time as a solution to a troubled system of charity which was thought anachronistic. The Haldane Society embraced the new-model state legal aid system. Support for the new model to replace the existing apparatus increased. It soon became evident that the State would intervene. The debate shifted to the level and method of intervention.

1.2 The Political Parties and Legal Aid

Prior to the report of the Committee under the chairmanship of Lord Rushcliffe in May 1945, the two main political parties held some consensus and some opposing views. Their respective positions are worthy of note, since elements of both parties policies were ultimately to form post-war modern legal aid.

Whilst previous moves for reform were rejected the Conservative Party and the Labour Party were now vigorously entering the debate as reformers of the existing inadequate systems. The two great parties realised that legal aid to the poor was a problem of major importance for large sections of the community. There was a mood for change and political gains were there to be made.

The Conservative Party appointed a Sub-Committee on Reforms in the Administration of Justice under the chairmanship of C.R. Havers KC. The Labour Party gave evidence

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11 The Sub-Committee was to consider, inter alia, two questions:

i) Is there any method by which the expense of litigation can be tempered to the litigant whose income is above the Poor Person's level?

ii) Whether there has been any complaint as to the expense of legal advice and procedure in non-litigious matters and if so whether there are grounds for such complaint?
before The Rushcliffe Committee. Under the chairmanship of J. P. Eddy KC a memorandum was prepared.\(^{12}\)

Both parties considered there to be a material difference between legal aid in litigation and legal advice. The former was viewed as highly important and the latter, rather unfortunately, given little attention.

### 1.3 Legal Aid in Litigation

Both political parties evidently agreed that legal aid should not be restricted to the High Court.\(^{13}\) The Conservatives saw merit in drafting the rules of the High Court and County Court similarly with regard to legally assisted persons. The Labour Party advocated two differing sets of machinery without clearly countering the argument that this would entail unnecessary duplication of work and create confusion for lawyer and applicant alike.

Neither party saw fit to extend their proposals for legal aid to any of the growing number of (legal) tribunals. This point was not missed by the Haldane Society who consistently drew attention to the need for legal representation before these bodies. At the time both parties were equally criticized by writers on this subject for their lack of foresight for not, at least, providing a legal aid framework for all future tribunals.\(^{14}\)

With regard to terminology both parties saw the need to avoid terms such as "Poor Persons" or "Legal Aid for the Poor". They were seen as reminiscent of England's primitive "poor laws" which belonged to the era of the industrial revolution and before. Such terms were based on the assumption that legal aid was a charity and could, therefore, be potentially socially degrading for some recipients. As legal aid was to be an

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\(^{12}\) The memorandum was reprinted in the Supplementary Report and Special Final Agenda for the 43rd Annual Conference of the Haldane Society. Much of it reflected the earlier work of the Haldane Society.

\(^{13}\) The Conservative Party stated that: "an overwhelming case has been made out today for the necessity of providing aid in the conduct of legal proceedings in the County Court to persons of modest means." Report of the sub-committee at p.13 No.23.

\(^{14}\) See for example the criticism of Cohn F.J. "The Political Parties and Legal Aid" (1945) 7-8 MLR 101.
indispensable part of the administration of justice within a modern post-war state the term "assisted person"\(^{15}\) and "person qualified to receive legal aid"\(^{16}\) were viewed by the Conservatives and the Labour Party respectively, as less humiliating.

The existing criteria with which to gauge a "poor person", those who earned less than £2 per week and were worth less than £50\(^{17}\), were disliked by both parties. They agreed reform was necessary.

Labour preferred the complete abolition of all financial limits leaving the certifying authority to assess each individual applicant. Due regard would be given to all the circumstances, income, means and approximate cost of the proposed proceedings. The Conservatives disagreed and looked to a semi-rigid system of assessment that would avoid the potential subjectivity of the Labour model. The Conservative proposal was to drop the property limit but to adhere to an income limit that would be regularly reviewed.\(^{18}\) It was argued at the time that the Conservative model fell into the existing trap of injustice, since a few shillings per week could be the difference between a person being a fully assisted applicant and being denied any assistance at all. E.J Cohn said of this system:

"The rigid method, even in this modified form, is based on too primitive an assessment of man's needs and requirements. To be able to judge what sacrifices a man can be expected to bring for the purpose of taking an action into court, one must know more about him than just what his income is and how many dependants he has."\(^{19}\)

Importantly, the Conservatives promoted the idea that the applicant should contribute to the cost of the proceedings according to their means.\(^{20}\) The Conservatives believed this provided a solution to the problem of the existing system being 'hit or miss'. The Labour

\(^{15}\) The Haldane Society Report supra n 12

\(^{16}\) Ibid.

\(^{17}\) The Conservatives feared that different certifying authorities would adopt different standards. See p.10 No.12 of the Report.

\(^{18}\) Their model favoured more than one income limit depending whether the applicant was single, married or had children.

\(^{19}\) E.J Cohn 'The Political Parties and Legal Aid.' (1945) 7-8 MLR 102.

Party criticised it on principle but more directly indicated that such a system would only be sustainable provided the certifying authority had a far-reaching measure of discretion. The Conservative's proposed system was seen as providing limits for the exercise of such discretion.

There existed a confusing conjunction of two issues. Firstly, who should the certifying authority be? Secondly, the discretion should they have? The Conservatives saw merit in keeping the existing expertise of the Poor Person's Committee of the various Law Societies throughout the country. They proposed to include one social worker as a member of the Committee to assist with the investigation of means. The Labour Party agreed with the Conservatives that the Committee's expertise should be retained, but saw a new role for these Committees.

Many critics of the committee system had previously suggested that they performed a judicial function. For this reason some guarantee of judicial independence or machinery for appeal was required. Labour favoured appointment by the Lord Chancellor of a 'Regional Director of Legal Aid' with jurisdiction to hear appeals from the Committees. However, with regard to legal aid in the County Court, Labour wished to leave this decision in the hands of a Master or District Registrar, viewing the committee system as too complicated for the county court process. The Conservatives argued that this would result in an unreasonable burden being placed on such personnel.

One issue upon which both Parties and the majority of critics did agree was that it was only fair for lawyers to assisted persons to receive remuneration for the work they perform. The Conservatives suggested lawyers should receive two-thirds of the ordinary

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22 Supra n.12.
23 Supra nn.11,12, and sec;
Gurney-Champion supra n 10 at p.39.
Jackson supra n 21 at p 253.
Egerton supra n 5 at p.90.
J.John supra n.6 Part II p. 259.
scale costs and Labour remained silent as to an appropriate level of remuneration. The result was clear, there was cross-party support for this social burden to be laid upon the Treasury.

Having agreed on remuneration for legal aid lawyers, it was suggested by the Conservatives that if a system were to be administered by existing committees, composed as they were from local Law Society members, a conflict of interest would arise. It could be claimed that the legal profession would become judge as between itself and the taxpayer. The conclusion was that the investigatory committee should not make the decision to grant legal aid to an applicant. A suggested solution was to leave the decision on granting legal aid entirely with the Director of Legal Aid. However neither political party appeared adequately to address how such a position could be genuinely autonomous. It was argued that this was a point not be neglected.\textsuperscript{24} A truly independent, judicially appointed Director of Legal Aid, who made the final decision on assistance, would retain the experience of the Committees. Furthermore, it would secure for the legal profession a proper share of influence, without burdening it with a responsibility that could harm its reputation and hamper the administration of legal aid.

The Conservative Party Report recommended that the assisted person should be allowed to choose his or her solicitor\textsuperscript{25} and this particular proposal was commended by contemporary writers on this issue. The rationale was simple; when an assisted person chooses his own solicitor he places in his advocate a higher degree of confidence than one who has been appointed for him. E.J.Cohn\textsuperscript{26} believed this freedom was a fundamental legal right:

"...to preserve the relationship of confidence between solicitor and client means to preserve the most important moral asset the legal profession possesses."

\textsuperscript{24} See for example: E.J. Cohn 'The Political Parties and Legal Aid' (1945) 7-8 MLR 109.
\textsuperscript{25} See Report p.12 No. 19. Note also that this was dependent on the selected solicitor being already on the panel of solicitors willing to accept cases under the scheme.
\textsuperscript{26} Cohn: E.J. supra n 24, 109.
It has previously been stated in this chapter that the requirement of a deposit from the applicant by The Poor Persons Committee was criticised as both prohibitive and misunderstood. The Labour Party Report called for this requirement to be abolished.\textsuperscript{27} They believed that it was an elementary requirement of justice that a financial obstacle should not prevent a poor person from bringing their case. The Conservative Report was silent on this issue. Whilst many critics of the existing deposit system favoured abolition, at the very least they requested the amount which the party had to contribute, should depend not only on what is the expected expenditure but also on the means of the applicant.\textsuperscript{28}

It could therefore be genuinely said of the two Party’s Reports that on many of the salient issues there was agreement. In hindsight, they could be accused of lacking attention to detail. However, it is clearly evident from the above analysis that the progressive spirit particularly born of the immediate post-war years was to the fore. Changes would be made.

1.4 Legal Aid Other than for Litigation

“Legal advice is the key to the solution of the problem of legal aid to the poor.”\textsuperscript{29}

If the words of Gurney-Champion are correct in their assumption, then both Parties Reports on legal aid other than for litigation were not merely woefully inadequate but displayed complete misunderstanding of social needs.

The heart of the matter is that the two Reports were overly brief on this aspect of legal aid but Gurney-Champion's assumption is also flawed. Good legal advice is of no use to a poor person if there is no machinery by which it can be implemented, or if the machinery exists but the funds to access it do not.

\textsuperscript{27} Memorandum at p.19. This entailed the technical removal of Order 16, Rule 28(5) of the then Rules of the Supreme Court.
\textsuperscript{28} E.J. Cohn supra n.24
\textsuperscript{29} Gurney-Champion supra n.10 at p.14.
The Labour Report recognised the need for legal advice but its proposed solution to the problem was poorly defined. The Conservative Report went further but in a negative direction. The Report concluded that no reform of the existing position was desirable.

Whilst the two Party's notions on this issue were sketchy, many contemporary critics and legal aid workers had very focused views on the scope and quality of such services which should be provided for the public. Most agreed that leaving the provision of such service to the responsibility of private charity was insufficient. The present state of affairs was universally felt to be in need of improvement. Several suggestions were put forward such as state-funded system of legal advice bureaux;30 local law centres;31 a public legal advice corporation;32 the setting-up of municipal legal aid bureaux and the subsidising of the existing Poor Man's Lawyer Centres.33

All were variations on the same theme which rejected a charity-based system and proposed replacing it with a comprehensive network of legal advice centres, drawing on Treasury funds specifically to target the low-paid. First-stop law shops were envisaged providing the poor with sound legal advice on any aspect of the law. As Mr Mervyn-Jones stated:34

"It is useless and unjust to make further appeals to, or demands upon, the legal profession for their voluntary services. In the absence of a comprehensive state-aided system of free advice and assistance, voluntary bodies must continue to cope with the problem of assistance ... They cannot do this satisfactorily so long as they are hampered by the absence of funds."

Cohn35 believed that the Unit Legal Advice Bureaux of the Services Divorce Department set up during the Second World War had proved beyond doubt that they performed a vital

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30 See Allen-Jones J.E., (1938) 186 The Law Times at p.296.
31 See Jackson (1940) supra n.21 p260. This scheme was to be supported by Government grant.
32 See the report of the Haldane Society (1942) supra n.12. The corporation would provide advice centres in the larger English towns.
34 Supra n.33, 57.
35 Cohn E.J. supra n.24, 113-114.
social service. Moreover he conducted a survey at the time of writing in 1945 which indicated that the proportion of matters in which mere advice was required to those which involved litigation was approximately ten to one.\textsuperscript{36} He was concerned, as were others, if the complacent attitude of the Conservative Party prevailed, the existing advice services known to be successful and praised by all, would dwindle without proper funding. The momentum of reform would be lost.

The Labour Party, whilst failing properly to define their blueprint for advice centres did state encouragingly that it is:

"...the duty of the state to take all necessary steps to ensure that proper legal advice is made available for all poor persons who need it."\textsuperscript{37}

Having stated this as their policy, their recommendation went no further than to retain the present Poor Man's Lawyer's Centres and the Citizens Advice Bureaux.\textsuperscript{38}

It could therefore be reasonably concluded that both political Parties, in their debate on legal aid, neglected to a great degree the provision of assistance outside litigation. Legal commentators at the time placed their hope for a comprehensive and funded advice system in the hands of the Rushcliffe Committee, desirous that such neglect would not be reflected in the Committee's forthcoming recommendations for reform.

\textsuperscript{36} The Manchester and Salford Poor Man's Lawyer Centre Annual Report. 1940-1941.
(a) Cases 2805. (b) Cases referred to Poor Person's Committee for litigation 216.
1942-1943.
(a) Cases 3097. (b) Cases referred to Poor Person's Committee for litigation 246.

\textsuperscript{37} Labour Party memorandum at p.18.

\textsuperscript{38} Ibid. There were approximately 120 such centres in England and Wales immediately before the Second World War. See Egerton, R., 'Historical aspects of Legal Aid' (1945) 61 LQR and Final Report of the Committee on Legal Aid for the Poor (1928) Cmd. 3016, Appendices II & III.
1.5 The Report of The Rushcliffe Committee

In the midst of the political debate and sure in the knowledge that the present system would soon be changed, the Government appointed a Departmental Committee under Lord Rushcliffe in May 1944. The Committee was to inquire into the existing facilities for giving legal advice and aid to poor persons and to make recommendations.

The Committee considered, carefully, the two political Party Reports, discussed in Sections 1.2 to 1.4 of this chapter, in detail. By October 1944, it also had for its perusal The Law Society's Memorandum of Evidence that outlined existing facilities, commenting on them and making proposals for a more comprehensive system. The Law Society recommendations, unlike the Party Reports, were detailed and sought to provide a truly comprehensive legal aid system. They saw a need for a legal panel of willing lawyers who would provide to any member of the public, legal services at a fee which he could reasonably afford to pay and the amount of which, so far as possible, he would know in advance. The scheme was to cover all courts and those who could afford no contribution would be provided with free legal assistance. The panel lawyers involved would be adequately paid for their work. The state should be responsible for such cost not covered by the applicants' contributions.

The Law Society's scheme was intended to supersede all existing schemes. England and Wales would be divided into administrative areas, each controlled by an Area Committee served by a legally qualified Area Secretary. Assisted litigants were to be given protection in respect of orders for costs against them if unsuccessful.

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39 In December 1944 a further and more elaborate memorandum was submitted to the Rushcliffe Committee by The Law Society.

40 The Committees would be responsible for setting up the panel of lawyers in their area.
The commitment to detail displayed within the Law Society's submission was recognised by the Rushcliffe Committee and when the Report was published in May 1945,\textsuperscript{41} it was found to have substantially adopted the proposals of The Law Society.\textsuperscript{42}

The Rushcliffe Report became therefore, a near exhaustive study of legal aid to the poor. Upon receipt of evidence it was clear to the Committee that the existing charitable system of legal aid and advice was:

"...a service which was at best somewhat patchy [and which] has become totally inadequate."\textsuperscript{43}

The Report's main recommendations were as follows:

(a) Legal aid was to extend to all courts.\textsuperscript{44}

(b) It was intended to provide support to a wider group of persons than those previously classed as "poor".

(c) Those who could not afford to pay for legal aid should receive it free, thereafter a contributory scale would be enforced.

(d) The state should bear the cost of the new system, but it would not to be administered either as a department of state (Ministry of Justice) or by local authorities.

(e) The Law Society would administer the scheme acting with the Bar Council and both would be answerable to the Lord Chancellor. A central Advisory Committee would in turn advise the Lord Chancellor on matters of general policy.

(f) A National Assistance Board would investigate the means of an applicant and the merits of the case would be investigated by a committee of lawyers. Such committees and Boards would be regionalised.

\textsuperscript{41} The Report of the Rushcliffe Committee (1945) Cmd. 6641, supra n.9.

\textsuperscript{42} Mr J.G. Lund was at the time of the submission to the Rushcliffe Committee the Law Society's Secretary. He had considerable personal involvement in the submission and was in many respects the architect of the scheme.

\textsuperscript{43} Supra n.9 at paragraph 126.

\textsuperscript{44} The only cases that were to be excepted from this rule were judgement summonses and cases of a defendant where the amount of debt is admitted and the only question is as to method of payment.
(g) Legal aid lawyers should receive adequate remuneration for their services.\textsuperscript{45}
(h) A chain of legal advice bureaux be set-up to provide legal advice outside litigation immediately, without a means test.\textsuperscript{46}

The Report was liberal in character and realistic and therefore stood a good chance of being implemented\textsuperscript{47}

The centre of gravity of the Rushcliffe recommendations was the Area Committee that could consist of solicitors and barristers. England and Wales were to be divided into ten areas with each area having its own committee. Each committee was to have its own Area Secretary, a permanent official, supported clerically. The Area Committee's primary tasks would be to supervise granting of legal aid outside litigation and that of appointing and hearing appeals from Local Committees which were to decide about applications for legal aid in litigation. The Area Committees were thus to be responsible for the general administration of the scheme, in both branches of legal aid, within their respective areas. Control on the central level was to rest with the Law Society, which was in turn answerable to the Lord Chancellor, who would have authority to issue rules in respect of the scheme and would allocate a block payment to cover the expenses of the machinery to the Law Society. The Law Society was to allocate necessary funds to the individual Area Committees.

Apart from detailing the structure of the legal aid scheme through the committee system, the Rushcliffe Report agreed that the term 'poor person' should disappear and be replaced by 'assisted person'. Full legal aid should be available where necessary and persons

\textsuperscript{45} Under the scheme legal aid lawyers would receive approximately 85 per cent of their normal fees.
\textsuperscript{46} The client would, where possible, pay two shillings and six pence to the organisation, which on its part would pay seven shillings and six pence to the solicitor, if any, who had given the advice.
\textsuperscript{47} It was no 'wish list', the Government had already promised implementation subject to normal Parliamentary debate. See Cohn I. J., supra n.24.
earning or worth above the benchmark figures\textsuperscript{48} may be granted legal aid in part. The concept of contribution where appropriate was accepted and accommodated by the Report with the level to be determined by the local committee.

Significantly, 'income' and 'property' were not to mean the gross amounts earned or possessed by an applicant. They were to be adjusted in accordance with a number of detailed rules.\textsuperscript{49} Such rules were the origin of the 'disposable income' and capital rules used today. The Report's suggestions, if adopted by the legislation, would result in a very substantial increase in the number of assisted persons compared with the system as existed.

With regard to the issue of fair remuneration for lawyers operating the legal aid system it was stated at the time of the Report that:

"...the Rushcliffe Committee has therefore been well advised to reject all those schemes and stick to the expensive, but, at the same time, the only justified course in holding that free professional men, freely chosen by the client to whom aid is being granted, must represent the assisted party, and that expertise must be borne by the tax payer. The importance of that principle is such that the details of the machinery by which it is being carried out hardly matter."\textsuperscript{52}

In following this path, the Rushcliffe Committee had been strongly influenced by a number of submissions from America and Australia.\textsuperscript{51}

At the time, there could be no doubt that the Report of the Rushcliffe Committee was viewed as significant to the entire future development of English Law. If accepted it would result in much court business being financed by the State. It heralded a new

\textsuperscript{48} The Rushcliffe Report recommended that full legal aid may be granted to a single man or woman with an income of no more than £156 p.a. and capital of no more than £25, or to married men with an income of no more than £208 and capital of no more than £50.

\textsuperscript{49} Such rules, it was intended, would be partly laid down by the committee and partly laid down by the Lord Chancellor as rule-making authority.

\textsuperscript{50} Cohn F.J., 'Legal Aid To The Poor And The Rushcliffe Report' (1946) 9 M.L.R. 65.

\textsuperscript{51} Cohn F.J., supra n.50 at p.64, refers to the New South Wales Act of 1943 where all poor persons cases were transferred to a public solicitor. It was believed that such a system detached the legal profession from legal aid and was therefore not to be preferred. See generally:


Smith, 'The English Legal Assistance Plan' (1949) 15 ABA Journal 453,454.
relationship between the State and the legal system that intended to open the courts to whole classes of the population so far excluded. The Report embodied the right of a modern state citizen to receive legal aid. E.J. Cohn acknowledged the courage of the Rushcliffe Committee for having

"...taken the first step on a road the end of which nobody can see."52

He was not alone in his admiration.

In the months that followed the Rushcliffe Report the Government were to accept the recommendations with only slight variation.53 The Law Society was invited to prepare a detailed scheme incorporating the Rushcliffe proposals.54 The Law Society's scheme was submitted to the Lord Chancellor and to the legal profession for discussion in February 1946.55 In effect the Law Society's proposals detailed the Rushcliffe recommendations and formed substantively the Bill that became the Legal Aid and Advice Act 1949.56 The Act was to be implemented incrementally and received the Royal Assent on 30th July 1949.57 A rudimentary charitable system of legal assistance had developed into a formally comprehensive system of state funded legal aid arguably then the most advanced in existence.

The Act demonstrated very strong continuities between the Poor Persons Procedure and the Legal Aid Scheme and yet represented a significant break with the past. It was generally viewed with consensus as a social reform and not a political arena for battle. Crucially, it extended state protection for legal aid beyond a mere poor law into the lower middle class of society.

52 E.J. Cohn supra n.50, 66.
54 The Rushcliffe Committee itself recommended this as a preliminary stage to legislation, para.127 (7).
55 Debated in HL 18 February 1946, col. 659, HC Written Ans. 31 May 1946 col. 239.
56 This Act did provide for certain subordinate legislation, chiefly:
Legal Aid (General) Regulations 1950.
Legal Aid (assessment of Resources) Regulations 1950.
Legal Aid Scheme 1950.
57 The delay in legislating seems to have been due to government fears of 'swamping' the legal profession before the release of solicitors and their clerks from the forces.
The charity-based system of legal aid was recognised as a failure. Politically there was a desire to construct a radically different mechanism for the delivery of civil legal aid. The new system was to be based on principles embodied in statute. Analysis of the success and failures of the statutory scheme is important to this study since failure, like its charity-based predecessor, would inevitably lead to further reform. As can be seen in the next chapter, the modern civil legal aid system represents a significant dilution of the political intention that underpinned its creation. Statutory civil legal aid is now viewed as a failure, in many respects, by both major political parties thereby opening the door to reform of the system and to private sector alternatives such as legal expenses insurance.
Chapter 2

The Rules of Access

It is the rules of access which effectively control the statutory civil legal aid scheme. This chapter of the study details the rules of access which are the "means" and "merits" tests. Analysis of these tests is important to the central theme of this study, the rise of legal expenses insurance. The "means" test has been used in recent years to limit access to only the very poorest members of our society and as such, has directly impacted on the perceived value and demand for such insurance. In addition, legal expenses insurers have adopted a merits test, detailed later in this study at Chapter 7, similar to that operated by the statutory civil legal aid scheme.

2.1 The Need for Structure and Control

By the summer of 1949, the Legal Aid and Advice Act 1949 was on the statute book; it was an impressive and comprehensive piece of legislation that aimed to provide legal services to the poor. It had been a product of much careful thought, planning and discussion. It had not generally become a matter of party politics. It was a national measure. In essence the scheme represented the fact:

"...that no man should be denied his rights to law for lack of means: but to translate this into actuality it was necessary to create a very considerable apparatus both on paper and in sheer organisation".  

In fact, in the words of the Lord Chancellor in 1949, the Act was largely a peg on which to hang regulations.  

The Act provided a framework of basic principles leaving the detail to be created by regulations and an essential administration scheme. It would itself employ many hundreds of legally qualified personnel. Additionally, it would draw on the services of

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2 Statement made on the second reading of the Bill.
several hundred practising solicitors and barristers who would be required to adjudicate upon applications for legal aid and generally administer the scheme.

It was a legal scheme of unprecedented magnitude in Britain and perhaps the largest of its kind in Europe and the United States of America. The control structure of the scheme is therefore worthy of analysis. Since it purported to establish legal aid as an integral part of the administration of British justice.

Significantly, it was The Law Society alone that was to administer the scheme, with its own internal appeal system. In effect this granted enormous authority to The Law Society and the power to influence the discretionary aspects of policy on legal aid provision.

2.2 Administration - An Outline

Any meaningful comparison or analysis of civil legal aid and legal insurance at a later point in the text of this study will not be possible without a brief summary of the apparatus presently existing to administer the statutory scheme.

Civil legal aid in England and Wales was available under the 1949 Act and later legislation to the poor and anyone of moderate means who satisfied the required conditions. Administration of the legal aid scheme was undertaken by The Law Society until the provisions of the Legal Aid Act 1988 came into effect. The transfer of the administration of legal aid from The Law Society to the Legal Aid Board ("the Board") was politically significant. Whilst prima facie The Law Society were relieved of a

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1 A view held by many. See for example: Cooper, J., Public Legal Services A Comparative Study of Policy, Politics and Practice. London, Sweet & Maxwell, 1983. In Chapter 2 he cites examples of the traditional admiration of European legal aid scholars for the English scheme.

4 The Bar Council was to have a consulting input.

5 Supra, n. 3. Cooper refers to the Society's discretion in whether or not to grant a legal aid certificate and that many have experienced the Society's discouragement of extensions on matters where the possible damages will be small: p.40.

6 Part II sections 3-7.
'burden' and became free to pursue its 'trade union' function, the replacement of a private body with a public one placed the administration of the service under the more direct control of government. In turn, the Board has arguably become closer to the government of the day and thereby the likelihood of political restructuring has increased.\(^7\)

In practice the Board, following the 1988 Act, simply took over the area offices of the Law Society Legal Aid Administration together with the staff. The Area Committees of the Law Society remained Area Committees of the Board composed, as before, of solicitors and barristers on a voluntary and unpaid basis.

It was, however, undoubtedly the long-term aim of the Government that the Board should have overall responsibility for all aspects of legal aid.\(^8\) The Act and regulations gave some discretion to Area Committees and directors although the Board aimed to adopt national standards.

The Legal Aid Board\(^9\) administers advice, assistance and representation under civil legal aid, and is responsible to the Lord Chancellor\(^10\) for the proper administration of the civil legal aid scheme.\(^11\) The Board's legal aid administration is based on 15\(^12\) legal aid areas. Each one has a legal aid office run by an Area Director. The Director has powers to grant and refuse legal aid. Appeals against the Director's decision lie to the Area Committee consisting of practising solicitors and barristers. In this way substantial numbers of solicitors and barristers are directly involved in the administration of legal aid.

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\(^7\) For example - see the argument propounded by Hansen, O., *Using Civil Legal Aid: The 1989 Scheme*, Legal Action Group, 1989 at pages 3-6.


\(^9\) Established under the Legal Aid Act 1988 s.3.

\(^10\) Legal Aid Act 1988 s.4.

\(^11\) The Lord Chancellor is the Minister responsible for both civil and criminal legal aid. S.3 of the 1988 Legal Aid Act requires that the Board shall consist of between 11 and 17 members appointed by the Lord Chancellor with one member appointed chairman by the Lord Chancellor. The Board must include 2 solicitors and 2 barristers appointed after consultation with the Law Society and Bar Council respectively.

\(^12\) Originally 13 under the Legal Aid and Advice Act 1949.
In each of the 15 areas the Committee deals with appeals against refusal of legal aid and financial matters, including appeals against area director's assessments of bills. Solicitors acting in accordance with the civil legal aid scheme should deal with the legal aid office covering the area in which their office is situated or in which their client lives and all enquiries about legal aid should initially be directed to that office. Any solicitor may undertake legal aid work provided they have a current practising certificate.\(^{13}\)

An application must be made in the prescribed form for legal aid in civil court proceedings\(^ {14}\) by the solicitor to the Area Legal Aid Office. If legal aid is granted, a certificate is issued; if it is not, a refusal notice is issued.\(^ {15}\) Financial assessment is undertaken by the Department of Social Security. The decision to grant legal aid on the merits of the case is made by the legal aid office. Emergency certificates may be issued in cases of urgency. There is a right of appeal to the appropriate Area Committee where an Area Director refuses an application for legal aid.\(^ {16}\) There is a further right of appeal where an assisted person has had his certificate revoked or discharged by the Area Director.

Appeals to the Area Committee generally regard the merits of the case. Appeals need not be made at the appellant's own expense.

In comparison, the administration of legal expenses insurance is less involved. The insured makes a claim once proceedings need to be issued or defended, direct to the insurer. A merits test is applied by the insurer. If the claim is declined most, but not all,

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13 The Legal Aid Board has issued a guidance note to the effect that solicitors, whether or not they themselves undertake such work, should always consider whether a client would be likely to gain an advantage from the facilities available under the LAA 1988 including advice and assistance, and should advise the client accordingly. *Legal Aid Handbook 1997*, London, Sweet and Maxwell 1997 - Notes for Guidance.

14 Forms CLA1, CLA2 or CLA4.

15 It should be noted that the *Legal Aid Handbook 1992*, London, Sweet and Maxwell, 1992, perhaps optimistically, suggests that "it will take approximately eight weeks before a certificate is issued or a refusal notified", at p.7. The author has anecdotal evidence to suggest that regularly the eight-week period is exceeded. Interestingly, later *Legal Aid Handbooks* make no such claims.

16 No appeal may be made where refusal was on the grounds that the applicant's disposable income exceeded the amount for which legal aid is available. Grounds for refusal are listed in regulation 34 of the Civil Legal Aid (General) Regulations 1989, SI 1989 No 339.
insurers offer an appeal which is re-submission of the claim and reconsideration of the matter by the insurer taking into account any new facts and circumstances that were not originally considered. There is no further appeal but matters may be brought to the attention of the Insurance Ombudsman or the Association of British Insurers, if the insurer complained of is a member of the latter.

Legal aid is available for most proceedings in the ordinary civil courts of England and Wales. This includes the House of Lords, the Court of Appeal, the High Court, any County Court, the Lands Tribunal, the Employment Appeal Tribunal and a certificate may be extended to proceedings in the European Court of Justice on a reference to that court for a preliminary ruling.\(^{17}\)

The most notable exception to civil legal aid proceedings is defamation\(^{18}\) including malicious falsehood and election petitions at general or local level.\(^{19}\) Coverage provided by legal aid, currently, compares favourably with legal expenses insurance as detailed later in Part Three of this study. The most notable omission in respect of insurance coverage being family matters.

The scheme provides that any person who can show that they meet the statutory requirements is normally entitled to legal aid, it therefore applies generally so that it may, for example, be granted to a foreign national.\(^{20}\) The only exception to this general rule is that legal aid may not be granted to a body of persons, whether corporate or un-incorporated. A certificate may not therefore be issued to a limited company or firm, though it may be given to an individual director or partner.

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\(^{17}\) The range of courts available for access by the civil legal aid assisted persons has increased gradually since the 1949 Act came into being. Perhaps the most notable exclusions from the array are the many forms of tribunals that now exist in Britain.

\(^{18}\) Legal aid is available to defend a counterclaim for defamation.

\(^{19}\) Under the Representation of The People Act 1949 ss. 107 (t), 112.

\(^{20}\) Civil Legal Aid (General) Regulations 1989.
Central to accessing civil legal aid for representation are two major tests. A "means" test and a "merits" test. These tests are of seminal importance and this chapter will deal with them in detail in due course.

This brief analysis of civil legal aid should not neglect the importance of the Green Form Scheme and Assistance By Way of Representation (ABWOR). The Green Form Scheme was introduced nearly twenty years after the original Act and provides legal advice and assistance from a solicitor and may include, for example, writing letters or entering into negotiations. It does not cover representation of a client before any court or tribunal. To qualify for this limited assistance, the client must satisfy a means test. The solicitor can undertake two hours of work including disbursements, but exclusive of VAT, without further authorisation from the legal aid office. The legal aid office will either approve a green form for payment or return it as provisionally assessed. The final decision as to the assessment lies with the Area Committee.

ABWOR covers the cost of a solicitor preparing a client’s case and representation in most civil cases in magistrate’s courts (Family Proceedings Courts) and to patients before Mental Health Review Tribunals. Application for ABWOR is through a solicitor with the merits test being decided by the regional legal aid office. ABWOR is means tested save for Mental Health Review Tribunal cases. Assisted persons under ABWOR may have to pay a contribution where weekly disposable income is between certain figures (currently £69 to £166). The contribution required is one third of the amount by which income exceeds the lower sum and is payable to the solicitor on a weekly basis.

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21 The financial eligibility test is relatively straightforward so that the solicitor can usually make an immediate decision as to financial eligibility and whether a contribution is payable.

22 3 hours in cases leading to the preparation of an undefended divorce or judicial separation petition. Notably the scheme does not generally apply to conveyancing and wills except in limited circumstances. See, Legal Aid Handbook 1997, London, Sweet and Maxwell, 1997-Notes for Guidance.

23 Legal Aid Act 1988.
Baldwin and Hill's research for the Lord Chancellor's Department in 1988 concluded that despite misgivings about the Green Form Scheme at the commencement of the research it was found to be an invaluable means of access to legal advice occupying a central position in the provision of legal services. It provided legal advice to those unable to pay for it and its clients appeared to have (contrary to popular belief) real and often urgent problems. Notably, it was found that many more people were assisted under the Green Form Scheme than were assisted under all other forms of Legal Aid put together. This is a remarkable fact given that the scheme made up only about a fifth of the total legal aid budget. It was therefore argued that in many respects the scheme had become a victim of its own success and that its position as a legal service needed to be consolidated and improved.

This, simplistically, is the civil legal aid scheme presently available in England and Wales. It hangs on broad principles, the roots of which are clearly defined in the 1949 Act. These principles provide legal assistance to individuals who due to their financial circumstances would otherwise not be able to exercise their civil rights effectively or at all. Moreover, legal aid will not be provided unless it is reasonable to do so in the circumstances of the case. Revisions have been made over the years both to its administrative structure and to the types of court and tribunal to which representation under the scheme applies. However, the scheme is controlled by the rules of access. It is the revision of these rules, particularly with regard to financial eligibility, which determine the extent and effectiveness of civil legal aid.

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26 Supra n.24, 137.

27 Chiefly:
The County Courts 1st January 1956
2.3 Assessment Control - The Merits Test

The merits of a person's application are considered by the legal aid area office which considers the information submitted to it and might decide to grant a certificate in full, in part\(^2\) or refuse the application. If refused, a letter of notification is sent to both solicitor and client.

In deciding whether a certificate should be granted, the area office has to apply a statutory test containing two limbs. The original test was contained in s.1(6) of the 1949 Act and now, in similar format is to be found in S.15 Legal Aid Act 1988, which provides:

(2) "A person shall not be granted representation for the purposes of any proceedings unless he satisfies the Board that he has reasonable grounds for the taking, defending or being a party to the proceedings."

(3) "A person may be refused representation for the purposes of any proceedings if, in the particular circumstances of the case it appears to the Board: -
(a) unreasonable that he should be granted representation under this Part; or
(b) more appropriate that he should be given assistance by way of representation under Part III".

The test of eligibility is expressed in a negative way. A person shall not be given legal aid in connection with any proceedings (a) unless he shows that he has reasonable grounds for taking, defending or being a party to them and (b) he may be refused legal aid if it appears unreasonable that he should receive it in the particular circumstances of the case.

The first test is primarily legal. The applicant must show that, as a matter of law, he has reasonable grounds for his case. He must satisfy the Area Director that on the facts put forward and the law which relates to them, there is a case or defence which is reasonably

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\(^2\) A limited legal aid certificate may be granted covering only the obtaining of Counsel's Opinion or for the conduct of the case up to a certain point. NB Prior to the Legal Aid Act 1988 this decision was made by Area Committee.
likely to succeed assuming the facts are proved. The onus of satisfying the Area Director in this regard lies with the applicant.29

Whilst the likelihood of success is a relevant consideration, its importance should not be over-emphasised. It is the Director's duty to decide whether there is an issue of fact or law that it is reasonable to submit to the court for a decision. Therefore the Director does not have a statutory function to adjudicate on issues or question the credibility of witnesses. It is not for the Director to cross-examine the applicant or his witnesses, or to hear the other side before reaching a decision. In addition there is nothing necessarily wrong in both parties to an action being granted legal aid since they may well have given contradictory accounts of the facts to their respective legal aid offices.30

Applications are considered on paper. Additional information may be submitted by either party to a case to the Director if felt to be appropriate by the applicant or requested by the Director. An applicant would normally be given the opportunity of commenting on such information, where relevant, before the Director makes any decision.

There clearly exists a fine line between a Director pre-judging a case and satisfying the first limb of his statutory obligations. The problem has existed since the introduction of civil legal aid in 1949. For example, reporting in 195631 the Estimates Committee saw fit to clarify the function performed by the Area Committee:

"...it is a dangerous fallacy to suggest that aid should only be granted to applicants with certain or near-certain cases, or even only to those who can show that they will probably win. Certainty plays no part in law; it is the essence of litigation that there are two opposing points of view ... for these reasons a 100 per cent success figure would be evidence of greatly excessive caution on the part of Certifying Area Committees and thus a denial of their just opportunity to many applicants."32

29 See R v Legal Aid Committee No 1 (London) Legal Aid Area, Ex parte Rondel [1967] 2 Q.B. 482, D.C.
30 This situation is particularly likely to occur in matrimonial cases.
31 Estimates Committee's Report 1956, xviii.
32 Ibid.
Almost a decade later the high success rate of assisted persons in court was criticised as being indicative of legal aid Committees having been too conservative in granting legal aid in individual cases. This criticism is barely removed from suggesting the pre-judging of applicant’s cases under the first limb of the statutory test. Perhaps more cynically it has been suggested that

"...an economy drive in the legal aid scheme could well result in the percentage of success for legally aided parties ... increasing significantly."34

Once again words of reassurance ensued this time from The Law Society:

"... area Committees should not be encouraged to lean too far towards granting legal aid in cases only where a successful result could be predicted with certainty."35

The second limb of the test provides that an applicant may be refused legal aid if it appears unreasonable for him to receive it in the particular circumstances of the case. This covers situations where, though there is a proper case of law, it would not be reasonable to pursue it, for example where the fruits would be trivial or illusory.36

When practically applied the two tests are covered by a single test: would the lawyers adjudicating upon the application for legal aid have advised a paying client of their own to pursue the matter? If they would have so advised a paying client to proceed and would expect him, after considering all the implications, to accept that advice, legal aid should be granted: if otherwise, it should be refused. This principle is based on the theory that a legal aid applicant should be placed in a position neither better nor worse than that of a paying client. The test has never been interpreted as involving any moral judgment. The moral character of the applicant or his conduct should not justify refusal unless a court would regard either as relevant to its decision.

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33 See generally Dworkin, G., 'The Progress and Future of Legal Aid in Civil Litigation' (1965) 28 MLR 434.
34 Ibid., 436 to 437.
36 E.g. Iversen v Iversen [1966] 1 All ER 258.
The test of the hypothetical paying client has been criticised in that there is no clear authority that this is the proper test and certainly no clear authority that it is the sole test. Critics of the reasonableness test claim that it gives rise to a number of classes of problem and that the:

"...general Regulations should be applied in the light of the tangible and intangible advantages to the applicant and also of the advantages to the community in which he lives. Since only a limited proportion of the people on the Clapham omnibus can afford to pay for their own litigation the pattern set by those who do should take a back seat".

Defenders of the 'reasonableness' test argue that the hypothetical paying client test is only one of the tests to be applied. Furthermore, that the test is not coextensive with the statutory criteria but only a convenient way of applying those criteria in certain circumstances. Moreover, it is argued that the Board should recognise the application is made precisely because the client is poor and hopes through legal aid to relieve that poverty or prevent it being increased. Pollock states that:

"...it is time to stop searching for ways in which legal aid can be manipulated to make good defects which lie in the law itself or the means by which it is administered ... legal aid inevitably reflects faithfully the defects that disfigure our legal system."

Pollock defends civil legal aid being used for 'social benefit' purposes. He seeks to justify its restriction by application of the 'reasonableness' and 'hypothetical client' tests. For the legal aid practitioner assistance in applying the merits test is to be found in the 'Notes for Guidance' section of the annually updated Legal Aid Handbook. Interestingly, this section has in recent years been re-written. Some critics claim the result is that the notes are now less useful than they were in 1989 and that a loss of information has

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38 Ibid.
40 Ibid., p.124.
41 See, for example, the comments of Hansen, O., 'Disappearing Merits Test Guidance' (1993) Legal Action, August, 13.
directly resulted from the re-writing process. The 1989 edition appears to encourage wider exceptions to the paying client rule than its successors and yet the statutory criteria remain the same throughout.

Briefly, by way of comparison, the merits test applied by legal expenses insurers is similar to the statutory provision. Whilst particular policy wordings may vary, broadly, the insurer requires the claim to have a reasonable prospect of success. This is accepted in the industry as being a 51% prospect of success and is akin to the first limb of the statutory test. The second limb of the insurer's test, typically states that cover will only be granted where it is reasonable to do so in the interests of the underwriters which aims to protect underwriters from funding trivial claims.

However carefully the legal aid merits test is studied, it is quite clear that after the Area Director has considered all the questions of fact or law arising in the matter to which the application relates and the circumstances in which the application was made a merit-based decision is made. Moreover, this process has had consistent judicial approval.42

2.4 Appeal

Perhaps the most illuminating method of analysing the effectiveness and fairness of the Director's merit-based decision is by examination of the appeal procedure, the volume of appellants and their rate of success.

Briefly, the procedure affords an appeal by an aggrieved applicant or assisted person to the appropriate Area Committee, should the Area Director refuse to grant a certificate for civil legal aid or revoke or discharge an existing certificate. There is also the right of appeal if the applicant is dissatisfied with the terms (other than financial) on which the legal aid is offered to him.

42 The leading case is R -v- Legal Aid Committee No. 1 (London) Legal Aid Area Exp p. Rondel, [1967] 2 Q.B. 482, D.C. Per Parker I.C.J ... "it would be quite wrong if the committee were not entitled to take into consideration what I may call the merits of the action itself." 2 Q.B. p. 492.
Notice of appeal must be given to the Area Director within 14 days of the date of the notice of refusal or date of offer (whichever is appropriate). Every appeal is by way of reconsideration of the application and the applicant is allowed to provide further information in support of the application. He may conduct the appeal himself or be represented by his solicitor or counsel. Appeals need not be made at the applicant's own expense. Where appropriate the green form scheme may be used. There is no appeal from the decision of an Area Committee. In exceptional circumstances only will a Committee be willing to consider fresh information or new representations with a view to reconsidering their decision.

Between 1995 and 1996 the Board in England and Wales received 411,087 applications for civil legal aid, a total of 27.9 per cent of which were refused on either legal or financial grounds, and 22.7 per cent of which were refused on legal grounds having 'failed' the merits test. Over the same period 52,133 appeals against refusal were registered with Area Directors; 55.7 per cent of these appeals were granted.

Even by taking into account abandoned appeals that may distort the figures the 55.7 per cent success rate does appear high. It could be argued that the high rate of success exposes problems with the initial merits test rather than the means test which is fact-orientated. It could also be argued that since the first statistics on appeals were compiled

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43 There is no prescribed form of notice of appeal.

44 If the appeal is from a decision to refuse a certificate or discharge or revoke a certificate. Where the appeal is for amendment, the applicant may only make representations in writing to the committee.

45 Note: this will not provide representation before the committee.


47 The Area Committee may:-
(i) Dismiss the appeal.
(ii) Direct the legal aid office to offer a certificate (with or without terms and conditions).
(iii) Direct the legal aid office to settle terms and conditions.
(iv) Refer the whole or part of the matter back to the legal aid office for determination or report.

48 The figures cited in this paragraph have been taken from the Annual Report of The Legal Aid Board 1995-96, HMSO, 1996.
in 1986-87 the success rate has been consistently high indicating an on-going failure to address the problem with initial assessment which clearly exists.

<table>
<thead>
<tr>
<th>Year</th>
<th>% Appeals Granted</th>
</tr>
</thead>
<tbody>
<tr>
<td>1986-87</td>
<td>37.2%</td>
</tr>
<tr>
<td>1987-88</td>
<td>39.1%</td>
</tr>
<tr>
<td>1988-89</td>
<td>42.6%</td>
</tr>
<tr>
<td>1989-90</td>
<td>48.8%</td>
</tr>
<tr>
<td>1990-91</td>
<td>45.6%</td>
</tr>
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<td>1991-92</td>
<td>40.0%</td>
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<td>50.3%</td>
</tr>
<tr>
<td>1993-94</td>
<td>52.5%</td>
</tr>
<tr>
<td>1994-95</td>
<td>55.8%</td>
</tr>
<tr>
<td>1995-96</td>
<td>55.7%</td>
</tr>
</tbody>
</table>


As a general indication these figures do appear to lend support to the fears expressed earlier in this study, namely that Directors are pre-judging applicants in some quantity and failing to satisfactorily apply the statutory test. A more generous view may suggest that the poor quality and detail of original applications accounts for many rejections and that generally appeals are more thoroughly prepared, in turn accounting for their success rate. Some Board Committee members were surprised and in some cases amazed as to the general poor quality of initial applications to the Board:
"The applications simply contained not enough information or the wrong kind of information so that it was impossible to make a decision on the merits". 49

Many assumed the Board was already acquainted with the details of the case. Conversely it is suggested that if you:

"...blind the Board with science and prove that you know something about your claim, it is unlikely that your application will be refused since they assume that solicitors have better things to do than take spurious claims." 50

In short, initial applications seem generally to lack supporting documentation and relevant information. Perhaps the truth, as it invariably does in such matters, lies somewhere in between.

2.5 The Means Test - The Principle

The means test has the greatest potential for direct control by the Board of access to the legal aid scheme.

Financial eligibility for civil legal aid and the contribution, if any is required, is determined upon the applicant's "disposable" income and capital. 51 Application is made through a solicitor who submits the completed legal aid forms to the legal aid office. Financial assessment is calculated by an Assessment Officer 52 at the Department of Social Security. It is that Officer's decision that decides financial eligibility. The legal aid office is then informed. If eligible, under the means test, the 'merits' test is applied. 53

49 See for example the expressed experience of Solomon, N., partner with Stephens Innocent when she joined her local area legal aid committee. 'Appealing Activities' (1992) 89/3/43 LSG 20.
50 Ibid 20.
51 Legal Aid Act 1988 s 15.
52 "Assessment Officer" means a person authorised by the Secretary of State to make a determination in relation to disposable income and capital of an applicant. Legal Aid (Assessment of Resources) Regulations 1980, reg.4.
53 If the applicant does not agree with the Assessment Officer's assessment he may ask the area office to supply details of how the assessment was reached and, if appropriate, ask that the assessment be reviewed.
It is not the purpose of this study to have regard to the precise calculation for civil legal aid eligibility. It is the fact that limits are set and more importantly at what level that provides or denies free or contributory access to the system. Most of the political debate is focused on the constraint or freedom that these levels provide.

The means test effectively creates three categories of individuals - those eligible for legal aid without having to pay anything, those eligible subject to payment of a contribution, and those altogether ineligible. Although the means test limits have been raised from time to time, they have generally fallen behind inflation (see section 2.6 below). For those who get legal aid it provides great protection. As the volume of ineligible persons increases the criticism becomes more heated.

2.6 Current Eligibility

In June 1991 the Lord Chancellor's Department published a consultation paper on Eligibility for Civil Legal Aid. In introducing the paper the former Lord Chancellor Lord Mackay stated:

"...it marks a change in the thinking about legal aid."

The thrust of the proposals was the need to make litigation more affordable both to the individual litigant and to the taxpayer. It argued that whilst the importance of legal aid in the legal system could not be overstated, cash to fund it was not in unlimited supply. The review itself states that it was conducted:

"...against a background of rising demand for civil legal aid and rising expenditure ... in the years 1985/86 - 1989/90 the number of legal aid certificates issued increased by 22%, gross expenditure rose by 120% from £70 million to £153 million and the cost to the taxpayer by 145% from £31 million to £76 million. Over the same period the average legal aid bill rose by 60% from £950 to £1,526."

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54 Disposable income is established by taking into account certain allowances such as tax, employment expenses, mortgage, rent, water rates, family and dependants. The Disposable capital calculation will assess items such as savings, value of chattels, value of property other than the house lived in and is the remainder after appropriate deductions.


56 See Annex D ibid., 109.

57 Supra n 55, p. 9, para 1.
The key issue was affordability and the brake on public expenditure, in this regard was being applied by Lord Mackay with a heavy foot. In the context of this chapter the most direct application of the 1991 paper was the reduction in the means test financial limits. From April 12th 1993 only persons in receipt of income support would be entitled to free civil legal aid for representation and free access to the Green Form scheme. A formal link with recipients of income support was forged.

2.7 The Decline Of Civil Legal Aid

The cutting of eligibility in April 1993 led to criticisms of the means test apparatus. In 1949 the scheme was set up to help those with "low or moderate means" with their civil legal costs. The Law Society argue that:

"...there has been no consistent approach as to what proportion of the population should be eligible to receive legal aid, or what other definition of "low and moderate" means should be used. Decisions about levels of qualifying income limits are made on a year by year basis."

In many ways history has shown the extent to which the provisions of the 1949 Act approximated towards the welfare rather than the Poor Law ideal. This is because the level of allowances as well as that of the limits themselves, determine the proportion of the population who are eligible at any given time. There has been considerable fluctuation as to where the line may be said to lie between a scheme that is intended to form part of the welfare state and one which is only for the deserving poor.

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58 Note also, that there came into existence with effect from the same date a new system of contributions. They are now payable for the lifetime of the certificate not over a 12 month computation period.

59 Green Form is now only available to those in receipt of income support, family credit, or disability working allowance, or with weekly disposable income not exceeding £75 who will pay no contribution.


Critics argue the failure to update eligibility limits, leading to a consequent cut in eligibility, has been used over the years to try to control the increasing cost of legal aid and has become a substitute for a fully worked out strategy for the future of the legal aid scheme.62

The erosion of eligibility is stark and worthy of detailed mention. In 1950, when the scheme was introduced, it covered over 80 per cent of the population on income alone.63 By 1973, it was believed that only 40 per cent of the population were eligible. While eligibility limits had kept pace with inflation, earnings had risen faster and more wives were earning. At the same time, the position of people outside the scheme had become worse than it was in 1950 because the cost of civil litigation had risen faster than earnings.64 In 1974, the legal aid limits and allowances were pegged to supplementary benefit levels and as a result were increased annually in line with inflation. This stopped further decline until the reversal in April 1979 during the last throes of the Callaghan Government. The Labour Government of that year intended to bring the civil scheme up to a minimum standard in order to enable improvements to be made.65 The lower disposable income limit was raised to a point 50% above supplementary benefit level. Contributions would only begin to be paid at a reasonable level of income. Dependents' allowances were raised by the same method allowing an even spread of benefit across differing family groups. The upper disposable limit was raised so that at least 70% of all households were eligible for some civil legal aid assistance. Finally, the proportion of disposable income taken away by the contribution was reduced to make the amount demanded more reasonable to all levels of income. In hindsight the period around 1979 was a high point for civil legal aid:

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63 Generally, insufficient information is available about individual capital holdings to include them in the calculations. Applying the capital limits would disqualify more people. Therefore all estimates overstate the proportion of the population which is eligible.


65 The changes made to undefended divorces provided funds for such improvements.
"It is to the eternal credit of the late Lord Elwyn-Jones that in 1979 the free income limit for eligibility before which applicants are not obliged to pay a contribution benefited 79 per cent of the population."66

Such a level was only maintained for the first year of the Thatcher Government. Michael Murphy has calculated that eligibility for civil legal aid has fallen dramatically between 1979-1989 with 16 million people ceasing to be eligible for legal aid, and less than half the population remaining within the scope of the scheme.67 In percentage terms 79 per cent of the population was eligible in 1979. By 1990 that had dropped to 47 per cent generally and 52 per cent in personal injury cases. Murphy believes the main reason was a failure to update the limits between 1980 and 1987. It is an interesting comparison that similar neglect took place in the 1950's with critics expressing concern for the growing 'middle income brackets' for whom civil legal aid had become unattainable. Consequently, the Legal Aid Act, 1960, revised the financial provisions to enable at least those who had been aimed at by the 1949 Act to benefit.68 Between April 1979 and November 1981 the lower income limit fell from 50 per cent to 11 per cent above the long term supplementary benefit rate. By April 1987, the last year for which the comparison can be made,69 the lower limit was only 16 per cent above the long-term rate.

Compared to earnings, the income limits showed an even bigger fall. Between January 1980 and January 1988, average earnings rose by 107 per cent but the legal aid limits increased by only 37 per cent.70 In April 1986 Lord Hailsham became the first Lord Chancellor actively to reduce eligibility by cutting dependants' allowances from 50 per cent to 25 per cent above supplementary rates.71

67 Murphy, M., Civil Legal Aid Eligibility Estimates 1979-90, London School of Economics, 1990
69 This is because, in that year, supplementary benefit was abolished.
71 Glasser, C., 'Legal Aid - Decline and Fall' (1986) 83/1 LSG 839. This cut had a great effect on families with children.
There was therefore over this period a cumulative effect of limits, which fell in real terms, and deliberate cuts in allowances. At the same time the effects of falling outside legal aid coverage had become worse because legal costs were rising faster than earnings. For example, in the five years between 1985-86 and 1989-90, average earnings rose by 38 per cent while the average legal aid bill rose by 60 per cent.72

In 1991 The Law Society and The Legal Action Group jointly commissioned updated research. Its findings were that eligibility for advice and assistance had dropped to 37 per cent of the population, about 20 million people in 1990 compared to 60 per cent of the population in 1979 or 36 million people. The research also showed that the proportion of households eligible for civil legal aid fell from 61 per cent in 1987 to 51 per cent in 1990.73 Most importantly, the impact of the April 1993 cut in eligibility to income support level for free legal aid,74 was estimated to affect as many as a further 14 million people.75

The report of the Law Society concludes that the approach to eligibility via the means test limits is:

"...unsatisfactory, arbitrarily depriving many people of moderate means of legal advice and assistance and the courts".76

Hansen argues that the erosion has changed:

"...legal aid into a benefit which will be available only to the very poor or people of moderate means - in effect those who at present pay contributions towards their legal aid - are consigned to the

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72 The writer is assuming that legal costs paid privately would have risen by a proportionate amount.
73 Supra n.60, para 13.
74 Including access to the green form scheme.
75 The London School of Economics has estimated that 11,456,000 or 29% of the adult population of England and Wales will be affected by the changes in green form eligibility and 14,555,000 or 37% of the adult population affected by the civil legal reforms.
76 Supra, n. 60, para 14.
private sector where it is suggested, they pay for litigation through legal expenses insurance ... the Conservative Government has explicitly abandoned welfare state principles in relation to legal aid."77

Lord Irvine of Lairg described the erosion culminating in the 1993 cut to eligibility as a:

"...body blow to legal aid ... reducing our legal aid system to a rickety ambulance to pick up only the poorest of the poor."78

2.8 The Means Test - A New Interpretation

Whilst there appear to be cogent reasons for suggesting that the present free limit for eligibility has deviated from the intent of the 1949 Act, the Lord Chancellor's Department has a different view of eligibility limits and their purpose. In the Department's consultation paper Review of Financial Conditions for Legal Aid 199179 it states:

"...it has been suggested that the effectiveness of cover should be judged by the maintenance of a particular percentage of the population within the scheme. This approach is unsatisfactory for the following reasons:

(a) It does not target need, because it does not relate means to costs.
(b) It presupposes that the distribution and level of means in the population remains a constant relative to the cost of litigation.
(c) It sees legal aid as the only means of funding the litigation of those who cannot afford to fund it themselves. However the volume of general litigation has increased, despite the perceived 'eligibility gap'."

At best this would appear an honest restatement of the purpose of the means test and at worst, taking the goalposts away.80 Points (a) and (b) understandably attract criticism given that legal costs have been rising more quickly than earnings. With regard to (c)

77 Supra n 61, 90.
79 Supra n 55, 11.
there is no obvious connection between the general increase in civil litigation and it proving a narrowing of the 'eligibility gap'. However (c) is put forward by the Lord Chancellor's Department as part of what it refers to as 'private client realism', in that civil legal aid litigants "prove that they are serious by putting down their own money."\textsuperscript{81} Since private litigants, suitably informed about all the risks involved, are in a position to make judgments about the importance to them of their case:

"The emphasis should be on the contributory system to encourage litigants to attach a realistic priority to the pursuit of legal remedies."\textsuperscript{82}

The Review clearly wished to emphasise the need for the prospective assisted litigant to understand the cost of litigation. Critics argued that the Review was simplistic and that if followed to a logical conclusion implied those too poor to pay out of their own pockets merely prove their lack of commitment.\textsuperscript{83}

The Review suggests that there is a good argument for a compulsory contribution from all prospective litigants since:

"...where a benefit is free, people are likely to use it freely because they lose nothing by doing so."\textsuperscript{84}

The Legal Action Group regard this as precisely the justification for making services free and that to:

"...use it as an objection is staggering."\textsuperscript{85}

It would seem quite clear that Lord Mackay's vision for the future of civil legal aid was to encourage litigants to think twice about their litigation.\textsuperscript{86}

It may be conceded that there is some merit to the argument that a litigant should make a conscious decision as to whether to purchase a new car or proceed with an action for

\textsuperscript{81} Supra n.55, 46.

\textsuperscript{82} Supra n.55, 11.


\textsuperscript{84} Supra n.55, 46.

\textsuperscript{85} Supra n.83, 7.

\textsuperscript{86} Supra n.55, 47.
negligence against his neighbour. However, the tenor of the Lord Mackay's review and new level of eligibility seemed to imply that civil legal aid litigants had been getting too much for too little too long and that the time had come to derail the gravy-train.

The means test, which has served since 1949, has had its purpose bravely re-defined by Lord Mackay. The new definition may be attacked for not adhering to the concept of civil legal aid as an integral element of the administration of justice. Lord Mackay categorically refuses to accept that an inability to sue your tortious neighbour freely with legal aid because of only moderate means equates to being denied 'access to justice'. He argues that the ability to proceed with civil litigation does not automatically have the same fundamental importance as the defence of a criminal charge. This is tantamount to another re-definition, that of 'justice' itself, seen only as a criminal concept. This approach seems far removed from the expectations and hopes of the Rushcliffe Committee, which by common desire in post-war Britain wanted actively to encourage the poor or those of modest means to pursue their civil rights. At no time was a distinction drawn between the importance of criminal rights over civil rights. The Legal Action Group consider that it is now time to take another look at Rushcliffe's criteria for legal aid and advice, then perhaps the needs of the consumers can play a central role in a coherent consideration of publicly funded legal services.

### 2.9 Financial Implications

The former Conservative government adopted a narrow perception of legal aid provision. The Lord Chancellor's Department defined legal aid provision as:

"...a conditional financial support, provided by the taxpayer, for individuals whose financial circumstances would prevent them from taking or defending proceedings without assistance with their legal costs." 89

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87 Supra n.55, 11.
89 Supra n.55 at p.5.
This stands at odds with the definition given by the same Department to Parliament in 1948 which emphasised the constitutional importance of legal aid arguing that its purpose was that no-one will be financially unable to prosecute a just and reasonable claim or defend a legal right. The emphasis has shifted from the enforcement of the individual's right to a question of cost.

Lord Mackay's bottom line was a £43 million savings target set by his government. This focused the task quite clearly:

"...to secure a balance between my responsibilities to the public to provide the means for reasonable access to justice and my responsibility to the public as taxpayers in controlling what is now a very high level of expenditure."

The importance of this statement is twofold. Firstly, it says that the process of accessing justice should be seen as a financial balance and no longer a right worthy of special protection. Secondly, it suggests that access to justice prior to April 1993 was unreasonably easy. Access to civil justice now seems to be dependent on the strength of the British economy at any given time.

Expenditure on legal aid (including criminal) for 1995-1996 was £1.15 billion gross. It had doubled in seven years. It is estimated that if allowed to continue to grow at such a rate, expenditure will be nearing £2 billion by the end of the decade, (see fig. 1). Politically this expenditure and estimated increase cannot be tolerated. Yet to attack the principles upon which criminal legal aid rests is at this stage out of the question. The focus of attention therefore logically comes to rest on civil legal aid means-tested eligibility levels as a softer target for potential savings.

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90 In 1984 the Government, in their written response to The Report of the Royal Commission on Legal Services (the Benson Commission) Cmd. 9077, remained consistent in approach "legal aid should be available to assist those of small or moderate means".

91 From the Lord Chancellor's speech to the Law Society Conference 1992 October 24th.

92 These figures were prepared by the Lord Chancellor's Department and quoted by the Lord Chancellor at the annual Law Society Conference 1992 October 24.

93 Note the comments of the Lord Chancellor supra n.92, "This rate of growth ... cannot be allowed to continue."
Critics such as Cyril Glasser\textsuperscript{94} firmly believe that:

"...the [former] Lord Chancellor ought not to be allowed to get away by justifying every change made, however unfair and discriminatory, by reference to the increasing cost of the scheme."

It has been suggested that for legal aid to stand at one per cent of public expenditure:\textsuperscript{95}

"...is not an exorbitant price to pay for a fair system of administering justice!"\textsuperscript{96}

Additionally, to attack civil legal aid will inevitably mean that many people will not be able to pursue their legal rights in areas of basic concern such as housing, family law, immigration and claims for personal injuries.\textsuperscript{97} To litigate at the expense of other basic needs will price many individuals out of the market.

Cutting civil legal aid eligibility for reasons of cost is seen by many as wrong in principle. It ignores the intentions of the Ruschilfse arrangements that have existed since 1950. Financial pressure should not impede access to justice. It may be viewed as an abdication of responsibility to a large section of the community for whom the legal aid scheme was devised.\textsuperscript{98} Conversely, it makes logical accounting and to place a potential litigant in a position where he or she has to determine their priorities is sensible in principle and in particular for the taxpayer.\textsuperscript{99} The cries of protest from civil libertarians must therefore be ignored for sound economic reasons.

Whilst political argument is intense, it is now a fact that the free limit for civil legal aid is at benefit level. When the eligibility net is cast, most independent research\textsuperscript{100} expects more individuals than at any other time in the history of civil legal aid, to slip through it.

\textsuperscript{94} 'Legal Aid - Decline and Fall' (1986) LSG 840.

\textsuperscript{95} At £1.5 billion.

\textsuperscript{96} Lord Alexander of Weedon: HL, Vol. 542, cols. 280-282, February 3, 1993. Note also the comments of Lord Hutchinson who in the same debate expressed that the price was not too high "for the very basis of our free democracy".

\textsuperscript{97} Ibid.

\textsuperscript{98} Supra n. 96.

\textsuperscript{99} Lord Mackay the Lord Chancellor's speech to the Law Society Conference. 1992 October 24.

\textsuperscript{100} Research commissioned by the Law Society and the Legal Action Group, 1992. Moreover, the Law Society criticises Government figures for eligibility in the past decade as being consistently overstated. The Civil Legal Aid Eligibility Review: The Law Society's Response, The Law Society, 1991 at para.11. See also Cyril Glasser supra n.71.
Generally, restoration of the scheme to 1979 levels is regarded as a 'pipe-dream'; restoration to any significant degree must be considered remote for the foreseeable future. Attention has turned inevitably to alternative forms of protecting that category of people described as being of "moderate" means by the Rushcliffe Committee and those who currently slip through the eligibility net.

It seems likely that increasingly they will be expected to protect themselves as the reaches of the welfare state in this regard are truncated and aspirations dating from Rushcliffe to the Magna Carta are apparently abandoned. The need for proper access to the civil justice system is arguably greater than in the 1950's, yet its extent is increasingly limited through the mechanism of state funded civil legal aid. The opportunity to provide access to the civil justice system for the middle classes of this country of moderate means has not escaped the legal expenses insurance industry whose position strengthens with each new limitation to the statutory system.

This section of the study suggests the introduction of civil legal aid was based on considered principles. It is questionable whether legal expenses insurance is similarly principled and may reasonably be viewed as part of a modern principled system, or is merely seizing opportunities created for it by restrictive government practices? These issues are discussed later in Parts Three and Four of this study.

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101 In a letter to the writer dated 26 May 1993 The Rt. Hon. John Morris QC, MP. indicated the Labour Party "would certainly wish to restore eligibility for Civil Legal Aid to the level it was when [The Labour Party] left office subject, of course, to availability of resources".

102 "To no one will we sell, to no one will we deny or delay right or justice".
### Figure 1

**CIVIL LEGAL AID NET EXPENDITURE (£m)**

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**CIVIL LEGAL AID GROSS EXPENDITURE (£m)**

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**CIVIL LEGAL AID ACTS OF ASSISTANCE**

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**CIVIL LEGAL AID AVERAGE PAYMENTS (£)**

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<td>1,875.04</td>
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Chapter 3

Protecting the Fund

Protection of the legal aid fund is relevant to this study since its effectiveness, or lack of it, impacts directly on the financial efficiency of the statutory scheme. This, in turn, will effect the taxpayer that funds the statutory scheme. If the current mechanisms are inefficient or inadequate, the taxpayer, most of who are ineligible for civil legal aid will have a convincing argument for either reform of the scheme, alternative private provision of access to civil justice, or both.

3.1 Methods of Protection

No analysis of the system of civil legal aid in England and Wales today, would be complete without a study of the statutory mechanisms employed by the Board to protect the Legal Aid Fund. There exist three significant methods by which the financial expenditure of the Fund is, in effect, limited. It is the intention of this section of the paper to examine in turn, contributions, costs and the statutory charge and to assess each as a protective instrument for the legal aid fund. Having a civil case with reasonable prospects of success, a certificate from the Board and a legal aid lawyer prepared to fight it, is, as will become apparent, not the whole of the equation.

3.2 Contributions - The Concept

"Contribution" means the contribution payable under section 16(1) of the Legal Aid Act 1988 in respect of the costs of representation.1 Section 16 of the Act develops further the principle of an applicant contributing to the cost of their case, section 16 states

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1 A definition provided by The Legal Aid Handbook 1996, London, Sweet and Maxwell, 1996, at p.278. See also earlier references to contributions at section 1.3, Chapter 1 and 2.7, Chapter 2 of this study.
"...a legally assisted person shall, if his financial resources are such as, under regulations, make him liable to make such a contribution, pay to the Board a contribution in respect of the costs of his being represented."²

The regulations to which this section refers are currently the Civil Legal Aid (Assessment of Resources) (Amendment) Regulations 1993, SI 1993/788. Further it is the regulations which determine whether legal aid is free, unavailable or subject to an applicant's contribution. The Board enforces the regulations in respect of any submitted application. In order to qualify for free legal aid, an applicant's disposable income and capital must be below the 'lower' capital and income limits as specified by the regulations, which may be altered from time to time. The current regulations³ establish a link with the level of Jobseekers Allowance for the 'lower' income limit.

In addition the regulations set an 'upper' limit⁴ above which an applicant will be disqualified from obtaining legal aid. The limits set by the regulations are usually amended annually in April at the commencement of the financial year.

A contribution becomes payable from the applicant where their disposable income and/or capital falls between the two defined limits. The contribution, if payable, may have to be made both out of the income and capital. The method of recovering contributions depends on whether the application for legal aid was received by the Board on or before, or after 12th April 1993. After that date, contributions out of income are paid monthly for the life of the certificate at the rate of 1/36th of the sum by which the applicant's disposable income exceeds the lower income limit. Prior to that date the contribution out of income remains a quarter of the amount by which the applicant's disposable income exceeds the lower income limit and is paid in twelve equal instalments over the first year of the certificate.⁵

² S.16 (1) Legal Aid Act 1988.
³ (SI 1993/788) which took effect from 12 April 1993.
⁴ Currently: Income £7,403 (£8,158 in personal injury cases); Capital £6,750 (£8,560 in personal injury cases).
⁵ Information extracted from the regulations, supra n. 3.
The capital contribution is the whole amount by which the applicant's disposable capital exceeds the lower capital limit, for all applications whether before or after 12th April 1993.

The regulations pertaining to the upper income limit are absolute and where exceeded that person is not entitled to any legal aid. Where the upper income limit is not exceeded but the upper capital limit is, refusal by the Board is not automatic. Such a person will only be refused legal aid where it appears that they could afford to proceed without legal aid.

It should be noted that the Board's discretion in respect of the upper capital limit is quite separate and different in nature from the Assessment Officer's discretion. Where the Assessment Officer disregards either capital or income, they are left out not only for qualification purposes but also in the calculation of the contribution. The result is that an applicant who is granted legal aid by the Board in their discretion, despite exceeding the upper capital limit, will have to pay the whole of his or her capital over the lower limit by way of contribution in the normal way. A further difference is that the Assessment Officer's discretion extends to income whereas the Board's does not. Finally, the Board's decision can be challenged by appeal, the Assessment Officer's cannot.

### 3.3 Assessment of Means

The applicant's means assessment is undertaken by the Benefits Agency of the Department for Social Security (DSS). The applicant is required to complete a means questionnaire that is submitted with the primary legal aid application form. Applicants are not initially asked

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6 Supra n.3 regulation 4.

7 A discretion derived under Resources Regulations schedule 2 paragraph 14 and schedule 3 paragraph 15.

8 Supra n.3.

9 Form 117 may be required from an employer if applicable.
to provide documentary evidence of capital, however the DSS is empowered to ask for
evidence of resources or expenses. If, in the view of the DSS, the case warrants further
investigation of means, further completed forms are required from the applicant.\textsuperscript{10}

Where means assessment is complex and in practice this often applies to the self-employed,
the DSS undertake assessment by interview.\textsuperscript{11} Importantly, there is no right of appeal
against a financial determination by the DSS:

"... as there is no right of appeal against the [DSS's] decision, it is of special importance that
the calculation of disposable income and disposable capital should be based on complete and
accurate facts. It is the responsibility of the interviewing officer to see that all the requisite
information is included in the applicant's statement ..."\textsuperscript{12}

The only form of review available under the operative DSS L Code follows the DSS's
supply of a copy of its calculations to the applicant (or advisor) who is dissatisfied with the
assessment. Calculations are reviewed, on request, by a senior DSS officer.

3.4 The Contribution Payment

Where, under the regulations, a contribution becomes payable, the applicant will be
informed in the offer of legal aid. Where a capital contribution is required it is usually
payable in a single lump sum before the certificate is issued. Where the capital assessed
includes items which will take time to realise, the Board may be asked by the applicant's
solicitor to issue the certificate and wait for payment for a reasonable period of time.

Income contributions are usually required to be paid in monthly instalments. For
applications made prior to 12th April 1993 contributions out of income will only be payable

\textsuperscript{10} Form L22 (unmarried applicant).
Form L23 (married applicant).

\textsuperscript{11} Note: The L Code governing the roles for assessment, provide flexibility for interview time and venue to suit the applicant. In
addition there exist provisions pertaining to the aged or incapacitated.

\textsuperscript{12} As per the L Code paragraph 842.
for 12 months after the date of issue of the certificate. For those made on or after that date contributions out of income continue to be payable for the lifetime of the certificate.

In certain circumstances the Board may decide that the contributions paid by an assisted person are sufficient to meet the likely costs of the case, it may waive further payment subject to a change of circumstances whereupon the obligation to pay is revived. The certificate will be amended accordingly. There is no power to waive contributions on general grounds such as hardship.

Where an assisted person falls into arrears, the Board, by letter, will remind that person to pay the due contribution. In concert with this reminder, the person's solicitor will be notified by the Board not to undertake further work under the certificate. Should a contribution be left unpaid, the certificate will be discharged after 31 days unless the assisted person asks for a re-assessment. It therefore becomes of paramount importance that an assisted person notifies their solicitor at the very earliest opportunity should they encounter difficulties in making the contribution payments through change of circumstances. Reassessment is possible in respect of income or capital and can take place at any time while the certificate is in force. Reassessments on changes of means will look at likely income and capital in the 12 months following the request to reassess, rather than being referred back to the original period of computation.

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13 See General Regulations regulation 52(2) and (3) as substituted by Civil Legal Aid (General) (Amendment) Regulations 1993 regulation 9.

14 This operation is undertaken by the Legal Aid Board's debt recovery unit.
3.5 The Value of Contribution Recovery

The mechanisms for assessment and recovery of contributions are (at times) complex and certainly labour intensive for applicant, solicitor, the DSS and the Board alike. The reward to the Board and thereby to the Treasury for this effort is considerable.

Recent statistics\(^{15}\) for civil legal aid applications indicate that out of 411,087 annual applications, 85.8 per cent of those required a nil contribution. 2.2 per cent attracted a contribution of under £150, 2.4 per cent of between £150 and £299, 2.7 per cent of between £300 and £499 and 6.9 per cent of £500 and over.\(^{16}\) The table in Figure 1 (overleaf) expresses these statistics and provides a ten-year analysis.

Of the 14.2 per cent of applicants who were required to contribute the Board received and retained £22,226,807 with a 7.9 per cent write-off.\(^{17}\) In the 1992-93 Annual Report it was stated that, the bad debt figures were likely to improve over coming years since during 1991-92 control of contributions was transferred to Area Offices. This led to a stringent review of outstanding contribution debt cases which resulted in a higher than usual level of write-offs in contributory cases.\(^{18}\) This situation did not, in fact, occur. In 1995-96, the contribution bad debt write off percentage is double the figure reported in 1992-93. The Board is failing to control bad debts figures through area offices. It seems arguable the removal of a central resource has added to the problem rather than provide a solution.

3.6 Green Form Eligibility and Contributions

With effect from 12th April 1993 contributory green form assistance has been abolished. Green form is now only available to those in receipt of income support, family credit, or

\(^{15}\) Legal Aid Board Annual Report 1995-96. HMSO, 1996.

\(^{16}\) Ibid., 65.

\(^{17}\) Supra, n.15, p.72.

### CIVIL LEGAL AID

**MAXIMUM CONTRIBUTIONS DETERMINED 1982-83 TO 1995-96**

<table>
<thead>
<tr>
<th>Year</th>
<th>Range of maximum contribution</th>
<th>Totals</th>
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<tr>
<td></td>
<td>Nil</td>
<td>Under £150</td>
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<tr>
<td>1994-95</td>
<td>330,789</td>
<td>8,540</td>
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</tbody>
</table>

1 Includes certificates issued for High Court, county court and magistrates' court proceedings.

*This table is extracted from The Legal Aid Board Annual Report 1995-1996 at p.65*
disability working allowance, or with a weekly disposable income not exceeding £75. Those who qualify will pay no contribution.

This means that a client eligible for Green Form assistance will be eligible also for legal aid, although the reverse is not true. The reasons are that anybody with a disposable capital of more than £1,000 cannot receive Green Form aid whereas legal aid may be given to a person with disposable capital up to £6,750 without paying a contribution out of capital. In addition, anyone with a disposable weekly income of over £75 is ineligible for Green Form help but may still qualify for legal aid, albeit with a contribution.

The picture may be completed by reference to the 'Advice by way of Representation Scheme' (ABWOR). A contributions system will continue for ABWOR but the pre April 1993 one-off contribution system was replaced by on-going contributions for the lifetime of the case.\(^\text{19}\) This may be paid weekly or by other instalments that may be agreed. Contributions are payable from the date ABWOR is approved until either it is withdrawn or the proceedings are concluded.\(^\text{20}\)

### 3.7 Criticism

The system of assessment for contributions is founded on the assumption that a DSS questionnaire duly completed by the applicant will yield real knowledge of their financial circumstances. Furthermore, that the form has been completed accurately and honestly. These assumptions, it is argued,\(^\text{21}\) are doubtful. Observers of the process concede that statistics and hard evidence with regard to incomes are not easy to come by\(^\text{22}\) but from their

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\(^{19}\) A client with weekly disposable income between £75 and £147 must pay his or her solicitor one-third of the excess over £75.

\(^{20}\) The full contribution history must be set out in form 'ABWOR 3' when costs are claimed. Legal Advice and Assistance Regulations 1989 reg. 12(3) as amended. ABWOR, as a form of civil legal aid is available for certain family and domestic proceedings.

\(^{21}\) See for example, Judge Fordham, J., 'Representation and Contribution' [1992] NLJ 996.

\(^{22}\) Ibid.
experience as the trial progresses and the true financial picture emerges, if it were to be compared, it would be at variance with application form declarations.

Whether there is any truth in the often thought view that dishonest people nearly always get legal aid with a nil contribution and those who are honest often have to pay a contribution is probably beyond proof. There is also a conflict between the belief that in practice little is done by direct sanction against dishonest applicants and the legal aid Area Offices who claim not to shy away from exercising powers of revocation in circumstances of dishonesty.23 The contention that Area Offices frequently revoke certificates in cases of dishonesty is based on the writer's personal conversations with Area Directors at Area Offices. Statistics on the frequency of revocation are not maintained by the Board, however, it may be concluded that whilst the withdrawal of legal aid as a penalty may protect the taxpayer, it is extremely inconvenient both for the court and lawyers involved.

One view24 promotes, as an alternative, the scrapping of the financial assessment as a criterion for granting legal aid. The dismantling of this machinery would save considerable time and money. Instead, legal aid would be offered without contribution, in every case where justice requires legal representation. Orders for contribution, in whole or in part, should then be assessed at the end of every case by the trial judge as part of the overall costs. The argument is based on the belief that in practice the perceived ability for a person to pay a contribution is better and more accurately assessable at the end of the case than at the commencement of proceedings.

The current regulations have been criticised25 in providing for contributions to run for the life of the certificate. This, it is felt, will cause considerable problems to courts and practitioners alike. If the contribution is to run for the life of the certificate there will be pressure upon solicitors to have cases brought on as quickly as possible, for bills to be taxed

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23 Power to revoke is contained within sections 74-84 of the Civil Legal Aid (General) Regulations 1989.

24 Supra n 21.

quickly and for the certificate to then be discharged.²⁶ Few will doubt the merit of delay avoidance but many doubt that the courts will be able to deliver in this respect to the satisfaction of assisted persons who are paying contributions, as their case progresses through the present court system. It follows that the applicant will be penalised until the Lord Chancellor reforms and simplifies the court procedures and effectively reduces the waiting time for court hearings. In this regard such criticism appears well founded.

ABWOR in its current guise offers an immediate problem. Importantly, contributions are payable until the conclusion²⁷ of the proceedings, but the meaning of 'the proceedings' is ambiguous. Is it that part of the proceedings covered by the scope of the certificate²⁸, the order made by the court, or an order made on another party's application which may be subject to a further review by the court? All of the above may be subject to different dates. The conclusion must be that the present situation is far from satisfactory.

### 3.8 Conclusions

The end of contributory Green Form advice and the payment of contributions throughout the case are, arguably,²⁹ particularly damaging elements in a recent package of eligibility cuts.

"Green Form eligibility at its newly established level simply excludes too many who lose any access to justice. Continuing contributions will sap the will of countless litigants."³⁰

It is believed that the Green Form cut will simply result in a large number of cases transferring to civil legal aid³¹ and continuing contributions will lead to administrative chaos

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²⁶ For only upon discharge will the liability of an applicant to stop paying an ordered level of contribution cease.

²⁷ Technically also withdrawal.

²⁸ See *Littaur v Streggles Palmer* [1987] 1 WLR 287.

²⁹ See 'An Interesting Year' [1993] NLJ 533.

³⁰ Ibid.

³¹ For example, on the basis that it is common for the Board to grant a limited purpose certificate.
as assisted persons go in and out of eligibility. It may even be foreseeable that opponents adjust their tactics by increasing delay, and litigants give up before the Board is likely to recoup its expenditure with a successful result. Couple these cuts, which have been described as shaving a little too thin the access to justice plank in government policy,\textsuperscript{32} with the inherent flaws of questionnaire-based eligibility assessment and the contributions system is clearly not without fault.

The apparatus for collection, from the DSS agency to the limits of the regulations, are openly criticised as an imperfect system. The contributions system successfully saves public funds over £22,000,000 per annum. However, this figure is less impressive when the legal aid statistics are considered in more detail (see fig.1 at the end of Chapter 2). The legal aid statistics show an ongoing increase in the cost to the taxpayer, an increase in average payments and a decrease in acts of assistance. It may be reasonable to conclude that the contribution sum recovered is, in context, insignificant particularly as a mechanism for controlling overall civil legal aid expenditure.

### 3.9 Costs

Originally under the 1949 Legal Aid Act it was deemed necessary, so as not to deter a potential litigant by fear of being made liable for the costs incurred by the opposite party should he lose, to limit the liability of that assisted person for costs.\textsuperscript{33} It soon became apparent that this caused injustice to the successful unassisted opponents of legally aided litigants, who, in effect, were unable to recover their costs from the legally aided litigant as they would otherwise have normally been able to do. Matters inevitably came to a head\textsuperscript{34}

\textsuperscript{32} Supra, n.29.

\textsuperscript{33} S.2 (23(e) The Legal Aid and Advice Act 1949.

\textsuperscript{34} See Aven v Rayner, [1960] The Times, 29 April and Rodgers v British Transport Commission [1963] Sol J 619 as examples of cases which highlighted the inequity.
and new statutory provisions put in place. It has been suggested that the changes implemented since 1949 were not significant nor of substance.

For the purposes of this study the issue of costs can be divided into, how one party may be ordered to pay them to the other (where either or both are legally-aided), and when and how the Legal Aid Fund may be ordered to pay costs to an unassisted party. The more limited the circumstances are in which the Legal Aid Fund may be ordered to pay costs, the more protection there is, in effect, for the Fund.

3.9.1 Costs Orders and Legally Aided Persons

Legal aid costs must be taxed by either the court or assessed by the Legal Aid Board. In the absence of agreement, costs payable by one party to another must always be taxed. The fees and disbursements payable by one party to another and by the Legal Aid Board to the assisted person's representative are both paid on the standard basis providing for a reasonable amount in respect of all costs reasonably incurred. This basis provides, on taxation of costs, there shall be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the taxing officer may have as to whether the costs are reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party.

Following taxation the court issues an order for costs against the paying party and an allocate showing the amount payable out of the Legal Aid Fund. The costs order is then

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35 Altered first by the provisions of The Legal Aid Act 1974 S.8 (1) (c) and latterly by The Legal Aid Act 1988 ss 13-18.


37 Time limits are imposed: 3 months in the High Court and the County Court (RSC Ord 62 & 29 and CCR Ord 38 & 20) and normally 6 months in Matrimonial cases.

38 See the judgment of Sachs, J., in Francis v Francis and Dickerson [1955] 3 WLR 973 and RSC Ord 62 & 12.
enforceable like any judgment. By this mechanism the process of taxation acts to protect the Legal Aid Fund.

3.9.2 Order For Costs In Favour Of The Assisted Person

Just as with a privately paying client it is extremely important for an assisted party to recover costs from the other side. Any costs paid to the assisted person's solicitors which are not recovered from the other side will be taken out of the assisted person's contributions, and if they are not sufficient through the application of the statutory charge (see later).

Moreover, an assisted person's solicitor is under a duty to act in a way that protects the Legal Aid Fund. It is normal for the Legal Aid Fund to pay out more to the assisted person's solicitors and counsel than is recovered from the unsuccessful party with the debit balance being recouped either from the contributions paid or if necessary by way of the statutory charge. Therefore, an assisted person is placed in a similar position to the privately paying client who has succeeded in their litigation, since it is normal in applying standard costs to recover only a portion of what they have paid to their own solicitor.

In practice, matrimonial cases are an area where frequently lawyers fail to ask for, or judges fail to make, orders for costs. There are thought to be two possible reasons. The first may be a general misunderstanding about the extent of the protection against an order for costs available to the unsuccessful assisted party. Secondly, this confusion is added to by the statistical fact that matrimonial cases have a higher proportion of assisted parties on both sides than any other category of litigation.

39 Regulation 110 of the Civil Legal Aid (General) Regulations 1989.

40 Before they are to be returned, if applicable.

Such misunderstanding in fact fails to apply S.17(1) of the Legal Aid Act 1988 correctly which does allow a reasonable level of liability\textsuperscript{42} for the assisted person. Furthermore, it is said:\textsuperscript{43}

"...the other reason that costs orders have been made too infrequently in matrimonial cases has been the court's general reluctance to make orders for costs in such cases."\textsuperscript{44}

A further area of doubt is whether a successful assisted person is entitled to ask for costs on an indemnity basis rather than standard.\textsuperscript{45} Generally, indemnity costs are payable only in exceptional cases, for example where the conduct of one of the parties may be called into question. Some maintain that indemnity costs cannot be ordered in favour of an assisted party.\textsuperscript{46} This view is based on the wording of the General Regulations.\textsuperscript{47} They state inter alia:

"that the costs of any assisted person shall be taxed on the standard basis".\textsuperscript{48}

In additional support of this argument the Legal Aid Board would profit if it were paid on the indemnity basis while paying out only on the standard basis. The receiving party would make a profit out of costs.

However, this view is perhaps incorrect, since the wording of the General Regulations is not clear and refers to an order on the standard basis in context by adding:

"...in addition to any other direction as to taxation".\textsuperscript{49}

\textsuperscript{42} "Liability ... under an order for costs made against him with respect to the proceedings shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances, including the financial resources of all the parties and their conduct in connection with the dispute".

\textsuperscript{43} Supra n. 41, 150.

\textsuperscript{44} Ibid.

See also the decision in Povey v Povey [1970] 3 All ER 612 which held that costs do not follow the event as in other areas of litigation. Now overruled by Gojkovic v Gojkovic [1992] 1 All ER 267 (CA).

\textsuperscript{45} The difference between the two being that in respect of the indemnity basis any doubts about the reasonableness of a claim or its amount will be resolved in favour of the successful party. The opposite applies with the standard basis.

\textsuperscript{46} See for example, Segal, M., 'Legal Aid and Indemnity Costs' [1990] Fam Law 417.

\textsuperscript{47} Civil Legal Aid (General) Regulations 1989.

\textsuperscript{48} Ibid., reg. 107.
Costs in favour of an assisted person on the indemnity basis are therefore not to be ruled out. In fact, it could be stated on one construction that an assisted person is as entitled to an order for indemnity costs as an unassisted person.

It would seem that the reluctance to so construe the General Regulations is, largely if not entirely, based on preventing unseemly profit for the Board.\(^{50}\)

### 3.9.3 Costs Orders Against Legally Aided Persons

Section 17(1) of the Legal Aid Act 1988 re-enacts earlier provisions as follows:

"The liability of a legally assisted person under an order for costs made against him in respect of any proceedings shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including the financial resources of all the parties and their conduct in connection with the dispute."

The authorities\(^{51}\) indicate that S.17(1) necessarily involves a two-part process. Firstly, the court is to apply general principles of law in deciding whether or not an order for costs should be made at all and, secondly, the court must go on to determine the quantum of that liability\(^{52}\).

The assessment of how much the assisted person has to pay is made either by the judge, the registrar or other person before whom the trial or hearing took place\(^{53}\). It may take place at

\(^{49}\) Reg 107 (3) (b).

\(^{50}\) Note. The Legal Aid Fund has similarly profited in the past, for example when legal aid High Court profit costs were liable to a 10 per cent deduction while no such deduction applied to party and party costs.


\(^{52}\) Megaw J. in *Cope* (*supra*) clarified that the protection offered by S.17 is the responsibility of the Court whether or not it is invoked by the assisted person.

\(^{53}\) Subject to a contrary direction.
the time of the hearing or at a later date but the proceedings must be concluded. On an assessment under S.17 all the factors set out within that section must be taken into account. Where an order for costs is made against an assisted person without a determination of his ability to pay, it is unenforceable and the assisted person cannot be asked to pay anything under that order.

The court is required to undertake a proper assessment of means before making an order, and it must also follow that simply using the level of any legal aid contribution to determine the level of liability cannot be a valid exercise of the court's discretion. The relevant financial resources are those at the time the order was made.

Inevitably, this necessary assessment under S.17 creates many problems. There is a noticeable tendency in case law, argued by some, which shows that where there is a nil contribution, the court has decided on that basis alone that no order can be made: an easy option but not a proper determination under S.17.

Determination, as stated above, need not be done at trial, in most cases the court will not have sufficient information there and then to make an order. In such circumstances adjournment is likely, whilst the court has no power to adjourn the determination indefinitely it does appear that once the court has made the determination it may postpone payment indefinitely. The effect is that, in practice, the standard order will say that the court has determined the liability for costs as being the whole of the costs of the action but the payment is postponed indefinitely.

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54 General Regs reg 117.
55 See the decision of Danners v Danners (1974) 118 SJ 168.
58 A situation made possible by the conflicting wordings of regulations 127 and 129 of the General Regulations.
59 Supra n. 57, 390.
Such an order is unsatisfactory and indefensible in its ignorance of the S.17 requirements, since it says that the assisted person must pay all the costs when clearly he does not have the means to pay anything. It can be defended only on its result.

In assessing liability the court must include present and future assets. It includes any damages that may be recovered in the action and extends to 'lump' sums recovered in ancillary relief proceedings. The court is entitled to take a broad view. With these factors in mind it is usually worthwhile to obtain an order for costs against an assisted person, even if it is clear that he cannot pay at the time. A person for whose benefit an order has been made under S.17 may apply within 6 years for the order to be varied on the grounds either that new information is now available or that there has been a change in the assisted person's circumstances. There exists no other power to vary the order.

The scope of protection afforded by S.17 only applies to the costs incurred during the currency of the certificate and does not cover costs incurred prior to the grant of the certificate nor to costs relating to any part of the proceedings not covered by the certificate. Persons receiving ABWOR are afforded similar S.17 protection.

3.9.4 Orders for Costs Against The Legal Aid Fund

When proceedings have been concluded and a decision made in favour of an unassisted party (and that successful party has been unable to obtain an order for all their standard basis costs against the unsuccessful assisted person) it may be possible for that person to obtain an

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60 McDonnell v McDonnell [1977] 1 WLR 34.

61 Subject to S.17(3) exempted assets:
Dwelling house, clothes, household furniture etc.

62 General Regs reg. 130.
order for costs against the Legal Aid Fund under S.18. The successful party must be unassisted and an order against the Fund may only be made if:

(a) the proceedings have been finally decided in favour of the unassisted party;
(b) the court has first considered what order shall be made against the assisted person under S.17(1);
(c) the court is satisfied that it is just and equitable in all the circumstances that provision for the costs should be made out of public funds.

Where costs are sought further to proceedings at first instance, the applicant must show;

(d) the proceedings must have been instituted by the assisted party;
(e) the court is satisfied that the unassisted party will suffer severe financial hardship unless an order is made.

With regard to a decision being "finally decided" generally it will be clear in whose favour a case has been finally decided. The unassisted party must have been substantially successful in the proceedings.

Whether it is "just and equitable in all the circumstances" to make such an order was amplified by the Court of Appeal. It stated that the words were incapable of precise

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63 Legal Aid Act 1988.
64 This includes ABWOR. See also Almond v Miles [1992] The Times 4 February.
65 S.18 (1).
66 S.18 (3).
67 S.18 (4) (c).
68 S.18 (4) (b).
69 Problems with the interpretation of this provision are usually in situations such as Calderbank offers. The respondent whose Calderbank offer has not been beaten could claim that proceedings have finally been decided in his favour even though his spouse has received some payment or property as a result of her application.
70 Hanning v Maitland (No 2) [1970] 1 All ER 812 (CA).
definition and that the court had a wide discretion. Factors taken into account included the success of the unassisted party and the financial position of the applicant relevant only to the extent that it would be just and equitable to make the order. The personal responsibility on the successful unassisted party for paying their costs is irrelevant. Moreover, it may be just and equitable to make an order in favour of a large, wealthy limited company or public authority.

The criterion that "proceedings must have been instituted by the assisted party" is a test of substance not form. For example a counter-claim may be treated as separate proceedings and an unassisted party's costs of successfully defending a counter-claim will be recoverable from the Fund.

"Severe financial hardship" has been approached less restrictively than the term 'severe' might imply. The hardship must be financial and not related to other matters such as inconvenience or anxiety. It would be regarded as severe if a person of moderate means had appreciably to reduce his capital to answer the case. The court is open to find by way of compromise that the Board pays costs above a form of severe financial hardship threshold.

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71 In *Davies v Taylor (No2)* [1973] 1 All ER 959 it was held that in some circumstances success itself may be sufficient to make it just and equitable that an order should be made.

72 *General Accident Limited v Foster* [1972] 3 All ER 877.

73 *Lewis v Averay (No 2)* [1973] 2 All ER 231.

74 *Kelly v London Transport Executive* [1982] 2 All ER 842.

75 *See R and T Thew Ltd. v Reeves* [1981] 2 All ER 964.

76 *Hanning v Maitland (No 2)* [1970] 1 QB 58.

77 *Adams v Riley* [1988] QB 372.
3.10 Criticism

It would appear that generally an unassisted person entering a civil dispute is in a more precarious position than a legally aided defendant or plaintiff.

If the successful plaintiff is unassisted and the defendant is legally-aided the plaintiff will be contractually obliged to pay his own solicitor's costs and will have to ask the court to order the defendant to reimburse him. There is no right to costs and the extent of recompense under S.17 is at the discretion of the court. The general rule that costs follow the event has only a technical application where the defendant is legally aided. In practice the plaintiff may get no costs or a nominal costs order against the defendant.

It seems arguable that not enough attention is being paid to the provisions of S.17 and that the standard type order (costs awarded against the defendant but suspended indefinitely) is being used as an easy way out. A successful plaintiff is forced to cross many hurdles if he wishes to force a legally aided defendant to pay costs.

In pursuing its positive duty to protect the legally aided defendants' rights, orders are made whereby people with no resources are being ordered to pay all the costs. This, it may be argued, is clearly wrong in principle. Moreover, in such successful unassisted plaintiff cases the court cannot order the Board to pay the plaintiff's costs even though he has won the case.

The unassisted but successful defendant against the legally aided plaintiff may in theory fair a little better. The plaintiff may be ordered to pay the defendant's costs but by application of S.17 this is likely to be nominal since he is to pay an amount no more than is reasonable in

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78 RSC 0.62 and CCR 0.38.

79 Supra n.57, 392.

80 See for example the judgment of Lord Denning in R and T Thew Ltd. v Reeves [1982] 2 All ER 964, where this manifest unfairness was recognised.
the circumstances. However, the successful defendant may then seek to rely on the provisions of S.18 as detailed in 3.9.3 above and request that the be ordered to pay his costs.

In principle the requirements of S.18 are not difficult to satisfy. In ordinary cases it is viewed as being just and equitable that the nuisance of being sued should lead to reimbursement from public funds. In many cases it is also obvious that the defendant will suffer financial hardship if he is asked to pay his costs in full.\textsuperscript{81} The net result is that the successful unassisted defendant is placed in a far better position than his plaintiff counterpart. The two types of party, whilst in similar positions, are treated quite differently. It has been argued that the distinction is unjust if not absurd.\textsuperscript{82}

3.11 Conclusions

The distinction between the unassisted defendant and plaintiff may be viewed as inclining the Board to take differing stances on cases falling into different categories, even though merit is similar. It must be conceded however, that there is little evidence to so conclude.

What may be readily concluded is the distinction, it is one of fact. Determination of the rationale for the 'injustice' of not treating similar claims alike is difficult. The only patent reason appears to be that a successful defendant is advantaged because he has not been the oppressive attacker or instigator of proceedings. Against this, in cases where neither party is assisted, the courts look upon both parties to the action in the same light, the costs position of both being identical.

The present position is one in which to sue a legally aided person successfully may lead to a complete inability to recover costs incurred. Section 18 prevents similar hardship to a successful unassisted defendant. The position does seem to be inequitable.

\textsuperscript{81} Note: This situation is the same in the context of ABWOR. See SS.12 and 13 of the Legal Aid Act 1988.

\textsuperscript{82} See for example, Reynolds, B., 'Legal Aid And Inequality Where It Really Matters' [1992] NLJ 669.
Some argue that it is socially desirable to regulate parties' liability to each other on the basis of ability to pay. Even if that is accepted, the present rules in legal aid cases stand in isolation. The rules allow abuse. That is, a legally aided person can persuade an opponent to settle a case on less favourable terms than would otherwise be appropriate, solely because of the grant of the certificate. In many instances, plaintiffs simply abandon cases once the opponent has been granted legal aid.

The costs order is protective in nature. If it were removed, or replaced with some other balanced measure in personal injury cases, those applying for legal aid would be forced to more properly assess their case and resources in preparation of bearing the costs of litigation. In so doing, a considerable saving of public money could be achieved. This, however, will necessarily result in a shift of an economic balance away from the poor.

3.12 The Statutory Charge

The statutory provisions relating to the charge are contained in section 16 of the Legal Aid Act 1988 and part XI of the Civil Legal Aid (General) Regulations 1989. The underlying principle of the charge is to put the legally assisted person, as far as possible, in the same position in relation to proceedings as an unassisted person. The unassisted person's first responsibility, at the end of the proceedings, is to pay whatever legal costs are not being paid by the other side. It prevents an assisted person from making a profit at the expense of legal aid and is a deterrent to running up costs unreasonably.\(^83\)

The origins of the charge lie back in history as the direct lineal descendant of the solicitor's lien, over "property recovered or preserved" through his instrumentality.\(^84\) Subsequent


\(^84\) See *Welsh v Hole* [1779] 1 Doug KB 238. In fact it was rather more "a claim to the equitable interference of the court to have the judgment held as security for the solicitor's costs". See also, *Barker v St Quintin* (1844) 12 H and W 441.
Legal Aid Acts\textsuperscript{85} were clearly modeled upon the existing law relating to the particular lien of solicitors and to the right to apply for a charging order under the Solicitors Act.\textsuperscript{86} It was not until the 1970's that it was perceived very substantial and valuable assets were being litigated over and recovered or preserved entirely at public expense and without any possibility of the Fund recouping any of the costs. This was because the regulations in force at the time provided a total exemption from the statutory charge in the case of any property recovered or preserved under orders made in matrimonial litigation.\textsuperscript{87} As a result the concept of an exemption limit was introduced.

The present position is now such that the Legal Aid Fund has first call on any money or property recovered or preserved for the assisted person as a result of the legally aided proceedings. The Legal Aid Fund may claim an amount up to that which has been paid out to solicitors and counsel\textsuperscript{88} on behalf of the assisted person, provided the Fund has not otherwise recovered such amount through contributions or an order for costs.\textsuperscript{89}

### 3.13 Application Of The Charge

The working of the charge highlights the importance of obtaining an order for costs against the opposition even where the client has a nil contribution. And, if such orders are obtained that they should be enforced against the other party wherever possible. Any costs not recovered from the other party (or via contribution) will come within the terms of the statutory charge. The effect of the charge is to place an assisted person who is successful in

\textsuperscript{85} Re: S.3(4) Legal Aid and Advice Act 1949;  
S.9(6) Legal Aid Act 1974;  

\textsuperscript{86} The 1974 Act (S.73).

\textsuperscript{87} Primarily under the provisions of The Matrimonial Causes Act 1973.

\textsuperscript{88} This does include VAT.

\textsuperscript{89} S.16 (6) Legal Aid Act 1988. Similar rules apply under the Green Form Scheme; Legal Aid Act 1988 S.11 (2).
litigation in almost the same position as a party who is paying privately. When the charge becomes applicable and is effected, legal aid works as though it is a loan to the assisted person. The costs incurred by the Fund to finance the litigation must then be repaid at the conclusion of the litigation.

For the charge to bite the assisted person must have been wholly or partially successful in the proceedings or obtained an out of court settlement with the benefit of legal aid. Furthermore, it is possible for one or more certificates to count towards the statutory charge.\(^90\) In addition, it is a pre-requisite that money or property has been "recovered" or "preserved" out of which the net liability can be met in whole or in part.\(^91\)

The charge applies to any rights under any compromise to bring an end to proceedings.\(^92\) It will apply to any costs obtained even if they relate to a period when the party was not legally aided.\(^93\) Section 16 is wide in definition including money, property or rights recovered or preserved as a result of the litigation.

Provision is made for certain property to be exempt from the statutory charge.\(^94\) The main exemptions are:

- (a) any periodical payment of maintenance;
- (b) the first £2,500 of certain property preserved or recovered;\(^95\)

\(^90\) Such cases include:
- (a) The linking of a second successful certificate to a first which was discharged;
- (b) Where a single certificate does not represent the true account of the assisted person with the Board;
- (c) Where certificates have been manipulated with the intention of avoiding the charge. See, *Manley v The Law Society* [1981] 1WLR 335.

\(^91\) Legal Aid Act S.16(6)

\(^92\) Ibid S.16 (7).

\(^93\) See for example, *Re H and Others (Minors) (No 2)* (1992) 142 NLJ 1004.

\(^94\) Legal Advice and Assistance Regulations 1989 sch. 4 and the General Regulations regulation 94.

\(^95\) This includes:
- (i) Property preserved or recovered under the Matrimonial Causes Act 1973;
- (ii) Orders made under the Inheritance (Provision For Family and Dependents) Act 1975 SS 2, 5 and 6;
(c) payments of money under an order made by the Employment Appeal Tribunal;
(d) orders for interim payments of damages.

The Green Form scheme provides two exemptions not available under the Civil Legal Aid scheme that are worthy of note. The Green Form statutory charge does not attach to the client's dwelling, household furniture or tools of trade that have been recovered or preserved under the scheme.\textsuperscript{96} It follows that careful use of the Green Form scheme as opposed to civil legal aid could be of added benefit to the client in certain cases.\textsuperscript{97} Secondly, property may be exempted if, in the solicitor's opinion it would cause grave hardship or distress to the client to enforce the charge.\textsuperscript{98}

Finally, in this brief summary of the provisions pertaining to the intended application of the charge, it is possible that in certain areas of family litigation the charge may be postponed.\textsuperscript{99} This provision became effective from 1 December 1988.\textsuperscript{100} Prior to that date where a legally aided client remained in the former matrimonial home following a court order, the Law Society took a charge on the property, which was interest-free, and would not be redeemed until the sale of the property. The postponement provision now imposes an

\begin{itemize}
  \item[(iii)] Orders made under the Married Women's Property Act 1882 S.17;
  \item[(iv)] Orders made under Sch 1 Childrens Act 1989;
  \item[(v)] Other miscellaneous family proceedings orders;
  \item[(vi)] Sums or payments which cannot by statute be assigned or charged.
\end{itemize}

\textsuperscript{96} Advice and Assistance Regs Sch 4 para (b).
\textsuperscript{97} E.g. Housing cases where the intention of the client is to preserve or recover possession of a chargeable interest.
\textsuperscript{98} This will necessarily depend on the circumstances in which the property was recovered or preserved.
\textsuperscript{99} Under:-
\begin{itemize}
  \item[(i)] The Matrimonial Causes Act 1973;
  \item[(ii)] The Married Women's Property Act 1882;
  \item[(iii)] The inheritance (Provision for Family and Dependents) Act 1975; and the
  \item[(iv)] Children Act 1989.
\end{itemize}
\textsuperscript{100} By virtue of the Legal Aid (General) (Amendment) (No 2) Regulations 1988 SI No 1938.
interest rate on all statutory charges whether or not they are deferred. The rate of interest is calculated on a simple rather than compound basis and is varied from time to time by regulation. Interest accrues from the time the charge is registered\textsuperscript{101} but does not fall to be paid until the charge is redeemed.\textsuperscript{102}

The Board can only agree to effect postponement if the area director is satisfied that the proposed property offers sufficient security, the assisted person agrees to execute a legal change in favour of the Board and agrees that interest will accrue from the date the charge is registered.\textsuperscript{103}

### 3.14 Mitigation and Avoidance

Quite legitimately there are several methods of mitigating or avoiding the hardship of the imposition of the statutory charge. In matrimonial proceedings the charge's impact can be minimised if the parties can resolve their differences by agreement rather than contested court proceedings.\textsuperscript{104} That is not to say settlements further to litigation are not caught by the provisions of the charge because they are. Alternatively legally aided litigants can protect themselves against the charge by being awarded costs. It must be remembered that obtaining the order is unlikely to be enough in itself. It must be enforced and costs collected if it is to reduce the statutory charge.

Narrowing down the issues and having certain property out of dispute may in some cases successfully avoid altogether the statutory charge.\textsuperscript{105} Similarly where an assisted person is

\begin{itemize}
  \item \textsuperscript{101} General Regulations reg. 94(4).
  \item \textsuperscript{102} Ibid reg. 99(1).
  \item \textsuperscript{103} The effect of General Regulations 96-98 are very broadly to incorporate the old Law Society guidelines as to its discretion to postpone enforcement of the charge or to substitute it to one or more further properties.
  \item \textsuperscript{104} See for example, the comments of Lord Denning MR in \textit{Cooke v Head (No 2) [1974]} 2 All ER 1124.
  \item \textsuperscript{105} \textit{Hanlon v The Law Society} [1981] AC 124 and \textit{Curling v The Law Society} [1985] 1 All ER 705.
\end{itemize}
acting under two legitimate certificates careful selection of proceedings under each can
avoid some of the rigours of the charge.\textsuperscript{106}

It may also be possible for family litigants to protect themselves against the charge if
payments are not made to them but to their children instead. However it should be noted
that some special circumstances must exist for such a method to achieve legitimacy.\textsuperscript{107}
A further method of side-stepping the charge is to take full advantage offered by the
exemptions,\textsuperscript{108} and finally by obtaining an increased lump sum payment to compensate for
any loss that will be caused by application of the charge.

\subsection*{3.15 Criticism}

The prudent solicitor must personally explain to legally aided clients that they may have to
account to the Legal Aid Fund for any property or money that they recover further to a
legally aided action. The Legal Aid Handbook in the ‘Notes for Guidance’, requires
solicitors to explain to an applicant how the statutory charge may affect them. Research
indicates\textsuperscript{109} that the effect of the charge is not being communicated to clients. Many clients
interviewed stated quite clearly that they had been given no warning about it and some
expressed shock at the thought of the charge implications. Moreover, the research revealed
that in many instances settlements were negotiated without regard to the charge. The
considerable volume of litigation in the 1980's in respect of the statutory charge, it is
suggested, is due to its application in matrimonial cases not being fully understood by
advisors.\textsuperscript{110} Decisions show how advisers (and occasionally judges) have misunderstood the

\begin{footnotes}
\item[106] For example where two certificates exist, one for wardship another for matrimonial ancillary proceedings, contested custody
proceedings should be brought in wardship to avoid their cost forming part of the statutory charge.
\item[107] \textit{Draskovic v Draskovic} [1981] FLR 87.
\item[108] Reg 94 of the 1989 General Regulations.
\item[109] February 1985 \textit{Legal Action} 9, published details of research undertaken by the Conciliation in Divorce research project at
Bristol University.
\item[110] For example, see, Davis, G., and K. Bader, "The Legal Aid Clawback" (1985) \textit{Legal Action}, April, 7.
\end{footnotes}
workings of the charge in matrimonial proceedings when attempting to settle financial
claims.\footnote{That the applicability of the charge in certain matrimonial settlements is overly
complex and ambiguous seems self-evident from the case law.}

A further criticism of the charge is the comparison between its application in personal injury
claims and divorce cases involving disputes over the matrimonial home. In personal injury
claims any recovery of damages will normally be accompanied by an order (or an
agreement) to pay the client's costs. An order or agreement to pay the party and party costs,
may leave a common fund element to be recouped out of the client's contributions or the
money recovered. The net effect in most cases is that the legally aided client receives his or
her damages with a minimal or nil reduction for costs. Similar results apply in other civil
claims where the client has an order for costs in his or her favour. Matrimonial property
disputes are quite different.

The nature of a divorce dispute is often composite, including elements such as the divorce,
contact, care and control of children, injunction proceedings and ancillary relief. Typically,
the cost of all such elements will fall within one legal aid certificate. Both parties are often
legally aided to some degree with the result that there is usually no order for party and party
costs.\footnote{The actual costs of conducting the case therefore become deductible from any
property recovered by either party. Quite clearly, the implications of the imposition of the
statutory charge weigh more heavily in matrimonial than other civil proceedings where it
purports to apply.}

The methods of avoidance outlined in paragraph 3.14 above are simplistic, logical and
legitimate tools for the legal aid practitioner faced with the potential ravages of the statutory
charge. Yet, all are impossible to achieve without a critical set of circumstances being in
place. There is often a fine line between reaching a settlement in a form which will

\footnote{For example: \textit{Curling v Law Society Court of Appeal (Civil Division) [1985] 1 All ER 705}. \textit{Simmons v Simmons Court of Appeal (Civil Division) [1984] 1 All ER 83.}}

\footnote{This is often the case even though technically incorrect.}
legitimately avoid, in whole or in part, the statutory charge on the one hand, and the resourceful lawyer devising an improper agreement with the intention of evading the charge on the other. This is a situation that, in practice, causes considerable problems. It has been held that lawyers must not:

"...try and manipulate [the] destination [of the proceeds of litigation] so as to [evade] the statutory charge".\textsuperscript{113}

For:

"...if and insofar as solicitors have intentionally deprived the Legal Aid Fund of a charge on their costs, they are themselves precluded from making any claim on the Legal Aid Fund for those costs".\textsuperscript{114}

The solicitor acts therefore, as an agent for the Board and acts on its behalf in protection of its rights as to costs. The solicitor owes a duty of care to the Legal Aid Fund.\textsuperscript{115} It seems possible to draw an analogy with taxation practice.\textsuperscript{116} Tax avoidance is legitimate, tax evasion is illegal. Attempts to defeat the charge are looked upon grimly by the courts and the ultimate penalty is served upon the solicitor, that being loss of costs. There is therefore the ever-present dilemma for the practitioner; will his proposed course of action be viewed as evasion or avoidance? It is by no means easy to see circumstances where the helpful or resourceful lawyer can avoid his client having to pay the charge. If postponement is possible the lawyer must additionally consider financial matters such as the cost effectiveness of borrowing money by loan (bank or family) to cover legal fees, at a cheaper rate than interest payable under the charge.

There is nothing in the postponement regulations to peg interest rates to bank base rates. It becomes questionable whether legal aid in this respect will continue to meet the needs of the


\textsuperscript{114} Ibid.

\textsuperscript{115} A point emphasised in \textit{Clarke v Clarke (No 2)} [1991] 1 FLR 179.

persons for whom it is intended, those who have limited financial options and those in society who are the most vulnerable.\textsuperscript{117}

3.16 Conclusions

It has been stated and supported by statute that the purpose of the legal aid statutory charge is twofold. It is intended to put assisted persons in a position similar to that of non-assisted persons as far as responsibility for payment of legal costs is concerned and to act as a deterrent to discourage unreasonable assisted persons from pursuing expensive proceedings. As has been outlined above, there would seem to be problems with regard to both of these intentions.

Firstly, the deterrent. It was observed in 1983 that:

"Many of the difficulties that have arisen on the operation of the statutory charge are caused by ignorance ... One of the aims of the charge is to deter unnecessary or unnecessarily prolonged litigation. It can only deter if clients are aware in advance of its implications."\textsuperscript{118}

Contemporary evidence suggested\textsuperscript{119} that many clients were so ill informed about the operation of the charge that the deterrent effect cannot possibly operate. In the decade since these observations were first reported, given that there has been no campaign to educate the public generally as to the concept and applicability of the statutory charge these comments would require little modification today. During the author's research and questioning of civil legal aid practitioners by telephone inquiry and personal interview, public understanding of the charge remains confused. Anecdotal evidence suggests the persistence of a general belief that once a certificate for legal aid has been granted there will be no charge for ensuing legal assistance.


\textsuperscript{118} The Lord Chancellor's Legal Aid Advisory Committee 33,\textsuperscript{116} Legal Aid Annual Reports, 1983, para. 83 as reported by Davis, G., and K. Bader, 'The Legal Aid Clawback' (1985) Legal Action, April, 8.

\textsuperscript{119} Supra n. 109.
Secondly, the principle of equality between assisted and non-assisted persons in the field of matrimonial proceedings may be called into question. The rationale behind the principle is allegedly to prevent a substantial benefit to the unassisted person. It is argued that this fails to take into account the nature of matrimonial disputes as distinct from other civil actions in that:

"Gaining a part-share in the matrimonial home is not like a win at the races. It was theirs to start off with. The matrimonial home is exempt from the financial assessment for legal aid at the start of proceedings for a very good reason: that is, that a roof over one's head is regarded as such a basic requirement that it is excluded from any calculation of expendable resources. It is therefore illogical that it be brought into the net at the end."\(^{120}\)

It must also follow that the £2,500 exemption is an irrational anomaly. The exemption amount should realistically reflect the cost of replacing the home if it is to exist at all.

Those critical of the statutory charge understand the principles behind its creation. Their concerns are that its application, in some circumstances, cause:

"...injustices which more than outweigh any good that is achieved."\(^{121}\)

Better methods of avoiding wasteful expenditure of public funds need to be explored. People on low incomes should not have to finance necessary litigation through a charge on their living accommodation.

The existence of the Legal Aid Fund has introduced a third party into what was formerly a one-to-one relationship. It follows that both the fund and the client:

"...look for protection to the good sense of the practitioner [which] must necessarily impose upon them high standards of trust and care".\(^{122}\)

\(^{120}\) Davis, G., and K. Bader, 'The Legal Aid Clawback' (1985) Legal Action, April 3.

\(^{121}\) Ibid., 8.

\(^{122}\) Booth, J., in Evans v Evans [1990] 1 FLR 319.
The practitioner is forced to apply the test propounded in *Manley*¹²³: would a solicitor acting for a private client reasonably put money beyond his reach by so constructing an order that it would be impossible for the court to impose a charge upon it? Upon the application of this test it must be concluded that it would be rare indeed for such an order to defeat the charge.

The dilemma remains:

"...avoidance by means of deploying professional legal skills based on an understanding of the law can easily overlap into evasion where the overdeveloped skill of the lawyer will then profit him nothing."¹²⁴

Moreover, the accusations that the application of the statutory charge is arbitrary across the range of civil litigation and often ill understood by applicants and solicitors, is not without substance.

### 3.17 Generally

The mechanisms presently in place to protect the Fund undeniably succeed in terms of securing many millions of pounds sterling for the Board.¹²⁵ However they are administratively cumbersome and open to error at best and at worst downright unfair for many unassisted litigants. In addition the legal aid practitioner is forced into the unenviable position, of attempting to serve the Board and the client. The present position is patently one of incremental and historical change through both statute and case law.

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¹²³ *Supra*, n.113.


¹²⁵ Contributions - £22,226,807

Costs (cash recovered) - £32,226,807

Statutory Charge

i) Total retained (Matrimonial) - £37,524,444

ii) Total retained (Non-matrimonial) - £13,359,089

As the criticism suggests, the evolution of legal aid fund protection has arguably resulted in a degree of inequity for some litigants involved in legal aid cases and muddled allegiance for the practitioner. Governmental pressure to restrain expenditure is likely to continue. The mechanisms for fund protection are to a great extent the tools of trade for implementing spending restriction. Further changes to these mechanisms would therefore also seem likely. It remains to be seen whether future change will make the system of civil legal aid more or less workable for the practitioner and more or less accessible for those it was designed to assist.

In addition, it may be argued that, having regard to the requirement of contributions and the operation of the statutory charge, the civil legal aid scheme operates for many as state-sponsored after-the-event insurance scheme. If this is true, legal expenses insurance is simply a transfer to a different risk-funder. This raises certain issues. Should the admissibility criteria be defined differently bearing in mind the assisted person is, in effect, a risk carrier? It is arguable that the lawyer should share or carry the risk, as is the case with existing conditional fee arrangements. Under legal aid, the lawyer is protected from any risk, whatever the outcome their fees are certain to be paid. In the circumstances, the lawyer is insulated from criticism that legally aided clients are dealt with differently from fee-paying clients. There appear to be good grounds to review the risk carrying of legal aid cases with the lawyers at least sharing in that risk with the Board.

Given that the amount recovered is only a fraction of total expenditure on civil legal aid (see fig. 1 at the end of Chapter 2) it follows that the taxpayer is largely responsible for bank-rolling the scheme. If this is so then it would only seem fair that the same taxpayer has access to civil legal aid should the need arise. Unfortunately for the majority of taxpayers, the amount they pay into the civil legal scheme fails to act as an insurance payment should they have a civil legal dispute. The current level of the means test excludes completely from the scheme the majority of those funding it.
In the circumstances it is not surprising that the same taxpayers are being lured by the attraction of legal expenses insurance which provides a degree of certainty of cover currently unmatched by civil legal aid. In addition, reform of the existing civil legal scheme may become politically acceptable if at the same time it secures a better deal for the majority of the tax-paying public.
PART TWO
Chapter 4

Civil Legal Aid and The Practitioner

This section of the study analyses whether legal aid in its present form provides a value for money product. Should it fail to do so, reform is to be encouraged if it is not later to be demanded. Moreover, if the assisted person and the practitioner regard the current statutory provision as unsatisfactory, reform is necessary and overdue. Later, in Chapter 5, the ‘franchise solution’ is considered.

4.1 The Legal Aid Practitioner - A Profile?

It has been said that the stereotypical legal aid lawyer is the high street family solicitor and barrister in private practice.\(^1\) It is however questionable whether this is typical.

One kindly approach to the schemes' practitioners is to suggest merely that legal aid work is done by specialists whose firms are geared to high turnover and who have low cost staff doing most of the work,\(^2\) or to small firms whose overheads are low enough to show some profit. It has also been suggested\(^3\) that there are many middle-sized firms who are doing a fair amount of legal aid work without knowing that they are making a loss. This is perhaps difficult to accept since it implies that the Government tacitly relies upon the indulgence of hard working misguided lawyers for the administration of the legal aid scheme, or alternatively, it is due to the poor accounting in such firms that the scheme benefits.

The plain fact is that despite the unity presented by lawyers in defending the legal aid scheme, it remains highly unusual to find a senior barrister or a senior partner in a large firm of solicitors actively engaged in legal aid work or promoting it. It does seem that collectively the profession is engaged in a defence of legal aid without giving due

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\(^{1}\) See for example: Hughes, 'Poor Law - Is Legal Aid Worth Fighting For?' [1991] Sol J 135 (23) Supp IV-V.

\(^{2}\) See: Thompson, P., 'The Legal Aid Board': A Decent Client?’ (1990) 87/2/28 LSG 19.

\(^{3}\) Ibid.
consideration to alternatives, displaying a conservative 'because it's here' attitude. One critic openly states that the situation is far more sinister:

"...and lawyers themselves of all types have co-operated and colluded in ensuring that it [the Legal Aid Scheme] gives the poor a rotten deal".4

This implies that generally it is badly managed and inappropriately delivered. That is not to say that centres of excellence do not exist but where they do they are rare, since the system itself places no premium on experience or expertise in its current form. It has also been said that when large firms state that they do not specialise in legal aid work it actually means that they have made a conscious decision not to. So who does undertake such work? It appears that legal aid is part of the training ground of the law, just as it was at the turn of the century. Newly qualified lawyers are seemingly the mainstay of the scheme, working within it energetically and enthusiastically until lured away by a more lucrative attraction.

Arguably, requiring the lesser lights in a firm to undertake such work leads to a second class service.5 Even mathematically this argument may not be sound. For example if the trainee solicitor is paid £30 per hour and takes that time to do the work a seasoned practitioner paid £60 an hour can do in 15 minutes, it is false economy to say the case must be conducted by the trainee solicitor. It is probably true that the profession has travelled too far down the cheap service road to reverse this trend. It is therefore concluded:

"...that the end of the road is a fragmented service provided by the junior and less able staff."6

Such an abrupt conclusion is over-simplified and does not amount to the profile of the typical legal aid practice. Whilst junior staff may be used in many instances it is probably impossible to arrive at a definite profile by virtue of the diversity of practices and practitioners within the profession itself. However, it would seem that the Board and

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4 Supra at n.1.
5 See, for example, the editorial comment in 'Spring will be a little late this year ...' [1991] NLJ 225.
6 Ibid.
the Lord Chancellor's Department are satisfied that a profile of legal aid practitioners readily emerges from legal aid fund payment statistics. Legal aid work is in fact concentrated within a small number of practices. Perhaps it is more important to know where legal aid work is being undertaken than who actually serves the interest of the client within that practice? It does certainly appear evident that the assessment of civil legal aid claims is of little use in forming an individual practitioner profile even if, in fact, that were possible.

What is both surprising and interesting is why, if it can be said that legally aided clients rarely get the benefit of continuity or experience, the legal profession is so aggressive in its defence of change?

An insight into the underlying reasons for such opposition to change can be seen by an analysis of the Lord Chancellor's Department suggestion in 1986 to divert Green Form money to advice centres. The suggestion was put forward for economic reasons. The Green Form scheme would cease to be the sole concern of solicitors and the profile of Citizens' Advice Bureaux-type centres would be raised to a more professional level. In principle, lawyers viewed this situation as unacceptable. They were also particularly concerned that this would necessitate state payments to 'unqualified' advisers or their employers. The view of the profession generally was that the civil legal aid scheme could not survive such fundamental change. There emerged, in an extreme form, a consensus to defend the existing legal aid system 'warts and all', which proved successful in the short term.

Critics suggest the defence of the existing system was motivated by self-interest on the basis that the:

"...legally aided divorcee of today would be coming back next year for a conveyance or will to be drawn".8

And that in truth:

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7 For more detail see Chapter 5 at 5.3.
8 Supra n.1.v.
"...the defence of legal aid is completely distinct from the fight for justice for ordinary people. The legal aid scheme has marginalised their needs and straight-jackets every effort to fulfil these needs, inside and outside the scheme, into a second-rate, half-baked service".  

The extent of this criticism is probably unfair in light of the fact that research into Green Form advice and assistance undertaken in 1988 indicated a high level of satisfaction in its operation by solicitors. However the strength of such sentiment implies that the system must be changed to give the legally aided client a better deal. One commentator has summarised the position thus:

"...I believe a point will come when more firms are giving up legal aid work than are taking it on, indeed we may have passed that point already. When the service to the public begins to break down, the Board and the profession will have to make some hard choices."

In fact, the Franchise Development Group of the Legal Aid Board confirm that the number of solicitor’s offices in England and Wales undertaking legal aid work to be consistent year on year. In a telephone conversation with the writer in January 1999, they maintained that statistics over the last decade indicate some 11,000 solicitor’s offices undertake legal aid work and they have no indication this figure is in decline.

The former Lord Chancellor, Lord Mackay, was readily in pursuit of changing the existing system. Lord Mackay openly called for greater efficiency in the handling of legal aid cases. He suggested solicitors should recognise that most cases involve more standard handling features than differentiating ones; that work should be distributed at the right level in the practice and that solicitors should ensure the price paid for services was reasonable for both the tax-payer and the provider. With these ideals in mind the concept of franchising was formulated. Franchising represents a key development of the system for the delivery of state-funded legal services and is therefore dealt with in detail later in this study at Chapter 5.

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9 Ibid.
In so doing, the focus of attention has shifted away from an analysis of individual practitioners and the level of service and value provided for their clients. The key concern is how the legal aid paymasters can secure service and value from the practices charged with the delivery of legal aid.

4.2 Cost Concern

When private lawyers are being paid for their work by an organ of the state, it is perhaps not surprising that conflict on the issue of payment arises. What is more surprising is the intensity of conflict that has arisen since the beginning of the 1990s with regard to the matter of remuneration for civil legal aid work and that it appears to have been led by the former Lord Chancellor Lord Mackay’s implementation of government policy. Unashamedly, Lord Mackay, on behalf of the Government, demanded of the legal profession a greater level of efficiency with a view to economy. Cost, has recently dominated the review of the delivery of civil legal aid. Now most of the:

"... legal service sector appears united against a mean 'market'-orientated anti-expenditure government to 'save' the legal aid scheme".13

Lord Mackay in seeking a review of civil legal aid clarified as one of his objectives that "...public funds ... are [not] wasted by poor advice or an inefficient service".14

Such comments are viewed by many practitioners as little more than a thinly veiled accusation that they have not, in meeting the needs of civil legal aid clients, provided the public purse with value for money. The state, through the Lord Chancellors' Department, is now actively hunting for an 'improved' and more efficient legal aid system. There is no hidden agenda. On the other side of the debate, many small-sized practices themselves now feel that, having for many years provided a highly professional service to legal aid clients for meagre or no profit, they have been rewarded only with a direct threat to their

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13 Supra, n.1.

very existence through the concept of franchising. Perennial complaints of lack of reward have been swept aside by a seemingly unstoppable review of the entire civil legal aid system, which is likely to change radically the delivery of legal aid in the future.

In the context of this study an assessment of the present system and perceived future problems of a state run civil legal aid scheme seem entirely relevant since the Law Society has stated that it:

"...does not believe legal expenses insurance can in the foreseeable future be an adequate substitute for the legal aid scheme, in whole or in part".

Implicit within this statement is commitment to a system destined to mutate through force of economic necessity and a system that many criticize as distinctly second-rate.

4.3 The Reward - General Perception

The Report of the Rushcliffe Committee published in May 1945 expressed an agreement with the profession that legal aid lawyers should receive adequate remuneration for their services. By design therefore, legal aid lawyers under the scheme would receive approximately 85 per cent of their normal fees. One of the main considerations influencing this chosen percentage was that state-paid legal aid lawyers would not have the bad debt concerns of ordinary private practice. By implication the legislation which shortly followed accepted such level of payment. The idealism behind these first intentions appears not to have been fulfilled in practice, particularly when assessing the situation over the last ten years.

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17 Ibid.
In practice, the fees paid to lawyers on legal aid have never been as high as those that could be charged to privately paying clients for the same type of work.\textsuperscript{18} To this extent it may reasonably be argued that:

"...legal aid has always been a second class service with a Poor Law, or charitable, element".\textsuperscript{19}

That said, it does not automatically follow that the private practitioner in the knowledge of receiving less remuneration will pursue his client's goal with less effort and enthusiasm. Furthermore, it would seem that it is only in the past ten years that any government has sought directly to abandon the principle that remuneration should be the same or similar to private work. In March 1986 evidence of this contention came in the form of the Lord Chancellors' Department trying to impose fees for criminal work which both sides of the profession claimed were in breach of the statutory obligation to provide fair and reasonable remuneration. The Law Society and the Bar started proceedings for judicial review that were eventually settled.\textsuperscript{20}

In 1987 it was stated in the Legal Aid White Paper:

"The Government does not consider that the rates for legally aided work should necessarily be the same as those for privately funded work".\textsuperscript{21}

In so doing it was argued that the principle of a second class service appeared to be confirmed. The Conservative Government maintained rates could be less by application of the economies of scale that necessitated review of the system of the delivery of legal aid.

The White Paper proposed a wider introduction of what were termed 'standard' fees. These would pay lawyers for particular items of work rather than, as was the custom in

\textsuperscript{18} See for example, "Is a Legal Aid Practice Possible?" (1978) Legal Action, September, 205.

\textsuperscript{19} See for example: Hansen, O., 'A Future for Legal Aid?' (1992) 19 J Law & Soc. At p. 90.

\textsuperscript{20} The Government paid the legal costs. See generally, 'Criminal Legal Aid Fees - Law Society Settles Terms with Lord Chancellor', (1986) 83/1 LSG 1022.

the private sector, according to the time taken for the work to be completed. The legal profession opposed such introduction and instead was desirous of limits on increases at no less than the rate of inflation.\textsuperscript{22} There followed claims from both sides of the profession, but more particularly solicitors, that lawyers were giving up legal aid work because it was becoming increasingly uneconomic.\textsuperscript{23} In 1986, following some original sample research undertaken by the Legal Action Group, 206 solicitors responded to a distributed questionnaire. The findings indicated that only 1.5 per cent of solicitors considered abandoning legal aid work completely. 7 per cent were thinking of cutting it down "considerably" and 21 per cent "moderately". Overall there was a positive indication that 68 per cent were not thinking of cutting down at all.\textsuperscript{24} The impression that lawyers were leaving legal aid work in 'droves' therefore appeared to be misleading.

Later in 1989 the Law Society Research and Policy Planning Unit undertook a more comprehensive survey. It was found that a majority of practitioners generally perceived legal aid work as their least profitable work or loss making.\textsuperscript{25} The figures disclosed by the research indicated that 42 per cent of firms stated that legal aid work only broke even and 18 per cent said that such work made a loss. More positively, and against the general feeling manifested by the journals of the profession, 35 per cent said that the work was fairly profitable and just under 2 per cent found such work very profitable.

However, the bald conclusions of the report were striking:

"...ninety per cent of firms considered both individual non-legally aided client work and company client work to be profitable, but only 37 per cent of legally aided client work was thought to be profitable".\textsuperscript{26}

\textsuperscript{22} Further to this counter proposal see generally, (1989) 86/1 LSG 22 March, 38.

\textsuperscript{23} Many legal journals around this time provided evidence of such claims. For example see: (1987) 84/1 LSG 454; (1989) 86/1 LSG, 22 March, 4; [1991] NLJ 226; \textit{The Times}, 13 December 1990.

\textsuperscript{24} It should be noted that the Legal Action Group statistics did not categorize legal aid work into civil and criminal. However for the purpose of this section of the paper the general intentions of the solicitors canvassed in the study is of relevance. The full findings of the study were reported in: (1986) \textit{Legal Action}, October, 8.


It was clear that categories of work such as residential conveyancing and probate work were subsidising legally aided client work.\footnote{27} Once more solicitors were found not to be planning en masse to reduce legal aid work. They did generally anticipate that in the near future legally aided clients would become a less important source of fees for their practice. The overall picture therefore, was that whilst undue credence should not be attached to anecdotal evidence of lawyers abandoning legal aid work, they were generally far from satisfied that it was profitable and most unsure that in the future such work could sustain a practice.

4.4 The Legal Aid Board

4.4.1 Payment

In the year 1995-96 the Board dealt with 372,611 civil legal aid cases and paid out to legal aid practitioners £882,580,360 at an average cost per case of £1,686.\footnote{28} Following the eligibility changes, volumes of certificates began to decline in the first quarter of 1993-94, but numbers of bills paid did not start to show a corresponding decline until the second half of 1994-95. Since then the Board states that the underlying trend has been obscured by the recoupment exercise carried out during 1995-96 to close outstanding case records. The exercise produced a number of claims on older cases where solicitors had previously received payments on account or, in some cases, had failed to claim for work done. As a result, the numbers of bills paid during the year 1995-96, showed an increase despite the decline in certificates issued throughout 1993-94 and into the early months of 1994-95. The number of applications received each year appears to have levelled off after the initial impact of the eligibility changes in April 1993.

\footnote{27} Ibid.

\footnote{28} These figures are taken from The Legal Aid Board Annual Report 1995-96, HMSO, 1996, 68.
In 1992-93 it was claimed in respect of the time taken to process civil legal aid applications from receipt in the area office to refusal, issue or offer of a certificate, that the national targets of processing 60 per cent of the same within 2 weeks and 85 per cent within 6 weeks were met.29

Furthermore, figures compiled in that same year maintain that in respect of the time taken to process civil bills from receipt in the area office to payment, 74 per cent were taxed and assessed within 6 weeks.30 The Board stated:

"As we develop our computer systems during the coming year we will be reviewing methods and timing of payments to see if it will be possible to improve upon this targeted level of performance either during 1993-94 or in subsequent years".31

In this respect the 1992-93 report made impressive reading. Whilst there is no reason to dispute the figures themselves they would appear to be at odds with the findings of legal aid practitioners. Evidence is mainly anecdotal and yet a pattern does emerge. Most problems with payment arise when many elements of the Solicitors Remuneration Order occur including value, urgency, a proliferation of documentation, a mixture of difficult legal and factual issues and great importance to the client. Such cases could quite typically be a commercial dispute, a partnership action, building dispute or a landlord and tenant case, which is all common fare for the legal aid practitioner.

All too often it is reported on the pages of legal journals that there has been untoward delay in receiving payment since a legal aid certificate was granted.32 In many cases such delay can be as much as 18 months.33 This delay often has a composite reason due to the time it takes a costs draftsman to prepare large and complex bills where large amounts of

30 Exceeding the target set the previous year, 1991-92, by 9 per cent in spite of a 20 per cent volume increase. Note: after The Legal Aid Board Annual Report 1992-93, HMSO, 1993, subsequent Reports provided no similar details.
31 Supra, n 29.
32 See: 'The Legal Aid Board: A Decent Client?' (1990) 87/2/28, LSG, 19, where Peter Thompson, partner with Turner, Martin and Symes, Ipswich, gives a personal comparison of the Legal Aid Board with privately paying clients.
33 Ibid.
documentation are in evidence and the need to check their accuracy, once compiled, with the lawyers involved. In addition it is not uncommon for High Court bills to reach taxation many months after they have been lodged. Once taxation has been completed a further period of time\textsuperscript{34} is often required for the work of an allocator to be completed. The situation has been described as the practitioner becoming a:

"...hostage to the generosity of individual civil servants; an institutionalised game of cat and mouse. One suspects that there might be a somewhat different reaction if those administering the system had their salaries delayed for similar lengths of time."\textsuperscript{35}

The total time delay is highly likely to diminish the value of the work done by the lawyer, when taking into account inflation and in cash flow terms such cases can be disastrous assuming the work is funded by bank borrowing. Many such legal aid cases run at a loss to the practice concerned when the time delay and the effect of inflation on the interest on the money are taken into account. In addition, the fees of the costs draftsman require deduction.\textsuperscript{36} In conclusion, where practitioners make the effort to analyse the costs and review such work as a single profit-making exercise, that they begin to question the merits of acting for legally aided clients.\textsuperscript{37}

The conclusions to be drawn from such practitioner experience are that the Legal Aid Board's analysis as detailed in section 4.4.1 above, is at best one dimensional and at worst a statistical smoke-screen which fails to address a very real problem of delayed payment. Clearly the time taken to process civil legal aid bills from receipt takes absolutely no account of the work and time involved on preparing and taxing bills for processing. The perception of timely and responsive payment (as presented by the Board) does not reflect the reality of the situation. In short, whilst practitioners generally agree that the Board

\textsuperscript{34} Typically such a period is a matter of weeks not months.


\textsuperscript{36} Typical cost being 6% of the profit costs as drawn.

\textsuperscript{37} See for example Ward, D., 'Despondency or Hope?' (1990) 87/2/23 LSG 12.
cannot be blamed for the antiquated machinery of the 'taxation' of bills, it does not pay the lawyer quickly.

4.4.2 Payment on Account and Interest Received on Costs

In its defence the Board maintains that the problems of delay are provided for by payments on account and interest received on costs in civil legal aid cases. The workings of these provisions are worthy of assessment since once more practitioners complain as to their practical ineffectuality. 38 Many take the view that the problem lies with the rules governing the administration of such facilities with some suggesting that:

"...for solicitors undertaking long-running cases on legal aid, they [the rules on payment on account and interest received on costs] are absurd to the point of farce." 39

It is quite foreseeable that a complex piece of civil litigation such as personal injury or medical negligence can take three to five years to complete. Often, this has little to do with the efficiency or competence of the solicitor involved but much to do with the legal formalities such as discovery, expert evidence and calculation of damages. Listing for a hearing upon application may be a year ahead in the High Court. It should be noted that counter to this assumption is the belief expounded by some which suggests the style of the litigator can contribute to time delay, inefficiency and in some cases a less desirable result for the client. 40 It is argued an over-conciliatory approach and an unwillingness to enter the courtroom fails to focus the opponent’s attention on either settlement or trial.

Presently there are two methods whereby solicitors may claim payments on account. Firstly under regulation 100 of the Civil Legal Aid Regulations 1989 a solicitor can claim 54 per cent of costs incurred on the first, second and third anniversaries of the legal aid certificate being granted. After three years there is no further provision. It is argued that

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38 As an example of similar complaints see generally: Allen, P., 'Pure Farce' (1992) 89/3/33 LSG 2.

39 Ibid. Note: Patrick Allen is a Partner with Hodge, Jones and Allen.

this rule, which is supposed to encourage fast, efficient litigation, penalises solicitors with genuinely long-running cases.41

Secondly, under regulation 101(1),42 a solicitor may claim a hardship payment if the proceedings43 are twelve months old and an order for taxation is unlikely within the next 12 months. Financial hardship must be proved with the result that most solicitors become reliant on the support of their bank manager. This system of using the date of a likely order for taxation is heavily criticized44 as unrealistic and arbitrary since with the inherent delays in the taxing system payment may not follow for anything up to two years after the taxing order. The result is that the practitioner can go up to three years without payment.

The plight of solicitors should perhaps be compared with that of barristers undertaking civil legal aid work. Counsel, merely have to prove that they have not received payment within a six month period after an order giving the right to taxation. Once this is done they can claim 75 per cent of their fees.45 In addition, it should be noted that draftsmen's costs do not apply to counsel.46

Turning now to the issue of interest received on costs, legal authority47 states that the interest belongs to the client. Accordingly, solicitors were advised to draft their terms of business to reflect the equity of the situation. In theory, the client should receive interest where costs have been paid in advance and the balance should be paid to the solicitor or barrister who had suffered delay in payment. Legal aid cases do not appear to reflect this

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41 Supra, n.38.
43 Formal court proceedings need not have been issued.
44 See articles by: Patrick Allen - footnote 38
Peter Thompson - footnote 32.
45 By virtue of regulation 101(2) Civil Legal Aid Regulations 1989.
46 Counsel do not pay for their fee note and generally have the taxation procedure administered for them free by solicitors and the courts.
47 See Hunt v R M Douglas (Roofing) Ltd. [1988] 3 All ER 823.
theory since the interest belongs to the Board. Invariably this is then given to the client to eliminate the unrecovered element of legal aid costs, the statutory charge, with any money remaining being kept by the Board.\textsuperscript{48} Interest is not paid to the solicitor or to counsel despite the fact that the interest is calculated precisely according to how long they have not been paid. The result, it seems, is that delay profits the client and the Board and generally disadvantages the practitioner. One legal aid solicitor observes:

"...it is becoming standard practice for insurers in personal injury cases to pay costs on account before taxation to stop the interest running at a punitive 15 per cent."\textsuperscript{49}

It would therefore appear on the evidence of legal aid practitioners that remuneration for civil legal aid work is more often than not barely enough to cover the costs incurred, invariably delayed and the provisions put in place to alleviate these very problems are often of no significant assistance. That said, a great volume of such work is undertaken, presumably by many solicitors who for their own reasons find such work attractive and worthwhile. Despite all the criticism, it is difficult to conclude other than there must be some benefit for many practitioners in servicing civil legal aid.

\subsection*{4.5 Conclusion}

In many respects it is evident that the legal aid system has failed to provide either a proper service to its clients or adequate and timely reward to its practitioners, and yet practitioners have continually defended it. The reasons for the legal profession’s defence of the existing legal aid system are open to conjecture. Such reasons may include blind conservatism, secret profiteering or an honourable desire to maintain a public legal service within the infra structure of the welfare state. Whatever the reason the current system of legal aid is now commonly recognised to have failed to adhere to the principles upon which it was founded in 1949.

\textsuperscript{48} Supra, n 38.

\textsuperscript{49} Supra, n 38.
Compound this with a strong political will, manifested through the arm of the Lord Chancellor's Department, to increase efficiency and to save cost in the administration of a public legal service, and the system must necessarily change through force of pressure. In a sense, the profession's dogged adherence to an aging and increasingly ineffective scheme has served only to promote the necessary changes that must now be implemented. Some see a grim future for legal aid if the problems of productivity and cost are not tackled successfully.\textsuperscript{50} If resolved, albeit in an altered state, a future begins to unfold. If not resolved, the future looks set to belong to those practitioners and individuals that have formed an alliance with the legal expenses insurance industry.

\textsuperscript{50} John Pitts, Former Chairman of The Legal Aid Board as reported, (1992) 89/2/25 LSG 2.
Chapter 5

Franchising - A Better Deal?

Franchising represents a significant development in the provision of state-funded legal services. It requires further analysis within the context of this study for several reasons. Firstly, it recognises the failures and inefficiencies of the old system and proposes a solution. Secondly, if the franchising model is successful, further demand for reform of the civil legal aid system may either, decline generally or continue with diminished credibility. Finally, franchising is essentially a contract between the funder and the provider of legal services and as such represents a significant shift away from the principles upon which civil legal aid was founded. The notion of a contract between the funder and the provider of legal services is rooted in the private sector and mirrors the relationship between legal expenses insurers and private practitioners discussed in the next part of this study.

5.1 Franchise - By what Definition

Most people's perception of a franchise equates to that of high street fast-food outlets or specialist clothing retailers. Such stores provide the customer with a predictable and similar range of goods throughout the county, thus being consistent. The customer knows what to expect and the franchisee knows what he is expected to provide.

A legal aid franchise is a different animal. In essence it is a quality-controlled contracting arrangement for supply of legal services within certain categories of law, which allows the taxpayer to get the best value possible in relation to the provision of the service. The current legal categories are consumer and general contract, crime, debt, employment,

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1 As per Lord Mackay, 'Mackay's Mission' (1993) 90/1/11 LSG 4.

2 Ibid., 5.
housing, immigration, family and matrimonial matters, personal injury and welfare benefits. The objectives of franchising are to provide a quality service to all those with an interest including the client, the Board and the profession. Additional objectives are to provide access throughout England and Wales, efficiency and value for money, representation where necessary and the capacity to respond to changes in the need for and delivery of legal services.

In order to achieve these objectives, franchises are granted by reference to three sets of criteria. First the Board will look at a firm's basic systems of work and management structure. Second, it will monitor the quality of work submitted to it by the practitioner. Finally, it will seek to monitor the quality of work undertaken for clients.3

The intended method of achieving the objectives gives a clear indication as to the difference between the popular view of a franchise and the Board model. In the former a potential franchisee purchases a franchise which has in place an entire management and administrative support structure which enables and facilitates quality assurance. A legal aid franchise is imposed on an existing structure which may not be adequately equipped to ensure quality, even if such a concept were easily defined. A legal aid franchise must therefore actively assess existing practice management standards. It is this interface which clearly indicates to practitioners that the Board seeks quality control.

The Board's response to the allegation that they seek quality control is that it is not their intention to dictate business decisions or other decisions taken by the profession. It is their intention to see that arrangements are in place that will give the Board certain assurances about the level of service the client will receive.4 Further, the Board believes that it is their right, as a bulk purchaser of legal services, to carry out this role.5 Others counter by suggesting the Board is unfit to set such franchise standards being potentially

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5 Ibid.
tainted by a government that speaks of the interest of the consumer while remembering all too clearly the demands of the Treasury.\textsuperscript{5}

It can therefore be demonstrated that the popular conception of a franchise does not sit easily in the context of providing legal services. That said, one clear conclusion does emerge from the implementation of the franchising scheme and that is a move away from fee indemnity to a contract fee for legal services, which perhaps in itself, is a reasonable objective for a legal aid franchise.

\textbf{5.2 Existing Inefficiency}

Given that any enterprise will only have a successful future if those who fund it remain willing to do so, it must also follow that willingness will decline if the funders perceive that the activities they are paying for are not being well managed.\textsuperscript{7} According to Board statistics it is evident that the average costs of legal aid cases are increasing well above the rate of inflation. If every year more resources are required and productivity declines it can only be a matter of time before the patience of the funders runs out.

The choice for those involved in the administration of legal aid is stark, either use the limited resources more effectively or concede that the legal aid scheme will become progressively limited. Fund management by the practitioners themselves would therefore appear to be an essential requirement when faced with this situation. At the same time most lawyers are not skilled managers which directly leads, albeit more often than not unwittingly, to an almost unworkable level of inefficiency.

Solicitors have been heavily criticized\textsuperscript{8} for failing to become more efficient over a period when their turnovers have been rapidly increasing. And it has been argued that radical

\begin{itemize}
  \item\textsuperscript{5} For example see generally, the comments of The Legal Action Group.
  \item\textsuperscript{7} See: Pitts, J., "The Future For Legal Aid" (1992) 89/2/25 LSG 2.
  \item\textsuperscript{8} See for example: Pitts, J., the former Chair of The Legal Aid Board (1992) 89/2/24 LSG 3.
\end{itemize}
changes are needed to improve their management if the cost to the tax-payer is not to rise above the growth of national income.\textsuperscript{9} Since legal aid turnover has more than doubled in the five years up to 1996-7 it is perhaps surprising that greater efficiency and lower average costs have not resulted. At the same time the Board does appear to have demonstrated an ability to improve substantially the costs and effectiveness of its own activities.\textsuperscript{10} Moreover, this efficiency is continuing, the Board expecting a further reduction in administrative costs year on year. It also claims that as a result of such savings, performance in key areas of the operation, far from becoming a casualty, actually continues to improve.\textsuperscript{11}

Indeed, the Board not only trumpets its success, it believes it can lead the way in improving the economic effectiveness of the whole scheme.\textsuperscript{12} There appears to be substance in such claims. Board Area Offices are actively seeking accreditation under BS5750 believing it will make them more efficient and demonstrate their commitment to providing a continuously improving quality of service leading to a greater consistency in decision making.\textsuperscript{13} John Pitts, the former Chair of the Board has stated:

"I cannot believe it is impossible for the other parts of the system to improve their management. The whole system is not well managed. In fact the whole system is not managed at all."\textsuperscript{14}

He suggests that a great part of the on-going problem is that the system consisted of a collection of autonomous bodies each dealing with their particular areas with no one body really 'getting hold of it'. Evidently, the concept of franchising is intended to

\textsuperscript{9} Ibid.

\textsuperscript{10} The LAB claims that the average cost of processing applications and bills has fallen by over 18\% in the last three years to 1997. Source: \textit{Legal Aid Board Annual Report 1991-92} HMSO, 1997.

\textsuperscript{11} Ibid.

\textsuperscript{12} See for example Pitts, J., 'The Future For Legal Aid' (1992) 89/2/25 LSG 2.

\textsuperscript{13} Accreditation of the Leeds area office has now been completed. Source: \textit{Legal Aid Board Annual Report 1992-93}, HMSO, 1993, 9 2.19.

\textsuperscript{14} (1992) 89/2/24 LSG 24 3.
reverse perceived existing mismanagement, as quality assurance is implemented nationally.

Interestingly, such remarks openly derogatory as they are in respect of legal aid practices, have merely drawn a dismissive response from The Law Society.\(^{15}\) They regard the former Board’s Chairman’s approach as the application of crude models from manufacturing industry\(^{16}\) that falsely assumes that they are directly applicable to the provision of public legal services. The Law Society denies that there is any connection between the increase in the average cost of cases and practice inefficiency, clearly the two parties cannot reach agreement on the issue of inefficiency, what seems obvious to industrialists is viewed as unrealistic by private practice.

The conclusion may possibly lie in middle ground. If it is correct that many solicitors’ business practices are inefficient it may be argued that the Board has done little to encourage business efficiency among them. For example good competent work is not being rewarded and therefore, quite logically, inexperienced staff are being left to deal with legal aid cases.\(^{17}\) It is claimed that a great number of difficulties occur from a minority of solicitors who are undoubtedly inefficient.\(^{18}\) This is corroborated by the fact that some 20 - 30% per cent of applications and bills submitted to the Board have to be returned because they are incorrectly completed or solicitors fail to inform the Board immediately where a statutory charge occurs.

It is largely the need and desire to target this minority of inefficient practices that has led to franchising, since it is the first step towards a system in the future which will have legal aid provided by 'approved suppliers'.

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\(^{15}\) Ibid. See the comments of Russell Wallman, Head of Policy Planning at the Law Society.

\(^{16}\) Note: John Pitts is the former Chairman of the Tioxide Group of Companies.

\(^{17}\) See the comments of Devonald, L., (retired Legal Aid Board Director) [1992] Sol J 910.

\(^{18}\) Ibid.
5.3 Targeting

Originally, the Board's franchising proposal, supported by the Lord Chancellor's Department, was based on the premise that some firms, a small minority, are committed to legal aid work, whereas the majority do very little or no legal aid work. Statistically the premise had good grounds. In 1978-79, 48.75 per cent of legal aid fund payments went to 9.75 per cent of solicitors.\(^{19}\) 72 per cent went to 22.51 per cent of the offices. Many of those firms received payments equivalent of the total gross fees of a small practice.\(^{20}\) Conversely, nearly two-thirds of solicitors on the legal aid list received less than would have been needed to pay for one full-time assistant solicitor.\(^{21}\)

These figures, which are comparable with any other year, indicate quite clearly that legal aid work is concentrated within a small number of practices.\(^{22}\) More recently these findings have been confirmed and the tendency appears to be towards an even greater concentration.\(^{23}\) The Law Society's Research and Planning Unit made findings in 1989 that indicated only 11 per cent of firms doing legal aid work obtained 50 per cent or more of their total fees from that client group.\(^{24}\) Furthermore, firms that derive a high volume of fees from legal aid expect to do more of that type of work in the future.\(^{25}\)

It is worth noting that whilst certain firms concentrate on legal aid work, Law Society statistics for 1996-97 indicate 71 per cent of all solicitor's offices in England and Wales receive a civil legal aid payment. Access to civil legal aid via this proliferation of offices should not be ignored.

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\(^{19}\) In fact, to those who were registered on the legal aid list.

\(^{20}\) That is, such firms received in that year more than £100,000 from the legal aid fund.

\(^{21}\) Less than £5,000 per annum was paid to 60.81 per cent of listed solicitors. These figures are taken from the Law Society and Legal Aid Advisory Committee, *29th Legal Aid Annual Report 1978-9* (1980) 43.

\(^{22}\) Note also that such figures only show proportions of the firms on the legal aid lists and do not reflect firms that undertake no legal aid work.


\(^{24}\) *Supra* n. 21, 63.

\(^{25}\) *Supra* n.21, 68.
It is also quite foreseeable that the future holds a further concentration of legal aid work as the effects of the loss of conveyancing and probate work following The Courts and Legal Services Act 1990 become apparent. This is so, since there is a common belief that much of the legal aid work previously undertaken by medium and large-sized firms is sustained by private fees from these two areas of the law. It is logical to conclude that as conveyancing profits are squeezed, whether by reform or recession or both, the number of general practices prepared to undertake legal aid work should contract.\(^\text{26}\)

Some argue\(^\text{27}\) that what is now being witnessed is the breakdown of the homogenous legal profession. As the old-style of the profession changes primarily in the private sector it in turn exposes more clearly the outlines of the public sector legal profession.\(^\text{28}\) Couple this with the rising costs of providing state funded legal aid and the cause of the present crisis emerges. An opportunity has presented itself for the fundamental reform of public legal services.

It should be noted that for franchising to be a progressive and fundamental reform it should seek to avoid existing geographical distribution of solicitors which many argued never really matched the needs of legally aided clients. Studies in 1973\(^\text{29}\) and 1986\(^\text{30}\) showed that distribution of solicitor’s offices varied enormously with a higher concentration of practices in the more prosperous owner-occupier areas, precisely the areas where civil legal aid practices are now, due to cuts in eligibility, of least use.\(^\text{31}\)

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\(^\text{26}\) Note: The Law Society’s Research & Planning Unit reported in 1989 that seven out of ten firms derived more than a quarter of their business from residential conveyancing, p.44.


\(^\text{29}\) Foster, K., ‘The Location of Solicitors’ (1973) 36 MLR, 153.


\(^\text{31}\) E.g. There was one office for every 2,000 people in Guildford and Bournemouth but only one for every 66,000 in Huyton in Liverpool.
Franchising, with its targeting of larger firms has therefore been criticized because it is viewed as a money-saving attempt to restrict the number of solicitor's offices able to dispense legal aid. To this extent, it fails the test of 'distributional justice'. Sir Timothy Chessells, current Chair of the Board has stated:

"We are aware of the need for even geographical coverage of franchising. We intend to concentrate on those areas with limited coverage at present."

### 5.4 The Concept of Quality

"An essential principle behind the franchising approach is that each party to the contract has a clear understanding of what the other party expects to deliver and each has a commitment to deliver its own contribution."

This then, was the concept as expounded by John Pitts the former Chair of the Board.

That may be true and laudable but others argue that such intellectual expression was not the driving force behind the concept and that it is in fact driven by the desire for potential economic efficiency. In the words of the Lord Chancellor's Department the nub of the issue is that:

"... a very substantial proportion of legal aid work is distributed among a very large number of solicitors' firms, suggesting that a large number of solicitors are each handling quite small numbers of cases. Firms handling relatively small volumes of litigation are unlikely to be geared up to do it as efficiently as those whose turnover allows them to install the necessary support systems, develop expertise and take advantages of economies of scale."

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32 A concept put forward by Townsend, P., *Poverty in The United Kingdom*, London, Butterworths, 1979, 64, which refers to distributional equality of material resources.

33 Speaking at The Legal Action Group Conference - 'The Franchising of Legal Aid - Present Lessons - Future Developments' 26 June 1996. Also speaking at that conference and referred to later in this Chapter, Professor Avron Sherr, Sally Moore and Roger Smith.

34 As reported in (1992) 89/2/25 LSG 2.

In contracting with certain firms exclusively for either a geographic or subject area, the Board will be able to reduce administration costs because it will be possible to block-fund rather than pay on a case by case basis.

The former Lord Chancellor, Lord Mackay, was at pains to clarify that it was unthinkable that quality should suffer in pursuit of this goal. Indeed, he even presented The Law Society with a contextual definition:

"...quality does not mean an unreasonable striving for perfection. What it does mean is that the service provided should be of a standard that achieves the desired results in the most efficient way possible."  

The franchise system seems to have as its bedrock this particular definition of quality and the Legal Aid Board's proposals are an attempt to develop criteria against which 'quality' can be measured.

The franchising experiment was initiated by a pilot scheme carried out in the West Midlands between May 1990 and September 1992. The project involved the re-structuring of payment arrangements and the devolution of certain of the Board's powers to legal aid practitioners alongside the introduction of quality monitoring for organisations seeking to gain legal aid franchises. Monitoring of firms took three distinct forms. Firstly, would be a consideration of the firm's basic systems of work and management structure. Secondly, the quality of work submitted to the Board and thirdly, the quality of advice and assistance given to clients.

A number of powers were to be devolved on legal aid firms for example granting Green Form extensions, ABWOR applications and emergency certificates in certain

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36 From the text of the speech given by the former Lord Chancellor, Lord Mackay on October 24 at the Law Society Conference 1992. As reported in NLJ that year, October 30, 1505 - 1508.

37 Despite the terminology there was no exclusive arrangement and firms within the experimental area were not required to seek franchises to be able to practice legal aid.

38 For example: the quality of their bills and applications.

39 Mostly, through the use of client questionnaires.

40 Without limit, including authority for disbursements.
circumstances. Payment arrangements were also improved for the duration of the project. For example payments on account could be claimed each time the franchisee granted ABWOR, or an emergency certificate within the guidelines. In return the Board considered a number of points in relation to the practice for example; independence, facilities, reference sources, non-discrimination, experience in categories of work, specialist knowledge, training and client records.

Franchisee's bills and applications were monitored. The Board maintains that the reason was two-fold, to determine sufficient volume to justify the delegation of powers and to assess quality. Monitoring would typically last 6 months, thereafter the firm's application for a franchise was granted, refused or the period of monitoring was extended. This then, was the experiment; it should be noted that the terms under which the proposals for national implementation are to be administered differ markedly.

Two key issues emerge from the experiment which carry through to national implementation. That is that such a scheme necessarily requires the definition of 'legal competence' for its administration. This is quite clearly a potential battleground between the Board and the applicant franchisee. The Board is careful to attempt to define it in objective terms such as the development of quality criteria and quality standards generally, perhaps in the hope that this will reduce potential conflict. Their aim is to provide clearly articulated standards by which practising lawyers can judge whether their work achieves a satisfactory level of competence and to allow them the opportunity to adapt and improve.

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41 On condition that an application for a substantive certificate was made within seven days. Board guidelines were to be used.
42 Up to £150 each time.
43 Up to £250 each time.
44 This list is not intended to be exhaustive.
45 The intention being to apply an extension in marginal cases.
In the words of Professor Avron Sherr:

"Assuming legal competence is absolutely necessary in the provision of Legal Aid, there must be a standard below which is unacceptable. However, legal competence is difficult to understand and describe. The higher the level of bureaucratic specificity, the higher up the tower of Babel one climbs." 48

The Board seems to be all too aware that whilst promoting a quality standard, the standard must not be so high as to drive up costs.49 In so doing, they tread a fine line. Quality standards are to be defined by a series of quality criteria known as transactions that will apply to specific types of legal work. Satisfaction of the criteria will be a requirement of a franchise. Once again the legal aid practitioner is presented with a very particular definition of quality, one that contains potentially conflicting elements such as quality, competence and the pursuit of excellence. Further clarification is not readily forthcoming from the Board. It does seem, however, that the traditional view of quality as the highest attainable standard of performance or excellence is not the type of quality required for the purposes of a franchise. The definition is subtly different, meaning conformance to the customer's requirements or meeting the customer's needs, preferences and expectations.50 Additionally, it is the Board's intention that the quality criteria will be on an ascending sliding scale as the concept develops and there becomes an understanding of the approach both within the Board and within organisations.51

The profession, unsurprisingly, are reserved about such systems for quality assessment. It remains to be seen whether the claimed level of trust and understanding between the Board and participating firms survives the honeymoon of the pilot scheme. Should it not, national implementation may prove to be a hotbed of hostility between the Board and practitioners. Perhaps a more likely outcome is that those firms able to secure a franchise will be quite content to work within the parameters of the new scheme and those, mainly

48 Supra, n.33.
49 Supra, n.47, 6.
51 Supra, n.47, 6.
smaller firms, which become excluded will complain to deaf ears within, lacking the muscle to change the inevitable. Sally Moore, Chair of the National Franchise Users Group provides a more positive experience:

"The Legal Aid Board is to be credited thus far, in assisting practitioners to achieve the required standards to obtain a franchise. Local offices have been helpful and have not, as envisaged, sought to trip-up practitioners."
However she cautions:

"Quality must not be abandoned in favour of price."\(^{52}\)

### 5.5 Criticism

In the main, the franchise concept is criticized by some practitioners\(^{53}\) for, as they perceive it, heralding the end of legal aid work by the sole practitioner and the smaller firms\(^{54}\) who they believe provide the bulk of high street legal services. The 'end' can be defined in one of two ways. Firstly are such small firms going to be excluded from the franchise system and secondly, if not, is the cost of meeting the required quality standards going to be prohibitive.

On the issue of exclusion, Law Society statistics for the year 1992 indicate that there exist over 8,000 practices in England and Wales. Of that number, some 6,500 have fewer than four principals. Very few of the largest firms do any quantity of legal aid work. Legal aid clients are presently very likely to be serviced by the smaller firm. The Board had the intention of granting around 2,000 franchises\(^{55}\). Statistically therefore, a large proportion of franchises are likely to be awarded to smaller firms.

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\(^{52}\) *Supra*, n 33.

\(^{53}\) See for example Hodge, H., 'Nasty and Significant Changes' [1992] NLJ November 6, 1532. Henry Hodge, of Hodge Jones and Allen, is a member of the Council of the Law Society and now a member of the Legal Aid Board.

\(^{54}\) Commonly defined as those firms with two to four partners.

\(^{55}\) 1300 were granted by July 1996 and by the end of 1997 the 2000 mark had been exceeded.
Whether such firms would meet the required quality standards remains to be seen. There is a fear that:

"Smaller firms will not always be able to afford the investment in management that a franchise requires and that the incentives on offer from the Legal Aid Board do not fully appreciate the administrative burden placed on smaller franchisees." 56

It is argued that the method of competence assessment to be adopted by the Board will in fact demand that such small practices operate like small companies, 57 having access to and designing strategic management plans, performance management and appraisal systems, cost control systems, budgets and cash flow forecasts. 58 In such practices there is little or no management on this model. Indeed, it is presently seen as one of the advantages of staying small that such extensive management can be avoided. Ironically:

"...being business-like and adopting good management systems as now advocated by the Board has already led most legal practices of any size to reject legal aid work as an activity". 59

On this view the act of satisfying the Board's management requirements is likely to lead to some practices recognising the financial mistakes they are making by continuing to give a legal aid service. Pursuing this opinion to its logical conclusion, whilst small firms may be able and willing to adjust to the Board's requirements it may lead them to pull out of legal aid altogether.

The words of the former Lord Chancellor Lord Mackay also indicate quite clearly, it is the smaller firms that have the most to fear from franchising. He states:

"...there is frequently a correlation between size and efficiency" 60

56 Supra, n.33, Sally Moore.

57 Supra, n.53.

58 See for example: The Law Society's Practice Management Standards, which are intended as a practical management tool and are incorporated by the Legal Aid Board as part of the requirement for the grant of a franchise.

59 Supra, n.53, 1532.

and whilst being cautious in qualifying that statement by adding not all large firms are necessarily well organised and competent and not all small ones are ill-organised or incompetent he does foresee that:

"...in the nature of things, a large firm has more scope for training its staff, specialising and securing economies of scale".\(^{61}\)

He expands on this and says that:

"...it is likely to be more difficult ... for a small business than for a large one to achieve this level of expertise whilst retaining the capacity to respond flexibly to new developments."\(^{62}\)

It would seem that the fears of small firms are formed on solid ground. The administrative machine for the new franchise system is openly based on the large firm model with only 'titbits' of legal aid work being done by unfranchised firms, in the former Lord Chancellor's own words:

"...only to ensure new firms coming forward."\(^{63}\)

The aim, it appears, is that as the number of larger firms increasingly meet the required standards and obtain a franchise, they will be given such a competitive edge in attracting the legal aid client that work will be squeezed from the smaller firms and into their hands.

It is envisaged that if franchised firms are allowed to obtain a marketing advantage, by having an externally approved legal aid service, that they will seek to capitalise on that. The concern for small firms is that before long they will develop methods of attracting clients from the small firm's client base by promotion of their managerial skills and qualities. The result may be the extraction from small firms of the most interesting and remunerative legal aid work. Countering this argument, Sir Tim Chessells stated that he does not accept the criticism that franchising quality standards have squeezed out small practices:

"Many small firms have informed the Legal Aid Board that the management techniques and measures that they have had to put in place in applying for a franchise, have had a positive effect on..."

\(^{61}\) Ibid.

\(^{62}\) Supra, n.60.

\(^{63}\) Supra, n.60.
the practice generally. There is ample evidence that small firms and sole practitioners can and have met franchise criteria successfully."\textsuperscript{64}

It is difficult to avoid the, often quoted, conclusions of the legal press on the issue of franchising that:

"...big is beautiful, even if that means the extinction of the small practice,"\textsuperscript{65}

and:

"God, or this [Conservative] Government, is on the side of the big battalions and will remain so."\textsuperscript{66}

But the definition of "big battalions" appears not to be confined to the larger law firms. There is evidence that solicitors will in time face competition from advice agencies that have a much lower level of costs. For example in areas such as debt, welfare and housing advice:

"The danger for solicitors is that areas which are now open to them may be closed because agencies who are more expert and more efficient will compete successfully with them and offer the Board better value.\textsuperscript{67}

The future may, in fact, hold a mixed model of provision.

The final criticism emerging from the proposal of national franchising is that of points of access for the public to the legal aid scheme and the wider connotation in terms of 'distributive justice'. It is argued that at present it is the smaller firm that provides these points of access. Furthermore, that the former Lord Chancellor's proposal amounts to no more than solicitors' firms becoming supermarkets that will lead to the eventual disappearance of smaller 'corner-shop' legal aid practices.\textsuperscript{68} It follows that the public will be disadvantaged reduced to commuting:

\textsuperscript{64} Supra., n.33.

\textsuperscript{65} 'A Denial of Justice' [1991] NLJ (editorial) 769.


\textsuperscript{67} Supra., n.17, 910. Note: generally the arguments of bodies such as the Law Centres Federation and The National Consumer Council seeking development in this direction.


\textsuperscript{68} See editorial - 'Black Saturday in Birmingham' [1992] NLJ 1493.
"...across counties to find approved solicitors who might take their case. The right will be to have a solicitor of your choice, but not a choice of solicitor."\textsuperscript{69}

This argument was supported at the commencement of the national franchise initiative in 1995 by the paucity of applications for franchises from areas such as South Wales. The original target of 2000 enfranchised legal aid firms contained no inherent structure to ensure an even distribution across the counties of England and Wales. This aspect has arguably been left to fortune. As at April 1998, 2281 legal aid franchises were granted by the Board. Sir Tim Chessells admits:

"The assisted person is entitled to some choice of supplier of the legal services they require, however, we believe this choice will inevitably be more restricted in the interests of quality assurance and cost-effectiveness."\textsuperscript{70}

The Board denies that it is looking, with its franchising system to cut down points of access for legal aid services. The former Lord Chancellor's position was equivocal, whilst keen to point out that he had no intention of reducing the number of legal aid practitioners to an arbitrary level he added the caveat:

"... for its own sake"\textsuperscript{71}

A cull seems imminent.

5.6 Conclusions

The franchise is here to stay. Whether the emphasis is on quality assurance, or quality control, within a franchise contract, currently remains open to debate. The Board in forcing through the concept of franchising have perhaps, been viewed as controllers. This perspective may prove to be unfair since any significant level of change requires a forceful propellant.

\textsuperscript{69} 'A Denial of Justice' [1991] NLJ June 7, 769.

\textsuperscript{70} Supra, n.33.

\textsuperscript{71} Supra, n. 66 at p.1355.
It has been argued that franchising provides a golden opportunity for all participating firms. In that there will be a natural opportunity to discuss within the firm what is the best practice, how things can be done better and possibly at a lower cost and to incorporate that into the firms procedures.\(^{72}\) Additionally, the requirements for supervision and periodic case review should also inform and help to focus the firm's development of training and education for all its personnel.\(^{73}\)

On another view, there remain grave reservations from the profession (even participating franchisees) as to the ability of the transaction criteria to measure quality of advice as opposed to the ability to carry out set routines.\(^{74}\) In addition, many participants are not convinced that the criteria will be confined to assess levels of competence but that ultimately they will be used to compare firms, thus engendering competition. On this point the message from the Board and the Lord Chancellor is mixed. The Board is reluctant to suggest competition between firms is the future, whereas, the former Lord Chancellor Lord Mackay assumed:

"... the people able to provide the service to a competent standard will be willing to compete with one another to provide it."\(^{75}\)

In predicting the future a consensus is emerging,\(^{76}\) that once a sufficiently large number of firms are financially dependent on having a franchise the Lord Chancellor will then reduce the rates of remuneration and eventually introduce some form of compulsory competitive tendering or block-contracting. The 1996 White Paper, *Striking the Balance*, proposed a form of block-contracting and is discussed later in Chapter 12 at 12.2. It is possible to foresee the lengths to which a firm may go to endeavour to retain its franchise

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\(^{73}\) Ibid., Blake, A., 887.

\(^{74}\) See for example, the comments of Harper, M., 'At The Sharp End' (1994) 91/2/29 LSG 23.

\(^{75}\) Lord Mackay, 'Mackay's Mission' (1993) 90/1/11 LSG 5.

\(^{76}\) Supra, n.17 and 'Block Contracts - Block Justice' [1994] NLJ 113.
and the calamity it will face on its loss. It follows that should contracts be awarded to the cheapest bidder that the choice of the consumer stands to be decreased if no balancing distributive factors are taken into account. Some lawyers believe that this heralds the commencement of:

"...a process which would result in an institutionalised salaried legal service which would actually be part of the Lord Chancellor's Department".

In the words of Roger Smith:

"The franchising process is now irreversible. Although the content may change franchising is as good or as bad as the contract between the Legal Aid Board and the franchisee. The use of quality control and assurance measures by the Legal Aid Board has in my view raised England and Wales above the rest of the world in the provision of state-funded legal services. The problem remains in ensuring the reasonableness and operability of such measures in the medium and long term. The development of franchising should follow a pragmatic and not ideological lead." 

Legal Expenses Insurance has developed free from the shackles of ideological dogma, driven chiefly by the pursuit of a profitable, practical solution to the problem of cost-effective access to civil justice for the expanding 'middle classes' of our society.

Franchising, in broad terms, is the statutory equivalent of the existing relationship between private practice and legal expenses insurers. Insurers, through their use of panel solicitors (see later Part Three, Chapter 10) have demanded from practitioners, efficiency, value and appropriate expertise. Those practices able to meet the demands of the insurers secure a profitable volume of business and those that do not are removed from the insurer's panel. The ultimate sanction of removal acts to regulate the conduct and efficiency of the practice. The effect of such business relationships on civil justice is open to debate. The fact remains insurers have contracted with practices long before the Legal Aid Board introduced the concept of franchising in the early 1990's.

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78 Supra, n.33. Director, Legal Action Group.
The development of legal expenses insurance is detailed in the next part of this study, along with the insurer’s relationship with practitioners. In many respects, there exist similarities between the needs of the funder, whether state or private, and the fears of the solicitor tasked with the delivery of legal services to the assisted or insured client.
PART THREE
Chapter 6

The Emergence of Legal Expenses Insurance

It is necessary in this section of the study to consider the definition of legal expenses insurance and the general categories of such insurance that are currently available in the United Kingdom. This analysis is required before examination of the actual market products, which follows later, in Chapter 7. This section aims to assess legal expenses in broad conceptual terms including historical development, the role of the solicitor, the calculation of risk and the requirement of control mechanisms to protect the insurer. Finally, recent market research results are considered with a view to predicting the future market for personal legal expenses insurance.

6.1 Definition

Legal expenses insurance (LEI) has been defined as:

"payment of an annual premium to buy cover, in given categories of cases, for a claimant's legal costs (including any costs awarded against him) up to a limit of indemnity".¹

LEI therefore, may cover the cost of litigation and indemnify the policyholder in respect of costs orders and/or awards made against him in the event of his case failing. There exist varying types of LEI in the United Kingdom today that fall into four distinct categories.

- **Personal Legal Expenses Insurance**

Such schemes are often referred to by the insurance market as 'stand alone' policies, covering an individual policyholder's liability for legal costs arising in a variety of situations. The scope of stand alone insurance cover is dependent upon definitions and

exclusions contained within the contract of insurance itself and would normally include liability in respect of tort, contract and civil disputes involving breach of statutory duty.2

- **Associated Legal Expenses Insurance**

Referred to as 'add-ons' such insurance will offer cover to individual policyholders to meet liability for legal costs arising from specific events as an extension to an existing policy. Typically cover under such policies will be more narrowly defined than the stand-alone policy and often with a reduced limit of indemnity.3

- **Group Legal Expenses Insurance**

Cover under such policies is akin to personal legal expenses insurance but is conditional upon the insured being a member of a certain class of persons such as a trade union member, trade association or professional body.4

- **Commercial Legal Expenses Insurance**

Purchased by businesses or limited companies these schemes will offer cover to meet liability for legal costs arising in the course of business. Cover will invariably include contract disputes (including employment) intellectual property and criminal prosecution-defence cover in respect of areas such as health and safety legislation.

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2 Such policies are expensive costing approximately £150 per annum. They have proved costly to underwriters in the past and further to the withdrawal of Allianz Legal Protection from this market in Autumn 1992 only the Legal Protection Group now offers this product.

3 Such add-ons are now common place and are often purchased with the main insurance or offered as an additional category of insurance. An example is an 'uninsured loss recovery' policy purchased with a main motor insurance policy, or LEI cover purchased as an additional category of insurance in conjunction with a main household buildings or contents insurance policy. Their cost is cheap, in both cases ranging from £5 - £15 per annum. All the major legal expenses insurers are presently actively in this area of the market.

4 In practice, such policies are bought by groups to pass on to their membership as a benefit.
In respect of all the above current forms of LEI indemnity against liability for legal costs, they are available for both pursuit and defence of a legal claim. Common to nearly all LEI policies is the exclusion of liability for legal costs pertaining to criminal activity on the part of the insured, in that to provide such cover would offend public policy principles. That said, whilst protection against civil liability is the norm there remain some anomalies, notably, protection of a company or business in respect of breaches in health and safety legislation which attract a criminal sanction and for the individual in defending prosecution for motoring offences. In both cases insurance is only available to cover liability in respect of the cost of the defence and unlike areas of civil litigation will not cover the cost of fines imposed by the court.5

The purpose of this study is the analysis of civil legal aid and LEI as it effects the individual. Commercial legal expenses insurance as detailed above are relevant only in so far as it completes the spectrum of LEI presently available in the United Kingdom.

In theory, the scope for LEI cover is substantial. The number of civil proceedings that take place each year in the United Kingdom is considerable. According to the Lord Chancellor's Department Judicial Statistics6 almost 3 million proceedings were commenced in the County Courts of England and Wales concerning the recovery of money or land with over 210,000 actions concerning contract disputes or tortious liability being commenced in the Queen's Bench Division of the High Court. All of this activity involved expenditure on legal services and most notably, legal representation. According to the Law Society7 in 1991-92 the gross annual fee income of all Solicitors in England and Wales was estimated at £6.2 billion. Research indicates8 in the majority of cases, costs are paid by a private client. The

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5 Concern over the issue of public policy is generally taken seriously by insurers, for example in 1989 a policy which provided the costs of chauffeur driven transportation for one year in the event of a driving licence suspension imposed by the court, was withdrawn from the market.


design and definition of LEI in the United Kingdom today is focused upon the private client. Whether LEI provides effective assistance will be addressed later in this study.

The cover offered by any given LEI product and its level of indemnity to the insured against the liability of legal costs incurred represents a narrow definition of the concept of LEI. Within the legal services section of the economy lies a wider definition which also assists in the identification of its position in relation to civil legal aid. Economic theory may view the legal system as:

"...a mechanism by which agents are given incentives to take account of the impact their actions may have on other parties; that is, to anticipate and pay attention to externalities associated with their actions".9

From an economic perspective, a legal system is securing an efficient outcome when the costs to society of reducing further externalities are just offset by the expected savings to society in terms of the lower prospects of accidents or disputes.10 In practice, it is extremely difficult to quantify these externalities or incentive effects and consequently it cannot be determined whether the present level of legal activity in the United Kingdom is too high, too low or optimal.

It is argued11 that:

"...reaching the point of efficiency requires that individuals are able to commence or pursue compensation claims in order to guarantee that others face the full costs of their actions. It follows that, if this is not possible, there may be some loss of efficiency. For this reason, there is an efficiency justification for ensuring that individuals can bear the costs of using the law. In addition, there is an equity argument, which states that justice is not like most goods and services, but is a fundamental right, so that rights would be infringed if individuals were excluded from the legal system solely because, for example, their income was insufficient to obtain access".12

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10 Ibid.

11 Supra, n. 9, 2.

12 Supra, n. 9, 2.
In principle there are a number of ways in which such efficiency losses and issues of equity may be dealt with. A contingency fee system could allow the plaintiff to shift the risk onto the lawyer. LEI could facilitate access by allowing individuals to shift their personal financial risks onto the insurer and finally, there could be established a means-tested subsidisation of access to the legal system by way of a state-controlled income distribution mechanism. The latter is obviously the civil legal aid system in its past and present form. However, this analysis of economic theory is most useful in its endorsement of LEI as a legitimate alternative mechanism to help individuals afford the law. There appears some convergence of pure economic theory, its positioning of LEI, and de facto the product as defined and designed by the insurers.

6.2 Legal-Expenses Insurance In Theory

There are many circumstances in which individuals might need to use the law in order to achieve their objectives. A common feature of all these circumstances is that they involve cost. Given this premise it has been said that:

"For the insurance industry to have a role in helping individuals to meet these expenses, there must be some risk surrounding the timing and size of legal expenses. In turn, this causes risk averse individuals to suffer a utility cost which insurance can help them to off-load onto organisations more able to bear the risks involved. Thus, the extent to which the insurance industry might assist individuals in gaining access to law depends on the law-related risks they face and their attitudes towards them".13

In some cases the risk is entered into by cooperative agreement for example the making of a will or a residential conveyance. There is a cost risk but it is not difficult to predict and suffers little variance. In these circumstances it is difficult to anticipate a flourishing market for LEI. However, a great number of circumstances involve the individual in a disagreement. In those cases:

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13 Supra, n. 9, 3.
"...costs are likely to be unpredictable in terms of their timing and amount."^{14}

Potential costs are difficult to plan for and can be high. It is argued that it is these conditions, in principle, which can generate a demand from risk-averse individuals for insurance against them.^{15}

Spreading the risk has long been a fundamental premise for the insurance industry, the analysis above has clarified the potential market for those persons who may be interested in using insurance in the context of LEI. The problem for insurers is to spread the risk over enough of those risk-averse individuals.

"To be effective it is important that the risk covered should occur fortuitously among the group to only a few of the group. The incidence of loss for individuals within the group will, of course, be random, but within a large enough group the incidence of loss will be predictable. Insurers seek to ensure that the risk remains predictable since this enables premium income both to meet the claims and to generate profits for the insurers."^{16}

This predictability requires that coverage be for "fortuitous" acts, not for the intentional acts of claimants. Therefore if legal expenses insurers:

"...do not want to undermine or destroy their financial viability, they can hardly seek to educate people as to their legal rights, encourage them to have legal check-ups, and in general stimulate purposeful legal activity..."^{17}

It would seem that in theory LEI has a market in the United Kingdom long-term but in practice the policies issued will walk a fine line between profitability and stimulating adverse selection. It is essential that the LEI market in the United Kingdom operates effectively. It has been suggested that private insurance against legal expenses in contentious cases would require the following conditions to be successful:

^{14} Supra, n.9, 3.

^{15} Supra, n.9, 4.


The probability of expense being incurred would have to be predictable, independent across individuals and less than one.

A sufficient volume of business is required to ensure that insurers were more risk neutral than most individuals and therefore more efficient risk bearers.

Firms offering LEI must have knowledge of the law as it relates to claims made by policyholders and knowledge of the policyholders themselves.\(^\text{18}\)

The first of these conditions is easily satisfied but the other two are information requirements. The requirements can be divided between the individuals and the insurer. In order to secure condition two, individuals should have sufficient information about the legal expenses risk they face. If they have that information they will, in theory, demand LEI. Individuals need to be aware of both the risk of a legal action being required and the cost of bringing or defending that action.

There is evidence to suggest that costs are prohibitive to many people and that individuals may underestimate the legal expenses involved in a dispute.\(^\text{19}\) Moreover, Rickman and Gray argue that:

"...most individuals have little idea of the probability that they may be involved in a legal case, and may underestimate this."\(^\text{20}\)

They calculate the risk to be objectively quite small, the risk of litigation to an individual being approximating 1 in 10 over a 20-year period.\(^\text{21}\) Their report asserts that individuals

\(^{18}\) Supra, n. 9, 4.

\(^{19}\) See for example the findings of Lord Pearson's Royal Commission (1978) and Harris, D. et al. *Compensation and Support for Illness and Injury* Oxford, Clarendon Press, 1984. The latter noted that a significant percentage (10-15%) of individuals, who had suffered a personal injury, actually pursued their case. For the majority of non-claimants, costs were an "important" reason. For those who abandoned their claim costs were cited as an "overwhelming" reason.

\(^{20}\) Supra, n. 9, 4.
believe their risk of incurring legal costs to be low either through misperception or because the number is genuinely low. Whatever the true reason, it has a marked 'knock-on' effect regarding the likely need for LEI.

There exists little evidence on individual's beliefs about their legal needs. Statistics on the usage of solicitors, Law Centres and Citizens Advice Bureau will fail to capture the perception of risk which can only be truly calculated at some time before their involvement as a legal service.

Rickman and Gray see the existence of civil legal aid as a possible explanation for an individual's perception of need for LEI being low:

"If individuals feel protected against legal expenses by this scheme, they will not demand protection from the private market".22

Once again, little evidence exists on the perceived substitutability between LEI and civil legal aid. In fact, what little evidence there is suggests general ignorance of civil legal aid is such that most individuals would not be in a position to consider the perception of substitutability between it and LEI.23 It may be that since such evidence was compiled the media coverage of the cuts to legal aid eligibility has altered the individual's position through imposed knowledge. It would seem plausible to suggest that the LEI market, in theory, may be stimulated by increased awareness to the individual of their current exposure to legal costs, in the event of a dispute under civil legal aid.

The third condition is to information requirements on the part of the insurer. Rickman and Gray suggest that:

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21 This risk assessment is based on figures supplied in LCD (1991). Annex A. Tables 3,4,5 and that in 1989 one-third of a million acts of litigation were initiated, equivalent to approximately 9 per 1000 adults.

22 Supra, n.9, 9.

"...the principal agent relationship that exists between insurers and the insured generates a number of information asymmetries".24 Typically these include the merits of the insured's case, costs, control and the legal representative. It is the need for this information and:

"...in essence how to attract customers to pay premiums to cover legal services they do not currently contemplate having to meet and have not in the past had occasion to use,"25 that has impacted directly on the development of LEI in the United Kingdom.

6.3 Inhibitors And False Comparisons

Development of the LEI market in the United Kingdom is in marked contrast to many of our continental neighbours. It has been highlighted in an early section of this study that access to civil legal aid in terms of the eligibility variable, was at a high point in 1979. In fact, at the time the first LEI product was launched into the United Kingdom it is likely that up to 70% of the population would have been covered by some form of civil legal aid. By contrast, until recently in Germany, there was no comprehensive legal aid scheme, but German lawyer's fees are set and their practices strictly regulated by law. Fees are standard and high. It is therefore little surprise that private insurance schemes to help meet these charges have proved attractive to the German public and have developed in the absence of legal aid. The German market has been propelled by a combination of lack of alternative to the public and standard legal fees providing reliable data upon which underwriters can sensibly determine product price. It follows that to measure German growth in the LEI market in the last two decades side by side with the United Kingdom is a false comparison.

24 Supra, n.9, 5.

25 Supra, n.16, 248.
For many years Sweden has, like Germany, had a high percentage of its population covered by LEI.26 However, the Swedish LEI product is designed as an adjunct to their legal aid system. In Sweden LEI can be used in a complementary fashion to their legal aid system with funds from one source topping up the other. Conversely, in the United Kingdom, usually:

"...the existence of a legal expenses policy disentitles the insured to legal aid even if he or she would otherwise be eligible".27

Once more, it seems the Swedish development of LEI cannot readily be translated into the United Kingdom market. The slow growth in the United Kingdom market is likely to be due to a combination of factors but it would seem that two key issues emerge. The first is that, until recently, the United Kingdom has operated a civil legal aid system with, relative to other European countries, a high level of population eligibility. It is likely that the effectiveness of civil legal aid in the United Kingdom has acted as a damper to the LEI market since its inception in the mid 1970's. Repeatedly:

"...insurers have found themselves having to try to convince the public of the wisdom of taking out such policies".28

Secondly, the market has been inhibited by the fundamental problem of LEI in adverse selection. The market has been blighted by the fact that the individuals most likely to buy the LEI on offer are those who are most likely to claim. Further, a great number of the population do not consider they will ever be likely to need LEI cover and will therefore choose not to insure at all. The 'risk prefer' element of the United Kingdom population and 'adverse selection' element are essentially two sides of the same equation and may therefore be viewed as a single inhibitor to the development of the LEI market. The control of adverse

26 It is generally agreed, up to 85% of Sweden's population is covered by LEI. See for example the Access to Justice statistics as per footnote 17 at p.113 footnote 368. And the joint report by the Consumers Association and the Law Society, Legal Expenses Insurance In The UK, The Law Society, January, 1991, 2.


28 Ibid. 2.
selection is essential to the growth of LEI in the United Kingdom since it stands to undermine the essential insurance principle that many people will insure but few will claim in any one period.

6.4 Small Beginnings

The concept of insuring against the risk of incurring legal expenses can trace its modern origins back to 1917 at Le Mans, when a mutual insurance company called La Defense Automotive et Sportive was founded to provide motor racing cover that was otherwise unobtainable.29 The commencement of LEI in the United Kingdom has been described as "hesitant".30 In 1973 a Lloyds scheme of legal costs and expenses insurance was started by Strover and Co Ltd. Insurance Brokers. Between 1973 and 1975 Strovers issued some 3000 policies. On 23 April 1975 the DAS Legal Expenses Insurance Company was launched and promoted a separate competitive scheme. DAS was at that time, owned by Phoenix Assurance and the Large Munich Insurance Company Deutscher Automobil Schutz. The German connection was significant given the pedigree of DAS as a specialist LEI Company in its own country.

Prior to the 1973 launch in the United Kingdom, significantly, legal costs insurance schemes were spreading rapidly in the USA, Canada, Australia, Germany and Sweden. French and German companies have long been regarded as the pioneers of LEI and have been accredited with strongly influencing the type and development of LEI in the United Kingdom.31

The market for LEI in the United Kingdom in the mid 1970's was one in which there was increasing realisation that litigation was becoming prohibitively expensive:

30 Ibid.
31 Supra, n.27, 2.
"...such relatively high costs must deter any private litigant who is not rich or supported by legal aid, a trade union, insurance company or other institution".32

Furthermore, studies showed the cost of litigation was even higher than assumed and that whilst litigation for large claims was proportionately inexpensive, litigation for the smaller claims which predominated the legal system, were extremely costly.33 An additional fillip was given to the LEI market by the Royal Commission on Legal Services (Benson Commission) reporting in 1979, it stated:

"There will always be those who are either ineligible for legal aid or might be liable to substantial contributions, who may wish to insure against these risks. Insurance may also prove helpful to companies, trade unions, small businesses and other bodies to provide cover for their members or their staff. Individuals or organisations in such circumstances are best placed to decide what insurance cover they consider appropriate. We do not recommend support for such arrangements out of public funds".34

The Government's response to the Commission's recommendations on the subject of LEI was to offer support:

"Legal costs insurance on a voluntary basis may prove a useful supplement to legal aid in some cases... The Government accepts that legal costs insurance on a voluntary basis may prove a useful supplement to legal aid and notes that the Law Society has recently endorsed one such scheme".35

The approved 'Law Society' scheme was the product of the Sun Alliance insurance company and was launched in 1982 with the active involvement of the Society. Solicitors received a "solicitors pack" to help them sell Law Society 'approved' Family Legal Expenses Insurance policies for Sun Alliance. The endorsement of LEI in concept by far overshadowed the particular product itself that sold fewer than was hoped and on the


33 Ibid., 20.

34 Final Report of the Royal Commission on Legal Services (Benson Commission), Cmd. 7648, 1979, 179.

other hand attracted "quite substantial" claims notifications.\(^{36}\) The *Access to Justice* survey reporting in 1978 stated:

"Developments in prepaid and group legal service plans in recent years are among the most far-reaching access-to-justice reforms discussed in this General Report. In this area we find bold proposals and plans to make lawyers accessible at reasonable costs to the middle and lower class individuals whose rights and interests have been our principal focus".\(^{37}\)

The report continued:

"...the growing importance of legal insurance is evident from the rapidly increasing volume of business being transacted ... Further, these schemes have become the focus of many concerned with access to justice. Since broadened coverage at relatively low premiums clearly helps make the legal machinery more accessible to those who obtain such insurance".\(^{38}\)

It would seem that on one view, the introduction of the United Kingdom to the LEI market in the late 1970's and early 1980's had much support. However, its development was and has been slow since the first policy was underwritten at Lloyds in 1974.

### 6.5 The Development of Legal Expenses Insurance

It has been said that:

"...the Benson Commission, with its 'two cheers' for legal expenses insurance, neither gave it the impetus the companies would have liked, nor consigned it to oblivion".\(^{39}\)

Infant United Kingdom LEI at that time lacked direction and was unregulated. The Law Society had no regulatory power over the policies issued by insurers. However, The Law Society did recognise in 1974 that the success or failure of legal expenses insurance would depend on its marketability. In 1975 it became clear that The Law Society were not willing

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\(^{36}\) See for example the comments of Brian Hall of the Sun Alliance as reported in the Legal Action Group Bulletin July 1983 at p.4.

\(^{37}\) *Su pra*, n. 17, p. 111.

\(^{38}\) Ibid., 113.

to rush in to welcome unreservedly the Strover and DAS legal costs insurance schemes until their early promise and scope for development was seen, in fact, to be proceeding on the right lines for protecting the public.\textsuperscript{40} It was reported that The Law Society very much hoped:

"...that these schemes will (a) grow, and (b) extend their range of cover and that new ventures will be launched so as to increase publicity and competition simultaneously".\textsuperscript{41}

In 1975 the Society laid down Guidelines for LEI policies. The guidelines were:

(i) the insured to have free choice of solicitor;
(ii) the solicitor (client relationship to be unaffected);
(iii) the extent of the cover provided by the policy to be clearly stated;
(iv) if the insured obtains legal aid, all papers to be made available to the Legal Aid Committee;
(v) that each policy should have an excess to discourage frivolous or unjustified litigation, although this would not apply to an initial consultation;
(vi) the solicitor acting for the insured to have complete control of the case;
(vii) arbitration to deal with disputes between the insured and his insurers and the cost of arbitration to go with the decision or as the arbitrator should decide.

These guidelines were not an attempt to restrict their market but to indicate the type of policy that would be attractive to the profession, and in the opinion of the profession also to the consumer. In fact the Guidelines contained many similarities to the basic principals upon which the legal aid scheme was initiated some 25 years earlier. Two concerns for the society emerged.

"One of the 'problem areas' has been the growth of 'specialist' quasi - legal organisations offering a 24-hour-legal-type service in particular areas in which solicitors would generally regard themselves as both competent and adequate to advise".\textsuperscript{42}

\textsuperscript{40} See, Mosley, S., 'Legal Costs Insurance - Small Beginning With Important Possibilities' (1975) 72/2 LSG 924.

\textsuperscript{41} Ibid., 924.

\textsuperscript{42} Supra, n. 39, 515.
The insurers believed the Advisory services to be an essential element of several schemes offering good value to the insured. The Society questioned rather dismissively the ability of the advisors as compared to solicitors in private practice and how much the service added to the premium cost of the insurance.

Secondly, the potential influence of insurers as major paymasters to the profession for legal services was worrying. Comments at the time reported from leading insurers in LEI made the society decidedly nervous.

"It may be assumed that few would subscribe to the remarks of Commander Brian Raincock of Legal Benefits Ltd, at the press launch of that scheme on 1st October 1980 when he said that solicitors would now have new commercial masters, and a greater degree of lay influence would be brought into the hallowed portals of the Law Society. Whatever the implications of that remark professional standards of integrity and independence must remain the same whether the client is funded by legal aid, legal expenses insurance, or is paying his own way".\textsuperscript{43}

In 1982 further to a Joint Working Party on legal expenses insurance the 1975 Guidelines were revised. The changes of significance included a requirement for insurers controls over a case covered by a policy of insurance to be clear to the insured at inception. Further, the existence of LEI is likely to preclude the granting of legal aid. Finally, of note, was the withdrawal of the guideline that prevented any LEI scheme from having the approval of the Law Society. It was this deletion from the 1975 guidelines that signalled the progression of the Society's involvement in the development of LEI in the United Kingdom.\textsuperscript{44}

The Law Society's 'approval' of the Sun Alliance Scheme in 1982 was met at the time with fierce criticism from varying quarters. The Legal Action Group complained\textsuperscript{45} to the Advertising Standards Authority. Its grounds, were that information contained in the first

\textsuperscript{43} Supra, n, 39, 515.

\textsuperscript{44} The current guidelines are contained within The Insurance Companies (Legal Expenses Insurance) Regulations 1990. S.I. No 1159.

page of the policy prospectus, misleadingly implied that very few people in employment are able to receive free legal aid, and that those on above average earnings experience uniform difficulties in obtaining contributory legal aid. The complaint was upheld by the Advertising Standards Association with the conclusion that:

"...the paragraph did suggest that the proportion of the population which might benefit from legal aid was smaller than in fact appeared from the official figures to be the case at present".46

In addition the Legal Protection Group (a LEI provider) took issue with The Law Society's authority to approve policies at all:

"...our own view is that the Law Society has no authority to 'approve' policies as such and that the public would be better served by allowing the present market of experienced specialist insurers to meet their needs".47

The Law Society in approving the Sun Alliance scheme had placed themselves in an invidious position. LEI providers without their stamp of 'approval' openly questioned their selective endorsement and other interested parties accused them of providing "knocking copy" in relation to the legal aid scheme for which it was responsible and professed a duty to support.48 In its defence, the Law Society stated that its involvement was to ensure that LEI schemes do not develop in a "haphazard and unsatisfactory manner".49 The duality of The Law Society acting as a promoter of a private scheme and the administrator of legal aid had in the eyes of many created an unacceptable conflict of interest.

"The Society has yet to resolve the relationship of legal expenses insurance to legal aid. Whilst the two are not incompatible, there are areas of overlap, which must cause concern to the Society, which has a statutory obligation to administer the legal aid scheme".50

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46 The prospectus stated: "But can't I rely on Legal Aid? You may be eligible - but the financial qualifications are very stringent. Almost all wage earners can expect to make a contribution and, if you earn above average income, you're unlikely to get any assistance at all". (Sun Alliance's emphasis).


48 Supra, n.45, 4.


50 Supra, n.39, 513.
Insofar as it may be argued that the Society had been guilty of an error, it was not to be repeated in the future and distance was to emerge between the Law Society and insurers in respect of LEI until the development of the Legal Aid Board in 1988. As the insurers developed their relationship and coexistence with the established providers of legal services in the United Kingdom, the LEI policies themselves evolved with the benefit of experience.

The perennial problem of adverse selection quickly came to the fore in this area of the insurance market. Unless tackled effectively, either premiums would rapidly become extraordinarily high, or the insurer would go out of business. The Law Society approved scheme itself proved disappointing and one year after its launch in 1983 was described only as:

"...showing steady though unspectacular progress".51

In 1984 Hambro Housley Legal Protection Ltd. were reported as saying:

"The lesson learnt from the early years was that this area suffered from great selection against insurers. By this I mean that policies are most attractive to the naturally litigious. We have avoided this by arranging group schemes where we attract a good spread of risks. The advisory scheme also helps minimise claims by ensuring that clients take sensible steps at an early stage".52

Clearly, LEI was a book of business that necessitated careful management and control if it was to grow profitably. By 1982 it was reported that:

"...the concept of legal expenses insurance now embraces a variety of schemes, from the basic simple house-holder's extension policy, to the more comprehensive schemes which are tantamount to pre-paid legal plans".53

The diversity of LEI cover on offer to the public underscored the experimentation employed by insurers to find their market and protect it against the rigours of adverse selection. Mechanisms to prevent over-use of the policy by the insured were developing as fast as the LEI product itself. These mechanisms included, excluding (as with most insurance) events

51 See the comment of Brian Hall of Sun Alliance "Legal Expenses Insurance Complaints Upheld" (1985) Legal Action, July 4.
52 Supra, n 47, 248 detailed as "Letter to writer dated November 21, 1983".
53 Supra, n 39, 515.
that occurred prior to taking out the insurance, contract claims and/or divorce claims for a finite period upon first insurance, excess charges to discourage smaller claims, 'panel' solicitors and reservation of the right to disallow otherwise legitimate claims if, in the company's judgment, there was no reasonable prospect of success. This list is not exhaustive and the screening mechanisms cited will be analysed in more detail later in this study. What is important, at this stage, is the creativity of insurers and insurance management companies in their attempts to control United Kingdom LEI and shield it from abuse which potentially could destroy the business. In seeking protection from abuse and over-use by the insured, the LEI industry may be seen in a similar light to the Board who seem equally keen to control usage of civil legal aid.

Unfortunately for the insurers the methods employed (they would argue necessarily) to avoid adverse selection were open to criticism. Insurers were accused of covering "only a small number of defined risks". And providing a "long list of exceptions", which overall provided "coverage [that] is far narrower than ... legal aid". In truth LEI was 'feeling its way' into the market for the provision of legal services and its position as a replacement for, or adjunct to, legal aid was unclear. It seems that many of LEI's strongest opponents often criticized from the perspective of the protection of the civil legal aid scheme against this 'young pretender'. In fact, from a very early stage in its evolution, LEI was targeting individuals within the middle income bracket who under the means-tested rules for eligibility would not get any, or any significant, civil legal aid.

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55 Ibid.
56 Supra, n. 54, 14.
57 See generally the criticism contained in:
However, it would be unfair to those who criticized LEI and sought to protect legal aid to suggest their attack was misplaced. The emergence of a strong LEI market in the United Kingdom could, as a side effect, allow reductions in the eligibility level for civil legal aid with limited political consequences. For example in the autumn of 1981 the Conservative Bow Group produced a paper which advocated an expansion of legal expenses insurance because the further extension of state funded legal aid was regarded as "undesirable in principle".

The effect of LEI on legal aid was unknown. Even in accepting that LEI could not replace legal aid there were doubts that the two systems could operate effectively side by side. It was feared that:

"...insurance will cream off the easier more profitable work leaving the legal aid fund to the rest, in the sense that the private scheme will be parasitic on public provision in much the same way as private health insurance is parasitic on the NHS".

Moreover, there existed concerns that a two-tier system, with one providing an inferior service to legal aid clients, was distinctly possible. If a two-tier system already existed, as some suggested it did, insurance would only exacerbate the division. The problem caused by two systems integrating effectively was evident. LEI depended on market forces for its survival. Reporting on the position of the two systems in 1984 it was suggested that:

"any integration of legal expenses insurance with legal aid must give preference to one or other form of funding legal services".

Which system was to be supplementary to which? Furthermore, if LEI came to be the preferred system:

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59 Supra, n.54, 15.

60 Supra, n. 54, 15.

61 Supra, n.47, 257.
"...then it is conceivable that civil legal aid might disappear altogether. It could be the first move in the privatisation of civil legal aid, which would be allowed to wither until its benefits were minimal." 62

Until such time as one system was to be clearly defined as supplemental to the other, the United Kingdom would continue to offer a hybrid apparatus for the provision of civil legal services.

In conclusion, the legal profession and legal establishment generally welcomed the development of LEI throughout the 1980's, with only limited reservation. Conversely, the public response was distinctly cool not aided by some bad press from the media. It did undoubtedly provide access to justice for middle-income United Kingdom that had previously been denied access by the increasingly prohibitive cost of going to law and levels of civil legal aid eligibility. Insurers became more certain of their target market and could by developing group plans and inexpensive add-ons profitably expand that market into lower-income areas of the population. The legal advisory services that so often went hand-in-hand with the insurance cover in most cases provided instant access to legal advice by telephone not previously available to the public. Despite the carping of private practice such immediate telephonic legal assistance was generally welcomed by the insured and perceived as a useful additional service to their insurance policy. This assertion is based on original sampling undertaken by the writer in 1993. The sampling recorded a “general satisfaction” rating of the service by its users, in excess of 90%. The sample was undertaken with the full cooperation of The Legal Protection Group Ltd. and confined its research to that Company's client base and legal advisory service. Callers to the telephone advice service were selected randomly and invited to complete a “customer satisfaction questionnaire”. The service was greatly valued by a large majority of its users.

By the 1990's it became generally accepted that LEI had ridden-out most of its growing pains and was here to stay. Its coexistence with civil legal aid remains an area for debate and with the cuts in civil legal aid eligibility now down to the level of income support it may be

62 Supra, n.47, 257.
suggested that the point at which civil legal aid has withered "until its benefits were minimal" has been reached. That said, it is perhaps still too early or imprudent to state which system is supplemental to the other.

6.6 Assessing The Future of LEI

In recent years, Government policy has promoted the importance of private insurance involvement in the markets for health and pensions in particular. It does seem that attention is now being turned to LEI and the role it currently plays and more importantly, could play within the present hybrid legal services system in the United Kingdom.

Data available to determine the size of the current LEI United Kingdom market is difficult to obtain and at best incomplete. However, according to the Association of British Insurers gross premiums for 1996 to 1997 can be estimated at £100 million per annum. This is almost certainly an underestimate since not all insurers in this market are ABI members and therefore their returned figures (if any) may contain inaccuracies. In 1984 it was estimated at £10 million per annum. The increase, even taking into account the rate of inflation over the years is considerable and significant. A Survey carried out in June 1990 indicated a surprisingly high figure of 7 per cent of those sampled saying they personally had some form of LEI. Reporting in 1997, the ABI estimated the figure to be nearer 20 per cent of the United Kingdom population. In addition the ABI reported gross premium income related to

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63 Supra, n. 47, 257.

64 As reported in Rickman, N., and A. Gray, Legal Expenses: State Legal Aid And The Market For Legal Expenses Insurance Second draft at p.7 for publication by the ABI, 1995.

65 It does, however, provide a total taking into account all forms of LEI and in all known sectors e.g. family, motor and commercial.

66 Supra, n.47, 257, where the writer takes his information (again presumably in short supply) from contemporary advertising literature to brokers from Hambro Housley.

67 Carried out by MAS Research Marketing and Consultancy conducting personal interviews with a nationally representative sample of 2452 adults in Great Britain.
advice-only policies of £3.76 million per annum over the period 1991-1993 with the average number of calls per annum from such policyholders being 171,000. Call volume for 1997 across the industry, is now estimated by the ABI at 1,000,000.

It would seem therefore, that at least 10 million people in Britain currently have LEI in some form. The June 1990 survey indicated a pre-dominance of this cover being provided by add-on policies since they were a relatively low-cost addition to an existing policy, e.g. house, building or car insurance.

Assessing the potential sales of LEI is extraordinarily difficult given the paucity of accurate data available in the past. Past forecasts have been generally over optimistic and, as has been shown, influenced by 'false' comparison with countries such as Germany and Sweden and inexact parallels drawn with the private health insurance market. The June 1990 survey aimed to analyse the potential market by questioning its sample group as to their interest in the concept. Their results were as follows:

1. The likelihood of taking out Motoring Legal Expenses Insurance.

<table>
<thead>
<tr>
<th>Likelihood</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very likely</td>
<td>6%</td>
</tr>
<tr>
<td>Fairly likely</td>
<td>18%</td>
</tr>
<tr>
<td>Not very likely</td>
<td>23%</td>
</tr>
<tr>
<td>Not at all likely</td>
<td>31%</td>
</tr>
<tr>
<td>Don't know</td>
<td>22%</td>
</tr>
</tbody>
</table>

Base: All those who have car insurance but do not have LEI.

2. The likelihood of taking out Household Legal Expenses Insurance.

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68 Supra, n 27, para. 3.14.
69 Ibid.
70 Supra, n 27, 7-8.
Very likely 3%
Fairly likely 10%
Not very likely 29%
Not at all likely 38%
Don't know 20%

Base: All those with some insurance other than LEI.

3. The likelihood of taking out separate Personal Legal Expenses Insurance.

Very likely 2%
Fairly likely 6%
Not very likely 24%
Not at all likely 49%
Don't know 19%

Base: All those with some insurance other than LEI.

The general conclusions would appear to be that potential for further growth in the motorists’ legal expenses insurance market clearly exists. Add-ons to general insurance provoked a 'lukewarm' response with only 13% overall saying they would be very or fairly likely to take out insurance and that reduced to 8% for the stand-alone style LEI policy.

"It would appear from the public opinion survey that many people remain unconvinced of the need to take out legal expenses insurance".71

Some positive signs though, have emerged for the insurers. Their middle-income target group with no access to legal aid may be sound theory since the survey indicated that 11% of the sample had in the past wanted to seek legal advice but had been put off by the cost. Of those aged 25-34 the figure increased to 16%. In addition, one reason for the warm reception

71 Supra, n 27, 9
motor LEI received, may be its higher public profile than other forms of LEI. That is, knowledge of the product leads consumer demand. Generally, the LEI market in the United Kingdom is currently quite small in terms of gross premium. It has been suggested that the main problem in developing a larger LEI market:

"... is the size of consumer demand, and supply side restrictions on the types of policy available, often in response to important information asymmetries, including adverse selection due to low volumes."\(^{11}\)

It does seem that development of the market may be significant once the way in which it should interact with the existing system of legal aid is resolved. For the moment, the market will grow steadily perhaps in line with its growth over the last decade but not dynamically until its position as a bona fide provider of legal services in the United Kingdom is more properly defined and endorsed by the legal establishment itself.

It is likely that a political element as yet prevents the embracing of the LEI concept. The result is a distancing of LEI from the existing legal aid system. The former Lord Chancellor, Lord Mackay, has assessed legal expenses insurance as having:

"...marginal relevance in relation to legal aid in the foreseeable future."\(^{13}\)

This fails to afford due recognition to LEI which, has assisted many thousands of people who would otherwise have had no legal recourse effectively available to them due to cost prohibition. The continued existence, growth and emerging profitability\(^{14}\) of LEI in the United Kingdom despite such distancing, surely portrays it at worst, as a most durable animal. In any event, it is a point of fact that, whether related or not to the growth in LEI, the eligibility levels for civil legal aid have been steadily trimmed to their present benefit

\(^{1}\) Supra, n. 64, 14


\(^{13}\) In 1994 the Legal Protection Group announced to the market that its 'stand alone' LEI policy proved both profitable to the Insurance Management Company and its underwriters. To the best of the writer's knowledge this is the first time in the UK history of such a particular LEI product that this has occurred.
related level. It is also fact, that the growing pool of individuals not entitled to free legal aid provides the LEI insurers with an ever-increasing potential market for their core product. Couple this with the potential effect of product knowledge for the consumer and it would seem inevitable that growth in the market will continue albeit unpredictably.

It seems clear that LEI will not provide a complete substitute for legal aid and it is unlikely, for obvious commercial reasons, that the insurers would want that conclusion even if, (which is unlikely) the Board were to start paying the premiums. Payment of premiums alone will not protect the underwriter if the provision of legal services is not properly controlled. What is equally true is that 'knocking' LEI will not make it go away. LEI seems to suffer from it being generally distasteful and for many, politically incorrect, to lend support to it in its capacity as a free market opportunist, when the purity of a welfare state civil legal aid service is in systematic decline. It appears that an opportunity to properly position LEI as a legal service provider is being lost. The general bad legal press LEI attracts does not seem to be reflected by the private practitioner who in most cases, where the opportunity arises, is willing to undertake LEI work with equal enthusiasm to its civil legal aid comparator. This is discussed in detail later in this study at Chapter 9, “The Solicitors Experience”. To conclude:

"... there is reason to suspect that, as in other areas where public expenditure currently plays an important role, private insurance arrangement might become increasingly involved in funding legal services in future".75

It does seem that with each review of civil legal aid undertaken by the Lord Chancellor's Department the future of LEI looks increasingly promising. Perhaps surprisingly, the insurers themselves are less optimistic that this assertion is correct:

"... the restriction of civil legal aid and the publicity that it has received should in theory affect demand for legal expenses insurance. In practice it has only very marginal impact".76

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75 Supra, n.64, 14

76 Christine Malkin, Manager of the Legal Department Hambro Legal Protection Ltd. in a letter to the writer dated 25.10.93. 
DAS, The Legal Protection Group and Allianz spokespersons answered similarly.
The reason offered is that the target market for LEI is not those who have most recently lost access to legal aid.\textsuperscript{77} It follows that whilst over a number of years the decline in eligibility for civil legal aid may make a difference to the potential LEI market, it appears that the experience of the insurers is that the impact is not immediate. The insurers choose to put their faith for the future of LEI in controlling successful areas of the known market:

"... the future is with add-ons and group covers to give both volume and the spread of risk".\textsuperscript{78}

\textsuperscript{77} "The people who have lost access to legal aid are not potential buyers of LEI". James Painter Marketing manager of The Legal Protection Group in a letter to the writer dated 13.10.93.

\textsuperscript{78} Allan Truman, Executive Manager Allianz Legal Protection in a letter to the writer dated 24.3.94. DAS, The Legal Protection Group, and Hambro Legal Protection answered similarly.
Chapter 7

The Range of Products Available

This chapter assesses the LEI products currently available in the United Kingdom and considers their diversity in respect of cover, price and value, from the motorist’s uninsured loss recovery policy to family legal benefits insurance. The main insurers are detailed and so too is the important distinction between the stand-alone and add-on LEI products. This distinction is of particular consequence in relation to the development of LEI in this country compared with our European neighbours and which later forms a separate section of this study at Chapter 11. The insurer’s use of a ‘merits’ test is also considered as are other risk-management tools such as legal advice help-lines for the insured. The insurer’s chosen methods of managing LEI risk can have important consequences with regard to the insured’s perceived value of the product.

7.1 The Market Products

As indicated in the previous chapter of this study the market place for legal expenses insurance products is diverse. Moreover, it continues to expand both in terms of market penetration and the product itself on offer to the general public. The range of LEI products remains broadly; stand-alone, add-on and uninsured loss recovery. The provision of services for affinity groups in the non-commercial/personal sector of the industry is akin to the add-on specification. Due to a paucity of information available in respect of this sector of LEI, the analysis will concentrate on a comparative study of the add-on market that will by implication encompass the affinity sector.

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1 In the writer’s own experience the explanation for the lack of information is due to the nature of the contract of insurance itself. The contract is negotiated between the affinity group and the insurer, often following invitations to tender. The provisions relating to the cover of such insurance are not public and the cost in some cases is a closely guarded secret for commercial reasons.
In spite of the fact that most LEI is in practice underwritten by little more than a handful of insurers, the market appears to be awash with brochures offering personal cover. The reason seems to be the trend in selling the LEI product through the corporate client outlets of the four main legal expenses insurers, Hambro Plc., D.A.S., The Royal And Sun Alliance Insurance Co., and Cornhill Insurance. Each of the big four insurers will have a range of corporate clients, typically banks and building societies with whom they conduct business to make contact with the public 'direct'. These corporate clients will offer LEI to their customers as an 'own brand'. It therefore follows that any meaningful analysis of the LEI market and a study of its policies must acknowledge this reality and concentrate on the core product of the insurer and not the corporate client outlet.

Further, adding to the confusion, the main insurers conduct business with their corporate clients through management companies that control the legal expenses insurance arm of their business. The management companies are often referred to as the “administrator” of the LEI provisions. The connections between the administration companies and the main four legal expenses insurers in the United Kingdom, are as follows:²

- Hambro Plc. - Hambro Legal Protection Ltd.
- DAS. - DAS Legal Expenses Insurance Co. Ltd.
- The Royal And Sun Alliance - The Legal Protection Group Ltd./ CareAssist.
- Cornhill Insurance Plc. - Lawclub Legal Protection Ltd.

² The LEI administrator companies cited are all wholly owned subsidiary companies of the respective insurers.
Other players in the LEI market such as Litigation Protection Limited and Abbey Legal Protection Limited, administer the policies having placed the underwriting with a Lloyds of London syndicate.

The comparative table of insurance policies at the end of this chapter (pages i to ix) for the reasons aforesaid, detail the products available from the main composite insurers and their administrators. In this way it is hoped that a meaningful comparison will emerge without unnecessary recourse to the myriad of policy variations which is in truth, illusory.

7.2 Stand-Alone Non-Specific Perils Legal Expenses Insurance

As detailed in the previous chapter, it is the stand-alone product that represents personal LEI cover in its most traditional form. It is a single policy of insurance available to the public upon payment of an annual premium that purports to provide LEI cover for all civil legal disputes subject to a limited range of general exclusions. According to research by DAS.3 while:

"...more than eleven million people have legal expenses cover though motor and household policies .... policyholder's with stand-alone cover number fewer than 50,000".

The Royal And Sun Alliance, through their subsidiary The Legal Protection Group, are the only insurer remaining in the stand-alone policy market. At present, they appear to have no intention of withdrawing their product known as "Family Legal Benefits Insurance". 4 A direct comparison with competitor products is therefore impossible.

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4 The intention to remain in this market has been expressed on two occasions to the writer by executive representatives of The Legal Protection Group Ltd. In April 1993 Malcolm Gilbert the General Manager of the Group clearly stated this view when interviewed by the writer. In June 1995 upon written submission of the question:

"Given the adverse claims experience in recent years in respect of stand-alone LEI and the withdrawal from this market by the other leading insurers, is it the intention of The Legal Protection Group to remain the sole provider of this form of LEI?"
Such policies cover the United Kingdom (including Northern Ireland) the Channel Islands and European community countries. They apply to the insured, their spouse, children under 21 and any other dependant permanently residing with the insured. Two limits of indemnity are offered with corresponding premiums. A limit of indemnity of £25,000 costs £209.86 and £50,000 worth of cover will cost £251.89.5

In order to control claims, the policy uses two mechanisms. The first is coinsurance, where the insured is contractually obliged to contribute ten per cent to the legal expenses incurred in commencing or defending their legal claim. Additionally, in applying a general principle of *de minimis* the policy may not be used in respect of contract disputes of less than £100 in value and up to £500 where the insured is a member of the building and allied trades. There becomes in effect, a minimum amount in dispute. As a further benefit to the insured, they are entitled to access a 'free' legal help-line available 24 hours a day 365 days of the year. The help-line may be used to take advice on any legal matter whether or not it is potentially covered by the policy of insurance.

The nature of the cover available under the policy is that of non-specific perils. It follows that the general exclusions are an important risk-management feature of the product. In summary, situations excluded are:

- Any pre-existing condition or event.
- Indemnity entitlement under any other policy of insurance held by the insured.
- Defence of any civil legal proceedings made by or brought against the insured arising from;

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Peter Smith, manager of the Legal Expenses Division of the Group stated again, quite clearly, that there were no immediate plans to abandon the product. Both, however, affirmed the need to regularly review the product and its profitability.

Price is listed as at 1st November 1995.
(i) death, bodily injury or disease of or to any person,

(ii) loss, destruction or damage of or to any property,

(iii) the breach or alleged breach of any professional duty,

(iv) the breach or alleged breach of any duty owed as a director or officer of any company.

(It is believed that adding these areas of cover would make the cost of such insurance prohibitive).

- Legal proceedings between family members.

- Dispute over custody/care and control of children.

- Damages, fines or penalties of any nature.

- Defence of any legal proceedings arising from any act committed deliberately, recklessly or with willful intent by the insured.

- The defence of any criminal proceedings unless charges are dismissed or the insured is acquitted.

- The defence of any legal proceedings arising from or relating to any actual or alleged dishonesty, fraud or malicious conduct of the insured.

- Any matter relating to the insured's business.

- Defamation actions. *(Similar to the position regarding civil legal aid)*
• Legal proceedings between the insured and a central or local government authority.

• Legal proceedings in relation to any contract of insurance in so far as the dispute is solely in respect of quantum.

• Any consequence of war, invasion, hostilities etc.

• Damage or loss in respect of radioactivity.\(^6\)

As general conditions the insured is obliged to undertake:

"...due observance of and compliance with the terms, provisions and conditions of the policy",\(^7\)

and:

"...all reasonable steps to prevent any occurrence which may give rise to a claim under [the] Policy".\(^8\)

It is a condition precedent to the Insurer's liability under the policy that their consent to pay legal expenses must be obtained by the insured from them in writing. Such consent will be given provided the insured can satisfy the insurer that:

a) "...there are reasonable prospects of successfully pursuing or defending the legal proceedings; and

b) it is reasonable for legal benefits to be paid in a particular case".\(^9\)

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\(^6\) Details as listed on p.p. 9 and 10 of the Family Legal Benefits Insurance Policy document as published by The Legal Protection Group Ltd. Fully reproduced on page (viii) of the comparative table at the end of this chapter.

\(^7\) The Policy document as above at p. 11.

\(^8\) Supra, n. 6, 11.

\(^9\) Supra, n. 6, 12.
There are obvious similarities between this test and the civil legal aid test detailed earlier in this study at Chapter 2.

Furthermore, where in the view of the insurer, the insured is made an offer of settlement and "unreasonably withholds agreement to a settlement", the insurer reserves the right to withdraw their support for the claim.10

To its credit, the policy in clear terms affirms the insured's right to freely select an appointed legal representative to act in any legal proceedings to which the insurer has consented. The policy goes on to offer to nominate a representative for the insured if they should so choose.11

It can be seen that the 'nineties' version of the traditional stand-alone product is wide in its purported cover with many of its exclusions seemingly obvious for reasons of either public policy or commercial reality. This breadth of cover and perceived value has remained constant in the last decade. The changes have been twofold. Firstly the introduction of claims controlling mechanisms such as coinsurance and the concept of a minimum amount in dispute are a fresh approach. Secondly and more subtly, the adherence to the wording of the policy and more careful scrutiny by the insurer of the "reasonable prospects" of a claim have acted to inhibit the use of such policies. To be fair to the insurers they have not acted in a way that may be described as disingenuous. Certainly, it is the belief of The Legal Protection Group that the only reason they have been able, to date, to stay in the stand-alone market is by reason of their prudent policy-wording and claims-handling policies.12

The insurer would argue that those who take out their stand-alone policy when not in contemplation of a dispute and subsequently fall into dispute, will be afforded a

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10 Supra, n 6, 15.

11 Supra, n.6, 13.

12 This belief has been made clear to the writer on more than one occasion in discussion and interviews with members of the executive management team of the Group.
considerable level of protection both in terms of what is in dispute and the limit of indemnity. Furthermore, that this protection represents good value for money. That said, in the words of The Legal Protection Group's marketing spokesman Tony Brown:

"High-flyers go for the Family Legal Benefits" and it is "the add-on policies" ... that ... "are priced within the reach of most people and cover the essential elements".\textsuperscript{13}

For many working within the LEI personal market, Mr. Brown's comment is a statement of fact.

\subsection*{7.3 Stand Alone Specific Perils Legal Expenses Insurance}

This hybrid LEI policy offers specified perils similar to the add-on market but is promoted as a distinct form of insurance like the traditional stand-alone product. It is the newcomer to the market and is itself a product of innovative marketing techniques. In fact, it is not stand-alone despite the way in which it is packaged. Members of the public do not have direct access to these policies. They must qualify, for example by holding a current account with a specific bank\textsuperscript{14} or have purchased a 'main' insurance policy such as car or household insurance\textsuperscript{15} before they are entitled to avail themselves of the opportunity of this type of LEI policy.

At present only a few of these LEI policies exist. Of those that do, their terms are similar but their price variable. The specific perils appear standard and cover consumer, employment, death and personal injury and residential matters.\textsuperscript{16} Cover extends to any member of the insured's family ordinarily resident with the insured and the limit of

\textsuperscript{13} Downing, H., 'UK Personal Legal Expenses - A Rocky Road' (1995 \textit{Post Magazine}, Jan, 12.

\textsuperscript{14} For example; Midland Banks' "Options" range of insurance and services which includes specific perils LEI available only to individuals who have a current account with The Midland Bank.

\textsuperscript{15} For example; Direct Line 'Family Legal Protection' policies are available only to individuals who already possess a motoring or household policy with Direct Line.

\textsuperscript{16} `Supra', n. 14 and n. 15. This conclusion is based on the content of the policy documents of these two LEI contracts.
indemnity is typically £25,000 or £50,000. The territorial limits vary significantly but most at least cover an extended definition of the United Kingdom which incorporates the Channel Islands and Northern Ireland. Price varies from £16.40 to £66.00 per annum17 as does any excess applicable, from £15.00 to £50.00.

Mechanisms for controlling claims include the provision of a minimum amount in dispute (usually £100.00) and a waiting period under a live policy before a claim may be made. It is not uncommon for there to be reference to two waiting periods, one for employment disputes (90 days is the norm) and another for property matters (180 days is typical). Presumably, it is by these provisions that the insurers hope to filter pre-existing events. It remains unclear from these policy wordings whether certain loopholes exist which may be exploited by the insured. For example there would seem no apparent reason why an individual, who has suffered a personal injury through the negligence of another, should not (if eligible) take out such insurance and pursue their claim. In theory, loopholes such as those described above may be closed by the insurer’s proposal form at the application-stage.

It is submitted that products such as these, sold directly to the public by telephone or though a corporate client intermediary of the insurer, are prone to the factual mistakes and confusion at inception, which dogged the true stand-alone market so many years earlier. If one glaring salutary lesson was learned from the experience of all insurers in their dealing with stand-alone products, it was the absolute need for questioning of the proposer and attention to detail before the LEI insurance contract became live. Failure to do so lead inevitably to a high volume of claims which in turn impacted adversely on the effective profitability of the product itself.

Any product, in whatever marketing format, holding itself out as a stand-alone LEI policy is likely to suffer, to some degree, from adverse selection. The stand-alone (with qualification) specific perils policies now available are fresh in the LEI market place. In

17 As at 1st November 1995. The Direct Line Product costs £16.40 per annum with an excess of £50.00. Midland Bank ‘Options’ product costs £66.00 per annum with an excess of £15.00.
cover, value and cost they are positioned somewhere between a full-blown stand-alone non-specific perils policy and an add-on. It remains to be seen whether their marketing can avoid the attraction of the litigious which so badly affected the market growth of the stand-alone product.

7.4 Additional Specific Perils Legal Expenses Insurance

There are many add-on LEI policies available in today's market place. Pages i to v at the end of this chapter provide details of the most popular products available. In many ways add-ons represent the ray of hope for the legal expenses insurers having suffered the gloom of adverse selection with their stand-alone policies in the past. Add-ons are typically sold in large numbers being attractive in price to many members of the public. A great number of such policies are sold in blocks of business as part of a scheme or benefit available to certain groups of people. In the words of James Innes, Chairman of Abbey Legal Protection Limited:

"The secret to a successful legal expenses insurance scheme is the chance to buy legal services ... extremely cheaply, so with bulk purchasing power you get a very good deal for the client and for the underwriter".18

Taking this to its logical extreme, the price for LEI should be so attractive that people buy it for protection only, with no intention of using it to fund an action known or unknown at the time of purchase. It would seem from the experience of add-ons that the price is certainly right but the level of cover is perhaps more questionable.

The range of cover available is considerable. Whilst there are similarities there are also some key variables. Territorial limits are similar, most with an extended definition of the United Kingdom (as per 7.3 above) and some including European Community Countries. The definition of insured normally includes the spouse and any member of the family ordinarily residing with the insured. Most operate a minimum amount in dispute of around

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18 Supra, n. 13.
£100.00. An excess is applicable, typically between £25.00 and £50.00 of each and every claim. A waiting period before which time a claim cannot be made is quite normal, with a distinction in most cases being made between property disputes (180 days) and employment (90 days). All the policies considered in this analysis offered the insured unlimited 'free' legal advice accessed by telephone. Such advice was available 24 hours a day 365 days of the year.

The common variables were price and the types of dispute covered by the insurance. Price ranged from £5.00 per annum to £55.00 per annum. That said, there exist a predominance of policies priced between £10.00 and £15.00 per annum aimed at the £1.00 a month mark. Little wonder many insurers believe adverse selection, for the moment, is truly beaten. A mid-range add-on will typically provide cover in the event of disputes in relation to employment, personal injury or death, residential matters, and consumer problems. Interestingly the limit of indemnity varies widely from £10,000 per claim to £50,000 and there appears to be no obvious connection with the amount of premium paid. Some of the best value policies will include cover for tax and VAT disputes, defence against motor prosecutions and in certain circumstances the cost of appeal.21

The insurers argue that the add-on range of policies offer good value for money and cover the "essential" areas of dispute. However, they fail to cover matrimonial and family matters. Paul Asplin of DAS offers an explanation:

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19 The Royal And Sun Alliance 'Home Contents' policy as administered by The Legal Protection Group Ltd. (Premium as at 1st November 1995).

20 The Avon Insurance Company 'Home And Friendly Extra Cover' policy. Details of the administration are not known. (Premium as at 1st November 1995).

21 See for example:

  Guardian Royal Exchange 'Select/Dimensions' policy, and/or Orion Insurance 'Star Plan'.

22 See the comments of Tony Brown of The Legal Protection Group supra n. 13.
"It's unrealistic to expect insurers to cover all the areas legal aid accounts for ... the risk of divorce is sadly too high to insure against and it's more likely that people will buy cover knowing that they have marital problems".23

The lack of cover available across the LEI market in areas such as family, welfare benefits and immigration, does suggest that LEI, in its present form, would make a poor substitute for civil legal aid.

Another material factor emerges, that of eligibility for purchasing an add-on LEI policy. They are only available to individuals who already possess a household policy or motoring insurance and typically in respect of the former.

"About one in four households do not have contents cover, leaving them totally vulnerable".24

7.5 Uninsured Loss Recovery Legal Expenses Insurance

Uninsured Loss Recovery (ULR) cover has been available in the United Kingdom since the mid 1970's and it is estimated that around a half of the United Kingdom's private motorists have arranged ULR cover as a low-cost add-on to their standard motor insurance cover.25 ULR cover is provided by specialist insurance companies and by specialist ULR companies who use an authorised insurer to underwrite the legal expenses cover. It follows, that the most popular type of LEI policy available in the United Kingdom market today is cover for the pursuit of ULR claims following a non-fault motor accident. The ULR cover complements motor insurance cover which does not cover legal costs to claim against third parties and should cover the cost of pursuing claims for uninsured losses against negligent


24 'Money-Go-Round Take Cover And Pay The Lawyers'. The Daily Telegraph, 4 March, 1995, 32, (A statistic confirmed by the Association of British Insurers upon telephone enquiry by the writer in August 1995).

25 This information is taken from the publicity documentation of The Motoring Uninsured Loss Recoveries Association (MULRA) 1994.
drivers, such as expenses, compensation for personal injuries and the costs of replacement hire vehicles.

ULR can be purchased through insurance brokers, intermediaries or as part of a motor insurance offer directly from insurers or through banks, building societies or other financial services retailers. The range of policies available is extensive and increasing. In the 1980's it was believed by many legal expenses insurers that standards in the market began to fall. To combat this perception six leading companies\textsuperscript{26} who provided ULR policies, set up The Motoring Uninsured Loss Recoveries Association (MULRA) on 15th March 1994. A key aim of MULRA was to establish and maintain recognised market standards\textsuperscript{27} and to act as a platform for industry debates regarding ULR. By February 1995 membership stood at eleven.

As a result of the emergence of MULRA it is reckoned that:

"...more than half of all ULR policies are now ... provided by member companies".\textsuperscript{28}

More recently it has forged new links with the Association of British Insurers which has openly approved of their initiative. The result is that the providers of ULR LEI in the United Kingdom now fall into two camps, MULRA and non-MULRA. The product comparison table at pages viii to ix reflect this situation.

\textsuperscript{26} The founder members of MULRA were: Countrywide Assistance Ltd., D.A.S. Legal Expenses Insurance Company Ltd., Law Club Legal Protection, Legal Protection Group Ltd., Motorists Legal Protection Ltd. and Uninsured Loss Recoveries Ltd.

\textsuperscript{27} Key membership requirements include;
- Paid up capital of at least £25,000;
- Full backing of an authorised insurer;
- A trading record of at least 3 years;
- Professional indemnity cover of at least £500,000 if not an insurer.

- Full policy wordings to be made available to the insured,
- Mandatory compliance with the 1990 Legal Expenses Regulations.
- The policy holder must be told the name of the underwriter, whether they are members of the Insurance Ombudsman's Bureau or other arbitration schemes.

\textsuperscript{28} 'New Members For MULRA', (1994) Insurance Brokers Monthly, November, 15.
Cover, as with other types of LEI policy, varies. The limit of indemnity is usually around £50,000 with the odd exception providing twice that amount. Nearly all offer to cover the cost of hiring a replacement private hire car and extend cover to include European Community Countries. Premiums start as low as £2.95\(^29\) and go up to £15.00\(^30\) with most policies costing an average £4.00 to £5.00 per annum. In common with other LEI policies most ULR providers offer the 24-hour legal help-line facility.

In terms of value for money, the cost to the consumer is cheap when compared to the cost of the main motor insurance premium. Again, adverse selection may be successfully avoided. In addition, many of the ULR insurers provide their own in-house claims negotiating teams whose task it is to recover sums from the negligent driver or their insurer. This has proved a cost-effective way of litigating and has acted to peg premiums at such low rates. Opinion is split as to whether in-house handling or appointing solicitors is the most efficient method. It is common for companies to handle the bulk of claims in-house and only farm out the more complex claims to solicitors. Paul Hurley of Lawclub Legal Protection believes in dealing with solicitors from day one claiming this:

"...is one reason why the company has lost less business than some competitors."\(^{31}\)

On the other hand:

"...Motorists Legal Protection employ their own highly qualified staff - 80 per cent are honours graduates".\(^{32}\)

It is estimated that there are between 70 and 150 companies in the ULR market.\(^{33}\) Some of the bigger companies are diversifying believing casualties are inevitable over the next two years:

\(^{29}\) Law Direct, underwritten by Lloyds via Cygnet.

\(^{30}\) Eurosure Legal Protection Ltd., 'Europcar Total Accident Management', underwritten by Lloyds L.R.G. Roberts Facility 55.


\(^{32}\) Ibid.
"When you can't increase your margins and overheads are increasing year on year something has got to give". "There is only so far efficiency can go in driving down premiums ... a lot of companies are living on jam today and forget about tomorrow".34

Others believe that:

"...there are far too many companies in the market. It's very cheap to get into it but we will see in the future that it's very expensive to get out".35

The only present winner seems to be the consumer who is able to purchase ULR cover very cheaply. This knock-on benefit is acknowledged in the market:

"...competition has to be a good thing in the long term it makes all the leading companies look at what they can do to improve their product."36

It has been observed that MULRA has made its mark on the industry, but not in ways its founders can have intended.

"The association has stirred up controversy with accusations that it is little more than an exclusive club for the big boys".37

Only a small proportion of the market has joined and Hambro has held back from throwing its weight behind the initiative. Whilst MULRA struggles to increase, or at least maintain, market standards it does seem to be a fact that most people have now accepted ULR as a normal part of their motor insurance contract. It is argued that this acceptance has important implications for the general LEI add-on market, where it is hoped that add-on products to household policies will become equally acceptable to the consumer.38

34 As per the comment of Adrian Bennett, sales and marketing director on ULR Services, as reported in Post Magazine supra n. 31.
35 Supra, n.31.
36 Alan Wood, managing director of Motorists Legal Protection as reported in Post Magazine supra, n.31.
37 Paul Hurley Lawclub Legal Protection Ltd. as reported in Post Magazine supra, n. 31.
38 Supra, n.31.
39 See the comments of Paul Hurley, Lawclub Legal Protection supra, n. 31.
7.6 Help-lines

The preceding sections of this chapter have indicated that in whatever guise LEI is purchased by the public - from stand-alone non-specific risks to a basic 'bolt-on' ULR policy - it comes with legal assistance to the insured in the form of a legal advice help-line. The growth in this phenomenon is itself worthy of brief analysis.

Before legal help-lines existed the individual in need of legal advice would have had to contact a local lawyer, wait for an appointment, discuss the matter and in all probability have then been charged for the service. Telephone legal advice was first provided in the mid-nineteen eighties by a small number of legal expenses companies in conjunction with their legal expenses policies. Advice would be on matters of law directly covered by the policy. Today the services provided are often 24 hour, 365 days of the year with the insured having access to a professionally qualified lawyer and being able to discuss any legal subject or dispute whether or not related to their policy of insurance. The reason for the rapid growth of legal help-lines appears to be twofold. Firstly, they represent to the insurer and the insured a real added-value benefit within almost any insurance contract with some suggesting that:

"...their high perceived value enhances the basic product out of all proportion to their minimal cost".\(^9\) Secondly, quite simply the public seem to appreciate the service." Help-lines have proved ... popular with the people using them".\(^40\)

The success of telephone legal advice lines are such that many of the leading legal expenses insurers offer their services to groups or associations as a stand-alone benefit. All this has been achieved in the face of considerable scepticism from the legal profession.

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\(^40\) Ibid. In addition, sampling undertaken by the Legal Services Division of the Legal Protection Group in 1993 in respect of its telephone advice line users returned a response of "total satisfaction", or more favourable, from 98% of the sample surveyed. The sample group comprised 500 insured clients selected at random.
concerned with the purity of lawyer/client relationships. They have grown largely by public
demand. There are even indications that the legal profession is mellowing in its view of
such services. It does seem that legal help-lines are going to firmly remain part of the LEI
package of services offered to the consumer in the future and that they do represent genuine
value to the insured (or otherwise) user. In the words of Paul Asplin:

"With such a wide spread of help-lines already established, insurance retailers need only use
their imagination to see ways to incorporate these, or others yet to be dreamed up, into schemes
which would benefit from a marketing boost."

Help-lines may be a marketing tool, but one seemingly appreciated greatly by the user
public. Within this small area of the LEI product insurers and consumers have discovered a
'win win' situation. From the writer's own working knowledge of telephone advice lines,
usage varies greatly, depending on how the service has been sold or advertised to its
intended market. On average the cost to the insurer of providing the service is 15-30 pence
per insured.

7.7 Value - The Public Perception

Whilst there may be many personal LEI plans available for the public:

"no one can deny that in the UK public awareness of private legal protection is low." This is backed by a recent survey carried out on behalf of the Legal Protection Group. Of
the sample group 48 per cent had encountered a legal problem in the last two years where
legal expenses insurance could have helped but only 3 per cent had insurance in place. The

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41 This proposal is based on the evidence of groups of solicitors such as Conquest, LawNet and LawSouth, employing the use
of help-lines for the benefit of their own client base outside normal office hours. Currently the Legal Protection Group
provide such a service on a contract basis to these groupings.

42 Supra, n.39.


44 The survey was undertaken by 'Directions Research Marketing' in January 1995 and its results were based on the responses
of a sample group of 1163 consumers.
present take up is evidently low. Of those who had insurance the survey showed most were unaware of the extent of their legal expenses cover:

"I bought it because you never know what's round the corner. I don't know the ins and outs of the policy".45

What did emerge from the sample group was that very few could envisage purchasing LEI as a stand-alone product in its traditional form. The cost of such a policy appeared prohibitive. To those for whom it was attractive the age-old problem of adverse selection reared its head once more:

"...I'd definitely go for something like that, I could see me getting my money back straight off".46

However, as an add-on, LEI appeared to have a far greater relevance and appeal. Many consumers spontaneously suggested including legal expenses insurance as part of another policy seeing the merit in avoiding a separate purchasing process and in the expectation of cheaper premiums. Moreover, on the evidence of the sample group the tie-in with the main product did not have to be strong and contents insurance was the obvious choice of main policy for the add-on. In terms of price, a majority of the group expected an add-on LEI feature to cost under £5.00 per month and most would be prepared to pay £2.00 to £3.00 per month; comments such as:

"...I wouldn't miss it if it were a few pounds a month",
were commonplace.47

Expectations as to the extent of cover for the price the sample group were prepared to pay, were similarly interesting. A majority of the group when presented with a list of matters covered by add-on LEI considered the cover satisfactory. However, it is submitted that before too much credence is attached to this finding it should be established as to how

45 Supra, n.44.
46 Supra, n.44.
47 Supra, n.44.
many of the group were sufficiently familiar with the nature of legal disputes adequately to comment on this issue. What did emerge was a realistic expectation that an add-on, for the typical low price, would not provide 'full' cover:

"You would not expect it to cover everything, not for £1.50 [per month]."*48

The list of exclusions was largely considered to be acceptable.

The mechanisms for controlling claims received a mixed review. An excess seemed acceptable provided it was small and not more than £50.00 but the group strongly rejected percentage contributions (coinsurance) objecting primarily to the potential personal cost. Waiting periods were also disliked by a majority of those sampled, seeing it as paying for insurance without being insured.

The telephone advice lines were perceived as a key motivating benefit likened to the Citizen's Advice Bureau "but without the queues".49 Generally, the research presented good news for the insurers confirming the potential of the add-on market. 46 per cent of the sample group were interested in buying legal cover at £35.00 a year or more. In response to the survey results Malcolm Gilbert, former general manager of The Legal Protection Group, said:

"...with the number of court cases increasing and media attention focusing on the demise of legal aid in the United Kingdom, the time [is] right for intermediaries to acquire and retain personal lines clients by providing legal protection."50

It does seem that such attention coupled with the ever-increasing willingness of the consumer to exercise their legal rights is having the effect of generally heightening the public perception of value and need, in respect of legal expenses insurance.

*48 Supra, n.44.

*49 Supra, n. 44.

*50 As reported in, 'Scope For Legal Cover' Lloyds List, 23rd February, 1995, 23.
7.8 Conclusions

The legal expenses insurance market is, albeit unremarkably, growing in the United Kingdom. Eligibility for civil legal aid is declining. Of the three main types of LEI cover available there are problems. Stand-alone traditional non-specific perils LEI, has become so unattractive to both the insurer and the insured that a choice of policy in the market place no longer exists. The insured think it’s too expensive and if they do buy it are immediately looking to recover their cost. The remaining insurer in this field is not actively promoting the product but concentrating on the management of the existing book of business. The attitude of the insurer is encapsulated in the comment of Janet Pressley, Marketing Manager of the Legal Services Division of The Legal Protection Group:

“If somebody comes to us looking to take out a Family Legal Benefits policy, we will not turn them away. However we are not actively looking to sell it to them either.”

It would seem that this form of LEI is destined to do no more than ‘wither on the vine’.

At the opposite end of the scale the ULR insurance market is so overcome with competitors that many industry members worry for its stability and integrity.

“There is a lot of unsavoury activity in the market. Solicitors are paying companies to send them claims sometimes. There are a number of fraudulent practices which are likely to give sections of the market a bad name”.

The MULRA initiative has been criticized for elitism despite the Department of Trade and Industry looking into the financial stability of ULR providers and Customs and Excise beginning to take an interest in companies which are not insurance based. The best that may be said is that presently within these undoubtedly murky waters, the consumer may catch himself a good deal in terms of the price, cover and value of ULR insurance. Add-on

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51 A comment relayed to the writer during a telephone conversation on 30th October 1995.

LEI seemingly is untroubled by similar matters. The public and the insurers find it attractive but it has yet to develop fully the standardisation to be found in the more established ULR market. A balance has yet to be found between burying the spectre of adverse selection with claims-control mechanisms and persuading the public that the cover represents good value for money. Presently, the public is uneasy. They like the price and the concept of add-on LEI but express a healthy cynicism towards claims controls wanting perceived value at the point of purchase not up to 180 days later. Whilst add-on cover does extend to most areas of housing law presently covered by legal aid and notably employment law not so covered by the state provision, its failure in respect of family matters is glaring. To consistently approach family matters in this way will arguably mean that LEI will never provide an alternative to a civil legal aid system. Legal expenses insurance will, like its most successful product, be itself an add-on to a more comprehensive insurance system, the welfare state.

However, the former Conservative Government wanted more people to take out private legal expenses cover and actively urged its increased use. Jonathan Aitken, former chief secretary to the Treasury, has described legal expenses insurance as a "neglected area".\textsuperscript{53} He believed that the present problem with civil legal aid was that:

\begin{quote}
"... neither the providers of the service nor the ostensible clients have any significant interest in the efficiency or economy of delivery. Indeed in the case of the providers, just the opposite is true".\textsuperscript{54} The Society has already advocated compulsory motoring legal expenses and urges insurers to look to "the extension of the existing private insurance schemes".\textsuperscript{55}
\end{quote}

Many insurers believe that while some aspects of state-aided funding will always be needed, for example in the criminal courts, block schemes arranged in conjunction with the most popular forms of domestic insurance could both reduce the need for legal aid and make private provision affordable. In certain areas of law:

\begin{itemize}
  \item In an address to the Society of Conservative Lawyers 13th February 1995. House of Commons.
  \item Supra, n. 53.
  \item Supra n. 53.
\end{itemize}
"many millions of people could be brought into the private area with all the benefits that this gives to the public purse. If such cover were to be bolted-on to the most common form of insurance for homeowners, buildings insurance, the cost could be as little as £5.00 per year".56

It is argued that the high uptake of legal expenses cover amongst private motorists shows how successfully the private providers can pursue justice on behalf of more than 250,000 people every year.57 Further, that there is no reason why this should not be the case for non-motor injuries. Cover can be provided at low cost over large sections of the population.58

It does seem that a significant change to the format of LEI policies would be facilitated by the imposition of some form of compulsory insurance. It is not beyond possibility that the best of the existing add-on covers could be extended to all areas currently dealt with by civil legal aid for little additional premium, perhaps £30-50 per annum. More important is the qualification which triggers the requirement of compulsory LEI, be it car, home ownership or some other. There will always be a significant number of individuals who will remain outside of this group either because they are without the requisite possession or by choosing to defy the law.

Until such time as some form of compulsory LEI is enforced the existing policies available look set to evolve slowly. Add-ons are presently on the fast track of development and are generating the greatest interest within the LEI industry. There does seem to be a consensus between those members of the public aware of LEI and the insurers, that they represent sound value for money. However the extent of their availability to, as yet, a minority of the general public must not be ignored. It remains the task of the insurers to innovate and create new markets for the add-on product that avoids adverse selection and yet significantly increases the number of people with LEI cover.


57 According to figures produced by the ABI.

58 Supra, n.56.
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<td>Limit of Indemnity per any one claim</td>
<td>£25,000 or £50,000 up to a maximum of £250,000 per annum.</td>
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**General Exclusions**

1. Pre-existing condition or event
2. Indemnity entitlement under any other policy of insurance held by the insured
3. Defence of any civil legal proceedings made by or brought against the insured person arising from;
   i) death, bodily injury or disease of or to any person
   ii) loss, destruction or damage of or to any property
   iii) the breach or alleged breach of any professional duty
   iv) the breach or alleged breach of any duty owed as a director or office of any company
4. Legal Proceedings between family members
5. Dispute over custody/care and control of children
6. Damages, fines or penalties of any nature
7. Defence of any legal proceedings arising from any act committed deliberately recklessly or with wilful intent by the insured.
8. The defence of any criminal proceedings unless charges are dismissed or the Insured Person is acquitted
9. The defence of any Legal Proceedings arising from or relating to
any actual or alleged dishonesty, fraud or malicious conduct of the insured Person unless such Legal Proceedings are successfully defended.

10. Any matter arising from or relating to any business or trading activity or venture for gain undertaken by the Insured Person including but not limited to any personal guarantee or investments in unlisted companies. Notwithstanding the provisions of this Exclusion Insurers will indemnify the Insured Person in respect of Legal Benefits incurred in the pursuit of Legal Proceedings arising from the Insured Person’s contract of employment subject otherwise to the terms and conditions of this Policy.

11. The pursuit or defence of any action alleging defamation.

12. Legal Proceedings between the Insured Person and a central or local government authority

a) unless the Insured Person has suffered or could suffer pecuniary loss if the Legal Proceedings are not pursued or defended.

or

b) concerning the imposition of statutory charges.

13. Legal Proceedings in relation to any contract of insurance insofar as the dispute is solely in respect of quantum.

14. Any consequence of war, invasion, act of foreign enemy, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection or military or usurped power.

15. Any expense, consequential loss, legal liability or any loss of or damage to property, directly or indirectly caused by or contributed to by

a) ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel.

b) the radioactive, toxic, explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof.
STAND ALONE
SPECIFIC PERILS

LEGAL EXPENSES INSURANCE

Company
Administrator
Policy Name
Territorial Limits
Definition of Insured
Limit of Indemnity
Price
Minimum Amount In Dispute
Excess
Waiting Period
Specific Perils

Direct Line
DAS
Family Legal Protection
Western Europe, Yugoslavia, Iceland
Insured and any member of the insured’s family
£50,000
£16.40 pa
£100
£50
180 days - property
90 days - employment
i) Consumer disputes/good and services
ii) Defending claims for personal goods
iii) Pursuing claims for death or bodily injury
iv) Pursuing civil claims relating to your principal place of residence
v) Pursuing contract of employment claims.

Company
Administrator
Policy Name
Territorial Limits
Definition of Insured
Limit of Indemnity
Price
Minimum Amount In Dispute
Excess
Waiting Period
Specific Perils

Midland Bank
Care Assist
Midland Options
Great Britain, Northern Ireland, Isle of Man and Channel Islands
Insured and any member of the insured’s family ordinarily resident with the insured.
£25,000
£66.00 p.a.
None
£15
90 days except in the case of personal injury.
i) Pursuing claims for death or bodily injury.
ii) Pursuit or defence of claims relating to defective goods or services.
iii) Pursuit or defence of actions in respect of the insured’s principal place of residence.
iv) Pursuing contract of employment claims.
### Additional Specific Perils
### Legal Expenses Insurance

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**DISPUTES COVERED**

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<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Tax &amp; VAT</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Construction and conversion of the home</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Crime Prosecution</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Data Protection</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Appeal Costs</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Disputes relating to the occupation of the permanent residence</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
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<td>COMPANY</td>
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<td>NORWICH UNION</td>
<td>ORION</td>
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<tr>
<td>-------------------------</td>
<td>---------------------------------------------</td>
<td>-------------------------------------------</td>
<td>------------------------</td>
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<tr>
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<td>Hambro</td>
<td>Hambro</td>
<td>DAS</td>
</tr>
<tr>
<td>Policy Name</td>
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<td>Home Plus</td>
<td>Star Plan</td>
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<td>United Kingdom only</td>
<td>UK</td>
<td>Most European Countries</td>
</tr>
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<td>Definition of Insured</td>
<td>Insured, and any member of the insured's family insured</td>
<td>Members of family residing with the insured under 21 residing with the insured</td>
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<tr>
<td>Limit of Indemnity</td>
<td>£25,000</td>
<td>£25,000</td>
<td>£50,000</td>
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<tr>
<td>Price</td>
<td>£12 pa</td>
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<td>Yes</td>
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<td>Excess</td>
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<td>£25</td>
<td>£50</td>
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<td>Waiting Period</td>
<td>Property - 180 days</td>
<td>Employment - 90 days</td>
<td>Property - 180 days</td>
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<td></td>
<td>Employment - 90 days</td>
<td>Other - 180 days</td>
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<td>Helpline</td>
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<td>Yes</td>
<td>Yes</td>
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<tr>
<td>DISPUTES COVERED</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>Consumer</td>
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<td>Yes (£200)</td>
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<td>Employment</td>
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<tr>
<td>Motor Prosecution and Defence</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
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<tr>
<td>Death/Personal Injury</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
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<tr>
<td>Tax &amp; VAT</td>
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<td>No</td>
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<td>No</td>
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<tr>
<td>Crime Prosecution</td>
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<td>No</td>
<td>No</td>
</tr>
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<td>Data Protection</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
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<tr>
<td>Appeal Costs</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
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<td>Yes</td>
<td>Yes (£250 excess)</td>
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<tr>
<td>-----------------------</td>
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<td>------------------------------</td>
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<tr>
<td>Administrator</td>
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<td>CareAssist</td>
<td></td>
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<tr>
<td>Policy Name</td>
<td>Home Insurance</td>
<td>Home Insurance</td>
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<td>Territorial Limits</td>
<td>Europe</td>
<td>UK, Isle of Man, Channel Is. E.U. members, Czech Rep, Scandinavia, Mediterranean countries</td>
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<td>Definition of Insured</td>
<td>Insured &amp; members of the family residing with the insured</td>
<td>Insured &amp; members of family residing with insured</td>
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<td>Limit of Indemnity</td>
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<td></td>
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<td></td>
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</tr>
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<td>Consumer</td>
<td>Yes</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
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<td>No</td>
<td>No</td>
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</tr>
<tr>
<td>Motor Prosecution/Defence</td>
<td>No</td>
<td>No</td>
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<tr>
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<td>No</td>
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</tr>
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<td>No</td>
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<td>Appeal Costs</td>
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<td>No</td>
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<td>SUN ALLIANCE</td>
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<td>------------------</td>
<td>----------------------------------------</td>
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<td>Value Cover</td>
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<td>Europe and countries bordering the Mediterranean</td>
<td>UK, Channel Islands, Scandinavia, Europe &amp; countries bordering Med.</td>
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<td>Definition of Insured</td>
<td>Insured, spouse, children (adopted and foster) parents and other relatives who reside with the insured</td>
<td>Insured, spouse, children (adopted and foster) parents and other relatives who reside with the insured</td>
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</tr>
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<td>None</td>
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<td>Property - 180 days Employment - 90 days</td>
<td>Property - 180 days Employment - 90 days</td>
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<td>Helpline</td>
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<td>Yes</td>
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<tr>
<td>DISPUTES COVERED</td>
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<td>Consumer</td>
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</tr>
<tr>
<td>Employment</td>
<td>No</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>Motor Prosecution and Defence</td>
<td>No</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>Death/Personal Injury</td>
<td>Yes</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>Tax &amp; VAT</td>
<td>No</td>
<td>Yes</td>
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</tr>
<tr>
<td>Construction and conversion of the home</td>
<td>No</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>Crime Prosecution</td>
<td>No</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Data Protection</td>
<td>No</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Appeal Costs</td>
<td>No</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Disputes relating to the occupation of the permanent residence</td>
<td>No</td>
<td>Yes</td>
<td></td>
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<td>Company and main policy</td>
<td>Entered market</td>
<td>Underwriter</td>
<td>Limit of Indemnity</td>
</tr>
<tr>
<td>------------------------------------------------</td>
<td>----------------</td>
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<tr>
<td>Acorn Response</td>
<td>1990</td>
<td>Lloyd's Facility 55</td>
<td>£50,000</td>
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<td>Action Direct London Ltd</td>
<td>1993</td>
<td>Independent</td>
<td>£100,000</td>
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<td>Albany</td>
<td>1985</td>
<td>Crowe at Lloyds</td>
<td>£50,000</td>
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<td>CareAssist Group Motoring Lawcare Plus</td>
<td>1981</td>
<td>Royal Insurance</td>
<td>£50,000</td>
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<tr>
<td>City Claims Ltd</td>
<td>1993</td>
<td>Economic Insurance Co</td>
<td>£50,000</td>
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<tr>
<td>Countrywide Assistance</td>
<td>1989</td>
<td>E J Hampsin and others</td>
<td>£100,000</td>
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<td>DAS Legal Expenses Insurance Co Ltd</td>
<td>1975</td>
<td>DAS</td>
<td>£50,000</td>
</tr>
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<td>Eurosure Legal Protection Ltd</td>
<td>1992</td>
<td>LRG Roberts Facility 55</td>
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<td>General Legal Protection</td>
<td>1986</td>
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<td>£50,000</td>
</tr>
<tr>
<td>Hambro Legal Protection Ltd</td>
<td>1980</td>
<td>AA Cassidy &amp; others</td>
<td>£50,000</td>
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<td>Hamco UK plc Drive Assured</td>
<td>1991</td>
<td>Cygnet</td>
<td>£100,000</td>
</tr>
<tr>
<td>John Holman &amp; Sons Ltd Basic, Basic + helpline</td>
<td>1984</td>
<td>Cassidy Davis, Equity Red Star</td>
<td>£50,000</td>
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<tr>
<td>Lawclub Legal Protection MotorLawclub</td>
<td>1986</td>
<td>Lawclub</td>
<td>£50,000</td>
</tr>
<tr>
<td>Company and main policy</td>
<td>Entered market</td>
<td>Underwriter</td>
<td>Limit of Indemnity</td>
</tr>
<tr>
<td>-------------------------</td>
<td>----------------</td>
<td>-------------</td>
<td>-------------------</td>
</tr>
<tr>
<td>Law Direct</td>
<td>1992</td>
<td>Lloyd's via Cygnet</td>
<td>£50,000</td>
</tr>
<tr>
<td>Legal Protection Group</td>
<td>1986</td>
<td>Sun Alliance</td>
<td>£50,000</td>
</tr>
<tr>
<td>Legal Recovery Group plc</td>
<td>1994</td>
<td>Europ Assistance</td>
<td>£50,000</td>
</tr>
<tr>
<td>Motor Claims Services (MCS) Ltd</td>
<td>1986</td>
<td>NIG Skandia</td>
<td>£50,000</td>
</tr>
<tr>
<td>Motorists Legal Protection Ltd</td>
<td>1982</td>
<td>R E Brown and others</td>
<td>£50,000</td>
</tr>
<tr>
<td>MSL</td>
<td>1988</td>
<td>Magnus Insurance Co Ltd</td>
<td>£50,000</td>
</tr>
<tr>
<td>Paramount Insurance Co</td>
<td>1995</td>
<td>Paramount Insurance</td>
<td>£50,000</td>
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<tr>
<td>Legal Fees Gold Card</td>
<td></td>
<td>Provident Insurance</td>
<td>£50,000</td>
</tr>
<tr>
<td>Total Accident Care Plus</td>
<td></td>
<td>Various Lloyds</td>
<td>£50,000</td>
</tr>
<tr>
<td>UK Legal Protection Ltd</td>
<td></td>
<td>Various</td>
<td>£50,000</td>
</tr>
<tr>
<td>LDR Services Ltd</td>
<td></td>
<td>F Barber &amp; Ors (1990)</td>
<td>£50,000</td>
</tr>
<tr>
<td>Uninsured Loss Recoveries Ltd</td>
<td>1983</td>
<td>Carridy Davis, Equity Red Star</td>
<td>£50,000</td>
</tr>
</tbody>
</table>
Chapter 8

Legal Expenses Insurance, Purchase and Use – An Analysis

Given the central theme of this study, any predictions in relation to the continued rise of legal expenses insurance must require an analysis of purchase and use. To what extent do the public share the insurer’s contention that legal expenses insurance provides a ‘gateway’ to civil justice?

8.1 The Need For Analysis

Previous sections of this study have considered in detail the concept of legal expenses insurance (LEI) and the market products currently available. Chapter 7, in particular, highlighted the recent move away from stand-alone products by most insurers, in fear of adverse selection, and a growing market place for the add-on type provision of LEI which, it is hoped, will provide a more even spread of risk. Both stand-alone products and add-ons have to be purchased and in requiring that positive act remain quite different from their civil legal aid counterpart. In this section of the study it is intended to assess purchase and use behaviour. Put simply, who buys the insurance and how many of the insureds then seek to make a claim?

The first part of this chapter, by way of survey, looks at the awareness of LEI and the type of person attracted to such insurance cover. The survey was conducted in 1994\(^1\) for The Legal Protection Group Ltd. (now a wholly owned subsidiary of The Royal and Sun Alliance Insurance Group)\(^2\). The findings of the survey are reproduced in tabular form at the end of this chapter marked \textit{figures} 1 to 9.\(^3\)

\(^1\) The Company commissioned to undertake the study was RSGB Omnibus Ltd.

\(^2\) Note: At the time the study was commissioned, Royal Insurance and Sun Alliance had not merged and The Legal Protection Group was a wholly owned subsidiary of The Sun Alliance Group.

\(^3\) The writer is grateful to The Legal Protection Group for their assistance and access to the survey report.
The second section of this chapter, which deals with the claims experience in respect of stand-alone and add-on products, has been researched by the writer with the assistance of the Insurance Services Division of The Legal Protection Group Ltd. The study was compiled using original data in respect of policies and claims experience for the year 1995 and is provided in tabular form at the end of this chapter marked figures 10 to 11.

8.2 Awareness And Purchase - The Sample Group

The sample group was split into four broad categories:

- Sex;
- Age;
- Social class;
- Domicile.

The categories were then split as follows:

i. **Sex**

ii. **Age**

   16-24
   25-34
   35-44

---

*Once again the writer is grateful to The Legal Protection Group for their open support in the collection of this information and assistance in compiling the tabular report.*
iii. Social Class

Using standard social grade classification, four bands were created: 5

- AB;
- C1;
- C2;
- DE.

iv. Domicile

The sample group was divided geographically using independent television regions:

- London;
- Anglia;
- South;
- Wales, the West and South West;
- Central;
- Lancashire;
- North East;
- Yorkshire;
- The Border and Scotland

---

5 The social grading used divided the population into six groups:

A: Upper Middle Class;
B: Middle Class;
C1: Lower Middle Class;
C2: Skilled Working Class;
D: Manual Workers;
E: Those at the lowest level of subsistence.
The group, which varied from 300 to 2000, was asked a series of questions in respect of LEI. The questions are as follows:

Q1. What types of insurance policy had they heard of?

Q2. What types of LEI had they heard of?

Q3. Were they aware of which companies provided LEI? (Unprompted).

Q4. As Q3 (prompted).

Q5. Were they currently covered by any type of LEI?

Q6. What type of LEI policy did they currently hold?

Q7. Had they ever used a solicitor in connection with a legal dispute?

Q8. If they had used a solicitor in such circumstances was the situation covered by LEI?

Q9. How interested were they in a stand-alone LEI policy costing in the region of £150.00 per annum?
8.3 The Findings

8.3.1 General Insurance Awareness

In answer to question 1\(^6\) some 39 per cent of men and 26 per cent of women\(^7\) had heard of LEI as a type of insurance. The age range of 25-34 was most likely to have heard of LEI and of those the likelihood increased in accordance with social grade.\(^8\) The geographical location of the sample appeared to make little difference, except in London\(^9\) where a higher proportion of those surveyed had awareness of LEI as a class of insurance business. The bad news for the insurers was that when compared with other types of insurance such as medical insurance,\(^10\) the sample group’s awareness of LEI was poor. In fact the group was some 60 per cent less likely to have heard of LEI than the other insurance cover cited in the study.

8.3.2 LEI Awareness

The sample group were then asked to specify the type of LEI of which they had heard; that is whether a stand-alone or add-on type product.\(^11\) More men than women were aware of both types of LEI and of both sexes, awareness was virtually consistent between them in respect of the stand-alone product and moderately enhanced the younger the age group in respect of the add-on product.\(^12\)

\(\text{See Fig. 1.}\)

\(\text{Sample size 1991: 914 male/1077 female.}\)

\(\text{AB 46 per cent.}\)
\(\text{C1 38 per cent.}\)
\(\text{C2 31 per cent.}\)
\(\text{D 22 per cent.}\)

\(\text{40 per cent.}\)

\(\text{For the purposes of this analysis, motor and travel insurance.}\)

\(\text{Sample size 668:377 male/291 female. See Fig. 2.}\)

\(\text{Add-on awareness;}\)
Social class was found to have an impact on awareness. Up to 10 per cent fewer members of the sample group within the DE category had heard of add-on LEI than the other social grades listed. In respect of stand-alone policies this 10 per cent differential occurred between the AB/C1 and C2/DE categories. Again, the geographic location of those surveyed made little significant difference to the general awareness of each type of LEI product.

### 8.3.3 LEI Coverage

The sample group was asked whether they held any type of LEI policy? 43 per cent declared that they currently had such cover, 51 per cent did not and 6 per cent did not know. 11 per cent more men than women had such insurance and the sample group indicated that LEI was markedly more prevalent within the age groups 25-34. The social grade statistics showed similar LEI ownership across all categories except that of DE, which was 10 per cent less than the nearest other grade.

---

16-24 age group 70 per cent,  
55+ age group 57 per cent  
(descending with increased age).

---

Add-on;  
AB - 62 per cent, DE - 53 per cent.

---

Stand-alone;  
AB - 46 per cent, C2/DE 35 per cent.

---

There were the occasional regional variations worthy of note: for example, 10 per cent more of those sampled from the Central region had heard of 'add-on' than any other region and 7 per cent more from the Yorkshire region had heard of 'stand-alone' LEI than the next most aware region.

---

See Fig. 3.  
Sample size 688: 377 male/291 female.

---

See Fig. 3.  
16-24 36 per cent.  
25-34 47 per cent.  
35-44 50 per cent.  
45-54 52 per cent.  
55+ 34 per cent.

---

AB - 49 per cent, C1 - 43 per cent, C2 - 48 per cent. See Fig. 3.

---

DE - 33 per cent see Fig. 3.
The geographical figures were interesting, displaying a similar spread in all but the North East, Yorkshire, the Borders and Scotland. These areas recorded 10-15 per cent less LEI ownership than others.

### 8.3.4 LEI Type

Those members of the sample group who did hold a current LEI policy were then asked to detail the type of cover held, whether stand-alone or add-on. The recorded figures indicated a remarkable difference between the volume of holders of each type of LEI. For every stand-alone policy the group held four add-on policies. Add-on was most common in the 55+ and 35-44 age categories. Stand-alone policies peaking marginally in the 35-44 age category.

Add-on were common across all social grades dipping to a low of 62 per cent in the C2 category and rising to a high in the DE category. This recorded peak was in stark contrast to the recorded pattern for stand-alone LEI in which the DE category showed only a 6 per cent ownership with an even spread from 18-22 per cent across all other social grades.

Whilst a relatively even geographical spread could be seen in respect of add-on the same was evidently not so for stand-alone policies. For example in the South and North East the sample group were up to four times less likely to own such LEI as compared with the other regions.

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20 See Fig. 3.

21 See Fig. 4. Sample size 300: 185 male/115 female

22 See Fig. 4. Add-on: 74 per cent. Stand-alone: 18 per cent.

23 See Fig. 3.

24 See Fig. 4.

25 Ibid.
8.3.5 Solicitor Usage

The entire sample group\(^{26}\) was questioned on their general usage of solicitors in connection with a legal dispute.\(^{27}\) Three-quarters of the group had not used a solicitor in respect of a contentious matter and only one-quarter had.\(^{28}\) Those sampled within the age categories 35-54 were 10 per cent more likely to use a solicitor for this purpose,\(^{29}\) their social class and geographical location seemed to make little difference.\(^{30}\)

8.3.6 Solicitor Usage Covered By An LEI Policy

Approximately one third of those questioned had been covered by an appropriate LEI policy (stand-alone or add-on) when they required the services of a solicitor in connection with a legal dispute. Conversely, two-thirds of the group had no such LEI cover.\(^{31}\) The survey asked whether the same group would be interested in purchasing an LEI policy for themselves and/or for their family. Of those that had been covered by LEI when they had a legal dispute, one-third were very or quite interested in purchasing such LEI. Remarkably, up to one-quarter was not very or at all interested in such a purchase. Those that did not have in place LEI when they had a legal dispute were, unsurprisingly,

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\(^{26}\) Sample size 1991: 914 male/1077 female.

\(^{27}\) See Fig. 5.

\(^{28}\) Ibid.

Yes, 26 per cent.

No, 74 per cent.

\(^{29}\) See Fig. 5

35-44: 35 per cent
45-54: 36 per cent

\(^{30}\) See Fig. 5.

Peak - Cl: 28 per cent
Low - AB: 23 per cent
Geographical Region:
Peak - South: 35 per cent;
Low - Border/Scotland: 22 per cent.

\(^{31}\) See Fig. 6.
much more interested in such a product, with two-thirds of them expressing an interest in individual LEI and three-quarters in a family policy.32

8.3.7 Level Of Interest - Stand-Alone LEI

Section 8.3.6 (supra) indicated a general high level of interest in an individual or family LEI policy. When the survey group were asked whether they would be prepared to pay up to £150.00 p.a. for such LEI (typical stand-alone cover price) the results were quite different.33 Only 2 per cent of the sample group were ‘‘very interested’’ and 11 per cent ‘‘quite interested’’ in such a purchase. One-third was ‘‘not very interested’’34 and half were recorded as ‘‘not interested at all’’.35

Of those most interested in such a product they tended to be younger and correspondingly those least interested were older.36 Social grades C1 and C2 were most likely to be ‘‘very’’ or ‘‘quite’’ interested. Geographical location seemed to be largely an irrelevant factor save for the Wales, the West and South West regions recording the highest negative interest37 and Lancashire the most positive interest.38

See Fig. 6. See Fig. 7. Sample size 1937: 880 male/1057 female.

Ibid. 28 per cent.

Ibid. 49 per cent.

See Fig. 7.

Ibid Not very interested: 60 per cent.

Ibid Quite interested: 13 per cent Very interested: 2 per cent.
8.4 Conclusions

It can be seen that this survey indicated a low level of general awareness of LEI as a class of insurance, particularly when compared with analogous types of insurance cover. The DE social class had markedly less knowledge than other social categories of either the stand-alone or add-on type LEI products available. Overall it appeared that much of the awareness of LEI was in the form of the add-on and that it also had far greater market penetration than the stand-alone LEI.

Significantly perhaps, for the legal expenses insurers, whilst the younger age groups were generally more aware of LEI products this did not seem to translate directly into the same age category purchasing such products. There are some explanations for this; for example, lack of purchasing power in that age category, general optimism or lack of experience of legal disputes. The insurers must hope that it is not inherent lack of interest in LEI that will be carried into the future.

Interestingly, the add-on had penetrated the DE social group to good effect. Add-on LEI has been criticized in the past for being an ineffective alternative to civil legal aid in this category. It being suggested that those of low means would not purchase LEI by choice and they would only have a choice, given the pre-requisite material possessions of a house or car. The survey findings in this regard are optimistic reading for the insurers and challenge the basis of such criticism.

The 'patchy' awareness of stand-alone products and their purchase is arguably only to be expected given that most legal expenses insurers have pulled out of this market altogether following poor claims experience and the one remaining insurer\(^{39}\) adopts a policy of deliberate non-promotion.

\(^{39}\) The Legal Protection Group, a wholly owned subsidiary of Royal and Sun Alliance.
The answers to questions on solicitor usage and interest in LEI are revealing. Across the social grades there was in evidence a general disinclination to use solicitors in the event of a legal dispute. The high level of interest initially displayed in LEI soon dissipated when presented with the average annual premium of stand-alone LEI. The sample group would not use solicitors except as a last resort, they would like ensuing costs covered by LEI but they were only willing, for the most part, to pay an add-on annual premium, which in reality is only 10 per cent of the price of the stand-alone product. This will please the insurers since the future market for LEI rests with the add-on product. The willingness to pay an add-on premium, as compared to the price of stand-alone LEI, must reinforce the insurer's belief that business in the latter category will not yield an even spread of risk so vital to a profitable LEI book of business. Reassuringly, the opposite would seem true in respect of the add-on.

8.5 Claims Experience

Having analysed the type of individual who may be attracted to the purchase of LEI (in whichever form), it is now necessary to consider the underwriters' experience. Using information provided by the Legal Protection Group,40 the findings41 provide an informative assessment of LEI usage.

Turning first to stand-alone LEI business, in the year 1995, the insurer surveyed indicated a total book of 9,595 policies.42 This generated a written premium in excess of two million pounds. The number of claims recorded for that book amounted to 722 over the same period.43 The claims incidence rate is therefore approximately one claim per

40 Supra n 4, The Legal Protection Group is the only legal expenses insurer currently providing a stand-alone product, therefore the writer in researching this part of the study was able to compare directly stand-alone and add-on LEI in terms of the claims experience of each.

41 Provided in tabular form (post) marked Figs. 10 and 11.

42 See Fig. 11.

43 Ibid.
thirteen policies. The average value of each claim was recorded as £1,667\textsuperscript{44} accounting for more than half of the written premium for that year, a position barely profitable for the underwriters concerned.

The corresponding add-on book of LEI business for the same insurer makes quite different reading. The total book for 1995, amounted to 359,686 policies\textsuperscript{45} generating a written premium in excess of three million pounds.\textsuperscript{46} The number of claims recorded amounted to 568, yielding an approximate claims incidence rate of one in six hundred.\textsuperscript{47} The average cost of each claim was valued at £1,797, \textsuperscript{48} slightly higher than that of the stand-alone book of business. Nonetheless, the total value of all add-on claims accounted for only one-third of the written premium for that year.

8.6 Conclusions

It is easy to see looking at the figures contained in the section above, why insurers like the one sampled, view the add-on as the future for personal LEI cover. The marked contrast in claims incidence rates between the two types of LEI do appear to support the insurer’s belief that the add-on successfully avoids the problem of adverse selection that all but destroyed the stand-alone LEI market. With the avoidance of adverse selection comes profit margin on claims against written premium, which far exceeds that experienced with the remaining stand-alone product available. Underwriters are in healthy profit and the consumer pays a premium of only 10 per cent of stand-alone product price.

\textsuperscript{44} As researched by the writer in accordance with information and assistance provided by the Insurance Services Division of the Legal Protection Group.

The highest recorded claim that year was £26,380, one of 13 in excess of £10,000.

\textsuperscript{45} See Fig. 10.

\textsuperscript{46} Ibid.

\textsuperscript{47} 1 in 633.

\textsuperscript{48} The writer’s own research, supra, n.44.
However, before heralding the add-on LEI market as a runaway success in the provision of affordable access to civil justice there are some causes for concern. As outlined in Chapter 7 the add-on products offer restricted cover. There is also some evidence that add-on accounts are declining in profitability year on year.\(^\text{49}\) One reason put forward is that consumers who opt for an LEI addition to a general insurance policy are now much more aware of its existence and are often prompted to search for such cover by their legal adviser.\(^\text{50}\) In order to attack this decline in profitability, underwriters of add-on LEI are applying even more restrictions.\(^\text{51}\) The danger for the future, as the add-on market matures, is that even with the maintenance of unrealistically low premiums their value for money will become questionable. As a 'gateway' to civil justice such policies are increasingly likely to fall way short of that mark.

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\(^{49}\) This is certainly true in respect of the insurer surveyed (The Legal Protection Group) and in his discussions with other insurers during this research the writer believes this to be true generally across the add-on market.

\(^{50}\) For example, solicitors, citizens advice bureaux and law centres are all generally more aware of LEI and where to find it, if it exists, under a general policy of insurance held by the complainant.

In addition, many of the legal advice help-lines run by the insurers themselves, prompt the use of add-on LEI in the event of a legal dispute, staffed as they are by 'independent' lawyers subject to the code of conduct of their professional ruling bodies.

\(^{51}\) For example, Direct Line have in 1996, amended their 'employment dispute' add-on section to cover only actions taken before an industrial tribunal. High Court and County Court contractual matters were therefore, at a stroke, excluded. It should be noted that currently, there exists no provision for civil legal aid at industrial tribunal.
### Fig 1.

**LEGAL EXPENSES INSURANCE STUDY**  
**Q1. Types Of Insurance Policy Heard Of**

| BASE: All Adults |  
| **Sex** | **Age** | **Social Class** | **ITV Region (Incl. Overlap)** |**Weighted Base** | Male | **Female** | **16-24** | **25-34** | **35-44** | **45-54** | **55+** | **AB** | **C1** | **C2** | **DE** | **London** | **Anglia** | **South** | **Wles/W/Scot** | **Central** | **Lancs** | **N.E.** | **Yorks** | **Bndr Scot** |
| Total | Male | Female | **16-24** | **25-34** | **35-44** | **45-54** | **55+** | **AB** | **C1** | **C2** | **DE** | **Weighted Base** | **London** | **Anglia** | **South** | **Wles/W/Scot** | **Central** | **Lancs** | **N.E.** | **Yorks** | **Bndr Scot** |
| Weighted Base | 2000 | 960 | 1040 | 377 | 373 | 316 | 277 | 657 | 302 | 515 | 543 | 640 | 544 | 193 | 194 | 219 | 411 | 283 | 147 | 264 | 184 |
| Sample Size | 1991 | 914 | 1077 | 368 | 373 | 294 | 615 | 328 | 552 | 560 | 551 | 524 | 191 | 183 | 228 | 420 | 287 | 150 | 269 | 181 |
| Private Medical Insurance | 1656 | 816 | 840 | 292 | 324 | 291 | 249 | 498 | 209 | 447 | 466 | 474 | 484 | 168 | 157 | 179 | 329 | 227 | 126 | 219 | 145 |
| Legal Expenses Insurance | 648 | 378 | 270 | 92 | 138 | 131 | 109 | 177 | 139 | 195 | 170 | 144 | 217 | 64 | 64 | 65 | 141 | 81 | 45 | 88 | 52 |
| Motor Insurance | 1892 | 923 | 969 | 363 | 362 | 304 | 265 | 598 | 287 | 486 | 521 | 598 | 521 | 183 | 178 | 214 | 384 | 268 | 140 | 257 | 175 |
| Travel Insurance | 1730 | 845 | 885 | 330 | 335 | 292 | 254 | 518 | 284 | 470 | 476 | 500 | 487 | 170 | 160 | 191 | 344 | 233 | 129 | 243 | 161 |
| Don't Know | 68 | 29 | 40 | 10 | 7 | 9 | 6 | 36 | 9 | 20 | 14 | 25 | 11 | 5 | 15 | 19 | 3 | 6 | 8 |

**Note:**  
- **Total** includes all respondents.  
- **Male** and **Female** columns represent sex distribution.  
- **16-24** to **55+** columns represent age distribution.  
- **AB** to **DE** columns represent social class distribution.  
- **London** to **Bndr Scot** columns represent ITV region distribution.  
- **Weighted Base** represents the total number of respondents.  
- **Sample Size** represents the number of respondents for each category.  
- **Private Medical Insurance** and **Legal Expenses Insurance** represent insurance types heard of.  
- **Motor Insurance** and **Travel Insurance** represent other insurance types.  
- **Don't Know** represents responses where the type of insurance policy heard of was not known.
### Fig 2.

**Q2. Types of legal expenses insurance heard of**

**BASE: All Adults Aware Of Legal Expenses Insurance**

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<th></th>
<th>Sex</th>
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<th>Age 25-34</th>
<th>Age 35-44</th>
<th>Age 45-54</th>
<th>Age 55+</th>
<th>Social Class AB</th>
<th>Social Class C1</th>
<th>Social Class C2</th>
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<td>173</td>
<td>152</td>
<td>213</td>
<td>175</td>
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<tr>
<td>One which includes some limited legal expenses cover within a car or household insurance policy</td>
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<td>249</td>
<td>156</td>
<td>64</td>
<td>91</td>
<td>86</td>
<td>63</td>
<td>101</td>
<td>86</td>
<td>133</td>
<td>110</td>
</tr>
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<td>158</td>
<td>107</td>
<td>36</td>
<td>57</td>
<td>52</td>
<td>49</td>
<td>70</td>
<td>64</td>
<td>92</td>
<td>59</td>
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<td>48</td>
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<td>18</td>
<td>21</td>
<td>38</td>
<td>21</td>
<td>19</td>
<td>25</td>
</tr>
</tbody>
</table>
### LEGAL EXPENSES INSURANCE STUDY

**Q5. Whether Currently Covered By Any Type Of Legal Expenses Insurance**

**BASE: All Adults Aware Of Legal Expenses Insurance**

|                  | Total | Male | Female | 16-24 | 25-34 | 35-44 | 45-54 | 55+ | AB | C1 | C2 | DE | London | Anglia | South | Wle/W/SW | Central | Lancs | N.E. | Yrks | Brdr | Scot |
|------------------|-------|------|--------|-------|-------|-------|-------|-----|----|----|----|----|--------|--------|-------|--------|--------|------|------|------|------|------|-------|
| **Weighted Base**| 648   | 378  | 270    | 92    | 138   | 131   | 109   | 177 | 139| 195| 170| 144| 217    | 64     | 64    | 65    | 141   | 81   | 45    | 88    | 52   |
| **Sample Size**  | 668   | 377  | 291    | 73    | 153   | 152   | 117   | 173 | 152| 213| 175| 128| 210    | 66     | 63    | 70    | 153   | 88   | 47    | 91    | 53   |
| **Yes**          | 281   | 180  | 101    | 34    | 65    | 66    | 56    | 60  | 68 | 84 | 82 | 47 | 95     | 33     | 29    | 28    | 75    | 40   | 16    | 31    | 17   |
|                  | 43%   | 48%  | 37%    | 36%   | 47%   | 50%   | 52%   | 34% | 49%| 43%| 48%| 33%| 44%    | 51%    | 45%   | 43%   | 54%   | 49%  | 36%   | 36%   | 33%  |
| **No**           | 330   | 183  | 147    | 51    | 64    | 60    | 45    | 109 | 62 | 99 | 79 | 90 | 110    | 29     | 31    | 32    | 58    | 38   | 25    | 51    | 29   |
|                  | 51%   | 49%  | 54%    | 56%   | 46%   | 46%   | 42%   | 62% | 45%| 51%| 47%| 63%| 51%    | 45%    | 49%   | 50%   | 41%   | 46%  | 57%   | 59%   | 56%  |
| **Don't Know**   | 37    | 14   | 22     | 7     | 9     | 5     | 7     | 8   | 9  | 12 | 9  | 7  | 12     | 3      | 4     | 5     | 7     | 4    | 3     | 5     | 5    |
|                  | 6%    | 4%   | 8%     | 8%    | 7%    | 4%    | 4%    | 7%  | 6%| 5%| 5%| 5%| 5%     | 4%     | 5%    | 7%    | 5%    | 4%   | 7%    | 6%    | 11%  |
**BASE: All Adults Aware Of Legal Expenses Insurance**

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<th>25-34</th>
<th>35-44</th>
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<td>35</td>
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<td>131</td>
<td>77</td>
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<td>46</td>
<td>54</td>
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<td>3</td>
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</table>

| Cover included in a car or household policy | 74% | 73% | 77% | 62% | 71% | 82% | 65% | 84% | 76% | 75% | 62% | 89% | 75% | 76% | 80% | 77% | 81% | 71% | 79% | 68% | 71% |
| Specialised comprehensive policy for self and family | 18% | 19% | 15% | 16% | 18% | 20% | 17% | 16% | 18% | 19% | 22% | 6%  | 20% | 23% | 5%  | 9%  | 13% | 20% | 4%  | 22% | 26% |
| None of these/Don't know | 6%  | 7%  | 5%  | 16% | 11% | 1%  | 7%  | -   | 4%  | 8%  | 8%  | 5%  | 5%  | 7%  | 8%  | 4%  | 8%  | 5%  | 5%  | 9%  | 5%  |
### Table: Whether Ever Used Solicitor in Connection With Legal Dispute

**BASE: All Adults**

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### Legal Expenses Insurance Study

#### Q8. Whether Ever Used Solicitor In Connection With Legal Dispute

**Base: All Adults**

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**Q9. Level Of Interest In Insurance Policy Costing £150 To Cover Self & Family Against Legal Costs**

**BASE: All Adults Not Already Covered By Specialised Comprehensive Policy For Self & Family**

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## Q3. Spontaneous Awareness Of Companies Which Provide Legal Expenses Insurance

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**Notes:**
- The table provides data on awareness of companies that provide legal expenses insurance.
- The data includes information on sex, age, social class, and ITV region.
- The percentages indicate the awareness rates for different categories.
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<th>New '95 Actual</th>
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Key - Figures 10 and 11

EP = Earned Premium

NIC = Net Incurred Claims

ELR = Earned Loss Ratio
Chapter 9

The Solicitor’s Experience

Both legal expenses insurance and legal aid require the services of practicing solicitors, in whole or in part, for their successful application. It follows, that assessment and analysis of the solicitor’s experience is a significant facet of this study and that their observations in undertaking work for insurers and the legal aid Board, are worthy of careful consideration.

9.1 The Importance of The Solicitors Experience

According to insurance statistics as previously outlined¹, it is reckoned that some 10 million people in Britain currently have LEI in one of its many guises. Given that quantity of insured potential for litigation, it may be expected that solicitors in England and Wales are now familiar with the incidence and application of LEI and that many of the same solicitors would be equally well-versed in civil legal aid activity. It would appear, therefore, that solicitors are well-placed to provide information on LEI and civil legal aid activity and application and in many cases, where appropriate, to provide comparative data worthy of further analysis.

In order to test these assumptions and to extract core material for such an analysis it was necessary to undertake sampling of solicitors in England and Wales. The remainder of this chapter intends to deal with the detail of the sample undertaken and the conclusions that may reasonably be drawn from its findings.²

¹ See Chapter 6 at 6.6.
² Appendix A follows the concluding chapter of this study and provides full details of the sample undertaken.
9.2 The Sample - Its Limitations And Intent

From 1st March 1995 to 31st May 1995, 200 private practice solicitors in England and Wales were asked a series of questions in relation to their practice, its workload and their experience of civil legal aid and legal expenses insurance. The sample group of 200 was split into eight geographical regions corresponding with the Law Society's solicitors' Regional Directory 1994/1995 edition. Within each of these eight regions, 25 practices were selected according to size. The practices selected were those first listed that met the selection criteria. Five practices were sampled from each of the following categories:

- sole practitioner;
- 5 or less partners;
- between 6 and 10 partners;
- between 11 and 20 partners;
- 20 partners and above.

All 200 of the practices were pre-selected having been listed in the Law Society Directory as dealing with legal aid. In total, 151 of the practices out of the chosen sample group returned completed questionnaires, representing approximately a 75 per cent rate of participation.

The questionnaire itself was divided into 4 distinct sections:

---

3 These questions were asked by submission of questionnaire detailed in full at Appendix A, (post).

4 Simplistically 'size' was measured by the number of partners listed as being in attendance at each office location.

5 Unfortunately the Directory offered no distinction as between criminal and civil legal aid undertaken by the practice.

6 For the purposes of this survey a 'completed' questionnaire was taken to include all returns in which one or more sections were fully answered.
Section 1

Practice details.

Section 2

Civil Legal Aid

Section 3

Legal Expenses Insurance

Section 4

Civil legal aid/legal expenses insurance comparison.

9.3 Practice Details

It was evident that the practices most prepared to take part in the survey, were these with multiple partners up to 20 partners, their participation percentage being as follows:

<table>
<thead>
<tr>
<th>Number participating</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>5 or less partners</td>
<td>39</td>
</tr>
<tr>
<td>6 - 10 partners</td>
<td>44</td>
</tr>
<tr>
<td>11 - 20 partners</td>
<td>30</td>
</tr>
</tbody>
</table>

For a general breakdown see fig 1.
PRACTICE DETAILS

<table>
<thead>
<tr>
<th>Number of Partners</th>
<th>Sole</th>
<th>5 or Less</th>
<th>6 - 10</th>
<th>11 - 20</th>
<th>20+</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number Participating</td>
<td>19</td>
<td>39</td>
<td>44</td>
<td>30</td>
<td>18</td>
</tr>
</tbody>
</table>

Figure 1
In some areas, for example Wales, it was not possible to select five practices with twenty-plus partners. Where none was available the next largest practice was selected from the sample group. It became evident from returns that many of the large practices listed in the Law Society Directory as dealing with legal aid cases, in fact, only dealt with criminal legal aid or such a negligible volume of civil legal aid work they felt unable to participate fully in the survey. Perhaps these two reasons account for the poor (12 per cent) response rate from this section of the sample group. Obvious conclusions from the similarly low response from the sole practitioner section (12.7 per cent), were not so apparent. That said, one or two did cite pressure of work as a reason for non-participation.

The practices were then asked a series of questions addressing the division of work between civil and criminal and legal aid and non-legal aid. 66 per cent of the practices approached were willing to state an approximation of the division of work. The correlation between a predominantly civil/criminal practice and legal aid/non-legal aid work was interesting, (see fig 2). Only a small percentage of the sample group (10 per cent) indicated that their practice undertook more criminal work than civil. Of those, perhaps unsurprisingly, 67 per cent stated that they generally undertook more legal aid than non-legal aid work. However 32 per cent expressly stated that they undertook more non-legal aid than legal aid work, with only 1 per cent equating the volume of work to be the same. Whilst a high correlation between large volumes of criminal work and large volumes of legal aid work was anticipated, the 67 per cent figure recorded from the sample group seems low. That said, figures should be treated with caution given the small number of practices that participated in this section of the analysis. Nevertheless, the conclusion that predominantly criminal law practices were much more likely to undertake legal aid work seems patently clear.

Conversely, the number of practices from the sample prepared to indicate that their practice undertook more civil than criminal work was high, (see fig 3). Some 58 per cent of the sample group expressed a predominance of civil work in their practice and some 87 practices in total provided information as to the division of work in this section of the
## PRACTICES THAT UNDERTAKE MORE CRIMINAL THAN CIVIL WORK

<table>
<thead>
<tr>
<th>Responses</th>
<th>More legal aid than non-legal aid</th>
<th>More non-legal aid than legal aid</th>
<th>Same amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number Participating</td>
<td>11</td>
<td>5</td>
<td>1</td>
</tr>
</tbody>
</table>

![Figure 2](image)

- *More legal aid*: 64.7%
- *More non-legal aid*: 5.9%
- *Same amount*: 29.4%
PRACTICES THAT UNDERTAKE MORE CIVIL THAN CRIMINAL WORK

Responses

<table>
<thead>
<tr>
<th>More legal aid than non-legal aid</th>
<th>More non-legal aid than legal aid</th>
<th>Same amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>26</td>
<td>47</td>
<td>14</td>
</tr>
</tbody>
</table>

Figure 3
survey. It was shown that those practices that undertook more civil work than criminal were considerably more likely to perform non-legal aid. Predominantly civil law practices would appear much less likely to undertake legal aid work. Of those largely civil practices that participated, just over 40 per cent declared that they generally undertook more non-legal aid than legal aid work.

9.4 Civil Legal Aid

The sample group was asked whether their practice dealt with civil legal aid applications. A resounding 98.7 per cent stated in the affirmative. They were then asked to indicate (by number of weeks) the approximate time delay between conclusion of the case and payment to the practice by the Legal Aid Board. The results were interesting, showing a typical delay of up to 15 weeks for most practices. The results seemed to indicate a further significant delay experienced by many between the 20 and 30-week mark. It may be suggested that this 'twin-peaking' (as exemplified by fig 4) distinguishes between complex and non-complex cases. This is conjecture. Comments from some of the respondents would lend support to this theory, for example:

"...it depends on how 'big' the file is. From experience the large personal injury files can take 4 months plus to be paid, particularly if there have been a lot of payments on account".

Secondly, the group were asked whether they received an interim payment from the Legal Aid Board, (see fig 5). A considerable number (some 75 per cent) of the group stated that they would “normally” or “nearly always” receive such a payment.

Rather surprisingly, in the light of anecdotal evidence to the contrary\(^7\), some 89 per cent of the sample group indicated that when applying for civil legal aid their applications were “almost never” rejected on the grounds of insufficient merit. According to Board statistics in 1997 less than 20 per cent are officially rejected. And in appealing against rejection, 78 per cent of the sample group expected their appeal to be “normally”

\(^7\) Comments made spontaneously to the writer by practitioners either by telephone or in person prior to participation in the sample study.
CIVIL LEGAL AID
TIME DELAY BETWEEN CASE CONCLUSION & PAYMENT BY LAB

[Graph showing time delay between case conclusion and payment by lab]

Figure 4
CIVIL LEGAL AID
RECEIVE INTERIM PAYMENT FROM LAB

<table>
<thead>
<tr>
<th>Responses</th>
<th>Never</th>
<th>Almost never</th>
<th>Normally</th>
<th>Nearly always</th>
<th>Always</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number Participating</td>
<td>8</td>
<td>21</td>
<td>75</td>
<td>34</td>
<td>9</td>
</tr>
</tbody>
</table>

![Figure 5](image_url)

<table>
<thead>
<tr>
<th>Percentage</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>51.0%</td>
<td>Never</td>
</tr>
<tr>
<td>14.3%</td>
<td>Sometimes</td>
</tr>
<tr>
<td>5.4%</td>
<td>Normally</td>
</tr>
<tr>
<td>6.1%</td>
<td>Occasionally</td>
</tr>
<tr>
<td>23.1%</td>
<td>Always</td>
</tr>
</tbody>
</table>
“nearly always” or “always” successful. Again, according to Board statistics in 1997 some 40 per cent of appeals are successful and this figure has changed little over the past five years. The conclusion, if the sample group is representative of the country as a whole, must be that those who criticize the Legal Aid Board cannot be doing so for its unfavourable merit assessment of cases.

9.5 Legal Expenses Insurance

A large proportion of the sample group stated experience with clients who had some form of legal expenses insurance, just under 70 per cent. This figure is particularly encouraging for the insurers and somewhat at odds with the Law Society's and Lord Chancellor's Department's perceptions, where its role and occurrence has frequently been stated as yet "insignificant". Perhaps the reason for this high percentage within the sample group is due to the now diverse forms of insurance available to the consumer. The recent emergence of add-on cover as part of other policies of insurance has greatly widened the availability of legal expenses insurance to the consumer and successfully avoided the rigours of adverse selection that so dogged early stand-alone policies. The following comment from one of the sample group is typical of their experience with the (now out-dated) stand-alone insurance product:

"We are very positive about legal expenses insurance and over many years have tried to market it - by newsletter, targeted approach and constant recommendation. Unfortunately, the general public do not share our enthusiasm and we have been spectacularly unsuccessful in persuading clients of its benefits. I doubt if we have sold 100 policies in the last five years, despite a newsletter solely on L.E.I. to 2000 clients".

In an analogous question to Section 2 of the questionnaire which dealt with civil legal aid, the sample group were asked to indicate the time delay (again in weeks) between completion of the case and payment to them by the insurance company, (see fig 6). The results show a significant proportion of practices experiencing a delay of up to five weeks

---

LEGAL EXPENSES INSURANCE
TIME DELAY BETWEEN CASE COMPLETION AND PAYMENT BY INSURANCE COMPANY

Figure 6
and then again between six and twelve weeks. Similar 'twin-peaking' is evident to that of payment by the Legal Aid Board but in the case of the insurers it is generally quicker. Once more, responses from the sample group do indicate a distinction between complex and non-complex cases. In the case of the former it has been expressed that:

"...expense/cost claims forms at the end of a case are often a nightmare with endless correspondence trying to sort it out prior to the payment".

This situation is quite similar to dealings with the Legal Aid Board in complex cases.

As compared to the receipt of interim payments from the Legal Aid Board the incidence of practices receiving a fee indemnity on account from the insurers was markedly different, (see fig 7). Only 43 per cent of the sample group expected such payment "normally", "nearly always" or "always" from the insurer, this is some 30 per cent less than those with similar experience of the Legal Aid Board. A possible answer to this disparity lies in the formality of the interim payment process as administered by the Legal Aid Board. The insurers, on the whole, seem to have no formal procedures, differ from one another in approach, and perhaps (in some cases) actively rely on the indemnity aspect of the insurance to avoid such payments before final assessment. Perhaps, therein lies an opportunity for insurers to win the support of solicitors as yet dissatisfied with the general emergence of legal expenses insurance.

A similarity appears to exist between passing the merits test with the Legal Aid Board and satisfying the insurer that the client has a reasonable prospect of success.9 Whilst 92.4 per cent of the sample group expected to fail the Legal Aid Board's merit test either "never" or "almost never", a comparable 88.6 per cent expected to either "never" or "almost never" fail the insurers merit test, (see fig 8). Despite the statistical similarity the sample group delivered a mixed message. Some praised the insurers on their merits test stating:

"...most are sensible, practical and reasonable"

in their application of the test. Others were quite certain where the best chance of success lie:

9 The equivalent 'merits test' in respect of legal expenses insurance.
LEGAL EXPENSES INSURANCE
RECEIVED FEE INDEMNITY PAYMENT ON ACCOUNT

Response | Never | Almost never | Normally | Nearly always | Always
--- | --- | --- | --- | --- | ---
Number Participating | 19 | 37 | 29 | 8 | 5

Figure 7

(37.8%)
(19.4%)
(29.6%)
(5.1%)
(8.2%)

Legend:
- Never
- Almost never
- Normally
- Nearly always
- Always
## LEGAL EXPENSES INSURANCE
### APPLICATIONS REJECTED - INSUFFICIENT MERIT

<table>
<thead>
<tr>
<th>Response</th>
<th>Never</th>
<th>Almost never</th>
<th>Normally</th>
<th>Nearly always</th>
<th>Always</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number Participating</td>
<td>19</td>
<td>68</td>
<td>9</td>
<td>2</td>
<td></td>
</tr>
</tbody>
</table>

**Figure 8**

- **Never**: (19.4%) (69.4%)
- **Almost never**: (2.0%)
- **Normally**: (9.2%)
"The Legal Aid Board are far more likely to take a realistic view of prospects and support a meritorious claim but one which is not certain of success".

Perhaps, in truth, much of the confusion centres on quite different merits tests, which are difficult to compare directly. One, alarming, dissimilarity between civil legal aid and legal expenses insurance appears to lie in appealing cases turned down on merit. The Board’s procedure is uniform and formal. The insurers however, are quite irregular. The sample group was asked whether insurers provided an appeal procedure at all? More than three-quarters of the insurers as experienced by the sample group, were recorded as having no appeal procedure whatsoever.

It does appear evident that the lack of formal procedures, particularly in connection with interim payments and the appeal process in respect of the insurers, is a problem area. That the diverse approach of insurers is causing concern to practitioners there seems little doubt:

"Legal costs insurers vary a great deal. Some (e.g. Hambro) are most helpful whilst others (e.g. D.A.S. or Countrywide Assistance) are the reverse".

"Some LEI companies run schemes similar to the Legal Aid Board. Others are far better than the Legal Aid Board".

And at its worse:

"...it’s bad enough dealing with the Legal Aid Board. I dread to think how complex it would be to deal with different legal expenses insurers as well, each with different requirements".

Of the 23 per cent of practitioners detailed as having used an insurer’s appeal procedure, the prospects for the solicitor of being successful on appeal were comforting, (see fig 9). Nearly 57 per cent of the group expected such appeals to be “normally”, “nearly always” or “always” successful. However, this still represents a perception of appeal success being 20 per cent less likely with an insurer than with the Legal Aid Board and that is subject to there being an appeal process in existence.

More worrying for the insurers and in many ways more unanswerable, is the sample group indicated even where an appeal to an insurer was coupled with a supporting
LEGAL EXPENSES INSURANCE
APPLICATIONS REJECTED - APPEALS SUCCESSFUL

<table>
<thead>
<tr>
<th>Response</th>
<th>Never</th>
<th>Almost never</th>
<th>Normally</th>
<th>Nearly always</th>
<th>Always</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number Participating</td>
<td>7</td>
<td>16</td>
<td>23</td>
<td>6</td>
<td>1</td>
</tr>
</tbody>
</table>

![Figure 9](image-url)
counsel’s opinion, 21 per cent stated that they would “never”, or “almost never”, be successful in changing the insurer’s decision. (See fig 10).10

9.6 Civil Legal Aid - Legal Expenses Insurance Comparison

Two thirds of the sample group were able to confirm that their practice dealt with both civil legal aid and legal expenses insurance. This high number allowed meaningful comparisons given that there was no obvious way or pre-selecting the practices as a result of their legal expenses insurance activity.

Just over 50 per cent of the sample group had experience of both insurers and the Legal Aid Board and said in their opinion, that they received payment more quickly from the insurer, (see fig 11). 36 per cent declared “no significant difference” and a small 12 per cent minority experienced quicker payment from the Legal Aid Board. The reason for this may lie in the:

"...interminable bureaucracy of the Legal Aid Board",

as described by one respondent or that:

"... you don’t have to endure the expense and delay of having your bill taxed by the court",

expressed by another.

The sample group was asked, in applying for a civil legal certificate or legal fee indemnity, whether they were more likely to pass the merits test with the insurer, the Legal Aid Board or whether there was no significant difference. Their answers were quite consistent with earlier sections of the questionnaire with just under 20 per cent siding with the insurer and just over 20 per cent opting for the Board with a large 60 per cent expressing no significant difference, (see fig 12).

---

10 The writer has made enquiries on this point to the claims departments of various legal expenses insurers. One possible answer appears to lie in the quality and content of the opinion itself. Insurers will not accept an opinion as ‘supportive’ of the insured’s claim if it is poorly drafted and ambiguous on the issue of merits. Insurers are looking for clarity of message from counsel.
LEGAL EXPENSES INSURANCE
APPLICATIONS REJECTED - WITH COUNSELS OPINION APPEALS SUCCESSFUL

<table>
<thead>
<tr>
<th>Response</th>
<th>Never</th>
<th>Almost never</th>
<th>Normally</th>
<th>Nearly always</th>
<th>Always</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number Participating</td>
<td>5</td>
<td>7</td>
<td>26</td>
<td>18</td>
<td>1</td>
</tr>
</tbody>
</table>

Figure 10
CIVIL LEGAL AID - LEGAL EXPENSES INSURANCE COMPARISON
PAYMENT RECEIVED QUICKER FROM:

<table>
<thead>
<tr>
<th>Response</th>
<th>The Legal Aid Board</th>
<th>The Legal Expenses Insurer</th>
<th>No significant difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number Participating</td>
<td>7</td>
<td>50</td>
<td>35</td>
</tr>
</tbody>
</table>

![Figure 11](image)
<table>
<thead>
<tr>
<th>Response</th>
<th>The Legal Aid Board</th>
<th>The Legal Expenses Insurer</th>
<th>No significant difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number Participating</td>
<td>20</td>
<td>17</td>
<td>54</td>
</tr>
</tbody>
</table>

![Figure 12](image-url)
The similarity with the experience of the merits test was not mirrored by the groups' experience of appealing applications rejected in the first instance. Only 7.7 per cent believed they stood a better chance with the insurer compared to a significant 43.5 per cent who believed the Legal Aid Board to be more favourably inclined to their appeals. The remaining 50 per cent conceded there to be no difference (see fig 13). These findings do seem to lend support to the view that the lack of formality (or any procedure at all) on the part of the insurer, is of deep concern and in some cases manifest irritation to the practitioner. If the 'credibility gap' on this issue is not to widen even more it must be addressed by all insurers, perhaps collectively, steered by the ABI forum for legal expenses insurers.

Finally, the group was asked to express a general preference for the insurers, the Legal Aid Board or to record no preference, (see fig 14). The minority of 23 per cent preferred the Board. Reasons expressed for the preference were manifold. Some appeared to resent the 'interference' throughout the life of a case by the insurer, complaining that the insurers were more 'hands on' than the Legal Aid Board. Others were wary of this coupled with other commercial considerations taken into account by the insurer but not the Board:

"The insurers are more likely to withdraw cover at a later stage, due to economic considerations".

"Legal expenses insurers invariably try and avoid giving an indemnity in expensive or complex claims. They impose even stricter costs controls [than the Board] and argue the toss at every step".

Whilst the above may be regarded as negative reasons for preferring the Legal Aid Board on the principle of 'better the devil you know...' others were more positive. One observed:

"Civil legal aid procedures are much improved in recent years and now provide an efficient service, this is particularly my experience of a franchised practice".

And more profoundly:

"Personally I believe Legal Aid is the better option because of the protection it affords the individual and as a matter of public policy".
CIVIL LEGAL AID - LEGAL EXPENSES INSURANCE COMPARISON

APPEAL MORE LIKELY TO BE SUCCESSFUL WITH:

<table>
<thead>
<tr>
<th>Response</th>
<th>The Legal Aid Board</th>
<th>The Legal Expenses Insurer</th>
<th>No significant difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number Participating</td>
<td>34</td>
<td>6</td>
<td>38</td>
</tr>
</tbody>
</table>

![Figure 13]

The Legal Aid Board

The Legal Expenses Insurer

No significant difference

43.5%

48.8%

7.7%
CIVIL LEGAL AID - LEGAL EXPENSES INSURANCE COMPARISON

WOULD PREFER TO DEAL WITH:

<table>
<thead>
<tr>
<th>Response</th>
<th>The Legal Aid Board</th>
<th>The Legal Expenses Insurer</th>
<th>No significant difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number Participating</td>
<td>23</td>
<td>31</td>
<td>43</td>
</tr>
</tbody>
</table>

![Figure 14](chart.png)
Where a preference was expressed a slight majority favoured the insurer (32 per cent). The reason for this marginal preference would seem, from the received comments, to be almost entirely founded on the insurers more efficient administration of the case with many of the group expressing 'good experiences' with insurers on this ground.

One practice stated the value to them of dealing with an insurer rather than the Legal Aid Board was that:

"...we know what they are looking for".

A typical sentiment expressed by one senior partner was:

"Civil Legal Aid procedure is still far too bureaucratic and time-consuming".

A more expansive remark, which perhaps best encapsulates the preference for the insurer read:

"At the end of the day we would favour our clients to be supported by insurance as no commercial organisation could be as petty bureaucratic or restrictive as the Legal Aid Scheme. The Legal Aid Board try hard but their statutory framework is so tight and ungenerous that unless something changes it just becomes less and less desirable. A cynic would say this is intentional!"

Interestingly, some 44 per cent per cent of practices stated they had no preference to dealing with the insurer or the Legal Aid Board. It would seem apparent from the number of similar responses from those practices that it would be quite reasonable to conclude that most solicitors are eminently practical in their approach to the Board and insurers. Three issues emerge.

Firstly, as has been discussed above, solicitors do not seem to mind particularly who they deal with provided an efficient mechanism for assessing merit and providing prompt payment upon conclusion of the case exists. Secondly, perhaps surprisingly, the majority of practices surveyed expressed clear support for legal expenses insurance.

"Legal expenses insurance should be encouraged. It is good value for money and provides a safety net to those over the Legal Aid financial limits".

"As an alternative scheme to support potential litigants it should be welcomed".

And:

"we would like more people to take up the insurance".
The general support of the practitioner would not, therefore, seem to be in any doubt. That said, this second issue to emerge from the analysis is inextricably linked with the third and is a point, it would seem, inadequately addressed by the insurers. Many of the practices in the sample group were supportive of legal expenses insurance but in many respects felt 'cut out of the deal' by the insurer. That is, they wanted to litigate for insured clients but the insurers restrictive practices and procedures effectively prevented this.

"Legal expenses insurance is available readily to clients but the insurance company often specify which legal firms are to conduct the work. This takes away from the firm the benefit of such insurance".

"Sometimes there are difficulties where a client with LEI wants to instruct a firm but the insurer has a preferred firm - they are not allowed to restrict a client’s choice of solicitor but it does inevitably result in delay and frustration".

"In our experience most legal expenses insurers insist upon instructing their own panel solicitors, which is almost a closed shop".

The practitioners’ concern is that whilst they are prepared to display considerable flexibility in accepting in concept and dealing with diverse insurers, many of their number are not able to participate in insured civil litigation. One respondent, aware of the general decline in civil legal aid, the emergence of franchising and insurers' use of panel solicitors feared being left out of civil litigation altogether. The common belief that legal expenses insurance if not controlled, will adversely effect the independence of private practice is unequivocal.
9.7 Conclusions

Most of the sample group appeared to accept, albeit reluctantly, due to a combination of the small size of their practice and the decline in legal aid eligibility generally, that civil legal aid cases seemed destined to decline in number in the foreseeable future. Moreover, their ability and desire to change with the times and, in a majority of cases, to embrace enthusiastically legal expenses insurance in concept and use, was unhesitatingly apparent from the sample group surveyed.

Conflict and irritation arose with the insurer’s enthusiasm for selected solicitor panels and 'hands-on' case management by a commercially aware claims department. It seems to be this 'closed-shop', occasionally coupled with what practitioners perceive as undue interference by the insurer, which led many of the sample group to express concerns. The Legal Aid Board and the insurers are similar and yet very different animals. Both increasingly require better value for money and on-going efficiency from participating practitioners. However, it is undoubtedly the insurer that is best placed to make demands in this respect untroubled by much of the public scrutiny that the Legal Aid Board must suffer. The robust, inquiring approach adopted by many insurers does seem to have surprised many solicitors and made some distinctly uneasy at the prospect of such future paymasters being in the ascendancy.

It would seem that practitioners must learn to accept new working practices with insurers. However, the insurers should not be complacent. Prudent insurers should realise that it is in the long term interests of the LEI industry not to ostracise great numbers of solicitors practice’s by their sole use of panels. A legal expenses insurance policy will inevitably be devalued in the eyes of the consumer if, ultimately, it affords an increasingly limited choice of legal representative in private practice. Public confidence is likely to be further
undermined should that nominated representative be the in-house employee of the insurer.

Insurers, always in need of increased market penetration, would do well to look to the practitioners as warm recipients and promoters of their products, but not as their sales force for stand-alone insurance that was such a disaster almost a decade ago by reason of adverse selection.\(^{11}\) It does seem to be a clear finding of the sample surveyed that most practices desire only from the insurers, sound, uniform administrative mechanisms and a fair slice of insurance-funded civil litigation. If insurers are able to adequately address such issues is not beyond reason that the practitioners themselves could become their fondest allies. It is a sad reflection on the present power-struggle between solicitors and insurers that the public will lose most should they fail to reach a compromise position.

\(^{11}\) E.g. The Law Society approved Sun Alliance scheme in 1982.
In the final chapter of this part of the study concerned with legal expenses insurance, it is necessary to consider the effect on the industry of European regulation. However principled the insurer's perceived their products and administration to be prior to 1987, a Directive was deemed necessary by member states to regulate the industry. Within the Directive were regulations aimed at the removal of conflicts of interest. Further to this aim, the insured was to be given freedom of choice of lawyer. No single aspect of the Directive has had (and continues to have) greater impact on the emergence of the legal expenses insurance market in the United Kingdom, than the right to freedom of choice of lawyer. Insurers struggled with the definition of 'freedom of choice' then as they do now. Direct control of lawyer's fees was not possible. Any effective control would be indirect and sail close to breach of the regulations if narrowly construed. The impact of the Directive on the legal expenses insurance industry was immense. Insurers employed disparate methods of cost control in an attempt to ensure market growth for their products. It follows that examination of the effect of the Directive on the insurance industry is a key component of this study.

10.1 Introduction - Pre 1987

The Treaty of Rome, signed by the six original member states in 1957, set down as its object the creation of a common market. The common market was to be achieved by changes specified in the Treaty. These included the abolition of obstacles to freedom of movement for persons, services and capital and affected the insurance sector. The Treaty provided for the common market to be progressively established during a transitional period. For many years progress as originally intended was very slow due to a comprehensive policy of detailed harmonisation that proved impractical. The deadlock
was broken in 1978\(^1\) with the emergence of the principle known as “mutual recognition”. This meant, that given a sufficient degree of harmonisation of diverging Member State regulations (but without standardising them completely) countries will allow nationals from other Member States to carry on business in their territory provided they comply with regulations in their own Member States. The second major step towards the single market was the Single European Act 1986. This was a further treaty signed between the then twelve Member States which amended the Treaty of Rome and which came into force throughout the EC on 1 July 1987. The Act is significant because it incorporated into Community law the deadline of 31 December 1992 by which the single market was to be achieved. The achievement of this programme was to irrevocably alter the shape of the insurance market within the growing European Union of States.

An overall objective of the programme of legislation was to remove the barriers to free trade in insurance. This intended to create a market in which nationals of one EC country are free to purchase insurance products from insurers based in any of the EC States and to create a strong and competitive market in which the customer benefits from a wider choice of products at lower prices.

To achieve the objective enormous progress was required. The process involved harmonisation of national legislation so insurers operated under the same basic regulatory framework in each country. Once in place, the next phase permitted insurers from one country to establish operations in the other States. Finally it was intended as part of this programme of liberalisation to allow insurers to operate on a services basis and to sell their products from an operation established in one country to customers in other EC countries.

Article 61(2) of the Treaty directly addressed the establishment of insurance and services in EC States. It stated:

“\(\text{The liberalisation of banking and insurance services connected with movements of capital shall be effected in step with the progressive liberalisation of movement of capital.}\)"

\(^1\) Rewe Zentral AG v Bundesmonopolverwaltung fur Branntwein Case 120/78 [1979] ECR 649.
In addition Article 59 provides for the abolition of restrictions on freedoms to provide services:

"... in respect of nationals of member states who are established in a state of the Community other than that of the person for whom the service are intended".

The approach of the European Court to the above provisions has created a distinction between establishment and services. "Establishment" is given a wide meaning. An insurer can be established in more than one Member State at the same time and will be regarded as established in a Member State in a number of circumstances. For example:

- he has his head office or principal place of business there;
- he has a branch or subsidiary there;
- he has an office there staffed by his own employees;
- he conducts business there through an independent person who is authorised to act on his behalf on a permanent basis; or
- he directs his activities entirely or principally towards that State.

Once established in a Member State the insurer must accept any disadvantages experienced by those who are already established in that State. Generally, limitations and exemptions from restrictive rules native to the host-State cannot be avoided. Moreover, national legislation or administrative practices must not be so restrictive so as to act against the concept of freedom of establishment.\(^2\)

By comparison, "services" were afforded different treatment.\(^3\) Restrictions on the right to provide services in another Member State could be maintained, if they could be

\(^2\) See the opinion of Advocate General Slynn in Case 205/84 (Germany), [1987] 2 CMLR ev. 86.

\(^3\) Ibid. 99-100.
objectively justified in the public interest. This interest was not already protected by the rules of the State of establishment and the same could not be achieved by less restrictive means (‘proportionality’). The field of commercial insurance was an obvious exception to the requirement of justification. The result is that restrictions on the freedom to provide “services” will be invalid if they are not objectively justifiable or they duplicate equivalent measures of protection, or they are disproportionate.

The consideration of consumer interest has acted to draw a distinction between the definition of “establishment” and “services” for the purposes of the Treaty within the internal market. Recently, technological feasibility in providing services without the physical movement of the provider has added impetus to litigation in respect of Article 59. So far, the court’s approach has been consistent with the narrow notion of a single market and has concentrated on using the justifications of public interest to guard against unnecessary intervention in the absence of legislative action.4 Given time, it is possible that this approach may change, with services being treated like goods5 and undue restrictions becoming invalid. For the moment, the distinction remains to thwart complete liberalisation in respect of services.

Before European intervention in 1987, legal expenses insurance in the United Kingdom had developed diversely and without formal regulations. In some cases, the insurance companies involved and their product offerings in this class of business, did not always act in the best interests of the insured. The intention of the Directive was both protective of the insured and regulatory in respect of the insurer. Insurers were presented for the first time with the rules of the game. Insurers required “authorisation”, the Directive applied a broad-brush approach to the definition of “legal expenses insurance”. The insured had the right to freedom of choice of solicitor and the insurer had to have in place apparatus for effectively dealing with conflicts of interest when they arose and arbitration in the event of a dispute between the contracting parties. Moreover, failure to comply with the

5 See the Cassis de Dijon case – Supra, n.1.
provisions of the Directive’s implementing regulations was, potentially, to have serious consequences for the insurer.

Insurers were faced with a restricted and constrained future LEI market, coming at a time when the problems of adverse selection were only too apparent and inhibited further market penetration. It is the aim of this section of the study to consider the extent of the Directive and its effect on the development of LEI in the United Kingdom.

10.2 The Directive, United Kingdom Legislation Its Extent And Application

The Legal Expenses Insurance Directive was issued by the European Communities in 1987 [1987] OJ L185/77. Article 2.1 of the Directive provides that:

"... this Directive shall apply to legal expenses insurance. Such consists in undertaking, against the payment of the premium, to bear the costs of legal proceedings and to provide other services directly linked to insurance cover, in particular with a view to:

- securing compensation for the loss, damage or injury suffered by the insured person, by settlement out of Court or through civil or criminal proceedings;
- defending or representing the insured person in a civil, criminal, administrative or other proceedings or in respect of any claim made against him”.

The purpose of the Directive, as expressed in Article 1, was to coordinate the legal provisions, regulations and administration concerning legal expenses insurance, with a view to facilitating effective freedom of trade and to preclude as far as possible any conflict of interest that may arise for insurers. It was not designed to be restrictive in nature but more to liberalise such insurance services throughout the Member States.

The Directive set an objective which Member States were compelled to implement, with the intention of addressing certain problems which had come to light in the operation of Legal Expenses Insurance (LEI) prior to 1987. The Directive gave Member States until July 1990 to implement its terms by domestic legislation. The United Kingdom adhered
to its obligations by issuing two implementing statutory instruments under section 2(2) of the European Communities Act 1972. The first was the Insurance Companies (Legal Expenses Insurance) Regulations\(^6\) that came into force on 1st July 1990 and dealt with the form of LEI policies. The second, the Insurance Companies (Legal Expenses Insurance) (Application For Authorisation) Regulations\(^7\) came into force on 21st June 1990 dealing with the information to be submitted on application for authorisation under the Insurance Companies Act 1982.

The Regulations do not provide a definition of LEI, although regulation 2 states that “legal expenses insurance business” means “insurance business (other than reinsurance business) within general business class 17 in Part I of Schedule 2 to the Insurance Companies Act”\(^8\). It further provides that “legal expenses insurance contract” and “legal expenses cover” shall be construed accordingly.\(^9\) Class 17 (supra) defines “legal expenses” business as:

“...[the] effecting and carrying out of contracts of insurance against risks of loss to the persons insured attributable to their incurring legal expenses (including costs of litigation)”.

A simplistic definition of LEI construed in conjunction with the Regulations is according to Cordery:\(^{10}\)

“...insurance which is granted to an insured only to cover his pecuniary loss solely attributable to legal expenses incurred by the insured. Such 'legal' expenses include disbursements, and may extend to the fees of accountants and others depending on policy cover. Cover indemnifies a company or an individual for any legal expenses incurred, for example, in attempting to recover outstanding debts, for legal costs incurred in litigation (whether as plaintiff or defendant) in contractual disputes, or in defending a criminal prosecution.”

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\(^6\) SI 1990 No.1159.

\(^7\) SI 1990 No.1160.

\(^8\) SI 1990 No. 1159 at p.1.

\(^9\) Ibid.

This definition supports that detailed by regulations 4 and 5 of the Insurance Companies Act (Legal Expenses Insurance) Regulations 1990.

"Legal expenses cover shall be the subject of either:
(a) a policy relating to cover only, or
(b) where that cover is provided under a policy relating to one or more other classes of general insurance business, a separate section of the policy relating to that cover only."\(^{11}\)

The 1990 Regulations\(^{12}\) provide a number of exceptions that are also contained in the EC Directive.\(^{13}\) They are as follows:

(i) LEI contracts concerning disputes or risks arising out of, or in connection with, the use of seagoing vessels.\(^{14}\)

(ii) Anything done by a person providing civil liability cover for the purpose of defending or representing the insured in an inquiry or proceedings, which is at the same time done in the insurer's own interest under such cover.

(iii) Legal expenses cover provided by an 'assistance' insurer where that cover is provided under a contract the principal object of which is the provision of assistance for persons who fall into difficulties while travelling, while away from home or permanent residence, and where the costs are incurred outside the State in which the insured normally resides.\(^{15}\)

In summary, the broad effect of the statutory provisions implementing the Directive is that insurance cover provided to an insured will be regulated by the Insurance Companies (Legal Expenses Insurance) Regulations 1990. Insurance cover states that the insured will

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\(^{11}\) Regulation 4.

\(^{12}\) Regulation 3.

\(^{13}\) Article 2.

\(^{14}\) Some marine policies will fall within this exception. The interpretation of 'vessel' generally requires self-propulsion. It follows that insurance policies for barges, oil platforms and rigs etc. may not fall within the exception and the 1990 Regulations will apply. There is no exception provided for aircraft of any type.

\(^{15}\) This exception is intended to relate to legal expenses ancillary to 'assistance' provided under a contract of 'assistance insurance' (which is the subject of general business Class 18 in Pt 1 of Sch. 2 to the Insurance Companies Act 1980).
be indemnified or is otherwise covered for a loss attributable to legal expenses other than in relation to the exceptions outlined above. Furthermore, where legal expenses cover is provided under a policy which also relates to one or more other classes of general insurance business, a separate section of the policy is required for the legal expenses cover.\footnote{16} This last point is an issue of particular importance and effect to the rapidly emerging area of LEI add-ons to general household and motor policies.

Subject to specific policy terms, the 1990 Regulations do permit LEI cover in respect of costs resulting from a wide range of criminal, quasi-criminal and civil proceedings, whether the insured appears or is represented as the accused, plaintiff or defendant. The insurer’s liability to pay costs may be limited to costs payable on a standard basis.\footnote{17} In consideration of public policy, fines and penalties cannot be indemnified.

In certain circumstances arrangements which provide ‘financial assistance’ towards legal expenses may not be deemed ‘insurance’ and therefore fall outside the 1990 Regulations. An example would be the Medical Defence Union (MDU) which provides its members with advice and representational expenses in defending professional negligence claims. Since the benefits under the MDU are discretionary to its members and not obligatory, it is not to be regarded as the provision of an \textit{insurance}.\footnote{18}

\section*{10.3 Compliance}

In cases where the 1990 Regulations apply, failure on the part of the insurer to comply fully with its provisions can have serious potential consequences. Regulation 11 states that a breach by an insurer of any of the regulations 4 to 9 shall be treated as a failure by it to satisfy an obligation to which it is subject by virtue of the Insurance Companies Act

\footnotetext{16}{Insurance Companies (Legal Expenses Insurance) Regulations 1990, SI 1990 No. 1159, reg 4(b).}

\footnotetext{17}{See RSC Ord 62. According to Cordery, \textit{supra} n.10 at p.M/204 paragraph M[1024], the Insurance Ombudsman has upheld an assertion by an insurer to that effect.}

\footnotetext{18}{As held in \textit{Medical Defence Union Ltd. v Department of Trade} [1980] Ch 82.}
1982. It is generally accepted that such a failure by an insurer will be a breach of Part I of that Act.\(^{19}\) Given this assumption certain sanctions may then be imposed against the errant insurer. Firstly, the Secretary of State may withdraw the insurer’s authorisation to effect a contract of legal expenses insurance.\(^{20}\) In the alternative, charges may be brought under the 1982 Act\(^{21}\), carrying a maximum prison term of two years or a fine or both, upon conviction. In respect of compliance failure, the 1982 Act provides that ‘officers’ of the insurer may also be convicted in certain circumstances.\(^{22}\)

It follows, for the purposes of compliance, regulations 4 to 9 are of fundamental importance. Briefly and in order, the regulations cover the following areas:

Reg. 4. The requirement that LEI cover shall be contained within a separate policy or section of a policy of insurance.

Reg. 5. Arrangements for avoiding conflicts of interest.


Reg. 7. An exception to regulation 6 in respect of emergency assistance services.

Reg. 8. Arbitration.

Reg. 9. Notification to the insured of their rights.

\(^{19}\) Supra, n.10, M/204 paragraph [1026].


\(^{21}\) S. 14.

\(^{22}\) S. 91.
In effect, regulations 4 to 9 reproduce (although not in the same order) Articles 3 to 9 of the Directive, and represent its substance. It is for this reason that regulation 11 seeks to enforce them so rigorously.

10.4 Authorisation

Regulation 10 of the Insurance Companies (Legal Expenses Insurance) Regulations 1990 makes important amendments to section 1 of the Insurance Companies Act 1982. The effect is to require separate authorisation from the Department for Trade and Industry to undertake LEI business.

Under S.1, an insurer requires authorisation to carry on any single class of insurance business. It goes on to provide that an insurer authorised to carry on any class of general (i.e. non-life) business is entitled to offer related and subsidiary insurance falling within any other general class. It follows that an insurer authorised to offer buildings insurance may also offer cover for liability arising from the use of a building without having to be separately authorised to carry on liability business.

The Authorisation Regulations insert a new sub-section into section 1 of the 1982 Act. It now provides that LEI cannot be offered as a related and subsidiary part of a policy on property or liability (or falling within any other general class) unless the insurer is separately authorised to carry on LEI. There are, however, two cases in which separate authorisation is not required for a subsidiary offering of legal expenses cover:

(i) where the main policy provides assistance for persons who get into difficulties while travelling, while away from home or while away from their permanent residence; or

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23 S.1 (4).
24 Other than credit insurance and suretyship, which require separate authorisation.
25 Subsection 1 (4A).
(ii) where the subsidiary legal expenses provision concerns disputes or risks arising out of or in connection with the use of sea-going vessels.

Where an insurer requires authorisation to carry on LEI business, the Authorisation Regulations set out the information required on application. For companies whose head office is in the United Kingdom their application for authorisation must include the following:

(i) the name of the company;
(ii) particulars of the classes of general business for which the company is presently authorised;
(iii) copies of the documents evidencing that the company issues policies falling within an authorised general class including subsidiary legal expenses cover, and;
(iv) a statement of the company's margin of solvency.

10.5 Conflicts of Interest

Suppose that A is insured by company X against incurring legal expenses and that B is insured by X against incurring public liability. If B causes injury to A and A wishes to commence proceedings against B, X is faced with a conflict of interests. The purpose of the Directive was, as far as is possible, to remove this type of conflict of interest. In practice most conflicts between the insured and the insurer fall into four categories.

(i) The 'prospects of success' provisions of the LEI policy.
(ii) Costs.
(iii) Disputes over disclosure; or

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26 Supra, n.7, Part I.

27 Similar requirements are imposed on companies operating from inside the EC and for companies operating from anywhere else.
(iv) a difference of opinion as to how the matter should proceed and, more particularly, the engagement of counsel and experts, the incurring of other expense, or the collation of evidence.

The 1990 Regulations\textsuperscript{28} oblige legal expenses insurers to adopt one or more specified forms of arrangement to avoid conflicts of interest where the insurer carries the risk of two or more parties to an incident. The three alternatives are:

(a) **Segregation of Staff**

No member of the insurer's staff concerned with claims management under LEI contracts, or with legal advice under such contracts, may conduct a similar activity in relation to any other form of general business offered by the insurer or by a linked insurer.

(b) **Segregation of Legal Expenses Business**

Legal expenses insurance may be carried on by an independent company established by the insurer, although in this case the staff of that company involved in claims processing or giving legal advice may not perform a similar activity for the insurer itself.

(c) **Independent Legal Advice**

The policy may provide that the assured has, (from the moment a claim under legal expenses cover arises), the right to choose his/her own legal representative.

The 1990 Regulations\textsuperscript{29} confer a general right on the insured to nominate his own lawyer whether or not the insurer has conferred that right on him under the policy.\textsuperscript{30}

\textsuperscript{28} Regulation 5.

\textsuperscript{29} Regulation 6 (2).

\textsuperscript{30} Under Regulation 5.
"The insured shall be free to choose a lawyer ... to serve his interests whenever a conflict of interests arises."

The insured's right to choose his own lawyer will also arise where he requires legal representation at an inquiry or in proceedings (see later). The right of the insured to choose their own lawyer is only excluded where the legal expenses insurance cover is limited to motor vehicle accident or breakdown insurance. This exclusion operates providing the insurers do not carry on liability business and the insured is entitled to an independent lawyer in the event of a conflict of interest.

In so far as the 1990 Regulations permit such freedom of choice, that freedom cannot be fettered in any way. An arbitration clause in a policy, which attempts to provide for arbitration of a dispute between the insured and the insurer without representation may be unenforceable. If severance is not possible, the clause in its entirety would be invalid, leaving the insured to rely on arbitration should he wish to do so. According to Cordery:

"... in almost all cases an insured will seek private arbitration, so as to avoid the dispute with his insurer taking place in open court for the benefit, inter alia, of the opposing party to the underlying proceedings."

The 1990 Regulations confer upon the insured the right to refer any dispute concerning the policy to arbitration, furthermore, that the policy must expressly refer to this right. The regulations also provide that, in the event of a disagreement between insurer and insured under a LEI policy, the insured must be informed of his right to independent legal advice and of his right to refer the dispute to arbitration. In addition the Regulations indicate that the insurer has the right to refer any dispute to arbitration.

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31 Regulation 6 (2).
32 Regulation 7.
33 Regulation 8(1).
34 Supra, n. 10 at page M/226 paragraph [1108].
35 Regulation 8.
36 Ibid.
Arbitration Agreements Act 1988, which has the effect of avoiding arbitration clauses for the reference of future disputes in contracts where one of the parties is a consumer, does not apply to insurance agreements. Therefore, there is nothing to prevent an insurer from insisting upon the right to go to arbitration whether or not the assured is a consumer.

It has been suggested,\(^\text{37}\) that the 1990 Regulations in respect of the insured’s right to have recourse to arbitration may not wholly comply with the requirements of the Directive\(^\text{38}\) which requires the Member States to adopt appropriate measures to ensure that:

".... an arbitration or other procedure offering comparable guarantees of objectivity is provided....."

The Directive also states that such a procedure must be:

".... without prejudice to any right of appeal to a judicial body which might be provided for by law".

The wordings of LEI policies almost without exception contain an arbitration clause allowing disputes to be arbitrated subject to the Arbitration Acts from time to time in force. The clause will require the arbitrator to be a solicitor or barrister agreed upon by the parties or, failing this, appointed by the Law Society.

Where the dispute is resolved by arbitration the matter will be at an end. If, after arbitration the party against whom the award was made is dissatisfied, unless the policy provides otherwise (and subject to the question of compliance with the Directive) there is nothing requiring that party to comply with the finding or award. Thereafter, only litigation can resolve the dispute.

\(^{37}\) Supra, n.10 at p. M/225 paragraph [1104].

\(^{38}\) Art 6 87/344/EC.
10.6  Conflicts and the Position of the Solicitor

Where a solicitor is acting for an insured in dispute with his insurer, the position of the solicitor can be cause for concern. The dilemma for the solicitor is how to deal with the proceedings that are the subject of the insurance claim while the dispute with the insurer is being resolved. Where the solicitor is retained solely by the insured he may find that any work conducted in furtherance of the proceedings will be without remuneration. The solicitor may have to agree payment with his client in the event that the dispute is resolved in favour of the insurer. Notifying the other party of the problem with the insurer (with a view to a standstill by consent) is not likely to be the favoured course of action except in but a few cases, but it may be the best practical and expedient option. Another option is to ensure the solicitor dealing with the substantive claim becomes first choice representative for the insured in respect of the dispute with the insurer.

Whatever happens with the dispute, the solicitor acting for the insured is under a duty to protect the client's interests. Unless the client instructs him to cease work in the knowledge that this may prejudice the case, the solicitor must continue to act unless and until he is removed from the record or his retainer is otherwise terminated.

10.7  Freedom of Choice

As previously indicated in the introduction to this chapter, no single aspect of the 1990 Regulations has caused so much compliance difficulty and concern for the insurers as that which purports to entitle the insured to freely choose his own legal representative. Practitioners have long argued that the interpretation of the Regulations is abundantly clear and that no method employed by insurers to circumscribe the free choice of the insured is lawful or should be tolerated. Insurers disagree and favour a narrow interpretation of the Regulations which they insist are reasonable and furthermore in the best interests of both the insurer and the policyholder. The Department of Trade and
Industry (DTI), if it has shown any favour at all, has sided marginally and cautiously with the insurance industry.

To add to the confusion, practitioners are split. There are those on the insurers panels who are their preferred suppliers of legal services and who have little complaint and those who are denied the prospect of litigating for an insured client due the 'restrictive' practices of the insurers. It is against this background that the provision of 'freedom of choice' is examined.

10.8 Panel Solicitors

The debate in respect of 'freedom of choice' and the application of the 1990 Regulations can be distilled into one that concerns the insurers use of panel solicitors. Is such use lawful and if so in what particular circumstances? The argument is also essentially financial concerning the insurer's control of the solicitor and his costs. For these reasons, this section of the chapter will draw on empirical material in its analysis of the argument for and against the use of panel solicitors, it being a matter of diverse approach and reasoning on the part of the insurers.

Most insurers would agree on the following advantages in using panel solicitors:

- solicitors are familiar with policy wordings;
- claims handling time is reduced;

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39 In 1993 and again in March 1996 the writer interviewed key staff at:

Hambro Legal Protection Ltd. - Christine Malkin - Director
Lawclub Legal Protection - Frank Nichols - Divisional Manager
- Allan Truman - Executive Manager
DAS Legal Expenses Insurance Company Ltd. - Paul Asplin - General Manager
The Legal Protection Group Ltd. - James Painter - Marketing Manager
- Malcolm Gilbert - General Manager
- Peter Smith - Insured Services Division Manager
Abbey Legal Protection Ltd. - James Innes - Chairman

The advantages and disadvantages as described are taken from their responses to questions at interview.
• advice on case merits should be more objective;

• higher recovery rate;

• lower claims costs;

• lower premiums;

• some private individuals want recommendation;

• control of service standards;

• control of solicitors costs;

The disadvantages were perceived as:

• the 1990 Regulations may be breached; and

• insurers may face litigation if the panel solicitor is negligent.

And for those insurers who do not at present run a panel scheme:

• loss of business if change to panel solicitors; and

• revision of policies/marketing literature.

Clearly, there are many good commercial reasons for insurers to use panel solicitors. The comments from the insurer’s representatives are enlightening:

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40 ibid.
"It is in the policyholder's interests that premium levels are minimised and therefore that as far as insurance law allows it, insurers should use cost effective legal representatives."41

Another42 saw panels as a necessary claims management tool in order to sustain a healthy profitable account. DAS Legal Expenses Insurance Company Limited commented:43

"Experience amongst legal expenses insurers shows that the insured and the insurer are both better off if the insured is directed towards a solicitor who is able to offer a full professional service and is likely to have the expertise to deal with the matter of the claim. Additionally, the solicitor will be familiar with the payment structures and operation of the insurer and this will ensure that the claim can be progressed smoothly and without difficulty."

Some insurers like Lawclub Legal Protection are quite open in their use of panels:44

"We now use panels for the majority of our claims. These panels guarantee a consistency of service level for all policyholders and enable us to negotiate standard fees for given types of work thereby controlling our claims cost."

Abbey Legal Protection Limited.45 were unequivocally clear that the use of panel solicitors was the way forward:

"In legal expenses insurance our main enemy are solicitors ... allow us [legal expenses insurers] to deal with those solicitors who we trust and with whom we have an agreement over charging rates and suddenly everything becomes cheaper ... Furthermore, where claims are handled in bulk, we [the legal expenses insurer] are prepared to delegate powers and responsibilities to the solicitor which serves the interest of the insured in dealing with the claim expeditiously."

As can be seen the insurers comments on the use of panel solicitors and the reasons given for their use are similar in nature to those of the Board in respect of franchised solicitors.

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42 Christine Malkin, Manager Legal Department, Hambro Legal Protection Ltd., in a letter to the writer dated 25th October 1993 and confirmed in a further letter to the writer dated 25th March 1996.

43 Paul Asplin, Assistant General Manager in a letter to the writer dated 22nd December 1993 and confirmed in a further letter to the writer dated 4th March 1996.

44 Allan Truman, Executive Manager in a letter to the writer dated 24th March 1994 confirmed in a further letter to the writer dated March 12th 1996 from Frank Nichols, Divisional Manager.

45 James Innes, Chairman, in a taped interview with the writer dated 22.4.94.
The emphasis is on control, efficiency and appropriate expertise. Such comments by insurers arguably reflect the views of the Legal Aid Board and represent the driving force behind the franchising initiative.

Other insurers, notably the Legal Protection Group, are more circumspect, and their comments highlight the differing strategies of insurers. Some as aforementioned, seem unable to conceive that a successful book of LEI business can be run without the use of panels and therefore are prepared to adopt a bullish narrow construction of the 1990 Regulations. Some, more sensitive to the strict letter of the law, seem most wary of acting in any way which may be construed as flouting the true intent of the Regulations:

"The EC Directive and the Regulations in my personal opinion do not allow legal expenses insurers to set up panels, or to use those panels. There is an area\(^46\) where panels are explicitly allowed and therefore I would argue that no other area is contemplated by the Regulations."\(^47\)

Malcolm Gilbert of the Legal Protection Group explains the 'fine line' that the insurer has chosen in order not to act outside of the 1990 Regulations:

"We have tried in legal expenses insurance to avoid having panels, we will make recommendations to the insured on their request and we will only deny the insured the use of a freely chosen solicitor under a policy if we believe that solicitor to be wholly unsuitable given the nature of the claim, which we believe is consistent with working in the best interests of the insured."\(^48\)

The approach of the insurers is mixed. The Regulations themselves state that the insurer:

".... shall, in the policy, afford the insured the right to entrust the defence of his interests, from the moment that he has the right to claim from the insurer under the policy, to a lawyer of his choice ...."\(^49\)

Furthermore:

\(^46\) Regulation 7 parts (a) to (c).

\(^47\) Peter Smith, manager Insurance Services Division, the Legal Protection Group Ltd. in a taped interview with the writer dated 3rd May 1993.

\(^48\) Malcolm Gilbert, General Manager, the Legal Protection Group Ltd., in a taped interview with the writer dated 27th September 1993.

\(^49\) Regulation 5(4).
"Where under a legal expenses insurance contract recourse is had to a lawyer ... to defend, represent or serve the interests of the insured in any enquiry or proceedings, the insured shall be free to choose that lawyer ..."^50

Accordingly, Cordery states^51 that the italicised phrase is unambiguous. Why then do some insurers openly use panel solicitors and others use mechanisms to restrict the insurer’s use of solicitor? For example, by providing that the freedom of choice of solicitor is subject to payment of an increased premium,^52 or that the excess is increased, or by requiring the insured to choose from the insurer’s panel of solicitors. Alternatively, the insurer may agree to the payment of costs only on a standard basis, or to limit hourly rate payments which may not be acceptable to the insured’s choice of lawyer. In respect of the latter, the insured may not be prepared to pay the additional costs incurred on a solicitor and own client basis.

The answer appears to lie somewhere between necessity and ‘green light’ signals from authorities such as the DTI and the Insurance Ombudsman.

10.9 The DTI, The Insurance Ombudsman and The EC Directive

When EC Council Directive [1987] OJ L185/77 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance, was adopted by the Council of Ministers on 22 July 1987, the DTI’s response was to issue a consultative document.^53 Its intention was to examine the various provisions of the Directive and to set out the Department’s proposals for the implementation of those provisions in the United Kingdom. It stated^54:

^50 Regulation 6(1).

^51 Supra, n.10 at page M/223 para. [1087].

^52 For example, Abbey Legal Protection Ltd. in 1993 offered to one group client two tiers of cover for a particular LEI product - Gold and Silver. Gold cover provides freedom of choice as per the 1990 Regulations silver did not. Silver carried a rating reduction in the order of 15%. Arguably the silver cover was unlawful and outside the requirements of the Regulations.


^54 Ibid. 9 para. 26.
"It seems clear however, that in principle the choice [of legal representative] should be an unfettered one [under the provisions of the Directive] and the insurer should not attempt to exert any influence over the choice of the policyholder."

It went on to confirm that in its opinion when the Directive was adopted, it was recognised that any LEI policy can be subject to an overall limit of indemnity and that Articles 3.2(c) and 4 "... do not prevent a legal expenses insurance contract from specifying a maximum limit for the fees of the lawyer or expert or other appropriately qualified person freely chosen by the insured."55 The DTI then delivered its verdict on panel solicitors:56

"Insurers may wish to use a panel of lawyers from whom the policyholder is free to select a lawyer to represent his interests. Provided such panels are constituted in a reasonable way and offer a genuinely wide choice to the policyholder, the Department believes that they are in the interests of both the insurer and the policyholder, and that they should be acceptable within the terms of Article 3.2(c)."

The DTI added a caution that it would ultimately be for the courts to determine if necessary, in any particular case, whether the arrangements made by an insurer met the requirements of the Directive, as reflected in United Kingdom law.

The message to the pro-panellists was clear; the DTI would support their use subject to the test of reasonableness. Little wonder so many of the legal expenses insurers feel safe to openly promote their panel solicitors to the insured. In addition, the DTI felt that there was nothing in Article 3.2(c) of the Directive which prevented the insured from choosing a legal advisor or other appropriately qualified person employed by the insurer (their in-house legal teams). The DTI added the caveat:

"Clearly however, where the insurer makes this option available to the policyholder he should not attempt to exert any influence over the latter's [the policyholder] choice."57

55 Ibid. 9 para. 26(i).
56 Ibid.
57 Supra, n.53, 10, paragraph 26(iii).
Some insurers, notably DAS Legal Expenses Insurance Company Ltd.,\textsuperscript{58} retain the right for their own staff to handle the claim. On the face of it, this is in breach of the 1990 Regulations. However, they then go on to state that if they do not wish to handle the claim in-house they will choose the representative to be appointed under the policy. Only once proceedings have been issued, or where there is a conflict of interests between more than one insured in the same matter, does the insured have freedom of choice of his solicitor in accordance with the 1990 Regulations.\textsuperscript{59} In summary, any claim admitted where legal proceedings (a writ, summons or otherwise) has not been issued and DAS will appoint a panel solicitor. The insured may only appoint after proceedings have been issued. Clearly, substituting legal representation at that possibly much later stage in the dispute may distinctly disadvantage the insured.

Whilst some insurers may cry ‘sharp practice’ and breach of the 1990 Regulations, the concept was given the support of the Insurance Ombudsman in 1993.\textsuperscript{60}

“In one case, following a road traffic accident, the policyholders made claims on their legal expenses policies, nominating their own solicitor to act for them. The insurer had advised them that, under the terms of the policy, the insurer’s own claims handling department could deal with the case and that the insurer was entitled to reject the policyholder’s nominee. Counsel had advised it that paragraph 6(1) [of the 1990 Regulations] meant in effect that the freedom to choose a lawyer did not arise until it became mandatory, unless the insured was to represent himself as a litigant in person, for him to be represented by a solicitor in any proceedings or inquiry. From the time of the issue of proceedings but not before, the insured would be free, as against his legal expenses insurer, to select his own solicitor.”\textsuperscript{61}

The Ombudsman declared that he was concerned that freedom of choice should be limited in this way, especially since the majority of cases never reach the courts.

\textsuperscript{58} Stated quite clearly in the policy wording and in claims handling advice to their policyholders.

\textsuperscript{59} See for example literature produced by DAS and issued to all DAS agents under “claims conditions”.

\textsuperscript{60} The Insurance Ombudsman, \textit{Annual Report and Case Review} 1993, 1993 at pp. 31-32.

\textsuperscript{61} \textit{Supra}, n.60, 31, para.6.58.
"It seemed to me that the time at which a policyholder would need the services of his own chosen lawyer would be immediately after the dispute had arisen so that he could receive wholly impartial and independent advice as to whether he should institute or defend proceedings at all."\(^6\) Nevertheless he ruled:

"In the absence of any authority that paragraph 6(1) [of the 1990 Regulations] is wider than its wording suggests I upheld the insurer's position that the freedom to choose a lawyer does not arise until administrative or legal proceedings have actually been started. Up until that point the insurer could properly retain the use of "in-house" technical staff, or nominate a lawyer from one of its panels."\(^6\)

The only warning to those insurers who practised this particular method of panel selection was that it was crucial to make this position clear to policyholders prior to proposal:

"Otherwise I might well require the insurer to give freedom of choice at an earlier stage."\(^6\)

Finally, in general support of restricted use of solicitors the Ombudsman believed that:

"... the policyholder could not reasonably expect to choose a solicitor for a simple claim whose high reputation might be matched by appropriately high fees."\(^6\)

Moreover in 1995\(^6\) the DTI stated the policyholders freedom of choice of lawyer under the 1990 Regulations:\(^6\)

".... will arise in significantly restricted circumstances ..... The DTI take the view that a reasonable interpretation would be that regulation 6(1) permits the policyholder to exercise his right of choice of lawyer when it becomes clear that the administrative stage of the claim is completed and negotiations have failed so that litigation (whether in the form of court proceedings or otherwise) will take place. Until that point is reached if in relation to the policy the Insurance Company has not

\(^6\) Supra, n 60, 31, para.6.59.
\(^6\) Supra, n 60, 32, para.6.59.
\(^6\) Supra, n 60, 32, para.6.60.
\(^6\) Supra, n 60, 32, para.6.60.
\(^6\) Regulation 6, specifically under regulation 6(1).
adopted the option specified in regulation 5(4), it would be entitled to specify the arrangements to be made to represent the interests of the policyholder."^68

From this analysis of the DTI and the Insurance Ombudsman's interpretation of the Directive it can be seen that some insurers habitual and open use of panel solicitors has not emerged from a vacuum. They, perhaps rightly, feel encouraged by such support and in some cases appear to honestly believe that their use is essential to the survival of LEI business, which in turn, must be in the best interests of the consumer. Why then are not all insurers like-minded? The answer lies in whether it is legally correct to adopt a narrow or broad interpretation of the 1990 Regulations in respect of the issue of freedom of choice.

10.10 Freedom of Choice, the Regulations, Their Interpretation and the Legal Implications for Insurers

(1) Freedom of Choice Before Proceedings

Provided the insurers adopt one of the arrangements set out in Regulation 5(2)-(3) (supra 10.5) there appears no obligation on them to afford the insured freedom to choose his own lawyer except as otherwise provided in the 1990 Regulations. The insured has the right to choose his own lawyer in the 2 situations set out in Regulation 6:

1. Where recourse is had to a lawyer to defend, represent or serve the interests of the insured in any inquiry or proceedings; and

2. Whenever a conflict of interest arises.

It follows that in situations where there is no inquiry, proceedings or conflict of interests and the insurers have complied with Regulation 5(2) or (3) there would appear to be no obligation imposed on the insurers by the 1990 Regulations to afford the insured free

^68 Supra, n.66, 2.
choice of a lawyer. It seems a reasonable interpretation of the words "inquiry" and "proceedings" in the context of the Regulations that they relate to inquiries and proceedings in the formal sense of these words meaning judicial or quasi-judicial inquiries or proceedings.69

The meaning of "conflict of interests" is ambiguous. A broad interpretation would provide such a conflict in almost every case as between the insurer's short-term pecuniary interests not to indemnify an insured and the insured's desire to claim and be indemnified. On this basis the insured would always have a right to choose his own lawyer to represent his interests upon submission of a claim to the insurer.

It would seem this broad view is not correct for the following reasons. Firstly it would be inconsistent with Regulation 5(1) which provides the right to the insured to have a lawyer of his own merely as an alternative to the other methods of avoiding conflicts of interest.70

Secondly, "conflict of interests" is not defined in the 1990 Regulations. There is reference to the meaning in the Directive. The Recitals to the Directive refer to conflicts of interest:

"... arising out of the fact that the [insurer] is covering [the insured] in respect of any other class of insurance .... or is covering another person."71

It seems clear that the term "conflict of interests" is not intended to bear a broad meaning,72 but is confined to those conflicts which are referred to in the Recitals to the Directive and the Explanatory Memorandum. A United Kingdom Court must have regard to the meaning of "conflicts of interests" referred to in the Directive. In the case of

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69 E.g. inquiries by Coroners or professional bodies and proceedings commenced before a Court of Law.

70 Regulation 5(2) and 5(3).


ambiguity in national legislation that purports to give effect to the United Kingdom’s obligations under the EEC treaty, the courts must interpret legislation so as to conform to those obligations.73

It would therefore seem upon scrutiny of the 1990 Regulations and the Directive itself, that insurers may nominate a lawyer (from a panel or otherwise) to act for the insured in advance of the commencement of proceedings by or against the insured.

(2) Freedom of Choice After Proceedings

The express terms of Regulation 6(1) appear to confer on the insured an unfettered and absolute freedom of choice of lawyer to defend represent or serve his interests in proceedings. There exist no limitations within the Regulations themselves in respect of cost, expertise, geographical location or even language. Literal application could lead to absurd results. Insurers are clearly concerned that no limitation on choice could seriously effect profitability and in turn product viability.

As a general rule the express words of the statutory instrument should be interpreted according to their ordinary English meaning unless they are ambiguous. Under Regulation 6(1) the operative words are:

"... the insured shall be free to choose that lawyer...."

Prima facie these words appear to be capable of only one meaning and are not ambiguous, unintelligible, absurd or irreconcilable with the intention of the rest of the Regulations.74 Furthermore, the Directive is also unambiguous in the context of other source documents suggesting an unfettered choice was intended by the European Commission and European Parliament. For example the Commission’s Explanatory

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73 There are several cases which support this contention for example:
Pickstone v Freemans [1989] 1 AC 66;

74 The court would apply the test per Lord Reid in Federal Steam Navigation Co. Ltd. v DTI [1974] 2 All ER 97,100.
Memorandum refers to an Insured's freedom to choose his own lawyer in the following terms:

"Under legal expenses insurance contracts, the costs and fees of the lawyer responsible for defending the interests of the insured person are borne by the insurer. It is inadvisable that this lawyer should be the usual lawyer of the insurance company, above all if it is a composite company (i.e., one that engages in liability insurance as well as legal expenses insurance). This would place the insurer concerned in a difficult position."

The European Parliament's Committee on Economic and Monetary Affairs considered the Draft Directive and concluded:

"The Committee is pleased that the Directive gives considerable attention to the policyholder's possibility of choosing his own lawyer ... it would seem advisable ... to eliminate any uncertainty as to whether the policyholder's general freedom himself to designate a lawyer might be interpreted as being limited to the insurance services of companies transacting several classes of business."

The European Parliament's Report on the Commission's Draft Directive and the Legal Affairs Committee similarly supported the insured's right to an unfettered choice of lawyer. The only proposal to restrict freedom of choice suggested that:

"provisions of a geographical nature should be laid down as regards the free choice of a lawyer."

It does therefore seem, in light of the evidence presented, that the insured has the right to choose a lawyer after he has commenced or is in need to defend proceedings and that this choice was intended to be unfettered.

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76 20 February (1980), PE 62, 085.
78 Ibid. 52-53.
80 This conclusion has been supported by counsel 12 September 1994 in an opinion provided on the request of a number of legal expenses insurers by Andrew J Moran of 1 Hare Court, Temple, London.
10.11 Insurers - Nomination and Recommendation of Solicitors to the Insured

Despite the conclusions as detailed above, from the insurer’s point of view it remains undesirable that an insured should have an absolute choice of lawyer or representative. For example, the lawyer or other chosen representative may be unskilled in the type of dispute, expensive, or inconvenient in the geographical location of his practice. Insurers would undoubtedly prefer to know that litigation is being conducted competently and economically by solicitors who they trust rather than facing the uncertainty of disputing bills of costs after litigation has been concluded.

From the point of view of solicitors approved by insurers, it will clearly be in their interests to provide a top quality and reasonably priced service in order to attract a steady flow of work. Insurers are not likely to recommend a firm of solicitors to their insured unless they are satisfied with the standard of service provided and its cost.

Freedom of choice after proceedings have commenced cannot be circumscribed by virtue of the wording of Regulation 6. On the other hand, the freedom to choose a lawyer or other representative would not be abrogated by insurers reserving to themselves a right to recommend a solicitor or firm of solicitors, provided that the insured was free to reject that recommendation. There exists a fine line between what constitutes a recommendation that an insured is entirely free to reject and a nomination that an insured is likely to feel pressurised into accepting.

Whilst it may be legitimate for the insurer to nominate a solicitor to act on behalf of the insured to protect the interests of the insured pending proceedings being issued by or against him, such positive action may well be unlawful thereafter. It follows that the following clause wording is unlawful under the 1990 Regulations:

“If your claim is accepted, we shall nominate a solicitor to act on your behalf.”
Such a clause clearly and unlawfully circumscribes the freedom of choice of the insured.
The following clause is however likely to be lawful:

"If your claim is accepted, we shall provide you with the name and address of a solicitor with
a suitable level of expertise in your type of dispute whom we recommend acts for you. If you do not
wish to accept our recommendation, you are free to instruct a lawyer or other appropriately qualified
person of your choice."81

The above examples effectively demonstrate this ‘fine line’ between assisting the insured
in his choice of solicitor and acting unlawfully in contravention of the 1990 Regulations.
In reality, most insurers have presently adopted a stance somewhere between the two
clauses outlined.

It does seem that due regard must be had to the difference between the words “nominate”
and “recommend”. The latter would best meet the requirements of both the insurers and
the legislation whilst the former implies that the choice of representative has already been
made.

In summary, the provisions of the 1990 Regulations do not appear to prohibit insurers
from recommending particular solicitors to their insured and the recommendation may be
drafted in such a way as to encourage their insured to accept it. What insurers cannot do
is to circumscribe the free choice of the insured by requiring the representative the
insured chooses to be approved either by them or some independent body.

10.12 Conclusions

The 1990 Regulations are the framework within which LEI is transacted in the United
Kingdom. Generally, the broad definition of legal expenses insurance, the authorisation
rules and apparatus for avoiding conflicts of interest and providing arbitration, have
largely been accepted and complied with by the industry. The Regulations requirement

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81 Counsel’s opinion supports the contention that such a clause would be lawful – Jane McNeill Farrar’s Building,
that the insured has freedom to choose his own lawyer has become problematical. The difficulty arises in the feasibility of reconciling that requirement with the concept of a panel system whereby the insurer has the right to insist the policyholder chooses a lawyer from a restricted number of firms.

The DTI and the Insurance Ombudsman have so far, acted sympathetically towards the insurers. The result is a mixed response from the insurers. Some openly using panels, others reverting to mechanisms of "recommendation" after proceedings are issued and of "nomination" before, believing them to comply with the Regulations. In truth, a number of such mechanisms adopted by some insurers would be open to a legal challenge as being in breach of the Regulations and the spirit of the EC Directive. Furthermore, the existence or non-existence of panels of solicitors retained by legal expenses insurers is a matter of some controversy among solicitors, some of whom apparently believe that they are being unfairly denied access to a source of work by not being accepted on to a panel.82

Finally, it is worth reflecting on why the debate is so particularly confined to the United Kingdom. In the words of Peter Smith of the Legal Protection Group83 a reason is suggested:

"In Germany in particular and France largely, there is far less variation in costs charged by lawyers in handling a case ... costs are defined by the area of law involved and quantum. The Directive was designed to give freedom of choice to avoid conflicts of interest. If costs are equal between solicitors, then you might as well give complete freedom of choice. In this country84 where hourly rates are discretionary, then giving complete freedom of choice is incompatible with common law duties to mitigate the loss where it is an insurance claim."

82 See for example the findings of research commissioned by the Law Society in respect of commercial LEI in the Law Society's draft report on Commercial Legal Expenses Insurance 1994 and the writer's own research as detailed in Chapter 9, supra.

83 Insurance Services Division Manager whose comments were made further to a taped interview with the writer 3rd May 1993.

84 Holland is in a similar position, in this respect, to the United Kingdom.
PART FOUR
Chapter 11

Legal aid and Legal Expenses Insurance – a European Comparative Study

This part of the study commences with a look at Europe. Continental LEI has developed differently to the United Kingdom both in concept and time. The varying degree of civil legal aid available in some countries has greatly affected the growth of the LEI market. Furthermore, it is possible that the mature LEI market in Europe offers the United Kingdom useful experiences from which to learn and, perhaps, a glimpse of the future.

11.1 The Comparators

No analysis of civil legal aid and LEI in the United Kingdom would be complete without, at least, a selective study of our European partners. Most European countries operate some form of civil legal aid if only rudimentary in nature and aimed at the poorest members of their society. Conversely, the same cannot be said of LEI. The availability and usage of such insurance varies dramatically from country to country. Some, like Germany, have a very advanced LEI system, covering a significant proportion of the population. Others, like Spain, are unaccustomed to the concept of such insurance and have a potential market for such products that may reasonably be regarded as being of negligible significance.

It is the intention of this study to select for analysis, those countries whose legal aid system, LEI market or the inter-relation between the two, provide the most interesting and noteworthy comparisons to the United Kingdom. For this reason, this study will confine itself to the consideration of Germany, France and the Netherlands.

These specific countries have been selected for the following reasons. Germany has a basic legal aid system coupled with a highly successful and most advanced LEI market. The Netherlands is particularly relevant for inclusion in this study, given that its legal aid
system has developed from a welfare state similar to our own and yet their experience of LEI is quite different. Finally, France is included since it was the birthplace of LEI, its current position in respect of such insurance is comparable with that of the United Kingdom and its legal system is experiencing problems which show interesting parallels with ourselves.

A brief study of the civil legal aid systems operating in Germany, France and the Netherlands is an important part of this comparative analysis. This is because the civil legal aid system (as has been shown to be the case in the United Kingdom in previous sections of this study) often has a significant impact on the development, need and success of any LEI market in that country. It would be wrong to assume that in all cases the civil legal aid system preceded the insurance market. However, it follows that the level of provision of government-funded civil legal services directly influences the commercial opportunity for a LEI market to flourish. To this extent, the two appear inextricably linked.

11.2 Germany

Despite ranking amongst the highest in the world as far as expenditure on its system of social security is concerned, Germany has never built up an infrastructure of legal aid institutions that could be compared to that of the United Kingdom. In Germany it took until 1981 for a modest legal advice scheme (Beratungshilfegesetz) to be enacted. Even though young lawyers in Germany, looking for new markets, are discovering legal aid as a possibility for attaining a subsidised clientele, pre-court advice on legal aid is still used to a relatively modest degree\(^1\).

German legal aid is very limited although it does vary from region to region. The provinces have individual responsibility for the provision of legal aid. Other than the

\(^1\) See for example: the comments of Blankenburg, E., in 'Comparing Legal Aid Schemes in Europe' (1992) 9 CJQ 107.
advice scheme referred to above, the Prozesskostenhilfegesetz is the law that authorises legal aid. Under this scheme, assistance is available to resident nationals, resident foreigners, non-resident nationals and non-resident foreigners.

Initial advice is available from private lawyers for a fixed fee of DM20\(^2\), only in respect of civil cases. This scheme was established by the Bundesrechtsanwaltsgebuhrenordnung (BRAGebo) under which lawyer’s fees for preliminary consultations are paid for by the Land Treasury. An individual entitled to civil legal aid under this scheme has a right to select a lawyer of their choosing and local Bar Associations are available to give guidance as to the choice of lawyer. Specialist agencies offering legal advice exist in the fields of welfare and social assistance law, housing law and consumer law.

The main features of the German civil legal aid model are as follows. Free or subsidised legal aid is available where a fixed scale of charges exists. The legal aid applicant must use his own assets as far as can reasonably be expected but can pay the fees in instalments. Legal aid will not be granted unless the applicant can show that his claim has a reasonable prospect of success and is not malicious. Legal aid will not be granted if the costs would probably not exceed four monthly instalments and any part amounts to be paid from assets\(^3\). Assistance under the legal aid scheme is provided by private lawyers, their fees paid by the Court Cashier from government funds. The fees will be up to the normal amount if the sums received by the Land Treasury exceed the sum necessary to cover all costs and claims. The means test in Germany is inflexible and operates a predetermined maximum financial limit that is reviewed annually\(^4\). The applicant may be


The fee cited is subject to annual review.

\(^3\) *Supra*, n.1.

required to contribute to the costs of the claim, however, once granted, there are no
classes of case or areas of law, for which legal aid is unavailable.5

Should a legally aided litigant lose their case, unlike the practice in the United Kingdom,
they would normally be liable to contribute substantially to the winner’s costs in some
form. Although there is no liability on the losing party in respect of Court fees.7

Upon being granted legal aid, the applicant can expect all fees and disbursements
necessary to his case to be met. The applicant will be entitled to legal representation but
it is only available where the services of the lawyer are obligatory.8

It is worthy of note that lawyers undertaking legal aid work in Germany:
"...receive a fee which bears some relation to the normal tariff they are entitled to charge in privately
funded cases. In other countries, Legal aid is based on a rather different tradition that, as a matter of
professional honour and obligation, a lawyer is expected to devote at least some of his time working
for the disadvantaged at personal financial sacrifice".9

Legal aid in Germany is very limited. In addition, the German government, if compared
with that of the Netherlands, spends 14 times less in subsidy per head of the population
on legal advice.10 The bulk of government subsidy for legal work is spent on divorce in
Germany at 75 per cent. The level of expenditure on legal aid cannot be explained by a
simple correlation with the welfare state levels:

5 Supra, n.2.

6 Supra, n.4.

7 Supra, n.2.

8 Supra, n.4.

9 Supra, n.4.

10 Supra, n.1, 107.
“There would be no reasons in economic and social structures to expect any significant difference in legal aid expenditures between [certain European] countries”. 1

There exist additional reasons that lead to the development of legal aid in some countries as compared with Germany. Outside of Court representation in Germany, subsidy for legal work is insignificant. Apart from the specialist agencies as previously described, Germany has no tradition of State-funded legal aid Bureaux or ‘law-shops’. Citizen’s Advice Bureaux, like the United Kingdom, which could be considered competition for lawyers, would be contrary to German law.

With 77 lawyers per 100,000 of the population, Germany has one of the highest lawyer-densities on the continent12. It might be expected that high lawyer frequencies in common law countries correlate with high government expenditures for legal aid. It seems clear in the case of Germany that its low rate of legal aid expenditure13 is by no means explained by the size of the bar.

The answer seems to lie in their traditional policy with respect to the services to be rendered by advocates and in how far they manage to maintain a privileged monopoly keeping other professions out of offering similar services. German advocates enjoy a privileged monopoly that is defended quite actively against any possible competition, even against journalists, ombudsmen and the like. It is argued that this acts to suppress

1 Supra, n.1, 107.

12 Supra, n.1, 110.
Note: England and Wales have 150 barristers and solicitors per 100,000 of the population.

13 For example, Germany spends 4.10 ECU’s per head of the population per year as compared with 6.66 in the Netherlands and 15.51 in the United Kingdom. These figures were taken from a report produced by the A.B.I in September 1996 and kindly made available to the writer.
'legal needs'. Even the modest legal advice subsidy (Beratungshilfe) remains strictly tied to the advocates’ monopoly.

That said, the overall German legal aid expenditure has risen steeply over the past 20 years, as have the costs in other countries. Presently, German discussions are mainly directed at reducing the growth of civil legal aid in divorce procedures, even their small expenditure for legal advice has come under attack because of its growth rate.

The monopoly theory of German control over legal aid expenditure is only part of the equation. In Germany, the impact of having one of the most advanced and successful systems of LEI in the world cannot be ignored:

"It is interesting to note that although Germany had developed quite a wide system of legal aid by the end of the 19th century, its impact declined in the 20th. This led to the growth of a very substantial private enterprise market, particularly following the expansion of the German economy after the Second World War."

It does seem that, in fact, the success and popularity of LEI in Germany has virtually replaced other forms of financing. As one commentator put it:

"...one has the impression that insurance companies now deal with more or less all the litigation between them, so that it is no longer the concern of the lawyer, let alone of legal aid."

The first LEI company in Germany was founded in 1928 as DAS Deutscher Automobil Schutz. Since that time, the development of LEI is by far the most significant in Europe. The German market for such insurance is the largest in Europe, with premium income in 1997 of 5.3 billion DM, equivalent to around £1.7 billion. With a population of around 82 million, this represents over £200 per head per year. In contrast, the English market, at

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14 Supra, n.1, 111.

15 Tony Holdsworth, Managing Director of DAS Legal Expenses Insurance, as reported in, ‘Europe: Legal Aid Schemes are Slashed in Euro Costs Purge’ (1993) Post Magazine, September, 30.

16 Supra, n.4.
£110m premium, is around £2 per head per year. Over 40 companies actively provide LEI in the German market covering 54 per cent of households. This percentage is largely made up from middle-income groups within Germany: “LEI in Germany appears to have been a remarkable success story; for the insured, who thereby secure access to justice at a relatively modest cost, for their lawyers who have a reliable source of fees and for the insurance companies who have made healthy profits”.

A typical policy premium would be £100-£150 for comprehensive cover and limits of indemnity of around £100,000. Most policies carry an excess of around £90. Comprehensive cover will include consumer and property disputes (including landlord and tenant) and even matrimonial disputes.

No LEI is compulsory although it is reported that some sales forces may try to connect LEI with third party motor insurance which is compulsory. Commission on legal expenses sales varies between companies, typically it is around 40 per cent at the start of the contract and 11 per cent thereafter. Interestingly, LEI contracts in Germany are usually of five years duration. Further, renewal is automatic unless the insured specifically cancels it. These features encourage a long-term relationship, often for the whole of a person’s life from the age of 18, between the insured and the company.

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17 These figures are taken from a report produced by the ABI in September 1996 and kindly made available to the writer.

18 Prais, V., Legal Expenses Insurance, Report commissioned for the Association of British Insurers and the Lord Chancellor’s Department, 1996.

19 It is reported to the ABI by the German industry that such limits are rarely required.

20 See the comments of Dr Jurgen Reinicke of Allianz Munich in an interview given to the ABI in September 1996.

21 Most motor insurance in Germany is third party only.

22 Supra, n.20.
When the insured has a legal problem he goes straight to the lawyer of his own choice, whose fees are paid by the insurers. The insured’s own lawyer decides on the merits of the case and the chances of success of litigation.

The very success of LEI in Germany has given rise to concern. The general belief was that it caused a flood of unmeritorious litigation. Moreover, that this was blocking the Court system. The concern was such that a five-year research project was financed by the German Ministry of Justice and carried out under the auspices of the University of Giessen. The terms of reference of the study were to consider the effect of LEI on the behaviour of insured people when faced with a dispute, on the way in which lawyers treat an insured case and on the number of cases that go to Court. In 1994, the findings of the research were published in a report, the starting point of which was an interesting pre-conception:

“If one asks the man in the street, or acquaintances and friends about the effect of Legal Expenses Insurance, one usually receives the following answer: Legal Expenses Insurance increases the willingness to consult lawyers and to initiate proceedings. This statement reflects a general experience; people use services that they receive free of charge without thinking very much about it. If one has paid an insurance premium, one wishes to obtain some benefit from it. One goes more readily to the doctor and has expensive medicines prescribed without concern, if the costs are met by health insurance. The insurance companies also claim that they enable legal proceedings to be taken which would otherwise not be initiated.”

The research points out figures for insurance premium in respect of the LEI market in Germany, increased between 1965 and 1991 from £90 million to £1.6 billion. Correspondingly, the number of Court cases increased until the middle of the 1980’s.

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23 'Prozesslawine' - avalanche of litigation.

24 Rechtsschutzversicherung und Rechtsverfolgung.


26 Translated from the German.
This relationship led to Judges and legal authorities claiming LEI was responsible for the increase in litigation experienced by the Courts, in recent years.

The study spanned five years and included analysis of 5,200 lawyers and Court files and involved the questioning of 800 lawyers. The results confirmed the view that LEI enabled the insured to issue proceedings more readily and to pursue those proceedings to judgment more forcefully than if he did not have insurance. However, the influence of LEI as a negative element was overestimated. The increase in litigation as a result of insurance was shown to be only between 5 and 10 per cent. In civil law matters, around 46 per cent of the potential litigants who had insurance issued proceedings, whereas 33 per cent of those involved in similar disputes, but uninsured, did so. Between 5-8 per cent more litigants proceeded to judgment if they were insured than if they were not insured. Only 3 per cent more of those who were insured won their cases than those that were not insured.

The clearest differences between the insured and the uninsured were amongst those involved in motoring cases and small claims. Even in those areas, the alleged increase in cases before the Courts caused by LEI, was calculated to be no more than 6 per cent. The research has suggested the following measures to counteract that proportion of the additional litigation attributable to LEI:

- higher representation costs for lawyers and higher Court fees;
- lower costs for initial advice from lawyers;
- stricter assessment of the chances of the success of an action before the insurers agree to pay;
- an increase in the fees paid to lawyers for out of court settlements;
- greater care by the authorities in bringing charges for minor motoring offences.27

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27 Since it was statistically shown that Defendants were acquitted in approximately 30 per cent of cases defended.
Following the report, the insurers associations in Germany have made some attempts to follow the recommendations contained within it. They have recommended that their members should require a report from an independent lawyer upon the chances of success of cases financed by insurance funds\textsuperscript{28}. They also suggested that insurance cover should exclude very minor road traffic violations.

The Germans identify the major reason for the success of LEI as the separation of those insurers from other branches of insurance in the early days of LEI in Germany\textsuperscript{29}. The two largest companies were formed in 1928 and 1935 respectively. This essentially derived from the desire to avoid conflicts of interest and was a legal requirement. It meant that companies transacting LEI were specialists, developing specialist products, some having specialised sales forces making strong efforts to sell LEI. Products became high quality, highly priced and correspondingly appeared to generate high profits for the insurers\textsuperscript{30}.

German LEI packages provide several areas of cover in one product. This has two consequences. Firstly, it allows the product to be high quality and high price. Secondly, it helps to counteract adverse selection. These features mean that the policies can be sold as stand-alone rather than add-ons. Nearly all LEI in Germany is stand-alone\textsuperscript{31}.

Another clear factor contributing to the success of the German market is the strict regulation of the fees charged by lawyers. Fees are dependent on completion of stages of the case, rather than on hours worked. Fees are calculated as a percentage of the disputed amount. A lawyer is entitled to one fee for pre-trial work, a second fee for hearings, a third fee for assisting with evidence and a fourth fee for attempting a settlement. This

\textsuperscript{28} Instead of, as was predominantly the case, the insured’s own lawyer making such a decision.

\textsuperscript{29} Supra, n. 20.

\textsuperscript{30} Supra, n. 20.

\textsuperscript{31} Contrast this position with that of the United Kingdom.
system is thought to place emphasis on getting the business done as quickly as possible, since fees are not dependent on time spent and encourages lawyers to reach a settlement in order to achieve their fourth fee\textsuperscript{32}.

As an added benefit, this system of fee regulation means that, in practice, the EC Directive on freedom of choice does not cause the insurers difficulties. It also means that the costs of a case can be estimated with a high degree of accuracy in advance, thus assisting the insurers in calculating appropriate reserves. Court fees are also known and fixed in advance and the time that a case will take may also be predicted with reasonable accuracy\textsuperscript{33}. The limited German legal aid system is also regarded as a contribution to the success of LEI in that country.

The restrictions imposed upon the rights to practice and the establishment of firms also acts as a control on the cost of legal services. In general, lawyers must be admitted to specific Courts and only a minority is admitted to State and Higher State Courts. In civil matters, a ‘Rechtsanwalt’ may only represent a party in the Court in which he has been admitted to practice and is entitled to only one office premises which, like his home, must be in the district of the Appellate Court. Where a case is heard in a Court where the lawyer retained has not been admitted, it is a requirement under German law the client must also be represented by a lawyer admitted to that Court. This results in two lawyers handling the same case. Such territorial restrictions are known as ‘localisation’. Recently, a number of German firms have merged to work in ‘trans-local’ partnerships across territorial boundaries. These were thought illegal but have been permitted by a ruling of the Federal Supreme Court provided that each partner in the trans-local firm has only one place of practice.

It has been said that:

\textsuperscript{32} \textit{Supra}, n.18, 15.

\textsuperscript{33} \textit{Supra}, n. 20.
"...against this background of regulation and restriction, German lawyers enjoy monopolies and privileges which are a fading memory for English lawyers or which never existed in our jurisdiction."34

LEI has been a feature of the German Legal aid system for so long that it is difficult to say with any certainty which features of the system favour the growth of such insurance and which have been maintained because of LEI. The system of scaled costs for litigation is often cited by legal expenses insurers in other European countries as being the important factor in the predictability of costs and favourable to the growth of the LEI market in Germany. As one commentator states:

"This is undoubtedly true, but it may equally be the case that the existence of a reliable source of funding for litigation makes the lawyers more amenable to scale costs and litigants less critical of those costs."35

The future of the German market is uncertain. The legal requirement to separate LEI from other business was superseded by the EC Directive. Composite insurance companies have begun to write LEI business. It is reported36 that these smaller, newer, LEI companies have brought about a move towards lower quality, lower price products sold as add-ons. This, understandably, has caused some concern to the established insurers.37 These established insurers are responding by offering a higher level of service and improved tailoring of products.

Group policies, which are also of lower quality, have similarly become more common. Currently, in-house lawyers are not allowed to take any cases, or even offer advice. While insurers would like this changed, and such restrictions removed, this could alienate

34 Supra, n. 18, 15.

35 Supra, n.18, 15.

36 Supra, n.17.

37 Although, in reality, it may be of public benefit by increasing the number of Germany’s population with some form of legal expenses insurance cover.
the powerful lawyers' lobby and (it is feared) jeopardise the writing of lawyers' professional indemnity business. Moreover, after-the-event policies do not exist in Germany and conditional fee arrangements are prohibited.

Finally, it has been said that whilst the EC Directive does not concern German insurers directly, many would like to see it more closely enforced in other European countries. They believe, perhaps correctly, that some foreign LEI companies are gaining competitive advantages by not adhering properly to the conditions imposed by the Directive.

11.3 France

Broadly, France has a less generous legal aid system than exists in England and Wales, even though it was much improved by a change in legislation in July 1991. As a result of the reform, each major Court centre, Tribunal de Grand Instance, has a legal aid office, a Bureau d'Aide Juridique. Applications are made to the legal aid office of the Court area in which the applicant resides. Each Bureau is technically composed of a committee chaired by a magistrate. One member of the Bureau must be appointed specifically to represent the interests of the consumers. The legal aid office grants or refuses legal aid but has no role in relation to remuneration. This is arranged through the local Bar. The Courts are organised into 33 regions, each with a separate Court of Appeal. There is at least one separate Bureau for each Court of Appeal and, in a number of regions, each major city has its own individual Bar.

The President of the Bar, the Batonnier, is responsible for payment and organisation of the lawyers who undertake legal aid. The position is therefore similar to a President of a local Law Society in England and Wales, only it carries the burden of far greater administrative duties. The Batonnier is the point of contact for the assisted person should

38 That person cannot be a lawyer or a Judge.
they experience difficulties. The Batonnier will generally feel a personal responsibility to ensure that an avocat is obtained by an applicant and acts for them. Individuals hold the position of Batonnier normally for two years.

Under the legal aid legislation, in theory, any person of limited financial means that needs to approach the Courts, may benefit from the services of a lawyer and receive all the assistance necessary for the proceedings. Legal aid may either be full or partial and is administered by the Ministry of Justice. Assistance under the scheme is provided by private lawyers, their fees paid by the State. Like Germany, legal aid is available subject to pre-determined maximum financial limits.

Aside from the means test, legal aid will only be granted where the applicant’s claim has a reasonable prospect of success. Eligibility is assessed by the legal aid Bureau, as described above, and their decisions are open to appeal. Where granted, legal aid is available for all disputes brought before the administrative and judicial Courts at all levels of the process; for instance, Appeal and Supreme Court Appeal.

In theory, legal aid in France is of two types: l’aide juridictionnelle for Court proceedings and the l’aide à l’accès au droit for advice. The French legal aid system is quite similar to our own and although it is generally accepted as being less generous, the range of proceedings for which it is available in France is greater than our own. It can, for example, be obtained for proceedings before all three types of Court: civil, administrative and criminal. It is also usually available for all parties to the action.

In civil matters, legal aid can be total or partial. The means test is based on the income of a household or family and alters annually. Income and capital is aggregated in the same way it is in England and Wales. One observer describes application of the test thus:

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39 The Batonnier may take the case on personally if problems occur.

40 Supra, n. 2.
"In practice, the capital test seems to be applied in a fairly rough and ready sort of way. There is no equivalent of the means examination by the Department of Social Security. The legal aid office makes the judgment, usually on the basis of the last tax statement."\(^{41}\)

Full legal aid is available if the monthly income of the family or household is below a certain threshold\(^{42}\). For each additional member of the household other than the applicant, the threshold is increased\(^{43}\). The effect of full legal aid is similar to a legal aid certificate with a nil contribution in England and Wales. The recipient is covered for all the fees and disbursements necessary to meet their case.

Partial legal aid operates differently. The law is designed to protect two principles. Firstly, advocates are able to negotiate their fee with their clients and secondly, the obligation of the state should be limited. A compromise is required. The State contribution is a fixed percentage of the amount paid for a fully legally aided case\(^{44}\). The client also has to pay a sum that is agreed with their lawyer. Strictly, freedom of contract exists, in practice the guidelines of each local Bar are followed. In addition, agreements have to be approved by the Batonnier\(^{45}\). Payment is calculated for all types of cases on the basis of a standard unit that has a different multiple. The lawyer can claim a


\(^{42}\) Approximately £600.

\(^{43}\) Approximately by £60.

\(^{44}\) For example - using 1993 figures.

<table>
<thead>
<tr>
<th>Resources in Francs</th>
<th>Percentage Paid by Legal Aid</th>
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<tbody>
<tr>
<td>4523-4729</td>
<td>85</td>
</tr>
<tr>
<td>4730-4986</td>
<td>70</td>
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<tr>
<td>4987-5346</td>
<td>55</td>
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<tr>
<td>5347-5757</td>
<td>40</td>
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<tr>
<td>5758-6271</td>
<td>25</td>
</tr>
<tr>
<td>6272-6784</td>
<td>15</td>
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</tbody>
</table>

\(^{45}\) Note the order of this system of remuneration as compared to the tradition of the French Bar where fees were seen not as compensation for work but as 'a spontaneous testimony of the client's gratitude'.
supplement for certain matters that represent additional work. In short, the system is akin to a sophisticated standard fee arrangement. Additional payments due to the lawyer will necessitate additional contributions from the assisted litigant.

Where partial legal aid is granted, the assisted litigant will, at the commencement of the case, be given in written form, details of the State contribution, the total cost and the contribution expected from him. Contributions, where payable, may be paid over 10 monthly payments.

Generally, as one observer of the French legal aid system states:
"...a major problem with legal aid [in France] is delay. It is not unusual for a legal aid application to take six months or more to be considered... particular attention needs to be given to the date of the hearing and the names and addresses of the parties. A minor omission, for example, of an address that is difficult to retrieve, can be fatal, since the effect of legal aid on civil proceedings is generally to suspend them."

It seems that the best advice a French lawyer given conduct of a legal aid case in France can give to the assisted litigant is:
"Be patient".

The origins of LEI lie in France in the 19th century. A society was founded in 1885 called ‘Prevoyance Judiciaire’ to meet future legal expenses of its members incurred either in bringing or defending legal proceedings in the civil courts. This initiative proved to be short lived but was followed in 1897 by a similar project called ‘Sou Medical’. The society was so called because the subscription amounted to a sou per day. The purpose of the Society was to pay for legal advice and defence of its medical practitioner members if they were sued as a consequence of their activities as doctors of

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46 In triplicate, stamped by the Batonnier.

47 Supra, n. 41.

48 Supra, n. 41.
medicine. The association was unfortunately no more successful than 'Prevoyance Judiciare'\textsuperscript{50} It is believed that these early attempts at LEI probably foundered on the difficulties of calculating risks and therefore premiums, correctly.\textsuperscript{51} The early German LEI companies at the beginning of the 20th century\textsuperscript{52} quickly surpassed those of their forerunner in France and met with lasting success.\textsuperscript{53}

Whilst LEI in France has had a very different history to its German neighbour, its current position is more comparable with that in the United Kingdom. As the birthplace of LEI, France has a more developed market than the United Kingdom but growth has been relatively slow. Annual premium income is estimated to be FF3 billion, (£344m)\textsuperscript{54}. A poll conducted by the Louis Harris Institute in 1993 indicated that approximately 14 per cent of the French population had some form of LEI. Premiums for motor add-ons vary from £4 to £48 per annum and household add-ons from £2 to £53 per annum. The average premium for an all-risks LEI policy is reported to be around £120.\textsuperscript{55} The market, like the United Kingdom, has for some time gravitated towards add-on LEI which accounts for much of the population coverage.

\textsuperscript{49} Its creation was inspired by the misfortune of one person, Dr Laporte, whose attendance at a birth led to a fatality. He was of limited means and was imprisoned further to a legal suit. His colleagues made a collection which raised enough money to obtain his release and were inspired to form 'Sou Medical', to protect themselves against similar misfortune.


\textsuperscript{51} Supra, n. 18, 3.

\textsuperscript{52} Notably the Society 'Defense Automobile et Sportive' (DAS) which was adopted in Germany in 1928 as 'Deutscher Automobil Schutz' (also DAS).


\textsuperscript{54} As reported by the French insurers to The Comité Européen des Assurances ('CEA') in 1995.

\textsuperscript{55} Ibid.
It is reported that the French legal system is experiencing problems which show interesting parallels with the United Kingdom\textsuperscript{56}. Fees of French lawyers are not fixed as in Germany. Costs of an action are unpredictable\textsuperscript{57}. For example, fees of a lawyer for a case before the ‘Tribunal de Grand Instance’ can vary from 2,000 to 20,000FF.

Sponsored by a leading LEI company\textsuperscript{58} in France in 1989, a poll by the Louis Harris Institute showed that 89 per cent of French people thought that French justice was too slow, 83 per cent too complicated, and 78 per cent too expensive. In the same year, the journal ‘50 Millions de Consommateurs’ found that 92 per cent thought French justice too slow, 56 per cent too expensive and 77 per cent too complicated. Together, these reports are a good indication of the state of the French legal system. Interestingly, they appear to mirror the recent findings of the Woolf Report in England and Wales that describes the legal process as:

“...too expensive, too slow and too complex”.\textsuperscript{59}

As a result of the unpredictability of legal costs, the development of LEI in France has largely followed the provision of legal services linked to an insurance policy\textsuperscript{60}. This kind of LEI has raised some apprehension among, and opposition from, lawyers. This has been recognised and reported by French commentators:

“Faced with the development of LEI, lawyers have had certain reservations about the insurers fearing that legal expenses insurers would direct clients from their firms and limit their income through the imposition of scale costs”.\textsuperscript{61}

\textsuperscript{56} Supra, n.53.

\textsuperscript{57} Supra, n.53, - he refers to an article in the journal ‘50 Million de Consommateurs’ (1991) November.

\textsuperscript{58} L’Avenir.

\textsuperscript{59} At para. 1.

\textsuperscript{60} Insofar as this is permissible under the terms of the 1987 Directive.

\textsuperscript{61} Supra, n. 53, 42.
In addition to the problems of cost, slowness and complexity as detailed above, the French have a less generous legal aid scheme than that available in England and Wales. Naturally, it follows that LEI in France is often viewed in terms of its potential to facilitate access to justice for those too rich for legal aid but too poor to litigate from their own funds. In 1989 the Prime Minister of France commissioned a report. It recommended the use of insurance to facilitate access to justice: “LEI - with free choice of lawyer paid directly by the insurers - is particularly appropriate to litigation relating to property matters, particularly for building disputes and consumer goods, where the procedure is often long and expensive because of the high cost of technical expertise”.

Fiscal incentives to facilitate the wider use of insurance were suggested: “Parallel with Legal aid, which must be restricted to the most needy, it would be desirable to promote a system of personal insurance permitting access to legal advice and assistance”.

Despite such encouragement from public authorities, to date, there have been no substantive moves by them to assist the wider spread of LEI in France. Presently, LEI in France does play a greater role than in the United Kingdom, although its development, the legal system and the difficulties facing the insurers are similar. It has been suggested that the French market is ahead of the United Kingdom:

“...in part due to the early history of the industry in that country, but more probably the result of the much less extensive Legal aid scheme.”

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62 Entrusted to M. Bouchet a member of the Conseil D'Etat.


64 The proceedings of a 'Convention Justice', on the 22 May 1991 under the auspices of the 'Etats generaux pour la France’. Reported by Cerveau, B., Ibid.

65 Supra, n.18, 18.
11.4 The Netherlands

The Netherlands has a highly developed system of social security generally, which is expensive to provide and administer. It has built up an infrastructure of legal aid institutions that could be compared to that of England and Wales. Most of this infrastructure was built during the 1970's. As has been stated, the Dutch government spends 14 times more in subsidy per head of the population on legal advice than the German government. However, even that level of expenditure is half that of England and Wales.

It is reckoned that some 47 per cent of the Dutch population are eligible for legal aid as compared to an estimated 38 per cent in England and Wales. Recently the Dutch government has sought to cut back on legal aid expenditure achieved by budget control and the reducing or holding down of legal fees, rather than reducing eligibility, the favoured method in England and Wales. In general terms, the Dutch civil legal aid system is government-run with the service provided by a combination of private lawyers and those employed by the legal aid Bureau. Initial advice is available from lawyers who participate in the TOGA (Tarief orierented gesprek met een advocaat). Consultations of up to half an hour are available free to those of limited means and at much reduced rates for others. Legal aid Bureau, (Bureaus voor Rechtshulp), in principle, give free advice to all, but in practice, usually only to those who qualify for legal aid. There is a Bureau in each of the 19 districts in which there is a District Court.

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66 Supra, n.1, 106.

67 According to the 1992 figures for expenditure.

68 Supra, n.18.

69 Supra, n.2, 161.
In any case too complicated for the TOGA scheme or legal aid Bureau, a lawyer may be assigned by the Bureau to give further assistance, either in or out of Court, subject to a means test.

Legally aided litigants may select their own lawyer from those participating in the scheme. Listings are available from the Presidents of the local Bar Associations, the Legal Advice Bureaux, lawyer’s referral list and the telephone directory. The Netherlands has no official system of specialisation, although specialist agencies do offer legal advice to the Dutch public and information on such agencies is available from the legal aid Bureau.

Currently, civil legal aid is available for all cases subject to a financial means test. An applicant must obtain a statement of limited means from the Municipality where he resides. Civil legal aid will not be granted if the case does not pass the merits test and have a reasonable prospect of success. Eligibility is assessed by the legal aid Bureau.

Provided the necessary criteria are fulfilled, the relevant legal aid Bureau will then issue a certificate of legal aid indicating the lawyer assigned and the contributions (if any) to be paid by the assisted person. Fees are fixed according to a set scale and like his German counterpart, the Dutch legal aid lawyer may expect to receive a fee that bears some relation to his normal tariff. Lawyers receive their fixed remuneration out of government funds.

Financial limits governing eligibility are amended annually. There is a net monthly income threshold beneath which the applicant will qualify for civil legal aid. Disposable income is also an important part of the financial equation and different thresholds exist, depending on whether the applicant is married or unmarried. In divorce cases the value of the property (within defined limits) is excluded from the consideration of the applicant’s means. A system of contribution operates in accordance with a fixed

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70 Gross income less tax, social security benefits, alimony, rent (up to a maximum figure) and child benefits.
scale linked to the means of the applicant. Where legal aid is granted, the applicant can expect all fees and disbursements necessary to be met, subject to the level of contribution, if applicable.

If granted, legal aid is currently available for all classes of civil law, in all Courts, Tribunals and Appeal Courts. Unlike England and Wales, cost recovery is more readily available in the Dutch legal aid system. Whether this occurs and if so the amount awarded is up to the Judge. Many costs are not covered by legal aid, such as Court fees and expert witness costs which, in that respect, make the Dutch system less comprehensive than in England and Wales.

In the Netherlands in the 1970’s there developed a number of local initiatives establishing law shops, complemented by the national system of state funded legal aid Bureaux. As a result, this provided a network of ‘social advocates’. In addition, a considerable part of the Bar is dependent upon legal aid clientele. Research in the 1980’s identified 10 per cent of the Dutch Bar as being specialised in a legal aid clientele, running law shops which cater exclusively on legal aid subsidy and 25 per cent of the Bar gaining a considerable part of their income from legal aid clients.

The Netherlands is similar to England and Wales in the extent per capita it concentrates its civil legal aid expenditure on the provision of legal advice. There is also a similarity between these two countries and the way in which, unlike Germany, they do not restrict the giving of such legal advice to lawyers. There is no monopoly as is evident with the German model of legal aid.

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71 As per the comments of Ernst Pompen, Managing Director of DAS Amsterdam, in an interview conducted by the United Kingdom ABI in September 1996.

72 Supra, n.1, 108.

73 Supra, n.1, 111.
However, it is argued that the Dutch system is, in comparison with England and Wales, more restrictive in that it combines government subsidised legal aid offices with a fee subsidising scheme for lawyers. It is submitted that, given time and the impact of franchising in England and Wales, the restrictions between the two countries will narrow in comparison.

During the 1970’s and early 1980’s, the Netherlands experienced a very steep rise in legal aid costs. This has been tackled to some good effect in recent years, with limits being imposed on entitlement coupled with the introduction of higher monetary contributions required from claimants. The restrictions coincided with the Dutch Conservative government’s attempt to reduce total welfare spending. One commentator observes:

"...while the budgets of our Ministry of Justice are increasing these days more than others, there are tendencies to keep (if not reduce) legal aid expenditures within these budgets... Future plans include a scheme of limited admission and maximum ceilings for legal aid expenditures".74

Finally, it is observed, as is the case in England and Wales, that in the Netherlands, the 'social advocates' make only a very modest living. More contentiously:

"...their ranks are not very likely to attract ambitious lawyers because of low income prospects. Many ... serve only a limited time, attempting to move over into regular law firms or government services (as well as teaching)."75

On a more positive note, which almost certainly may be compared evenly with legal aid lawyers in England and Wales, it is noted that the Dutch system:

"...has attracted sufficient number of activist lawyers who have helped to develop jurisprudence in new fields of law and tender rights more effective which were designed for employment protection, tenants and consumer protection as well as for improving the legal position of welfare clients and immigrants."76

74 Supra, n.1, 112.

75 Supra, n.1, 113.

76 Supra, n.1, 113.
The Dutch LEI market is significantly larger than the United Kingdom. It is estimated the total premium income in the two countries is roughly the same\(^77\) (see figure 1), but the population of the Netherlands is only 14 million, 1/4 of the United Kingdom. The Dutch market is, however, young by German standards, originating in 1963. The Dutch believe that the market only became mature in the 1980's\(^78\). In the last 5 years, premium income has doubled and it is expected that annual growth rates of 10-15 per cent per year are sustainable in the medium term. The potential for growth is indicated by the low\(^79\) percentage of the population covered by some form of LEI, around 9 per cent.

Recent growth in the market has been associated with a reduction in the coverage of State legal aid, although the legal aid system remains generous in comparison with others in covering over 50 per cent of the Dutch population. The Dutch also accredit growth to what is referred to by one commentator as:

"...increasing complexity in the society, with more rules and laws and a greater knowledge of their rights by the citizens".\(^80\)

Like Germany, the Dutch market is dominated by stand-alone policies mostly sold as separate products by brokers\(^81\). Some 90 per cent of the Dutch market is represented by stand-alone products. Typical premiums are £100 with indemnity limits of perhaps £20,000. Most policies carry an excess in the order of £10-20 and the waiting time before a claim can be made is usually 3 months. Generally, the policies, as expected with

\(^77\) At approximately £100 m according to figures returned to the CEA.

\(^78\) As reported to the ABI in September 1996 by Ernst Pompode, executive of DAS Amsterdam.

\(^79\) C.f. Germany.

\(^80\) Supra, n.78.

\(^81\) 30 per cent of the market is now sold direct.
stand-alone products, are comprehensive. The predominance of the stand-alone market results from the perceived superiority of the German model as compared with that of the United Kingdom and France where the market originated. Currently, the market is split into thirds, being one-third individual or family, one-third motor and one-third business. It is the latter category that is perceived by the insurers as having most potential for expansion and motor the least. On the whole, the Dutch insurers do not perceive LEI as a particularly profitable branch of insurance. Profits rest at around 5-6 per cent of gross retained premium. Commission is typically 20 per cent of the annual premium. The duration of policies varies, often being for 3 or 5 years.

Typical Dutch LEI customers are those with middle and high incomes. The market has no particular enthusiasm to reach those with lower incomes who are thought to be the worse risks in that they are less able to understand the procedures involved, thereby making advice, negotiation and assistance more expensive to administer.

The most conspicuous feature of the Dutch market is the importance of in-house lawyers. They are allowed both to advise and to take cases to Court in many circumstances. The result is that, although lawyers fees are not fixed and regulated as in Germany, costs can be largely controlled with (in most cases) the whole case being conducted by a single lawyer paid by the LEI company. Some 97 per cent of cases are handled in this way. Because of this, LEI in the Netherlands is known as legal assistance insurance rather than cover for legal expenses. In most cases, what is provided is help, rather than money.

This might be thought to contradict the EC Directive on freedom of choice. However, the Dutch interpret the EC Directive as only applying to those claims which are not handled

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82 Save for matrimonial disputes which, typically, are excluded.

83 Supra, n 78.

84 Supra, n 78.

85 Subject to a financial limit in some types of litigation.
by in-house lawyers, thus, freedom of choice does not have to be offered in 97 per cent of cases and some of the remainder will also be handled by panels of solicitors. Dutch insurers estimate that, without in-house handling, the premiums of £100 would rise to nearer £600\(^86\).

It is reported\(^87\) that the 3 per cent of cases, which do go to outside lawyers, prove to be extremely expensive. This is not always as a result of freedom of choice, since it follows that many of this number are the most complex civil cases and are beyond the expertise of in-house lawyers employed by the insurers. The cost of this small percentage of cases amounts to around 32-40 per cent of the total expense to insurers. In 1995, 7,200 cases out of an annual total of 190,000 cost 55m out of 170m\(^88\) Guilders total premium for that year. This is despite some of these out-sourced cases being settled out of Court. In the expensive cases, fees may be negotiated with solicitors with typical rates in excess of £100 per hour. Some piece work negotiations are beginning, particularly in cases which go to a member of the insurer's panel of outside solicitors.

As with Germany, no evidence has been produced to show that the existence of LEI leads to more Court actions. However, it has been suggested that if an individual has insurance they may be more persistent with their claim and less willing to compromise, perhaps encouraged by their solicitor.\(^89\)

Selling LEI policies on a group-basis, is thought by the big insurers to be unwise for fear that it will damage relations with brokers. The same is said of direct selling. Smaller insurers do sell group policies. The Dutch appear to be less concerned than the Germans about smaller companies coming into the market with cheaper, lower quality products,

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\(^86\) As reported to the ABI during interviews conducted in the Netherlands in September 1996.

\(^87\) Ernst Pompen executive DAS Amsterdam, September, 1996.

\(^88\) DAS Amsterdam figures 2,000/55,000 cases costing 16m/40m Guilders.

\(^89\) Supra, n.78.
perhaps as add-ons, because they claim that their market has always been very open and competitive in contrast to the German market.

In 1993, it was reported that government discussions were expected on the possibilities of introducing compulsory LEI as a substitute for, or complement to, civil legal aid. There have been no further developments in that direction and the Dutch LEI industry is generally sceptical of its feasibility.

11.5 Conclusions

The countries analysed in this section of the study and the United Kingdom have one unarguable common factor, that is, they all operate some form of civil legal aid system alongside a LEI market. From that baseline, each has a different history and experience of the interplay between state and privately funded access to civil justice. The question for the United Kingdom is what lessons (if any) can be learned from our European partners? How can an analysis of the difficulties experienced by these countries and the chosen solutions, assist the debate on State and privately funded legal services in this country?

The Germans may have only a slim civil legal aid system as compared with the United Kingdom yet notably, they are concerned to control its ever-increasing cost.

It is interesting that the decline of civil legal aid at the beginning of this century, in Germany, appeared to lead directly to the growth of LEI via a strong private enterprise market. If civil legal aid was allowed to wither and die in the United Kingdom, it may be speculated that we would experience a similar growth in the LEI market. However, that would require a brave decision of any United Kingdom government and would realistically be politically unpalatable.

90 The Dutch return to the CEA.

91 The current Dutch government is ideologically in favour of a free market making it unlikely to occur.
It could be argued that the LEI market in Germany has, due to its success, suppressed the need for anything more than a very basic civil legal aid model. This summary is too simplistic. The real interest in assessing the German example is, as has been detailed, to understand the reasons for such success and the messages that ensue for the United Kingdom market.

The Germans have placed great faith in the stand-alone market that has proved to be robust in defeating adverse selection. They have developed and marketed a 'cradle to grave' culture of LEI purchase. A long-term relationship with the insured has been nurtured and encouraged. The Germans realised early on that the LEI market is specialist, best dealt with, for legal and political reasons, by correspondingly specialist insurers clearly removed from the composite insurance market. Specialisation seems to have allowed the stand-alone market to grow successfully. Perhaps, therein lies a lesson for the United Kingdom composite insurers who increasingly view the LEI market as being able to be adequately serviced by divisions within their corporate structures. This could be viewed as one of the reasons for the move away from stand-alone towards add-on policies in this country in recent years.

A regimented and cost-controlled legal profession appears to have been a fertile environment in which the insurance market could flourish amidst the knowledge of certainty and predictability. For all that, the Germans are concerned with the future market, which they foresee could be damaged by the introduction of cheaper add-on LEI policies. The prevailing philosophy in the German market is of a comprehensive insurance product which being of high quality is sold at a correspondingly high price. Anything less, and the insurers fear shrinking profit margins and unsustainable products.

In addition to these indicators, the German example does suggest that a successful LEI market in the United Kingdom will drive up, albeit modestly, the volume of litigation in this country adding to the already considerable burden on the Court system. A
government decision to actively encourage and support the growth of the LEI market must take account of this factor.

France, like the United Kingdom, suffers from a cumbersome over-stretched legal system that results in considerable delay to the general administration of civil justice. The French are concerned with the rising cost of civil legal aid and to link control of this cost to the reform of the legal system. It remains unclear in the United Kingdom, the extent to which that association has been made and whether in proposing the reform of the civil justice system and capping or controlling expenditure on civil legal aid, one is considered with the other.

France shares with the United Kingdom its belief in the future of the add-on market and insurers shun the stand-alone product. In turn, they are similar in recording a slow growth in the LEI market. Despite encouraging noises from a cash conscious government, the LEI market fails to grow at the rate desired by the French insurers, who are, as in the United Kingdom, frustrated by their government’s lack of tangible support for the private market. Concentration instead appears to have turned on the inherent inadequacies and problems of the civil legal system.

As in the United Kingdom, French insurers wrestle perennially with the difficulties of legal cost predictability. Closer links between insurers and lawyers, with a view to seeking agreements on costs, seeming to be the primary response to this difficulty. France is further support for the message that the less developed a State funded civil legal aid system is the more mature the LEI market will be.

The cost concerns of civil legal aid in the Netherlands were such that it led directly to a cut in the coverage of legal aid itself. It is believed that, in turn, this directly resulted in growth of the LEI market. Despite recent cuts, the Netherlands has a well-developed legal aid system and shares with the United Kingdom a view that a significant proportion of the legal aid budget should be spent on the delivery of legal advice.
At a relatively early stage in their development of the LEI market, the Netherlands appeared to make a conscious decision to follow the German model in placing their trust in a market based around the stand-alone product. This decision has not disappointed them and the market has grown rapidly. The Netherlands example is particularly interesting from the viewpoint of the United Kingdom in the method employed to control and predict the cost of lawyers. Unlike the United Kingdom, its legal expenses (assistance) market is more carefully controlled by the insurers in their use of in-house lawyers and what can fairly be regarded as novel interpretation of the EC Directive. The Netherlands has robustly defended itself against criticism that it is failing to conduct its LEI business in accordance with the European regulations, on the basis that its methodology protects the consumer from the cost of meaningful and comprehensive stand-alone LEI cover becoming prohibitive. This argument is powerfully persuasive in the market’s favour. The LEI market in the United Kingdom could similarly pursue this line in, for example, defending the formation of a formal panel solicitor system. Championing the interests of the consumer may assist the market in this country and allow more readily, the imposition of controls on solicitor’s costs that are so important in general terms, for the success and sustainability of a LEI market. The latter being evident from all the countries analysed in this study.

This comparative analysis highlights the importance of the dynamic between the insurance market and the level of provision of state funded civil legal aid in any given country. The role of government policy in promoting or choking the insurance market is thereby alarmingly clear.

The countries detailed offer lessons for the United Kingdom LEI market.

"Wholesale transportation of the methods of other systems is neither practical nor desirable, but some comparison of the proposed changes with those features of other jurisdictions which foster the expansion growth of LEI is essential."92

92 Supra, n.18.
### Figure 1

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2. 1993 National Reports of CEA - converted to sterling at average exchange rates for 1993.
3. OECD Main Economic Indicators - January 1995.
5. CEA figures as qualified by French LEI industry.
6. LEI industry estimate.
Chapter 12

A New Government A New Direction?

Much of the time LEI has been available in United Kingdom the Conservative Government was in power. During that time civil legal aid and LEI have evolved under a free market political philosophy. Consideration of the potential impact a new government may have on the future shape of civil legal aid and LEI, is therefore an important aspect of their analysis and of this study.

12.1 Consensus on Cost

It was clear before the General Election in May 1997, whatever party won, there would be no more money for legal aid. The facts are plain. The cost of legal aid has doubled in the past five years to a figure of £1.4 billion in 1995. It has been the fastest growth area of public expenditure. The principal factor underlying the growth in legal aid expenditure has been the increase in the number of people helped; from 1 million in 1980-1981, to 3.5 million in 1995-1996. The figures illustrate the need for a legal aid system, although not necessarily the present system. They also demonstrate why the Labour party, in opposition, said as emphatically as the Conservative Government, that the legal aid budget cannot be permitted to increase. Paul Boateng, former opposition spokesman for legal affairs, stated:

“A Labour government would not spend a penny more on legal aid than was [currently] spent”\(^1\)

The former Lord Chancellor, Lord Mackay stated:

“Government expenditure must be controlled, and legal aid cannot be an exception.... the writing is on the wall. The growth in legal aid expenditure must be curbed.”\(^2\)

\(^1\) (1996) 93/2/27 LSG 4, (editorial).

\(^2\) Speech by the former Lord Chancellor, the Right Honourable the Lord Mackay of Clashfern to the Social Market Foundation Wednesday, 11 January 1995.
Whilst there may be cross-party support in containing legal aid costs, their positions differ in the targeting of current expenditure.

The former Lord Chancellor, Lord Mackay, spelt out his plans for securing budgetary control in the White Paper *Striking the Balance*. These proposals offer an important contribution to the analysis of the current position of legal aid. Whilst the Labour Government is under no obligation to implement the proposals, it has not stated with any measure of clarity whether it intends to adopt some, all or none of the measures proposed.

### 12.2 Mackay’s Last Stand

In broad terms, the White Paper proposed that the legal aid budget would be capped and priorities and deserving cases would be targeted. There would be separate predetermined budgets for civil and family legal aid. A merits test for civil cases would be introduced to take into account whether there is an alternative way to help the applicant and whether a case deserves a share of the public funds available. Criteria would include the prospects of success; the importance of the case and the likely cost compared to the likely benefit. The Legal Aid Board would initially apply the test but this may be later delegated to contractual providers.

Applicants with access to other ways of paying, such as legal expenses insurance, would not be eligible for legal aid. The Government would consider whether a conditional fee arrangement should be taken into account when awarding legal aid.

There would be required a minimum contribution from all legally aided people for most types of cases. Liability for contributions after the case until the cost is met, would be based on a graduated scale and depend on income. There would be consideration on imposing an upper limit on the amount payable and a maximum period over which contributions remain payable.
Legally aided people would be liable for the other party’s costs but the maximum cost of a case an assisted person might have to pay, would be set in advance. There would be a detailed means assessment for longer cases.

It was proposed that contracts be introduced between the Legal Aid Board and service providers for specified services of defined quality at agreed prices. Regional legal services committees would advise the Board about local needs and the best way to meet them. The scheme would be extended to new types of providers and services, including advice agencies. It was decided not to give legal aid for representation in tribunals but it was stated this measure might be implemented in the future.

It is worth examining the contracting proposal in more detail. It was envisaged that most legal aid services would be provided by contract between the Board and providers in the private or voluntary sectors. However, the Board would be able to test and develop other avenues including grants and the use of directly employed staff. The Board would seek the best price for services that met its requirements for quality, geographic access and range of providers. All contracts would include quality standards, building on the Board's franchising initiative. In addition, outcomes and other key features under contract would be monitored.

Payment under contract would be made in a way that rewarded efficiency. The main options would be either a single price covering all work that comes forward at a particular place and/or over a particular period, or a set price per case subject to a maximum volume. Prices would include disbursements, including expert reports and the use of barristers or other advocates. There would be special arrangements for very expensive cases or unexpectedly high demand. Providers would be paid at regular intervals.

In putting forward such radical proposals, the former Lord Chancellor, Lord Mackay, called on lawyers to co-operate in implementing the reforms. He said:
"I think lawyers have a good opportunity here to develop a quality service which will satisfy the public."³

He insisted that the proposals would benefit lawyers adding:
"I think that a degree of venture and co-operation are required."⁴

Lord Mackay also believed his proposals would be a balanced package of changes to the financial conditions for legal aid. His aim was to ensure that people thought carefully about the importance of their case, especially before pursuing another party through the courts, and that they contributed as much as they could reasonably afford towards the cost. Lord Mackay viewed pilots and widespread consultation as the route to badly needed reform of the system. His primary objectives being to achieve genuine control over legal aid spending, targeting and improving value for money.

### 12.3 Criticism

The White Paper proposals were met with a chorus of disapproval from the lawyers and the advice sector. Perhaps the most profound criticism was if the legal aid budget was capped, it would breach international and European human rights law;⁵ on the basis that the money will run out:

"At some point, someone will be denied legal aid to enforce his or her rights, whether as spouse, consumer or otherwise... for no other reason than the money has run out."⁶

The Bar attacked the proposals as:
"...bureaucratic, expensive and unjust."⁷

The National Consumer Council questioned:

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³ As reported in The Lawyer 9 July 1996.

⁴ Ibid.

⁵ Michael Beloff QC, as reported in The Times, 1 August, 1995.

⁶ Ibid.

"...the whole idea that denying people access to legal help [would] save money overall. We suspect the taxpayer foots the bill through state benefits and health and social care when people cannot afford legal help."  

Lord Mackay refuted the suggestion that under these reforms fewer people would be granted legal aid. He claimed his proposed graduated scale for calculating contributions, in which applicants would pay more if they became better off, would mean legally-aided litigants at the lower end of the scale would pay less than they do at present. He was insistent that legally aided litigants should not have an “unfair advantage”, over non-assisted parties when costs were awarded. Lord Mackay acknowledged the White Paper did nothing to help those not eligible for legal aid but said his proposals should be seen in the light of the Woolf civil justice reforms, which aim to make litigation cheaper and more accessible.

The proposals were criticised for being a reaction to the Government’s propaganda about “weak and trivial cases”. It is argued that this rationale for reform rests on false premises. Given the 300,000 legal aid certificates that are granted each year, it is unsurprising statistically, that a few weak and trivial cases get through the system. That aside, it is argued the assumption that there is no ‘deservingness’ test in the present system is incorrect. Legal aid, it is said:

“... is already subject to a ‘deservingness’ test. The requirement to show that it is reasonable to grant legal aid - the so-called ‘private client’ test - is designed to ensure legal aid is not granted in cases where a privately-paying litigant would not think it worthwhile to litigate”.

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8 Ruth Evans, Director of the NCC as reported in The Times, 1 August, 1995.
10 As reported in The Lawyer, 9 July, 1996.
12 Ibid.
The belief that the White Paper proposals will reduce the likelihood of undeserving cases being funded is also challenged:

"The White Paper is likely to increase the number of weak and trivial cases funded. The plan to delegate decision-making to thousands of individual contract holders, will inevitably produce more inconsistent results than by leaving responsibility for this with the thirteen existing area offices. Many contract holders will find their capacity stretched to the limits. They will no doubt turn away weak cases. But others will have spare capacity from time to time and in those circumstances, there must be a real risk that legal aid will sometimes be granted when it should be refused."\(^{13}\)

Further, the portrayal in the White Paper, of legal aid litigants as 'State funded Rottweilers', is condemned and:

"...to sweep aside all costs protection for legally-aided clients because of bad behaviour of a tiny minority is a grossly disproportionate response."\(^ {14}\)

The concern is that people will simply not risk taking legal action and will be deterred from defending their rights by the prospect of being saddled with a 'debt for life' should they lose the action, however well intended.\(^ {15}\) Under the new scheme they will face the possibility of having to pay the full costs of the case to the winning opponent. The debt to the fund will become a second mortgage on their home, a powerful discouragement to ordinary people to take proceedings.

It is evident from the proposals that Lord Mackay was adamant the imposition of controls over funding via contracting, was a hugely significant development. The Legal Aid Practitioners Group put forward a number of cogent criticisms.\(^ {16}\) Under a block-

\(^ {13}\) Supra, n.11.
See also the comments of Professor Michael Zander 'More Peace for the Wicked' *The Times*, 12 July, 1996, 39.

\(^ {14}\) Supra, n.11.

\(^ {15}\) See the comments of Wallman, R., (1996) 93/2/25 LSG 1.
See also Professor Michael Zander 'More Peace for the Wicked'. *The Times*, 12 July ,1996, 39.

\(^ {16}\) Bill Montague, Co-Chairman of the Legal Aid Practitioners Group and the administration partner of Dexter, Montague & Partners, Reading, as reported (1996) 93/2/25 LSG 12-13.
contracted system, firms seeking a contract with the Board would be deemed 'new providers'. The White Paper says that the Board will encourage new providers to seek contracts as time goes on. If it does not, it is argued that cartels will be created. For a new firm to contract, it will have to be allocated funds:

“This would mean carving a new contract sum from existing contracts which are coming up for review. A new firm would have to compete with local firms with whom the Legal Aid Board has a valued 'long-term relationship', as the White Paper calls it. What could a new firm compete on if not price?”

Winning a short-term contract from the Board would be dependent upon satisfying minimum requirements on a preliminary audit. New practices will have nothing upon which a preliminary audit could reasonably be carried out. It is therefore argued that:

“In future, the only genuinely new providers would be those set up by the Legal Aid Board.”

As a result it is believed that existing franchise firms are the only ones likely to survive, apart from salaried services run by the Board or the advice sector. Larger, established legal aid practices would be best placed to negotiate and handle contracts. However, established firms and new providers alike will be completely at the mercy of the Board.

Contracts with advice agencies are expressly referred to in the White Paper. It may reasonably have been assumed that the advice agencies would have supported any measures designed to break the solicitor’s monopoly on providing legal aid services. In fact, the proposed contracts did not receive a warm welcome from the National Association of Citizens Advice Bureaux, (NACAB):

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17 Ibid.
18 Probably for one year while the practice systems develop.
19 Supra, n.16.
Note: Under the proposals the Legal Aid Board were given powers to make grants and to employ staff direct to provide services.
“The White Paper represents a sad retreat from the founding principle of legal aid, that no-one should be denied access to justice through being unable to pay.”

NACAB are concerned that the price of controlling legal aid would be paid by the many thousands of people of modest means who find that justice is a luxury they cannot afford. NACAB experience regular reports of disabled clients living on benefits who are forced to drop strong cases because they cannot afford the substantial contributions that they would have to pay in pursuing their action. Moreover, that these are not people taking weak and trivial cases at the taxpayers expense but people who need legal help to defend themselves against domestic violence or the threat of losing their homes. They include people injured or made ill through work, or the negligence of their employers. NACAB believe the proposals conflict with their fundamental principles of providing a free service and being open to all:

“...which may prevent the CAB service being able to take up the role envisaged for it in the new legal aid scheme.”

As Professor Michael Zander is quick to point out:

“...if the CABs decide not to participate, Lord Mackay’s reforms will be in a spot of difficulty; making the Bureaux part of the system of providers is central.”

Professor Zander also challenges the need for radical tightening of the existing system when it is such that the overall success rate of legally aided civil actions is 92 per cent. Professor Zander foresees difficulties with Lord Mackay’s ‘brave new world’. He suggests that we are moving away from a position of certainty, where a citizen with a good case who qualified on the means test has a right to legal aid and no problem in

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20 Ann Abrahams, former Chief Executive, reported in *The Times* July 1996.

21 Ibid.

22 Professor of law at the London School of Economics.

23 *Supra*, n 13.

24 *Supra*, n 13.
finding a lawyer to take the case. In the new plan, the citizen will have to persuade the practitioner that the case deserves support out of his fixed budget. The lawyer will be able to pick and choose his cases. Naturally, he will tend to choose the most straightforward cases. He argues the former Lord Chancellor turned a blind eye to such disagreeable concerns in order to be able to tell the Treasury that he has found a way to put a cap on legal aid expenditure. Professor Zander also questions the monitoring of standards proposed by the Board. He believes much of this is just public relations talk and asks:

“How much real monitoring of the work of thousands of providers of legal services can the Board hope to undertake?”

Writing in the summer of 1996, Professor Zander prophetically suggests:

“...by the time that the public comes to realise that it has been sold a package that seriously reduces access to justice for millions of ordinary citizens, Lord Mackay will be enjoying retirement.”

12.4 Implementation of the White Paper Proposals

In July of 1996, the Lord Chancellor’s department stated that consultations over setting standard fees for civil cases as a prelude to the block contracts was due to start immediately. Phase one of ‘the civil pilot’ block contracting scheme, was scheduled to involve firms of solicitors being placed at random into one of three groupings to enable the examination of three different methods of payment. None of these three methods

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25 Supra, n.13.

26 Supra, n.13.

27 Supra, n.13.

28 Group 1 - paid a monthly sum based on the initial projection of what they earn from the Green Form Block Contract Pilot over one year.

Group 2 - paid a monthly sum agreed between the Legal Aid Board and the Firm based on their projected income for advice and assistance over 12 months.

Group 3 - paid a monthly sum agreed between the Firm and the Legal Aid Board - based on their projected income over twelve months.
was the intended model for the final approach. By 1997, 145 firms had been invited to join the pilot scheme. Phase two of the pilot was to involve the not-for-profit sector advice agencies. By November 1996, some 300 such agencies had submitted statements of intent to apply for block contracts under the second phase. The Board was: “Delighted by the positive reception of [their] proposals”.

And was: “...reassured... that earlier reservations expressed by the advice sector networks had not deterred organisations from being involved in the next phase of the pilot.”

In excess of 160 Citizens Advice Bureaux submitted statements of intent together with approximately 80 members of the Federation of Independent Advice Centres, 20 Law Centres, several Shelter Housing Aid Centres and a number of other organisations. Sir Tim Chessells stated: “I have already acknowledged the not-for-profit sectors strongly-held principles and its concerns that those principles should not be compromised. I am pleased that so many agencies have shown that they want to work with the Board in this next phase of the pilot. I remain confident that by working together we can make a significant contribution to the development of quality legal services provision for those most in need.”

The Board made it clear that under the civil pilot, firms would not be competing against each other. There would be no bidding on price or volume and performance under the pilot would not affect decisions about who gets contracts in the future.

By April 1997, phase one had been derailed. A decision of the Law Society Council recommended the non-participation of solicitors firms in the block contract pilot.  

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29 In four legal aid areas.

30 ‘Not - For - Profit Agencies and Block contracts’ [1996] NLJ 1678.

31 Ibid.

32 Chairman of the Legal Aid Board, supra, n.30.
was the fiercest war of words between the Law Society and the Board since the introduction of franchising. The heart of the dispute being the draft contract for the pilot due to commence on 1 June 1997. Key objections to the contract were that it was one-sided in emphasising the obligations on the firms without corresponding obligations on the Board. Furthermore, the burdens imposed on firms were onerous, without adequate financial incentives.33 Practitioners argued that they were being asked to: “Fund significant public research on a pro bono basis.”34

The Board offered concessions but as the dispute progressed, it was overshadowed by the General Election in May 1997 that culminated in a postponement of the block contract pilot. The future of the project now depends on the line taken by the Labour Government. The omens are not good for the continuance of the project. Immediately prior to the General Election Labour’s legal affairs spokesman, Paul Boateng, would only confirm that a Labour Government would not terminate pilot projects already underway.35 Decisions on all new initiatives, including block contract pilots, would be subject to the outcome of a “comprehensive review of the legal aid and civil justice system”.

A further blow for the Board was criticism from the Legal Aid Practitioner Group, who argued that in devoting its resources to the block contract pilots, the Board had neglected to examine the progress of the franchise system. Franchise practitioners were said to be frustrated at the lack of progress.36

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33 (1997) 94/2/16 LSG 1, (editorial).
Whilst perhaps not a direct implementation of the White Paper proposals, but certainly in keeping with its spirit, legal aid practitioners suffered a legal aid pay freeze in April 1997. This imposition angered practitioners who described it as: "... disgraceful and short-sighted."\(^{37}\)

The importance of the freeze is that it points to the key dilemma for legal aid practitioners. That is in embracing the concept of franchising and in cooperating fully with the Legal Aid Board, this naturally involves them giving up a level of independence and freedom of action. As they become more tied to the Legal Aid Board and concentrate on long-term relationships, they become more vulnerable to financial rulings of this nature which are often born out of political expediency:

"The course that the Board and the Lord Chancellor's department are mapping for [legal aid practitioners] would leave them increasingly prone to arbitrary cuts and political manipulation."\(^{38}\)

Couple this with the Board’s ability to divide and rule\(^{39}\) as a bulk buyer of legal services and it becomes commercially perilous for legal aid practitioners to be over-reliant on a single ‘superclient’. The Legal Aid Practitioners Group argued that the vision for a reformed system should be generous enough to embrace the client’s needs in terms of the nature, quality and effectiveness of the service offered. In addition, it must be alive to the pressures and mechanisms that restrict or undermine its ability to deliver a quality service. They cautioned:

"We ignore at our peril the irresistible drive towards growth, standardisation and streamlining of ... legal services in order to bring down unit costs and make justice more affordable."\(^{40}\)


\(^{38}\) Ibid.

\(^{39}\) Note: In their dispute with the Law Society over Block Contract terms in April 1997, the Legal Aid Board indicated that they would negotiate with individual firms as well as through the collective mechanism of the Law Society.

\(^{40}\) Supra, n 37.
The Group believes quality assurance systems are not a threat, but an opportunity to keep the needs of their clients and quality of service at the top of the agenda. They look to the new Labour Government to provide an opportunity for a change of culture. Stating that in recent years legitimate concern with 'value for money', has been accompanied by too high a degree of cynicism, for legal aid clients and their lawyers:

"It would be refreshing to deal with policy makers and administrators who understand and value the public service that we provide and are committed to working to make it even more effective in its fullest sense."\(^{41}\)

However, the new Government appears committed to the cause of controlling the cost of publicly funded civil legal services. There does not appear to be a significantly different political philosophy at work after the May 1997 election. In fact, the proposals to broaden the areas of law to which conditional fee arrangements may be applied, in place of civil legal aid, may be viewed as the logical progression of Lord Mackay's White Paper.

\(^{41}\) Supra, n 37.
The central theme of this study has been the rise of legal expenses insurance over the last twenty years. To assess this, it has been necessary to journey through the historical development of the State provision of civil legal aid, the principles upon which it was founded and the inadequacies and inefficiencies inherent within the current system. As always, politics and economics have played important roles during the development of civil legal aid with their emphasis and direction shifting, particularly in the last decade. The once opportunist market of legal expenses insurance may now even be encouraged by the State as an alternative to publicly funded legal services. The concluding chapter of this study considers the past in attempt to assess what the future holds for the insurers.

13.1 Legal Aid - Lessons From The Past : Solutions for Today

As detailed in previous sections of this study, the post-war development of Legal Aid as we know it had its roots in the failure of the charity-based system that preceded it. The ineffectiveness of the charity-based provision of legal aid was exposed at a time when litigation was generally increasing. Arguably, this is a weakness that has been similarly exposed in recent years. The merit in granting civil rights which cannot, in reality, be enforced by the indigent members of our society, were argued as fiercely in 1945 as they are today. The Rushcliffe Committee therefore advocated the provision of advice and assistance to a wider group than the ‘the poor’. One key difference has emerged. The cross-party consensus that existed in the 1940's lay in respect of a comprehensive legal aid system being a necessary social reform. The consensus has shifted and is now based on the budgetary controls of legal aid.

The scheme as it was originally designed was of unprecedented magnitude in the non-communist world. It was a key component of the post-war welfare state. In 1950, 80 per
cent of the population of England and Wales were entitled to some form of civil legal aid, albeit with some fluctuation, this figure had dropped only 1 per cent by 1979. From 1991 onwards there came calls from the Conservative Government that cash to fund legal aid was not in unlimited supply. The financial limits of the means test were systematically attacked culminating in 1993, where a link was forged between the right to non-contributory legal aid and the recipients of income support. Subsequent to this cut, the former Lord Chancellor, Lord Mackay, admitted:

“I had to use one of the blunt instruments and tighten the eligibility conditions. There were howls of protest, but no one was ever able to tell me how I could achieve the same expenditure effects over time by another means. I [did] not relish taking measures like that”.

Critics argue we are left with little more than a poor law, where access to justice is now dependent on the strength of the British economy in any given financial year. The need for a comprehensive legal aid system is perhaps greater now than it was in 1950 and yet the extent of the current system appears increasingly limited.

It is the writer's view that a government of whatever political ideology must sensibly and necessarily address the issue of civil legal aid cost. To ignore it, will lead to uncontrolled cost and considerable wastage. It is absolutely right to target need. Arguing against cost control for jurisprudential reasons may result in attractive 'knocking copy' but is fundamentally flawed in its failure to observe reality. The concern in targeting need would appear to be the definition of 'neediness'. We have already seen a significant shift in this concept since 1945. The 'poorest of the poor' to people of 'moderate means' is a wide cross section of our society. It cannot be right that people of moderate means should be less able to protect or pursue their legal interests than poorer individuals. Objectively, this is manifestly unfair. And yet LEI insurers report significant numbers of people with moderate incomes considering and purchasing their insurance. For such

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1 Speech by the former Lord Chancellor, the Right Honourable the Lord Mackay of Clashfern to the Social Market Foundation, Wednesday, 11 January 1995.

2 The Lord Chancellor, Lord Irvine of Lairg.
people there does appear to be a fear, borne out of the knowledge of legal aid ineligibility and lack of available funds, to engage in litigation should that unfortunate need arise. The current targeting of legal aid has left exposed large numbers of our society who must pay privately to protect their civil legal rights.

In doing little in recent years to promote LEI, the Lord Chancellor's Department has missed an opportunity to assist the 'moderate means' class of persons. Active endorsement of LEI by the Lord Chancellor's Department is likely to have resulted in greatly increased sales that in turn would have lowered premiums and widened cover. Adverse selection problems would have been reduced. Had the Lord Chancellor's Department operated in this way, their targeting of financial resources on only the very poor would at least have been more palatable for those left ineligible. As the situation stands, cutting eligibility without directing the ineligible towards sound alternatives has left a bitter taste with the public and insurers alike. Only recently has the Lord Chancellor's Department woken up to opportunities put to them by insurers. It is to the insurer's credit that they have tenaciously kept a dialogue alive with the Lord Chancellor's Department in the face of ignorance and indifference towards their products.

In truth, the Lord Chancellor's Department, perhaps more than at any other time since The Legal Aid Act 1949, now needs the creativity of the insurance profession. It is required to ease the pressure on a tightly controlled civil legal aid budget and to provide a quality affordable alternative for those cut-off from the legal aid system by the imposition of draconian eligibility rules.

Historically, legal aid work has been undertaken by a concentration of practices. Evidence suggests that the work was and still is performed by younger, less able lawyers.\(^3\) Whatever the truth of the latter suggestion, the legal profession for too long but for many sound reasons, defended an inherently ailing system in which a change in emphasis on the delivery of the service was the inevitable conclusion of Treasury cost concerns. Change has been forced on the legal profession.

\(^3\) See Chapter 3 at 3.1.
The concept of the franchise was designed to combat perceived existing inefficiencies in the system. It imposed industrial philosophy on private practice. Larger firms were targeted as franchise outlets and issues of ‘distributive justice’ emerged. The concept of ‘quality’ provides a source of endless argument and difficulties although it now seems to be broadly recognised that there must be an acceptable standard of service. Above all, the franchise concept has been criticized for heralding the end of legal aid work being undertaken by the small high-street practitioner. It seems franchises are here to stay and, moreover, may lead to block contracts with the Legal Aid Board. Some firms that have embraced the franchise concept have reported the necessary implementation of management techniques and measures upon their practice has had a positive effect. Just as a polarity of view has emerged between franchise and non-franchise holding firms of solicitors, so too has the view of academics and commentators as to whether the further developments of franchising should follow a pragmatic or ideological lead.4

It remains a remarkable achievement of the Legal Aid Board that such development occurred in the past 5 years. In particular, when during this period they faced an intransigent legal profession, many of whose members refused to accept any criticism of an outdated civil legal aid service which was at best grossly inefficient and at worst abused. To deny the failures of the pre-franchise system was an insult to the taxpaying public who both paid for and relied on the service. They deserved a better deal and the Legal Aid Board pushed through diplomatically and determinedly necessary changes to ensure just that.

To cries of protest from many practitioners who viewed the franchise proposals as an affront to their professional integrity the Legal Aid Board remained clear-headed through the storm and stuck to their task. Of course service standards had to be introduced. To suggest otherwise was a disservice to the consumer public. Such standards would not be easy to determine or assess. But the task was not, as many suggested, impossible. It

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4 Supra, n.78, Chapter 5.
required application, an acceptance of necessary change on the part of the practitioner and a relationship of trust with the Legal Aid Board. Those practitioners quick to embrace these requirements were equally quick to acknowledge the benefits to the practice generally of complying with the franchise transaction criteria.

However, sympathy must lie with the many smaller practices that prior to the franchise initiative provided a thorough, if ‘low-tech’, service for their legal aid clients. Franchising is destined to increasingly take this business from them. They will be forced to grow or give up civil legal aid work unless special provisions for their protection are implemented soon by the Legal Aid Board. If such practices do become extinct, like any loss of species, the natural world of civil legal aid service provision will be poorer for it. Access to justice and distributive justice will be obvious casualties. This will occur particularly in the rural areas of the United Kingdom. It is still not too late for the Legal Aid Board to address this potential problem, but at present, emboldened by the changes they have successfully imposed and looking to a future in which block contracts are a prominent feature, they barely acknowledge it.

Those practitioners who have worked with the Legal Aid Board in successfully implementing the franchise concept have displayed both courage and a considerable act of faith. It is true that such practices stood to gain an increased civil legal aid caseload, but at what price? The relationship of trust and confidence between franchise practices and the Legal Aid Board is fragile. Should the Legal Aid Board abuse the strength of its bargaining position and seek to block contract with only the cheapest service providers, the bright future of franchising could be severely tarnished. The Legal Aid Board risk alienating many of the practices which shared its vision for the future and supported its proposals. There will be an outcry from existing and potential franchisees who submit unsuccessful bids for block contract work whilst having been put to considerable financial investment in many cases. Such practices can expect support in their attack on the Legal Aid Board, from non-franchise practices who will be quick to point out, with hindsight, their distrust of the Board’s motives for change. Much of the good work done by the Board in forging a working partnership for the future with franchise practices
stands to be undermined. The move towards block contracting is therefore significant for reasons other than its nature as a novel transaction for the purchase and supply of legal services; the legal profession's trust in the Legal Aid Board is at stake.

A situation where contracts are awarded solely on price, whether directly or indirectly, is unlikely to be tolerated by practitioners. Yet, that is the logical long-term conclusion to cost-control that many practitioners, politicians and administrators agree, is necessary. Given a situation where quality and location are equal between firms, it is difficult to foresee what else can determine a contract award other than price. The level of cooperation shown by franchisees towards the Board has, to date, been considerable. It follows that such willingness to move forward with the Board will see it face a 'cheapest bidder' situation with alarming speed. When it does, unlike the present position, there will be no room for a fudged response to this issue from the Board.

Any further alteration of the civil legal aid system without proper consideration of its position in the wider context of the civil justice system would seem naive. Ongoing changes to the eligibility rules will be seen for what they are, nothing more than tampering with the system in order to balance the books. Civil legal aid is a significant part of the civil justice system and seeks to protect and enforce the fundamental rights of many citizens of England and Wales. Civil legal aid deserves to be recognised, as it was in post-war years, for its vital contribution in providing access to justice to those otherwise unable to fund necessary litigation. The application of simplistic accountancy principles, as civil legal aid has suffered in the last decade, devalues the basis upon which it was founded. It would seem to be this fact, more than any other, which has so outraged the legal profession and driven it, in adversity, against the Lord Chancellor's Department and made it most wary of the Board. It is therefore with some relief that the Labour administration is not prepared to make further changes to the system until a comprehensive review has been undertaken in respect of the civil justice system.

Whilst the analysis of the civil justice system and proposed review are themselves, outside the scope of this study, the future positioning and significance of civil legal aid
must take its lead from its outcome. It is hoped that the forthcoming review of civil justice will endorse the requirement for civil legal aid within our society, identify against whom it is targeted, ensure certainty of resource and recognise its limitations. It is with regard to the latter, that necessitates a formal relationship with those who provide privately funded legal aid; the LEI industry.

13.2 Legal Expenses Insurance - Existing Problems

We know the ideal climate within which LEI will thrive as a class of business. That is, predictable expense, sufficient volume and knowledge of the law and policyholders on the part of the insurer.\(^5\) For good measure, there should be little or no state provided civil legal aid. Unfortunately for the United Kingdom LEI industry, these conditions do not exist. The United Kingdom market cannot realistically look, for example, to what has propelled the German market. That would simply not be an exercise in comparing like with like. Arguably, the optimum time to study other national markets is prior to the introduction of that class of insurance in the United Kingdom. In this respect, we are some 30 years too late.

That said, 10 million individuals in the United Kingdom have some form of LEI, albeit nearly one third of them having no more than an uninsured loss recovery policy attached to their main motor insurance. As indicated in the study undertaken by the writer and detailed at Chapter 7, the add-on market is growing fast, liked by the insured because of its reasonable premiums and by the insurer for its ability to avoid adverse selection. The problem for insurers with add-on business is that as the awareness of this product increases, the likelihood is that so too, will claims. Insurers may then look to protection from exclusions or cover limitation. This runs the very real risk of damaging the public’s perceived value of the add-on product that in turn may result in the contraction of this sector of the LEI market. Examples of narrowing add-on cover are already apparent.

The clear message from the writer’s survey (reported at Chapter 9) is solicitors are generally enthusiastically in favour of LEI and have no difficulty in theory or practice, in accepting LEI insurers as paymasters. They do, however, have grave reservations at some insurers’ attempts to derogate from the principle of freedom of choice of lawyer enshrined in Community law but ignored or, at best, manipulated by a growing number of insurers and evidenced by the writer’s research referred to at Chapter 10. The challenge for insurers is to increase market penetration of profitable LEI business, against the background of current difficulties which include adverse selection, perceived product value, Community regulation and the tepid endorsement of Government - of whatever political persuasion. Even for an insurance market as renowned for its ingenuity and flexibility as our own, this is a tall order.

13.3 Possible Solutions

Many LEI insurers like Litigation Protection Limited would like to see the concept of LEI promoted by Government through the arm of the Lord Chancellor’s Department. Brian Raincock, of Litigation Protection Limited, views current LEI as a low-quality, low premium product, often synonymous with uninsured loss recovery, which he believes gives a bad image to the product. He would like to see the LEI market in this country:

“...as a high-premium, quality, comprehensive stand-alone product... on this basis, the creation of a mass market is possible. However, this requires a high-intensity marketing campaign (as was used to launch medical insurance)”.

This vision is not shared by some of the main insurers who believe that reliance on marketing was a mistake made in the earlier phases of the LEI market.

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6 He envisages a yearly premium of £140, which should allow £50,000 of cover.

7 In an interview with the Association of British Insurers conducted in summer 1996.

8 For example, the views of Malcolm Gilbert the General Manager of the Legal Protection Group Ltd. put forward to the ABI at an interview in summer 1996.
The plain fact is, for a single insurer to market their LEI product will necessitate, to an extent, a programme of public education and profile raising of LEI in concept. This will be expensive and the returns run the risk of being spread across the industry. It seems for this reason insurers are unwilling to engage in an expensive marketing campaign particularly when profitability on many LEI products is marginal. We have witnessed a national marketing campaign by insurers in respect of their legal help-lines but as yet, LEI is barely mentioned. This would seem reverse logic. It appears unlikely that the insurers will collectively market LEI as a concept and therefore the prospect of a mass market campaign would seem only to be possible in conjunction with the Lord Chancellor’s Department.

Commenting on the future, Mr. Raincock stated that he would like to see an expansion in the number of areas where conditional fee agreements are possible. This he believed would encourage the sales of "after the event" LEI policies in conditional fee cases. He provides as an example, every criminal prosecution against the 'body corporate'. Mr. Raincock would like to see directors, officers and employees of businesses insured by employers when acting in their corporate capacity. Such insurance could be tax-favoured or even compulsory.

In the legal aid field, Mr. Raincock believes the current arrangement whereby costs are not (or rarely) awarded against legal aid recipients, is unfair and should be changed. Then there may be a demand for products that insure the situation, for example, the Legal Aid Board purchasing insurance on behalf of the assisted person. He is also strongly in favour of removing the restrictions preventing more than one type of funding being used for a single action. LEI and legal aid should be able to interact.

There is considerable sense in this last point. For example, in every case of legal aid requiring a contribution the funding of the action is from two different sources. During

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9 Litigation Protection Ltd. is a specialist provider of such LEI insurance.

10 Supra, n. 7.
the many interviews conducted by the writer with key individuals working within the LEI industry during the compilation of this study, desire to see positive interaction between LEI and legal aid was common to all. There exist no obvious reasons why, in theory, private and public funding of a single action cannot be a valid strategy and worthy of proper consideration by the Lord Chancellor’s Department and the Legal Aid Board.

Abbey Legal Protection Limited, also favour increasing the range of cases that can be covered by conditional fees agreements. They too offer ‘after the event’ insurance, currently worth to them in the region of £1 million per annum and expected to rise to £3 million in five years. Yet this market represents only a small percentage of their business with conventional ‘before the event’ LEI accounting for most of their annual turnover. Under the present rules, they foresee the potential market as being ten times these figures and estimate the total potential LEI market in the United Kingdom as being around £1 billion per annum.

They would welcome a more active approach from the major insurers in respect of the LEI market, since they want to see a general increase in the market they are interested in selling the concept of LEI as well as individual policies. They see foreign insurers as more interested in LEI in this country than the United Kingdom insurers themselves.

As a specific proposal, Abbey Legal Protection would like to see LEI premiums made tax-deductible in order to increase the market size. This would seem unlikely to occur under the present Government given its recent tax treatment of medical insurance in the summer budget.

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11 At present these cover only personal accident, insolvency and European Court of Human Rights Actions.

12 This information is taken from an interview given by James Innes (Chairman) and Michael Touhy (Managing Director) with the ABI in summer, 1996.

13 Abbey Legal Protection Ltd. had to look to American Insurers to underwrite ‘after the event’ policies.
The views of the main LEI insurers, who concentrate solely on ‘before the event’ mass-market products, are materially different from specialists such as Litigation Protection Limited and Abbey Legal Protection Limited. For example, Allianz Cornhill suggest that ‘after the event’ policies and conditional fees are dangerous in that:

“If you have to pay a large premium to buy an ‘after the event’ policy, you are likely to try to get your money’s worth, not giving up after using a few thousand pounds of indemnity.”\textsuperscript{14}

On these grounds, they believe the premiums for conditional fee ‘after the event’ policies at about £85\textsuperscript{15} are 20% of the level they should be. It follows, if 99% of cases are successful, one losing case only has to run up £8,500 of costs to make the venture unprofitable. Despite these reservations, the general view of large LEI insurers is the potential market for conditional fee and ‘after the event’ insurance is significant.

What would also seem clear, although the point has not been mentioned by any of the insurers, specialist or otherwise, is that conditional fee arrangements are dangerous for other reasons. The expansion of conditional fees\textsuperscript{16} may boost the ‘after the event’ LEI market but in all probability at the cost of the ‘before the event’ market. A consistent difficulty in marketing conventional LEI has been to persuade the public to purchase it. As detailed in the study reported at Chapter 8, the public perception of need for LEI is generally low. Arguably it will be lower still if the public can rely on a broader base of ‘no win no fee’ conditional arrangements being readily available in the future, perhaps even supplied through their High Street solicitor.

Astute, traditional before the event insurers will only protect their position by marketing their product as a better option for the public. They will be able to do this given the very nature of the insurance which couples with conditional fee arrangements. Before the

\textsuperscript{14} Frank Nichols of Allianz Cornhill Insurance in an interview with the ABI conducted in summer, 1996.

\textsuperscript{15} This figure relates to personal injury actions only.

\textsuperscript{16} Plans to expand conditional fee arrangements are currently being drawn up by the Labour Government, as reported in \textit{The Sunday Times}, 20 July 1997, 24.
event policies (like civil legal aid itself) require a reasonable prospect of success. This is commonly said to be a 51 per cent prospect of success. Most insurance for conditional fee arrangements covers the other side’s costs if the insured loses their case. But if a case is lost the lawyer gets nothing. It follows that the lawyer is most unlikely to run the risk of no fees for a case that has anything much less than a 75 per cent prospect of success. The lawyer cannot afford to do otherwise since they are, in effect, carrying the risk with the insured, the latter paying a minimum premium of £160.

On one view, before the event insurance is cheaper, offers wider coverage and can be used to pursue or defend legal actions which have a prospect of success of between 51 to 75 per cent and greater. Its value over a conditional fee insurance arrangement would seem obvious. The attraction of conditional fee insurance arrangements is that they are event specific and will naturally appeal to ‘risk prefer’ individuals.

The Lord Chancellor fully supports conditional fee arrangements stating:

“Individuals need to know what their costs will be before they start on litigation. I want to eliminate as much uncertainty as possible”. 17

Conditional fee arrangements look set to expand, with the Lord Chancellor consulting over the next months on the maximum possible extension of such arrangements to all civil proceedings, other than family cases, from April 1998:

“Subject to consultations I expect to exclude most claims for money or damages from legal aid. Those on low income, as well as those on middle or higher incomes will then be on an equal footing - taking forward a civil case will depend on whether or not it has the merit to persuade a lawyer to handle it on a “no win, no fee” basis. The decision whether or not to go ahead with any particular case will depend on its strength, not on the financial resources of the client.” 18

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17 Extract from keynote speech to the Bar Conference, September 28, 1996.

18 Ibid.
It also seems likely, that at a stroke, a large number of cases with a prospect of success greater than 51 per cent but perhaps not good enough to tempt a lawyer to risk their fees, will never be pursued or defended due to lack of funds. The long-term implications this may have on civil justice could be profoundly damaging.

Allianz Cornhill, see as crucial to the issue of controlling legal fees, the role of in-house legal work performed by the insurers. They would like to see in-house lawyers given greater legitimacy within the legal system. They would like to follow the Dutch in-house model but currently feel restricted by the European Directive and the lack of clarity in its interpretation. They presently use panel solicitors in the manner of the Board and its franchise solicitors. DAS voiced similar concerns in respect of employed lawyers and firmly believed that the removal of current restrictions placed upon them:

"... would allow more cases to be dealt with in-house and therefore result in significant long-term cost reductions." 19

They argue reforms of this nature may not affect premiums to add-on policies but they may make stand-alone policies more attractive to the market. 20

Extending rights of audience for in-house employed lawyers whilst a sensible move generally would not, of itself, address the current problems of the insurers. Their problem is the role of such lawyers in conjunction with LEI European Directive. In-house or panel, the issue is exactly the same, does it offend European Law on freedom of choice of lawyer where the insurers direct and control the insured towards the use of a particular lawyer? Undoubtedly, increased use of in-house lawyers by insurers would save costs. The Dutch example is weighty support for this conclusion with further extended rights being announced recently. 21 However, the issue should not be isolated from that of panel of solicitors and both require and deserve proper clarification from the

19 Tony Holdsworth and Chris Wright of DAS in an interview with the Association of British Insurers conducted in summer, 1996.

20 Ibid.

Department of Trade and Industry. The current situation is confusing and unfair to insurers in failing to provide a ‘level playing field’. It could and should be addressed by the appropriate government department at an early opportunity.

The Royal & Sun Alliance Insurance Company, view group products, that is LEI sold to the entire membership of an association or affinity group, as a possible area for future growth in the LEI market, since adverse selection difficulties are largely overcome by such schemes. They believe the add-on market has great potential but care should be taken not to devalue the product and they advocate increasing cover to an extent where it is broadly similar to that of a stand-alone product. To achieve this goal, they acknowledge this requires the commitment of the large insurers. They question whether this is likely to be forthcoming, especially as the household insurance market is highly competitive which naturally discourages price increases.

Increasing add-on cover must be a move in the right direction. Consumers appear willing to purchase this product in sufficient quantity to avoid adverse selection. If insurers decrease cover on this product-type and undermine its perceived value in the eyes of the consumer, they have no fall back position given the markets’ negative experience of stand-alone products. The add-on product is the insurer’s chance to widen the general LEI market. Once widened and public awareness is heightened, increase in premiums to ensure profitability becomes a realistic proposition.

There exists a further consensus between insurers and that is encouragement to the Government to accept the Woolf proposals. The position of the insurers is clear; the greater certainty about the cost and duration of litigation and the possibility of lawyers’ charges being set by the case rather than by the hour, would enable premiums to be reduced and cover to be extended. In turn, this benefits insurers and insured alike.

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22 Cost of such extended add-ons would increase to an estimated £30 - £40 per annum.

23 Malcolm Gilbert, General Manager of the Legal Protection Group in an interview with the Association of British Insurers conducted in summer, 1996.
Whilst insurers continue to propose solutions to existing problems and move fluidly with the market, at present, the range of policy covers available in the LEI market, is wider than it has ever been and, at the same time, sales of all types of policy continue to grow, some rapidly. Amidst all the problems they have encountered, this situation is a credit to the LEI industry in the United Kingdom and is acknowledged by outsiders:

"...there is scope for big expansion of legal expenses insurance. It can make a major contribution to the delivery of legal services."  

The achievement of the LEI industry is having moved to this position from one which was described in 1993 by the former Lord Chancellor, Lord Mackay as of "marginal importance". The challenge for the LEI insurers from their 'new' position of prominence is to forge working partnerships with the Lord Chancellor's Department, the Board and private practice. There is plenty of evidence to suggest that the industry is doing just that.

13.4 Partnership - The Way Ahead

After the event insurance policies for personal injury actions marketed through and with the Law Society in conjunction with the Accident Line initiative, has proved a highly successful venture for practitioners and insurers alike. More similar initiatives would undoubtedly be pursued if the areas of law to which conditional fees applied, were expanded.

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24 According to annual figures held by the Association of British Insurers and made available to members of the Legal Expenses Insurance Forum.


26 The former Lord Chancellor Lord Mackay, in his review of civil legal aid eligibility.
A number of insurers believe they could play a significant role in connection with the Green Form advice and assistance scheme and the administration of claims handling for the Board. DAS believe their ‘comprehensive legal help line’ could assist in the replacement of the traditional Green Form advice service which is proven to be expensive and which Board figures suggest is being manipulated by practitioners in order to maximise their income from this source. DAS suggest:

“...that private operators such as themselves should be funded, perhaps by a given amount per person receiving state benefit, such that anyone able to quote a valid DSS reference could gain immediate access to advice. Franchising could be on a regional basis. This should lead to improved access to justice, at lower cost.”

Hambro Legal Protection similarly favour privatising the Green Form system. They argue solicitors have no incentive under the present rules to shorten the duration of their consultation with the client. Hambro believe there is a lot of scope for improving the efficiency of this service. They argue for:

“Replacing the Green Form scheme by a telephone advice line which would improve access to advice... as long as the advice centre can ascertain eligibility to legal aid at the start of the call, a private advice service (funded by the Legal Aid Board) should be able to offer a cheaper service than the current legal aid system.”

The insurers are aware that their legal advice help-lines are highly popular with their insureds and this is borne out by the writer’s own research in respect of help-lines reported at Chapter 7 of this study. That said, there is a concern that in their keenness to replace Green Form with a ‘Green Phone’ that the insurers are over-simplifying the service currently received by the public from private practitioners. The provision of

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27  Legal Aid Board figures indicate that out of a potential 2 hours initial advice available, the average time charged is 1 hour and 55 minutes.

28  Tony Holdsworth - DAS in an interview with the Association of British Insurers conducted in summer 1996.

29  The experience of their help line shows 2 hours of advice is excessive.

30  Christine Malkin, in an interview with the Association of British Insurers in summer, 1996.
sound legal advice is naturally dependent upon the extraction and knowledge of the facts from the client. However good a telephone advice service is, it remains difficult to argue that it can effectively compete with a face to face meeting in the client’s locality, possibly with a solicitor known to that person. The latter must be regarded as being more likely to result in the provision of proper and adequate legal advice. Whilst the insurer’s helplines are well received by their insureds, their primary function where the caller has LEI, is as a risk management tool. In a non-insurance situation they are an ‘added-value’ item for another product or membership. It would require a quantum leap for the insurers, away from the current nature of their help-line services, to effectively replace Green Form by a telephone service and a bold move by the Lord Chancellor’s Department tasked with restoring the public image of legal aid. A ‘Green Phone’ arrangement would seem politically unacceptable. 31

Some insurers are quick to seize upon the opportunities presented by Lord Mackay’s White Paper in relation to the supply of advice and assistance outside private practice:

“Legal expenses insurance companies will be able to provide additional services which, until now, have been the exclusive province of solicitors…. we welcome the opportunity to assist in the wider arena that the White Paper proposes, and to ease the burden on the taxpayer while, simultaneously, giving access to civil justice for all those who need it.”32

Allianz Cornhill are emphatic that LEI insurers possess the expertise necessary in respect of case management of claims, which they believe is currently sought by the Board.33

“It would thus be natural to conduct an agency transfer of some cases from the Legal Aid Board starting with contractual or personal injury claims.”34

31 During his employment with The Legal Protection Group Limited in 1995 the writer participated in a presentation to, and at the request of, The Lord Chancellor’s Department where project “Green Phone” was put forward as an alternative to the current Green Form scheme; it was rejected.

32 Paul Asplin, General Manager of DAS, The Times, July 11, 1996.

33 Frank Nichols – Allianz /Cornhill Insurance Company in an interview with the Association of British Insurers conducted in summer of 1996. It was conceded that this expertise did not extend to criminal and some types of civil action.

34 Supra, n.33.
They concede, that this would require a re-drawing of the merits test bringing the legal aid test closer to the LEI definition.

In fact this proposal has more merit to it than it would at first appear. Insurers have been in the past and remain, very effective in their control of solicitors and cost which was apparent from the writer’s survey of solicitors detailed in Chapter 9 of this study. They have had to be to survive. Insurers would provide a commercial toughness perhaps not currently present within the Board offices. The technical competence of the claims negotiators is also, generally, of a high level. Some form of contracting-out of this function currently performed by the Board, should not be lightly dismissed but viewed positively as an area for future development and partnership between the Board and the insurers.

Several LEI insurers seek the ‘Holy Grail’ of some form of compulsory LEI enacted by Government. An alternative radical option mooted by some is for the Government to simply pare legal aid further to an absolute minimum in conjunction with actively encouraging private provision above this level. Less radical reforms suggest a Government-assisted scheme to raise awareness of LEI by providing information and education. The likelihood of any of these reforms occurring openly in the near future is slim. However, there are some positive signs on the horizon for the insurers.

Recently, the new Labour administration, through Sir Richard Scott, has offered words of encouragement to the LEI industry. In general, he favours a new approach to costs so that the loser is not liable unless and to the extent that his prosecution or defence of the

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35 Where panel solicitors are used the system is often self-regulatory; in that the ultimate sanction imposed against an errant firm is removal from the panel.

36 The comments of Christine Malkin, Hambro Legal Protection Ltd., in an interview with the Association of British Insurers in summer, 1996.
case was unreasonable. Also, that the Board should be expected to pay the costs of the winner if the action fails. Hand in hand with such changes, he is reported as saying:

"I'd like to see encouragement of litigation costs insurance. I'd like to see employers begin to offer litigation costs insurance to their employees and tax incentives provided by the Government to do that."37

The future for the insurers necessitates further and continued discussions with the Law Society, the Lord Chancellor's Department and the Board, to explore opportunities and to design plans for establishing the key areas where insurance could complement, combine with, or replace funding currently provided by the public sector. The LEI industry is already funding an increased percentage of cases. Insurers must lobby for the removal of restrictions and constraints currently placed upon them. Of late, the Lord Chancellor's Department's approach to change has been dynamic and refreshing, presenting opportunities for the LEI industry. Mr. Brian Raincock, of Litigation Protection Limited, describes the former Lord Chancellor, Lord Mackay, as having:

"Thrown down the gauntlet to the profession and to insurers. It must not be ignored or timorously picked up - all problems are capable of a solution."38

The United Kingdom operates a hybrid model for the delivery of public and privately funded civil legal aid to its citizens. This mixed mechanism is, in itself, unlikely to change, but the emphasis on its component parts has and will continue to do so. The LEI industry must develop further. A more strategic vision and a creative approach are vital to their well being. It follows that they must display a willingness to cooperate with all interested parties and provide insurance and assistance products which aim to do more than cover existing areas of exposure but seek to provide a very real and comprehensive alternative to the state-funded system of legal aid. Paradoxically, in striving to achieve this, they may become an inherent and important part of a State-funded system.

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37 Reported in [1997] NLJ 750 and in The Times, Saturday, May 17, 1997. A view previously held by others outside the LEI industry, see for example, the comments of Russell Wallman, Head of Professional Policy The Law Society, as reported in The Daily Mail, Wednesday, July 24, 1996.

38 "PFI for Legal Aid?" (1996) 93/2/27 LSG 2.
CIVIL LEGAL AID

AND

LEGAL EXPENSES INSURANCE

SAMPLE ANALYSIS
Contents

1. SAMPLE GROUP DETAILS
   - SECTION 1 PRACTICE DETAILS
   - SECTION 2 CIVIL LEGAL AID
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2. DIAGRAMMATIC REPRESENTATION OF THE SAMPLE RESULTS
   FIGURES 1 - 15

3. COPY OF ORIGINAL QUESTIONNAIRE SUBMITTED TO SAMPLE GROUP.
ANALYSIS

Civil Legal Aid and Legal Expenses Insurance

SAMPLE GROUP

200 Private Practice Solicitors in England and Wales. The group was split into 8 geographical regions corresponding with the Law Society's Solicitors Regional Directory 1994/95 edition. Within these 8 regions 25 practices in each region were selected according to size. 5 from each of the following categories;

- sole practitioner;
- 5 or less partners;
- between 6 and 10 partners;
- between 11 and 20 partners;
- 20 partners and above.

These practices were pre-selected as germane to the analysis being listed in the Law Society Directory as dealing with legal aid matters.

TIME

Questionnaires were issued to the sample group on 1st March 1995 and returned by 31st May 1995.

RETURN

151 of the practices sampled returned completed questionnaires representing approximately a 75% rate of participation.

THE QUESTIONNAIRE

The questionnaire (copy attached) was divided into 4 Sections.

Section 1

Practice details

Section 2

Civil legal aid
Section 3
Legal expenses insurance

Section 4
Civil legal aid/legal expenses insurance comparison.
SECTION 1

PRACTICE DETAILS

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<tr>
<th>Type</th>
<th>Number Participating</th>
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<td>5 or less partners</td>
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<td>6 - 10 partners</td>
<td>44</td>
<td>29.3%</td>
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<tr>
<td>11 - 20 partners</td>
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<td>20%</td>
</tr>
<tr>
<td>20 + partners</td>
<td>18</td>
<td>12%</td>
</tr>
</tbody>
</table>

(Figure 1)

(2) Type of Work Undertaken by the Practice

- Civil work only          34%
- Criminal work only       nil
- Mix of criminal and civil 66%

The sample group were asked to state an approximation as to the division of work between civil and criminal.

Practices who stated a division 66%
Practices who did not state a division 34%

Where a division was stated:

Percentage of Civil Work

- 1 - 10% nil
- 11 - 21% 0.8%
- 21 - 30% 6.2%
- 31 - 40% 7%
- 41 - 50% 8%
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<tr>
<th>Percentage of Criminal Work</th>
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<tr>
<td>11 - 20%</td>
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<td>21 - 30%</td>
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<tr>
<td>81 - 90%</td>
<td>nil</td>
</tr>
<tr>
<td>91 - 100%</td>
<td>nil</td>
</tr>
</tbody>
</table>

(3) Where the practice indicated that it undertook civil legal work it was asked further to give an approximation as to the division of that work between legal aid and non-legal aid.

Practices sampled that undertook civil work 100%

Percentage Of Legal Aid

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1 - 10%</td>
<td>13%</td>
</tr>
<tr>
<td>11 - 20%</td>
<td>14.6%</td>
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<tr>
<td>21 - 30%</td>
<td>15.3%</td>
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<tr>
<td>31 - 40%</td>
<td>14%</td>
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<td>41 - 50%</td>
<td>14%</td>
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<tr>
<td>Percentage of Non-Legal Aid</td>
<td></td>
</tr>
<tr>
<td>-----------------------------</td>
<td></td>
</tr>
<tr>
<td>51 - 60%</td>
<td></td>
</tr>
<tr>
<td>61 - 70%</td>
<td></td>
</tr>
<tr>
<td>71 - 80%</td>
<td></td>
</tr>
<tr>
<td>81 - 90%</td>
<td></td>
</tr>
<tr>
<td>91 - 100%</td>
<td></td>
</tr>
<tr>
<td>1 - 10%</td>
<td></td>
</tr>
<tr>
<td>11 - 20%</td>
<td></td>
</tr>
<tr>
<td>21 - 30%</td>
<td></td>
</tr>
<tr>
<td>31 - 40%</td>
<td></td>
</tr>
<tr>
<td>41 - 50%</td>
<td></td>
</tr>
<tr>
<td>51 - 60%</td>
<td></td>
</tr>
<tr>
<td>61 - 70%</td>
<td></td>
</tr>
<tr>
<td>71 - 80%</td>
<td></td>
</tr>
<tr>
<td>81 - 90%</td>
<td></td>
</tr>
<tr>
<td>91 - 100%</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>11.3%</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>4%</td>
</tr>
<tr>
<td></td>
<td>6.6%</td>
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<tr>
<td></td>
<td>4.6%</td>
</tr>
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<td>2.6%</td>
</tr>
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<td>6.6%</td>
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<td>14.6%</td>
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<td></td>
<td>10.6%</td>
</tr>
<tr>
<td></td>
<td>12%</td>
</tr>
<tr>
<td></td>
<td>14%</td>
</tr>
<tr>
<td></td>
<td>10%</td>
</tr>
<tr>
<td></td>
<td>8%</td>
</tr>
</tbody>
</table>
SECTION 2  CIVIL LEGAL AID

1. The survey sample were asked whether their practice dealt with civil legal aid applications.

   YES 98.7%
   NO 1.3%

2. In dealing with civil legal aid applications, the sample survey were asked to state the approximate time delay between conclusion of the case and payment to the practice by the Legal Aid Board.

   93.3% of practices who responded to the survey gave an answer to this question, their findings were as follows;

   **DELAY**
   
   Up to 3 weeks  1.4%
   Up to 4 weeks   8.5%
   Up to 5 weeks   0.7%
   Up to 6 weeks   7.8%
   Up to 8 weeks   26.4%
   Up to 10 weeks  0.7%
   Up to 12 weeks  24.2%
   Up to 16 weeks  3.5%
   Up to 20 weeks  3.5%
   Up to 24 weeks  14.2%
   Up to 32 weeks  1.4%
   Up to 36 weeks  5%
   Over 36 weeks   2.7%

   (Figure 4)

3. The sample group were asked whether they would receive an interim payment from the
Legal Aid Board;

- Never 5.4%
- Almost never 14.3%
- Normally 51%
- Nearly always 23.1%
- Always 6.2%

(Figure 5)

4. The sample group were asked whether, in applying for civil legal aid their applications were rejected on the grounds of insufficient merit;

- Never 2.7%
- Almost never 89.7%
- Normally 7.5%
- Nearly always nil
- Always nil

(Figure 15)

5. The sample group were asked, where an initial application is rejected on the grounds of merit are the appeals successful;

- Never 2.1%
- Almost never 19.7%
- Normally 39.4%
- Nearly always 34.5%
- Always 4.3%

(Figure 16)
1. The survey sample were asked whether their practice dealt with clients who had some form of legal expenses insurance.

- YES 68.2%
- NO 31.8%

2. In their experience in dealing with legal expenses insurers the sample group were asked what was the approximate time delay between completion of the case and payment to them by the insurance company.

80% of practices who had dealt with legal expenses insurers gave an answer to this question, their findings were as follows:

<table>
<thead>
<tr>
<th>DELAY</th>
<th>PERCENTAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to 2 weeks</td>
<td>6%</td>
</tr>
<tr>
<td>Up to 3 weeks</td>
<td>7.2%</td>
</tr>
<tr>
<td>Up to 4 weeks</td>
<td>36.1%</td>
</tr>
<tr>
<td>Up to 6 weeks</td>
<td>8.4%</td>
</tr>
<tr>
<td>Up to 8 weeks</td>
<td>25.3%</td>
</tr>
<tr>
<td>Up to 12 weeks</td>
<td>13.25%</td>
</tr>
<tr>
<td>Up to 16 weeks</td>
<td>2.4%</td>
</tr>
<tr>
<td>Up to 20 weeks</td>
<td>1.35%</td>
</tr>
<tr>
<td>Over 20 weeks</td>
<td>nil</td>
</tr>
</tbody>
</table>

(Figure 6)

3. The sample group were asked whether they received a fee indemnity payment on account, during the period of a case, from the insurer.

- Never 19.4%
- Almost never 37.8%
- Normally 29.6%
The sample group were asked whether in applying for legal expenses fee indemnity they were rejected on the grounds of insufficient merit;

- Never 19.4%
- Almost never 69.4%
- Normally 9.2%
- Nearly always 2%
- Always nil

Where an initial application is rejected on the grounds of merit;

a) does the insurer provide an appeal procedure?
- YES 23.6%
- NO 76.4%

b) request counsel's opinion in support of your application
- Never 18.7%
- Almost never 48.7%
- Normally 26.2%
- Nearly always 5%
- Always 1.4%

c) Where an appeal is submitted, are your appeals successful;
- Never 13.2%
- Almost never 30.2%
<table>
<thead>
<tr>
<th>Opinion</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Normally</td>
<td>43.4%</td>
</tr>
<tr>
<td>Nearly always</td>
<td>11.3%</td>
</tr>
<tr>
<td>Always</td>
<td>1.9%</td>
</tr>
</tbody>
</table>

(Figure 9)

d) Where a supporting counsel's opinion is submitted are your appeals successful;

<table>
<thead>
<tr>
<th>Opinion</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Never</td>
<td>8.7%</td>
</tr>
<tr>
<td>Almost never</td>
<td>12.3%</td>
</tr>
<tr>
<td>Normally</td>
<td>45.6%</td>
</tr>
<tr>
<td>Nearly always</td>
<td>31.6%</td>
</tr>
<tr>
<td>Always</td>
<td>1.8%</td>
</tr>
</tbody>
</table>

(Figure 10)
SECTION 4  CIVIL LEGAL AID - LEGAL EXPENSES
INSURANCE COMPARISON

1. The sample group were asked whether their practice dealt with both civil legal aid and
legal expenses insurance.

- **YES** 66.7%
- **NO** 33.3%

Those that had experience of both were asked the following questions.

2. Upon conclusion of a case, in your opinion is payment received more quickly from;

- The Legal Aid Board 12.3%
- The Legal Expenses Insurer 51.5%
- No significant difference 36.2%

(Figure 11)

3. In applying for a civil legal aid certificate or legal fee indemnity are you more likely to pass
the merits test with;

- The Legal Aid Board 22%
- The Legal Expenses Insurer 18.7%
- No significant difference 59.3%

(Figure 12)

4. In appealing an original decision to reject your application on the grounds of insufficient
merit, is the appeal more likely to be successful with;

- The Legal Aid Board 43.5%
- The Legal Expenses Insurer 7.7%
- No significant difference 48.8%

(Figure 13)
5. Generally, would you prefer to deal with;

- The Legal Aid Board 23.7%
- The Legal Expenses Insurer 32%
- No preference 44.3%

(Figure 14)

MSCF

30.5.95
### PRACTICE DETAILS

<table>
<thead>
<tr>
<th>Number of Partners</th>
<th>Sole</th>
<th>5 or Less</th>
<th>6 - 10</th>
<th>11 - 20</th>
<th>20+</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number Participating</td>
<td>19</td>
<td>39</td>
<td>44</td>
<td>30</td>
<td>18</td>
</tr>
</tbody>
</table>

*Figure 1*

![Pie chart showing distribution of practice details]

- *Sole*: (26.0%)
- *5 or Less*: (29.3%)
- *6 - 10*: (12.7%)
- *11 - 20*: (12.0%)
- *20+*: (20.0%)
PRACTICES THAT UNDERTAKE MORE CRIMINAL THAN CIVIL WORK

Responses

<table>
<thead>
<tr>
<th></th>
<th>More legal aid than non-legal aid</th>
<th>More non-legal aid than legal aid</th>
<th>Same amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number Participating</td>
<td>11</td>
<td>5</td>
<td>1</td>
</tr>
</tbody>
</table>

Figure 2
PRACTICES THAT UNDERTAKE MORE CIVIL THAN CRIMINAL WORK

<table>
<thead>
<tr>
<th>Responses</th>
<th>More legal aid than non-legal aid</th>
<th>More non-legal aid than legal aid</th>
<th>Same amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number Participating</td>
<td>26</td>
<td>47</td>
<td>14</td>
</tr>
</tbody>
</table>

Figure 3
CIVIL LEGAL AID
TIME DELAY BETWEEN CASE CONCLUSION & PAYMENT BY LAB

Figure 4

[Graph showing delay in weeks with peaks at 10, 20, and 30 weeks]
### CIVIL LEGAL AID
#### RECEIVE INTERIM PAYMENT FROM LAB

<table>
<thead>
<tr>
<th>Responses</th>
<th>Never</th>
<th>Almost never</th>
<th>Normally</th>
<th>Nearly always</th>
<th>Always</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number Participating</td>
<td>8</td>
<td>21</td>
<td>75</td>
<td>34</td>
<td>9</td>
</tr>
</tbody>
</table>

![Figure 5](image)

- Never: 8 (23.1%)
- Almost never: 21 (51.0%)
- Normally: 75 (14.3%)
- Nearly always: 34 (5.4%)
- Always: 9 (6.1%)
LEGAL EXPENSES INSURANCE
TIME DELAY BETWEEN CASE COMPLETION AND PAYMENT BY INSURANCE COMPANY

Figure 6
LEGAL EXPENSES INSURANCE
RECEIVED FEE INDEMNITY PAYMENT ON ACCOUNT

<table>
<thead>
<tr>
<th>Response</th>
<th>Never</th>
<th>Almost never</th>
<th>Normally</th>
<th>Nearly always</th>
<th>Always</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number Participating</td>
<td>19</td>
<td>37</td>
<td>29</td>
<td>8</td>
<td>5</td>
</tr>
</tbody>
</table>

Figure 7

- Never: 37.8% (0.378)
- Almost never: 19.4% (0.194)
- Normally: 29.6% (0.296)
- Nearly always: 5.1% (0.051)
- Always: 8.2% (0.082)

Legend:

<table>
<thead>
<tr>
<th>Response</th>
<th>Symbol</th>
</tr>
</thead>
<tbody>
<tr>
<td>Never</td>
<td>□</td>
</tr>
<tr>
<td>Almost never</td>
<td>◻</td>
</tr>
<tr>
<td>Normally</td>
<td>■</td>
</tr>
<tr>
<td>Nearly always</td>
<td>□</td>
</tr>
<tr>
<td>Always</td>
<td>■</td>
</tr>
</tbody>
</table>
## LEGAL EXPENSES INSURANCE
### APPLICATIONS REJECTED - INSUFFICIENT MERIT

<table>
<thead>
<tr>
<th>Response</th>
<th>Never</th>
<th>Almost never</th>
<th>Normally</th>
<th>Nearly always</th>
<th>Always</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number Participating</td>
<td>19</td>
<td>68</td>
<td>9</td>
<td>2</td>
<td></td>
</tr>
</tbody>
</table>

**Diagram:**

- Never: 19 (69.4%)
- Almost never: 68 (20.0%)
- Normally: 9 (9.2%)
- Nearly always: 2 (6.9%)
<table>
<thead>
<tr>
<th>Response</th>
<th>Never</th>
<th>Almost never</th>
<th>Normally</th>
<th>Nearly always</th>
<th>Always</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number Participating</td>
<td>7</td>
<td>16</td>
<td>23</td>
<td>6</td>
<td>1</td>
</tr>
</tbody>
</table>

Figure 9
**LEGAL EXPENSES INSURANCE**

APPLICATIONS REJECTED - WITH COUNSEL'S OPINION APPEALS SUCCESSFUL

<table>
<thead>
<tr>
<th>Response</th>
<th>Never</th>
<th>Almost never</th>
<th>Normally</th>
<th>Nearly always</th>
<th>Always</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number Participating</td>
<td>5</td>
<td>7</td>
<td>26</td>
<td>18</td>
<td>1</td>
</tr>
</tbody>
</table>

**Figure 10**

- Never: 12.3% (31.6%)
- Almost never: 45.6%
- Nearly always: 8.8%
- Always: 1.8%
**CIVIL LEGAL AID - LEGAL EXPENSES INSURANCE COMPARISON**

**PAYMENT RECEIVED QUICKER FROM:**

<table>
<thead>
<tr>
<th>Response</th>
<th>The Legal Aid Board</th>
<th>The Legal Expenses Insurer</th>
<th>No significant difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number Participating</td>
<td>7</td>
<td>50</td>
<td>35</td>
</tr>
</tbody>
</table>

**Figure 11**

![Chart comparing payment received quicker from the Legal Aid Board, The Legal Expenses Insurer, and no significant difference.](chart.png)

- The Legal Aid Board: 12.3%
- The Legal Expenses Insurer: 51.5%
- No significant difference: 36.2%
CIVIL LEGAL AID - LEGAL EXPENSES INSURANCE COMPARISON
MORE LIKELY TO PASS MERITS TEST WITH:

<table>
<thead>
<tr>
<th>Response</th>
<th>The Legal Aid Board</th>
<th>The Legal Expenses Insurer</th>
<th>No significant difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number Participating</td>
<td>20</td>
<td>17</td>
<td>54</td>
</tr>
</tbody>
</table>

Figure 12

The Legal Aid Board

The Legal Expenses Insurer

No significant difference
CIVIL LEGAL AID - LEGAL EXPENSES INSURANCE COMPARISON

APPEAL MORE LIKELY TO BE SUCCESSFUL WITH:

<table>
<thead>
<tr>
<th>Response</th>
<th>The Legal Aid Board</th>
<th>The Legal Expenses Insurer</th>
<th>No significant difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number Participating</td>
<td>34</td>
<td>6</td>
<td>38</td>
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</tbody>
</table>

Figure 13
CIVIL LEGAL AID - LEGAL EXPENSES INSURANCE COMPARISON
WOULD PREFER TO DEAL WITH:

<table>
<thead>
<tr>
<th>Response</th>
<th>The Legal Aid Board</th>
<th>The Legal Expenses Insurer</th>
<th>No significant difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number Participating</td>
<td>23</td>
<td>31</td>
<td>43</td>
</tr>
</tbody>
</table>

Figure 14
**CIVIL LEGAL AID**

**APPLICATIONS REJECTED - INSUFFICIENT MERIT**

<table>
<thead>
<tr>
<th>Responses</th>
<th>Never</th>
<th>Almost never</th>
<th>Normally</th>
<th>Nearly always</th>
<th>Always</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number Participating</td>
<td>4</td>
<td>132</td>
<td>11</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Figure 15**

- **Never**: (89.8%)
- **Almost never**: (2.7%)
- **Normally**: (7.5%)
CIVIL LEGAL AID
APPLICATIONS REJECTED - APPEALS SUCCESSFUL

<table>
<thead>
<tr>
<th>Responses</th>
<th>Never</th>
<th>Almost never</th>
<th>Normally</th>
<th>Nearly always</th>
<th>Always</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number Participating</td>
<td>3</td>
<td>28</td>
<td>56</td>
<td>49</td>
<td>6</td>
</tr>
</tbody>
</table>

Figure 16

- Never (39.4%)
- Almost never (19.7%)
- Normally (4.2%)
- Nearly always (2.1%)
- Always (34.5%)
**LEGAL EXPENSES INSURANCE**
**APPLICATIONS REJECTED - REQUESTS COUNSEL'S OPINION**

<table>
<thead>
<tr>
<th>Responses</th>
<th>Never</th>
<th>Almost never</th>
<th>Normally</th>
<th>Nearly always</th>
<th>Always</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number Participating</td>
<td>15</td>
<td>39</td>
<td>21</td>
<td>4</td>
<td>1</td>
</tr>
</tbody>
</table>

![Figure 17](image_url)
Analysis - Civil Legal Aid And Legal Expenses Insurance

Questionnaire
Section 1

Practice Details

1. Please indicate the size of your practice:

   □ Sole practitioner
   □ 5 or less Partners
   □ Between 6 and 10 Partners
   □ Between 11 and 20 Partners
   □ 20 Partners and above

2. Does your practice undertake

   □ Civil work only;
   □ Criminal work only;
   □ A mix of criminal and civil work.

   If your practice undertakes a mix of criminal and civil work please give an approximation as to the division of work;

   Civil ...........%  Criminal ...........%

3. Where your practice does undertake civil work please give an approximation as to the division of work:

   Legal Aid ...........%  Non-Legal Aid ...........%
Section 2

Civil Legal Aid

1. Does your practice deal with civil legal aid applications?

☐ yes  ☐ no

If the answer is 'No' please move on to Section 3. If the answer is 'Yes' please answer the following questions concerned with your experience of the civil legal system.

2. In dealing with civil legal aid applications what is the approximate time delay between conclusion of the case and payment to the practice by the Legal Aid Board?

......weeks ......months ......other (please specify).

3. Would you receive an interim payment from the Legal Aid Board?

☐ never  ☐ almost never  ☐ normally  ☐ nearly always  ☐ always

4. In applying for civil legal aid are your applications rejected on the grounds of insufficient merit?

☐ never  ☐ almost never  ☐ normally  ☐ nearly always  ☐ always

5. Where an initial application is rejected on the grounds of merit are your appeals successful?

☐ never  ☐ almost never  ☐ normally  ☐ nearly always  ☐ always
Section 3

Legal Expenses Insurance

1. Does your practice deal with clients who have some form of legal expenses insurance?

☐ yes ☐ no

If the answer is 'no' please move on to Section 4 of this questionnaire. If the answer is 'yes' please answer the following questions concerned with your experience of legal expenses insurance.

2. In your experience in dealing with legal expenses insurance applications what is the approximate delay between completion of the case and payment to you by the Insurance Company?

........... weeks ........... months ........... other (please specify)

3. Would you receive a fee indemnity payment on account, during the period of a case from an insurer?

☐ never ☐ almost never ☐ normally ☐ nearly always ☐ always

4. In applying for legal expenses fee indemnity are you rejected on the grounds of insufficient merit?

☐ never ☐ almost never ☐ normally ☐ nearly always ☐ always
5. Where an initial application is rejected on the grounds of merit does the insurer;

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>a)</td>
<td>provide an appeal procedure;</td>
<td></td>
</tr>
<tr>
<td></td>
<td>□ yes</td>
<td>□ no</td>
</tr>
<tr>
<td>b)</td>
<td>request counsel's opinion in support of your application;</td>
<td></td>
</tr>
<tr>
<td></td>
<td>□ never</td>
<td>□ almost never</td>
</tr>
<tr>
<td>c)</td>
<td>where an appeal is submitted, are your appeals successful;</td>
<td></td>
</tr>
<tr>
<td></td>
<td>□ never</td>
<td>□ almost never</td>
</tr>
<tr>
<td>d)</td>
<td>where a supporting counsel's opinion is submitted are your appeals successful;</td>
<td></td>
</tr>
<tr>
<td></td>
<td>□ never</td>
<td>□ almost never</td>
</tr>
</tbody>
</table>
Section 4

Civil Legal Aid - Legal Expenses Insurance Comparison

1. Does your practice deal with both civil legal aid and legal expenses insurance?
   □ yes □ no

   If the answer is 'no' please move on to question 6. If the answer is 'yes' please answer the following questions concerned with your experience of civil legal aid and legal expenses insurance.

2. Upon conclusion of a case, in your opinion is payment received more quickly from:
   □ The Legal Aid Board □ The Legal Expenses Insurer
   □ No significant difference

3. In applying for a civil legal aid certificate or legal expenses insurance fee indemnity are you more likely to pass the merits test with:
   □ The Legal Aid Board □ The Legal Expenses Insurer
   □ No significant difference

4. In appealing an original decision to reject your application on the grounds of insufficient merit, is the appeal more likely to be successful with:
   □ The Legal Aid Board □ The Legal Expenses Insurer
   □ No significant difference

5. Generally, would you prefer to deal with:
   □ The Legal Aid Board □ The Legal Expenses Insurer
   □ No preference

   If a preference is specified please state why?:
   ..............................................................................................................
Section 4 ....cont.

6. If you have any further comments on civil legal aid or legal expenses insurance please state:

........................................................................................................................................
........................................................................................................................................
........................................................................................................................................
........................................................................................................................................
........................................................................................................................................
........................................................................................................................................
........................................................................................................................................
........................................................................................................................................
........................................................................................................................................
........................................................................................................................................

7. Would you be prepared to take part in a structured personal interview at your convenience if requested?

☐ yes ☐ no

8. Signed ........... Dated ...........

Position in practice ......... ☐ Assistant

☐ Associate

☐ Partner

☐ Other (please specify)

Thank you for your time in completing this questionnaire, a stamped addressed envelope is provided for its return.
Appendix B
Contents

1. Interview Details
2. Interview Questions.
1. **Interview Details**

During the course of this study the following key personnel in the legal expenses insurance industry were approached by the writer with a view to soliciting their informed comment and opinion on specific matters.

(i) **Lawclub Legal Protection Allianz Insurance Company Limited**

- Allan Truman  
  Executive Manager  
  24.3.94

- Frank Nichols  
  Divisional Manager  
  12.3.96

(ii) **DAS Legal Expenses Insurance Company Limited**

- Paul Asplin  
  Assistant General Manager  
  22.12.93  
  4.3.96

(iii) **Hambro Legal Protection Limited**

- Christine Malkin  
  Director  
  25.10.93  
  4.3.96

(iv) **Abbey Legal Protection Limited**

- James Innes  
  Chairman  
  22.4.94

(v) **The Legal Protection Group Limited**

- Malcolm Gilbert  
  General Manager  
  27.9.93

- James Painter  
  Marketing Manager  
  13.10.93

- Peter Smith  
  Insurance Services Division Manager  
  3.5.94
2. **Interview Questions**

**PROPOSED QUESTIONS FOR INTERVIEW**

**Preface**

The purpose of these interviews is to elicit informed comment and opinion from key personnel who were or are presently instrumental in the progression of legal expenses insurance (LEI) in the UK market. It is not the interviewer’s intention to consider commercial legal expenses insurance but to confine the discussion to the civil legal aid v legal expenses insurance debate.

At no time will part, all or any of the interviews be used or published other than for the purpose of the interviewer’s research degree, without prior consent from the interviewee. A transcript of the interview will be provided on request.

1. Following the withdrawal of Allianz legal protection from the LEI ‘stand alone’ market in autumn 1992 it would appear that LEI underwriters have suffered considerable losses through claims incidence in recent years. What would you say to underwriters to reassure them as to the future profitability of personal LEI lines?

2. Critics of LEI have often regarded it as being only attractive to the naturally litigious. What would your response be to such as assertion?

3. Given that the assertion in question 2 is correct what suggestions would you put forward to attempt to moderate claims incidence rates?

   a) Do you agree with requesting a contribution from the insured towards costs?

   b) Do you agree with acceptance of claims above a pre-determined minimum amount only, regardless of merit?

   c) Do you agree with attempts to restrict the insured in his choice of solicitor for example by guiding him towards a selected panel of solicitors or towards in-house legal departments?

   d) Is a need to moderate claims incidence just linked to restraining the naturally litigious, or simply sound commercial practice for everyone?

4. Would you agree that in the past companies selling LEI products in the insurance market have concentrated on premium income having insufficient regard for the protection of their underwriters?

5. What are the merits, if any, of a stand alone LEI product for the individual or family?
6. Controlling solicitors’ expenses under a LEI policy is considered by many as an important aspect of profitability. Do you agree?
   
a) If not why not?
   
b) If yes, how would you effect such controls?
   
7. Do you feel the Lord Chancellor’s Department is sympathetic towards and keen to promote LEI generally?
   
a) Has its attitude altered in recent years in:
      
      (i) your opinion?
      (ii) your experience?
   
b) What would you like the LCD to do in this regard?
   
8. Many LEI companies now operate legal advice telephone lines. Do you regard their role as primarily:
   
a) to dispense unlimited independent legal advice to insureds;
   
b) to minimise claims incidence;
   
c) to provide cheap legal services to protect underwriters from the cost of private practitioners?
   
d) Do you feel it is either:
      
      (i) possible; or
      (ii) appropriate
   
      that such legal units may seek to perform elements of all of the above functions?
   
e) Does your company provide such legal advice telephone lines?
   
9. Civil legal aid eligibility has recently been reduced. How do you see this affecting, if at all, the LEI market?
   
a) How in your view, should LEI be marketed in the UK?
   
10. Do you reasonably foresee some form of compulsory LEI being introduced in the UK?
a) In what form would you anticipate such statutory regulation?

11. How do you see the future development of LEI in the UK?

a) Where do you see the primary market, in:

i. policy add-ons

ii. group-plan insurance

iii. stand-alone products?
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