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Legal Expenses Insurance and Access to Justice

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Contents

Executive Summary

Access to justice is a relevant contemporary legal issue that the international community has recognised as affecting all jurisdictions around the world, regardless of legal system, socio-economic development or mode of government. Justice is not accessible without robust and timely legal advice and representation: mechanisms that increase an individual's ability to access to legal assistance must consequently increase their access to justice. Data from the World Justice Project's *Rule of Law Index 2019*[1] suggests that lower rates of accessible and affordable civil justice are not primarily caused by issues in legal or civil justice systems themselves, but by the means by which individuals can access and use those systems.

Obtaining legal advice and representation from a private provider is financially prohibitive and generally only those with severely limited financial means qualify for state or donation-funded legal aid or pro bono schemes. The 'forgotten middle' – those who lack the disposable income to spend on services from a private provider at will, but earn too much money or have too many assets to qualify for legal aid or pro bono assistance – are often left without an avenue to access legal advice or representation. This is a significant access to justice concern for a substantial number of citizens around the world.

Legal expenses insurance (LEI), a purchasable product through which individuals can obtain legal assistance from a private provider with some or all of the expenses covered by an insurer, is a mechanism through which the 'forgotten middle' could potentially access legal advice or representation (and consequently access justice).

This report explores the nature of LEI policies available to individuals on a 'before-the-event' and 'after-the-event' basis. Like other types of insurance, coverage provided under LEI policies varies between providers and jurisdictions, including areas of law, types of services covered, financial caps and excesses, and waiting periods. The majority of LEI policies do not cover damages payable to, or by, the policyholder as part of a legal dispute – it simply covers the policyholder's legal expenses incurred through the course of obtaining legal advice or representation.

This report uses case studies to look at a number of jurisdictions that have either widespread or limited LEI markets to determine what barriers exist to the greater implementation, uptake and use of LEI in existing jurisdictions and expansion of LEI into new jurisdictions. The following jurisdictions are explored as case studies in this report:

- **Germany, Japan and Sweden** as widespread LEI market jurisdictions; and
- **Australia, Canada, England and Wales, the Republic of Korea, Scotland and South Africa** as limited LEI market jurisdictions.

This report explores the following factors in relation to LEI through the case studies **– marketing and consumer awareness, limits of indemnity, free choice of lawyer and costs jurisdiction issues –** and identifies elements of each factor that are common among the widespread LEI market jurisdictions. It then explores whether the absence of or failure to address these elements acts as a barrier in limited LEI market jurisdictions.

1 World Justice Project, *World Justice Project: Rule of Law Index 2019* (2019).

Marketing and consumer understanding

Assessing this factor in the case study jurisdictions of Australia, England and Wales, Germany, Scotland and Sweden highlights correlations between the lower, if any, uptake and use of LEI, and a lack of information on LEI available to individuals in limited LEI market jurisdictions. Therefore, the poor availability of information and promotion of LEI as a purchasable product to individuals is a barrier to increasing its implementation, uptake and use in limited LEI market jurisdictions.

A barrier to the greater uptake and use of LEI in widespread LEI market jurisdictions is the automatic inclusion of LEI in an insurance bundle (which is often unbeknown to the policyholder due to poor circulation of information).

Limits of indemnity

This report considers how this factor is addressed in the case study jurisdictions of Canada, England and Wales, Germany, the Republic of Korea, South Africa and Sweden. Each insurance provider within each jurisdiction has their own limits on the indemnity it provides to its policyholders, but increasing the premium paid on LEI policies appears to increase the financial cap, lower the excess and include extra coverage for additional practice areas.

In both widespread and limited LEI jurisdictions, the ability to purchase broader coverage through a higher premium could be a barrier to the 'forgotten middle' having proper access to justice: as people in this category are less likely to have the disposable income to spend on higher premiums, they would be restricted from having broader LEI coverage.

Another barrier in both widespread and limited LEI jurisdictions is the widespread carve-outs to exclude coverage for family law and criminal law – two practice areas in which people commonly find themselves needing legal advice and representation.

Free choice of lawyer

This factor has been reviewed in the case study jurisdictions of Canada, Germany, Japan, Scotland, South Africa and Sweden. Many LEI providers assign a panel lawyer to deal with a policyholder's legal dispute, and only allow the policyholder to choose their own lawyer by paying a higher premium. Laws in some jurisdictions are intended to protect an individual's free choice of lawyer, but vary in the success of this protection.

The limitations on an individual's ability to choose their own lawyer, for whatever reason under the policy and under local laws, can be a barrier to the greater uptake and use of LEI in any LEI market jurisdiction. As discussed above, those in the 'forgotten middle' often do not have the disposable income to afford the higher premiums that would allow a policyholder free choice of lawyer.

Costs jurisdiction issues

This factor is explored through the case study jurisdictions of Australia, England and Wales, Germany, Japan, South Africa and Sweden. The different principles surrounding the law on costs in civil litigation directly impact the risk to LEI insurers disproportionately in different jurisdictions. This in turn may affect the availability of LEI products (and consequently, the level of implementation, uptake and use of LEI policies) in limited LEI market jurisdictions.

It is plausible that the complexity of calculating the financial liability to insurers by virtue of the costs scheme in jurisdictions with a common law or hybrid (with primarily common law elements) system can present as a barrier to the greater availability, and therefore implementation, uptake and use of LEI policies.

This report concludes with a discussion of three high-level key barriers – lack of awareness and information available to consumers; gaps in indemnity: family law and criminal law; and the perception of conflicting interests – that the legal profession, insurance industry, law-makers and policy-makers could address to increase implementation, uptake and use of LEI and therefore, access to justice. It is not practical to develop policies to address these barriers exclusively for the legal profession to implement in isolation – it must be a *multi-industry approach*.

The following mechanisms could be useful to address the barriers identified in this report:

- increase individuals' awareness of LEI as a purchasable product;
- improve information given to existing policyholders regarding coverage;
- improve data gathering to measure the spread and impact of LEI;
- expand LEI coverage to include family law disputes;
- dispense with panel lawyer schemes to remove the perception of conflicting interests; and
- bar associations and law societies could establish and maintain panels of legal practitioners who meet predetermined qualifications and are prepared to act based on a set scale of fees.

Chapter 1: Introduction

1.1 Context: access to justice and LEI

Access to justice is a pressing contemporary legal issue relevant in jurisdictions across the world: it is not only a fundamental right in itself,[2] but also a precondition to the enjoyment of many other rights. As a core aspect of the rule of law, access to justice allows people to have their voices heard and is an essential enabler of social and economic development.[3]

As in previous reports,[3] the International Bar Association (IBA) adopts a comprehensive definition of 'access to justice' as including (among other aspects) access to legal advice and representation providers to participate effectively in formal and informal dispute resolution mechanisms within a legal system.

The World Justice Project has recently released two relevant reports – *Measuring the Justice Gap*[4] in May 2019 and *Global Insights on Access to Justice 2019*[5] in June 2019 – exploring the barriers to accessing justice. These reports explicitly identify that the cost of the dispute resolution process is one such barrier.[6]

The international community has also formally identified the aim to 'provide access to justice for all' in Goal 16 of the United Nations' 2030 Agenda for Sustainable Development[7] (Sustainable Development Goals or SDGs). State governments have a responsibility to provide and promote institutions that improve access to justice.[8] This can be facilitated by actively working towards meeting the goals and obligations under such international agreements as the SDGs. However, governments will undoubtedly encounter a number of context-specific barriers as part of this process.

Justice is not accessible without robust and timely legal advice and representation; therefore, any means by which legal advice and representation can be more readily obtained must *ipso facto* promote access to justice. One such mechanism is legal expenses insurance (LEI), which is a purchasable product through which individuals can obtain legal assistance from a private provider with some or all of the expenses covered by an insurer.

The need for legal assistance generally arises out of a crisis, or at least an untimely and unexpected event, and can have a disproportionately adverse effect on people in lower and middle-income brackets.

Obtaining independent, robust legal advice prior to a crisis could mitigate the risk of a dispute arising from that crisis in the future; however, legal advice is generally unattainable for those with limited financial means. These same individuals are also unlikely to be able to afford legal advice and representation once the crisis actually occurs or a dispute arises.

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2 United Nations General Assembly, *Declaration of the High-level Meeting on the Rule of Law* (A/Res/67/1, 30 November 2012) Art 14.

3 See Julinda Beqiraj, Lawrence McNamara and Victoria Wicks, *Access to Justice for Persons with Disabilities: From International Principles to Practice*, IBA, October 2017; Julinda Beqiraj, Sabina Garahan and Kelly Shuttleworth, *Ombudsman schemes and effective access to justice: A study of international practices and trends*, International Bar Association, October 2018.

4 World Justice Project, *Measuring the Justice Gap* (May 2019).

5 World Justice Project, *Global Insights on Access to Justice 2019* (June 2019).

6 See n 4 above, p 31; and see n 5 above, p 9.

7 UN General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development* (A/Res/70/1, 21 October 2015).

8 See n 2 above.

Often, attaining legal advice and representation from a private provider is financially prohibitive, and an advantage that only those with sufficient financial resources can afford. Private legal advice and representation is therefore, in some jurisdictions, restricted to the wealthy.

Pro bono legal assistance is also available from private providers in strict circumstances, including limits on the number of cases, an individual's financial circumstances and types of legal disputes.

State or donation-funded legal aid can provide legal assistance to those with limited financial resources who meet an often exceedingly low set threshold. Eligibility is generally determined by stringent needs and means tests (incorporating both income and assets), and can be difficult for some to prove (eg, self-employed individuals). Realistically, individuals eligible for legal aid are in the lowest income bracket.

Stuck between these options for obtaining legal advice and representation is the 'forgotten middle': those who lack the disposable income to spend on services from a private provider at will, but earn too much money or have too many assets to qualify for legal aid or pro bono assistance. Herein lies a significant access to justice concern for a substantial number of citizens around the world, and this report aims to explore whether LEI could effectively address it.

1.2 Aims

This report, commissioned by the Access to Justice and Legal Aid Committee (the 'Committee') of the IBA, forms part of the Committee's ongoing activities of gathering, publicising and coordinating information from around the world on barriers to access to justice in different jurisdictions, and ways in which these barriers can be overcome.

The Committee has previously undertaken research into general barriers to, and solutions for, achieving access to justice, as well as providing guidance on improving legal institutions (eg, legal aid and ombudsman services). The Committee has also commissioned research projects for specific demographics, including legal aid in criminal cases, redress for victims of violence, and access to justice for children and persons with disabilities.[9]

As part of the Committee's continuous work, this report aims to:

1. determine why the rate of implementation, uptake and use of LEI in different jurisdictions around the world varies significantly;

2. identify specific barriers to greater implementation, uptake and use of LEI in jurisdictions where it operates in a limited capacity; and

3. provide guidance to the legal profession to enable increased implementation, uptake and use of LEI in existing jurisdictions, and expansion of LEI into new jurisdictions.

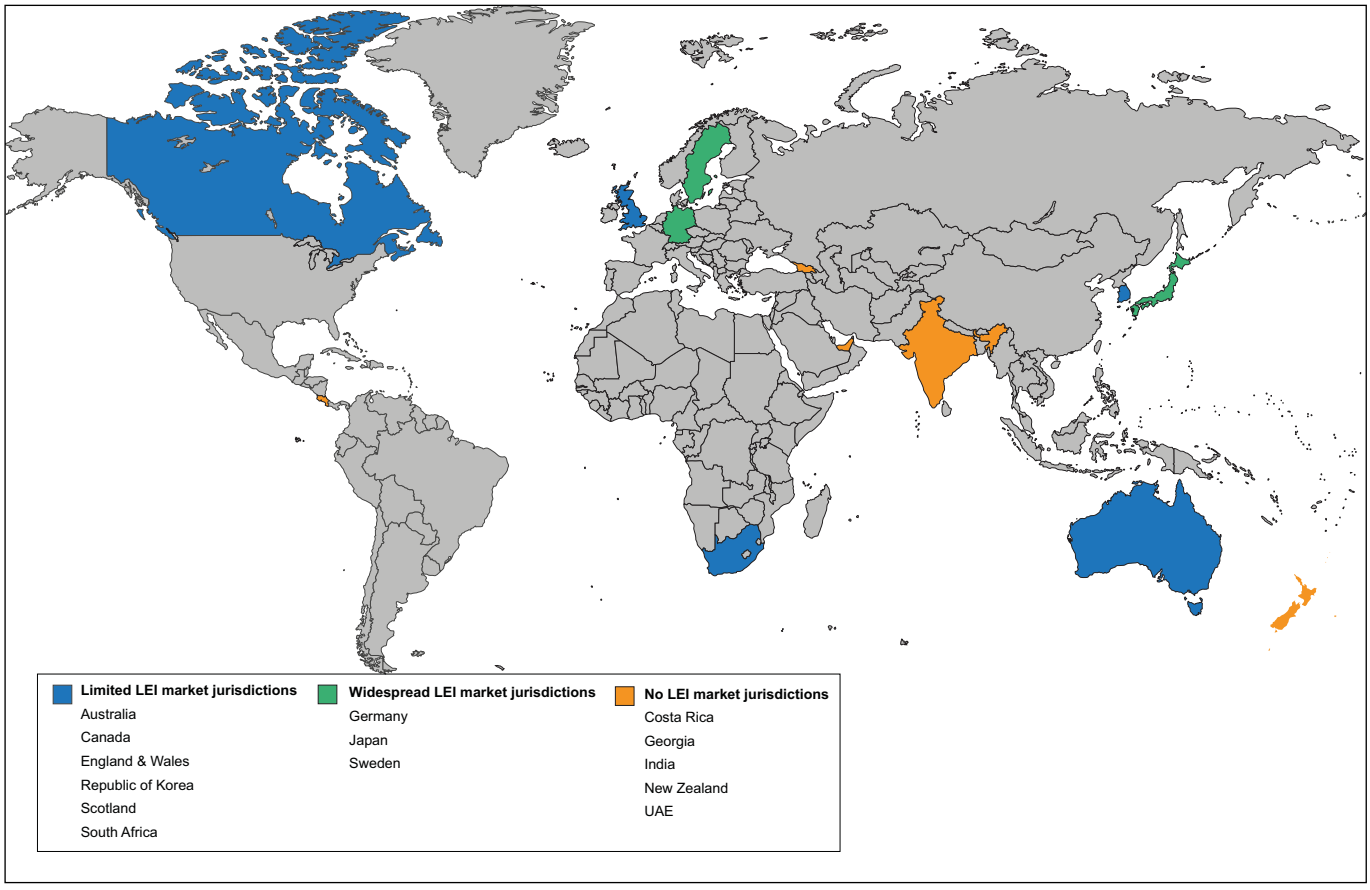
9 Julinda Beqiraj and Lawrence McNamara, *International Access to Justice: Legal Aid for the Accused and Redress for Victims of Violence*, IBA and Bingham Centre for the Rule of Law, October 2015; Julinda Beqiraj and Lawrence McNamara, *Children and Access to Justice: National Practices, International Challenges*, IBA and Bingham Centre for the Rule of Law, October 2016; and see n 3 above.

1.3 Methodology

This report draws on an extensive desk-based review of LEI policies offered by insurance and undertaking companies, as well as reports, surveys and data collected from bodies within both the legal and insurance professions across various jurisdictions. As access to justice is primarily concerned with individual human rights, the scope of this report is limited to LEI policies available to individuals on a 'before-the-event' (BTE) and 'after-the-event' (ATE) basis only.

The report concludes with a discussion of three key barriers to the increased implementation, uptake and use of LEI policies in existing markets (which may assist with the expansion of LEI into new markets) in order to increase access to justice for the 'forgotten middle'.

This report includes case studies of LEI markets in the following jurisdictions: Germany, Japan and Sweden (as widespread LEI market jurisdictions); and Australia, Canada, England and Wales, the Republic of Korea, Scotland and South Africa (as limited LEI market jurisdictions).



Anna McNee in the IBA Legal Policy & Research Unit has undertaken the research and drafting of this report on behalf of the Committee, with the Committee participating in the process by way of proposing topics, and providing guidance and comments on earlier drafts of the report. Andrew Mackenzie and Mark Woods, Co-Chairs of the Committee, acknowledge and thank Anna for her work and the following people for their contributions, research and assistance with this report: IBA staff members Sara Carnegie, Juni Son, Penny Newton and Jennifer Sadler-Venis; previous IBA interns Yannic Körtgen and Yasmin Younis; Antje Fedderke at the International Association of Legal Protection Insurers (Rencontres Internationales des Assureurs Défense or RIAD); and Karl Blockwell at DAS UK Group.

1.4 Report structure

The rest of this report follows the below structure:

- Chapter 2 contains a comprehensive analysis of LEI as a concept and purchasable product, identifies the case study jurisdictions, and identifies the insurance and legal regulators in each jurisdiction.
- Chapter 3 identifies a number of factors affecting the implementation, uptake and use of LEI, considers whether these factors act as barriers in limited LEI market jurisdictions and explores how each of the factors are addressed in each case study jurisdiction.
- Chapter 4 provides a commentary on three key barriers to the increased implementation, uptake and use of LEI, and concludes the report.

Chapter 2: LEI and the Regulatory Framework

2.1 What is LEI?

LEI, also known as legal protection insurance, is a well-established industry and a significant part of the legal landscape in many jurisdictions, but it is a relatively new concept in others. There are a number of precursors to the modern form of LEI, with the earliest form developed in France and Germany around the turn of the 20th century to protect motorists.[10] By the late 1980s, and after much development in the preceding decades, LEI had established itself as commonplace throughout many countries in mainland Europe, which is where we see many of the widespread LEI market jurisdictions today.

LEI is formally defined by the European Union as:

> '*an insurance undertaking [which] promises, against the payment of a premium, to bear the costs of legal proceedings and to provide other services directly linked to insurance cover, in particular with a view to the following:*
>
> *(a) securing compensation for the loss, damage or injury suffered by the insured person, by settlement out of court or through civil or criminal proceedings; and*
>
> *(b) defending or representing the insured person in civil, criminal, administrative or other proceedings or in respect of any claim made against that person.*'[11]

Put more simply, LEI is a product individuals can purchase from insurers or underwriters to cover some or all of the legal expenses they incur in obtaining legal assistance from a private provider in relation to a covered dispute. LEI can be bought on:

- a BTE basis, as a standalone policy, an automatic inclusion in an insurance bundle, or a bolt-on to an existing insurance policy (eg, household insurance) or other financial products (eg, credit cards); or
- an ATE basis, as a standalone policy.

LEI can also be available as part of a group policy that applies to members of a specific group, such as employees of a particular company. Further, members of a policyholder's family may also be covered if LEI is purchased as a bolt-on to a household insurance policy.

Like other types of insurance, coverage provided under LEI policies varies between providers and jurisdictions, including areas of law, types of services covered, financial caps and excesses, and waiting periods. Some policies only cover a policyholder if legal action is taken against them, and others (generally, for a higher premium) provide coverage if the policyholder wishes to take legal action against someone else. Generally, bolt-on LEI only covers a dispute arising in relation to the primary insurance policy to which it is added.

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10 Carlos Isola, *Legal Expenses Insurance Origins and Developments: From Protection For Motorists To Access To Law* (International Association of Legal Protection Insurers, 2004).

11 Art 198 of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), Official Journal of the European Union L335/ p 77 (17 December 2009).

It is important to acknowledge that the majority of LEI policies do not cover damages payable to, or by, the policyholder as part of a legal dispute – they simply cover the policyholder's legal expenses incurred through the course of obtaining legal advice or representation. Cover for damages liability is generally provided in the primary insurance policy to which LEI is automatically included or bolted-on.

Having LEI coverage does not mean all legal expenses will be paid with no questions asked: the policyholder must make a claim, and that claim must be approved. Some common LEI policy terms that affect whether a claim will be approved include:

- the policyholder must make a claim within the requisite notification period;
- the policyholder must advise the insurer of an event that may give rise to a claim under that policy as soon as the policyholder becomes aware;
- the claim must have reasonable prospects of success, particularly in relation to the policyholder taking legal action against someone else; and
- the insurer may refuse payment if the cost of legal advice or representation is likely to be disproportionately greater than the amount of any likely damages.

2.2 'Before-the-event', 'after-the-event' and group plans

As identified in section 2.1, LEI is sold on both a BTE and ATE basis, and can be provided to individual members of a specific group through a group plan. These three styles of policies provide different coverage, and are taken out at different points in time in relation to a legal dispute.

(a) BTE

LEI is most commonly sold on a BTE basis, with the policyholder paying a premium to protect themselves against the risks associated with potential unforeseen legal expenses. The premiums for BTE policies are less than for other types of LEI because the risk to the insurer of paying out is lower.

As the name suggests, BTE policies only cover events from which legal expenses stem that have not already occurred. These policies cover most legal expenses (unless explicitly carved out), including lawyers' fees, disbursements, such as court filing fees and barristers' fees, and any legal costs (but generally not damages) payable if unsuccessful in the dispute. If successful, the price of the LEI premium is generally not recoverable as part of costs payable by the losing party.

Insurers or underwriters generally sell BTE policies as a bolt-on to other insurance products or an automatic inclusion in an insurance bundle. LEI can also be available to some through membership or association with a group or union, or as part of a benefits package from a large employer.

LEI providers selling BTE policies as an automatic inclusion or bolt-on are generally large corporations who offer many different types of insurance to consumers. To protect themselves against large claims and spread the risk, these large insurers often collaborate with different providers (who generally specialise in LEI only), who provide coverage for the LEI component of the policy. If the provider of the primary policy does not formally engage another provider to cover the LEI component, the administration of that LEI component is outsourced.

(b) ATE

LEI sold on an ATE basis provides only limited protection for the policyholder against incurring significant legal costs. ATE policies can only be purchased after the event from which the legal expenses stem has occurred, but before legal proceedings have commenced. In some jurisdictions, an ATE policy can be purchased after legal proceedings have commenced – these do not cover legal expenses that have already been incurred, and are not commonly sold. The premiums for ATE policies are much higher than BTE policies because the risk to the insurer of paying out an ATE policy is significantly higher.

ATE policies only cover limited areas of the policyholder's legal expenses. They generally complement a conditional fee agreement, such as 'no win, no fee' between the lawyer and the policyholder, covering areas where the conditional fee agreement falls short (ie, disbursements and the opponent's costs).

An ATE policy can be purchased from the lawyer from whom the policyholder is receiving legal advice or representation (the lawyer will take out the LEI policy with the insurance company or underwriter directly). Insurers assess the risk associated with the proposed legal action, and may impose specific and unusual conditions on an ATE policy.

(c) Group plans

Also known as a 'prepaid' plan, a group plan is the pre-emptive employment of an in-house lawyer or purchase of external legal services prior to any specific legal issue arising, which is accessible by members of a specific group in the instance that a legal issue arises. This type of coverage is generally limited to 'predictable and specified events that are low cost, routine and high frequency'.[12]

Most commonly applying to employees of a company or members of a union, a group plan is funded either completely by the employer/union or jointly with the beneficiaries of the group plan. A group plan, therefore, is not technically 'insurance' because it relies on the funds of the prepaid bulk payment to finance any claims.

Due to the limited application of group plans to the aims of this report, there will be no further exploration of this product. A research project could be conducted on this independently.

2.3 Widespread and limited LEI market jurisdictions

It has become evident through the research undertaken for this report that the existence of LEI market jurisdictions is almost exclusively confined to Europe, with a number of notable exceptions. LEI markets have been identified operating in the following countries:

- **EU**: Austria, Belgium, the Czech Republic, Denmark, England and Wales, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, the Netherlands, Northern Ireland, Poland, Portugal, the Republic of Ireland, Scotland, Slovakia, Slovenia, Spain and Sweden; and
- **Non-EU:** Argentina, Australia, Brazil, Canada, Iceland, Israel, Japan, Norway, the Republic of Korea, South Africa, Switzerland, Taiwan, Turkey, the United States and Vietnam.

12 The Law Foundation of New South Wales 'Legal Expense Insurance: An Experiment in Access to Justice' (1999) p 9; Francis Regan, 'Whatever happened to Legal Expenses Insurance?' (2001) 26(6) Alternative Law Journal 294–295.

With a view to meeting the aims of this report – identifying barriers to the implementation, uptake and use of LEI, and developing guidance to overcome these barriers and expand LEI markets into new jurisdictions – the widespread and limited LEI markets in the following jurisdictions have been analysed.

Widespread LEI market jurisdictions	Limited LEI market jurisdictions
Germany (EU)	Australia
Japan	Canada
Sweden (EU)	England and Wales (EU)
	Republic of Korea
	Scotland (EU)
	South Africa

As access to justice is primarily concerned with individual human rights, the scope of this report is limited to LEI policies available to individuals rather than businesses. However, many of the barriers to the increased uptake of LEI in limited jurisdictions and expansion into new jurisdictions are similar for both individual and business LEI policies.

2.4 Industry regulation

The common factors arising in this report's review of each widespread and limited LEI market jurisdiction must be analysed and considered in the context of the regulatory framework in which the national insurance and legal industries are situated. The impartiality of insurance and legal industry regulators is of significant importance for transparency and accountability of operations, by both LEI insurers and lawyers retained to act in legal disputes by those LEI policyholders.

(a) Insurance industry

The following table summarises the regulatory scheme for insurance providers and underwriters in each case study jurisdiction:

Jurisdiction	Regulatory body	Independence
Australia	Australian Prudential Regulation Authority	Independent statutory authority
Canada	Office of the Superintendent of Financial Institutions	Independent statutory authority
England and Wales	Prudential Regulation Authority	Quasi-government statutory authority, run through the Bank of England
Germany	Federal Financial Supervisory Authority	Independent statutory authority
Japan	Financial Services Agency	Government-run statutory authority
Republic of Korea	Financial Services Commission	Government-run statutory authority
Scotland	Prudential Regulation Authority	Quasi-government statutory authority, run through the Bank of England
South Africa	Financial Sector Conduct Authority	Government-run statutory authority
Sweden	Swedish Financial Supervisory Authority[13]	Government-run statutory authority

13 Insurers domiciled in the European Economic Area (EEA) with an office in Sweden are subject to supervision from the regulator in their home jurisdiction, but still need to provide the Swedish Financial Supervisory Authority (SFSA) with information when requested. Insurers domiciled outside the EEA with an office in Sweden are regulated by the SFSA unless they have an office in another EEA state and the SFSA approves the regulator from that EEA state as having supervisory jurisdiction.

(b) Legal industry

The following table summarises the regulatory scheme for lawyers in each case study jurisdiction:

Jurisdiction	Regulatory body	Independence
Australia	Regulated on a state-by-state basis by: • the law society or bar association of that jurisdiction; or • an independent statutory authority.	Profession-run law society Independent statutory authority
Canada	Regulated on a province-by-province basis by the law society of that jurisdiction	Profession-run law society
England and Wales	Solicitors Regulation Authority Bar Standards Board	Independent industry bodies
Germany	German Federal Bar Association 28 regional bar associations	Self-regulatory bodies
Japan	Japanese Federation of Bar Associations	Profession-run law society
Republic of Korea	Korean Bar Association	Profession-run law society
Scotland	Law Society of Scotland Faculty of Advocates	Profession-run law societies
South Africa	The Law Society of South Africa The General Council of the Bar	Profession-run law societies
Sweden	Swedish Bar Association	Profession-run law society

(c) LEI industry: international guidelines?

This report also considers whether there are any international guidelines or best practice principles specific to the operation and regulation of the LEI market.

At an EU level, Directive 87/344/EEC (now repealed) and Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (commonly known as Solvency II) contains provisions in section 4 of chapter II concerning the development of a unified, common LEI market across EU Member States, and provides equal protection of rights. Like any EU directive, Solvency II is binding on the Member States, but it is the Member State's responsibility to enact laws to implement the content of the directive.

There do not appear to be any guidelines or best practice principles in non-EU jurisdictions, such as Japan.[14]

2.5 Accessible and affordable civil justice?

The reality and practical operation of a country's civil justice system must be taken into account if there is to be a genuine effort to increase LEI implementation, uptake and use in limited LEI market jurisdictions, and expansion of LEI into new jurisdictions.

14 Masaki Omoto, Judicial System and Finance for Civil Litigation in Japan (Contribution Paper to the 24th RIAD Congress in Seville, Spain) 6.

As such, the World Justice Project's *Rule of Law Index 2019*[15] has been reviewed to identify whether there is a discernible link between the independence and scrupulousness of the civil justice system, and the accessibility and affordability of civil justice in each of the case study jurisdictions.

This report looks at the following factors measured in the index:

- absence of corruption in the judiciary;
- due process of the law and respect for the rights of the accused;
- civil justice (generally); and
- accessibility and affordability of civil justice (specifically pulled from the civil justice factor).

World Justice Project – *Rule of Law Index 2019*					
Country	Global overall rank	**Index**			
		Absence of corruption in the judiciary	Due process of the law and respect for the rights of the accused	Peaceful and effectively functioning civil justice system[16]	People can access and afford civil justice
Sweden	4	0.98	0.92	0.81	0.78
Germany	6	0.95	0.82	0.86	0.78
Canada	9	0.95	0.79	0.70	0.57
Australia	11	0.97	0.76	0.76	0.62
United Kingdom (no distinction between jurisdictions in the UK)	12	0.96	0.81	0.73	0.53
Japan	15	0.97	0.74	0.79	0.70
Republic of Korea	18	0.88	0.78	0.77	0.66
South Africa	47	0.71	0.55	0.59	0.49

The data above indicates that:

- the almost complete absence of corruption in the judiciary (0.95 and above);
- relatively strong respect for due process of the law and rights of the accused (0.7 and above); and
- a generally well-functioning civil justice system (0.7 and above)

does not necessarily equate to high levels of accessible and affordable civil justice (0.7 and above). This is evident in the statistics for Canada, Australia and the UK (of which England and Wales, and Scotland are jurisdictions) – all of which are limited LEI market jurisdictions.

This data therefore suggests that the lower rate of accessible and affordable civil justice is not primarily caused by issues in the legal or civil justice system itself, but by the means by which individuals can access

15 See n 1 above. The index is a scale from 0–1: the higher the number, the more accurate the statement being measured on the index is in relation to that jurisdiction.

16 The overarching 'civil justice' factor on the World Justice Project's Rule of Law Index 2019 incorporates the following subfactors: People can access and afford civil justice; civil justice is free of discrimination; civil justice is free of corruption; civil justice is free of improper government influence; civil justice is not subject to unreasonable delay; civil justice is effectively enforced; and alternative dispute resolution mechanisms are accessible, impartial and effective – see n 1 above, p 13.

and use that system. This is supported by the higher rates of accessibility and affordability to civil justice in Germany, Japan and Sweden – all of which are widespread LEI jurisdictions.

There are various external influences present at local, national and international levels affecting the index ranking of the factors in the above table, including politics, economic stability and strength, and inter and intrastate conflict. However, these factors are outside the scope of this report.

Chapter 3: Implementation, Uptake and Use of LEI

This chapter reviews the following factors common to both widespread and limited LEI market jurisdictions that affect the implementation, uptake and use of LEI among individuals, such as:

- marketing and consumer awareness;
- limits of indemnity;
- free choice of lawyer; and
- costs jurisdiction issues.

Each section of this chapter analyses a different factor and contains case studies that examine how that factor is addressed in relation to LEI in each jurisdiction. This chapter also identifies elements of each factor common among the widespread LEI market jurisdictions, and considers whether the absence of or failure to address these elements acts as a barrier in limited LEI market jurisdictions.

3.1 Marketing and consumer understanding

The manner of marketing and selling LEI policies to consumers varies significantly between jurisdictions and can be indicative of how well LEI is understood and used by individuals.

The following common elements are identifiable in widespread LEI market jurisdictions where the implementation of LEI policies by insurers (and therefore variety in availability to consumers) is high, and consumer uptake and use are high:

- LEI is primarily sold on a BTE basis as an automatic inclusion in an insurance bundle;
- LEI has been promoted by state governments as an alternative means of access to justice for those who do not qualify for legal aid (whether because of residency or financial status);
- consumer awareness of LEI as a product is high; and
- consumer understanding of LEI's functions is generally high.

To analyse the intricacies of marketing and advertising theory and modelling is beyond the scope of this report; however, it is possible to infer high-level logical conclusions by analysing the common elements identified above.

It would appear from the above analysis that higher levels of consumer awareness of the existence, function and benefits of LEI are likely to result in the greater uptake and use of LEI by individuals. Equally, correlations can be drawn between the lower, if any, uptake and use of LEI and a lack of information on LEI available to individuals in limited LEI market jurisdictions.

Therefore, it could be argued that the poor availability of information and promotion of LEI as a purchasable product to individuals is a significant barrier to increasing its implementation, uptake and use in limited LEI market jurisdictions.

The automatic inclusion of LEI in an insurance bundle statistically results in a higher percentage of a population with LEI protection; however, it has been acknowledged that this can result in a policyholder being unaware of their LEI coverage once a legal dispute has arisen.[17] This may be because a policyholder does not read the terms of their policy closely, or information on a policyholder's LEI coverage is inadequately brought to their attention during the purchase of the primary policy. This ignorance of a policyholder's LEI coverage may result in an individual being unable to meet the specific terms of their policy (eg, notification periods if attempting to make a claim), and thus protection not being available at all.

It is apparent that the automatic inclusion of LEI in an insurance bundle (that is often unbeknown to the policyholder due to poor circulation of information) can be a barrier to the greater uptake and use of LEI in widespread LEI market jurisdictions, even though the implementation of LEI policies by insurers (and thus variety in availability to consumers) is high.

Widespread LEI market jurisdictions

Germany[18]

LEI is well known among the population in Germany, and is one of the top ten most sold insurances in the country. In 2017, 22 million LEI policies were sold by 46 companies, bringing in a combined income of €3.981bn from premiums.

Historically, LEI was sold in Germany by only specialised insurers as a standalone policy. Nowadays, however, it is an automatic inclusion in an insurance bundle, but underwritten by a different company to the primary insurer. LEI is sold in Germany almost exclusively on a BTE basis.

In May 2018, Ipsos conducted a survey of consumers in eight European jurisdictions on behalf of the RIAD. Of those Germans surveyed, the results indicated that:

- 43 per cent would consult their LEI insurer first when a dispute arose;
- 47 per cent prefer to pay for LEI to prevent trouble in the case of a legal dispute; and
- 59 per cent thought that LEI insurers were competent in a legal dispute.

Although the demographics of the focus group were not revealed in the survey results and LEI appears to be well known among the population, the above statistics indicate that LEI in Germany is only used to a moderate extent. This is supported by the estimate that only 40 per cent of households in Germany

17 Matthias Kilian and Francis Regan, 'Legal Expenses Insurance and Legal Aid – Two Sides of the Same Coin? The Experience from Germany and Sweden' [2004] 11(3) International Journal of the Legal Profession 233, 236; Civil Justice Council, *The Law and Practicalities of Before-the-Event Insurance: An Information Study* (November 2017) p 96.

18 Matthias Kilian and Francis Regan, 'Legal Expenses Insurance and Legal Aid – Two Sides of the Same Coin? The Experience from Germany and Sweden' (2004) 11(3) International Journal of the Legal Profession 233; Statista, 'Bestand an Versicherungsverträgen in der Rechtsschutzversicherung in Deutschland von 1990 bis 2017 (in Millionen)' (Statista, 2019) https://de.statista.com/statistik/daten/studie/6599/umfrage/vertragsbestand-der-rechtsschutzversicherung-seit-1990 accessed 17 June 2019; Gesamtverband der Deutschen Versicherungswirtschaft eV, *Statistical Yearbook of German Insurance 2018* (August 2018) pp 66, 67 and 82; and Ipsos, Survey Results: *Consumer Perception of Legal Issues and Legal Protection Insurance in France, Germany, the Netherlands, Ireland, Hungary, the Czech Republic, Switzerland, and Belgium* (RIAD, March 2018).

actually have LEI protection. It appears that those with limited income take out LEI policies far less than those with disposable income, and LEI is apparently the insurance of lowest priority for those with limited financial resources.

Sweden[19]

The vast majority of the LEI market in Sweden consists of BTE policies, which are the primary source of legal protection for individuals. In a 2017 survey, the Council of Bars and Law Societies of Europe (Conseil des barreaux européens or CCBE) found that 95 per cent of households in Sweden had LEI protection.

LEI policies are automatically included as part of household insurance policies; they are generally not sold as a bolt-on or standalone policy. In the lead up to the significant 1997 legal services reforms, the Swedish government actively promoted LEI as an option for those who were no longer going to be eligible for legal aid under the new system.

It is therefore prudent to state that consumer awareness of the availability and functions of LEI is very high in Sweden. However, it is acknowledged that young people (16–34 year olds), immigrants and those without household insurance (which is not mandatory, but is the norm) are unlikely to be covered by LEI, but not necessarily unaware of its existence and utility.

Limited LEI market jurisdictions

Australia[20]

LEI is not a common insurance purchased by individuals in Australia, and there are very few insurance or underwriter providers. Where it does exist, LEI is either offered as a group policy or sold to individuals on a BTE basis as an opt-out bolt-on to a primary policy (typically home and contents, or motor insurance). LEI is rarely offered on an ATE basis, and when it is, it is typically linked to a litigation funding arrangement or conditional fee agreement.

Interestingly, one of the primary reasons for the lack of uptake of LEI in Australia has been cited as the existence of litigation funding arrangements and the common presence of conditional fee agreements as alternatives to LEI. It was anticipated with deregulation of litigation funding providers in law reforms in 2012 that interest in LEI protection for individuals may increase; however, this does not seem to be the case and consumer awareness of LEI is not high.

There have also been recent developments in the Australian LEI market: ARAG Services Australia Pty Ltd was launched in July 2019, with its LEI products underwritten by HDI Global Specialty SE – Australia, a speciality lines insurer in Australia. LEI products offered by ARAG Services Australia Pty Ltd will be available to individuals for coverage for their families.

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19 Isabel Schoultz, 'Legal Aid in Sweden' in Olaf Halvorsen Rønning and Ole Hammerslev (eds), *Outsourcing Legal Aid in the Nordic Welfare States* (Palgrave Macmillan 2018); Matthias Kilian and Francis Regan, 'Legal Expenses Insurance and Legal Aid – Two Sides of the Same Coin? The Experience from Germany and Sweden' (2004) 11(3) International Journal of the Legal Profession 233, 247; and CCBE, *CCBE Position on Legal Expenses Insurance* (position paper, 31 March 2017) 1.

20 JUSTICE, *Delivering Justice in an Age of Austerity* (April 2015), Annexe: Summary Note on Legal Expenses Insurance, pp 5–6; Michael Legg, 'Regulation of Litigation Funding' (University of New South Wales Centre for Law Markets and Regulation, 8 August 2012) https://clmr.unsw.edu.au/article//regulation-of-litigation-funding accessed 19 June 2019; and The ARAG Group and HDI Global Specialty SE, 'ARAG launches operations in Australia' (3 July 2019).

England and Wales[21]

In England and Wales, LEI can be sold to individuals:

- on a BTE basis as a bolt-on or automatic inclusion in an insurance bundle (standalone BTE policies are almost non-existent);
- on an ATE basis as a standalone policy; or
- as a group policy through employment or trade union membership.

Uptake of LEI in England and Wales is significantly lower than those in mainland Europe, only generating €592m from premiums in 2012. However, it is difficult to garner the actual rate of uptake and use of LEI among individuals in England and Wales from empirical data. This is primarily due to a lack of understanding regarding what LEI provides coverage for, and a lack of awareness that LEI is often automatically included in an insurance bundle.

In 2009, Sir Rupert Jackson, retired judge of the Court of Appeal of England and Wales, estimated in a report that 40–60 per cent of households in the UK had some form of BTE coverage. However, in 2017, the Legal Services Consumer Panel surveyed a small focus group and results indicated that 8 per cent of those in England and 13 per cent of those in Wales had BTE coverage. These two starkly different figures may reflect the exclusion of Scotland and Northern Ireland from the second data set or the 2014 legislation reform barring insurance companies in the UK from selling opt-out bolt-ons. However, it has been acknowledged that the likely cause of discrepancy is lack of consumer awareness of whether someone has LEI coverage or not, and the scope of that coverage.

DAS UK Group has recently estimated that approximately 50 per cent of motorists and 27 per cent of households have LEI coverage in England and Wales, and they have attributed this low rate to poor consumer awareness of LEI as a product.

Scotland[22]

LEI is available to individuals in Scotland on a BTE basis as a bolt-on or automatic inclusion in an insurance bundle, on an ATE basis as a standalone policy (which often works in conjunction with a speculative fee agreement), or as a group policy through employment or trade union membership.

It is not clear exactly how many people in Scotland have LEI coverage, as there are no published studies that relate solely to Scotland or provide figures broken down between Scotland, and England and Wales. However, a 2012 survey conducted by Consumer Focus Scotland indicated that BTE insurance did not appear to be widely used at that time.

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21 JUSTICE, *Delivering Justice in an Age of Austerity* (April 2015), Annexe: Summary Note on Legal Expenses Insurance pp1–2; Civil Justice Council, *The Law and Practicalities of Before-the-Event Insurance: An Information Study* (November 2017) pp x–xiv, 90, 99–100, 105; and focus questionnaire response from DAS UK Group (25 June 2019).

22 The Taylor Review, *Report of the Review of Expenses and Funding of Civil Litigation in Scotland* (September 2013) pp 138–139, 142 and 171; Consumer Focus Scotland, *Report of the Consumer Network survey and focus groups: expenses and funding of civil litigation in Scotland* (2012); and Scottish Civil Courts Review, *Report of the Scottish Civil Courts Review* (2009) vol 2, p 105.

The survey also found that although over half of those surveyed had one, if not two, BTE policies purchased as an automatic inclusion or bolt-on, the majority did not know what the policy covered. Further, only five per cent of those surveyed had actually used their LEI coverage.

Those respondents to the survey who did not have BTE coverage gave the general following reasons:

- it had never been offered to the consumer;
- the consumer either did not know about the product or understand what it covered;
- the consumer did not think that they would need it;
- it was too expensive;
- the consumer was sceptical about whether an insurer would actually pay; or
- poor accessibility of information – particularly, use of small print and lack of 'plain English'.

ATE insurance has reportedly grown slowly and sporadically in Scotland. In 2013, general insurers and ATE insurers tended to be separate companies; however, this could change as the LEI market develops in Scotland.

3.2 Limits of indemnity

Each insurance provider within each jurisdiction has its own limits on the indemnity it provides to its policyholders. The types of limits are generally consistent within the confines of each jurisdiction but vary significantly between jurisdictions.

A number of inherent limits were identified in chapter 2 depending on the type of LEI purchased: for example, BTE policies do not cover events that have already occurred. As such, the different elements of policies available to individuals at a general high-level in widespread LEI market jurisdictions have been reviewed and analysed and there are indications that:

- coverage is primarily provided for representation in litigation;
- family law and criminal law are almost always excluded from coverage;
- financial caps on the amount claimable vary significantly;
- the policyholder must generally pay an excess proportionate to the premium paid; and
- there are waiting periods before a policyholder can make a claim – but this varies significantly between months and years.

Research for this report also indicates on a general scale that increasing the premium paid on LEI policies can increase the financial cap, lower the excess and includes extra coverage for additional practice areas. It could be argued that the different coverage provided through different premiums can be a barrier to the 'forgotten middle' having proper access to justice. People in this class

(particularly those at the lower end of the class) are less likely to have the disposable income to spend on higher premiums allowing them to have LEI coverage with wider protection.

Further, common practice areas in which people often find themselves needing legal advice and representation, namely family law and criminal law, are almost always excluded on the basis that the cost of legal disputes in these practice areas can build dramatically, and the risk is too high for the insurance providers.

Individuals may be dissuaded from purchasing LEI coverage at all if the protection they are interested in (eg, family law) is not covered or requires the payment of a higher premium that they cannot afford. Therefore, the limitations of indemnity in many existing LEI policies can be a barrier to the increased uptake and use of LEI among individuals, and to facilitating greater access to justice for the 'forgotten middle'.

Widespread LEI market jurisdictions

Germany[23]

In Germany, coverage of LEI policies primarily depends on the premium that the policyholder is willing to pay, but often, the exclusions in policies with basic coverage can be bought as inclusions for a higher premium. The typical limits of LEI indemnity include:

- coverage is primarily limited to litigation funding – legal advice can only be covered if related to the 'insured event';
- intentional criminal acts are not covered (but negligent criminal acts are);
- family law proceedings are generally excluded because the policy itself generally covers a whole family and therefore both sides of a dispute;
- there is generally an excess of €150–200, depending on the premium paid;
- the financial cap on maximum coverage is, on average, €500,000, but a higher premium can be paid to increase the cap;
- there is a standard three-month exclusion period in which the policyholder cannot make a claim after taking out the policy; and
- coverage is only provided for commencing proceedings against someone else where the prospects of success are relatively high (this generally involves giving the insurer significant information otherwise protected by lawyer-client privilege).

23 Matthias Kilian and Francis Regan, 'Legal Expenses Insurance and Legal Aid – Two Sides of the Same Coin? The Experience from Germany and Sweden' (2004) 11(3) International Journal of the Legal Profession 233.

Sweden[24]

Despite the extremely high proportion of the population that has LEI coverage in Sweden, there are a significant number of general limits to LEI indemnity:

- only litigation funding is covered – legal advice and minor disputes not proceeding to court are excluded;
- proceedings brought under the Group Proceedings Act (2002:559) are often excluded;
- family law, criminal law, employment law, administrative review, and matters in specialist and administrative courts are generally not covered;
- most insurers require a policyholder to have taken out the household policy for at least two years before the LEI section can be used;
- the policyholder must cover 20 per cent of the base amount, and 20 per cent of the damages that exceed the value of 20 per cent of the base amount;
- insurers will generally not approve a claim with a value of 'less than half a base sum' (which was €2,400 as at 2015); and
- in 2015, the financial caps on maximum policy pay-outs varied from €13,000 to €27,000.

LEI generally also covers situations in which the policyholder is compelled to pay the costs of the opposing party or to the state, as well as settlements (if it is likely that the court would have decided on a higher amount).

Limited LEI market jurisdictions

Canada[25]

The existence of LEI in Canada as protection for individuals is limited by provincial boundaries and involvement of the relevant law society or bar association. Currently, LEI is only available to individuals in Québec province, and within that province, only ten per cent of people have LEI coverage. However, the policies available appear to have wide-ranging coverage.

LEI in Québec generally covers an individual for legal expenses incurred in obtaining telephone advice from either a legal call centre or lawyer, legal representation in disputes, and situations involving powers of attorney regarding estates and protection of incapacitated persons of consenting age in the absence of a dispute.

LEI generally covers a policyholder for starting a claim against someone else and having a legal claim brought against them; however, this differs between policies and providers. There are generally no limits on the practice area and no caps on the amount of fees claimable for telephone advice.

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24 Isabel Schoultz, 'Legal Aid in Sweden' in Olaf Halvorsen Rønning and Ole Hammerslev (eds), *Outsourcing Legal Aid in the Nordic Welfare States* (Palgrave Macmillan 2018).

25 Barreau du Québec, 'Barreau du Québec: Frequently Asked Questions' (Barreau du Québec, 2019) www.legalinsurancebarreau.com/faq accessed 25 June 2019; and Canadian Bar Association, *Reaching Equal Justice: An Invitation to Envision and Act* (Report of the Access to Justice Committee, November 2013) 101–103.

In relation to LEI coverage for disputes, policies are generally limited by the following:

- only consumer rights, personal injury and medical negligence, property and premises, income and workplace (if the policyholder is not part of a union) related disputes are covered;
- intentional criminal acts are not covered (but negligent criminal acts are, and only in relation to workplace incidents or in violation of the Highway Traffic Act);
- financial caps are generally are around CAD$5,000 per case and CAD$15,000 per year, and CAD$1,000 per case involving powers of attorney;
- some insurers may impose an excess or contribution from the policyholder of 20–25 per cent of legal fees; and
- there is generally a 60-day exclusion period in which the policyholder cannot make a claim after taking out the policy.

England and Wales[26]

The limits on different LEI policies in England and Wales provide different levels of coverage for individuals depending on the style and premium paid on the policy. BTE policies generally cover individuals for access to an online database of legal document precedents, an online document review service, telephone legal advice and legal representation from the start of a dispute.

LEI policies are generally limited by the following:

- defamation, family law, disputes with public bodies, tenancy and landlord disputes, consumer law, judicial review, human rights law and areas where state funding is available are generally excluded;
- financial caps are generally in the order of £50,000 to £100,000;
- most policies do not have an excess, but when they do exist, they are in relation to a specific element of a policy; and
- waiting periods range from 90 days on employment and contract disputes to 180 days on redundancy disputes (however, they can be waived if equivalent LEI cover was in place before the relevant LEI policy being claimed).

ATE policies are less commonly available in England and Wales; however, where they are available, the high premium paid to the insurer is not recoverable as part of costs if the policyholder is successful.

Republic of Korea[27]

LEI coverage in the Republic of Korea appears to be relatively broad despite the almost complete monopoly of the LEI market by one insurance provider (DAS). Coverage for individuals extends to family law disputes, landlord and tenant disputes, ordinary life, traffic accidents and legal advice.

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26 Focus questionnaire response from DAS UK Group (25 June 2019); and The Taylor Review, *Report of the Review of Expenses and Funding of Civil Litigation in Scotland* (September 2013) p 172.

27 Eun Hyeon Kang, *National Report: Korea* (International Association of Procedural Law Seoul Conference 2014, Session 3: Effective Access to Justice, 2014) p 53.

Despite the broad range of coverage, there is limited uptake among citizens – reportedly due to resistance among the community in accepting the possibility of getting caught up in a lawsuit at some point during one's life.

South Africa[28]

Coverage provided to individuals by LEI policies in South Africa is relatively comprehensive for a limited LEI market jurisdiction, including providing coverage for the policyholder, their spouse and children up to the age of 18 (or 25, if studying). Most LEI policies in South Africa cover an individual for legal advice and mediation services through a legal call centre or walk-in service centre, and legal representation in disputes.

The typical limits of LEI indemnity include:

- family and intentional criminal acts are only excluded by some providers, but when covered, have very low financial caps and limits (eg, only uncontested divorces are generally covered, and those claiming for an intentional criminal act must not have committed a serious offence in the past six years);
- business matters, class actions, and tenant and landlord disputes are excluded;
- financial caps are imposed for disputes on either a per case or annual basis – these generally range from R 30,000 to R 200,000 per year;
- most policies do not have an excess, but when they do exist, they are low; and
- waiting periods are generally one month for obtaining legal advice, one to three months for civil litigation representation and extended waiting periods are common for family law matters.

3.3 Free choice of lawyer

Another factor affecting the uptake and use of LEI policies by individuals is the free choice of lawyer principle. There is also a significant difference between EU and non-EU jurisdictions on this topic.

Prior to 1 January 2016 in the EU, Articles 3(2)(c) and 4(1)(a) of Directive 87/344/EEC and the European Court of Justice's decision in *Eschig v Uniqa* C-199/08 enshrined an individual's right to the free choice of lawyer. Since that time, that right has been protected through Solvency II, which provides (and caveats the provision of) an individual's free choice of lawyer in:

- Article 200(4), which states that a policyholder will have the free choice of lawyer 'from the moment that those insured persons have a claim under that contract';
- Article 201, which specifies that contracts must expressly provide a policyholder the free choice of lawyer 'to defend, represent or serve the interests of the insured person in any inquiry or proceedings'; and
- Article 202, which identifies a specific set of circumstances (concerning policies limited to incidents involving motor vehicles) where EU Member States can exempt LEI providers from granting a policyholder the free choice of lawyer.

28 Eighty20 Consulting and Finmark Trust, *Legal Expenses Insurance* (February 2014).

However, the degree to which EU Member States comply with the above articles varies significantly. In a 2017 survey of its members from 25 countries, the CCBE found that an individual's right to the free choice of lawyer is strongly upheld and respected in five jurisdictions only: Estonia, Finland, Iceland, Luxembourg and Sweden.[29]

Research for this report has identified the following elements in widespread LEI market jurisdictions (including those outside the EU where Solvency II is not enforceable):

- an individual's free choice of lawyer is protected (directly or indirectly) by statute; or
- LEI policies contain terms allowing an individual's free choice of lawyer for a higher premium (rather than staying with the insurer's choice of lawyer for a lower premium).

However, the finding in the second point above also applies in Scotland, a limited LEI market jurisdiction.

The above observations raise the question of whether allowing the free choice of lawyer only for those who can afford a higher premium is really 'free choice' for all. This is especially relevant from an access to justice perspective, as those in the 'forgotten middle' often do not have the disposable income to spend on private lawyers' fees and are therefore unlikely to be able to afford the higher premiums allowing them the free choice of lawyer. This is especially concerning for EU Member States where the right to the free choice of lawyer is supposed to be protected by law, as per Solvency II.

It appears that the limitations on an individual's ability to choose their own lawyer, for whatever reason under the policy under local laws, can be a barrier to the greater uptake and use of LEI in any LEI market jurisdiction.

Widespread LEI market jurisdictions

Germany[30]

Most LEI policies in Germany contain terms that allow an individual free choice of lawyer (rather than one suggested by the insurer), but only for a higher premium. The German Supreme Court has found that these terms in policies do not breach Article 201 of Solvency II.

However, the CCBE has claimed that insurers in Germany attempt to circumvent the free choice of lawyer requirements by recommending policyholders to legal advice hotlines established by the insurer. The insurers are inadvertently leading policyholders to engage with lawyers who have a pre-existing working relationship with the insurer (the fiduciary relationship).

The 2018 RIAD survey found that 38 per cent of individuals surveyed in Germany thought being recommended a competent lawyer by the LEI provider was *very important*, and 43 per cent felt it was *somewhat important*.

29 CCBE Position on Legal Expenses Insurance (31 March 2017) p 1.

30 Christian Deckenbrock, 'Versicherung darf Kunden Vorteile versprechen' (Law Tribune Online, December 2013); Ipsos, *Survey Results: Consumer Perception of Legal Issues and Legal Protection Insurance in France, Germany, the Netherlands, Ireland, Hungary, the Czech Republic, Switzerland, and Belgium* (RIAD, March 2018); and CCBE, *CCBE position with Respect to the Free Choice of Lawyer in relation to Legal Expenses Insurance* (9 September 2010) p 3.

Japan[31]

In Japan, the provision of legal services, including acting as an intermediary, by anyone who is not an admitted lawyer is strictly prohibited (Attorneys Act, section 72). Consequently, insurers are prohibited from referring policyholders to specific lawyers – the policyholder therefore has complete free choice of lawyer.

The Japan Federation of Bar Associations has established a Legal Access Centre helpdesk scheme whereby those with LEI protection can attend their local bar association and be introduced to lawyers in the relevant area of dispute, whom they can then retain.

Sweden[32]

An individual's right to free choice of lawyer is strongly enforced and respected in Sweden; however, there are some caveats on this choice. Generally, the lawyer must be located close to either the policyholder's residence or the hearing location of the dispute, and their costs are only payable on a standard hourly rate.

It is possible for a policyholder to appoint alternate appropriate legal representation, but it is subject to obtaining approval from the Swedish Board for Legal Protection Insurance Issues.

Limited LEI market jurisdictions

Canada[33]

According to the Barreau du Québec, LEI coverage in Canada is supposed to cover the policyholder for 'legal fees for the lawyer of your choice'. In practice, however, LEI providers tend to assign a panel lawyer they believe is the best fit for the dispute once the prospects of success for the claim has been reviewed and the claim approved. Internal dispute resolution mechanisms appear to be available through the insurer if the policyholder is dissatisfied with their appointed lawyer, but it is not clear from the information available how a policyholder may change their appointed lawyer, if at all.

Scotland[34]

An individual's right to free choice of lawyer is somewhat protected in Scotland under regulation 6 of the *Insurance Companies (Legal Expenses Insurance) Regulations 1990*, which implements EU Directive 87/344/EEC and Solvency II. We note that this legislation also applies in England and Wales.

However, many BTE polices in Scotland give the insurer the right to appoint a panel lawyer up to the time when legal proceedings start, and some require the policyholder to pay an excess (up to £500) to use a solicitor of their choice.

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31 Masaki Omoto, *Judicial System and Finance for Civil Litigation in Japan* (Contribution Paper to the 24th RIAD Congress in Seville, Spain) pp 3 and 6; focus questionnaire response from RIAD (2 August 2019) 7; and Japan Federation of Bar Associations, 'Support Activities to Remedy the Violation of Rights' www.nichibenren.or.jp/en/about/activities/Remedy.html accessed 19 June 2019.

32 Isabel Schoultz, 'Legal Aid in Sweden' in Olaf Halvorsen Rønning and Ole Hammerslev (eds), *Outsourcing Legal Aid in the Nordic Welfare States* (Palgrave Macmillan 2018) p 50.

33 Barreau du Québec, 'Barreau du Québec: Frequently Asked Questions' (2019) www.legalinsurancebarreau.com/faq accessed 25 June 2019; Legal Expense Canada, 'Legal Expense Canada: Personal Legal Expense Coverage, Frequently Asked Questions' (2019) https://legalexpensecanada.com/personal-insurance/faqs accessed 25 June 2019.

34 The Taylor Review, *Report of the Review of Expenses and Funding of Civil Litigation in Scotland* (September 2013) p 132; and Consumer Focus Scotland, *Report of the Consumer Network survey and focus groups: expenses and funding of civil litigation in Scotland* (2012).

In a 2012 survey by Consumer Focus Scotland, it was found that just under half of those surveyed would be unhappy about their insurer appointing a lawyer, and around one-third were undecided. This was reportedly due to uncertainty about whose interests the lawyer would be serving. Trust in the lawyer was also an issue, and concerns were raised about quality of appointed lawyers. Participants also indicated a slight preference towards paying a higher premium to enable them to choose their own lawyer.

The survey also found that of those who did not have concerns about an insurer appointing a lawyer, it was thought that the insurer was better placed to make a choice as to the appropriate lawyer.

South Africa[35]

Insurers in South Africa employ staff who are 'legally qualified' to provide legal assistance, advice and mediation services to policyholders contacting a legal call centre, and potentially in a walk-in service centre. However, there is no minimum educational standard for an individual providing these services.

As insurance providers are prohibited under South African law to employ practicing lawyers to conduct in-house litigation, these services are out-sourced to pre-selected panel lawyers. It is reportedly possible for policyholders to choose their own lawyers (who are paid at the same rate as panel lawyers).The policyholder is responsible for covering any lawyer fees that exceed the panel lawyer rates.

3.4 Costs jurisdiction issues

The different principles surrounding the law on costs in civil litigation directly impact the risk to LEI insurers disproportionately in different jurisdictions, and may affect the availability of LEI products (and consequently the level of implementation, uptake and use of LEI policies) in limited LEI market jurisdictions.

Civil law, common law and hybrid jurisdictions all have different rules on costs, including when costs orders can be made, whom they can be made in favour of and caps on how much can be recovered through costs orders.

Costs associated with legal disputes in civil law jurisdictions tend to be lower than those in common law jurisdictions, primarily due to civil litigation procedure (eg, the absence of extensive disclosure/discovery obligations, and the treatment of evidence at trial).[36] Costs in common law jurisdictions are ordered more often than not in civil litigation disputes; however, the granting of a costs order is completely at the discretion of the judicial officer presiding over the dispute. Further, only limited areas of civil litigation in common law jurisdictions have a fixed or capped amount recoverable as costs imposed by statute – most areas are not limited at all.

The case studies in this report are from different jurisdictions and costs schemes, and we have found in relation to costs:

- there is more difficulty in calculating the risk of financial liability for insurers in jurisdictions where costs:
  - are not fixed or capped by statute;

35 Eighty20 Consulting and Finmark Trust, *Legal Expenses Insurance* (February 2014).

36 Eduardo Reyes, 'Civil Law Disputes: Written In Code' *The Law Society Gazette* (London, 11 April 2016).

- do not generally follow a predetermined scale of costs; or
- are not predictably determined, but are at the discretion of a third party;

- widespread LEI jurisdictions tend to be civil law or hybrid jurisdictions (with primarily civil law elements) where the prediction of the financial risk to insurers is easier; and
- limited LEI jurisdictions tend to be common law or hybrid jurisdictions (with primarily common law elements) where the prediction of the financial risk to insurers is complex.

It is therefore plausible to draw links between the limited number of insurers offering LEI policies to individuals in common law jurisdictions and the complexity of calculating the financial liability to insurers by virtue of the costs scheme. It could be argued that the costs schemes in jurisdictions with a common law or hybrid (with primarily common law elements) system can present a barrier to the greater availability, and therefore implementation, uptake and use of LEI policies. This major feature of civil litigation in legal systems of each jurisdiction is not going to change to facilitate an increase LEI implementation, uptake and use; but it is worth noting that this feature is likely to be a cause of the limited availability and operation of LEI in many limited LEI market jurisdictions.

Widespread LEI market jurisdictions

Germany[37]

In the civil law jurisdiction of Germany, cost orders are made in favour of the successful party to a dispute, but proportionate to the amount of the claim that the successful party won. These costs are also capped by fixed statutory limits.

Costs comprise court fees and lawyer's fees; however, only reasonable expenses and fixed statutory lawyer's fees (which are proportionate to the amount in dispute) are recoverable as costs. This is known in other jurisdictions as party/party costs. This statutory scale is not binding for costs awarded on a lawyer/client basis, but is the norm to be used.

Claims are generally made up of a number of elements, and it is not common that one party will outright win 100 per cent of a disputed claim. As such, costs are distributed proportionately. For example, a losing party may be liable for 70 per cent and the winning party would cover the other 30 per cent.

Japan[38]

In Japan, a jurisdiction with a somewhat hybrid system of mostly civil law traditions but incorporating some common law elements, the scheme for liability of legal costs is limited. There are no provisions in Japanese law that allow a successful party in civil litigation to recover legal fees from an unsuccessful party: each party bears its own costs, including lawyer's fees and disbursements.

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37 Matthias Kilian and Francis Regan, 'Legal Expenses Insurance and Legal Aid – Two Sides of the Same Coin? The Experience from Germany and Sweden' (2004) 11(3) International Journal of the Legal Profession 233; and Richard Kreindler, Thomas Kopp and Johannes Schmidt, 'Litigation: Germany' (Global Arbitration Review, 29 June 2017) https://globalarbitrationreview.com/jurisdiction/1000215/germany accessed 20 June 2019.

38 Masaki Omoto, *Judicial System and Finance for Civil Litigation in Japan* (Contribution Paper to the 24th RIAD Congress in Seville, Spain) p 4.

Lawyer's fees are not fixed by statute on a scale of costs: lawyers can charge whatever they wish. Nonetheless, it is the norm in civil litigation matters for Japanese lawyers to follow an 'initial fees and success fees' formula and a table of fees similar to those set in the Attorney's Remuneration Standards (which was repealed in 2003). The fees under this formula are proportionate to the amount of money in dispute or damages expected to be granted in the policyholder's favour.

Sweden[39]

Civil litigation in Sweden, a hybrid (but primarily civil law) jurisdiction, follows the practice of other civil law jurisdictions and allows for parties to make submissions as to costs. The court will generally order the successful party's costs to be recovered from the unsuccessful party.

Costs can also be distributed proportionately in the instance of the partial success of one party, rather than complete success. Further, the court has the discretion to order each party bears its own costs if the determining factor of the dispute or some evidence was unknown to the unsuccessful party before the proceedings.

Limited LEI market jurisdictions

Australia[40]

As a common law jurisdiction, costs follow the event in litigation proceedings in Australia and are not restricted by fixed statutory limits. The relevant court can make a costs order at their discretion:

- on a party/party basis, where the unsuccessful party pays the successful party's costs that were fairly and reasonably incurred to bring the matter to trial (this typically amounts to around 60–70 per cent of the total costs incurred); or
- on an indemnity (or lawyer/client) basis, where the unsuccessful party pays almost all the costs incurred by the successful party.

The default position for the courts is to award costs on a party/party basis, unless the circumstances of the case warrant awarding lawyer/client or indemnity costs. Parties must actively seek an order for costs during the substantial proceedings (with some exceptions where costs are automatically awarded); otherwise, each party bears its own costs.

In most instances when a costs order is made, a costs assessor will review the successful party's legal fees and disbursements and determine the amount recoverable as costs. This method is regulated by statute, and there is a mechanism for review if either party is dissatisfied with the costs assessor's determination.

Parties may seek an order from the court capping the costs payable in the proceedings, but this is generally limited to disputes with a value of under AUS$100,000. Some jurisdictions have fixed statutory limits on recoverable costs, but this is generally only the case in lower courts. It has been acknowledged

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39 Isabel Schoultz, 'Legal Aid in Sweden' in Olaf Halvorsen Rønning and Ole Hammerslev (eds), *Outsourcing Legal Aid in the Nordic Welfare States* (Palgrave Macmillan 2018) p 44; and Nyman Rudenstam, 'Litigation in Sweden: A Summary Legal Guide' (2016) www.nymanrudenstam.se/wp/wp-content/uploads/2016/05/1138_Booklet_Litigation-In-Sweden-v2.pdf accessed 26 June 2019.

40 Francis Regan, 'Whatever happened to Legal Expenses Insurance?' (2001) 26(6) Alternative Law Journal 293; and Practical Law Dispute Resolution, 'Costs: General Principles' (Thomson Reuters Practical Law (Australia), 2019) https://anzlaw.thomsonreuters.com/Document/Ic440c9d3ec1411e698dc8b09b4f043e0/View/FullText.html?transitionType=SearchItem&contextData=(sc.Default) accessed 20 June 2019.

that previous attempts to implement LEI in Australia were hampered by the absence of fixed fee schedules and unpredictability of litigation costs.

England and Wales[41]

In England and Wales, a common law jurisdiction, costs of civil litigation are recoverable by the successful party from the unsuccessful party at the discretion of the court.

Currently, a scheme of fixed recoverable costs, which limits the amount of costs payable, only applies to matters concerning low-value personal injury claims, road traffic accidents, employer's liability accidents and public liability. There is no other statutory limit on costs in this jurisdiction.

In other practice areas, costs are assessed by the trial judge of the substantive proceedings (as a summary assessment) or a costs judge (as a detailed assessment). The standard basis for assessing claimable costs is whether the costs are 'proportionate, reasonably incurred and reasonable in amount'. Indemnity costs (where proportionality is not considered) are only awarded if the circumstances of the case warrant (eg, one party has acted unreasonably).

DAS UK Group has identified that, from an insurer's perspective, expanding the application of fixed recoverable costs will not resolve the uncertainty surrounding costs payable by an insurer because insurers do not set the value of fixed recoverable costs – the legal profession does. Even if a policyholder is successful and the other party to the dispute pays the fixed recoverable costs, the insurer will still be liable to cover any legal costs of the policyholder above that fixed amount. Fixed recoverable costs therefore do not alleviate the uncertainty for LEI providers of potential financial liability stemming from the costs scheme in England and Wales.

Republic of Korea[42]

In the Republic of Korea, a civil law jurisdiction, the costs of a civil litigation dispute are generally borne by the unsuccessful party, but the court has discretion to award costs proportionately if a claim is not 100 per cent successful.

The value of lawyer's fees recoverable as part of costs is capped by the Korean Supreme Court Regulations. If damages awarded to the successful party to a dispute exceed US$100,000, then only 0.5 per cent of the value of damages is recoverable as lawyer's fees.

41 Focus questionnaire response from DAS UK Group (25 June 2019); and Oliver Cain and Danielle Carr, 'Litigation and Enforcement in the UK (England and Wales): Overview of Costs' (Thomson Reuters Practical Law (UK), 2019) https://uk.practicallaw.thomsonreuters.com/7-502-0631?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1#co_anchor_a749962 accessed 26 June 2019.

42 The Korean Supreme Court Regulation No 1829: Regulations on the Fee-shifting Rule (9 June 2003); Kyung Hwan Baik and In-Gyu Kim, 'Contingent Fees Versus Legal Expenses Insurance' (2007) 27 International Review of Law and Economics 351, 355; Jin Yeong Chung and Sungjean Seo, 'Litigation and Enforcement in South Korea: Overview' (Thomson Reuters Practical Law (UK), 1 June 2018) https://uk.practicallaw.thomsonreuters.com/8-381-3681?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1#co_anchor_a532067 accessed 15 July 2019.

Chapter 4: Discussion and Conclusion

This report has identified a number of barriers to the greater implementation, uptake and use of LEI in various jurisdictions in chapter 3, and thus barriers to increasing access to justice. It is clear that these barriers do not stem exclusively from one industry but are a result of how LEI is addressed across many industries and sectors. Consequently, it is not practical to develop policies to address these barriers exclusively for the legal profession to implement in isolation – it must be a *multi-industry approach*.

As such, this report concludes with a discussion of three high-level key barriers stemming from the LEI market that the legal profession, insurance industry, law-makers and policy-makers could address to increase the implementation, uptake and use of LEI, and therefore access to justice.

It could be argued that the following mechanisms may be useful to address the barriers identified in chapter 3:

- increase individuals' awareness of LEI as a purchasable product;
- improve information given to existing policyholders regarding coverage;
- improve data gathering to measure the spread and impact of LEI;
- expand LEI coverage to include family law disputes;
- dispense with panel lawyer schemes to remove the perception of conflicting interests; and
- bar associations and law societies could establish and maintain panels of legal practitioners who meet predetermined qualifications and are prepared to act based on a set scale of fees.

4.1 Lack of awareness and information available to consumers

Section 3.1 identified the manner in which LEI policies are sold to individuals and the subsequent consumer understanding of LEI as a product. This could be arguably seen as the greatest barrier to the increased uptake and use of LEI by individuals in limited LEI market jurisdictions and thus a barrier to increasing access to justice. Beyond an all-encompassing awareness campaign to increase consumer awareness of LEI as both a pre-emptive mechanism (ie, BTE policies) and a safety-net mechanism (ie, ATE policies), the mechanisms suggested below could be of assistance to address this barrier.

Insurance providers that sell BTE policies as an automatic inclusion in an insurance bundle or a bolt-on may wish to promote the existence, benefits and coverage provided by LEI when the primary insurance is being purchased. Insurers may choose to include a separate document outlining the coverage and terms of the relevant LEI policy that has been purchased at the same time as providing the terms of the primary insurance policy (rather than wrapping the terms up in the main policy documents). This could increase awareness among consumers of the existence and limits of their coverage and clearly outline the terms a policyholder is required to abide by. Such a mechanism could decrease the amount of claims rejected for noncompliance with technical terms, such as notification timeframes.

The relevant law societies and bar associations of jurisdictions where LEI exists may choose to inform their members of the awareness of LEI as a product. This could increase awareness among legal practitioners about a mechanism that clients may have to pay legal fees.

As most people who apply for legal aid are already involved in a dispute, the providers of publicly funded legal aid could look to provide those who have been rejected (because they exceed the legal aid threshold) with an impartial fact sheet about the existence of ATE LEI (if it is available for consumers in that jurisdiction). In order to avoid advertising for specific companies, these fact sheets ought to be simple and impartial.

Finally, the insurance industry regulator could introduce a separate indicator specifically for LEI in the annual reporting requirements to measure and track trends in the implementation, uptake and use of LEI in the jurisdiction.

4.2 Gaps in indemnity: family law and criminal law

Another key barrier to LEI increasing access to justice for the 'forgotten middle' was identified in section 3.2: the widespread carve-outs in coverage for family law and criminal law disputes. Existing coverage for individuals in these two areas is limited, and the research carried out for this report has only identified cover for simple family disputes (eg, uncontested divorces) and negligent criminal acts (eg, certain driving offences).

These types of disputes can be highly emotionally charged, involving people's personal lives, belongings and family homes, and in relation to criminal law, an individual's liberty. As such, disputes in these two practice areas can incur significant legal costs for an individual, regardless of socio-economic status, and people can spend well beyond their means on a dispute because it affects them emotionally. Thus, the lack of coverage in LEI policies for family law and criminal law disputes can act as a barrier to accessing justice for a significant proportion of the world's population.

LEI could increase access to justice for the 'forgotten middle' if greater coverage is provided for individuals in family law disputes. Insurance providers selling BTE policies as an automatic inclusion in an insurance bundle or a bolt-on could provide coverage for family law disputes in an incremental manner. Indemnity could be limited initially (eg, low caps and only covering simple matters, such as uncontested divorces, as is the case in South Africa). Coverage could expand and caps increase the longer a policy is held by an individual. In this case, the insurer would have been paid more money in premiums over the time the policy is held, and is still capping the maximum amount the insurer may be liable to pay.

Issues have been identified in Germany specifically in relation to coverage for family law disputes because LEI policies sold as an automatic inclusion or a bolt-on to household insurance typically provide coverage for a whole family. Consequently, both sides of a family law dispute would be covered and a conflict of interest could arise under such a policy. A potential solution to this issue is already standard practice among insurers in the context of spreading the risk of providing LEI protection as part of an automatic inclusion or a bolt-on. As identified in section 2.2(a), two different LEI providers to the primary provider could underwrite the LEI section and cover the different parties to a family law dispute to prevent any conflict of interest.

In criminal law, there exists the ethical conundrum of respecting the presumption of innocence (which varies from jurisdiction to jurisdiction) and thus supporting an expansion of the availability of LEI, against the possible result of unmeritorious defences being run by policyholders facing criminal charges. This has

been addressed by legal aid authorities throughout developed jurisdictions. The use of tests, such as the 'reasonable prospects of success' merits test or the 'prudent self-funded litigant test', as well as the ethical obligations placed upon the accused's lawyers themselves, are powerful disincentives to unmeritorious defences being run.

4.3 Perception of conflicting interests

A final barrier to the greater implementation, uptake and use of LEI is linked to the perception of integrity, scrupulousness and trustworthiness of the legal and insurance industries in each jurisdiction. Arising in the context of the free choice of lawyer (discussed in section 3.3), individuals could potentially perceive a panel lawyer appointed by the insurer or in-house lawyer employed by the insurer as having conflicting interests in their obligations to both the policyholder and insurer.

A fiduciary relationship is established between a policyholder and panel lawyer at the time the parties sign a retainer: legal profession conduct rules and standards will apply to this relationship. An obligation under that fiduciary relationship in many jurisdictions is for a lawyer to act in the best interests of their client. Thus, a panel lawyer has the obligation to act in the best interests of the policyholder.

A panel lawyer appointed to a dispute covered under a LEI policy would likely have an agreement with a referring insurer, under which both parties would have specific obligations. A commercial agreement of this nature would not likely give rise to a fiduciary relationship unless the insurer is also a client of the panel lawyer. In jurisdictions where non-lawyers are not prevented from providing legal services, an in-house lawyer employed by the insurer could be assigned a policyholder's dispute.[43] This in-house lawyer would inherently owe obligations to the insurer as their employer (but unless they are a company director, this would also be unlikely to amount to a fiduciary relationship). Therefore, a panel lawyer or in-house lawyer would also have obligations to the insurer under either a commercial or employment agreement.

It is therefore possible that a panel lawyer or in-house lawyer may not be able to act in the best interests of the policyholder and comply with the obligations owed to the insurer at the same time. This would not create a *legal* conflict of interest unless there is a fiduciary relationship between the insurer and panel lawyer or in-house lawyer. However, a lay policyholder could *perceive* a panel lawyer or in-house lawyer's impartiality to be tainted by their commercial or employment relationship with the insurer to whom they owe obligations.

For example, a panel lawyer could immediately cease working on a policyholder's dispute upon reaching the financial cap of the LEI policy (in accordance with the terms of the commercial agreement with the insurer); but this could result in delays in addressing that policyholder's dispute while they search for alternate funding (which is not in the policyholder's best interests).

Although it is unlikely to amount to a *legal* conflict of interest, the potential for individuals to perceive that their legal representation has conflicting interests in their obligations to both the policyholder and insurer could be a barrier: the legal and insurance professions may choose to address this issue by dispensing with the panel lawyer scheme or in-house lawyer involvement and allowing an individual the free choice of lawyer, but with an insurer maintaining some reasonable administrative control (eg, placement of

43 Focus questionnaire response from RIAD (2 August 2019) 7.

financial caps on hourly charge-out rates, or limits on years of post-qualification experience). The removal of the perception of a policyholder's legal representation having conflicting interests may increase the uptake and use of LEI by individuals, thereby increasing access to justice more generally, and potentially increasing individuals' confidence in the fairness and effectiveness of the legal justice system.

The Committee sees a role for bar associations and law societies in the establishment and maintenance of panels of legal practitioners who both meet the predetermined qualifications (eg, years of practice) and preparedness to act on the basis of a set scale of fees. Moreover, the Committee can see a role for professional associations in negotiating those fees with insurance providers.

4.4 Conclusion

The case study analysis of LEI operation and legal systems in various limited and widespread LEI market jurisdictions in chapter 3 provides practical insight into the common elements present in widespread LEI jurisdictions and the barriers facing the implementation, uptake and use of LEI. Placing focus on the areas of concern identified in this report could be seen as an attempt to address issues hampering the implementation, uptake and use of LEI in limited and widespread LEI market jurisdictions. This may pique interest in the insurance industries of other jurisdictions to explore options for introducing LEI as a purchasable product available to individuals to protect them from unforeseen legal expenses.

The discussion in chapter 4 considered the practical limitations and inherent interests of each industry when proposing potential mechanisms that may help to address the barriers identified in chapter 3. As LEI does not operate in a vacuum, it is important to acknowledge the utility of a multi-industry approach to address the barriers limiting the implementation, uptake and use of LEI.

There is scope for further research in areas related to LEI not explored in this report.

Strong consumer awareness and affordability of LEI may equate to the widespread and popular use of LEI among individuals, and thus increased access to justice. Increasing the scope of coverage for LEI products and removing the perception of conflicting interests of appointed legal representation could also increase levels of uptake and use among individuals once the product is better known to consumers. A push from the legal profession to increase access to justice in an affordable manner could potentially lead to greater trust in the legal profession generally.

There is no one-size-fits-all approach that could help to increase LEI implementation, uptake and use. The appropriateness of mechanisms to potentially increase access to justice for the majority of the world's middle-class population – like LEI – need to be considered in the context of each jurisdiction to avoid situations of legal transplant. Nonetheless, LEI has the potential to facilitate access to legal advice and representation for the 'forgotten middle' in some jurisdictions, and thereby contribute to increasing access to justice.

Bibliography

Kyung Hwan Baik and In-Gyu Kim, 'Contingent Fees Versus Legal Expenses Insurance' (2007) 27 International Review of Law and Economics 351.

Barreau du Québec, 'Barreau du Québec: Frequently Asked Questions' (2019) www.legalinsurancebarreau.com/faq.

Oliver Cain and Danielle Carr, 'Litigation and Enforcement in the UK (England and Wales): Overview of Costs' (Thomson Reuters Practical Law (UK), 2019) https://uk.practicallaw.thomsonreuters.com/7-502-0631?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1#co_anchor_a749962.

Canadian Bar Association, *Reaching Equal Justice: An Invitation to Envision and Act* (Report of the Access to Justice Committee, November 2013).

Jin Yeong Chung and Sungjean Seo, 'Litigation and Enforcement in South Korea: Overview' (Thomson Reuters Practical Law (UK), 1 June 2018) https://uk.practicallaw.thomsonreuters.com/8-381-3681?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1#co_anchor_a532067.

Civil Justice Council, *The Law and Practicalities of Before-the-Event Insurance: An Information Study* (November 2017).

CCBE, *CCBE Position on Legal Expenses Insurance* (31 March 2017).

CCBE, *CCBE position with Respect to the Free Choice of Lawyer in relation to Legal Expenses Insurance* (9 September 2010).

Christian Deckenbrock, 'Versicherung darf Kunden Vorteile versprechen', *Law Tribune Online* (December 2013).

Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), Official Journal of the EU L335/ pg 77 (17 December 2009).

Eighty20 Consulting and Finmark Trust, *Legal Expenses Insurance* (February 2014).

Financial Ombudsman Service, 'Legal Expenses Insurance' (6 March 2019) www.financial-ombudsman.org.uk/businesses/complaints-deal/insurance/legal-expenses-insurance.

Focus questionnaire response from DAS UK Group (25 June 2019).

Focus questionnaire response from RIAD (2 August 2019).

Gesamtverband der Deutschen Versicherungswirtschaft eV, *Statistical Yearbook of German Insurance 2018* (August 2018).

International Association of Legal Protection Insurers, 'Key Issues: Free Choice of Lawyer' (2019) http://riad-online.eu/key-issues/free-choice-of-lawyer.

International Association of Legal Protection Insurers, 'Key Issues: Consumer Survey 2018 Ipsos-RIAD Survey on Legal Disputes and Risk Awareness of Europeans' (2018) http://riad-online.eu/key-issues/consumer-survey.

Ipsos, *Survey Results: Consumer Perception of Legal Issues and Legal Protection Insurance in France, Germany, the Netherlands, Ireland, Hungary, the Czech Republic, Switzerland, and Belgium* (RIAD, March 2018).

Carlos Isola, *Legal Expenses Insurance Origins and Developments: from protection for motorists to access to law* (International Association of Legal Protection Insurers, 2004).

Japan Federation of Bar Associations, 'Support Activities to Remedy the Violation of Rights' www.nichibenren.or.jp/en/about/activities/Remedy.html.

JUSTICE, *Delivering Justice in an Age of Austerity* (April 2015), Annexe: Summary Note on Legal Expenses Insurance.

Eun Hyeon Kang, *National Report: Korea* (International Association of Procedural Law Seoul Conference 2014, Session 3: Effective Access to Justice, 2014).

Matthias Kilian and Francis Regan, 'Legal Expenses Insurance and Legal Aid—Two Sides of the Same Coin? The Experience from Germany and Sweden' (2004) 11(3) International Journal of the Legal Profession 233.

Richard Kreindler, Thomas Kopp and Johannes Schmidt, 'Litigation: Germany' (*Global Arbitration Review*, 29 June 2017) https://globalarbitrationreview.com/jurisdiction/1000215/germany.

Legal Expense Canada, 'Legal Expense Canada: Personal Legal Expense Coverage, Frequently Asked Questions' (2019) https://legalexpensecanada.com/personal-insurance/faqs.

Michael Legg, 'Regulation of Litigation Funding' (University of New South Wales Centre for Law Markets and Regulation, 8 August 2012) https://clmr.unsw.edu.au/article//regulation-of-litigation-funding.

Birgit Müller, Susanne Siegert and Ronald Frank, 'GfK Global Trust Report 2017' (Nuremberg Institute for Market Decisions, March 2017).

Birgit Müller, Susanne Siegert, Rolf Bürkl and Ronald Frank, 'GfK Global Trust Professions Report 2018' (Nuremberg Institute for Market Decisions, March 2018).

Nyman Rudenstam, 'Litigation in Sweden: A Summary Legal Guide' (2016) www.nymanrudenstam.se/wp/wp-content/uploads/2016/05/1138_Booklet_Litigation-In-Sweden-v2.pdf.

Masaki Omoto, Judicial System and Finance for Civil Litigation in Japan (Contribution Paper to the 24th RIAD Congress in Seville, Spain).

Practical Law Dispute Resolution, 'Costs: General Principles' (Thomson Reuters Practical Law (Australia), 2019) https://anzlaw.thomsonreuters.com/Document/Ic440c9d3ec1411e698dc8b09b4f043e0/View/FullText.html?transitionType=SearchItem&contextData=(sc.Default).

Francis Regan, 'Whatever happened to Legal Expenses Insurance?' (2001) 26(6) Alternative Law Journal 293.

Eduardo Reyes, 'Civil Law Disputes: Written in Code' *The Law Society Gazette* (London, 11 April 2016).

Isabel Schoultz, 'Legal Aid in Sweden' in Olaf Halvorsen Rønning and Ole Hammerslev (eds), *Outsourcing Legal Aid in the Nordic Welfare States* (Palgrave Macmillan 2018).

Scottish Civil Courts Review, Report of the Scottish Civil Courts Review (2009) vol 2.

Dean Sobers, 'Legal expenses insurance: is it worth buying?' (Which: Money, January 2019) www.which.co.uk/money/insurance/legal-expenses-insurance/legal-expenses-insurance-reviews-ady0v9f25nw8.

The ARAG Group and HDI Global Specialty SE, 'ARAG launches operations in Australia' (3 July 2019).

The Law Foundation of New South Wales 'Legal Expense Insurance: An Experiment in Access to Justice' (1999).

The Taylor Review, *Report of the Review of Expenses and Funding of Civil Litigation in Scotland* (September 2013).

Lisa Webley, 'The Costs of Complaining and Claiming' in Peter Cane and Joanne Conaghan (eds), *The New Oxford Companion to Law* (OUP 2009).

Alice Woolley, 'Judicial Regulation of the Legal Profession: Correspondent's Report from Canada' (2015) 13 *Legal Ethics* 104.

World Justice Project, *Global Insights on Access to Justice 2019* (June 2019).

World Justice Project, *Measuring the Justice Gap* (May 2019).

World Justice Project, *World Justice Project: Rule of Law Index 2019* (2019).

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