Whatever happened to LEGAL EXPENSE INSURANCE?

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Recent successes and failures of legal insurance schemes in Australia and overseas.

Legal expense insurance (LEI) is one of the 'access to justice' mechanisms that was considered in many societies in the 1980s and 1990s. Governments, legal professions, and legal reformers in the rich western societies highlighted the potential of mechanisms such as LEI, contingency fees and class actions to improve citizens' access to justice by controlling the cost of legal services. By controlling these costs, LEI and the other mechanisms promised to improve citizens' access to legal services and the courts. LEI was particularly popular because it promised to improve access to legal services for the 'in betweens' or middle income groups. That is to say, it promised to improve access to legal services for the income group that were not poor enough to qualify for legal aid but not rich enough to easily afford the cost of legal services.

The evidence from the last two decades suggests, however, that LEI has been a qualified success in improving citizen's access to justice. In general, it seems that the reformers had unrealistic expectations about the ease of developing LEI. The result is that while LEI is successful in some societies, the cost of legal services continues to be a problem for the 'in betweens' in many others.

This article takes stock of LEI developments in a number of societies over the last two decades and considers its prospects for the future. First, it describes the development of LEI in a group of common and civil law societies. It demonstrates that LEI has fared best in the societies with civil law traditions but that the picture is more ambiguous in the common law societies. It concludes by highlighting some lessons to be learnt from these developments. In the following section I explain the meanings of LEI.

What is LEI?

LEI can be defined in a number of ways. One recent definition was proposed by the Australian government appointed Access to Justice Advisory Committee which proposed that LEI 'schemes are designed to provide insurance cover, upon the payment of a premium, for the cost of specified legal services'. While there are a number of different types of LEI, this umbrella definition is sufficiently broad to incorporate the wide range of variations between schemes.

There are many ways of organising LEI and these are reflected in the significant differences between continental Europe and North America, England and Wales, and Australia. The range of schemes is, therefore, sketched below and the main differences highlighted.

The pure form of LEI applies insurance principles that are similar to other forms of insurance. In LEI the insurance is a means of financing often unpredictable legal costs that arise in relation to often catastrophic events. The LEI cover spreads the risk of liability among policy holders. The policies are generally offered to individuals rather than to groups and the result is that the individual member’s costs are reduced because of the number of policy holders. The pure form of LEI originated in
Where has it worked and why?

The comparative evidence suggests that LEI is widespread in a number of civil law societies but has been less successful in the common law societies.

Civil law societies — Sweden

Sweden is one of the world’s most remarkable LEI success stories. It is estimated that approximately 90-95% of Swedish households have LEI policies. The astonishing success of LEI in Sweden must be understood in context. First, rather than stand alone the policies are add-ons to the typical household insurance policies that are sold on the market. LEI is automatically included in the household policies and at no extra cost to consumers. Until recently the LEI policies were also closely enmeshed with the very generous legal aid scheme in Sweden. That is, LEI complemented the legal aid scheme by covering its main gaps including assistance for legal problems that were not covered by legal aid, the costs awarded against an unsuccessful party, and the cost of legal expenses for the small proportion of Swedes who did not qualify for legal aid. Paradoxically, therefore, LEI was successful because most Swedes recognised that it was in their interests to have LEI even though most also had access to at least some legal aid. The Swedish acceptance of LEI can be best understood in terms of that society’s commitment to ‘risk protection’ in relation to many areas of human activity. Not only is Sweden the archetypal welfare state in terms of income support and other forms of welfare. It also has no-fault insurance for a range of accidents including medical, vehicle, and pharmaceutical. In other words, LEI is successful in Sweden because citizens expect to be protected from many forms of risk including legal expenses.

Nevertheless, the future of LEI in Sweden is unclear. Changes to legal aid in 1997 mean that most Swedes must rely first on their LEI rather than legal aid if they need legal services. Consequently, the cost of the household insurance is likely to rise and pressure may then be brought to bear to remove LEI from the household policies with the result that fewer people will have this from of risk protection. Finally, Swedish LEI may decline if European insurance companies enter the market and offer cheaper household policies that do not include the LEI component.

Other European societies

LEI is also widespread elsewhere in European although there is considerable variation between societies. For example, more LEI policies are sold in Germany than any other European society by virtue of the size of that society’s population. In 2001, approximately 25 million policies were issued as stand-alone policies sold to individuals, in a population of 82 million. However, because most policies cover more than one person and usually a family, the proportion of the population covered is significantly higher than the data suggests. LEI is successful in Germany for similar reasons to Sweden. That is, policies complement legal aid by covering legal matters that legal aid does not, they include a number of serious and complex legal disputes that must be resolved in court including motor vehicle accidents; they cover the opponent’s costs in unsuccessful cases; and client choice of lawyer is generally allowed. However, the policies also have large gaps. In particular, German LEI rarely covers the routine transactions such as
legal advice and assistance with documents that are commonly included in the prepaid plans in the USA.

The German LEI policies are also attractive from the insurer's point of view because the German legal profession operates on the basis of a fixed fee schedule. The cost of legal disputes are, therefore, predictable, a major incentive for the insurers. Finally, other mechanisms designed to improve access to legal services such as contingency fees do not exist in Germany.

LEI is also developing in other European societies. For example, while approximately 10% of households have such insurance in the Netherlands this figure is growing at 16% a year. LEI is also widespread in other Scandinavian societies although not to the same degree as Sweden.

Common law societies

LEI has not flourished in the common law societies to the same extent as in their civil law counterparts. There seems to be a number of reasons for this, including the generally weaker role of trade unions.

The USA

Among the common law societies LEI has developed most successfully in the USA. The policies in the USA are generally prepaid plans for predictable and specified events that are of low cost, routine and high frequency. Meanwhile, the existence of contingency fees, class actions, and the absence of a costs rule means that legal services are generally available for unforeseeable and catastrophic events.

In contrast to continental Europe, the prepaid plans 'emerged predominately in the context of the group employee plans, either totally employer funded or jointly funded by union members and employers'. The prepaid plans have been very successful. In 1997, 105 million people or 39% of the population were estimated to be covered by prepaid plans. Nevertheless, after spectacular growth in sales of policies in the 1970s and 1980s, group sales appear to have plateaued in the 1990s and future growth appears to lie in individual stand-alone policies.

The policies vary considerably in their coverage and cost. In general the prepaid plans are designed routine matters including simple divorce and other family law matters, and wills and estates. Telephone legal advice is also central to many of the plans because it is cheap and can prevent problems from escalating into costly litigation. Finally, while prepaid plans rarely offer assistance for complex legal problems some offer discounts on private lawyers services for more complex matters.

England and Wales

LEI has not been a success in England and Wales. One reason relates to the early sponsors of such policies. In the 1980s the Law Society was involved in designing policies that were targeted to the household insurance market. However, the policies were not a success in large part because the public were wary of the profession's self-interest in the policies. More recently, attempts have been made to sell policies by alternative means. For example, about 30 insurance companies currently sell add-on LEI policies linked to household and motor vehicle policies. The coverage of the policies varies considerably but family and motor vehicle cover dominates. The cost of policies also varies, ranging from £4 to £20. In addition, there are new policies for group coverage and telephone advice lines. While income from advice only policies was low, £3.76 million over 1991-1993, they have proved popular with consumers. Between 1991 and 1993 an average of 171,000 advice calls were made to advice lines annually by policy holders.

Nevertheless, the penetration of LEI into the England and Wales market is at an early stage. Estimates of the total size of the market are rubbery but the estimated total number of people covered by the policies varies from 10-17 million. The total premium income remained a relatively low annual average of £70 million between 1991 and 1993.

Future growth of the LEI market in England and Wales is uncertain. First, some providers are withdrawing from the market due to low demand for policies and increased competition between providers. At the same time demand is low because individuals believe that they have a low risk of incurring legal expenses and are therefore unwilling to purchase policies. They also believe that they can often get the legal help they need from other sources including legal aid or trade union advice schemes.

Australia

This section describes two recent and contrasting Australian LEI developments. The first was an ambitious failure, the second has limited goals but is a quiet success.

Example 1 — Legal Expense Insurance Ltd (LEI Ltd)
The Law Foundation of New South Wales and the Government Insurance Office in NSW established Legal Expense Insurance Ltd (LEI Ltd) as a project to improve the community's access to legal assistance by providing a commercially viable legal expense insurance product. The LEI Ltd project ran from 1987 to 1992.

Initially, policies were designed to improve access to legal services for low to middle income families. Over time policies were also developed for specific groups of workers including childcare workers. The policy holders were covered for a specified and narrow range of legal services but the policies did not trigger many claims or generate customer loyalty. Drawing on the USA experience, the initial aim was to sell policies primarily to groups. Employees were a main target group and the idea was that unions would promote policies as an employee fringe benefit. However, trade unions and employer groups were reluctant to accept these policies as a means of providing legal services for their members/employees.

Service delivery involved a closed panel, a specified group of private legal professionals. In addition to the insurance benefits a number of non-insurance benefits were offered including a telephone advice service and minor assistance with documents for routine legal matters. The telephone advisory service and educational efforts were popular with consumers and, in terms of access to justice, were arguably the most worthwhile achievements of the project.

The project ultimately failed to sell many policies for a number of reasons. For example, it proved difficult to convince potential consumers of the benefits of the policies; brokers and agents were not familiar with the product and did not promote it strongly; the public's perception of the availability of legal aid resulted in reduced interest in the product; and it was difficult to sell the policies to employers as an employee benefit in tight economic times. In addition, there were a number of operational problems that inhibited...
the success of the project. Finally, close relationships were not developed with trade unions.

Furthermore, "Community attitudes and market practices in Australia are not conducive to achieving the necessary sales volume for legal expense insurance'. Part of the reason for the lack of conduciveness is that "The Australian legal system — adversarial, without scheduled fees, and with the availability of costs orders — is not conducive to offering the level of affordable legal expense insurance benefits which would result in a high claims ratio'. The relationship between LEI and legal aid was also a problem. Australia's legal aid practices hindered the development of LEILtd because not only do the publicly funded Legal Aid Commissions in each State offer free, non-means tested legal advice to all Australians but also many people also assumed, incorrectly, that if it were necessary they would qualify for legal aid from the Legal Aid Commissions.

The failure of the LEILtd project can be highlighted in a number of ways. On the one hand, a relatively small number of policies was actually sold. About 30,000 policies were sold to groups. Second, while income from sales increased over the life of the scheme, income was never sufficient to outweigh the overall costs. Income from sales of premiums rose from $24 in 1989/90 to $15,503 in 1992/93 to $237,141 in 1994/95. Third, very few claims (a total of seven) involving legal action were made on the scheme. Fifth, relatively little use was made of the legal advice component of the scheme. For the years 1991-95, a total of 4368 calls were made to the telephone advice line.

In the end, however, the long-term impact of LEILtd might be significant. That is, it might be an important incremental step in opening up the market for this kind of insurance. The report estimates that there are now between 100,000 and 150,000 people with such policies in Australia, which is many more than were insured prior to LEILtd.

Example 2 — Public Service Association (PSA) scheme

Perhaps the most successful LEI scheme in Australia is operated by the PSA, the main trade union for public servants, in South Australia. The PSA established a trial LEI group scheme for its membership in 1991 that automatically included all members of the union. The early success of the scheme meant that the union leadership continues to operate the scheme to the present day. In the mid 1990s the scheme cost the PSA approximately $10 a member, or $250,000 for the 25,000 members.

From the outset, the PSA scheme gave a priority to assistance with routine and less serious legal problems. Consequently, the scheme offered legal advice and minor assistance, rather than specialising in services for unpredictable catastrophes. Members with a legal problem first ring a telephone advice line and get professional advice. The advice component of the scheme is offered on a contract basis by the publicly funded legal aid body, the Legal Services Commission of South Australia.

Services are not limited to advice. Education materials are offered to members including pamphlets that provide easy to understand explanations of the law as it relates to a range of common legal problems. Assistance is also available for more complex legal matters if required. In the small number of matters that cannot be resolved over the telephone the member will be advised of their options which may include referral to a government agency, referral to a private lawyer to investigate the matter further, or in family law disputes they can be referred to family mediation. If they proceed to an interview with a solicitor under the scheme, the first interview is free.

If necessary, legal representation is also available for a range of matters including motor vehicle matters, personal and consumer problems, and most minor criminal matters. Agreement from the scheme's administrator is required before such legal actions are accepted under the scheme and this decision is partly based on the likely chances of the matter succeeding. Since the scheme was established in 1991, it has provided assistance in over 9000 instances. Most assistance consists of advice and mediation and very few cases proceed to court. The bulk of the assistance is in relation to family law and civil matters.

While the PSA scheme is, therefore, a success story and one of the few in Australia, it is significant for two reasons. First, it demonstrates that it is possible to establish well-designed and targeted LEI schemes in Australia. However, while the scheme is successful it has had a weak demonstration effect — it has not resulted in other trade unions, or other organisations, establishing similar schemes.

Lessons to be learnt

There are a number of lessons to be learnt from the discussion in this article about the development of LEI. In general, the evidence reinforces the conclusion that LEI has potential to improve access to justice for the 'in-betweens'. In other words, governments, legal professions, and legal reformers can continue to be optimistic about its potential. LEI can in some circumstances and in some ways, improve access to justice for that group. It is not, however, a panacea. It is not simply a matter of deciding to establish LEI. Instead, the challenge is to decide how to improve access to justice, for which groups, and then identify the role of LEI.

It must also be recognised that LEI cannot solve the access to justice problems for the in-betweens. Policies rarely include all or most of the population which means that only those who actually have the policies benefit from them. The low-income groups in particular are unlikely to be included. In addition, the LEI policies vary considerably within and between societies.

The discussion in this article also suggests a number of lessons for common law societies. First, the experience in the USA, England and Wales and Australia, all suggests that in order for LEI to develop it needs to be promoted by significant groups. That is, it seems that either governments and/or employers and trade unions must promote LEI to groups. Where LEI has penetrated markets in the USA and Australia, it was because it was in the form of award bargaining or because the trade unions purchased the policy for the group as in the case of the PSA scheme. This evidence also suggests that stand-alone policies are unlikely to be successful either for groups or generally. The USA and Australian examples suggest that group or add on policies are, at least initially, more likely to be successful. Finally, close involvement by the legal profession seems to hinder the development of LEI. The lesson seems is that the legal profession cannot be seen to be too closely involved in promoting its own financial self-interest.

The international evidence also suggests that LEI is more likely to flourish if two related strategies are adopted: targeted markets and incremental growth. That is, in the first instance LEI policies don't seem to do everything well. Instead, LEI is more likely to succeed if the policies are
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carefully designed and targeted to a specific market. The schemes in the USA are generally limited to less complex legal problems and are often targeted to trade unions for the reasons discussed above. The PSA in South Australia is also targeted and allows for incremental market growth. The emphasis is on low-cost advice and minor assistance although more extensive assistance is offered if required. This experience could also be used to promote the value of such a scheme to other unions.

The final lesson is that if LEI is to be successfully developed it must be tailored to the specific circumstances of the particular society. This means that careful planning is needed in order to successfully develop these policies. The international experience examined here suggests that LEI will struggle in societies where there are other forms of assistance offered for particular types of legal problems. If these lessons are taken into account, however, LEI might begin to justify the reformers’ optimism of two decades ago.

References


3. A Pfingstorf notes, there are significant differences between the way that the European societies organise LEI to the ‘grandstand’ in the USA. Nevertheless, for the purposes of this article it is reasonable to refer to all the approaches as legal expenses insurance. See Pfingstorf, W., ‘A Summary Review of American and European Approaches to Legal Protection Schemes,’ in W. Pfingstorf and A. M. Schwartz (eds), Legal Protection Insurance: American and European Approaches, American Bar Foundation, Chicago, 1989, 1996, p.1.


7. See discussion in Regan, above, ref. 5.

8. This section draws on discussions of the German developments in a number of chapters in Pfingstorf and Schwartz (eds), above, ref. 3, and Killian, M., ‘Legal Aid and Access to Justice in Germany’, Paper to the International Legal Aid Group Conference, Melbourne, 13-16 June 2003.


11. Law Foundation of New South Wales, above, ref. 4, p.9.

12. Law Foundation of New South Wales, above, ref. 4, p.10.

13. Law Foundation of New South Wales, above, ref. 4, p.10.


16. Gray, A. and Rickman, N., above, ref.4, estimate that 10 million are covered while the Law Foundation of New South Wales, above, ref. 4 refers to 17 million.


18. The project is described in Law and Justice Foundation of NSW, above, ref.4.

19. Law and Justice Foundation of NSW, above, ref.4, p.36.

20. Law and Justice Foundation of NSW, above, ref.4.

21. Law and Justice Foundation of NSW, above, ref.4.

22. The discussion in this section draws on the descriptions in the Access to Justice Advisory Committee, above, ref.1, the PSA website, and correspondence from the PSA. The PSA website address is <http://www.newlaws.com.au/members.htm>.


Tyrell article continued from p.277


17. ‘The Profile of the Serial Killer’ in Selzer, above, ref 16.


21. C. Fred Alford notes, ‘[o]n wonder Arendt’s thesis of the banality of evil is so threatening. It takes the proportion out of evil, making its cause uncausal to its effect, making light of our suffering, revealing our tormentor to be not Satan but a ridiculous fool.’ What Evil Means To Us, Cornell University Press, 1997, p.135.


23. Freeland discusses the ‘familiar empty formula’ of the explanation of the serial killer, above, ref.22, p.179.

24. These examples are from Peggy McIntosh, Dyer, Richard, White, Routledge, 1997, p.8.

25. The predictive nature of this statistic has been questioned in recent years due to interstitial killers such as Gary Heidnik and Jeffrey Dahmer.


27. There is a tendency to individualize crimes if a white perpetrator is involved, downplaying environmental influences. Kammer, Wendy, It’s All the Raga: Crime and Culture, Addison-Wesley Publishing Company, 1995.