

“Legal Expenses Insurance and Legal Aid – Two sides of the same coin?” The Experience From Germany & Sweden

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INTRODUCTION

Publicly funded legal aid schemes are the most well known and widespread legal services policy that flourished in many western societies in the post war era. These schemes can be understood as attempts by governments to use public subsidies to overcome market failures in the provision of legal services. That is, the governments subsidise the cost of legal services for those citizens who would otherwise not have been able to afford the cost of legal services.² Such legal services are necessary for citizens to be able to effectively defend and assert their legal rights against the state, companies, or other citizens. In this way, it was hoped that many societies would come close to the ideal of equal justice for all regardless of income and wealth. Unfortunately, the ideal of equal justice remains a stubbornly elusive goal in western societies. There are a number of reasons for this. Sometimes legal aid schemes did not, for a number of reasons, live up to expectations but instead appeared to be a bottomless pit of increasing expenditure with minimal extra cases undertaken. Meanwhile while a number of schemes were apparently relatively successful in improving equal justice governments in the 1990s began to lose faith in large public policy programs. In other words, preferring to do less harm rather than more good, many governments steadily reduced expenditure on public programs including legal aid.³

While in some societies the decline of legal aid created a vacuum of mechanisms to ameliorate the effects of market failure, an additional solution had been developed. That is, Legal Expense Insurance (LEI) also developed in a number of societies at approximately the same time that publicly funded legal aid emerged and flourished.⁴ To a certain degree, they are therefore two sides of the same coin, different responses to the same problem of the failure of the market for delivering legal services to all.

More importantly, it needs to be appreciated that governments sometimes fostered a degree of interdependence between these two forms of legal services policy. For example, LEI was sometimes designed to cover the cost of the expense of legal services for particular types of

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² The classic discussion of the rise of legal aid is Cappelletti, M., et.al., eds., (1975) *Towards equal justice: A comparative study of legal aid in modern societies*, Dobbs Ferry: Ocean. More recent scholarship examining legal aid is Regan, F., Paterson, A., Goriely, T. & Fleming, D., eds. (1999) *The Transformation of Legal Aid: Comparative and Historical Studies*, Oxford: Oxford University Press.

³ See the analysis in Regan et.al. eds. (1999)

⁴ For a recent discussion of such insurance in European societies see: Goriely, T. (2000) *Access to Legal Services: A European Comparison*, London: Scottish Executive; for an earlier discussion see: Pfennigstorf, W. & Schwartz, A.M., eds. (1986) *Legal Protection Insurance: American and European Approaches*, Chicago: American Bar Foundation.

legal problems that were excluded by legal aid schemes. Consequently, however, the co-existence of legal aid and LEI the recent decline of public schemes has not always undermined the goal of equal justice to the extent that it would otherwise have done. Significantly, the evidence of the operation of the interrelationship between these two policies in a number of societies also suggests that a similar policy package could be constructed elsewhere in order to continue promoting effective equal justice. The relationship between LEI and legal aid is therefore worthy of further attention for this reason alone.

Nevertheless, as we explain, LEI and publicly funded legal aid are not identical in their response to market failures. In addition, it is important to note that there are different forms of LEI. Finally, as we demonstrate, LEI does not in the societies under study here, offer the same degree of assistance to citizens that a comprehensive legal aid scheme is able to achieve.

In this paper we outline the interrelationship between LEI and publicly funded legal aid in two societies, Germany⁵ and Sweden⁶. It is important to consider these two societies because they offer different models of the interrelationship between LEI and legal aid. In the first section we explain the core features of LEI. In the following two sections we examine the policies in Germany and Sweden respectively, while the final section of the paper reflects on the findings and questions identified in the paper.

CORE ELEMENTS OF LEI

The purpose of LEI is to provide protection to the insured against the costs of bringing or defending legal action where this is necessary to resolve a dispute. The British law describes LEI as follows: "Effecting and carrying out contracts of insurance against risks of loss to the person insured attributable to their incurring legal expenses (including costs of litigation)."⁷ While these definitions seem to be reasonably straightforward, it is necessary to understand that there are different forms of legal expenses insurance and also funding mechanisms which seem to similar to legal expenses insurance, but in fact do not follow insurance principles.

The most important distinction can be made between 'before-the-event' (BTE) and 'after-the-event' insurances (ATE):

- a before the event policy is bought, like any other insurance, to cover the consequences of an event which has not yet occurred. In contrast:

5 For an analysis of the German developments see: Kilian, M. (2001) "Legal aid and access to justice in Germany", in Fleming, D. & Paterson, A., eds., *The challenge of the new century*, ILAG; and Kilian, M. (2003) "Alternatives to public provision: The role of Legal Expense Insurance in broadening access to justice: The German experience", in Moorhead, R. & Pleasence, P., eds., *After Universalism: Re-engineering Access to Justice*, Oxford: Blackwell.

6 For an analysis of the Swedish developments see: Regan F. (2000) "Retreat from equal justice? Assessing Sweden's recent legal aid and family law reforms", *Civil Justice Quarterly*, Vol. 19, pp. 168-184; and Regan, F. (2003) "The Swedish legal services policy remix: The shift from public legal aid to private Legal Expense Insurance", in Moorhead, R. & Pleasence, P., eds., *op.cit.*

7 Nr. 16 Schedule 1 to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001.

- an after the event policy is bought to cover legal expenses in a case where the disputed event has already occurred, although the expenses of the court case resulting from it have yet to be incurred⁸.

The terminology is, however, to some extent, misleading. As a form of insurance, both types cover an uncertain, future risk, i.e. the risk of being liable for the expense of legal costs. "After-the-event" therefore refers to the triggering event that makes assistance or representation necessary. From an insurer's point of view, the risk of being forced to indemnify the insured against legal costs is much higher under an ATE policy as the risk that the insured will become involved in litigation is no longer abstract. A main feature of all insurance schemes is risk-pooling, i.e. the idea that many members of the pool will never draw any payments from it easily off-set the costs for the relatively members of the pool who will at some point need to be indemnified⁹. This principle applies to BTE policies, while it is only partially true for ATE policies: The risk-pool of ATE policy holders only consists of members who are already "at the steps of the courthouse". A much higher percentage of the pool members will need to be indemnified against costs at some point, resulting in much higher premium for ATE policies than for BTE policies¹⁰. Therefore, BTE schemes are much more affordable and from a policy point of view a more valuable funding mechanism in the context of access to justice. BTE insurance dominates the insurance market in both Germany and Sweden, while ATE plays an important role in the United Kingdom as a necessary addition to funding by way of conditional fees¹¹.

While both the Swedish and the German market are dominated by BTE policies, they differ with regard to the way in which the policies are sold. For historic reasons, until the harmonization of the European LEI market by the European Union¹², policies could only be provided in Germany by insurers that did not offer liability insurance at the same time. This strict rule was felt to be necessary by German regulators to avoid any potential conflict of interest for an insurer when faced with an obligation to fund litigation for a claimant and indemnify the defendant from her liability possibly arising from such a claim. As a result, LEI in Germany is offered by specialized insurers as a "stand-alone-product". In contrast, in many other countries – including Sweden - it is offered as an "add-on" to more traditional forms of insurance such as personal liability insurance, car insurance or household insurance¹³. For a small additional premium – or sometimes even at no direct extra cost - the add-on policy covers legal costs arising from legal disputes related to, e.g. the household, personal liability for negligent acts or participation in motorized traffic. The two different distribution channels also have an effect on the market. From a macro-economic point of view, an "add-on"

8 For a discussion of after-the-event-insurance, see Walters/Peysner, Event-Triggered Financing Of Civil Claims: Lawyers, Insurers And The Common Law, [1999] 8 *Nottingham Law Journal*, 1 at 8.

9 Outreville, *Theory And Practice Of Insurance* (1998), p.132.

10 Kilian, (2003) op.cit. p. 31 at 33.

11 For a discussion of the interaction between AEI und CFAs, see Walters/Peysner,, op. cit., White/Atkinson, Personal Injury Litigation, Conditional Fees And After-The-Event Insurance, [2000] 19 *Civil Justice Quarterly* 118.

12 See Directive 87/344/EC; official reporter EC Nr. L 185, July 4, 1987, p.77.

13 For a discussion of LEI in 18 different jurisdictions, see Kilian, Determinanten des europäischen Rechtsschutzversicherungsmarktes, [1999] *Zeitschrift für die Gesamte Versicherungswissenschaft*, p. 21.

approach guarantees access not only to an established market and to a solid customer base, but also to a risk-pool which is usually much larger and much more well-balanced than the risk-pool of a stand-alone product. However, add-on policies are usually limited in their coverage to legal disputes related to the risk covered by the insurance policy to which they are added. Stand-alone policies, in contrast, usually cover the risk of getting involved in whatever legal dispute (although usually a number of disputes are excluded from coverage in the policy¹⁴). The main consequence of these differences – risk-pooling and coverage – is that premiums for stand-alone policies are – unsurprisingly – more expensive. They also require additional marketing efforts as they are not sold in conjunction with a product a lot of consumers are willing to purchase anyway. One phenomenon of the add-on mechanism is, however, that it is sometimes more or less hidden in another policy, resulting in consumers being unaware of the fact that they are covered by insurance once they have become involved in a legal dispute.

From a policy point of view, the question how citizens can be convinced to take out insurance cover instead of relying on legal aid (or other ad hoc funding mechanisms such as speculative fees) is crucial. The most straightforward approach is to make legal expenses insurance compulsory, an approach that has been taken in other areas of life (health, motoring) in the interests of public welfare. While compulsory LEI has been discussed in some jurisdictions, it has not been introduced by legislators. Promotion of LEI has to be achieved, therefore, through indirect incentives. From the point of view of those who fund legal aid, the alternative is to limit access to public funds to encourage the use of insurance. As will be shown in this paper, different options exist whereby the attractiveness of LEI can be improved at the expense of other funding mechanisms.

LEGAL EXPENSES INSURANCE VS. LEGAL SERVICES PLANS

While this paper addresses LEI as a funding mechanism, it is important to recognise that LEI is not only a funding mechanism, but also a form of insurance. This can raise issues of contract law and insurance law which are unique in the context of funding legal services, e.g. problems of non-disclosure, wilful misconduct or subrogation. Attorneys, for example, must constantly be aware that their client has duties to the insurer.

The insurance aspect also demonstrates that not all products available and marketed as “legal insurance” are indeed LEI. This is most notably true for many US-style “legal services plans”¹⁵. A popular definition describes the rationale of LSPs as “legal services provided by an individual licensed or admitted to practice law in the jurisdiction in which the services are rendered, and which are provided in return for a predetermined specific periodic fee.”¹⁶ Prepaid LSPs exist in most parts of the US and have become popular since the 1970's, although the ABA gave up its resistance – centred on the issue of unlawful solicitation of

14 See, e.g., for Germany Kilian (2003) op. cit., p. 31 at 37.

15 For a discussion on LSPs, cf. Stonecipher Robinson, *The Pre-Paid Legal Story*, 2000, pp. 1; Abel, *American Lawyers*, 1989, pp.136; Heid/Misulovin, *The Group Legal Plan Revolution: Bright Horizon or Dark Future?* [200] 18 Hofstra Labour & Employment Law Journal, p. 335; Molvig, *Group Prepaid Legal Service Plans*, [1999] 72 (6) *Wisconsin Lawyer* 10. For an example, see Hallauer, *The Shreveport Experiment In Prepaid Legal Services*, [1973] 2 *Journal Of Legal Studies*, p. 223.

16 See [2000] 1 Consumer Alert, p. 1.

work – only in 1987¹⁷. They are sometimes described as “insurance-like prepaid plans”¹⁸, a term that suggests that LSPs are akin, but not similar to LEI¹⁹. Whether a LSP is a form of LEI will not necessarily be the same for each prepaid plan²⁰. Much depends on the exact structure of the plan. Some US jurisdictions have, however, chosen to regulate prepaid legal service plans as insurance policies. The dominant feature of insurance is a contract of indemnity against contingent loss²¹. This definition is not descriptive of prepaid legal service contracts as they usually give access to a limited number of hours of consultation time, regardless whether or not an insured event has occurred²². *Coughlan* describes the features of typical LSPs as follows²³:

Prepaid legal service plans can take a variety of forms. Most provide at least for telephone advice, which ranges from one call per issue to unlimited telephone calls, depending on the plan. Others provide for actual representation in negotiations or in court. Some plans have limits on the number of hours of representation or the types of matters covered. Some set a fixed rate for representation services beyond the maximum number of hours provided under the plan. This is typically lower than the market rate for legal services. Plans also frequently cover the preparation of wills or handling of residential real estate transactions

LSPs do not focus on funding of litigation, but on legal advice and legal document drafting. Only very few LSPs cover some or all of the costs involved in litigation – which is the basic idea of an insurance, indemnifying against the risk of getting involved in a legal dispute and thus the concept of LEI. The aspect of insurance - indemnifying from costs – distinguishes LEI from LSPs in that all costs, except for an excess to keep petty cases out of the system, are met by a LEI policy. By contrast, LSPs often only give access to lawyers who in return for their membership of the plan, provide panel work to clients for discounted rates. However, if, depending on its features, a particular plan is a form of insurance, then it must comply with insurance legislation rules involving proper capitalization of the plan and so forth²⁴.

LEGAL EXPENSES INSURANCE IN GERMANY

The market

Germany is not the oldest, but by far the largest legal expenses insurance market in Europe. With the exception of Austria – which has a legal system similar to Germany – the per capita

17 See American Bar Association formal opinion 87-355 (Dec. 14, 1987).

18 See Roach, *Allowing Lawyers to Own Their Own Prepaid Legal Service Plans: Lower Prices, Greater Profits*, <http://www.uiowa.edu/~cyberlaw/elp02/brfinfin.html>.

19 See, e.g., the amendment made to the insurance law in the state of New York, which now distinguishes between “legal services insurance” and “legal services plans”; for details see State Of New York Insurance Department, Circular Letter No. 6 (1999) March 1, 1999.

20 See Coughlan, *Prepaid Legal Services*, <http://www.cba.org/CBA/EPIIgram/May2001/>.

21 Brock v. Hardie, 154 So. 690 (Fla. 1934).

22 Kilian, op. cit., p. 31 at 36 (Fn. 27).

23 See Coughlan, op. cit.

24 Coughlan, op. cit.

premium income in Germany is significantly higher than in all other European countries²⁵. Germans spend on average approx. 36 € annually on LEI premiums, compared to 22 € spent in Belgium, 21 € in Switzerland and 15 € in the Netherlands. All others countries are trailing behind, with the French spending only 7 €, the British 2,50 € and the Italians 1.70 €²⁶. These figures are not a result of differing gross domestics products or of a widely differing attitude towards insurance in general²⁷.

It has grown to its current size without intervention by policy-makers or fundamental changes in the legal system: Legal aid is available for all areas of litigation and for representation in criminal cases, subject to a means and merits test²⁸. The legal aid budget, funded on a federal level by the 16 states and administered by the courts, only amounts to 1/8 of the premium income of Germany’s legal expenses insurers. (See Table 1)

Table 1: LEI premium income and legal aid expenditure in Germany

Year	LEI premiums (in mill. €)	legal aid budget (in mill. €)
1980	860	75
1985	1 241	205
1990	1 722	206
1995	2 301	n.a.
1999	2 745	349

Compared to the modest expenditure on legal aid by the public purse, the German population spends approx. 2.8 billion € in LEI premiums per annum, resulting in 25 million legal expenses insurance policies being underwritten annually. Germans spend more money on LEI than on household or fire insurance, although with only 6 per cent of the whole premium income of the industry, LEI is a relatively small market²⁹.

Some features of the German market are³⁰:

- it is estimated that approx. 44 per cent of all households are covered by LEI.
- approx. 50 insurance companies are offering LEI in Germany.
- LEI companies fund approx. 3.6 million cases each year.
- the average case is funded with approx. 540 €.

25 Kilian, (2003) op. cit. , p. 31 at 40.

26 Kilian, (2003) op. cit. , p. 31 at 40.

27 Kilian, (2003) op. cit. , p. 31 at 40.

28 For details, see Kilian, (2001) op.cit., pp. 13.

29 Kilian, (2003) op. cit. , p. 31 at 38.

30 Data taken from the annual reports of the Chairman of the German Insurance Companies Association’s (GDV) Working Group on legal expenses insurance, Andreas Schiller, published annually in the bi-weekly magazine Versicherungswirtschaft (VW). See for example [2000] Versicherungswirtschaft p. 1332; [1999] Versicherungswirtschaft p. 106; [1998] Versicherungswirtschaft p. 962.

- in the past few years, LEI companies had to use between 73-76 per cent of their premium income for funding cases.
- LEI companies pay more than 1.5 billion € in lawyer's fees and 0.5 billion € in court fees each year.
- statistically, every German lawyer is paid 15.000 € in fees p.a. by LEI companies.³¹
- statistically, LEI companies pay 25 per cent of all fees earned by lawyers.
- 80 to 85 per cent of all applications for coverage submitted by policy holders are approved by the insurance companies³².
- LEI covers more than 3 million cases each year. The breakdown: 2.7 per cent social security law; 3.7 per cent family law/law of succession (only advice covered); 13,3 per cent landlord & tenant law; 15 per cent employment law; 19 per cent contract/property law; 22 per cent tort law; 22.6 per cent penal law (mostly traffic law).³³

It is not easy to draw conclusions from this data as to why the LEI market in Germany is so different from other countries. Unlike Sweden, where legislators cut back legal aid to encourage the use of LEI, legal aid and LEI have existed in Germany in the current form without significant changes for decades now. There was at no point state intervention to take away fiscal pressure from the legal aid budget. In contrast, certain features of the German legal systems offered ideal conditions for an insurance-type funding mechanism to flourish without any interference by legislators.

The consumer's point of view

First of all, in Germany alternative funding mechanisms are either unavailable or less attractive for the consumer. Speculative funding of attorney fees is explicitly forbidden by law³⁴, making Germany one of the few jurisdictions in the world where no form of “no win no fee”, “no win less fee” or contingency fee agreements is allowed³⁵. “No win no fee” agreements offered by lawyers follow the same micro-economical principles as LEI policies, leading American commentators to compare large law firms doing “no win no fee” work to insurance companies³⁶: Lawyers pool their risk of receiving no remuneration for a case they take on by cross-subsidizing the unsuccessful cases with the successful cases. To guarantee a

31 Based on the number of admitted lawyers (105.000) in the year (2000) in question. Of those, quite a large number do not work in private practice or are in fact retired. v.an Bühren, *Rechtsschutz-Versicherung – Partner der Anwaltschaft* [1991] *Anwaltsblatt* p. 501 at 504, assumes that at the most 50 per cent of all lawyers deal with legal expenses insurance companies. This would bring the annual income from fees paid by legal expenses insurance companies up to 30.000 € for each lawyer.

32 Heinsen, [1999] *Versicherungswirtschaft* p. 101 at 106.

33 One interesting aspect is that while coverage for employment law only has a 15 per cent share, it is responsible for 30 per cent of all fees paid by LEI companies. This can partly be explained by the fact that contrary to the general rule, there is no cost-shifting in first instance court proceedings before employment courts.

34 For details, see Kilian, *Das anwaltliche Erfolgshonorar*, [1994] *Das juristische Büro* pp. 641

35 For a list of other jurisdictions, see Kilian, *Das internationale Privatrecht des Erfolgshonorars*, [2003] *Anwaltsblatt*, Heft 7.

36 Cf. Brickman, *Contingent Fees Without Contingencies*, [1989] 37 *UCLA Law Review* 29 at 44; Fleming, *The American Tort Process*, Oxford 1988, p. 198; Drummonds, *The Law And Ethics of Percentage Contingent Fees in Oregon*, [1993] 72 *Oregon Law Review* 859 at 874.

sufficient return, high risks (i.e. weak cases) are screened and declined. *Drummonds* describes the underlying principle of “no win no fee” agreements as follows: “Taking more of a client’s recovery than the particular case justifies and diverting that money to the cases of other clients whose claims are less worthy.”³⁷ The absence of “no win no fee agreements” from a legal systems means that consumers have to turn to options available on the commercial market, i.e. offered by insurers or claims assessors. In contrast, some American authors explain the absence of a developed system of LEI in the United States with the widespread use of contingency fees. Consequently, in the United Kingdom, when options were considered to reduce the costs of the legal aid system, LEI was evaluated as an alternative to the introduction of conditional fees. These examples demonstrate that LEI and speculative funding interrelate to a greater extent than other funding mechanisms.

To rely instead on legal aid as an alternative funding mechanism can only be an option for those who are able to pass a stringent merits and means test. While the merits criterion does not differ from similar thresholds set up for other speculative fee agreements or LEI, the means test locks out a large number of citizens who do not qualify for legal because of their disposable income and assets. Even for those with very little disposable income, the contributions to the cost of their case can be significant. While this limiting factor is not unknown to other legal aid schemes, from the point of view of the indigent the most serious drawback is that a legal aid grant covers only one’s own costs. As Germany operates a two-way cost-shifting regime, the party supported by legal aid has to meet the opponent’s costs – attorney fees and court fees – if a case is lost. The cost-risk is therefore significant³⁸. In contrast, an LEI policy covers the costs of the insured and the opponent if the case is lost (if the case is won, the costs of the insured are met by the losing opponent (or her insurance policy)). Therefore, insurance cover takes away the cost risk from litigation completely, legal aid only partly. As a result, legal aid is of greater importance only in areas for which LEI is unavailable: Family law and criminal law³⁹.

Finally, a loophole known in most jurisdictions is unavailable in Germany: Neither lawyers nor non-lawyers are allowed to offer legal services, or *pro bono publico*. Lawyers are required to charge minimum fees according to a scale of fees, while non-lawyers are not allowed to provide legal services at all because of extensive monopoly rights of the legal profession. Even those who are willing to take matters in their own hands before that background are only allowed to do so before district courts. Before the high courts, the courts of appeal and the supreme representation by a lawyer is required.

The supplier’s point of view

While the features of the German legal system described above help to explain why LEI is an attractive option for the consumer, it does not necessarily explain why the market is also attractive for insurance companies. Insurance companies only offer insurance products if

37 Drummonds, op. cit., [1993] 72 *Oregon Law Review* 859 at 874.

38 For a discussion of the different alternatives for reducing the cost risk in the German system of civil litigation, see Mümmler, *Beschränkung des Prozeßkostenrisikos*, [1971] *Das juristische Büro*, pp.1

39 In 2000, a first insurance company began offering coverage for family law disputes (subject to rather stringent conditions), so that the status quo might change in the future.

these are in demand *and* offer a reasonable prospect of a positive return from a commercial point of view.

To make an insurance product viable, it is of paramount importance for an insurer to be able to calculate the risk that is carried by a policy underwritten. The bigger and/or less calculable the risk, the higher the premium has to be to refinance the assumption of risk by the insurer and the less attractive the policy becomes for the consumer. Most insurance products insure against a pecuniary loss defined by market prices, i.e. the value of an automobile, the contents of a household, a building or a loss which is at least capped by law. Where this control mechanism does not apply, premiums tend to escalate, (a good example is the current crisis of professional liability insurance for doctors in the US and Australia). If, like in almost all jurisdictions, lawyers are charging hourly rates and therefore are simply “running the meter”, it is extremely difficult to calculate the risk for an insurer. While the “going” hourly rate is easy to find out, its multiplier, the number of hours that will eventually be charged, is the great unknown. Calculation can only be based on experience, although this will only be a very rough guideline. In Germany, party/party costs (and court fees) are based on a statutory scale of fees that defines the remuneration, taking the value of the matter and the services rendered into consideration. From an actuarial point of view, the calculation of the risk a policy carries is no great challenge if a scale of fees defines the maximum payout. While the scale of fees is not binding for lawyer/client costs, in the marketplace it is de facto binding for work for private clients. As these clients are often insured and the insurance policy will only meet party/party costs (which are, unlike in other jurisdictions, quite reasonable), lawyers usually find it difficult to negotiate a top-up fee.

In addition to the requirement that the insured risk must be calculable and reasonable to bring down costs for a premium, insurers must make sure that they spread their risk as much as possible, i.e. create a sizeable risk-pool. As has been noted, this is best achieved through “piggy-backing”, i.e. adding the LEI onto a policy that already has access to a well-balanced risk-pool. In Germany, the prohibition of add-on policies made it necessary to create a risk-pool from scratch. Germany has been able to achieve this over a period of more than 75 years and with the sheer size of the risk-pool has long overcome the problem of risk-adverse selection: The fundamental requirement for the existence of insurance contracts is the existence of a large number of similar loss exposures. What makes insurance feasible is the pooling of many loss exposures into classes (classes of business), according to the theory of probabilities.⁴⁰ The risk-pool of a legal expenses insurer, therefore, will need some people who will not be litigious to off-set the bigger risk resulting from those who are more litigious than others. While it is possible to influence the composition of the risk-pool to some extent, most of these measures will reduce the attractiveness of the product: A relatively straightforward approach to an unbalanced risk-pool by an insurer is to raise premiums to off-set the above-average risk. This will result in premiums being more expensive than is desirable to be able to offer a sensibly priced product attractive to the masses. Other mechanisms that counter-balance risk-adverse selection can be introduced. For example, insurance companies can charge excesses, introduce minimum claim levels, reduce the coverage of policies or tighten cost-control by providing services in-house. Little can be learnt

40 Outreville, op. cit. at 132.

from Germany in this context as the structure of the risk-pool is mainly a historic achievement.

The problem of risk-pooling and adverse selection, however, has to be born in mind when contemplating the introduction of LEI into the system of access to justice elsewhere. Experience from other countries shows that this often-underestimated problem can ultimately lead to market failure. Examples are the market failure of BTE in England in the 1970s and the failed attempt of the Law Society of Scotland to promote stand-alone BTE in Scotland in conjunction with selected insurers.

LEI and its inherent limitations

While the aspects analysed above clearly encourage the use of LEI by the consumer and the offer of such policies by the insurance industry, as an insurance product LEI cannot be a “catch all”-funding mechanism: LEI has its inherent limitations particularly with regard to advice (instead of representation) and in the field of criminal and family law.

First, all types of insurance define the circumstances under which the policy can be invoked by requiring the occurrence of an “insured event”. The occurrence of this (external) event will trigger the rights of the insured, allowing her to consult a lawyer. From an insurance point of view, the “insured event” is the core element of insurance, justifying the assumption of a potentially high risk, and distinguishes insurance from, e.g., subscription to a scheme that gives access to services when desired. If the requirement of the occurrence of an insured event is waived in such schemes, the off-set usually is a strict limitation of the services that can be used. This principle of insurance is by definition incompatible with giving the insured access to general advice. The minimum requirement of an “insured event” is, for example, that claims are made, the insured has committed or suffered from a tortuous act, violated contractual obligations etc. General advice unrelated to such events of legal life is, in contrast, not covered as long as it cannot be related to what the policy describes as the “insured event”. LEI, therefore, is focused on representation and ultimately on litigation. While the reason for this are to some extent the strict monopoly rights lawyers enjoy in Germany – as they prohibit, e.g., telephone advice services provided by insurers as part of a LEI policy – the main reason are more fundamental principles of insurance.

Another inherent limitation of the effectiveness of LEI follows from the principle that all types of insurance companies decline cover if the insured event is triggered by a wilful act of the insured. Therefore, criminal law is excluded from LEI policies (except for negligent acts committed as, e.g., the driver of an automobile), forcing defendants in criminal proceedings to rely on private funding or legal aid. Family law is another area where LEI mechanisms do not work because insurance principles conflict with the characteristics of such proceedings: LEI usually is a family insurance, which, in the first place, means that the policy would have to cover both parties in family law proceedings. Second, even if cost-shifting mechanisms would apply for family law proceedings, there is no prospect for the insurer that the insured party could win and be indemnified by the losing opponent, limiting the insured risk to be forced to pay-out. Third, with more than 50 per cent of all marriages statistically facing divorce, the risk-pool for a policy covering family is so unattractive that, taking the other conflicting

aspects into consideration, premiums would have to be extremely expensive to make the policy feasible. Consequently, it is rare that LEI will cover family law disputes and when they are covered there are strict conditions⁴¹.

As criminal law and family law are rarely covered by LEI, legal aid plays an important role in these two areas of legal life in Germany. Both family and crime-related proceedings are sensitive for society and require financial assistance by the government for those who are unable to fund advice or representation privately. The biggest portion of the legal aid budget is spent on criminal and family law, demonstrating that funding mechanisms are not necessarily competing, but complementing each other. In addition, a state-financed scheme under which (limited) advice from lawyers can be sought had to be established in 1980 (the so-called “Beratungshilfe”) to cover needs not met by other funding mechanisms.

LEI and society

While there is agreement that funding problems must be overcome to improve access to justice, there is also agreement that only just cases should be allowed into the system. As an insurer analyses cases from a purely economic point of view, there is some risk that weak cases which are inexpensive for the insurer – under the German system cases with a small monetary value as these result in little remuneration for the lawyers involved – are approved as the costs for close scrutiny might be disproportionate to a pay-out. This raises the question if LEI leads to frivolous litigation. While this allegation has been made in Germany over many years, empirical research shows that the allegation is not supported by facts. Overall, legal expenses insurance is responsible for an 4 – 8 % increase in litigation.⁴² This data includes claims which are justified, but would not be brought to court if they were not covered by legal expenses insurance. The types of cases most responsible for additional litigation were court proceedings in relation to parking offences which usually involved fines of 50 € or less.⁴³ It could be derived from the statistics that LEI policy holders were indeed encouraged to go to court over such “trivia” which would otherwise not be pursued on a cost-benefit basis. As a result of the empirical research, coverage for parking offences has since been excluded from policies.⁴⁴ In other areas, no additional litigation in substantive numbers was verifiable⁴⁵.

From a policy point of view, it is important to know whether consumers in the lower income brackets take up LEI, given that they have a limited budget for insurance and the choice between different insurance products on offer. Empirical data shows that while the distribution of private liability insurance and household insurance policies more or less reflects the overall income structure of the population, LEI is taken out to a much lesser degree by those with little income⁴⁶. In fact, the least priority seems to be given to LEI if only

⁴¹ For an example of an LEI policy that does offer limited cover for family law disputes see Regan, F. (2001) What ever happened to Legal Expense Insurance?“, *Alternative Law Journal*, Vol.26, pp.293-297

⁴² Jagodzinski et al., *Rechtsschutzversicherung und Streitverhalten*, [1993] *Neue Juristische Wochenschrift* p. 2769 at 2775 (the academics who carried out the research).

⁴³ Braun, *Strukturanalyse der Rechtspflege* [1994] *Mitteilungen der Bundesrechtsanwaltskammer* p. 6 at 10.

⁴⁴ Heinsen, *Rechtsschutzversicherung und Anwaltschaft im Umbruch* [1999] *Versicherungswirtschaft* 100.

⁴⁵ For a more detailed discussion, see Kilian, (2003) *op. cit.*, pp. 45.

⁴⁶ For a more detailed discussion, see Kilian, (2003) *op. cit.*, pp. 45.

limited financial resources are available. The implication of this data is that it is difficult to replace legal aid by a system of voluntary LEI.

Table 2: Holders of insurance policies by income brackets in Germany⁴⁷

income in DEM 1 DEM = 0.51 €	population 14-64 yrs	LEI	PLI	PAI	RLI	HHI
all	50.887.485 = 100 %	21.490.898 = 42,23 %	26.232.283 = 51,55 %	15.633.893 = 30,72 %	7.094.329 = 13,94 %	33.169.411 = 65, 18 %
below 2.000	3.494.919 = 6,9 %	674.443 = 3,1 %	1.470.590 = 5,6 %	567.952 = 3,6 %	233.266 = 3,3 %	2.058.826 = 6,2 %
2.000 - 2.999	7.839.766 = 15,4 %	2,586.210 = 12,0 %	3.899.599 = 14,9 %	1.713.998 = 11,0 %	775.863 = 10,9 %	5.223.130 = 15,7 %
3.000 - 3.999	11.394.537 = 22,4 %	4.477.693 = 20,8 %	5.877.289 = 22,4 %	3.372.215 = 21,6 %	1.582.152 = 22,3 %	7.804.269 = 23,5 %
4.000 - 4.999	11.673.442 = 22,9 %	5,273,840 = 24,5 %	6.024.348 = 23,0 %	3.965.522 = 25,4 %	1.734.282 = 24,5 %	7.702.849 = 23,2 %
5.000 - 5.999	6.120.697 = 12,0 %	3,012.174 = 14,0 %	3.296.150 = 12,6 %	2.195.743 = 14,0 %	826.573 = 11,6 %	3.788.037 = 11,4 %
more than 6.000	10.365.124 = 20,4%	5.461.467 = 25,4 %	5.664.307 = 21,6 %	3.823.534 = 24,5 %	1.942.193 = 27,4 %	6.597.371 = 19,9 %

LEI = legal expenses insurance
PAI = personal accident insurance
HHI = household insurance

PLI = personal liability insurance
RLI = risk life insurance

Table 2 shows that those in the lower income brackets tend to have a less comprehensive range of insurance cover than those with a higher income.⁴⁸ However, the chart also reveals that the population within the lower income brackets, i.e. those who are most likely to qualify for legal aid, do not give LEI such a priority as those within the higher income brackets do. While the distribution of private liability insurance (PLI) and household insurance (HHI) policies more or less reflects the overall income structure of the population, - resulting in a coverage of the lower income brackets only slightly below the overall average - LEI is taken out to a much lesser degree by those with little income. In fact, the least priority seems to be given to legal expenses insurance if only limited financial resources are available. If this would be true also for countries with a developed legal aid system, it would be difficult to promote voluntary LEI as a replacement for legal aid as those who would no longer qualify for legal aid would be more reluctant to purchase insurance than those with a higher income (who never qualified for legal aid in the first place).

⁴⁷ Data taken from the “Marken-Profil 9 / Stern” (2001) empirical research study carried out by MMA, IFAK and Ipsos. The study is based on a sample of 10.035 Germans aged between 14 and 64 (resulting in a multiplication factor of 5.071) and was carried out in early 2001.

⁴⁸ The chart only includes types of insurance that are typical risk insurance products (thus excluding non-risk life insurance), are purchased voluntarily (thus excluding vehicle insurance) and as stand-alone products (thus excluding bolt-on type of insurance sold in addition to public health insurance or state-run pension schemes).

The assumption that people with lower income prioritise when they take out insurance cover is proven by research into what those without insurance cover intend to purchase over the next three years. (See Table 3)

Table 3: Intention of non-insured to take out insurance cover over the next three years.⁴⁹

income in DEM 1 DEM = 0.51 €	population 14-64 yrs	LEI	PLI	PAI	RLI	HHI
all	50.887.485 = 100 %	1.470.590 = 100 %	1.430.022 = 100 %	1.064.910 = 100 %	370.183 = 100 %	1.546.655 = 100 %
below 2.000	3.494.919 = 6,9 %	106.491 = 7,3 %	111.562 = 7,8 %	50.710 = 4,6 %	20.284 = 5,9 %	177.485 = 11,4 %
2.000 - 2.999	7.839.766 = 15,4 %	228.195 = 15,5 %	182.556 = 12,7 %	152.130 = 14,4 %	50.710 = 13,9 %	304.260 = 19,6 %
3.000 - 3.999	11.394.537 = 22,4 %	263.692 = 18,0 %	258.621 = 18,0 %	207.911 = 19,7 %	131.846 = 36,5 %	314.000 = 20,4 %
4.000 - 4.999	11.673.442 = 22,9 %	339.757 = 23,2 %	294.118 = 20,8 %	278.053 = 20,5 %	111.562 = 30,3 %	315.000 = 20,5 %
5.000 - 5.999	6.120.697 = 12,0 %	228.195 = 15,5 %	177.485 = 12,5 %	162.272 = 15,0 %	15.213 = 4,7 %	106.491 = 6,8 %
more than 6.000	10.365.124 = 20,4%	299.189 = 20,5 %	400.609 = 28,2 %	273.834 = 25,9 %	30.426 = 8,7 %	329.615 = 21,4 %

As Table 3 demonstrates, with the exception of household insurance, LEI shows the biggest gap between the actual and desired possession of a policy for people in the two lowest income brackets. Meanwhile, those with a higher income feel a bigger need to take out life insurance, a type of insurance traditionally targeting the better-off population. Those who are not too well-off seem to recognize the usefulness of LEI, but do not give it a high priority when actually spending their limited resources allocated to their insurance budget. Thus, cutting back legal aid budgets with the hope that those excluded by legal aid in the future will take out insurance cover would be a rather optimistic approach. It seems to be more likely that a fair number of those losing legal aid cover would be left totally unprotected against the expense of legal services.

LEI IN SWEDEN

Background

While Germany has the largest LEI market, Sweden is noteworthy for two reasons for its approach to the relationship between LEI and publicly funded legal aid. First, for the last quarter of the twentieth century Sweden's legal services policy combined very generous legal aid and widespread LEI. The policy combination meant that Sweden came close to attaining the ideal of equal access to legal services for all. Sweden is also noteworthy because its reform of legal services policy in the late 1990s marked a significant retreat from the achievements of the previous quarter of a century. The reforms effectively meant that most Swedes were no longer able to rely on legal aid but instead were required to rely on LEI.

⁴⁹ Data taken from the "Marken-Profil 9 / Stern" (2001) empirical research, op. cit.

When Sweden constructed one of the most highly developed welfare states in the post World War II period the welfare programs, including legal aid, were based on two characteristics. First, universal, or including all or most of the population, and second, comprehensive, or including a wide range of assistance. This meant that all, or at least most, of the population were eligible for comprehensive programs including health, parental support. Similarly, assistance under the public legal aid scheme introduced in the early 1970s was offered for most legal problems including advice and minor assistance as well as assistance related to litigation. It also included most of the population depending on the cost of the legal problem.⁵⁰ Consequently, the Swedish legal aid was for the last quarter of the twentieth century was probably the generous and comprehensive scheme internationally.⁵¹

Swedish legal services policy was unusual, however, because an additional quasi universal form of protection from the costs of legal services complemented the legal aid scheme. After pressure from the labour movement in the 1960s, most Swedes also had automatic access to LEI that was integrated at no additional cost into the policy for their household building and/or contents insurance.⁵² The ATE component of the LEI policies was designed to cover many legal problems in court in addition to those relating to the house. The automatic inclusion meant there were no extra costs to purchase the LEI, nor did the strategy rely on the purchasing discretion of the householder.⁵³ Consequently, the low income groups as well as all other people purchasing household insurance in Sweden had LEI policies.

The labour movement had promoted LEI in the 1960s because of concerns about the inadequate legal aid available at that time, particularly for middle income earners. The LEI policies were therefore designed to fill the gaps in the legal aid scheme rather than to compete with it. LEI therefore covered the legal problems (including libel), social groups (including the rich) and legal costs excluded by legal aid (such as costs awarded by the courts in unsuccessful civil cases). The combination of legal aid and LEI meant that Swedes had comprehensive protection from legal costs. Consequently, at least for the last quarter of the twentieth century the ideal of equal access to legal services for all was probably closer to being a reality in Sweden than in any society in history.

In the 1980s and 1990s, however, Sweden embarked on a course of cuts to welfare programs. The cuts included incremental changes to legal aid and later a major redesign of legal services policy. While the general approach was one of minor cuts to welfare programs, this was ultimately not the case for legal aid. Initially the incremental legal aid changes included restrictions on eligibility, higher client contributions and more types of excluded cases but later reforms were far more extensive.⁵⁴ The late 1990s redesign of legal services policy included: a major funding cut to legal aid and a retreat from quasi universal and

⁵⁰ The 1972 reform is discussed in detail in Bruzelius, A. & Bolding, P.O. (1975) 'An introduction to the Swedish public legal aid reform', in Cappelletti, M., et.al., eds., *Towards equal justice: A comparative study of legal aid in modern societies*, Dobbs Ferry: Ocean; and summarised in Regan (2000) op.cit.

⁵¹ Commentators in the 1970s were well aware of the highly developed nature of the Swedish scheme.

See Cappelletti, et.al., eds., op.cit.

⁵² Bruzelius & Bolding, op.cit.

⁵³ For a discussion of the difficulties involved in selling LEI policies to individual consumers see: Pfennigstorf and Schwartz, op.cit.

⁵⁴ For details of the incremental changes see Regan (2000) op.cit.

comprehensive coverage, and a shift from public to private protection for legal expenses. The combination of these changes meant that in contrast to other welfare reforms in Sweden, the core features of legal services policy were substantially transformed.⁵⁵

Sweden's unusual combination of public *and* private protection for legal expenses also had a curious although perhaps unintended consequence. When the government cut public legal aid expenditure in the late 1990s, it was able to point out that the population continued to have some protection from legal expenses under their LEI policy. Indeed, in the lead up to the changes in 1997 the government highlighted this fact in advertisements about the reforms. The government was able, therefore, to substantially reduced legal aid spending without provoking public protest from any quarter apart from the Swedish Bar Association.⁵⁶

The 1997 reforms

The complex package of reforms that took affect from 1 December 1997 affected a number of related areas of legal services policy.⁵⁷ First, the new legal aid act tightened the rules governing legal aid eligibility so that most Swedes were no longer eligible for assistance in most civil and family court cases. In addition, legal aid was generally restricted to the 'deserving poor' alone rather than including most of the population as was the case under the previous scheme. Legal advice services were also revised. First, a more expensive fee was levied for legal advice with no provision for reductions or waivers. Importantly, all legal aid applicants also had to demonstrate that they had tried to resolve their problem in an advice interview prior to applying for assistance in court.

Legal aid was also effectively abolished for most family law disputes for most Swedes. Instead, 'Cooperation talks', an alternative dispute resolution procedure, was introduced to process such disputes.⁵⁸ These talks were designed to divert most family law disputes involving children out of the courts to the local social welfare office. In contrast to legal aid, Cooperation talks were also offered to all Swedes free of charge and were not means tested. In other words, they were designed to remove many family law disputes from the courts not merely those funded previously by legal aid. In addition, legal aid was abolished for most simple and non-contested divorce applications. Applicants were instead required to lodge a relatively simple 'do-it-yourself' application form.

In a related policy change, most Swedes were henceforth required to use their LEI policy rather than legal aid for most civil and family law disputes. As explained above, most had LEI policies as part of their household insurance but the cover was not comprehensive because LEI was designed to complement not compete with legal aid. The financial conditions of the LEI policies also did not compare favourably to those of legal aid. For

⁵⁵ Kautto, M., Heikkila, M., Hvinden, B., Marklund, S. & Ploug, N., eds. (1999) *Nordic Social Policy: Changing welfare states*, London: Routledge.

⁵⁶ Regan (2000) op.cit.

⁵⁷ The changes to legal aid were introduced in: Rattshjälpslagen (1996:1619) (Legal Aid Act 1996). For a more detailed discussion of the 1997 reforms see: Regan (2000), op.cit.

⁵⁸ A recent overview of family law in Sweden, including Cooperation talks is: Ryrstedt, E. (2000) 'Family and inheritance law', in: Bogdan, M., ed. (2000) *Swedish law in the new millenium*, Stockholm: Norstedts Juridik

example, claims on LEI require policy holders to pay an up-front € 110 fee, a 20% contribution towards the estimated cost of the case, and a ceiling of € 11,007 on the amount that can be claimed on an LEI policy per year. Meanwhile, other conditions, including a two year waiting period, an exclusion on divorce and a two year exclusion on claims arising from divorce, also acted to restrict claims on the policies.

While the reforms did not initially generate public concern, they were criticised by the Swedish Bar Association. In response to the concerns, the government modified the act over the following three years. For example, it introduced free legal aid for children in custody or other proceedings, low income Swedes can now receive legal advice for half the normal fee and in some cases, at no cost to the applicant; and the scale of client contributions toward the cost of legal representation was reduced for low-income earners.

What was the impact of this remix of legal services policy? In particular, what was the impact on Swedes access to legal services? A Swedish government appointed evaluation committee released its final report in 2001 that was generally positive about the 1997 reforms.⁵⁹ It concluded, for example, that the government achieved its goal of reducing public expenditure on legal aid. As Table 4 demonstrates, expenditure was reduced by nearly 50% from €39.7 million in 1994/95 to €20.7 million in 2000 as a result of significantly reducing the number of legally aided cases.

Table 4 Impact of 1997 reforms on Expenditure and Number of Cases

Form of legal assistance	Year	Expenditure	
		(€ mill)	No of cases
1. Legal Aid	1994/95	39.7	60,000
	2000	20.7	14,200
2. LEI policy	1997	15.9	10,775
	2000	25.6	14,000

The committee was also positive about the impact of shifting most of the population from legal aid to LEI. While public the sector costs were reduced this resulted in increased in costs for the private insurance industry. However, the increase in the insurance industry costs was much smaller than the fall in public expenditure. From 1994/95 to 2000, the costs to the

⁵⁹ Utvärdering av rättsbjälpslagen (1996:1619) – redovisning av ett regeringsuppdrag, Domstolsverket-rapport 2001:6. (*Evaluation of the Legal Aid Act of 1996 – Government Assignment Report*, National Courts Administration Report No: 2001:6). The data in the following discussion is either taken from the report or provided by colleagues in Sweden.

insurance companies for legal expense claims increased by nearly 70% from €15.9 to €25.6 million. This means, however, that the private sector the insurance companies' costs did not increase by a similar amount to the fall in public expenditure. As explained below, this suggests some disputes are now either funded by alternative means or that Swedes now abandon many cases before they get to court.

The redistribution of costs from the public to the private sector is, not surprisingly, reflected in a much lower volume of legally aided cases. The number of cases decreased from about 60,000 to 14,200 in 1994/95 and 2000 respectively. The biggest fall was in family law cases because legal aid was abolished for most such cases by the 1997 reforms. As discussed above, it was to some extent replaced by other mechanisms such as Cooperation talks and 'do-it-yourself' divorce applications for non-contested divorces.

The fall in the number of legally aided cases also resulted in an increased volume of cases funded by LEI policies. The number of LEI funded cases increased from 10,775 in 1997 to 14,000 in the year 2000. The small increase in LEI funded cases is due, among other things, to the impact of Cooperation talks and the DIY divorce applications. The reform did not however alter the breakdown in the types of cases funded by LEI. The largest proportion of cases funded continues to be family law (30%), real estate disputes (25%), claims for damages and debts (25%) and disputes over wills (9%).

The report concluded that the LEI policies are significantly less generous and comprehensive than legal aid. The companies impose an upfront excess and a percentage contribution. The ceiling on the cost of legal fees that can be claimed in a year is also restrictive because it was set in the 1970s at €11,007. In other words, the effect of inflation and rising cost of legal fees means that the amount of legal work that can be claimed on a policy in a twelve-month period has steadily declined. The policies naturally do not include waivers for low-income earners in the way that is possible with legal aid fees and charges. The committee recommended that the government and insurance industry examine this issue in the future.

The report also concluded that some Swedes are actually worse off under the new policy mix. The problem is that most, but not all Swedes have insurance policies on their household that includes a component of LEI. The committee noted that 97% of Swedes between 20 and 64 years had such insurance but young people under 25 and immigrants had lower rates of household and therefore LEI than the rest of the population. If people in these two groups experience complex legal problems and are not eligible for legal aid they are at risk of incurring very expensive legal services. Importantly, however, a number of concerns raised prior to the introduction of the 1997 reforms had not been eventuated. For example, the insurance companies had not reduced the coverage under of typical LEI policies, nor had they increased the cost of the LEI component of household insurance policies.

What were the consequences of the reforms for the ideal of equal access to legal services? As explained below the reforms raise a number of doubts about the Swedes' access to legal services. A comparison of the assistance offered by public legal aid before and after 1 December 1997, with that offered under LEI policies suggests that the reforms reduced access to legal services in a number of important ways. The assistance is summarised in Table 5.

Table 5 Swedish Legal Aid and LEI before and after the 1997 reforms

<i>Feature</i>	<i>Legal aid pre 1/12/1997</i>	<i>Legal aid post 1/12/1997</i>	<i>LEI policies</i>
Proportion of the population included	Quasi universal – 85% Swedes qualified depending on cost of case	Mean - in general the deserving poor alone qualify but others can in some circumstances	97% of the population have LEI policies
Legal advice - 1. Available	Yes in all cases	Yes in all cases	Not offered
2. Fees charged	Yes but could be waived or reduced for low-income earners	Yes flat fees for all and no reduction/waivers allowed until 2000	Not applicable
Legal aid for litigation 1. Coverage	Comprehensive – most types of cases included	As before but most family cases excluded except in special circumstance	Many cases excluded including divorce
2. Fees charged	Graduated fees linked to applicants' income	Yes linked to applicants' income	Upfront fee €1,10 plus 20% of cost of case
3. Maximum expenditure per case	Yes	100 hours of advocats work	Ceiling of €11007 per year

As Table 5 demonstrates, the priority of the package of 1997 reforms was to reduce public expenditure and at the same to ensure that Swedes were assisted with the cost of legal services for specific types of court cases. Eligibility under the legal aid scheme was reduced dramatically but continues to assist people with complex legal disputes in court. The LEI policies continue to serve that same purpose. Surprisingly, however, the government downgraded access to legal advice and minor assistance. Many legal problems that are outside of litigation are now a curiously low priority for Swedish legal services policy. The high cost of legal advice fees from legal aid and the absence of legal advice under the LEI policies means that unless people want to initiate litigation they are left to their own resources when they experience commonly occurring non-litigation legal problems. Family law is the only area where the government ensured access to assistance for non-litigation problems by establishing the Co-operation talks mechanism. However, as the international empirical research regularly reminds us, what people often want and need is help to work out whether or not they have a legal problem and, if they do, what their options and the consequences of those options might be.⁶⁰ Unfortunately, the reforms give little priority to such assistance. On the contrary, the high costs of legal advice from legal aid and its absence under LEI means that people are actively discouraged from seeking advice. In this way it seems, that together the policies actually discourage or push people away from using lawyers and the legal system. As Table 5 makes clear, this was not the case under the

⁶⁰ For example, see the recent survey research reported in: Genn, H. (1999) *Paths to justice: What people think and do about going to law*, Oxford: Hart Publishing.

previous comprehensive legal aid scheme. The Co-operation talks for family law disputes also reinforces the pressure not to use lawyers and the courts.

The pressure not to use lawyers and the courts for advice and for litigation in many civil and family cases also conflicts with other aspects of Swedish legal services policy. For example, while civil legal aid was reformed in 1997, legal aid in criminal matters, or Public Defence Counsel, was not.⁶¹ Instead, it retains the comprehensive and generous characteristics typical of most Swedish social policies. Public Defence Counsel is offered free of charge to all Swedes for all serious cases and no means, assets or other eligibility tests are applied. The Swedish government is also in the process of introducing legislation to establish a mechanism for group actions in some civil matters in court.⁶² In other words, this reform is designed to improve access to legal services and litigation while legal aid/LEI reforms are designed to discourage people from using lawyers and courts.

There may also be several unintended consequences of the policy package. Unfortunately, the main likely unintended consequence in the future is an increase litigation and therefore also increased legal aid expenditure because a number of Swedes are now left to their own devices when they experience common legal problems. For example, will the cases that are apparently missing from the courts that were referred to above eventually find their way to court only to resulting in new and more complex and costly litigation in the future? The higher fees for legal advice from legal aid, together with the absence of legal advice under LEI may have this consequence because people may decide not to get advice, accept things that they did not understand and then later initiate legal action. Such cases may also later qualify for legal aid and be more costly to resolve. If people are discouraged from seeking legal advice to clarify their options the longer term effects might be the opposite of what was intended.

It is too early to identify all the consequences of this package of reforms. But in the future it will be interesting to see whether they stimulate more complex and expensive litigation and increased legal aid expenditure in family and other types of non-criminal disputes. One of the sober lessons from other policy reform processes around the globe is to expect unintended and often negative consequences that are often precisely the opposite of what was intended.⁶³ Future legal aid expenditure in Sweden may be an example of this rule.

CONCLUSION

There are four important points to highlight from this paper. First, we have demonstrated that it is possible for governments and societies to develop a more comprehensive legal services policy package which responds to market failures in the delivery of legal services. The legal services policy can include a combination of publicly funded legal aid that is to some extent interdependent with LEI. The combination of policies can mean that the ideal of access to

⁶¹ Lindblom, P. H. (2000) 'Civil and criminal procedure', in: Bogdan, ed. (2000) *Swedish Law in the New Millenium*, Srockholm: Norstedts.

⁶² The proposal is discussed in: Lindblom, P. (1998) 'Individual litigation and mass justice: A Swedish perspective and proposal on group actions in civil procedures', *American Journal of Comparative Law*, Vol.XLV, pp. 805-832.

⁶³ For example, see Rein, M. (1976) *Social Science and Public Policy*, Harmondsworth: Penguin.

legal services for all regardless of income is more effective than relying solely on the private market for legal services. But as the evidence from the two societies discussed in this paper demonstrates, LEI on its own, is for a number of reasons, unable to come close to achieving that ideal. In other words, while in some respects LEI and legal aid are two sides of the same coin, they are in practice very different and subsequently have different consequences for equal access to legal services. The reasons include the fact that LEI is by definition limited in the protection it offers and the fact that those who need LEI most, the low income citizens, are the least likely to purchase such insurance. This conclusion needs to be recognised by governments and justice system administrators in many societies, particularly the English speaking, where LEI has not taken root in the same way it has in many European societies.

Second, while the combination of LEI and publicly funded legal aid can respond well to market failures it is by no means a permanent policy panacea to the problem of devising policy responses to promote equal access to legal services. It is probably inevitable that many governments will embrace a legal services policy package that includes LEI. But this does not resolve the problem, rather it raises new questions about the nature of the relationship between LEI and publicly funded legal aid. This relationship is by no means uncomplicated as the experience of Germany and Sweden has demonstrated, nor is it removed from the ebb and flow of political currents. As the experience in Sweden demonstrates, given particular political and economic circumstances, governments have not qualms in deciding to shift responsibility for legal services policy away from publicly funded legal aid and onto LEI.

Third, one of the most obvious weaknesses of LEI, at least in its ATE form, is the lack of legal advice and minor assistance. Research tells us that most people rarely go to court and therefore that their need for legal services is not usually for assistance with complex litigation. Instead what most people most often need assistance with is the commonly occurring non-litigious legal problems of every day life. The future development of LEI and legal aid needs to take account not only of the importance of assisting people with litigation but also their non-litigation legal problems. Without this twin focus neither LEI nor legal aid will adequately promote equal access to legal services.

Finally, the paper suggests an important lesson for legal aid administrators in societies where LEI has not already emerged as part of legal services policy. If there is likely to be an interdependent relationship between LEI and publicly funded legal aid, at least to some degree, then legal aid administrators would be wise to play a central role in shaping and determining the nature of that relationship. They would also be wise to maintain close links with government to monitor the development of that relationship in order to ensure that the goal of equal access to legal services does not become completely subsumed to desires to reduce public expenditure.