CIVIL JUSTICE COUNCIL

THE LAW AND PRACTICALITIES OF BEFORE-THE-EVENT (BTE) INSURANCE

AN INFORMATION STUDY

November 2017

TABLE OF CONTENTS

Members of the Working Group v
Terms of reference vi
Preface viii
Executive Summary x
List of abbreviations xv
Acknowledgements xvi

A. Why BTE matters 3
1. Reasons for the study 4
2. The interplay with legal aid 9
3. The interplay with other forms of funding 14

B. A solicitor's obligations re BTE insurance 17
1. Enquiring about BTE 17
(a) The *Code of Conduct* 17
(b) Professional negligence suits 18
(c) Relevant case law 19
(d) Further publicity 22
2. The BTE insurance limit of indemnity 23
3. Disclosure of BTE insurance 24

C. The scope of coverage of BTE insurance 25
1. Consumer BTE policies compared 25
2. Those covered by the BTE policy 42
3. The money paid out under BTE insurance 42
(a) Own costs and disbursements 42
(b) Adverse costs 43
(c) Damages 45
(d) Communication costs 47
(e) Income foregone 48
(f) Fines 48
4. The limits of indemnity 49
5. The insurable events 50
(a) An international snapshot 50
(b) The areas of law typically covered by consumer BTE policies 51
6. Exclusions from BTE insurance 58
(a) Common exclusions 58
(b) Group litigation 59
7. BTE insurance for businesses 62

D. Assessing the BTE claim: Relevant factors 64
1. Initial merits assessment of the claim 64
2. Grounds for declining to fund the claim at the outset 66
3. Grounds for withdrawing or terminating BTE cover 69
(a) The general grounds 69
(b) The 'TCF' obligations upon insurers 70

E. Legal helplines 74
1. Legal websites 74
2. Legal helplines 76
(a) Coverage 76
(b) Usage 77
3. The Irwin Mitchell legal helpline: A case study 81
(a) The staffing of the helpline centre 81
(b) The hours of operation 82
(c) The areas covered 83
(d) The media used to handle queries 85
(e) The 'client' relationship 86
(f) Payment operations 87
(g) Quality assurance 88
4. Conclusion 89

F. The distribution and take-up of BTE insurance 90
1. How BTE is sold in the United Kingdom 90
2. Impact of distribution channels on transparency and awareness 96
3. The extent of market penetration 97
4. Stand-alone BTE insurance policies 102
(a) Business policies 102
(b) Consumer policies 105
5. The Federation of Small Business (FSB) package 107
6. Affinity groups and BTE insurance 110
7. Employer-provided BTE insurance 118
8. Union membership 118
9. BTE for the low socio-economic demographic 123
10. Mandatory BTE insurance 125
11. The 'block insurance' proposal 127
(a) The proponents' views 129
(b) The opponents' views 131

G. Awareness of BTE insurance 134
1. The importance of awareness 134
(a) Existing cover 134
(b) Available products 135
2. Potential measures to increase awareness 136
(a) An advertising campaign 136
(b) Policy wording 137
(c) Solicitors' obligations re BTE insurance 138

(d) Other measures 139
(e) Individual responsibility 139

H. The pricing of BTE: Some relevant issues 141
1. Observations about the BTE premium 142
(a) An international comparison of pricing 142
(b) Pricing the premium 143
(c) Filing fees 144
2. The impact of the Jackson reforms on pricing 145
3. The potential impact of fixed recoverable costs on BTE 146
(a) The impact of fixed recoverable costs 147
(b) 'CPR-lite'? 149
4. Potential impact of anticipated rise in small claims limit and whiplash reforms 150
5. Tax implications 151
(a) IPT tax 151
(b) Tax deductibility 151

I. Freedom of choice of lawyer 152
1. The relevant legislative provision 152
2. Reservations and concerns about the interpretation of Reg 6 153
(a) Judicial uneasiness 153
(b) The Council of Bars and Law Societies of Europe 156
(c) The Law Society of England and Wales 157
(d) Non-panel law firms 160
3. The BTE Insurers' view 161
4. What the BTE policies provide 162
5. The Financial Ombudsman's view 164
6. The quality of BTE panel solicitors 166
(a) The arguments against panel law firms 166
(b) The arguments in favour of panel law firms 167

J. Miscellaneous issues 170
1. Alternative business structures 170
2. Dual insurance cover 172
(a) Multiple BTE policies 172
(b) Different types of insurance 173
3. Making a complaint about BTE insurance 173
4. Conflicts of interest on the part of BTE insurers 176

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MEMBERS OF THE WORKING GROUP

The taskforce for the Civil Litigation Review Working Group (BTE Insurance) consisted of the following members:

1. Professor Rachael Mulheron (Chair: Dec 2016–Sep 2017) (Queen Mary University of London, and CJC member)
2. Maura McIntosh (Deputy Chair) (Commercial litigation specialist, Herbert Smith Freehills LLP)
3. Lesley Attu, Product Development Manager, ARAG
4. Steven Beahan, Commercial Litigation partner, Irwin Mitchell Solicitors
5. Kate Fairhurst, Policy Advisor, Law Society
6. Peter Holland, Head of Legal Expenses, DWF LLP
7. Richard Miller, Head of Justice, Law Society
8. Rocco Pirozzolo, Underwriting Director, Quantum Legal Costs Cover Limited
9. Rebecca Scott, Citizen's Advice, and member of the Civil Justice Council
10. Dr John Sorabji, Principal Legal Adviser to the Lord Chief Justice and Master of the Rolls, and member of the UCL Judicial Institute
11. Matthew Williams, Head of AmTrust Law, AmTrust Europe

Robert Wright, Head of Policy, Civil Litigation Funding and Costs, and Access to Justice, Ministry of Justice, was an observer of the Working Group's discussions.

The Secretariat was provided by Peter Farr, Andrea Dowsett, Alexandra Morton, and Graham Hutchens of the Civil Justice Council.

TERMS OF REFERENCE

1. General

The broader terms of reference for the Civil Litigation Review Working Group, of which BTE insurance forms the second topic for consideration, are as follows:

'CIVIL LITIGATION REVIEW'

1. To consider and review a series of discrete topics relating to civil litigation and, in particular, those issues relating to the funding of claims and of furthering the CPR's overriding objective of enabling the court to deal with cases justly and at proportionate cost.
2. To appoint a small, core membership for the group, to be supplemented by additional expert members for the purposes of particular subject areas which are undertaken by the group during its work programme.
3. To maintain a rolling work programme, with an emphasis on flexibility, to allow the group to respond to new topics as they emerge, but with a proposed initial focus on the following:
   a. Hot-tubbing of experts; and
   b. The role which BTE insurance might play in improving access to justice.
4. To consider 4–5 topics consecutively, during a period of approximately 18 months, starting in April 2016, and reporting on each as work is concluded on that topic.
5. To provide relevant information obtained by, and reports produced by, the group, for the assistance of the Post-Implementation Review of the LASPO Act Part 2 reforms, which Review is due in early 2018.

2. Specific

In addition, the Working Group prepared terms of reference specific to the BTE Insurance project, as follows:

'BEFORE THE EVENT INSURANCE'

1. To investigate the current (and potential) application of 'Before-the-event' (BTE) insurance in the current and potential civil justice landscape; the content, coverage, and take-up of various BTE policies which are available to consumers and to businesses; and any gaps in the market in which BTE insurance may not be available or procurable;

2. To investigate the ways in which BTE claims are assessed, and how BTE policies may operate within FCA guidelines, following acceptance of a claim;

3. To thereafter report to the Civil Justice Council in October 2017 on the Working Group's findings, including (as appropriate) recommendations as to how such policies might be further employed, and their coverage extended, to increase access to justice.

These terms of reference are available, on the Civil Justice Council website, at <https://www.judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/cjc/working-parties/civil-litigation-review-working-group/>.

PREFACE

The Working Group formed for the purposes of this project drew upon a great deal of expertise. Several members have been associated with the BTE insurance market for many years, others are lawyers who have regularly acted on behalf of BTE Insureds or who have defended such claims, and others are highly-respected insurance industry representatives. Specialist policy advisors at the Law Society of England and Wales, the Ministry of Justice, and Citizen's Advice, were also able to bring their unique perspectives to this qualitative study.

The Working Group met seven times in 2017: 26 January; 2 March; 30 March; 4 May; 28 June; 11 September; and 18 September. The meeting held on 28 June was a 'Visitors' meeting'. A number of people attended, to provide their insights to the Working Group about BTE insurance, and how it could be improved, amended or widened in its take-up or coverage. Two other visitors also attended the meeting on 30 March. These visitors' details are provided under 'Acknowledgements'. The Working Group considered this input vital, to gain a better and more thorough understanding of the issues arising in the BTE market.

In this report, several BTE insurance policies are cited or referred to. All of these are available online. The Working Group should not be taken to be supporting or endorsing any of these BTE insurance policies over and above those which are not referenced herein; they are simply referenced to illustrate the points made throughout the report.

This report also refers to a number of previous reports and studies on BTE Insurance from various sources, some of which are now several years old. The Working Group noted that in recent years there have been a number of changes relating to BTE Insurance which have been aimed at enhancing consumer protection, including a prohibition on opt-out selling and increased requirements regarding information provision which are discussed later in this report. References to older reports and studies should be read with that in mind.

In some instances, references are made throughout this report to the content of some short papers that the aforementioned visitors prepared prior to or following their attendance on 30 March or 28 June. Those

papers remain on file and are not available for wider dissemination beyond the auspices of the Working Group, but the most relevant excerpts from those papers have been reproduced herein. Otherwise (and unless noted to the contrary), all documents referred to in this report are in the public domain.

EXECUTIVE SUMMARY

1. Before-the-event insurance (BTE insurance) is insurance which the insured has already purchased prior to the prospect of any legal claim arising; and may cover some or all of the insured's potential costs liabilities in any subsequent proceedings (including own-side and adverse costs); and which costs are not insured under any other policy of insurance. For cover to be available in most cases, there will be a requirement that sufficient prospects of prosecuting or defending the claim exists.

2. This report was commissioned to explore the role which BTE insurance plays, and may potentially play, in enhancing access to justice in England and Wales. The Working Group's membership comprised a range of professional practitioners (whether from the legal profession, the Law Society, the insurance industry and academia) with expertise and experience in BTE. The report aims to provide a comprehensive and up-to-date picture of the BTE market, and how it might develop. It contains a range of information, interviews, case studies, BTE policy analysis, and insights drawn from the marketplace. However, the report does not make recommendations. Policy-makers, commercial interests and Government are better placed to study market conditions and to develop policies or proposals to expand BTE, and to expand an awareness of its benefits (and limitations), in the consumer and business marketplaces.

3. **Role of BTE** – BTE is not, and is not designed to be, a substitute for legal aid, following recent or historic reductions in legal aid scope and eligibility. However, it offers large numbers of people access to significant assistance, including via legal helplines (and, less commonly, legal websites) which may help to nip legal concerns and issues 'in the bud' prior to the commencement of any legal proceedings, and by managing the risk of the BTE Insured's claim or exposure to claim. A challenge is addressing low levels of awareness of helplines and other services, among those paying for BTE cover (often indirectly, as part of wider insurance cover) or among potential users of BTE insurance products *(Section A)*

4. **Solicitors' obligations** – relevant regulatory and professional practice requirements oblige solicitors to ascertain whether clients have BTE insurance cover; and, where there is such cover available to a client, to advise on the scope of coverage, any limitations and exclusions, and the risks arising from that form of funding. There is presently no legal obligation to disclose to an opponent that a party is in receipt of BTE funding *(Section B).*

5. **Scope of Coverage** – BTE insurers differ in respect of the types of legal grievances and issues for which BTE cover is provided. Discerning businesses will 'shop around' to find the type of cover and policy conditions that suit them best. Consumer BTE insurance is purchased by a significant percentage of individuals via home and/or contents insurance, motor vehicle insurance, or travel insurance. This insurance is commonly bundled or 'added on' to another insurance product. So the nature and extent of such cover is dependent on the provider of the main insurance product. Unlike the position in many European jurisdictions, stand-alone consumer BTE policies are practically non-existent in the UK jurisdiction. The market has been adaptive to social trends (e.g. emerging coverage for cyber-bullying). There are common areas of exclusion from scope – such as fines, payment of damages, involvement in group litigation, and disputes arising before the policy was purchased, to nominate a few. However, the scope of a typical BTE insurance policy is broader than many consumers would imagine – for example, family members are typically covered as part of the insurance, and loss of income incurred due to jury service is also commonly included. *(Section C).*

6. **Assessment of BTE claims** – the almost-uniform approach to the merits assessment of a BTE claim is to apply a balance-of-probabilities assessment of the prospects of the claim succeeding. If this threshold is met, then the claim will be funded by the BTE insurer. The report sets out 10 common reasons for funding being declined. The report also explains the most common grounds for an insurer withdrawing or terminating BTE insurance cover. This section should offer a useful reference source for consumers and businesses *(Section D).*

7. **Legal Helplines** – regarded by experts as 'the jewel in the BTE crown'. Helplines offer initial and ongoing advice and support for BTE insureds on a wide range of legal problems, disputes and queries. Such helplines are not confined to BTE insurers (such assistance is also commonly offered by, e.g., trade unions, and entities such as the Federation of Small Businesses). Helplines are sometimes supplemented by legal websites with further information and resources, such as downloadable forms. Helplines are typically conducted on a '24/7 basis', as the Irwin Mitchell case study in this section

demonstrates. While some people (e.g., those with language difficulties) may not find them as useful, legal helplines have huge scope to assist consumers and businesses in the early stages of a dispute *(Section E).*

8. **Distribution and take-up of BTE** – the household and motor (personal) BTE has been a well-established market for years; the business (or commercial) BTE insurance is a market which is evolving and growing significantly. Although such insurance has been available in some form for many years, there has been a noticeable increase in both the take-up and awareness of the coverage offered by these products, by micro-businesses, SMEs and larger businesses. These entities may purchase such insurance as stand-alone BTE policies; or may be covered by an 'affinity group' BTE package; or such entities may be offered BTE insurance protection via a package which is purchased as part of the business's subscription to an industry representative group. Another option is trade union legal services' packages as part of membership subscriptions (*Section F).*

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9. **Can BTE help people on low incomes?** There are particular challenges in making BTE insurance available to those who are in the lower socio-economic demographic, and who may not have access to the usual insurance products through which they could acquire BTE insurance. Organisations such as Fair Finance are seeking to implement strategies to overcome these barriers. Mixed views existed among the Working Group membership as to whether it would be feasible for housing associations and social housing landlords to take out 'block BTE insurance policies' to cover social housing and other tenants. Ultimately, the provision of BTE insurance is a business; and the potential problems of adverse selection, and the prospect of claims against the entity which has paid for the acquisition of the block BTE insurance policy, are acknowledged. However, the assistance provided by BTE insurance can ease the workload for those, in the advice sector, who are thus able to concentrate on helping those in need and who may be least able to afford legal advice *(Section F).*

10. **Mandatory BTE insurance** – the Working Group was not persuaded that certain 'common categories' of potential defendants (e.g., the drivers of motor vehicles, employers) should be compelled to take out BTE insurance which covers their own legal costs, and also the legal costs of those whom they may negligently injure, or who may otherwise have claims against them (*Section F*).

11. **Awareness** – there appears to be a general lack of awareness of BTE insurance among consumers, in particular — both of its existence as part of their insurance policy, and of the scope of the BTE coverage. Recent reforms to prohibit 'opt-out selling' of BTE insurance are welcomed, and may have reduced this difficulty. A promotional campaign by BTE insurers to raise awareness in the consumer market appears to be unlikely, given the costs of such a campaign, and the lack of brand recognition. There are important structural (and apparently cultural) differences in the marketing of BTE which exist between the UK jurisdiction and some other European countries, where the take-up of stand-alone or bundled BTE insurance policies is far higher. Any lack of awareness of BTE insurance which the BTE insured already holds as part of another insurance policy may result in part from a failure by consumers to read the material provided by the BTE insurer. A number of stakeholders in this area – lawyers, brokers, insurers, the Law Society, and the advice sector – all have an important role to play in ensuring that an awareness of the existence, and the terms, of BTE insurance is maximised *(Section G)*.

12. **Pricing of BTE** – consumer BTE insurance is relatively cheap, with premiums in the region of £15–£25 per consumer BTE policy purchased through home and/or contents insurance, and which purchases cover in the region of £50,000. Increased usage of BTE insurance in due course may lead to an increase in the premium-per-policy. The Working Group accepted that the 'price comparison website approach' to consumer buying meant that people were increasingly looking to trim costs on services, such as insurance cover, rather than consider paying extra for additional benefits. Many consumers do not expect to need insurance coverage for legal costs incurred in the future, and in any event are unsure of what is covered. Wider developments in civil justice, such as the extension of fixed recoverable costs, may affect the utility and attractiveness of BTE *(Section H)*.

13. **Choice of lawyer** – a common criticism of BTE insurance is that consumers find themselves, in practice, being compelled to use a lawyer from the insurance company's panel, with little exercise of choice, at least until the claim form is issued. With a widely drawn membership, the Working Group acknowledged the controversy associated with this legal interpretation of Reg 6 of the Insurance Companies (Legal Expenses Insurance) Regulations 1990, but confined itself to setting out the way in which the current system operates, the case law which has arisen on this issue, and the arguments for and against that practice of restricting the choice of lawyer until the claim is commenced *(Section I)*.

14. **Other issues** – the final section of the report deals with miscellaneous, but important, issues such as the complaints processes which apply for BTE services, and how conflicts of interests are addressed *(Section J)*.

LIST OF ABBREVIATIONS

The following abbreviations are used throughout this report:

ATE insurance	after-the-event insurance
B	billion
C	Claimant/s
CFA	conditional fee agreement
CJC	Civil Justice Council of England and Wales
CPR	Civil Procedure Rules 1998
D	Defendant/s
FCA	Financial Conduct Authority
FRC	fixed recoverable costs
FSA	Financial Services Authority
FSB	Federation of Small Business
LAA	Legal aid agency
M	million
MOJ	Ministry of Justice
reg	Regulation
SRA	Solicitors' Regulation Authority
[13.2]	this designates para 13.2 of the relevant report/article

For those tables reproduced at pp 42, 43, 91 and 136 of the report, the abbreviations of countries in the tables follow the usual domain extensions designated for particular countries, a sample of which are provided below:

AT – Austria
BE – Belgium
CA – Canada
CH – Switzerland
CZ – Czech Republic
DE – Germany
EE – Estonia
FR – France
GR – Greece
IT – Italy
JP – Japan
NL – Netherlands
PL – Poland
ZA – South Africa

ACKNOWLEDGEMENTS

The Working Group was assisted by a number of visitors to its meetings, who gave of their time and expertise to assist with the Working Group's understanding and appreciation of specific issues pertinent to BTE Insurance. Each visitor was asked to provide a short document, covering their main points, so as to help Working Group members direct any questions which they wished to raise for that visitor at the meetings. The visitors are noted in the Schedule below:

30 March 2017			
Name	***Organisation***	***Time***	***Reason for visit***
Antje Fedderke	Secretary-General, RIAD (International Association of Legal Protection Insurance)	11.00 am	To discuss the take-up of BTE in jurisdictions other than in the UK, and to provide input on the operation of BTE insurance generally
Warren Smith	Federation of Small Business	11.30 am	To discuss the membership package for FSB members, and its BTE component
28 June 2017			
Name	***Organisation***	***Time***	***Reason for visit***
Helen Buczynsky and Jeanette Sainsbury	Unison	10.40 am	To discuss the availability of BTE that unions provide for their union members, the types of claims, exclusions, insights as to how the cover is working for union members
Faisel Rahman	Founder and principal, Fair Finance	11.00 am	To discuss this business that offers a range of financial products and services designed to meet the needs of people who are financially excluded; and how to provide financial products to those who often don't have home and contents insurance, via hire purchase-type arrangements, e.g.; discussing how to increase the reach of BTE to this demographic

Mark Harvey	Head of Specialist Personal Injury, Hugh James Solicitors	11.20 am	To discuss the availability of BTE for group litigation, where it has been used and where it has been precluded, the types of issues arising when using BTE in that context, and changes in that area
Rob Adams	Euna (Underwriting Manager)	11.40 am	To discuss the design, underwriting and distribution of specialist BTE package products for particular sectors/occupations (e.g., for those who operate recruitment or employment agencies)
Eddie Coppinger and Elizabeth Davey	Legal Advice Centre (University House)	12.00 pm	To discuss their experiences of BTE insurance for social welfare legal services, and how BTE could be improved, or made more extensive in coverage for those on social welfare, including via housing associations and local authorities

The insights derived from each visitor's input are contained, where appropriate, throughout the report. The Working Group is particularly grateful to the visitors for their assistance.

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CIVIL JUSTICE COUNCIL

THE LAW AND PRACTICALITIES OF BEFORE-THE-EVENT (BTE) INSURANCE

AN INFORMATION STUDY

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A. WHY BTE MATTERS

The difference between BTE and ATE insurance was recently described by Picken J in these terms:

PM Law Ltd v Motorplus Ltd [2016] EWHC 193 (QB) [6]:
A typical BTE policy is one which covers the insured person against what might be labelled 'own side' and adverse (or opponent's) costs of litigation in the event that an event occurs in the future and the insured person seeks to recover loss which is not insured under any other policy. An ATE policy is one which is issued after the event, typically in circumstances where the insureds enter into a conditional fee agreement (or 'CFA') with solicitors. The ATE policy will cover the risk of failing in the litigation and being liable for adverse costs and, in some cases, disbursements.

A convenient definition is also provided as follows:

Practical Law Glossary (Thomson Reuters):
Before the event insurance or BTE insurance is insurance which the client already had before the prospect of legal proceedings arose (for example, as part of the client's house insurance or car insurance policies) and which covers some or all of the client's potential costs liabilities in any subsequent proceedings.

It has been said that BTE insurance was first sold in the UK in 1974 (per R Lewis, '***Litigation Costs and Before-the-event Insurance: The Key to Access to Justice?***' (2011) 74 *Modern L Rev* 272, 278), but that, prior to that, it was unheard of:

> There had been little demand for it partly because people were often unaware of the risk of incurring legal costs and, in any event, there was a competitor — the protection offered by legal aid. Insurers also faced difficulties in pricing the insurance when the cost of litigation was much less predictable in the UK than in other countries.

Working Group representatives also made the point that legal expenses insurance (whether BTE or ATE products) began to emerge, following the enactment of the ***Criminal Law Act 1967***. Section 13(1) abolished maintenance and champerty as criminal offences, and s 14(1) provided that no one could be liable in tort for any conduct amounting to maintenance or champerty either.

BTE insurance is now a mature market, with several providers offering a range of BTE insurance for both consumers and businesses.

1. Reasons for the study

It was considered by both the Civil Justice Council and the Ministry of Justice that the time was right for an information study to be undertaken of BTE Insurance. There were several reasons for this.

First, there has been no specific study undertaken of the topic by either of these bodies for a decade. The report, ***The Market for BTE Legal Expenses Insurance*** (a study prepared for the MOJ, July 2007), contained both qualitative and quantitative research, whilst proposing some 'future issues' for the UK BTE market. Four years later, Consumer Focus also undertook a study: L Bello, ***In Case of Emergency: Consumer analysis of legal expenses insurance*** (2011), to which the legal expenses insurers responded: ***Promoting Access to Justice through Before the Event Legal Expenses Insurance*** (Jan 2012). The BTE market has changed somewhat since those days, and it was considered apposite to consider the topic again.

Secondly, in his review of costs and funding in 2009, Sir Rupert Jackson recommended that BTE insurance be developed:

Review of Civil Litigation Costs: Final Report (Dec 2009), ch 8:	
[4.6]	... I recommend that both insurers and the Department for Business, Innovation and Skills should make serious efforts to draw to the attention of SMEs, and especially micro businesses, the forms of BTE insurance available and the costs. In my view, a greater take-up of BTE by small businesses would be one way of promoting access to justice.
...	
[5.6]	In my view, BTE insurance as an add-on to household insurance is a beneficial product at an affordable price, established on the basis that the many pay for the few. ... the uptake of BTE insurance by householders should be actively encouraged.
...	
[7.1]	I recommend that positive efforts should be made to encourage the take up of BTE insurance by SMEs in respect of business disputes and by householders as an add-on to household insurance policies.

The Working Group noted that, following the Jackson reports, the Government endorsed these recommendations regarding the greater use of BTE insurance. In its report, ***Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations: The Government Response*** (Mar 2011), the Ministry of Justice stated that:

MOJ, ***The Government Response*** (Mar 2011) (citing the previous Consultation Paper, ***Proposals for Reform of Civil Litigation Funding and Costs in England and Wales*** (15 Nov 2010):	
[28]	We know that, even where individuals have BTE insurance, CFAs with recoverable success fees are nevertheless used by claimants, for example in RTA claims. However, the Government is aware that BTE insurance can be and is used as an alternative to ATE insurance as a means of covering the risk of having to pay the opponent's legal costs. There is no reason why that should not continue, but on a more widespread basis. Sir Rupert suggested that positive steps should be made to encourage the take up of BTE insurance more widely, including for small businesses. As stated in the consultation paper, 'The Government therefore supports Sir Rupert's view on BTE insurance and would welcome a change in culture so that there is a greater use of existing BTE policies and the development of the market to expand BTE insurance coverage.'

As Sir Rupert said (at [3.8] of the ***Final Report***), post the LASPO reforms, 'the world in which BTE insurers operate in the future will be very different from the present world.' This Working Group set about the task of determining just **how** different.

Thirdly, some rather disparaging viewpoints are often expressed on the topic of BTE insurance. For example, the well-known costs commentator and practising solicitor Kerry Underwood stated, in 2014, that: '[t]he good news is that BTE insurance is withering on the vine', critiquing many aspects of this particular form of funding (per '***Insurers at it Again (1) and (2)***', 21 Jul 2014, Wordpress.com, available at: https://kerryunderwood.wordpress.com/2014/07/21/insurers-at-it-again-2/). Furthermore, some lawyers have expressed disquiet about, inter alia, the use of panel solicitors and the 'panel rates' that the BTE Insurer is willing to pay. For example:

David Greene, ***'A Hollow Choice?'*** (*New Law Journal*, 18 Nov 2011), extract:
There has been, with the development of before-the-event (BTE) insurance (which itself may be knocked by the ban on referral fees), an increasing tension between the insurer and the insured about who should represent the insured in any litigation, despite the overriding freedom to make that choice. This tension has arisen in two main respects: first, when the freedom to choose in accordance with the Directive and Regulations applies; and second, the rates at which a lawyer of choice may be remunerated. Indeed, rates payable can be used to impose the insurer's choice upon the insured.

These particular issues are addressed later in this report in Chapter H, 'Freedom of Choice of Lawyer'.

Finally, the Law Society has expressed several reservations about aspects of BTE insurance on numerous occasions. In its ***Access to Justice Review: Final Report*** (Nov 2010), at pp 25–26, the Society expressed the view that there could be scope for further encouragement of BTE insurance, in line with Jackson LJ's recommendations, but that there should be a full review of the way in which legal expenses insurance is provided and proper consumer protections built in.

In that report, the Law Society made two recommendations:

We, therefore **recommend** that:

- **There should be a review of the provision of LEI and a proper, enforceable code of practice created dealing with such issues as freedom of choice of lawyer, referral fees and the scope of cover.**

- **In the light of that review, discussions should take place with the insurance industry on the feasibility of additional cover for areas, particularly where there is no monetary compensation available and so a contingency arrangement is inappropriate.**

Neither of these recommendations was carried out subsequent to that report. Hence, in light of its ongoing concerns, the Law Society undertook a web-based survey about BTE Insurance in April 2014, entitled: ***Legal Expenses Insurance Survey***. Whilst that survey has not been formally published, a copy of it was made available to the Working Group for the purposes of this project. The table below summarises the key aspects and findings of that survey:

Law Society of England and Wales, ***Legal Expenses Insurance Survey*** (2014), at p 2:

THE SURVEY:

A web survey was conducted between 23 April and 7 May 2014. The link to the web survey was emailed to those members of the Law Society recorded as undertaking employment law and/or personal injury law. The link was also advertised on a number of websites (including those of the Employment Lawyers Association, APIL, MASS, and the Law Society's own website).

In total, 695 individuals took part in the survey. Responses from three individuals were excluded from the analysis on the grounds that they were not representative of the respective membership base. Of the 692 respondents completing the survey, 91% of worked in private practice. In total, 73% respondents were responding on behalf of themselves, whilst the other 27% responded on behalf of their firm.

KEY FINDINGS:

- respondent lawyers in the majority of both BTE-funded employment cases and personal injury cases have experienced problems relating to BTE cover;
- one of the principal concerns of respondents was that clients were being expressly limited in their choice of lawyer, particularly through policy documentation and the low fees available for non-panel law firms;
- the most common deficiency in BTE policy documentation, in the view of respondents, was that the BTE policy summary implicitly limited the choice of lawyer to panel law firms;
- 89% of respondents to the survey indicated that they had taken at least one action to complain about the BTE policy under which they were acting for their client;
- 20% of all respondents had actually charged for giving advice to a client on the terms of the client's BTE policy, demonstrating the common complexity of these policies.

Various specific concerns arising from that survey conducted by the Law Society are dealt with subsequently in this report. However, in relation to the Law Society's comments regarding the need for proper consumer protections, insurer representatives on the Working Group have pointed out that the insurance industry is regulated by the FCA and there are significant protections built in to the provision of BTE insurance, including in relation to the information that must be provided at the point of sale.

2. The interplay with legal aid

Whilst BTE was never a substitute for legal aid — for many individuals and businesses who can access BTE insurance would **never** have been entitled to legal aid support — the Working Group was conscious of the fact of a real reduction in the availability of legal aid for civil and family actions over recent years pursuant to the Access to Justice Act 1999, and then again since the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act (the LASPO Act) in 2013. This was also a particular factor that warranted a re-examination of whether BTE was a realistic source of access to funding — either to prosecute or to defend a legal claim — for those who would once have been able to rely upon legal aid support.

Some sobering figures of the reduction in legal aid were summarised in the House of Commons Library publication, '***Civil legal aid changes since 2013: the impact on people seeking help with legal problems***' (published 14 Jan 2016):

House of Commons Library Research Briefing (Briefing Paper 06645, 14 Jan 2016), at p 18 (internal citations omitted):

> Net expenditure on legal aid in 2014–15 was £1.6 billion. This compares to a net expenditure of £2.2 billion in 2010–11. The largest part of the Legal Aid Agency's net expenditure on legal aid is on criminal legal aid. In 2014–15, spending on criminal legal aid was £919 million, while spending on civil legal aid was £622 million. ...
> Civil representation workload — representation by the solicitors and barristers for civil cases — fell following the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The MOJ and the LAA state that, in April to June 2015, the civil representation workload was around two-thirds of what it was prior to the Act.

This Briefing Paper also noted (at p 10) that, earlier in 2015, the Commons Justice Committee conducted a review of legal aid, and concluded that access to justice had been 'damaged for some litigants'. In its report, ***Impact of changes to civil legal aid under Part I of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*** (12 Mar 2015, HC 311, 2014–15, Summary), the Justice Committee stated that:

Justice Committee report (Mar 2015): Summary, cited in the abovementioned ***Research Briefing*** (at p 11):

The Ministry's four objectives for the reforms were to:

- discourage unnecessary and adversarial litigation at public expense;
- target legal aid to those who need it most;
- make significant savings in the cost of the scheme; and
- deliver better overall value for money for the taxpayer.

Our overall conclusion was that, while it had made significant savings in the cost of the scheme, the Ministry had harmed access to justice for some litigants and had not achieved the other three out of four of its stated objectives for the reforms.

[The Committee also made note of the following outcomes of the LASPO Act – see pp 14–16 of the Research Briefing):

- a shortfall in debt cases;
- an under-use of the Civil Legal Advice telephone gateway service; and
- the exceptional cases funding scheme had not done the job Parliament intended, as insufficient weight had been given to access to justice in the decision-making process.

As noted at p 15 of the ***Research Briefing***, the MOJ did not agree with all of the conclusions of the Justice Committee's Report: see MOJ, ***Government Response to Justice Committee's Eighth Report of Session 2014–15*** (Cm 9096, Jul 2015, at p 18).

Nevertheless, the aforementioned reduction in the use of legal aid, by reference to objectively-ascertainable figures, was of interest to the Working Group. These reduced figures are explainable by **two** factors. First, there has been a marked reduction in the areas of grievance covered by legal aid — for example, almost all of personal injury was removed from legal aid pursuant to the Access to Justice Act 1999; and much of social welfare law and the majority of private family disputes were removed under the LASPO Act 2012. Secondly, financial eligibility requirements have become increasingly strict — though there are some exceptions, where the client is not required to pass a financial eligibility assessment (e.g. applications to the Mental Health Tribunal) or the eligibility limits and/or contributions can be disapplied if it is considered equitable to do so (e.g., in the case of inquests, forced marriage, female genital mutilation, and domestic violence). However, generally speaking, the following table provides the rather bleak picture of how narrowly-available legal aid has become (derived from: MOJ, ***The Current Legal Aid Financial Eligibility Rules – Summary*** (Annexure C to the Consultation Paper, ***Digital Communications: Legal Aid Eligibility and***

Universal Credit (2014)):

The diagram below summarises the financial eligibility criteria for civil and criminal legal aid.

Civil Eligibility assessment Legal Help and Representation	Capital < £3,000	Capital between £3,000 and £8,000			Capital > £8,000
	And	Or			Or
		Disposable income exceeds £315			
	Passported or Pass Gross and Disposable Income Test	Band A - 35% of DI between £311 and £465	Band B - 45% of DI between £466 and £616 + Band A contributions	Band C - 70% of DI above £616 + Bands A and B contributions	Monthly disposable income >£733
Legal Representation	Non-contributory Legal Aid	Contributory Legal Aid			No Legal Aid
Legal Help and Mediation	Non-contributory Legal Aid				No Legal Aid
Public Family Law cases	No means test				

The ***Summary*** further explains that, in most cases, individuals will not be financially eligible for legal aid if they have a gross monthly income of >£2,657.30; or have a disposable monthly income of >£733; or have a disposable capital of >£8,000. Below these thresholds, individuals may be required to pay a contribution to their legal aid, if they have monthly disposable income of >£315 or disposable capital of >£3,000.

Hence, civil legal aid is now seriously restricted. On the other hand, legal aid covers criminal cases and public law family cases (e.g., re care orders issued by local authorities), which consumer BTE policies generally would **not** cover.

Furthermore, BTE insurance funding and legal aid are underpinned by differing philosophies, as Antje Fedderke, Secretary-General of RIAD points out (per ***'How can 'Before-the-event legal protection insurance be made more effective across the population of England and Wales?'*** (30 Mar 2017), at para 2:

> Legal aid is a benefit which is available without a financial contribution, and must be seen in the context of the Government's obligation to guarantee access to law and justice for citizens. The target group are needy people who cannot afford to pay for pursuing their rights. These elements of welfare and the context of safeguarding a fundamental right make it particularly difficult to replace legal aid with legal protection insurance because, to start with, the people concerned do not have any extra money to spend, and the providers of legal protection insurance are businesses that need to work for a profit and must organise their businesses accordingly, e..g, ask for an adequate price for their services.

The Working Group considers that the legal helplines commonly available via BTE insurance policies (discussed later in this report in Chapter E) are filling a real 'gap' in the marketplace — provided that those who are entitled to their use know about them! Therein lies one of the dilemmas of BTE insurance, as the report will discuss in due course. However, legal helplines will not, for example, pay for a surveyor in the case of a social housing tenant's disrepair claim, nor pay for a lawyer to draft correspondence and documents; it offers a far more basic advisory service than that. Hence, these helplines cannot be viewed as a substitute for legal aid. Nevertheless, BTE has a considerable role in improving access to justice in the current legal landscape, in the Working Group's view — especially when the **total** 'BTE package' is considered. Without it, the landscape would be much more inhospitable.

It must be noted that some lawyers at the 'coal-face' of legal practice strongly support the accessibility to justice which BTE insurance can provide, for scenarios which legal aid would once have covered — and such lawyers are taking proactive steps to try to source that alternative funding for those who have suffered alleged grievances. The following article was instructive for the Working Group:

B Likulunga (Avon and Bristol Law Centre), '***You may be covered for tribunal legal costs***' (*Bristol Post*, 26 May 2017):

'Are you thinking of going to an employment tribunal, or taking a consumer case to court, but are put off by the possible legal costs and fees, it's worth checking whether you have legal expenses insurance (LEI). Many people have it but don't use it when they need it.

One client who contacted me had worked for his employer for 10 years. Frank had an accident at work and damaged some equipment. His employer blamed him and fired him for gross misconduct. He believed this was unfair as his employer did not consider his long service, the fact that it was an accident, and other mitigating circumstances.

Frank wanted to challenge his employer in the employment tribunal, but could not afford to pay for solicitors. He would not have been able to find a similar job and it is only right that he was given a chance to assert his employment rights. It turned out that Frank had LEI on his home insurance policy; which he could use to bring a claim in the employment tribunal and receive high quality legal advice and representation.
...
The changes to Legal Aid mean Legal Aid is no longer available in employment law. Legal Aid is still available for discrimination law – however, this can only be accessed through the telephone Civil Legal Advice service.
The fact that Frank had LEI meant he was able to access legal advice and representation. ...

Avon and Bristol Law Centre is currently looking into assisting people who have LEI to obtain legal advice and representation in employment cases. We receive a high number of employment queries on how people can take their employer to court. A large number of these people cannot afford to pay for solicitors' fees. The project is looking to improve access to justice for people who cannot afford to pay private solicitor fees, particularly in employment cases.'

The Working Group notes that the Government's view has been that BTE insurance is an attractive vehicle by which to gain access to justice, given that it places no demands upon public funding. It is also perceived by the Government to be a potential vehicle by which to 'fill the gaps' for funding claims that would not otherwise be brought. The Government's support for the greater use of BTE insurance has been noted earlier in this report (per its statement in the ***Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations: The Government Response*** (Mar 2011), at para 28).

However, as the Working Group fully appreciates, the challenge is to identify the gaps that exist — both for business and for consumers — and how BTE insurance may be employed in those areas.

3. The interplay with other forms of funding

BTE is one way of funding civil claims, but it is not the only means of funding. Where a client does not have the benefit of a BTE policy that will cover the litigation, and assuming Legal Aid is not available, it may be possible to instruct a lawyer to take on the case under a "no win, no fee" deal, most commonly a CFA, with ATE insurance to cover disbursements and adverse costs liability. (It may also be possible to instruct a lawyer under a damages-based agreement, or DBA, though such agreements are not widely used.)

Other forms of funding may also be available, such as:

- the client paying the lawyer under a traditional hourly rates retainer – though this form of funding is widely recognised as being largely out-of-reach for individuals of average means; or

- a third party funder providing funding for legal costs and disbursements, in return for a share of any proceeds of the litigation – though such arrangements tend to be available principally for high value litigation (typically where claim values are in the millions of pounds) and therefore are rarely a realistic alternative for claims that could be funded via BTE.

The widespread availability of CFA arrangements, and the extensive advertising of such arrangements particularly in the context of personal injury claims, may tend to give rise to a perception in some circles that individuals will be able to pursue their claims at no cost even if they do not have BTE.

However, the existence of CFA arrangements does not provide a complete answer for a number of reasons, including the following:

(i) Since the implementation of the Jackson reforms, CFAs are no longer entirely free of cost for the client, given that the "success fee" is generally no longer recoverable from a losing opponent and therefore must be paid out of any damages if the case succeeds (though it is capped at 25% of damages in personal injury cases). Although it is possible for a solicitor to enter into a CFA without charging a success fee (the solicitor may agree to charge only the costs that are recoverable from the opponent if the case wins) this is less common.

(ii) Similarly, since the implementation of the Jackson reforms, ATE premiums are no longer recoverable from a losing opponent (subject to certain limited exceptions). Although the implementation of Qualified One-way Costs Shifting (or QOCS) reduced the need for ATE insurance in personal injury claims, it is still a potentially significant cost to be borne by litigants in other types of litigation.

(iii) CFAs are widely available in personal injury litigation, but are much less common in other areas of litigation, eg boundary disputes or commercial claims.

(iv) Although CFAs are theoretically available to defendants, it tends to be difficult to find a solicitor that is willing to defend a claim under a CFA.

(v) In claims that fall within the small claims limit, there are no recoverable costs and therefore lawyers may not generally be willing to take on cases under a CFA, though it will be necessary to wait and see how the market reacts. With recent proposals for an increase in the small claims limit in personal injury cases, the number of claims that can be pursued under a CFA could reduce.

Having access to BTE insurance therefore presents litigants with a number of advantages over the prospect of funding their litigation via a CFA/ATE package – though obviously there are advantages of CFA/ATE such as the ability of the client to choose his own solicitor throughout the matter (see the discussion under 'Freedom of choice of lawyer' in Chapter I below).

In the past, where a litigant had BTE cover, it was relatively common for the case to be taken on under a CFA – ie the two forms of funding would often coincide. In his report, ***Review of Civil Litigation Costs: Preliminary Report*** (May 2009), Sir Rupert Jackson referred (at ch 13, para 4.2) to what he described as a basic distinction between what he called "BTE1" cover, where insurers pay solicitors to act for the insured when a claim arises, and "BTE2" cover, where insurers will “sell” claims to solicitors to take on under a CFA in return for a referral fee paid to the insurer – though he noted that the distinction was not clear cut and that some policies would provide both types of cover.

BTE2 type arrangements most commonly arose where the BTE was an add-on to a motor vehicle policy, and the claims typically "sold" in this way were largely personal injury claims. This is no longer permitted since the ban on referral fees for personal injury claims introduced by the Jackson reforms. In addition, and as noted above, CFAs are no longer "cost free" for the litigant. Accordingly, the Working Group's

understanding is that BTE2 type arrangements are no longer common, if they exist at all. This is also discussed below in chapter H in relation to the pricing of BTE.

The remainder of this report deals with substantive legal and practical issues associated with BTE insurance which the Working Group considered during this project.

B. A SOLICITOR'S OBLIGATIONS RE BTE INSURANCE

1. Enquiring about BTE insurance

(a) The Code of Conduct

Solicitors have an obligation to ascertain whether or not their clients have BTE insurance. Under the SRA's 'outcome-based' approach to regulation, various 'indicative behaviours' under the ***Solicitors' Code of Conduct*** 'tend' to show compliance with the required outcomes. It states:

Solicitors' Code of Conduct, Outcome 1.6:
you only enter into fee agreements with your clients that are legal, and which you consider are suitable for the client's needs and take account of the client's best interests.

The relevant 'indicative behaviour' provides as follows:

Solicitors' Code of Conduct, IB 1.16:
discussing how the client will pay, including whether public funding may be available, whether the client has insurance that might cover the fees, and whether the fees may be paid by someone else, such as a trade union.

In addition, there are some specific safety nets, whereby checking for the availability of BTE Insurance is required. For example, ATE insurers require their panel solicitors to ask whether the client has a current BTE policy. Legal aid advisers are also compelled to check for BTE availability.

However, unfortunately these checks do not always happen.

(b) Professional negligence suits

The Working Group noted that a failure to enquire about the availability of BTE insurance has given rise to professional negligence claims in the past, and that this problem area continues to afflict legal professionals from time to time, whether from small, medium or large law firms.

Where a solicitor overlooks the possibility of BTE insurance and, instead, takes on the case under either a traditional retainer or a CFA with ATE insurance, this may give rise to an action in negligence in damages, whether the would-be BTE Insured wins or loses:

- if the would-be BTE Insured loses the case, and has to pay own solicitor and/or adverse costs that the BTE Insurer would have been liable to cover had the BTE insurance been taken out, then those costs are the measure of damages for which the solicitor will be liable;

- if the would-be BTE Insured wins the case, then that party may incur irrecoverable costs that would have been covered by the BTE policy; and further, under a CFA/ATE funding arrangements post-April 2013, the would-be BTE Insured must pay any success fee under the CFA out of his own damages (prior to those reforms taking effect, the defendant was liable to pay those sums). Such deductions from the damages would not have been necessary, had the claim been funded by a BTE Insurer. Hence, those deductions are the measure of damages for which the solicitor will be liable, post-2013; and

- any premium for an ATE policy paid by the would-be BTE Insured, which would not have had to be incurred had the BTE insurance cover been utilised, will also be recoverable by way of damages in these types of suits.

Prior to the LASPO reforms of April 2013, the success fee under a CFA and an ATE premium were claimable from the defendant. Hence, if the claim could have been funded by a BTE insurer instead, then *the defendant* was liable to object to the use of the CFA/ATE, because that party was potentially 'on the hook' for the success fee and the ATE premium if the claimant won. Since the LASPO reforms, however, the challenge is more likely to come in the form of a claim for negligence by *the would-be BTE Insured.*

The Working Group noted that these professional negligence claims were quite difficult for a solicitor to defend successfully, if there were no contemporaneous notes that enquiries about the possibility of BTE funding had been made.

Of course, the solicitor with whom the client originally consults about the dispute may lose the case to a BTE panel law firm (at least until proceedings are commenced – as discussed later in the report), or if that solicitor retains the case, the hourly rate capable of being charged may be reduced in accordance with BTE 'panel rates'. A long-term working relationship with the client may also be lost, if the BTE funding is taken up. The Working Group did **not** suggest that this would ever be a reason for a solicitor to decline to check whether BTE insurance cover was available to the client (and nor has that suggestion been made in the case law examined by the Working Group for the purposes of this report). However, a theoretical possibility of a conflict of interest is apparent.

(c) Relevant case law

Historically, the point often arose as to whether the claimant's solicitor was in material breach of the Conditional Fee Agreement Regulations 2000 by failing to make adequate enquiries as to whether the claimant had BTE insurance available to him.

Pursuant to Regulation 4(2)(c), solicitors were required to take active steps to check the BTE position before entering into a CFA. The problem tended to arise wherever the claimant did not know of the presence of a BTE policy that later came to light, and which rendered the funding arrangements that were taken out rather less advantageous than BTE cover would have been.

A breach of the regulatory requirements would render the CFA unenforceable, so that the solicitor's client (typically the claimant) was not liable for any fees and, as a result of the indemnity principle, no costs could be recovered from the losing opponent (typically the defendant). This meant that defendants were incentivised to bring challenges on the basis that the solicitors had not complied with the requirements of the CFA Regulations 2000, in order to avoid having to pay adverse costs in cases they lost.

The CFA Regulations 2000 were withdrawn from 1 November 2005 and so do not apply to CFAs made after that date. However, the question of whether or not a solicitor has made suitable enquiry about the availability of BTE insurance remains a live issue today, as it is obviously relevant to whether or not the solicitor has discharged the indicative behaviours of the Code of Conduct.

The following observations made by judges about the obligations imposed upon solicitors to enquire about the funding available to their client therefore remain pertinent today, though they were made in the context of considering whether there had been a breach of the CFA Regulations 2000:

Puksis v Brumby [2008] EWHC 90095 (Costs):

FACTS: The solicitor had written to the claimant in these terms:

'*It may be that you are covered by legal expense insurance to bring a claim. Please bring with you any relevant motor insurance policy, any household insurance policy and any stand-alone BTE insurance policy belonging to you or your spouse.*'

The attendance note of the meeting between solicitor and client recorded, under 'Funding', that:

'*Legal Expense Insurance – Surprisingly client does not have household contents insurance. She does not drive and does not have credit cards so that there is no legal expense cover.'*

The solicitor subsequently confirmed that, 'I have not stated in my attendance note but can confirm that I was told by Mrs Puksis that she and her husband owned 73 Fassetts Road, Loudwater, and it was subject to a mortgage. Mrs Puksis confirmed that she had not paid for additional legal expense in relation to her property insurance of which she only had building insurance cover. It was either at this meeting or subsequently before the Conditional Fee Agreement was entered into that Mrs Puksis produced an Insurance Policy Schedule which confirmed that she had building insurance but not contents insurance and that she had not paid any extra premium for legal expense insurance.'

DECISION: Master Gordon-Saker held that the solicitor had made reasonable and sufficient enquiries for the purposes of the Regulations (at [42]–[43]):

> 'in my judgment the enquiries ... were sufficient. ... I am satisfied on the evidence that he checked the building insurance policy that she did have. Those enquiries covered the realistic possibilities in this case.

It seems to me that somebody who has bought a *stand-alone* legal expenses insurance policy would know that they had it, because they would only have it as the result of a conscious decision to buy it. While, in the event, it was probably pointless for Mr Gasper to ask Mrs Puksis to bring along "any stand-alone BTE insurance policy" because she did not then know what it was, it seems to me to be likely that she would only have had that type of policy if she knew what it was.'

Hence, there was no breach of the Reg 4(2)(c) in this case.

Sarwar v Alam [2001] EWCA Civ 1401, [45] (Lord Phillips MR):

GUIDANCE: The Court of Appeal gave guidance as to the practice for a solicitor enquiring about BTE cover:

'In our judgment, proper modern practice dictates that a solicitor should normally invite a client to bring to the first interview any relevant motor insurance policy, any household insurance policy and any stand-alone BTE insurance policy belonging to the client and/or any spouse or partner living in the same household as the client. It would seem desirable for solicitors to develop the practice of sending a standard form letter requesting a sight of these documents to the client in advance of the first interview. At the interview the solicitor will also ask the client, as required by paragraph 4(j)(iv) of the Client Care Code … whether his/her liability for costs may be paid by another person, for example an employer or trade union'.

Richards v Davis [2005] EWHC 90014 (Costs):

DECISION: 'There is a clear lack of protection where the solicitors failed to give the client advice on alternative methods of funding or failed properly to check for BTE cover. On the face of it, the client will have lost a significant proportion of his damages as a direct result of the failure to identify and recommend a suitable funding method. In addition, ... there is a materially adverse effect on the proper administration of justice when costs claims are unnecessarily inflated by excessive claims for ATE premiums. ... [the claimant] had in force a DAS BTE policy under which he had already made one claim. No effort was made to consider the appropriateness of that policy and ... it was unreasonable and disproportionate to have taken out the TAG [ATE] policy. The ATE premium is therefore not recoverable [from the defendant – this was a pre-LASPO case].'

(d) Further publicity

The Working Group noted that the occurrence of professional negligence suits against solicitors may reflect a combination of circumstances:

- not all solicitors dealing with litigation matters may be completely familiar with the potential availability of BTE insurance cover (whether stand-alone or add-on BTE insurance cover), particularly for commercial cases — and especially where the scope of coverage among policies is subject to change and revision, as the BTE market develops;

- it may be helpful for all ATE proposal forms to ask the specific question as to whether BTE insurance cover is available to the potential Insured (currently, some do not);

- it is arguable that insufficient publicity about BTE insurance exists, not just in the consumer and business marketplace, but in the legal marketplace too. It was suggested by some members of the Working Group that some further measures could be taken to enhance the familiarity with BTE among the legal marketplace:

  i. the publication of a Practice Note by the Law Society;
  ii. an article in the *Law Society Gazette*;
  iii. events conducted by the Law Society's Litigation section;
  iv. some Practice Development lectures conducted by the Law Society.

Other members of the Working Group, however, considered that solicitors ought to be aware of their obligations pursuant to the ***Solicitors' Code of Conduct***, and that further publicity about that obligation was surely not necessary.

In this, as with several issues, the members of the Working Group were not of a unanimous view.

2. The BTE insurance limit of indemnity

Each BTE policy has a cap of cover, a limit of indemnity, which may depend upon a variety of factors, e.g.: the point of purchase (e.g., whether it is acquired online or directly from a broker); the distributor (intermediary) used; the type of policy (i.e., whether it is consumer- or business-oriented); and the insured event/s covered by the policy.

When a decision is made by a BTE Insurer to fund the claim, then the lawyer who is representing the BTE Insured must advise that client of relevant matters, which are likely to include: (1) the cap; (2) what will occur where the limits of indemnity are exhausted; (3) precisely what costs are included in that cap; (4) what funding mechanisms (e.g., taking out a CFA and ATE) are available to cover the funding, once the cap is exceeded; and (5) the risk that the BTE Insured must pay any shortfall in legal costs (whether his own, or adverse costs) out of his own pocket, if other funding mechanisms are not put in place or available. This is all part of the solicitor's duty to advise of the funding options available to the BTE Insured, in accordance with Indicative Behaviour IB 1.16 of the ***Code of Conduct***, reproduced earlier.

This advice about the BTE limits of indemnity, and how the claim will be funded, should those limits be met, must be both upfront and ongoing. It is especially important that the lawyer clearly state this advice at the point that proceedings are commenced.

The Working Group members noted that it was quite unusual for BTE Insureds to need to exceed the limits of indemnity. In practice, these are not often exceeded.

It is the BTE Insured's solicitor's obligation to maintain a close monitoring of the 'consumption' of the BTE limits. As a rule of thumb, some Working Group members noted that a solicitor will commonly attribute about half the BTE cover to the BTE Insured's own costs and disbursements, and the other half will be allocated for potential adverse costs in appropriate cases.

The funding options, should BTE cover run out, are likely to be that the BTE Insured will enter into a CFA, possibly with ATE cover; and more rarely, self-funding the balance under a traditional retainer.

3. Disclosure of BTE insurance

Just as with third party funding, there is no additional costs liability accruing to the defendant, if the claimant is being funded via BTE insurance. The view amongst the BTE insurance industry is that there are no grounds for upholding mandatory disclosure of BTE insurance. The two key reasons as to why compulsory disclosure is not considered necessary are that:

- BTE Insurance policies do **not** require the BTE Insurer to pay security for costs (being an indemnity policy), and non-party costs orders against BTE Insurers are unheard of. Hence, there is no reason for a defendant to know whether, and if so, which BTE Insurer is standing behind the opponent to the claim; and

- unlike the pre-2013 position where a defendant had to be informed, should the claimant be funding the case on the basis of a CFA and ATE policy — precisely because a losing defendant would become liable to pay the success fee and the ATE premium, respectively — that scenario does not apply to BTE insurance funding. There is no exposure for the defendant, should BTE funding be employed by the BTE Insured, and hence, no need to disclose it.

A BTE Insured may *choose* to disclose this fact, as the merits assessment of the claim was clearly of sufficient quality for a BTE Insurer to fund the claim. It may matter to the claimant, tactically, to publicise the fact that a BTE Insurer regarded the claim as meritorious.

However, there is no compulsory requirement to disclose the fact of BTE funding – and nor did the Working Group consider that such a requirement should be imposed. The Working Group was of the view that it should remain a strategic position whether or not to disclose that funding.

C. THE SCOPE OF COVERAGE OF BTE INSURANCE

1. Consumer BTE policies compared

It is of interest and utility, for the purposes of this section, to compare a number of consumer BTE policies on the market, across a range of factors. The information contained in this table, which is correct and up-to-date as at February 2017, should not be considered as definitive or as providing certainty. It is based on documents which are subject to change and revision, so readers should check with providers for up-to-date services/prices:

THE COMPARATIVE TABLE						
Factor	**ARAG**	**DAS**	**Arc**	**Direct line**	**Legal Protection Group**	**LIM**
Policy wording reference	FLSPW.09-16BL	FAMC2 | 02.2016 | DAS11726.02	Contract 194 PEN Family Legal - Master Certificate Number LES/1007/1367	HM157 0916	Wording not available, comparison based on Keyfacts summary	Premier Family 1215 MC for Kindertons. Also Static Caravan wording for Commercial Express
Insurer	Brit	DAS	Inter Partner	UK Insurance	International	UK General

THE COMPARATIVE TABLE						
Factor	**ARAG**	**DAS**	**Arc**	**Direct line**	**Legal Protection Group**	**LIM**
	Syndicate 2987 at Lloyd's		Assistance SA (subsidiary of AXA)	Ltd	Insurance Company of Hannover SE	Insurance Ltd on behalf of Ageas Insurance Ltd
Limit of indemnity	£50,000	£50,000	£50,000	£100,000	£50,000	£50,000, except £5,000 for Education Appeals
Excess	£250 excess on nuisance/ trespass	£250 excess on nuisance/ trespass	Variable	No excesses	No excesses	Not known (as stated on schedule)
Minimum amount in dispute	£100 for all claims	£125 for contract disputes and property damage	£250 for contract disputes	No minimum amounts in dispute	£100 for contract disputes and property damage	£100 for contract disputes and tax aspect enquiries, £500 for Home

THE COMPARATIVE TABLE						
Factor	**ARAG**	**DAS**	**Arc**	**Direct line**	**Legal Protection Group**	**LIM**
						Sale/Purchase
Territorial limits	Contract & PI: UK, CI, IoM, EU, Norway, Switzerland. Other covers: UK, CI, IoM	Contract & PI: UK, CI, IoM, EU, Albania, Andorra, Bosnia Herzegovina, Gibraltar, Iceland, Liechtenstein, Macedonia, Monaco, Montenegro, Norway, San Marino, Serbia, Switzerland and Turkey.	Great Britain, Northern Ireland, IoM and CI	Contract & PI: UK, EU, Albania, Andorra, Bosnia Herzegovina, Gibraltar, Iceland, Liechtenstein, Macedonia, Monaco, Montenegro, Norway, San Marino, Serbia, Switzerland and Turkey (west of the Bosphorus).	Contract & PI: UK, CI, IoM, EU, Norway, Switzerland. Other covers: UK, CI, IoM	UK, CI, IoM

THE COMPARATIVE TABLE						
Factor	**ARAG**	**DAS**	**Arc**	**Direct line**	**Legal Protection Group**	**LIM**
		Other covers: UK, CI, IoM		Other covers: UK		
Reasonable prospects clause	Applies to civil and criminal claims	Does not apply to criminal claims	Applies to civil and criminal claims	Applies to civil and criminal claims	Not clear if this also applies to criminal claims	Applies to civil and criminal claims
Insured person	*"You, your partner and relatives permanently living with you in your main home in the UK. (The insurer will cover your children temporarily away from home for the*	*"... the policyholder, and any member of their family who always lives with them. This includes students temporarily living away from home and*	*"Any person who is permanently resident at the property covered under the household insurance to which this cover attaches. Cover also applies to*	*"The person or persons named in your schedule and any of the following who normally live with them: their husband, wife, partner (a person*	"*…you and members of your family who permanently live with you…*"	*"You, your husband, wife, partner, children (including adopted and foster children), parents and relatives who all normally live with you."*

THE COMPARATIVE TABLE						
Factor	ARAG	DAS	Arc	Direct line	Legal Protection Group	LIM
	purposes of higher education.)"	*unmarried partners. Anyone claiming under this policy must have the policyholder's agreement to claim."*	*Your family members normally resident with You."*	*living with them as though married), civil partner, children, parents and other relatives normally living with them."*		
Legal service website	yes	no	no	no	no	no
LEGAL HELPLINES						
UK legal advice	yes	yes	yes	yes	yes	yes

THE COMPARATIVE TABLE						
Factor	ARAG	DAS	Arc	Direct line	Legal Protection Group	LIM
Europe legal advice	yes	yes	no	no	no	no
Tax advice	yes	yes	no	no	yes	yes
Health and medical information	no	yes	no	no	no	no
Counselling	no	yes	yes	no	yes	no
Identify theft advice	yes	yes	no	no	yes	yes
INSURED EVENTS						
employment dispute	yes	yes	yes	yes	yes	yes
contract disputes	yes	Contract must be	Excludes disputes	Excludes contracts	yes	90-day waiting

THE COMPARATIVE TABLE						
Factor	ARAG	DAS	Arc	Direct line	Legal Protection Group	LIM
(non-motor)		entered into during the period	relating to manufacturer's warranty or guarantee. Contract must be entered into after inception	entered into before inception		period applies. Excludes claims where money was due more than 180 days before claim is reported
motor contract disputes excluded	yes	yes	yes	no	yes	yes
purchase of main home	yes	no	180-day waiting period applies	yes	yes	all seven insured events are spelled out
sale of main home	yes	no	180-day waiting	yes	yes	

THE COMPARATIVE TABLE						
Factor	**ARAG**	**DAS**	**Arc**	**Direct line**	**Legal Protection Group**	**LIM**
			period applies			
renting main home as tenant	yes	no	no	no	yes	no
occupation of main home under lease	yes	no	no	no	yes	no
construction work	Maximum £6,000 incl VAT	Maximum £5,000 incl VAT	Maximum £5,000 incl VAT	Maximum £15,000 incl VAT	Maximum £7,500 incl VAT	no
property damage (home)	yes	yes	yes	yes	yes	90-day waiting period applies
property damage	yes	yes	no	no	yes	yes

THE COMPARATIVE TABLE						
Factor	**ARAG**	**DAS**	**Arc**	**Direct line**	**Legal Protection Group**	**LIM**
(other property)						
property damage (vehicles)	no	yes	no	no	unclear	no
property nuisance/trespass	yes	yes	180-day waiting period applies	yes, no excess applies	yes	90-day waiting period applies. Covers "*alleged infringement of rights pertaining to the home*."
personal injury	yes	Excludes mental health unless as a result of personal	Excludes motor	yes	yes	Excludes extended use of artificial tanning

THE COMPARATIVE TABLE						
Factor	ARAG	DAS	Arc	Direct line	Legal Protection Group	LIM
		injury				equipment. Excludes claims falling within Small Claims limit. Excludes pharmaceutical or related claims (incl tobacco products)
clinical negligence	yes	Excludes misdiagnosis. Excludes mental health unless as a result of personal injury	no	Excludes misdiagnosis. Excludes surgery, procedures or treatment that occurred before	yes	yes

THE COMPARATIVE TABLE						
Factor	ARAG	DAS	Arc	Direct line	Legal Protection Group	LIM
				inception. Explicitly only covers mental health if it results from physical injury		
tax enquiries	Covers full & aspect enquiries. Excludes assets, monies, wealth outside GB and NI.	Excludes aspect enquiries	Excludes aspect enquiries	Excludes aspect enquiries	Covers full & aspect enquiries	Covers full & aspect enquiries
employee pre-prosecution defence	yes	no	Excludes costs where Insured is entitled to	no	yes	Provides 24-hour cover (i.e. not limited to

THE COMPARATIVE TABLE						
Factor	**ARAG**	**DAS**	**Arc**	**Direct line**	**Legal Protection Group**	**LIM**
(non-motor)			Legal Aid			work as

employee prosecution defence (non motor)	yes	yes		yes	yes	employee) although excludes any offence of deliberate and wilful criminal acts or omissions. Where Insured is entitled to Legal Aid, the policy will only pay same amount as any means-tested contribution which would be payable by Insured
motor prosecution defence	yes	no		yes	no	no

THE COMPARATIVE TABLE						
Factor	**ARAG**	**DAS**	**Arc**	**Direct line**	**Legal Protection Group**	**LIM**
discriminatio n defence	yes	yes	yes	yes	yes	no
investigation or disciplinary hearing by professional or regulatory body	yes	no	yes	no	yes	no
loss of earnings (attendance expenses/jur y service)	£1,000 limit	£1,000 limit	£1,000 limit	Covers jury service, no cover for attendance expenses. No inner limit applies	No inner limit applies	no
identity theft	yes	yes	yes	no	Includes cost of re-	Includes cost of re-
data protection	no	yes	yes	yes	yes	no

THE COMPARATIVE TABLE						
Factor	**ARAG**	**DAS**	**Arc**	**Direct line**	**Legal Protection Group**	**LIM**
defence						
will disputes	no	no	no	*"We will cover the costs of claims for a dispute over something left to you in a will."*	no	*"The pursuit of claims by the Insured Person in respect of a probate dispute involving the will of the Insured Person's parents, grandparents, children, step-children or adopted children."*
education admission appeals	no	no	no	no	no	*"Appealing against the decision of a*

THE COMPARATIVE TABLE						
Factor	ARAG	DAS	Arc	Direct line	Legal Protection Group	LIM
						Local Education Authority (LEA) arising out of the LEA's failure to comply with its published admission policy, resulting in the refusal to accept the Insured Person's child or children at the state school of their preference,

THE COMPARATIVE TABLE						
Factor	ARAG	DAS	Arc	Direct line	Legal Protection Group	LIM
						subject to a Claim Limit of £5,000 any one claim."

Aspects of this comparative table will be referred to later in the report.

2. Those covered by the BTE policy

Many BTE policies are, basically, 'family policies', in that a number of relatives of the party who paid the BTE premium are BTE Insureds under the policy. This enhances the value of the policies — provided that those covered are aware that they are potentially BTE Insureds, even if they have not themselves paid the premium required for the household or motor vehicle policy.

These policies can have a wide geographical reach too. As the ***DAS policy*** states (referred to in the Comparative Table previously), its policy covers relatives who are 'students temporarily living away from home'. The ***HSBC Home Insurance Policy*** provides (at p 27) that its BTE cover applies to the following parties who are connected with the premium-paying party:

> The legal services cover will only apply if it is shown on **your schedule**. The cover is for the persons named on **your schedule**, together with their domestic partner and all members of their family, including foster children, who live with them.

However, it is worth bearing in mind the caveat cautioned by Lord Phillips MR in ***Sarwar v Alam*** [2001] EWCA Civ 1401, [2002] 1 WLR 125, [46], that:

> 'The solicitor's inquiry should be proportionate to the amount at stake. The solicitor is not obliged to embark on a treasure hunt, seeking to see the insurance policies of every member of the client's family in case by chance they contain relevant BTE cover which the client might use.'

3. The money paid out under BTE insurance

The BTE Insured is taking out insurance against the possibility of being involved in litigation arising from an insurable event, and not against the actuality of already being involved in such an event (as the ATE policy covers). The type of outlay/costs/damages that the BTE insurance may cover varies a great deal.

To mention a few categories of cover arising under BTE policies:

(a) Own costs and disbursements

A BTE policy will generally cover the BTE Insured's own legal costs (fees and disbursements). Very rarely, this may be *all* that the policy covers. If so, then the risk of having to pay adverse costs, should the BTE Insured lose, will need to be offset by the BTE Insured taking out an ATE insurance policy at the outset. However, this singular type of coverage is, in the Working Group's experience, very unusual in consumer BTE policies.

The payment of the BTE Insured's disbursements which are properly incurred in the course of the litigation is an important feature of BTE Insurance policies. This will entail, for example, payment of filing fees; the costs of experts' reports (preparation and attendance at hearing); other witness expenses; and counsel fees.

(b) Adverse costs

A consumer BTE policy is far more likely to cover **both** own costs and adverse costs, should the BTE Insured lose the claim. The ***Chubb Insurance Home Policy*** provides an example (at p 59):

Legal Costs and Expenses means

- Reasonable legal costs and disbursements reasonably and proportionately incurred by the Appointed Advisc on the standard basis and agreed in advance by ARAG. The term "standard basis" can be found within the Courts' Civil Procedure Rules Part 44.
- Reasonable experts' reports, reasonably and properly incurred by the Appointed Advisor.
- In civil claims, other side's costs, fees and disbursements where You or a Family Member have been ordered to pay them or pays them with ARAG's agreement.

The ***HSBC Home Insurance Policy*** also provides for this dual cover (at p 30):

Insured Events

For the insured events described below, which **we** have agreed to and authorised, **we** will pay **your costs and expenses** to:

a) pursue or defend a claim for damages;
b) pursue the enforcement of an agreement;
c) seek an injunction e.g. to stop a neighbour being noisy;
d) seek any other legal remedy.

where the crucial bolded term is defined to mean (at p 27):

> In addition to the definitions in the main Home Insurance Policy, where the following words or phrases appear in bold within this section they will have the following meaning:
> **Costs and expenses** – All legal costs charged by the **lawyer** and authorised by **us** or that **you** are ordered to pay by a court/other body.

BTE insurance policies will generally cover costs incurred either as a claimant or as a defendant to an action. Hence, for the latter, it will cover the costs of the defendant defending the claim brought against him, as well as the adverse costs of the claimant, should the defendant lose. Notably, from a defendant's point of view, BTE insurance policies may also cover claims to which there is no outright defence available, but there may be, instead, a reasonable prospect of reducing the level of damages or refuting other remedies claimed against the BTE Insured defendant.

Some BTE policies are *specifically* addressed to the prospect of having to defend claims. One example is ARAG's policy, ***Family Prosecution Defence*** (at p 2):

If you or a member of your family is accused of breaking the law you have the right to defend yourself in court, to prove your innocence or to accept the blame and mitigate any penalty imposed by the court – but can you afford your defence costs?

Whether you are entirely innocent or have made an error in judgment and been drawn into committing a crime for which you wish to apologise, the cost of obtaining justice can be too high for many individuals and their innocent family members to bear. Recent cuts to legal aid mean that without insurance your family could have to make a significant contribution towards the legal costs of your defence and in many cases you will not be able to recover your lawyer's costs from the court even if you are found not guilty.

Family prosecution defence gives you immediate access to expert legal representation and pays your legal defence costs if you are accused of committing a criminal offence.

What we cover

Cover empowers you and your family to defend yourself if accused of committing certain criminal offences. With support from ARAG you could be protected from legal costs and loss of earnings arising from:

- legal representation at an interview by the police or other authority with the power to conduct a criminal investigation
- preparing your defence to criminal charges following an arrest (whether or not in custody)
- a Magistrates' or Crown Court trial or an Appeal Court hearing
- a formal investigation or disciplinary hearing brought against you by a regulatory or professional body
- bringing or defending an appeal against sentence or conviction.

(c) Damages

BTE insurance rarely covers the payment of damages which the BTE Insured may be ordered to pay. This unusual cover may arise in BTE cover that pertains to employment disputes, but does not apply under general consumer BTE policies.

An example of damages being covered by a BTE Insurer is to be found, for example, in the ***AXA Retailers' Insurance Policy*** (at p 64):

Employment disputes cover

We agree to pay **you** for **legal expenses** and **awards of compensation** incurred by **you** in defending legal proceedings brought against **you** by an **employee**, ex-**employee** or prospective **employee** in respect of their contract of employment with **you** or a breach of employment related legislation.

where 'awards of compensation' are defined at (at p 62) as follows:

Awards of compensation

Basic and compensatory awards and compensation for unlawful discrimination made against **you** by an employment tribunal or settlement of them, subject to the consent of the **administrator** but not including Additional awards under the Employment Rights Act 1996, Protective awards under Trade Union and Labour Relations (Consolidation) Act 1992, Interim relief under the Employment Rights Act 1996, arrears of pay or awards of damages under the Equal Pay Act, or arising out of failure

Where the BTE policy does cover compensation awards arising out of employment disputes, the cap of cover per claim will cover the BTE Insured's own expenses, adverse costs of the opponent, and the compensation, up to the limit of indemnity per claim (which is usually in the region of £100,000–£250,000 per claim), and where the annual aggregate limit for all claims in the same period of insurance is usually in the region of £1,000,000 per annum. The ***Sportsafe Insurance for Sports Tuition and Sports Camps Policy*** (at p 14, under 'Legal Expenses') is another example of a policy which covers compensation awards in employment scenarios:

Cover

Following an Insured event the **insurer** will pay **legal costs & expenses** (and compensation awards under Insured event 2 Employment compensation awards) up to the limit of indemnity and aggregate limit specified in **your schedule** (£1,000,000 aggregate limit per annum under Insured event 2 Employment compensation awards) for all claims related by time or originating cause including the cost of appeals subject to all the following requirements being met.

Where a BTE policy does provide for the payment of compensatory awards (or, say, rent arrears), the BTE

Insurer is effectively a liability insurer for that particular payout. Hence, some Working Group representatives suggested that the requirement of freedom of choice of the BTE Insured's own solicitor (discussed later in Chapter H) embodied in Regulation 6 of the ***Insurance Companies (Legal Expenses Insurance) Regulations 1990*** will not apply in the case of those particular BTE policies.

(d) Communication costs

In the increasingly sophisticated technological world, BTE policies have adapted — and one notable instance of this is in relation to identity fraud. Many policies now cover this adverse event, an example of which is the ***Cornish Home Insurance Policy*** (at p 34, under the section, 'Legal Expenses'):

> Identity Theft Advice and Resolution Service 01872 272 169
>
> This provides:
>
> - an identity theft advice helpline between 8.30am and 7pm Monday to Friday for advice about keeping your identity secure and fraud prevention tips
> - help with contacting the three credit reference agencies to review any incorrect informat and amend or dispute any incorrect data if personal information is used without your permission to commit fraud or other crimes
> - reimbursement of communication costs you will have to pay to reinstate your identity.

where 'communication costs' bears the following meaning (at p 35):

> Communication Costs
>
> means the reasonable cost of phone calls, postage (including special delivery), image scanning, photocopying or credit reports where **you** have taken advice from **our** Identity Theft Advice and Resolution Service.

(e) Income foregone

A number of consumer BTE policies (noted in the ***Comparative Table*** previously) cover the income foregone, especially caused by jury service. In the ***Chubb Home Insurance Policy***, these are called 'attendance expenses cover', and cover a range of scenarios where income may be foregone (at p 61, under the section, 'House and Contents Legal Expenses Cover'):

Attendance expenses cover	Arising out of Your or a Family Member being absent from work to attend any court, tribunal, arbitration, disciplinary hearing or regulatory proceedings at the request of the appointed advisor or whilst on Jury service. The amount the Insurer will pay shall not exceed £10,000.

This is particularly important for the BTE Insured who is self-employed. The ***Federation of Small Business Legal Protection Scheme*** covers this scenario in these terms (at p 3):

Section A2 Jury Service

What is covered by this Section...	Most frequently asked questions about what is NOT covered...
✓ Up to £100 per day with a maximum of £1,000 per claim for losses incurred due to you or an employee attending jury service	✗ If notification of jury service was prior to when you joined the FSB

(f) Fines

Notably, the payment of fines or penalties is **not** part of BTE insurance payouts, whether in the UK or elsewhere. This means, for example, that payment of parking or traffic fines are excluded from cover. Whilst the costs of *defending* proceedings brought against the BTE Insured for offences leading to the payment of a fine or a penalty may be covered by the BTE Insurance policy, the actual fine or penalty imposed is not.

Notably, some jurisdictions elsewhere do not cover as many costs, expenses and outlays as BTE policies in the UK typically do. The table below, sourced from RIAD, ***'How can before-the-event legal protection insurance be made more effective across the population of England and Wales?'*** (30 Mar 2017), illustrates the international comparison of the types of costs that may be covered by BTE insurance:

Figure 4 - Types of costs covered in different countries

	AT	CH	CZ	DE	NL	BE	ES	FR	GR	SK	UK	CA	HU	IT	PL	EE	IE	NO	ZA	JP
Payment of fines																				
Bailiffs																				
Bail (security to allow person to leave custody)																				
Mediation																				
Witness																				
Debt collection																				
Enforcement																				
Out-of-court negotiation																				
Experts				1)										1)						
Court																				
Lawyers																				

1) Covered if part of a litigation and expert is appointed by order of a judge

Covered

Source: RIAD members

4. The limits of indemnity

As the ***Comparative Table*** shows, for consumer BTE policies, cover of between £50,000–£100,000 is the norm (although more commonly towards the lower end of that range).

For business BTE policies designed to cover SMEs and micro-businesses, cover of £100,000 is common, although some policies may cover a higher cap.

However, a BTE home insurance policy which is ostensibly aimed at 'you and your family' may cover a wide range of business-related disputes, and up to an indemnity limit of £500,000. In this respect, some home insurance policies can represent something of a 'hybrid' and/or may be aimed at high-net-worth individuals who are willing and able to pay a higher premium for such a high indemnity limit. One such example is the ***Chubb Home Insurance Policy***, which states (at p 59):

Limit of Indemnity	The maximum payable by the Insurer in respect of all claims related by time or original cause is £500,000. For claims made under Personal injury cover for travel up to 90 consecutive days during the Policy Period the maximum payable by the Insurer is £50,000.

However, for most consumer BTE policies, cover in the region of £50,000 per claim is usual.

5. The insurable events

BTE insurance policies in the UK do not offer a complete safety net against all potential involvement in legal difficulties. The modest pricing of such policies depends upon a non-exhaustive coverage. Hence, the policies target particular areas of coverage, and have some common exclusions.

(a) An international snapshot

The common exclusions from BTE insurance exclude some fairly frequent legal occurrences. However, UK policies are by no means unusual in that regard – and indeed, are more extensive than in some other jurisdictions. An international comparison of BTE insurance across countries reflects that, as a general rule, family law is excluded from coverage. Although tax (fiscal) law is an area commonly excluded in some other countries, BTE policies in the UK typically cover that area (although advice on how to arrange the client's tax affairs optimally is not included, for example).

The table below, sourced from RIAD, '***How can "before-the-event" legal protection insurance be made more effective across the population of England and Wales?***' (30 Mar 2017), illustrates the international comparison of areas of law covered by BTE insurance:

Source: RIAD members and national insurance associations

Figure 3 -Areas of law covered by legal protection insurance in different countries

	AT	BE	CA	CH	CZ	DE	EE	ES	FR	GR	HU	IE	IT	JP	NL	NO	PL	SK	UK	ZA
Administrative law																				
Contract law																				
Criminal law																				
Damages/ Awards (employment compensation or third party liability)																				
Employment law																				
Family law																				
Fiscal law																				
Motor																				
Property/ household (personal injury)																				

Covered

Source: RIAD members

As will be discussed shortly, whilst legal expenses associated with criminal wrongdoing is typically precluded

from consumer BTE policies (although defending proceedings brought in respect of motoring offences or employment wrongdoing may be included, as discussed below), it is common to see some types of such conduct covered by BTE policies which are directed toward *businesses*.

(b) The areas of law typically covered by consumer BTE policies

One of the notable aspects of consumer BTE policies is the width of cover which policies commonly offer. The following example illustrates this — the ***Chubb Home Insurance Policy*** provides (at p 59):

> **Insured Event** means Employment disputes cover, Disputes with domestic employee cover, Contract disputes cover, Personal injury cover, Clinical negligence cover, Property protection cover, Tax protection cover, Work legal defence cover, Motor legal defence cover, Jury service cover or Identity theft cover.

However, those of the Working Group who had considerable experience in handling BTE claims on behalf of clients pointed out that what is **not** covered within these broad categories of cover is particularly important in BTE policies — albeit that there can be quite a range of different coverage across the policies. It is also worth noting that, even if a matter is excluded from legal representation under the policy, the BTE Insured can still use the legal helpline provided by the BTE Insurer in such circumstances (these are considered later in detail in Chapter E), if a helpline is included in the BTE package.

To take a few examples of commonly-arising claims under BTE policies:

Re **employment** disputes, these clauses tend to be very wide. Typically, internal proceedings arising from disciplinary or grievance procedures are excluded — although legal representation for the BTE Insured is available in proceedings which follow from an employer's disciplinary or grievance process. See, for example, the ***HSBC Home Insurance Policy*** (at 36):

Employment Disputes

What is covered

- A dispute with **your** employer regarding **your** contract of employment including unfair dismissal.
- A breach of **your** legal rights under employment law.
- Checking and advising on the terms of a settlement agreement.

What is not covered

- Any disciplinary or grievance procedures at work.
- Disputes with **your** employer which commenced before or within the first 30 days of this cover starting unless **you** had a similar policy which finished immediately before this cover began.

For **property** disputes, much is covered, but leasing disputes with tenants typically are not. Again, the ***HSBC Home Insurance Policy*** illustrates (at pp 30–31):

Property Disputes

The property dispute section covers **your** main **home** and, for this section only, includes any other **homes you** own or rent. **You** will not be covered for a claim which relates, in any way, to the letting out of a property.

What is covered

- A dispute relating to the interference of **your** use, enjoyment or right over **your home**.
- A dispute relating to damage to **your home**.
- A dispute regarding an agreement for the sale or purchase of **your home**.
- A dispute with **your** landlord regarding a tenancy agreement to rent **your home**.
- A dispute with a contractor in relation to work on **your home**.

What is not covered

- A claim relating to quarrying, gas extraction or other major land works where the effect is not limited specifically to **your home**.
- A claim relating to planning including town and country planning legislation.

30

Common examples of property disputes

- Where a neighbour's overgrowing ivy or leylandii damages **your home**.
- Boundary disputes regarding building work or fences.
- Rights of way disputes especially over shared driveways.
- Noise and other nuisance disputes e.g. tree root encroachment.
- Interference with drains or sewers by building work.

It is worth noting that, for those areas that are excluded from BTE insurance policies, they may be covered by more specialist, sector-specific BTE policies. Leasing disputes with tenants is one such example, where landlords are able to purchase BTE insurance that is tailored to that particular issue, and which will cover disputes arising from rent arrears, contract disputes, etc. For example, a bespoke policy which is suitable for landlord–tenant disputes is provided by ***Home and Legacy Landlord's Legal Expenses***, as follows:

Cover is provided for:

- Legal costs to:
  - Regain possession of the property
  - Remove squatters/unauthorised occupants
  - Pursue rental arrears
  - Defend an action against the landlord brought by the tenant.
- Witness expenses £100 per day (up to £1,000)
- Alternative Accommodation £50 per day (up to £1,500)
- Legal costs incurred as a result of identity fraud
- Legal costs for the landlord to defend an action brought in relation to the insured property under
  - The Housing Health and Safety Rating System (England) Regulations 2005
  - The Furniture and Furnishings (Fire) (Safety) Regulations1988
  - The Gas Safety (Installation and Use) Regulations 1998
  - The Electrical Equipment (Safety) Regulations 1994
  - HMRC jurisdiction (Tax/National Insurance/VAT)

Re **boundary** disputes, BTE Insureds typically cannot claim under the BTE policy to ascertain where the boundary is. The BTE Insurer will only fund a dispute in respect of the breach of the *already-ascertained* boundary — the position of which may be the very problem arising between neighbours. The ***Chubb Home Insurance Policy*** is typical:

Property protection	A dispute relating to visible property which You own following: • an event which causes physical damage to Your visible property including Your residences listed in Your Policy Schedule • a public or private nuisance or trespass providing where any boundary is in dispute, You have proof of where the boundary lies.

Re **defamation**, although this is commonly not covered by BTE policies, these policies are reflecting the changing times. The coverage of identity theft has already been mentioned. Some policies now also cover 'cyber bullying' — although, interestingly, this is more likely to be found under the Home and Contents Insurance part of the policy, and not under the BTE section of the policy. One such example of this is provided by the ***Chubb Home Insurance Policy*** (at p 29, under 'Contents Cover'):

Cyber bullying

We will pay for cyber bullying expenses You or a Family Member incurs solely and directly as a result of a Cyber bullying Occurrence.

Cyber bullying Occurrence means more than 3 acts by the same individual or group of individuals that harass, threaten or intimidate You or a Family Member, provided that individual or group of individuals doesn't include You or a Family Members Co-Workers or Employer(s).

These acts include threats of violence, libel, slander, defamation of character, or violation of privacy that harms You or Your Family Member and was sent via computer, mobile device, telephone, or any other electronic device that leads to:

- wrongful termination
- wrongful arrest
- wrongful discipline by a secondary school or higher education
- significant duress leading to the inability to attend secondary school, higher education or work for more than a week, as diagnosed by a physician, psychologist or other authorised mental health professional.

For this relatively new type of cover, the policy typically covers the 'clean-up' of online content, rather than the pursuit of loss or damage arising from the online content. The ***Chubb Policy*** makes this clear:

Professional services for Cyber bullying. We will pay the following related reasonable costs You or a Family Member incurs, up to a maximum of £25,000 for all occurrences in a Policy Period, when incurred within 12 months after a Cyber bullying Occurrence for:

- a professional public relations consultant;
- a professional digital forensic analyst to aid in prosecution;
- a professional cyber security consultant;
- a online reputation management service.

Lost salary. For Cyber bullying, We will pay for salary lost during due to wrongful termination the first 60 days after the Cyber bullying Occurrence, up to £25,000 for each person up to a maximum of £50,000, in excess of any other valid and collectible benefits including disability allowance or insurance, employer's liability insurance, unemployment benefit, employee sick pay, or other similar salary replacement plans.

Temporary relocation expenses. We will pay for the incurred related temporary relocation expenses for You or a Family Member up to a maximum of £25,000, when incurred within 60 days after a Cyber bullying Occurrence.

Insurance representatives on the Working Group noted that, whilst some BTE policies in other European

jurisdictions have moved to cover cyber-bullying, and whilst such cover may be available under UK policies which are typically taken up by high-net-worth individuals (such as the ***Chubb Policy***, above), it is still uncommon to find cyber-bullying covered in BTE consumer policies in the UK, due to the extra cost in premium which insuring against that risk would entail. However, this is an emerging topic, and UK consumer policies may be developed, and priced, to include that type of event in the future.

Re **criminal wrongdoing**, some home policies do cover the costs of defending certain proceedings that may be brought against the BTE Insured, as noted above. One example of such a policy is the ***Cornish Home Insurance Policy***. Albeit that 'any claim relating to ... a parking offence' is noted to be excluded, the policy provides (at p 39) this cover:

7. Legal defence

(a) Work

An alleged act or omission by **you** that arises from **your** work as an employee and results in

(i) **you** being interviewed by the police or others with the power to prosecute.

(ii) a prosecution being brought against **you** in a court of criminal jurisdiction.

(iii) civil proceedings being brought against **you** under unfair discrimination laws.

(b) Motor

A motoring prosecution being brought against **you**.

(c) Other

(i) A formal investigation or disciplinary hearing being brought against **you** by a professional or regulatory body.

(ii) Being absent from work to attend any court tribunal arbitration disciplinary hearing or regulatory proceedings at the request of the

Re **personal injury claims**, BTE policies tend to be quite generous, except that they may not cover 'any claim for an illness or injury which develops gradually or is not caused by an identifiable incident'. The ***HSBC Home Insurance Policy*** states, by way of example (at p 31), that:

Personal injury

What is covered

- A claim following an incident that causes death or injury to **you.**

What is not covered

- Any claim for an illness or injury which develops gradually or is not caused by an identifiable incident e.g. repetitive strain injury.
- Any claim relating to **your** own injury or death in a **motorised vehicle** that **you** are driving

Working Group representatives noted that, whilst ATE insurance cover is available for 'industrial disease' cases, BTE Insurance policies typically exclude the legal expenses which arise from claiming for such a condition.

6. Exclusions from BTE insurance

(a) Common exclusions

One of the features of consumer BTE insurance policies is that they contain exclusions, which tend to be quite consistent across policies. For example, previously-arising disputes; deliberate or reckless acts; fines and penalties; defamation (whether libel or slander); judicial review; and involvement in group litigation orders, are typically excluded.

The exclusions from generic policies mean that sometimes they don't cover the most significant needs that may arise. This includes the issue of 'problem clusters', which tends to happen with people who are least likely to be able to afford legal assistance in the first place, and may experience more than one problem at once owing to their economic circumstances – see discussion of BTE for the lower socio-economic demographic later in this report.

The ***HSBC Home Insurance Policy*** provides a typical list of exclusions (at p 32):

Legal Services Conditions & Exclusions

We will not pay for:

a) Any claim **we** reasonably believe **you** knew was likely to happen when **you** took out this insurance, e.g. where **you** were already in a disciplinary process at work before taking out this policy, which then led to **you** making a claim.

b) Claims where **you** do not keep to the terms, exclusions and conditions of the cover.

c) **Costs and expenses** which are incurred prior to **our** written agreement and authorisation.

d) Claims where the initial dispute or series of incidents leading to a claim on this policy happen before this cover starts or after it comes to an end as shown on **your schedule**. **You** can only make one claim for all disputes arising from the same incident.

e) Any legal action **you** take which **we** have not agreed to or where **you** do anything to hinder **us** or the **lawyer**.

f) Any fines, penalties, compensation or damages which **you** are ordered to pay by a court or other authority.

g) Any claim deliberately or intentionally caused by **you**.

h) A dispute between **you** and someone related to **you** or who is insured under this policy.

i) Any claim relating to or arising as a result of divorce, separation, matrimonial issues or cohabitation, joint property ownership, joint financial obligations or maintenance, financial or custody arrangements involving children.

j) Any claim in respect of libel and slander.

k) An application for judicial review.

l) Disputes relating to class actions e.g. If **you** are part of a group of people who are all making the same claim.

m) Disputes between **you** and **us** or Arc where the dispute relates to this cover.

n) Any claim relating to compulsory purchase or to major works where the effect is not specific to **your home** but is more widespread e.g. work on roads, railways and airports.

o) Any claim made by anyone other than **you** or **your** family attempting to enforce their rights under this cover.

p) Where the incident leading to any claim occurs, or any proceedings are conducted, outside of the United Kingdom or the Channel Islands or the Isle of Man.

q) Any test case unless:
(i) The case relates to the interpretation of a newly or recently enacted law, and
(ii) **Our lawyer** agrees that the case is more likely than not to be successful.
When a court considers a dispute which has never been decided before this is often referred to as a 'test case'. The court's decision on a test case will then be used to decide future cases on similar grounds to ensure the legal system is consistent and fair.

r) A claim resulting from anything set out in the **General Exclusions** section.

(b) Group litigation

The Working Group was particularly interested in the common exclusion of group litigation from BTE insurance cover, given that such claims can involve a large number of claimants who may hold BTE cover as part of their home and contents policies.

It is particularly ironic that BTE cover which is attached to home policies is usually quite fruitless in providing for legal assistance where the BTE Insured has a grievance concerning the peaceable enjoyment of that home, and wishes to bring a private or public nuisance action as part of a group action. The Working Group understands that, in the view of some BTE insurers, BTE insurance is simply not appropriate for group litigation, and that this type of litigation is more suited to a bespoke ATE solution.

The Working Group invited Mark Harvey, head of Specialist Injury at Hugh James Solicitors — and a lawyer who is very experienced with the conduct of group litigation — to discuss that particular exclusion under BTE policies. The following table summarises the key points arising from that discussion with the Working Group:

DISCUSSION: Hugh James partner, Mark Harvey:

- Hugh James has extensive experience in prosecuting group actions across a range of areas of law, viz, occupational disease litigation, product liability, transport disasters, and environmental nuisance claims. These claims are almost invariably contingently-funded, via a combination of CFA and ATE packages;

- whilst Hugh James always enquires as to the BTE insurance cover that a group claimant may hold, its experience, particularly in the more complex higher risk litigation, is that it is rare for BTE insurance to indemnify this type of work. In some cases, where the BTE policy held by a claimant precludes cover for cases that result in group litigation orders (GLOs) (under CPR 19.III), some claimants have started their claims using BTE insurance, but have been unable to find alternative insurance part-way through the case when the GLO has been made, and have therefore declined to join the group register. This occurred, e.g., in the metal-on-metal hip GLO. This has resulted in their being unable to pursue their claim;

- there is no market for the use of BTE insurance in group or class actions, and this seems unlikely to change. BTE Insurers are not willing to cover this area, because almost invariably the actual cost of the premium is very low (say, approximately 20 pounds), but on the basis of the many paying the few — the fundamental tenet of insurance — one can see just how many premiums need to be sold to have any prospect of being able to indemnify these sorts of cases;

- also, group claims are 'their own breed'. For example, environmental nuisance claims involve the risk of adverse costs (i.e., dust, noise or smell interferences rarely give rise to personal injury, and hence, QOCS does not apply); expensive experts' reports are often required on each side; the defendant is often a well-resourced major national or international firm, and hence, the claims are vigorously defended; the length of the group action is unpredictable (up to and including the delivery of judgment); and the costs are high in comparison with the low damages per group member. Such claims are unattractive to BTE Insurers;

- in 2013, out of a sample of 4,333 potential claimants with legitimate environmental nuisance claims, only 35 had an effective BTE insurance policy (i.e., 0.08% of the prospective claimants). The reason for the lack of availability related to exclusions, including: group actions, actions relating to work by or under the order of government, public or local authorities, and applications for judicial review; and strict time limits for notifying the BTE Insurer of the nuisance;

- BTE insurance policies also commonly exclude 'injuries gradually arising'. This will exclude many product liability-related claims, because, e.g., the failure of a hip prosthesis is not usually a one-off catastrophic incident — it is often a deterioration or toxic insult over a period of time. BTE policies may also only cover 'bodily injury' which will exclude psychological-related conditions such as stress-related claims, and some cases arising from transport accidents where there is no physical injury, but a psychological injury alone;

- time limitations also pay a part. BTE Insurers may allege that the tort complained of fell outside the period of cover, e.g., for environmental nuisance, it may have started in 2016, but only rise to a level which a claimant considers they cannot put up with in 2017, commencing their claim at that point. The BTE Insurer may argue that the nuisance started in 2016, that the BTE Insured did not have cover at that point, and hence, cannot claim indemnity for that reason;

- commonly, BTE caps are modest, and often insufficient for group actions, where the BTE Insured's share of the common cost disbursements may often be much larger than that cap. That leaves such a claimant either at significant risk of bearing those costs themselves, or burdened with trying to find and purchase an ATE product. This has an impact on the lead solicitor and their ability to ensure the common cost disbursements are borne equally throughout the claimant group cohort and that all exposure is insured.

7. BTE insurance for businesses

In the case of potential business liability, the range of disputes brought against the BTE Insured may be very wide — e.g., intellectual property disputes; employment disputes; criminal charges; civil disputes arising from harassment or negligence; and personal injury claims.

As noted earlier, coverage of legal expenses arising from alleged criminal conduct is typically covered by a business BTE policy. For example, the ***Sportsafe Insurance for Sports Tuition Groups and Sports Camps Policy*** covers corporate manslaughter (at p 8), although notably this is under the 'Public and Products Liability' section of the policy:

2 **Corporate Manslaughter**

We will indemnify **you** against

a) legal costs and expenses incurred with **our** prior written consent and

b) prosecution costs awarded against **you**

in the defence of any criminal proceedings including an appeal against conviction arising from such proceedings brought under The Corporate Manslaughter and Corporate Homicide Act 2007 as a result of any death happening in connection with the **business** during the **period of insurance** and which may be the subject of indemnity under this section.

Provided that

i) **our** liability under this extension shall not exceed the limit of indemnity stated in the **schedule** during any one **period of insurance**

ii) all amounts payable under this extension will form part of and not be in addition to the limit of indemnity stated in the **schedule**

iii) where **we** have already provided an indemnity in respect of any legal costs or expenses incurred in connection with the defence of any criminal proceedings including appeals against conviction arising from such proceedings brought under The Corporate Manslaughter and Corporate Homicide Act 2007 arising out of the same occurrence which gave rise to such proceedings any amount paid or payable by **us** will be deducted from the amount payable under this extension

iv) **we** agree in writing to the appointment of any solicitor or counsel who is to act on **your** behalf prior to their appointment.

We will not be liable for

i) any fines or penalties or the cost of implementing any remedial order or publicity order

ii) an appeal against any fines penalties remedial order or publicity order

iii) any costs incurred which result from the failure to comply with any remedial order or publicity order

iv) costs and expenses in connection with an appeal unless advice has been obtained from solicitors or counsel approved by **us** that there

— whilst the ***AXA Retailers' Insurance Policy*** is even wider, and provides (at p 64, under the 'Legal Expenses Section') that:

Criminal prosecution cover

We agree to pay the **insured persons legal expenses** incurred in

1 defending a prosecution against the **insured persons** in a court of criminal jurisdiction

2 an appeal by the **insured persons** against the service of an Improvement or Prohibition Notice under the Health and Safety at Work Act 1974 or the Food Safety Act 1990.

Tax protection cover is also a crucial part of many business BTE policies, as the ***AXA Retailers Insurance Policy*** (at p 65) provides:

Tax protection cover

1 Inland Revenue investigations

We agree to pay **you** for **professional expenses** incurred in representing **you** at an **Inland Revenue investigation**, including representation at a First-tier Tribunal, Upper Tribunal and at an appeal against a decision following such a tribunal, provided that there is a reasonable prospect of reducing the liabilities alleged by HMRC.

2 VAT disputes

We agree to pay **you** for **professional expenses** incurred in representing **you** in a **VAT dispute** for the local review procedure in order to reach agreement with HMRC, a First-tier Tribunal Upper Tribunal or VAT Tribunal, including an appeal, provided that there is a reasonable prospect of reducing the liabilities alleged by HMRC.

Further details about the actual or potential coverage of BTE policies for SMEs are discussed in the following chapter, in the context of the distribution and take-up of that insurance.

D. ASSESSING THE BTE CLAIM: RELEVANT FACTORS

1. Initial merits assessment of the claim

The wording of this requirement varies considerably from policy to policy, e.g.: 'reasonable prospects of success against the third party'; or 'if it is more likely than not that you will recover damages or obtain any other legal remedy'. However, the practice in the BTE industry is consistent: the initial merits test applied under BTE insurance policies is a strict balance-of-probabilities assessment. If the opinion of the BTE Insured's lawyer is that the BTE Insured's claim has a 51% prospect of success, then the claim will be funded (subject to the matters raised in the following section).

Sometimes that standard is explicitly stated in the policy. For example, the ***Chubb Home Insurance Policy*** provides (at p 59) that:

> **Reasonable Prospects of Success** means
> - Other than as set out below, a greater than 50% chance of You or a Family Member successfully pursuing or defending the claim and, if You or a Family Member is seeking damages or compensation, a greater than 50% chance of enforcing any judgment that might be obtained.
> - In criminal prosecution claims where You or a Family Member
  - pleads guilty, a greater than 50% chance of successfully reducing any sentence or fine or
  - pleads not guilty, a greater than 50% chance of that plea being accepted by the court.
> - In all claims involving an appeal, a greater than 50% chance of You or a Family Member being successful.

The Working Group was not aware of any policies which require a higher assessment of merits than that, whether in consumer or business BTE policies. The Working Group also noted that third party funders and ATE insurers typically require a better merits assessment than a strict balance-of-probabilities.

The Financial Ombudsman Service notes that, in complaints made to it by BTE Insureds who were concerned about the rejection of their claim because of inadequate merits, they **also** apply a balance-of-probabilities assessment. The FOS also makes the point that just because a BTE insurer rejects a claim as

having less than a 51% prospect of success, and the claim then goes on to succeed, does not render the BTE Insurer automatically wrong and the proper subject of complaint. According to its ***Online Technical Resource*** (available at: http://www.financial-ombudsman.org.uk/publications/technical_notes/legal-expenses.html):

FOS, ***Online Technical Resource***:
Legal expenses policies invariably contain a clause that allows the insurer to withhold or withdraw funding for a legal action or defence, if there are no "reasonable prospects of success". If the insurer has rejected a claim on this basis in a complaint referred to us, we usually expect it to have acted on expert advice - not to have made an arbitrary, uninformed decision. If the insurer considers that a claim should be pursued, the normal practice is for it to be passed to an external firm of solicitors on the insurer's panel. This firm should have knowledge of the relevant area of law - and their opinion as to the prospects of success is usually a sufficient basis for the insurer to agree (or refuse) to fund the legal claim/defence. In cases we see where the policyholder disputes this opinion, we will usually ask the policyholder for independent evidence from a suitably qualified, and comparable, lawyer - to support their view on the prospects of success of the legal action. Sometimes there may be conflicting legal opinions from two different solicitors on the prospects of success of the action. This may happen when the insurer's panel solicitor has advised that the case does not have prospects of success but the policyholder has a legal opinion from a solicitor to the contrary. If this happens in cases we deal with, we generally expect the insurer rather than the policyholder - unless the policy states otherwise - to obtain a legal opinion from a qualified barrister who has knowledge of the relevant area of law. In this situation, we normally place greater weight on the barrister's opinion than that of the solicitor's - as the barrister will be the expert in the particular area of law and in court advocacy and litigation generally. Some proposed legal actions may have no reasonable prospects of success because there is, for example: - a lack of evidence; - legal obstacles, such as statutory time-bars, immunities or decided case law; - no known cause of action. In the cases we deal with, we interpret "reasonable prospects of success" to mean a *51% or more* chance of winning. If the legal experts advise that there is an *even (50-50)* chance of success, we will not usually regard this as sufficient. Complaints referred to us *after* the result of court proceedings is already known may involve a case that had a *less than 51%* chance of succeeding - but which then won in court. This does not necessarily mean that the insurer was wrong to refuse funding. The insurer can rely only on the advice and evidence available at the time. It does not have the benefit of hindsight that the policyholder and we may have when later reviewing its decision.

2. Grounds for declining to fund the claim at the outset

The Working Group noted the adage that is often expressed in legal circles, that BTE 'is insurance that does not apply where it is most needed'.

Indeed, there are **ten** principal reasons, derived from the commonly-used terminology in BTE insurance policies, as to why funding a claim may be declined. Summarising these — cover may be refused:

i. where the event which occurred is not an 'insurable event', or is an excluded event (as discussed above);

ii. where it is a pre-existing claim (as noted in the ***HSBC Home Insurance Policy*** reproduced earlier);

iii. where the prospects of success do not exceed balance of probabilities (i.e., 50% or lower), as discussed in the previous section, or where the claim is likely to be considered to have no reasonable grounds, or is frivolous or vexatious in nature;

iv. where the claim does not exceed the minimum threshold of damages under BTE insurance policy — the earlier ***Comparative Table*** sets out the minimum threshold for many of the common BTE policies;

v. where there is late notification of the claim — there is a window of notification of claims under several BTE policies. For example, 180 days is permitted under the ***Amtrust Motor Legal Protection Policy***, at p 2 — a clause that conveniently sets out a number of bases for precluding a BTE claim:

Significant features and limitations of this section of the policy

- Cover is provided up to a maximum of £100,000 for legal expenses.
- Any claims must be reported within 180 days of the accident.
- The identity of the third party must be known and they must have held valid motor insurance at the time of the accident.
- There must be reasonable prospects of success against the third party.
- The estimated legal costs for the claim must not exceed the estimated value of the claim.

The wording of the notification periods can be quite stringent in BTE policies, suggesting that the funding will not be provided if the notification is out-of-time. However, late notification often does not preclude the BTE Insurer from funding the claim, provided that the delay in notification does not prejudice the Insurer's position. Only some BTE policies explicitly state that — one such example being the ***Sportsafe Insurance for Sports Tuition Groups and Sports Camps***, at p 17 (under the 'Legal Expenses' section):

> 11. The **insurer** will not cover a claim where the **insured person**'s failure to notify **us** of within a reasonable time of the **occurrence date** adversely affects the **reasonable prospects of success** of the claim or **we** consider the **Insurer's** position has been prejudiced.

On this point, the FOS sets out some useful examples of where such 'prejudice' may feasibly be suffered by the BTE Insurer from a late notification:

FOS, ***Online Technical Resource***:

Most legal expenses policies contain a clause requiring the policyholder to inform the insurer as soon as they become aware of an event that may give rise to legal proceedings. A breach of this clause could result in the insurer refusing cover.

In the cases we see, we usually decide that an insurer should *not* reject a genuine claim - as long as it has not been prejudiced by the late notification. Late notification can be a significant issue with legal expenses policies, because failing to act as quickly as possible can adversely affect a legal case — for example, where issues involve:

- the preservation of evidence;
- difficulties in tracing witnesses;
- witnesses less able to recall information;
- time-bars coming into effect;
- the legal requirement to avoid "inordinate and inexcusable" delay not being satisfied;
- interest and costs building up.

In cases we deal with where late notification is an issue, we look carefully at the evidence, to decide whether the insurer was entitled to reject the claim or limit its liability to certain costs. We take the view in these cases that the onus is on the insurer to show they have been prejudiced.

vi. where legal costs and expenses were incurred without the BTE Insurer's consent, prior to any notification of the claim, those cannot be refunded to the BTE Insured;

vii. where the proposed opponent is a 'straw defendant' — if that is ascertainable when the claim is notified to the BTE insurer, then that will mean that the claim will not be funded. Some policies make that very clear, for example, the ***Amtrust Motor Legal Protection Policy***, at p 2, reproduced above. In other cases, this will be part of the 'due diligence' carried out by the BTE Insurer (and by its law firm), e.g., credit checks undertaken of the defendant;

viii. where the BTE Insured has failed to follow advice or assistance provided to him, or has failed to take steps required to be taken to protect his own interests, or has been less-than-truthful, or has taken steps prejudicial to the BTE Insurer's interests. The ***Cornish Home Insurance Policy*** illustrates (at p 42):

> You shall at all times be entirely truthful and open in any evidence, disclosure or statement you give and shall act with complete honesty and integrity throughout. Where, on the balance of probabilities and having considered carefully all the facts of the claim, it appears that you have breached this condition and that the breach has:
>
> (i) affected our assessment of reasonable prospects of success, and/or
>
> (ii) prejudiced any part the outcome of your claim
>
> the insurer shall have no liability for legal costs & expenses.

ix. where costs–benefit analysis does not work in the BTE Insured's favour — again, the the ***Amtrust Motor Legal Protection Policy***, at p 2, is illustrative; or

x. where the territorial limits applicable to the BTE Policy are not adhered to — these are set out in the ***Comparative Table***, for many of the common consumer BTE policies in the UK.

3. Grounds for withdrawing or terminating BTE cover

(a) The general grounds

Even should the BTE claim be funded, that may be withdrawn by the BTE Insurer at a later stage in a variety of circumstances which are outlined in the policy. These clauses are quite diverse. To collect a number of these reasons below:

i. where the prospects of success are no longer in the BTE Insured's favour. As the landscape of the litigation changes, particularly post-disclosure, these prospects clauses may provide the BTE Insurer with sufficient grounds to cease funding the claim;

ii. where the costs–benefit analysis is no longer in the BTE Insured's favour (i.e., the costs of pursuing the claim will outweigh what would be derived from the claim) — although, in some cases where the value of the claim is very low (e.g., a loss-of-wage claim of, say, £250, or a very low-value property dispute), the BTE Insurer may opt to pay the claim of the BTE Insured itself (i.e., 'bagatelle' the claim) rather than proceed to fund the claim to trial or settlement;

iii. where the BTE Insured acts dishonestly, misleadingly, or unco-operatively in respect of his claim;

iv. where the BTE Insured has colluded with the opponent, or with any witness in the claim;

v. where the BTE Insured has dismissed the BTE panel law firm without good reason, or where the BTE panel law firm refuses to continue acting for the BTE Insured with good reason; or

vi. where the BTE Insured refuses to settle the claim when advised by his solicitor to do so.

(b) The 'TCF' obligations upon insurers

The Working Group took note of the 'Treating Customers Fairly' principle, which was promulgated by the Financial Services Authority in July 2006 (per ***Treating Customers Fairly: Towards Fair Outcomes for Consumers***, 2006), and which continues to this day, under the supervision of the Financial Conduct Authority (see the details, TCFInfo, available at: http://www.tcfinfo.co.uk/mepasite/49/What_is_TCF.aspx).

The content of that TCF is described as follows:

FCA, ***Treating Customers Fairly***:

All firms regulated by the FCA have to support the FCA Sourcebook's principle that a firm 'must pay due regard to the interests of its customers and treat them fairly'.

The TCF ('treating customers fairly') principle aims to raise standards in the way firms carry on their business by introducing changes that will benefit consumers and increase their confidence in the financial services industry.

Specifically TCF aims to help customers fully understand the features, benefits, risks and costs of the financial products they buy minimise the sale of unsuitable products by encouraging best practice before, during and after a sale

Desired consumer outcomes of TCF

The FCA has outlined six core consumer outcomes that it wishes to see as a result of the TCF initiative. These are:

Outcome 1 - Consumers can be confident that they are dealing with firms where the fair treatment of customers is central to the corporate culture

Outcome 2 - Products and services marketed and sold in the retail market are designed to meet the needs of identified consumer groups and are targeted accordingly

Outcome 3 - Consumers are provided with clear information and kept appropriately informed before, during and after the point of sale

Outcome 4 - Where consumers receive advice, the advice is suitable and takes account of their circumstances

Outcome 5 - Consumers are provided with products that perform as firms have led them to expect, and the associated service is of an acceptable standard and as they have been led to expect

Outcome 6 - Consumers do not face unreasonable post-sale barriers imposed by firms to change product, switch provider, submit a claim or make a complaint.

This series of obligations is published as 'principles' of the FCA, and applies to BTE Insurers automatically. However, Working Group members noted that the TCF principles are also frequently treated by BTE panel law firms as imposing obligations upon those solicitors, over and above the ***Code of Conduct's***

requirements.

The TCF obligations apply to **all** aspects of the BTE Insurer's conduct and behaviour, but particularly in respect of where the prospects of the claim are alleged to have changed. The Working Group noted that, if the prospects do drop, then BTE Insurers do not wish to go to court and lose — but equally, it is open to the BTE Insured to contest that assessment. Also, if the prospects have changed for the worse, the BTE Insurer may wish to fund the claim sufficiently long to seek to negotiate an exit from the case. BTE policies commonly set out what the BTE Insured must do, in that scenario.

The ***HSBC Home Insurance Policy*** provides one such example (at pp 28–29):

If, in the **lawyer's** opinion,

a) **your** claim is likely to be considered a waste of court time, or

b) the prospects of success are no longer in **your** favour, or

c) **your** claim has reached a point where incurring further **costs and expenses** would not be reasonable

then **we** will not pay any further **costs and expenses** towards it. If this happens the **lawyer** will tell **you** what options would be available should **you** wish to continue.

Please note that prospects of success may change throughout **your** claim as evidence is obtained and legal arguments develop.

What can I do if I do not agree with the lawyer's opinion?

We have confidence in the opinion of **our** appointed **lawyer** and rely on this when deciding if **we** should continue to pay the **costs and expenses** towards **your** claim.

If **you** do not agree with **our lawyer's** opinion and **you** find a different **lawyer**, at **your** own cost, or **you** already have a **lawyer** who supports **your** view, then **we** will be happy to offer a review of the case. The opinion of **your** chosen **lawyer** must be based on the same information regarding the claim that **you** provided to **us**.

28

The **lawyer** conducting the review will be chosen jointly by **you** and **us**. If **we** cannot agree on who this **lawyer** should be then **we** will ask a relevant law society to appoint one. The reviewing **lawyer** will assess the case and **we** will abide by their decision. **We** will pay for the cost of this review and should they decide in **your** favour **we** will also pay any cost that **you** incurred for **your** chosen **lawyer's** second opinion.

This review and any resulting decision will not affect **your** rights to make a complaint as detailed in the complaints procedure section.

The separate complaints procedure referred to in this extract is considered in more detail later in this report, in Chapter I.

E. LEGAL HELPLINES

Provision of some form of phone advice is a common, and very important, element of BTE policies in the United Kingdom.

In the view of one Working Group member, the legal helpline is 'the best bit of BTE', in that it covers a multitude of areas of grievance or worry (wider areas than the entitlement to legal representation in many cases), and may be used unlimited times by the one caller. Another of the Working Group members, Lesley Attu, has written (previously) that legal helpline services 'can benefit policyholders who don't need to claim, and their value inevitably exceeds the typical £25 premium': '***Putting the record straight on Legal Expenses Insurance***' (*ARAG News*, 14 May 2015).

Following a brief discussion of legal websites, and an outline of some legal helpline examples, this section of the report considers one particular legal helpline — how it operates, what it covers, its exclusions, and its pricing.

1. Legal websites

Quite apart from the legal helpline, some BTE insurance policies provide legal assistance via websites. However, as the ***Comparative Table*** notes, most of the common consumer BTE policies do not provide this service.

Where it is provided, it allows the BTE Insured to access and download legal documents, such as a free Will, or other legal document templates, or even law dictionaries. Sometimes there is a small fee for access to some of the documents.

Some examples of policies which provide access to legal websites are below.

The ***Chubb Home Insurance Policy*** provides as follows (at p 59):

Additional Legal Services	**ARAG Consumer Legal website** As a benefit of Your House and Contents Legal Expenses Cover You have access to ARAG's Consumer Legal website. ARAG's Consumer Legal website has been designed to meet Your personal needs, allowing unlimited access to online legal documents to download that will assist You with personal legal-related matters. These include wills, power of attorney, buying and selling Your home, and consumer complaints. To access this website, go to: **www.araglegal.co.uk** You will then need to enter Voucher Code **AFA598CC568B** to register for the first time. Registration will allow You to create Your individual sign in details to use in the future.

The ***Cornish Home Insurance Policy*** is another example:

Consumer Legal Services
Register at www.araglegal.co.uk and enter the voucher code AFE48BBE98B5 to access the law guide and download legal documents to help with consumer legal matters. Many documents such as wills are free to down load while others attract a modest fee.

However, some Working Group members noted that these types of websites are expensive and time-consuming to maintain, putting upward pressure on the premium pricing, and hence, they are becoming more exceptional.

It was also noted that such websites are more likely to be used by business BTE Insureds rather than by consumer Insureds, due to a greater awareness among the business market that such websites exist — and hence, these websites tend to represent better value for businesses than for the consumer Insured, for that reason.

2. Legal helplines

(a) Coverage

Helplines take all sorts of forms. The ***Federation of Small Business Legal Protection Scheme*** is quite extensive, given its membership:

FSB Legal Advice Line

The FSB Legal Advice Line is provided by solicitors, barristers, taxation and health & safety experts. The advice is provided as a right of membership to FSB members, except for the cost of the call which is charged at your network local rate wherever in the UK you are calling from. When calling you will be asked to validate your entitlement to advice by stating your Membership Number (see your membership card) and the postcode of your address (as recorded by the FSB). Please have any relevant papers to hand and note that in the interests of monitoring the quality of the advice, conversations may be recorded. A Call Reference Number will be allocated by the receptionist and/or the adviser, a note of which should be kept by you in the event that you need to make further calls on the same subject.

Subjects covered by the advice line include:

- General Legal Advice - 24 hours a day
- Scottish Legal Advice - 24 hours a day
- Employment Advice - 24 hours a day
- Safety & Environmental Advice - 9am to 5pm, Mon to Fri
- Tax, VAT & PAYE Advice - 9am to 5pm, Mon to Fri

Some BTE policies offer a phone helpline for a particular type of cover, amongst the wider range of cover offered via legal representation. For example, in the ***Chubb Home Insurance policy***, a dedicated 'Identity Theft Resolution Service Helpline' is offered as part of a wider cover (at p 7):

ARAG Identity Theft Advice and Resolution Service helpline 0333 000 2083

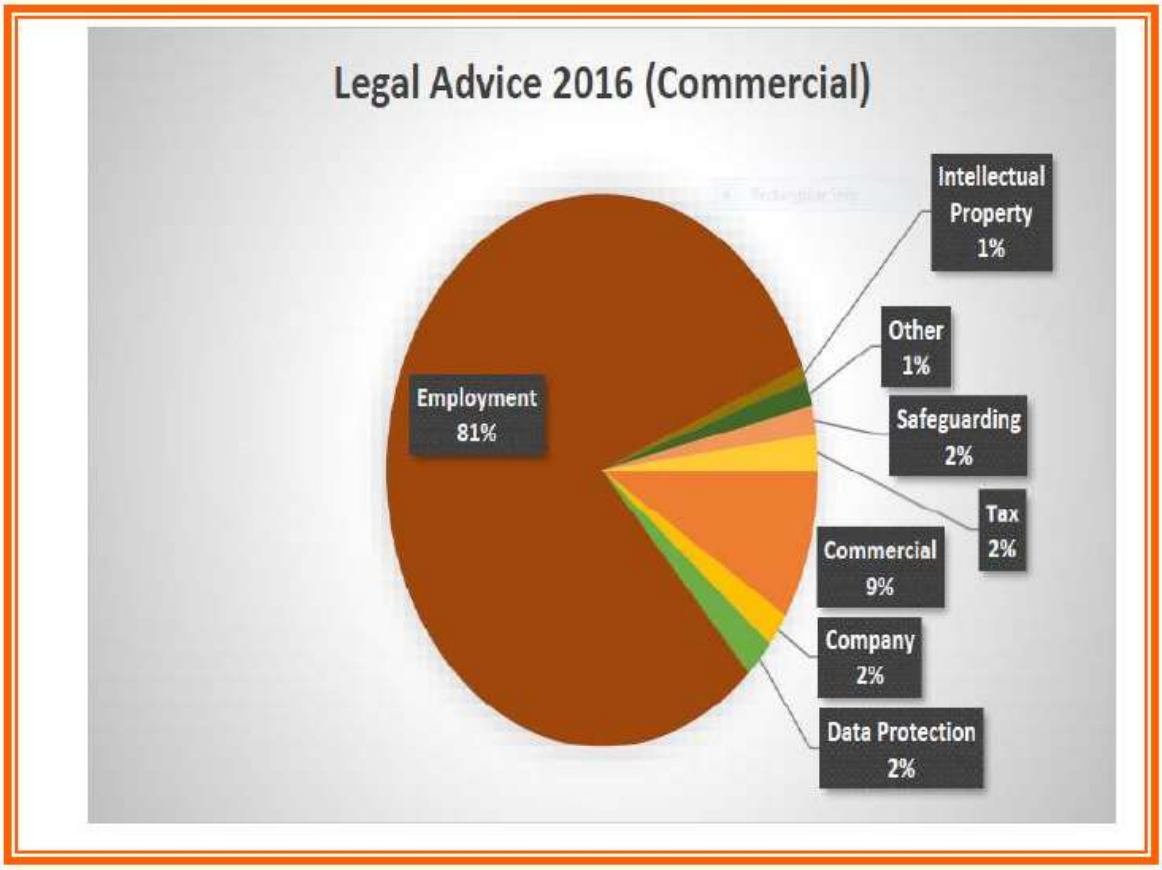
This provides:

- an identity theft advice helpline between 8am and 8pm seven days a week. This gives advice about keeping Your identity secure and fraud prevention tips
- help with contacting the three credit reference agencies to review any incorrect information and
- amend or dispute any incorrect data if personal information is used without Your permission to commit fraud or other crimes
- reimbursement of communication costs You will have to pay to reinstate Your identity.

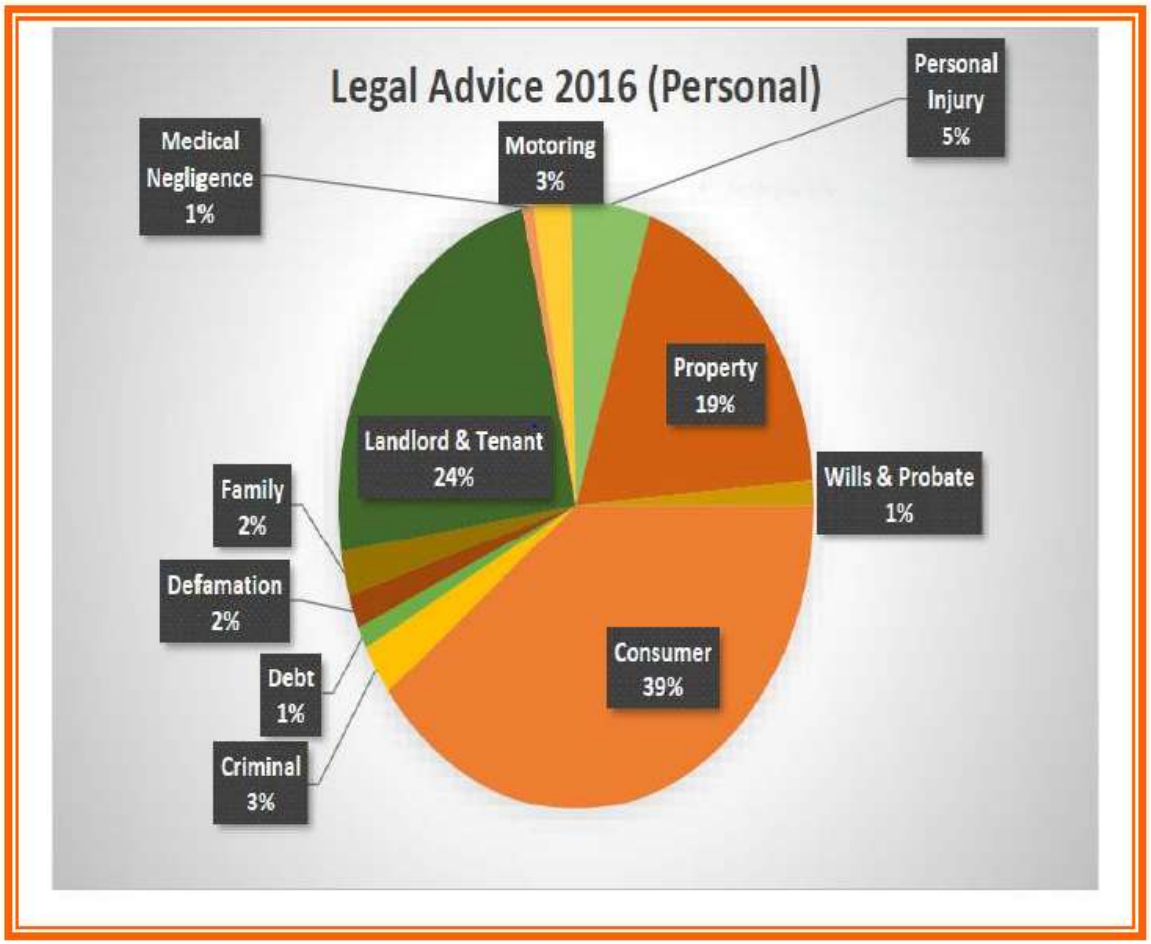
If You have a House and Contents Legal Expenses or Home Emergency Cover query or claim, or for legal and tax advice: Call ARAG on **0800 018 0678**. Please send Your House and Contents Legal Expenses or Home Emergency Cover query or claim to: ARAG legal services, 9 Whiteladies Road, Clifton, Bristol BS8 1NN or email at HNWclaims@arag.co.uk.

(b) Usage

The figures from the ARAG legal helplines for 2016 show that employment is by far the most commonly-occurring cause of a legal helpline call under that entity's commercial BTE policies:

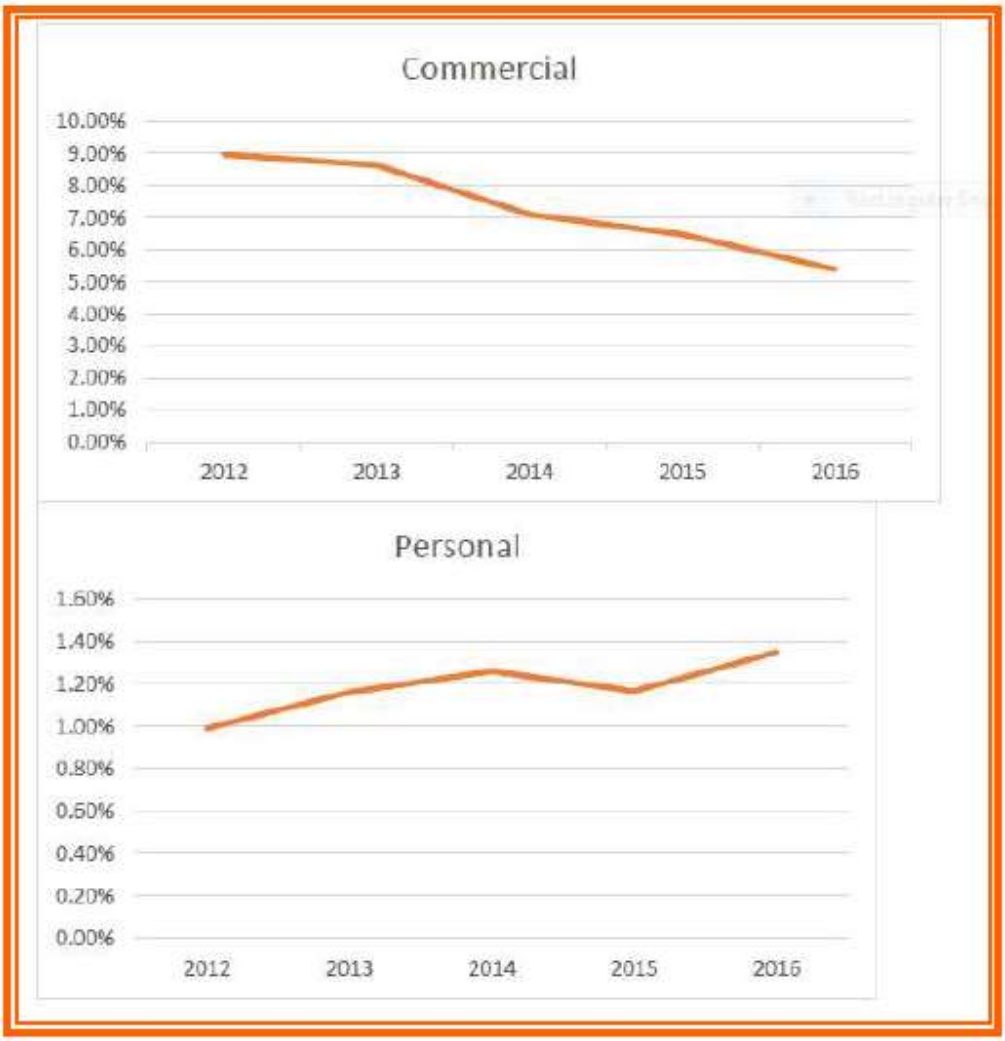


— whilst consumer claims are the most commonly called about under consumer BTE policies:



To clarify these graphs, most of the landlord and tenant calls made to the ARAG legal helplines were made by landlords who had problem tenants, rather than by tenants who had grievances against landlords. Also, the fact that only 5% of the calls related to personal injury is probably explainable by the fact that the data set for the abovementioned graphs does not include motor policyholders. It only includes family and landlord BTE Insureds.

The graphs overpage show the call frequencies made to the ARAG legal helplines, covering all types of law — and showing contrasting trends for consumer and business claims to the helplines:



The call frequencies measure the number of calls as a ratio of the number of insured customers. There has been a significant dip in call frequency under business BTE policies since 2013. This may possibly be a consequence of the falling numbers of individuals bringing employment tribunal claims since the introduction of employment tribunal fees. The increase in filing fees in the civil courts generally may also have had some impact. The large-scale increases to civil court fees in 2014/15 have been suggested as a barrier to people pursuing claims, and former Master of the Rolls, Lord Dyson, in giving evidence to the Justice Select Committee, said that "the risk of denying justice to a lot of people was intense". As noted earlier in this report, court fees are normally covered in BTE insurance policies.

3. The Irwin Mitchell legal helpline: a case study

Irwin Mitchell's Sheffield office services (amongst other things) the legal helpline for the BTE insurance policies underwritten by a number of BTE Insurers. It handles one of the biggest legal helpline centres in the country, and has been in operation for 12 years.

In the view of Irwin Mitchell personnel who were interviewed for the purposes of this report, the usage of this legal helpline has increased markedly in the last five years — as more individual BTE Insureds become aware of their availability, as affinity group BTE policies become more commonly underwritten (and for which the usage and prevalence of legal helplines has increased), and as more commercial BTE policies are taken up in the commercial marketplace.

This section of the report outlines the key aspects of that helpline, by reference to a field trip that Prof. Rachael Mulheron took, on 3 August 2017, to the Irwin Mitchell office at Sheffield.

(a) The staffing of the helpline centre

The legal helpline at Irwin Mitchell is based entirely at its Sheffield office. The legal helpline sits firmly within the solicitors' practice.

It is staffed by a centre comprising some 34 lawyers, 31 of whom are termed, 'client experience experts'. Each of these staff has, as a pre-requisite, a law degree; that is a contractual requirement, for those who staff the helpline centre. The descriptor of the staff is intended to reflect the two key aspects of a legal helpline staff member: to provide legally accurate advice; and to do so with support and empathy. The number of applications for vacancies in the helpline centre far exceeds the positions available.

Three members of staff are the 'leaders' of the helpline centre, and are fully-qualified and very experienced solicitors. These leaders are responsible for a variety of tasks, *viz*: (1) training the team of client experience experts; (2) identifying where there is a need to bring in experts from other Departments within Irwin Mitchell to handle a query made to the helpline, whether from the Business Legal Services (BLS) or the Personal Legal Services (PLS) sectors of the firm; (3) perusing and signing off the training materials used by the client experience experts; and (4) providing additional support to team members regarding substantive legal queries that are made by some callers to the helpline.

The helpline centre also employs two medical researchers: a nurse, and a staff member who holds a

medical degree. These two personnel contribute to the training of the helpline centre staff, and also assist with individual call enquiries. This adjunct to the helpline centre staff is considered to be very important to enhance the familiarity of the client experience experts with the terminology and key concepts which arise in those calls received by the helpline centre about medical grievances (as noted below, this is one of the key areas of usage of the Irwin Mitchell helpline).

The trainers and team leaders of the helpline centre also benefit from external training from time to time, e.g., from the Samaritans and from other charities or firms, which is then passed onto the client experience experts. These training sessions are especially beneficial, should callers make threats of self-harm, or against third parties.

All calls received by the helpline centre are recorded. The helpline is intended for general preliminary advice only. Staff do not draft documents on behalf of the caller.

The staff of the legal helpline centre receive extensive training, via mock scenarios, training materials, and observation of other staff, before they are able to undertake 'live' calls. In many cases, staff are trained for one BTE Insurer client, as that can be helpful if the preponderance of legal issues means that specific education about those issues can offer a better level of service to the callers.

In addition, staff receive specific training on particular areas which may prompt a flurry of calls to the helpline (e.g., where a disaster occurs, such as a plane crash, or the Grenfell disaster), by way of additional support, since experience shows that calls do spike upon the occurrence of such an event.

(b) The hours of operation

The legal helpline is open 24 hours a day, 365 days a year. Staff service the legal helpline either from the Irwin Mitchell offices (from 7.00am–9.00pm weekdays) or from their own homes outside of those hours. It is truly a 'round-the-clock' operation.

The computerisation of the helpline applies, no matter where the advice is provided. That is, all calls are recorded; claims logged by callers are maintained via detailed computer records; and the system's recording is highly-automated. The working environment, the computers, the recording equipment, and other digital systems used by helpline staff at their own homes, are regularly checked for compliance, security, and

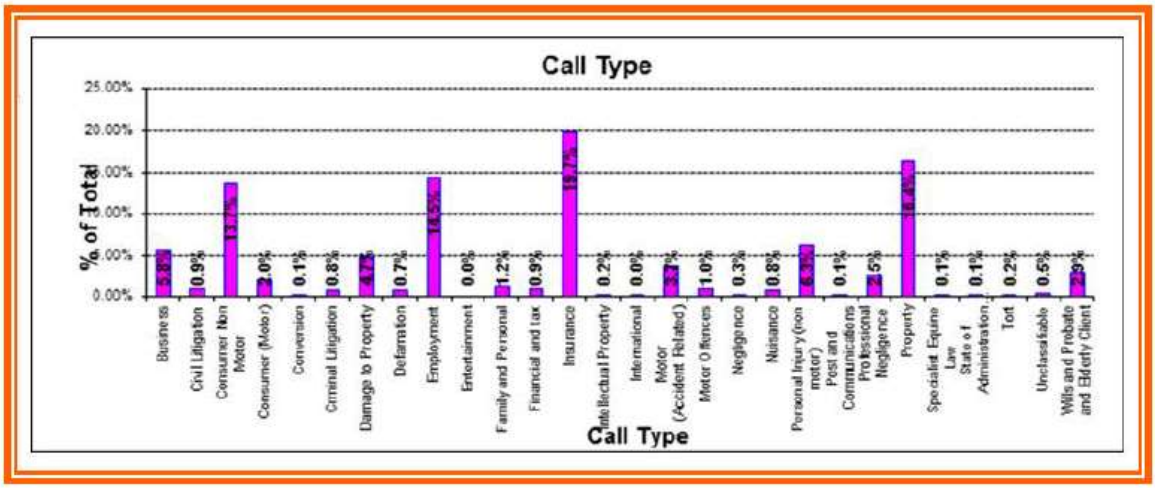
confidentiality.

In the experience of the legal helpline staff, many calls occur outside business hours, including at weekends and on public holidays. This is especially so in the case of micro-businesses or SMEs whose personnel are preoccupied with work matters during the working day, and can only call the helpline when time permits after business hours, and when privacy is more assured.

(c) The areas covered

The helpline centre administered by Irwin Mitchell in Sheffield receives approximately 100,000 calls per annum. Approximately 75% of those calls are made by a BTE Insured via a BTE policy; the other 25% are by way of private callers who learn about the helpline by word-of-mouth.

The breakdown of these calls, by area of grievance, is outlined below.



As is plain from the graph, employment, property, and non-motor consumer-oriented disputes are the key areas of the legal helpline's operations.

It is important to appreciate that, under the helpline provided by the particular BTE Insurers who are serviced by Irwin Mitchell's office, most areas of legal grievance are covered by the legal helpline, even if those areas are not covered by the BTE policy, insofar as legal representation is concerned. If the area is an excluded area for legal representation under the policy, then following the preliminary advice, the staff of the helpline will provide the caller with advice as to where, and how, to proceed, absent further BTE cover.

For those uncommon areas which are not covered by the legal helpline (e.g., information relating to benefits; advising on tax arrangements; and immigration queries), the callers are referred on to other relevant parties, such as Citizen's Advice, or accountancy firms.

An average of 2–3 contacts are made per person who makes use of the legal helpline. Each claim notified to the helpline is allocated its own file number. Subsequent calls on that file can be handled by a different client experience expert. If a caller wishes to speak to the same legal representative as previously, the centre leaders will try to facilitate that.

The territorial application of the legal helplines depends entirely upon the policy under which the BTE Insured is making the call. They do not necessarily coincide (as the ***Comparative Table***, earlier in this report, illustrates). Hence, the client experience officers must be able to meet the legal knowledge requirements of those different territories.

A caller is not necessarily going to carry on to make a claim for legal representation under the BTE policy. The point of the legal helpline is to provide **legal** as well as **practical** advice, so that legal disputes may be prevented from escalating. One common example is in the case of boundary disputes. Where neighbours dispute the position of a boundary, then that must be declared on sale, and it may reduce the sale price by a margin — hence, a legal helpline adviser can assist a party to take steps to prevent the dispute from escalating and causing detriment to a prospective sale. This meets the legal and practical needs of the caller, at the time that it is most required.

Some commercial BTE policies require that the BTE Insured make a phone call to the legal helpline at the outset, to render a claim valid.

(d) The media used to handle queries

The BTE Insured may make the initial query by: (1) a web-based query via a blog site maintained by Irwin Mitchell; or (2) by email; or (3) by phone.

Whatever the forum used at the outset, the legal helpline is intended to be phone-based service, and advice will be provided in that way. A phone service has been found to be helpful for a number of reasons:

- a conversation assures that the right questions are being asked by the BTE Insured. It is not just a question of reviewing what the BTE Insured has provided. The legal helpline is the 'starting point of the client experience', and it is easier to get to the nub of the problem via a phone conversation rather than via a written medium;

- a reassuring and helpful tone is easier to maintain by phone, particularly when this first port of call is often being made by the BTE Insured in panicky, worried, aggrieved or angry circumstances;

- phone conversations are typically 10–12 minutes long, and can accommodate a great deal of legal information in that time. It would be more inefficient to commit such advice to writing in this setting. Whilst 10–12 minutes is the average length, some calls from SMEs which involve more complex employment disputes may take longer;

- it is important that the BTE Insured not prejudice the position of himself or of the BTE Insurer, and rapid advice by phone tends to ensure that such prejudice is staved off.

Each BTE Insurer for whom Irwin Mitchell provides staffing for the legal helpline is branded for that particular insurer, and has a dedicated phone line.

Notably, a live-chat forum, via a digital channel, is currently being tested, to widen the delivery of legal assistance via the legal helpline. This is seen as having benefits to those who may wish to use the helpline, in the following respects:

- it can be particularly important to international travellers who get caught up in events that give rise to

a grievance, given that wifi is often free, but phone calls from their hotel room are not; and

- a live chat forum can be useful for callers to articulate embarrassing issues in writing, rather than by discussing them orally at the outset.

The point of a legal helpline is to provide flexibility when dealing with a wide range of callers (to reiterate, the helpline handles over 100,000 calls per annum), and a live chat forum is perceived to be a further platform that will assist with that flexibility.

(e) The 'client' relationship

At the point at which advice is being provided via the legal helpline to a party who is making the call pursuant to their BTE policy, that BTE Insured is not a client of Irwin Mitchell. Rather, at that stage, the BTE Insurer is the client of the law firm. Helplines permit a law firm to provide generic preliminary legal advice. If the call escalates to the issuance of a claim, then the caller may become a formal client of the law firm (following the usual pre-retainer compliance checks, etc).

As noted previously, about a quarter of the callers to the legal helpline are private referrals, i.e., by parties who do not have a BTE policy, but who are seeking preliminary legal advice. Unlike for the BTE Insureds, those callers must pay for that phone advice, and they do become clients of the firm at the point at which the preliminary call is placed (thus requiring conflicts checks to be undertaken at the outset).

The legal helpline provides preliminary legal advice. The computer systems used to record the receipt of calls, and the provision of advice, are entirely isolated from the systems of the remainder of the law firm, maintaining a 'Chinese wall' between those who are clients, and the callers to the helpline who may not be clients at that stage.

Much of the language used in the helpline conversations needs to be considered in light of the fact that callers may not have legal training, or a familiarity with legal terms (e.g., 'injunction'). Hence, part of the role of the client experience experts is to de-mystify the law for these callers who are seeking preliminary advice.

During this period of preliminary legal advice, every attempt is made to match the caller to a staff

member of the helpline centre of their preference, e.g,: (1) a staff member with whom they have had previous contact on the same matter; (2) a staff member of a particular gender, if that issue is sensitive to the caller; or (3) a staff member who may have an expertise in a niche area.

Callers who are (1) vexatious in nature; or (2) children, are quite rare to the helpline. Occasionally, an identifiable threat against a third party may be made by a caller. In such a case, the call will be escalated to the team leader for consideration, and it will be drawn to the attention of the BTE Insurer and, possibly (depending upon the circumstances), the police, subject to the usual professional guidelines.

(f) Payment operations

In generalist terms, the key to a legal helpline is to ensure that it is both sustainable and reliable. A fee is paid by the BTE Insurer to Irwin Mitchell for the provision of the legal helpline for that Insurer.

Whether an individual has BTE cover of £75,000 or an SME has BTE cover of £1 million, the assistance of the legal helpline is 'free' to that BTE Insured, in that its cost is not claimed against the limit of that cover, should the claim go forward. In that regard alone, the legal helpline is very well-received by the BTE Insureds who utilise it.

There are no restrictions on the number of times that one caller can call the helpline on the one matter; or the length of time that a call may take.

The cost of the legal helpline is based upon a variety of costing mechanisms, depending upon the BTE policy. Some calls are priced per minute (every call is time-recorded); others may be priced per call; and others may be priced per caller (where, say, a caller may be a new entrant to the BTE policy cover, and that call may be priced differently as a new entrant). Flexibility is key. For a caller who makes several calls, or who makes lengthy calls, a costs cap may be imposed by the BTE Insurer, following which any excess time is borne at Irwin Mitchell's own cost.

(g) Quality assurance

It is standard practice (and is provided in the BTE insurance policies for which Irwin Mitchell provides legal helpline advice) that, should a complaint be made about the legal advice provided via the helpline, then that should be referred to the in-house complaints department of Irwin Mitchell, and failing resolution at that stage, the BTE Insured may make a complaint to the Financial Ombudsman Service or to the Legal Ombudsman. (The topic of complaints is covered later in this report.)

In addition to the regulation of the legal services provided by the helpline via the Solicitors' Regulation Authority, Irwin Mitchell voluntarily adheres to the model of Quality Assurance that the Financial Conduct Authority outlines for those who provide financial products. BTE Insurers hence gain the reassurance that an extra level of supervision and monitoring is being undertaken in respect of the legal helpline. This entails **three** layers of quality assurance protection for the callers who make use of the helpline:

i. as already noted, all calls made to the helpline are recorded. The team leaders of the helpline centre regularly and systematically re-listen to a sample of those recordings, in a 'moderation session', to ensure that they meet the two criteria of providing good client experience:

- accurate legal advice, and
- the advice is provided with empathy and support.

This moderation ensures that consistency of performance is met across the helpline team, and avoids the 'telephone lottery' syndrome;

ii. an in-house auditor (an employee of Irwin Mitchell), who does not have input into the helpline centre but who has a close familiarity with its operations, will also listen to a sample of calls, and will apply the same two criteria noted above. Any below-par performance will be notified and rectified with further training and feedback;

iii. finally, the BTE Insurer is offered the opportunity to vet a sample of calls to the helpline, to reassure itself of the standards being met by the helpline staff.

4. Conclusion

In conclusion, the legal helpline centre provided by Irwin Mitchell undertakes a very large volume of calls per annum, and performs a vital link in the BTE Insurance landscape, by seeking to resolve concerns and grievances by BTE Insureds at a very early stage, and in areas of the law for which the BTE policy may not permit full legal representation.

In a wider context, legal helplines comprise an important, diligently-administered, and perhaps under-appreciated 'access to justice' tool in the overall scheme of BTE Insurance. The use of BTE helplines potentially reduces the frequency of claims, and manages the risk better, due to early intervention. In the Working Group's view, it is essential that an awareness of this tool, within both the consumer and business markets, be maximised.

However, the Working Group noted that there will be some clients/users for which legal helplines will be unsuitable or will not offer an appropriate solution (whether because of language difficulties, or a cultural reluctance to use a helpline for a very personal concern, or other reason).

F. THE DISTRIBUTION AND TAKE-UP OF BTE INSURANCE

1. How BTE is sold in the United Kingdom

For both consumers and businesses, BTE insurance can, theoretically, be purchased in one of three ways:

- as a 'stand-alone' policy, where the insurance is not pooled with other products; and where the risk is priced for the particular areas of law the subject of the policy, and for the characteristics of the insured;

- as a 'bolted on', or 'add-on', product to other insurance policies — most commonly, to household and/or contents insurance policies or motor vehicle insurance or travel insurance (though BTE cover sold via travel insurance tends to provide quite limited cover); or

- as a 'bundled' product, whereby BTE insurance is embedded as part of a package of benefits, so that there is no additional premium payable for the insurance.

Stand-alone BTE policies are less common in the UK. The Working Group noted that there are a modest number of stand-alone BTE policies in the business community, and virtually none in the consumer market. Of course, with stand-alone products, the BTE Insured is entirely aware of what the product is — because the Insured has assessed and purchased the product. The situation is, however, quite different for policies which are bolted on to other products (whether that be another insurance policy, or even credit cards).

Clearly, the manner in which BTE insurance is sold has a significant effect upon its take-up rate — and on that score, significant changes have been made recently.

On 24 July 2014, the Financial Conduct Authority published its findings, following on from its market study on the sale of general insurance add-ons, in its report, ***General Insurance Add-Ons: Provisional findings of market study and proposed remedies*** (Mar 2014, MS14/1). That document set out the FCA's provisional findings, and took account of consultation responses received (consultation was open until 8 Apr 2014). The study had been launched, much earlier in December 2012, by the Financial Services Authority, and thereafter became the FCA's first market study.

The FCA was concerned about add-ons to financial products. In particular, it found that an opt-out arrangement meant that consumers acquired BTE insurance because of 'inertia selling' — they failed to take that step to opt out. Its market study found poor value in both add-on and some stand-alone insurance products; and that it was difficult for consumers to assess the value of the insurance product. In relation to BTE insurance policies, in particular, the FCA's principal concerns were set out as follows:

General Insurance Add-Ons (Mar 2014), at p 31:

Opt-outs are associated with consumers not making informed decisions. Buying insurance should be an active and informed choice which a consumer makes once they have received appropriate information on the main features of the policy including the benefits, significant exclusions and limitations and the price. Our rules require firms to take reasonable steps to ensure they give customers appropriate information about a policy in good time and in a comprehensible form.

There is also evidence that consumers are often very unwilling to deviate from the option that is set for them by default. The information firms provided as part of our review of motor legal expenses insurance (MLEI) showed that, while some consumers do have the confidence to de-select MLEI when it has been pre-selected for them by a firm, it remains likely that some consumers do not have the confidence to override the 'authority' of an insurance company or intermediary that they believe has decided they need MLEI.

Data obtained from a large insurer as part of our MLEI review showed that for one of the firm's brands that sold MLEI on an opt-out basis the penetration rate was 80%, whereas for another brand that sold MLEI on an opt-in basis penetration rate was about 40%. Moreover, similar default inertia has been found to have a powerful effect on shaping consumer behaviour in many other settings ranging from pension savings in the US and the UK to insurance take-up by farmers in developing countries to organ donation rates.

Purchasing a product on an opt-out basis can also have a significant negative impact on the likelihood of consumers claiming on a policy. One large insurer explained that the key variables when designing and pricing a new product include whether the product is to be sold on an opt-out or opt-in or stand-alone basis. The insurer identified that claims frequencies are lowest for opt-out policies, slightly higher for opt-in policies and significantly higher for stand-alone policies.

Overall, evidence suggests that opt-out selling is declining. ... But pre-ticked boxes are still being used to sell general insurance add-ons online, and we remain concerned that this continues to have a detrimental impact on both consumer decision-making and consumer outcomes.

Following its provisional findings, the FCA then issued a policy statement, ***General Insurance Add-Ons Market Study – Remedies: banning opt-out selling across financial services and supporting informed decision-making for add-on buyers*** (Sep 2015, PS 15/22). It confirmed its intention to implement a ban on opt-out selling, and that BTE insurance should **not** be excluded from that ban:

Policy Statement, PS 15/22, at p 11:
A number of respondents queried whether the ban should apply to legal expenses insurance – given that firms had already started to move away from selling this on an opt-out basis. Respondents also commented that motor legal expenses insurance (MLEI) is a valuable product, which customers ought to have. ... We are not making any changes to the scope of the ban as a result of this feedback. Our own research at the time of publishing revealed that MLEI was still sold on an opt-out basis. Therefore, excluding these products could result in customer harm. Our thematic review into MLEI did find that consumers valued this product. There are many other add-on products that customers benefit from. MLEI can be a complex product and we believe that, in line with our policy objectives, customers should be making active and informed decisions about whether or not to purchase it.

The FCA also provided, in its document, ***PS15/22: Our expectations and case studies***, a series of helpful case studies as to what would infringe, or not infringe, the FCA's new ***Handbook Guidance***, ICOBS 6.1.6AG: 'This clarifies that the existing product information provision rule (ICOBS 6.1.5R) applies to any policy, regardless of whether it is sold on its own or with another policy, or other goods or services.' Some of these case studies provide useful examples of how BTE insurance should, and should not, now be sold:

The FCA's Case study C:
Firm C is renewing their customer's motor insurance policy. The policy was sold with a number of optional additional products, including breakdown cover and legal expenses cover. The customer previously elected to purchase these optional additional products. Since the customer's last renewal there have been a number of changes, including: the addition of a new country to European coverage on the breakdown policy; an extension of the legal expenses cover to include contractual disputes; and a change of underwriter for the legal expenses cover to a branch of an EEA based insurer. Firm C sends the customer their renewal documentation, which details the above changes but relies on the customer's previous election as consent to renew all covers. **FCA:** The rules banning opt-out selling allow firms to automatically renew previously chosen optional additional products, if the terms of the products remain substantially the same. Firm C has not asked the customer to actively elect to purchase these products again. Whether or not a change results in an agreement being on substantially the same terms will be very case specific. When thinking about whether an agreement has substantially the same terms a firm may want to consider the effect of the changes on the customer as part of its broader obligations to treat customers fairly (which is not the subject of this note). For example, in relation to the legal expenses cover, the FCA might be interested to know whether the change of underwriter resulted in the customer being afforded reduced protections e.g. recourse to the Ombudsman and FSCS.

Some previous practices surrounding the sale of BTE would need to change in the light of these reforms, according to the FCA:

The FCA's Case Study D:

A customer decides to purchase home insurance through Firm D's online sales process. Once the customer has indicated that they are happy with the cover they have selected, they click 'buy now' and are taken through to another page. This second page introduces some add-ons– an optional extra of freezer cover and a legal expenses policy. The customer decides to purchase from Firm D the optional extra of freezer cover and the optional legal expenses policy. The customer is not presented with individual prices for their chosen options but is given a single price for the package of home, freezer and legal expenses cover. The customer purchases the package.

FCA: Firm D has introduced two add-ons to the customer after they have clicked 'buy now'. The non-Handbook guidance encourages firms to introduce all add-ons, particularly their most common add-ons, to customers early in the sales process. This helps customers make more engaged and informed decisions. It is not clear whether legal expenses and freezer cover form part of the firm's most commonly purchased add-ons, but Firm D has introduced both very late in the customer journey and both will increase the cost to the customer. Firm D should consider how to introduce these add-ons earlier in the sales process. Also, Firm D has only provided the customer with a single package price. While we believe providing a total price can help customers compare packages from different providers, Firm D has not acted in line with the new Guidance. Firm D has not provided separate prices for the individual policies in this package. This means that Firm D is likely to be in breach of ICOBS 6.1.5R. ... this rule applies to any policy, whether or not it is sold alone or in connection with another policy.

The new rules banning opt-out insurance which was ‘added on’ to a primary product took effect on 1 April 2016:

Clifford Chance, ***Briefing Note*** (Nov 2015):
On 1 April 2016, the FCA ban on opt-out selling across the financial services sector will come into effect and consumers will no longer be defaulted into purchasing add-on products. To help consumers make informed choices, firms and their representatives selling add-on insurance products must comply with the FCA's new guidance on general insurance add-on sales by 30 September 2016. The ban on opt-out selling comes into effect through the operation of new rules on 'optional additional products'. The rules, which apply from 1 April 2016, will apply to insurance and banking customers ... Alongside the new rules banning opt-out selling, the FCA has published extensive guidance on 'appropriate and timely information'. In line with the new guidance, firms should: introduce add-ons to customers earlier in the sales process, in particular the most common add-ons; help customers compare packages of primary product and add-ons (e.g., by giving a clear price for the whole package); and display the annual price of add-ons (as well as monthly).

As a result of these reforms, a BTE Insured must either positively opt in to take out BTE insurance, or accept that as part of a bundled package to which the BTE Insured has subscribed (in this latter scenario, it will still be possible that the BTE Insured will lack all awareness of the fact that he has BTE cover). However, there is no longer any possibility of the BTE Insured having to opt-out of the insurance.

2. Impact of distribution channels on transparency and awareness

The Working Group noted that BTE Insurance is perceived to have a ‘transparency issue’, in that many consumers will have purchased BTE together with some other insurance product, either as an "add-on" or as part of a bundled product, and so may have little or no awareness either that they have this policy or precisely what it covers.

The FCA's ban on "opt-out" selling may have improved the position somewhat, as those who positively choose

to purchase BTE as an add-on are likely to have a greater awareness than those who simply fail to opt out (perhaps by "un-ticking" a box on an online form). The issue, however, remains a live one in that:

(i) where BTE is purchased as a (typically relatively low-cost) add-on to some other insurance product, awareness is likely to be lower than where a decision has been made to purchase insurance on a stand-alone basis; and

(ii) BTE is still commonly sold as part of a bundled insurance product (and indeed the insurance representatives on the Working Group noted that the FCA ban on opt-out selling is likely to have led insurers to a move towards offering BTE via a bundled product more often than previously) and in this scenario awareness is likely to be particularly low (though there are requirements to ensure consumers are given appropriate information about the product – referred to later in this report).

However, the insurance representatives on the Working Group also acknowledged that there was 'zero appetite' among insurers to offer stand-alone BTE insurance policies for consumers in this jurisdiction. And similarly, there would likely be very little appetite on the part of consumers, given that premiums would have to rise significantly if BTE were to be sold on a stand-alone basis.

3. The extent of market penetration

The take-up of BTE insurance across jurisdictions differs enormously. It is far less advanced in the UK than in other European jurisdictions.

According to RIAD, '[t]he most mature markets ... are in Austria, Belgium, Germany, the Netherlands, Switzerland, and France ... [based on] market size, penetration rate, growth, premium income, acceptance of the product among citizens, etc' (***'How can "Before-the-event" legal protection insurance be made more effective across the population of England and Wales?'*** (30 Mar 2017), at [5]. RIAD details the degree of penetration and the degree of density of BTE insurance across the jurisdictions. This is outlined in the table below:

		GWP - direct insurance € at constant exchange rates		Penetration rate		Density		Growth rate in %		Average annual pre-mium private family cover	Population	
	Coun-try	GWP 2014	GWP 2015	in % 2014	in % 2015	in 2014	in 2015	2014/2013	2015/2014	in € 2014	2014	2015
CORE COUN-TRIES	AT	504.000.000	522.000.000	0,1531%	0,1548%	59,25 €	60,87 €	3,28%	3,57%	250	8.506.889	8.576.261
	BE	478.500.000	499.600.000	0,1195%	0,1220%	42,71 €	44,57 €	9,72%	4,41%	range from 60 to 300	11.203.992	11.208.986
	DE	3.486.000.000	3.621.000.000	0,1192%	0,1194%	43,16 €	44,59 €	2,02%	3,87%	280	80.767.463	81.197.537
	NL	659.881.000	655.646.000	0,0995%	0,0969%	39,21 €	38,79 €	-0,17%	-0,64%	150	16.829.289	16.900.726
	CH	493.771.889	514.104.317	0,0821%	0,0859%	60,66 €	62,41 €	7,13%	4,12%	320	8.139.631	8.237.666
	FR	1.100.000.000	1.200.000.000	0,0514%	0,0550%	16,69 €	18,07 €	9,45%	9,09%	75	65.889.148	66.415.161
OTHER COUNTRIES	CA	18.327.929	24.672.212	0,0013%	0,0018%	0,52 €	0,69 €	62,50%	34,62%	133	35.544.600	35.848.600
	CZ	14.513.472	15.730.305	0,0092%	0,0094%	1,38 €	1,49 €	7,43%	8,38%	70	10.512.419	10.538.275
	DK	29.227.613	23.750.677	0,0112%	0,0089%	5,19 €	4,19 €	-17,11%	-18,81%	n.a.	5.627.235	5.659.715
	EE	1.938.328	2.113.950	0,0097%	0,0103%	1,47 €	1,61 €	17,96%	9,06%	185	1.315.819	1.313.271
	ES	125.060.000	130.816.657	0,0120%	0,0121%	2,69 €	2,82 €	7,67%	4,60%	n.a.	46.512.199	46.449.565
	FI	87.000.000	91.000.000	0,0424%	0,0435%	15,96 €	16,63 €	n.a.	4,60%	n.a.	5.451.270	5.471.753
	GR	38.261.628	37.299.565	0,0215%	0,0212%	3,50 €	3,44 €	-9,06%	-2,51%	60	10.926.807	10.858.018
	HU	7.580.645	8.064.516	0,0073%	0,0074%	0,77 €	0,82 €	n.a.	6,38%	n.a.	9.877.365	9.855.571
	IE	12.000.000	n.a.	0,0062%	n.a.	2,61 €	0,00 €	n.a.	n.a.	n.a.	4.605.501	4.628.949
	IT	375.486.000	394.390.000	0,0233%	0,0241%	6,18 €	6,49 €	5,91%	5,03%	120	60.782.668	60.795.612
	JP	448.216.812	n.a.	0,0124%	n.a.	3,53 €	n.a.	n.a.	n.a.	21	126.794.564	126.573.481
	LU	22.081.000	23.073.000	0,0452%	0,0443%	40,17 €	40,99 €	5,19%	4,49%	n.a.	549.680	562.958
	LV	22.350	26.364	0,0001%	0,0001%	0,01 €	0,01 €	n.a.	17,96%	n.a.	2.001.468	1.986.096
	NO	35.471.000	41.838.990	0,0094%	0,0120%	6,94 €	8,10 €	n.a.	17,95%	n.a.	5.107.970	5.166.493
	PL	19.095.385	41.887.861	0,0046%	0,0098%	0,50 €	1,10 €	-36,70%	119,36%	47	38.017.856	38.005.614
	PT	17.582.000	19.828.000	0,0101%	0,0111%	1,69 €	1,91 €	6,07%	12,77%	n.a.	10.427.301	10.374.822
	SI	3.501.958	3.775.044	0,0094%	0,0098%	0,65 €	0,70 €	-2,21%	7,80%	n.a.	5.415.949	5.421.349
	SK	2.971.996	3.184.633	0,0039%	0,0041%	1,44 €	1,54 €	n.a.	7,15%	n.a.	2.061.085	2.062.874
	TR	27.883.229	31.685.289	0,0048%	0,0049%	0,36 €	0,41 €	25,54%	13,64%	n.a.	76.667.864	76.695.904
	UK	508.734.836	591.326.178	0,0203%	0,0230%	7,91 €	9,11 €	n.a.	16,23%	n.a.	64.351.155	64.875.165
	USA	866.155.926	910.319.964	0,0055%	0,0056%	2,71 €	2,83 €	4,34%	5,10%	n.a.	319.448.634	321.773.631
	ZA	68.796.173	n.a.	0,0256%	n.a.	1,27 €	n.a.	n.a.	n.a.	40	53.969.054	54.490.406
		9.452.061.169		0,0379%		13,18 €						1.091.944.459

This table is interesting. It shows, for example, that in the UK in 2015, 0.023% of the Gross Domestic Product of this jurisdiction was spent on BTE premiums (as measured by the national gross written premium paid for BTE products throughout the UK in that year). This compares with 0.1194% of the GDP spent on BTE insurance in Germany, and 0.1548% of the GDP spent on BTE in Austria. These so-called 'penetration rates' of BTE, as measured by the spend of a jurisdiction's GDP on BTE, is much more significant in the European mainland jurisdictions.

The figure also shows that, in the UK in 2015, each person (man, woman and child) spent, on average, the equivalent of 9.11 Euros on BTE insurance. This compares with an average spend-per-person of 44.59 Euros in Germany, and 60.87 Euros in Austria. Note that this so-called 'density' figure does not reflect either (1) the number of persons who actually paid for BTE in any of the jurisdictions, or (2) how much each of those persons paid for it in 2015.

However, both penetration and density figures are objective indicators that illustrate the degree of presence and development of BTE in any given jurisdiction. As such, it provides a convenient basis for comparison of BTE across jurisdictions.

On the separate question as to how many households or individuals in the UK have BTE insurance cover, that seems to be a difficult matter to ascertain — hence the RIAD's preference for penetration and density figures. To give a sample:

In his report, ***Review of Civil Litigation Costs: Preliminary Report*** (May 2009), Sir Rupert Jackson noted (at ch 13, para 2.3) that approximately 10–15 million households in the United Kingdom (out of a total of 25 million households) have some form of BTE insurance. The change of law in 2014, barring any opt-out requirement, and requiring BTE Insureds to either opt-in to this cover, or to accept BTE cover as part of a wider 'bundled' package, may have had an impact upon the take-up rates of BTE across households, but the extent of this is impossible to assess. Many consumers will not opt-in to BTE insurance cover, thinking that the requirement for costs protection arising from a legal dispute will never arise. In any event, the RIAD viewpoint is that the coverage of households with BTE insurance does not distinguish the kind of contracts (e.g., whether it be an add-on policy for £25, or a stand-alone policy for £320), nor indicate the true take-up of BTE across a jurisdiction.

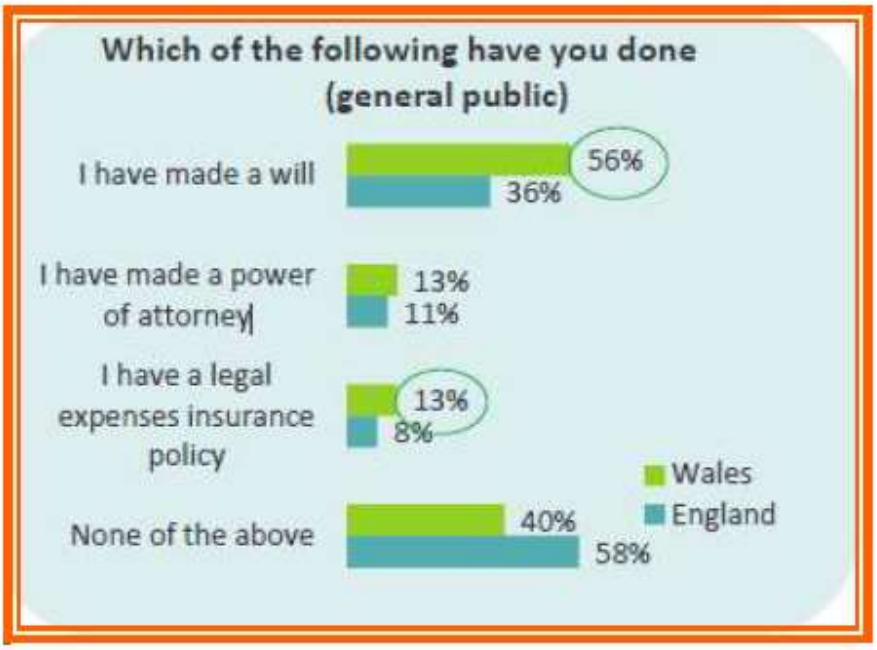
In July, the Legal Services Consumer Panel, part of YouGov, published its ***Legal Services Consumer Tracker 2016: Insight Report***. That report stated that, based upon its survey, only 8% of those in England, and only 13% of those in Wales, had a BTE insurance policy, from the following sample size:

Approach

- The research has been undertaken annually since 2011, making this the sixth wave of this tracking study. The project consists of two samples:
  - A representative sample of 1,864 adults in England and Wales. The sample was drawn from the YouGov online research panel of around 425,000 UK adults.
  - A representative sample (by legal service use) of 1,523 users of a legal service in the last 2 years from England and Wales.

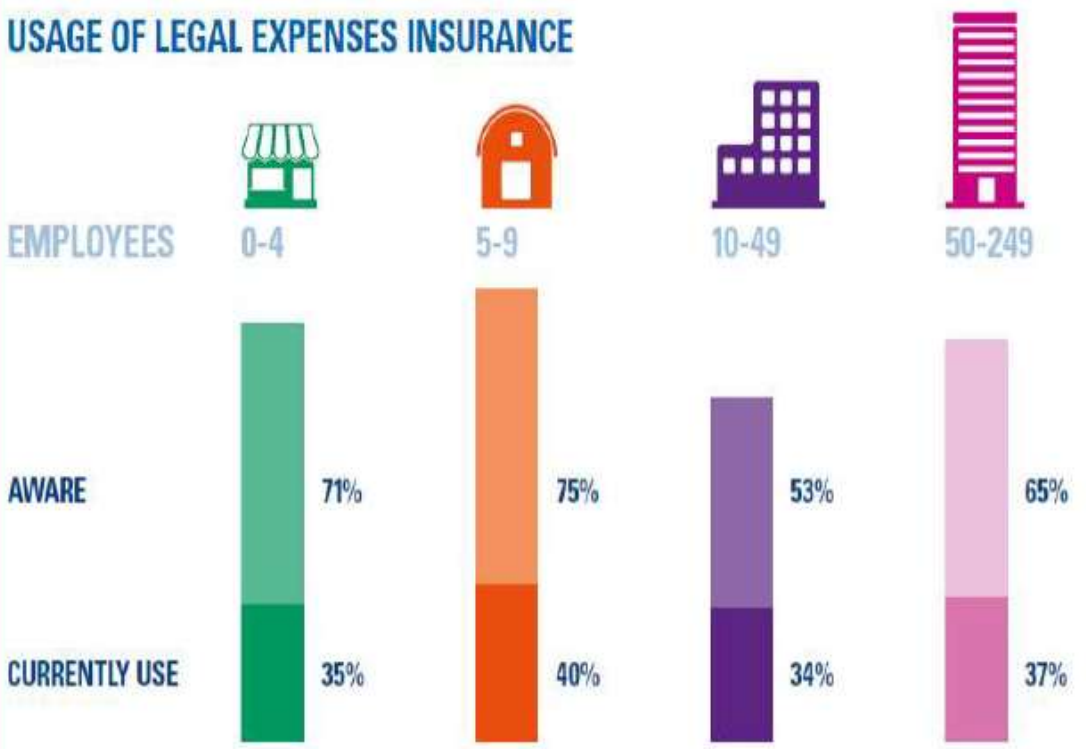
The responses to the survey (noted below, from p 10 of the report), whilst very low, appear to illustrate the general 'lack of awareness' problem that has been identified elsewhere in this report, especially among

consumers — particularly given that the take-up of BTE Insurance was put as much higher by Sir Rupert Jackson in his 2009 report (referenced above):



More recently, the insurer DAS conducted a survey of the degree of penetration of BTE Insurance in the SME market. The results, reported in ***DAS Market Barometer: SME*** (May 2017), at p 18, were rather sobering:

Given the Financial Conduct Authority's recent guidance to insurers to improve customer understanding of the products and services they are purchasing, there is still relatively low usage of legal expenses insurance which suggests that businesses don't yet fully understand the product.



4. Stand-alone BTE insurance policies

(a) Business policies

Stand-alone BTE policies for businesses (whether for big business, SMEs or micro-businesses) are still less common in this evolving market. No doubt there are several reasons for this: (1) some businesses will have 'in-house' legal departments; (2) some businesses may prefer to pay for legal costs and disbursements as and when they arise, for which they have budgeted a certain legal expenses budget, rather than lay off those expenses to a BTE Insurer; or (3) BTE insurance policies may be perceived as being quite expensive by small business enterprises.

Bespoke BTE products are being constantly developed to meet demand, but vary hugely, regarding their level of indemnity, premium, and the insurable events covered.

One BTE provider which caters for businesses, with the premium dependent upon the business's turnover, is ***Arthur J Gallagher Commercial Legal Expenses***. The features of that stand-alone BTE policy for businesses are described on its website (available at: http://www.ajginternational.com/small-business-insurance/commercial-legal-expenses/), and include the following information:

Our Commercial Legal Expenses insurance not only provides you with comprehensive cover up to £100,000 per year but also gives you access to the legal expenses specialist DAS.

This means that you will have year-round access to legal advice and emergency helplines and, should the need arise, a team of solicitors are on hand to resolve your issue.

Our comprehensive cover can start from as little as £75, depending on your company's turnover, and with our expert day-to-day advice and assistance, you can save thousands of pounds.

Features of cover include:

- Up to £100,000 of cover per year
- Access to specialist legal help lines
- Advice and assistance via phone and the Business Law website
- Employment disputes and compensation awards
- Legal Defence
- Tax and Property Protection
- Bodily Injury
- Debt Recovery
- Statutory Licence Protection
- Contract Disputes
- Court attendance expenses

Stand-alone BTE policies are still developing for the business marketplace. The Working Group was interested in the work being undertaken on that front, and to that end, it invited Rob Adams, from EUNA, to describe how that broker is taking steps to try to increase BTE's penetration of the SME market:

DISCUSSION: EUNA representative, Rob Adams:

- in EUNA's view, BTE insurance has something of a bad reputation with SMEs, for being of low value, and 'not worth the candle'. Hence, part of the challenge in this area is to design and offer an insurance product that provides a list of different covers;

- EUNA has focussed principally on SME businesses with a £700,000–800,000 turnover. This particular discussion concentrated on recruitment agencies. A recruitment agency acts as an intermediary between an organisation that is looking to employ someone and an individual who is looking for a job. In the UK, it is a £28.5B industry, with over 27,000 registered agencies. The average turnover of an agency from EUNA's client base is £2.5M, i.e., SME businesses;

- in designing the insurance package for recruitment agencies, BTE cover would be only part of an optimal package. Other essential products are employers liability; public liability; professional indemnity; property; directors and officers' insurance; and personal accident.. These are all packaged. A design question, for BTE Insurance, is whether BTE should be built into the package and thereby seen as a 'free' cover, or sold as an additional cover. In EUNA's view, 'free' cover is not taken as seriously, and it is not a 'free' sale either, with a distribution of premium occurring behind the scenes. There are also concerns about mis-selling the product, where it is built into the package and shown as a 'free' purchase;

- the package for recruitment agencies has an indemnity level of £100,000. The product is priced at £250 plus tax; and is offered alongside the other cover of the package;

- EUNA has had an approximately 30% uptake (higher than property insurance);

- BTE Insurance is particularly important for recruitment agencies for some specific dispute such as HMRC and VAT disputes (especially tax IR 35 disputes); employees leaving with data/clients; bad debt claims; disputes with employees; temporary workers; and redundancy disputes;

- this is an evolving area, which requires brokers to design products that meet the needs of SMEs at a competitive price.

(b) Consumer policies

As already mentioned, stand-alone BTE insurance policies are extremely rare in the consumer market in the UK, compared with the position in several mainland European jurisdictions.

The Working Group insurance representatives referred (anonymously) to a stand-alone consumer BTE policy which was offered by one major insurer in the past, but which has since been removed from the market. Reportedly, the BTE Insureds used the helpline to such an extent that it caused a significant loss to the BTE Insurer, and was not a viable financial product for that insurer.

Working Group insurance representatives noted that, previously, stand-alone consumer BTE policies *were* more common in the UK, but they tended to suffer from three problems, from an Insurer's perspective:

- given their relative rarity, they tend to suffer from the problem of 'adverse selection', i.e., they are sought by those who expect that they need such costs protection. Adverse selection makes the pricing more difficult. By contrast, where BTE cover is 'bolted on' to other products, the pricing of the BTE premium can be subsidised by other parts of the product;

- as noted above, some BTE Insureds claim very regularly, and/or make extensive use of the legal helpline, putting pressure on the pricing of the premium;

- other BTE Insureds tended not to claim at all, and then declined to renew their BTE policy because they believe it to be of no use, meaning that the pricing of the premium is affected.

Hence, stand-alone consumer BTE policies were phased out, and there now appears to be very little appetite amongst the insurance industry to provide such BTE cover in this jurisdiction.

Why are consumers in some other European countries prepared to take up stand-alone BTE Insurance policies? The reasons for this no doubt reflect a complex web of social, cultural, and legal backdrops. However, RIAD suggests some reasons for the stark difference:

i. following WWII, the legal aid regime in the UK was accessible to a fairly wide socio-economic

demographic, and across a wide array of areas of grievance. Undoubtedly, that has changed significantly in recent years (as outlined in Chapter A of this report). By contrast, in some European countries, there has never been a robust legal aid system, and hence, their citizens have long relied on insurance protection for potential legal difficulties, because they have not expected the State to provide cover for those costs. There has been a longstanding acceptance, in countries such as Germany and France, that insurance companies, rather than tax revenue, are the vehicles by which to obtain legal costs protection;

ii. in countries such as Austria and Germany, generations have grown up with an acceptance of BTE as being one of the stand-alone policies that the household acquires. It is one of the forms of insurance that provides for the protection of the family against insurable ills, and is a plank of the household arrangements that are traditionally implemented to foster economic security for that household;

iii. also, contrary to popular belief, some of the European jurisdictions in which BTE stand-alone policies are dominant are quite litigious, compared with the UK population. Hence, many purchasers of such insurance buy the product, expecting to use it in those jurisdictions (however, data on the number of claims per BTE policy was not available from RIAD);

iv. as mentioned previously, there is a great deal of marketing, advertising, and promotional activities around BTE insurance in some other European jurisdictions. Television advertisements are common. Door-to-door selling in the more traditional way is common in Germany. Some of the higher premiums charged in those European jurisdictions are used to pay for much wider advertising than occurs in the UK. There is a 'brand recognition' of insurance companies who operate in this area in those jurisdictions, which is generally absent in the UK; and

v. there is far more use of scales of fixed costs in Germany and other European mainland jurisdictions than there has been to date in the UK. Fixed costs yield better predictability as to how much a claim will cost to bring/defend, and what amount of adverse costs may be awarded against the funded party. BTE Insurers prefer this scenario, as the premium is easier to price.

Although that list probably does not do justice to the complex cultural and legal differences between the UK and the European mainland jurisdictions, including significant differences between the respective legal systems and costs regimes, it does suggest that the longstanding acceptance of stand-alone BTE is entirely

absent among householders in the UK and is unlikely to develop any time soon.

As discussed later in this report, there have been recent proposals to increase the use of fixed recoverable costs in litigation in England and Wales, which may have some advantages for BTE Insurers. However, in the Working Group's view, the implementation of such proposals would not, in itself, counteract the other factors which have to date prevented stand-alone consumer BTE policies gaining acceptance in the UK market, and which mean such acceptance is unlikely in the near to medium term.

5. The Federation of Small Business (FSB) package

The Working Group took particular note of the packages being put together, via industry representative groups, which include some limited BTE insurance cover for their members. This was referenced in the report by Sir Rupert Jackson, ***Review of Civil Litigation Costs: Final Report*** (Dec 2009), ch 8, para 4.2.

The Federation of Small Business's ***Legal Protection Insurance Policy***, previously referred to in this report, is one such industry package. It offers a BTE product for certain business-related activities, and has a cap per claim of £50,000. The package is available to those who are paid-up members of the FSB (which may, in fact, be relatively large businesses too, as well as the local newsagent or the corner shop).

As a current member you are protected by Legal Protection Insurance. The insurance covers full, joint, retired and associate members for certain business related activities. There is a limit of £50,000 for Any One Claim. The insurance is subject to various terms and conditions, including a prospects of success clause, and there are exclusions.

The BTE package is provided by Abbey Legal Protection. The BTE insurance is just one part of the overall membership package — other benefits include business development programmes, networking opportunities, conferences, continuing education, and lobbying campaigns on issues of importance to the FSB's members. The BTE insurance offered as part of the FSB package covers **three** main areas of potential business grievances. Re criminal conduct:

Section A Criminal Prosecution – Defense

What is covered by this Section...	Most frequently asked questions about what is NOT covered...
Legal representation for criminal prosecutions which include:	✘ Speeding offences
✔ Road Traffic Act prosecutions	✘ Persistent offenders
✔ Tachograph prosecutions	✘ Tax-related matters
✔ Weight prosecutions	✘ Proven cases of fraud or theft
✔ Appeal against an Improvement Notice – under the Health & Safety at Work Act, Consumer Protection Act & Food Safety Act	✘ Prosecution under the Company Directors Disqualification Act

Re foregone income:

What is covered by this Section...	Most frequently asked questions about what is NOT covered...
✔ Up to £100 per day with a maximum of £1,000 per claim for losses incurred due to you or an employee attending jury service	✘ If notification of jury service was prior to when you joined the FSB

and defending employment disputes:

Section B Employment Disputes – Defense

What is covered by this Section...	Most frequently asked questions about what is NOT covered...
✔ Legal representation	✘ A dispute relating to TUPE regulations
✔ Basic and Compensatory Awards	✘ Pursuit of an action

The helpline offered by the FSB's ***Legal Protection Scheme*** has already been referred to.

The Working Group invited FSB executive Warren Smith to its Third Meeting (on 30 March 2017) to explain the FSB's package in more detail:

DISCUSSION: Warren Smith, FSB:

- BTE protection is favoured by the FSB, without which many SMEs and micro-businesses would have barriers to taking up a similar type of product;
- the FSB has approximately 170,000 members. The pricing of the membership fee depends upon the number of employees of that member. The BTE is highly valued by FSB members;
- the majority of FSB members are micro-businesses (plumbers, hairdressers, e.g.), not sophisticated businesses but more akin to consumers, and as a result, there is a certain lack of awareness of BTE insurance products in that business marketplace, which this package also seeks to overcome. More awareness of BTE insurance — via better promotion by both the Government and by insurers — would be beneficial, since the take-up of BTE outside of this FSB package is, in the FSB's experience, quite low;
- most legal claims by FSB members are under £25,000 — the average claim is £18,000, so these are not huge claims, but to the micro-businesses often at the centre of the conflict, it is a great deal of money to pursue. Micro-businesses are the 'backbone of the economy';
- bespoke BTE coverage could be available via the FSB's policy underwriter, Abbey Legal Protection, for a fee;
- the FSB package of BTE insurance includes a Legal Advice Line. According to the FSB, fewer than 1% of call volume lead to claim being issued; and approximately 150,000 calls per year are made on this helpline. Approximately 60% of the calls made to the legal helpline concern employment disputes, with 30% of the claims issued under the BTE policy arising from that area; tax disputes account for 20% of claims; with the other 50% of claims relating to other business-related activities;
- simplicity of coverage is key for micro-businesses. There is a perception among these members that: insurers will 'duck out of cover' via exclusions, and that a lawyer appointed by the insurer is off-putting. If the FSB member could choose its own lawyer from the outset, that could help offset a lack of trust. Empowering small business is key across all areas, including in dispute resolution procedures;
- whilst the BTE insurance offered by the FSB package covers both the prosecution and defence of claims, the figures provided to FSB is that most call upon the coverage is defence-oriented (note that pursuit of employment-related claims is not covered by the BTE policy);
- contractual disputes are excluded from the ambit of the BTE coverage. This means that the pursuit of alleged debts due and owing to a business, or a dispute with a supplier over goods — both common types of claims that afflict small businesses — are not covered, where a claim requires commencement. However, the FSB offers a debt recovery service and also the Legal Advice Helpline is available for such queries, and if the commencement of proceedings is advised, then the FSB member will be directed elsewhere to pursue that claim;
- cyber attacks on businesses is an increasing concern, and that coverage for prosecuting claims for loss and damage caused by this activity is an emerging area that the FSB is interested in seeking BTE protection for their members.

The Working Group noted the exclusion of contractual disputes under the FSB package — e.g., a

hairdresser who has a contractual dispute with a supplier over the supply of products required for the conduct of his business; or a supplier of products who is unpaid and who alleges that there is a debt due and owing to him. Both of these types of parties will probably require something more than advice via a helpline. However, the FSB package represents the minimum standard of cover for an affordable price, covering a wide range of businesses, and reflects one solution to the tension between cover/exclusions and price/affordability, particularly for SMEs and micro-businesses.

The FSB policy notably covers jury service. This is, in the experience of Working Group members, very important for micro-businesses. It can be extremely detrimental to such a business, where the proprietor or sole employee is summoned for jury service, especially if the trial lasts for more than a few days.

With the development of 'affinity group' BTE packages (considered further below), micro-businesses and SMEs have another type of BTE policy available, where the cover may be tailored to the particular circumstances of, say, a child-minding agency or a travel agent. Such packages could for example be tailored to offer cover for contractual disputes, or defending claims for property damage, or pursuing claims for Data Protection Act infringement (for those ex-employees who take the Insured's client list with them when they leave). However, the FSB package offers a convenient and accessible BTE product, particularly in a market in which awareness of that product is not high.

The FSB package shows the effectiveness of a legal helpline. To handle approximately 150,000 calls for a membership of 170,000 (bearing in mind that some members will make multiple calls on the one matter) shows an effective and useful tool in that BTE armoury.

6. Affinity groups and BTE insurance

There is an increasing tendency for membership packages to be put together for particular types of business or professionals. These are 'affinity group' packages, which offer their members various benefits (e.g., lobbying, networking, continuing education), including BTE insurance which is 'bolted on' to the membership package. Affinity group insurance is available for a variety of businesses, e.g., for farriers, opticians, travel agents, reflexologists, teachers, accountants, hairdressers, prison officers, the police, and so on. In the UK, it is far more common for businesses to obtain BTE cover via affinity group packages, pursuant to which BTE is an 'add-on' to the overall commercial package put together for the members, than via any other means.

The BTE cover tends to be either optional (i.e., opt-in) or bundled as part of the entire package. This method of distribution of BTE is widespread and effective, and allows the BTE insurance to be modestly priced. According to insurance representatives on the Working Group, the BTE component of the annual membership fee per business is typically between £35–£50.

Some of these policies offer a legal helpline, and others do not. These commercial packages may be tailored to the particular sector being covered (e.g., people falling on a wet floor in a shop; loss of property), or they may be more generic.

One insurance company that specialises in affinity packages is Arc. The ***AXA Retailers' Insurance policy*** is an example of an affinity policy provided by this BTE Insurer. It is not tailored to any one particular type of retailer — it may apply as equally to hairdressers as to the corner shop. The policy provides for specific areas of cover that retailers may require from time to time — contractual disputes, property or personal injury disputes, data protection disputes, employment disputes, some criminal prosecutions, and statutory nuisance disputes are all covered. The fact that the policy provides cover for some contract disputes and for debt recovery means that it provides further cover than the FSB policy. On the other hand, the minimum sum in dispute under this policy for any contract dispute is £500 (at p 64). This minimum threshold will rule out using the policy to defend several types of claims that may be brought by customers — but it is one of the limitations of the policy which ultimately makes it more affordable for a variety of retailers:

> 2 we will not be liable to provide indemnity unless the amount in dispute between **you** and the **contracting party**, to which indemnity applies exceeds £500

For retailers, disputes and HMRC investigations regarding tax or VAT are reasonably commonplace, which are duly covered by this affinity BTE insurance package (at p 65):

Tax protection cover

1 Inland Revenue investigations

We agree to pay **you** for **professional expenses** incurred in representing **you** at an **Inland Revenue investigation**, including representation at a First-tier Tribunal, Upper Tribunal and at an appeal against a decision following such a tribunal, provided that there is a reasonable prospect of reducing the liabilities alleged by HMRC.

2 VAT disputes

We agree to pay **you** for **professional expenses** incurred in representing **you** in a **VAT dispute** for the local review procedure in order to reach agreement with HMRC, a First-tier Tribunal Upper Tribunal or VAT Tribunal, including an appeal, provided that there is a reasonable prospect of reducing the liabilities alleged by HMRC.

However, just as with consumer BTE policies, not everything is covered in affinity packages. A fairly lengthy list of exclusions is provided for under the ***AXA Policy***. For example, the following types of contract disputes are excluded:

Contract dispute exclusions

We will not cover **you** for **claims** arising out of or in connection with

1. contracts that provide or arrange credit, insurance, securities or guarantees
2. contracts where **your** liability or right of recovery is incurred through **your** agent or by assignment
3. franchise contracts
4. contracts governed by or alleged to be governed by the Consumer Credit Act 1974
5. contracts of employment
6. contracts for the use of **property**.

We will not cover **you** for the **excess** shown in **your** schedule.

Another example of a BTE affinity package provided by Arc is that entitled, ***Police Officers Legal Assistance***. Unlike the AXA policy above, this is an affinity BTE policy that it is tailored to a particular group. The package covers specialist legal advice and assistance over a wide range of matters that may affect police officers in the carrying out of their work – e.g.:

1a Crime – Pre Charge

i) Interview

What is insured
If **You** are asked to attend an interview with the police to do with an event which might lead to **You** being cautioned or charged with a criminal offence, the **Insurer** will pay **Advisers' Costs**, for **You** to see an **Adviser** before the interview takes place, and for representation at the interview itself where the relevant body refuses to fund representation by the **Adviser**.

ii) Post Interview

What is insured
If, following an interview under caution **You** are not charged with a criminal offence straight away, but there is a possibility that **You** may be at a later date, and it is necessary for **You** to consult with an **Adviser** to protect **Your** interests, the **Insurer** will pay **Advisers' Costs** for **You** to see an **Adviser**.
What is not insured:-
Claims made by a police officer above the rank of Chief Inspector where the alleged offence arises from the **Insured Person's** duties as a police officer

1b Crime – Magistrates Court

What is insured
Advisers' Costs to defend a **Legal Action** in Magistrates Court after any event which results in criminal proceedings being brought against **You**, including making an appeal against **Your** conviction or sentence. Pleas in mitigation are covered where there is a reasonable prospect of such a plea materially affecting the likely outcome and when it is in the public interest to do so.

What is not insured:-
Claims

a) Arising from parking offences which **You** do not get penalty points on **Your** licence for
b) Made by a police officer above the rank of Chief Inspector where the alleged offence arises from the **Insured Person's** duties as a police officer
c) Where **You** had a previous insurance policy that will still provide cover for the alleged incident

The package also provides BTE insurance cover for several other stressful and difficult scenarios that a police officer may face in his or her work:

What is insured

If **You** are committed to stand trial in a Crown Court the **Insurer** will pay a sum equal to any assessed income based contribution payable towards the costs of **Your** defence incurred under the Crown Court Means Testing scheme limited to the amount which **You** would be assessed as being required to pay in the absence of this insurance contract. For the avoidance of doubt, neither **Our** resources, the resources of the **Insurer** or the resources of any other party involved in the provision of this insurance are otherwise available to **You** in order to meet such costs as **You** may be assessed as being required to pay under the Crown Court Means Testing scheme.

Where **We** believe that it is not appropriate to apply for legal aid **We** reserve the right to fund **Your** defence by other means.

What is not insured:-

Any amount **You** are ordered to pay in excess of the pre-conviction income based contribution under the Crown Court Means Testing scheme

Claims

a) Arising from any action brought against **You** under the terms and/ or conditions of or for the breach of the terms and/ or conditions of a Representation Order Under the Crown Court Means Testing scheme
b) Where **You** do not apply for a Representation Order under the Crown Court Means Testing scheme, unless agreed otherwise by **Us**
c) Where **You** do not provide information requested under the Crown Court Means Testing scheme
d) Where **You** do not keep to the terms of the Representation Order
e) Where **You** do not use an **Adviser** that can act under the terms of a Representation Order under the Crown Court Means Testing scheme unless agreed otherwise by **Us**
f) Made by a police officer above the rank of Chief Inspector where the alleged offence arises from the **Insured Person's** duties as a police officer
g) Where **You** had a previous insurance policy that will still provide cover for the alleged incident

2. Disciplinary Hearings

What is insured:-

a) If **You**, as a police officer are being investigated for Gross Misconduct, the **Insurer** will pay for legal advice in appropriate cases, where authorised to do so by the Police Federation Joint Branch Board in consultation with **Us**
b) **Advisers' Costs** to prepare for and represent **You** as a police officer at the Gross Misconduct Hearing or a Police Appeals Tribunal following a disciplinary procedure

What is not insured:-

Claims made by a police officer above the rank of Chief Inspector

3. IPCC Complaints

What is insured

Advisers' Costs to represent **You** in an investigation by the Independent Police Complaints Commission provided that the

However, this affinity BTE policy is much wider than merely offering a work-oriented support package. It also provides BTE insurance cover for matters such as personal injury, property damage, and consumer complaint claims which are entirely unrelated to the BTE Insured's work.

As with consumer BTE policies, these affinity packages are also 'family-type packages', in that they cover a wide range of individuals *connected with* the police officers. For example, the Police Officers Legal Assistance policy defines the 'members' of the Police federation as follows —

Member	The individual for whom a premium has been paid to **Us** who is either: ▪ A police officer who is a **Member** of the Police Federation ▪ A retiree who is a former **Member** of the Police Federation ▪ A police officer above the rank of Chief Inspector who was formerly a **Member** of the Police Federation ▪ A civilian employee of the police service ▪ An employee of the Police Federation ▪ A Special Constable who is a **Member** of the Police Federation

— but, then, some areas of this affinity BTE policy are stipulated to cover those who are *related to* the defined member:

You / Your / Insured Person As defined in this table:	The Sections of Cover	Who is covered
	2, 3, 4, 5, 6, 10, 11, 16	The **Member**
	1a, 1c, 15	The **Member** and partner living with the **Member**
	7, 8, 9, 12, 13, 14, 17, 18, 19, 20	The **Member** and partner living with the **Member** and their family members normally living with them in their main home including children temporarily away from the home at school or university
	1b – Motor and Non-Motor Prosecutions	The **Member** and partner living with the **Member**
	1b – Motor Prosecutions only	The **Members'** family normally living with the **Member** in their main home including children temporarily away from the home at school or university

Affinity packages also commonly offer a legal helpline.

In the absence of a general willingness to run commercial litigation on a CFA basis, the take-up of BTE insurance by SMEs and micro-businesses is important, including to enable such businesses to lay off the risk of irrecoverable costs in litigation. If Business A is seeking recovery of a debt from Business B, and wins that claim, the legal costs incurred by Business A may exceed the recoverable costs payable by Business B. If Business A has a BTE policy which covers that as an insurable event, then Business A is entitled to have that 'gap' paid for by the BTE Insurer.

The Working Group noted that there is no BTE affinity package available for the solicitors' profession! However, some consumer BTE policies actually cover the costs involved with disciplinary proceedings — which would cover, e.g., proceedings brought against a solicitor by the Solicitors' Disciplinary Tribunal. The ***Chubb Home Insurance Policy*** is one such example (at pp 60–61):

Work legal defence cover	An alleged act or omission of You or a Family Member that arises out of Your or a Family Member's work as an employee and results in:

Chubb *Masterpiece* SIGNATURE Home Policy 61

- You or a Family Member being interviewed by the police or others with the power to prosecute;
- a prosecution brought against You or a Family Member in a court of criminal jurisdiction;
- a civil action brought against You or a Family Member for compensation for failure by a data controller to comply with certain data protection requirements under Section 13 of the Data Protection Act 1998;
- civil proceedings brought against You or a Family Member under unfair discrimination laws;
- a formal investigation or disciplinary hearing brought against You or a Family Member by a professional or regulatory body.

7. Employer-provided BTE insurance

The Working Group was aware that some BTE packages have been taken out by large employers who have >10,000 employees. The policies commonly provide insurance cover for a range of issues which employees of that firm may have.

Although a sample of such a policy was not available to the Working Group, insurance representatives on the group noted that it is common for the policies to exclude funding for claims by employees against that same employer. However, in some packages, the employer-provided BTE packages do permit cover for claims made against them — a strategy considered by some employers to be a marketing exercise, as a symbol of tangibly healthy, transparent and proactive workplace relations.

Otherwise, most BTE insurance policies that are taken out for employee groups are arranged by professional bodies or trade associations, and comprise an 'affinity group' BTE insurance package of the type described in Section 6 above.

8. Union membership

Unions are **not** BTE Insurers. However, some unions potentially offer three levels of support to their members:

i. they typically operate campaigns on behalf of their members, on issues such as equality, safety in the workplace, pensions, and pay levels, as well as providing their members with additional support, such as planning for retirement, and professional support where the member has taken leave from the workforce. This is support on a 'macro' level;

ii. on an individual level, however, one of the benefits of union membership is frequently the provision of legal support (in the form of advice and legal representation), in the event of a grievance arising out of the union member's work or employment; and

iii. some unions also provide their members with much wider legal support than that, on non-work related matters — sometimes in connection with a specific law firm which may advise members on a range

of legal matters.

All of this comes as part of union membership, where the membership fee per annum typically depends upon the amount which the member earns. The Working Group considered whether, and to what extent, this three-tier support arrangement may offer a useful alternative to BTE insurance.

An example of a union package is provided by the ***University and College Union (UCU)***, which outlines its legal support on its website in this manner:

UCU negotiates members' pay and conditions both nationally and locally, and campaigns on a whole range of issues including education funding, privatisation and pensions. And we offer members advice on equality, health & safety, pensions, planning for retirement, part-time working and professional issues.

But it's often the case that members find themselves calling on UCU when they run into a problem that affects them as individuals. Problems like these can arise in any number of ways. And one of the main benefits of belonging to UCU is that, if a difficult situation arises, we can help by giving advice, support and representation.

And as well as offering support to members on work related issues, we also offer **non-work related services** including wills, lasting power of attorney, renunciation of executorship, probate, severance of joint tenancy, buying a newly built home, conveyancing, re-mortgaging and financial mis-selling claims such as payment protection insurance (PPI).

For the 'non-work related services', the coverage is extensive. The UCU website provides that:

Legal help for you and your family

As part of our service we're committed to providing a wide range of benefits including expert legal help to members and their families. UCU offers UCU Law Extra*, an award winning team of experts covering the complete range of legal services which can meet all your needs, including:

- **family law services**
- **wills online**
- **probate and estate administration**
- **lasting powers of attorney**
- **property (including conveyancing and landlord and tenant)**
- **road traffic defence**
- **professional negligence**
- **medical negligence.**

UCU Law Extra is able to offer these services to you at competitive prices by our partner Slater and Gordon. UCU may receive a referral fee and such proceed will be used to support our front line service to members.

Notably, some of the legal assistance provided by the union (in respect of the third tier, at least) is available not only to members but to their family members too, replicating the 'family-oriented' nature of BTE policies in this respect.

The union, UNISON, also offers, via its membership package, the same three-tier level of support for its members. UNISON is the UK's largest trade union serving the public sector. It currently has more than 1.3 million members working in the NHS, local government, schools and universities as well as in the police and justice sector and the electricity, gas and water industries, transport and community and voluntary sectors. UNISON's three-tier support for its members may be summarised thus (drawn from the paper '***UNISON***', prepared for the visitors' meeting, 30 March 2017):

UNISON's multi-level benefits:

i. UNISON's local branches and regions do 'on-the-ground' work, related to its members' employment including, inter alia negotiating and bargaining over pay and working conditions, campaigning, trying to resolve workplace disputes, dealing with workplace health and safety issues.

ii. It also supports its members through a comprehensive legal assistance scheme. Approximately one million of UNISON members are women, about 50% of whom earn less than £17,000pa. Many are also migrant workers for whom English is a second language. The scheme affords its members legal representation, and covers employment law advice and assistance. It can cover very complex cases involving equal pay or discrimination. Under this scheme, UNISON has assisted in about 4,500 employment law matters since June 2016. The assistance is provided either from the in-house team or via its appointed solicitors. Personal injury claims are also covered. The majority of these cases (~70%) arise from employment related injuries/diseases, which are particularly complex, technically and legally; and where liability is much more likely to be denied (as in 70–80% of such cases) so that legal representation is crucial;

iii. As the third pillar of support, UNISON also assists its members and their family members in relation to non-work-related personal injuries. The personal injury service is a free service, such that UNISON makes no deduction from claimants' compensation in successful personal injury claims. Legal assistance is provided, as long as the claimant has reasonable prospects of success, it relies on specialist personal injury solicitors. That scheme achieved almost £29 million for its members and their family members in 2016. Other legal services members can access by virtue of their membership are: criminal law services (to defend work related allegations); wills and conveyancing service; and a free legal advice service.

All up, UNISON advised/assisted > 21,000 members since June 2016.

The Working Group obtained further insights as to the UNISON's legal support from a discussion with UNISON representatives, Helen Buczynsky and Jeanette Sainsbury, at the Visitors' Meeting on 28 June 2017. As noted later in this report, UNISON had a major legal victory recently in the Supreme Court, successfully challenging the lawfulness of the filing fees charged by the Employment Tribunal. This will reduce the costs to UNISON of legally representing its members in that tribunal going forward (many of whom are low-paid and who would have been incapable of paying for that filing fee themselves). Quite apart from that, some pertinent points of that discussion, insofar as UNISON's legal assistance for its members, were as follows:

DISCUSSION: UNISON representatives, Helen Buczynsky and Jeanette Sainsbury:

- some legal representation of members is outsourced (e.g., personal injury), but other work (such as some employment tribunal work) may be undertaken 'in-house';
- the increase in employment tribunal fees was a significant disbursement for UNISON to bear. To combat this, UNISON sometimes arranged with its members to loan them the fees. The recent Supreme Court decision renders that arrangement no longer necessary – however, it shows the ways in which unions can adapt their practices, in light of reforms, to assist their members in adverse circumstances;
- UNISON considered it important to continue to bring workplace claims such as occupational disease cases, notwithstanding their difficult legal and technical nature (and in which the cost of experts' reports is often significant), to facilitate access to justice for its members, many of whom are low-paid. UNISON is very concerned about the impact the proposed whiplash reforms, which refer to an increase to the personal injury small claims limit for non-whiplash cases too, will have on continuing access to justice for those injured in work-related claims such as occupational disease cases;
- UNISON applies a merits test to all claims (those with 'reasonable prospects of success');
- UNISON does not take a portion of their members' damages, where cases succeed;
- UNISON is also concerned that forthcoming reforms to road traffic accident cases, including whiplash damages claims, may well impact upon the ability for the union to assist members (e.g., ambulance drivers negligently injured whilst carrying out a public service) with their claims, given the proposed reduction in damages that will flow from those reforms and from the proposed new costs regime;
- UNISON offers legal assistance to close family relatives of the union member in some circumstances;
- UNISON does not apply a limit of cover per claim per member;
- UNISON is well-positioned to take on particular cases that are 'test cases', of importance to legal principle or to a particular group of members that would not otherwise be run (such as the recent Supreme Court decision regarding tribunal fees);
- it is not UNISON's practice to check to see whether their members have BTE insurance cover because of the comprehensive cover which UNISON provides under its legal assistance scheme, including the added value given through the branch and regional links it has supporting our members;
- whilst covered by the legal assistance scheme, UNISON protects members with civil claims from bearing legal costs. In personal injury cases, a collective CFA is used and the legal costs are indemnified or underwritten by the union, and without any success fee being deducted from members' damages. This covers adverse costs for example, in the event of a failed part 36 offer or where an order is made against a member on an application or interim appeal during the case.

Clearly, union membership offers at least some of the same benefits as does BTE insurance cover, for

those cases which are funded by the union. Under both regimes, legal helplines are typically provided; and the benefits may extend to the insured's family relatives. Indeed, at the meeting of the ***All Party Parliamentary Group on Public Legal Education***, chaired by Mr Tom Tugendhat MP, held on 19 July 2017 at 1 Parliament Street (and referenced later in this report), one delegate who represented a trade union law firm noted that its members regularly advised trade union members not to purchase BTE insurance as an add-on to a home or contents policy, given the extent of cover which their union membership will provide.

However, the Working Group noted that there may be some types of case, particularly outside of the employment and personal injury areas, which may not be taken forward by a union on behalf of its members but which may be covered by a BTE policy — in which case BTE insurance has a 'gap-filling' role to play, even for union members.

9. BTE for the low socio-economic demographic

The Working Group took note of the fact that many in society do not have household contents insurance, do not own a motor vehicle, and do not travel. Add-on BTE insurance, via the usual channels, is out of reach for those people. Even for those who do carry these types of insurances, they may prefer to opt for a 'basic' policy that excludes add-ons such as BTE insurance. Further, the coverage of existing BTE policies may not suit this socio-demographic — e.g., existing BTE policies that cover employee disputes are not relevant for those who are unemployed but who may have significant other concerns for which some form of BTE insurance would be helpful.

The Working Group was concerned as to the reach of currently-available BTE insurance cover, and sought advice from a visitor to its meeting, Faisel Rahman of Fair Finance, who outlined the attempts being made to develop products that could provide legal assistance to that particular socio-economic demographic:

DISCUSSION: Fair Finance representative, Faisel Rahman:

- Fair Finance is a not-for-profit business which tackles financial exclusion, and offers personal loans, business loans and debt advice to some of the most excluded people in London and across the UK. It is financed through a mixture of social investment from a range of 'high-net-worth' individuals and foundations; commercial finance from a number of banks; and philanthropic support specifically for its money advisory services.

- The typical users of Fair Finance vary, depending on the product — but they are linked by being unable or unwilling to use mainstream finance (i.e., banks) for their primary source of credit, are on low incomes, and have very little by way of financial assets. They represent the 8–9M of the UK population considered 'sub prime'.

- One of the most difficult things for such clients is that many with poor credit histories are unable to borrow small amounts or be approved for overdrafts — so that when they need to make an unexpected payment or purchase a high value item like white goods or replacement household item, they will use a range of sub prime lenders. While many will use a doorstep provider or some source of high cost credit, others will often use hire purchase or rent-to-own firms. Whilst these firms will often arrange credit to purchase the items (say, with an interest rate of 39-69%, and with a loan structured over 36 months), the goods purchased are often more expensive than if bought somewhere else; and as the item is not owned by the person until they make the final payment, some type of insurance cover is required until it is paid off. This insurance will be sold at point-of-sale, and will be mandatory unless the person has home insurance of their own.

- About 90–95% of Fair Finance clients have no home or contents insurance and so when using one of these rent-to-own firms they are required to purchase the company's insurance product.

- A typical washing machine costing around £250–300 at a department store, will instead cost around £400 as its base costs at the rent to- own firm. Once paid for with additional financing costs and insurance cover, it will cost over £1,000 all in. Such clients may have approximately three items in their house that are insured individually by the hire purchase firm. The cost of the three individual policies bought when the items were purchased is usually greater than the cost of a standard home insurance policy. Hence, and ironically, whilst the vast majority of Fair Finance's clients have no contents insurance, the amount they pay to insure these products in all likelihood exceeds the cost of a general household contents insurance policy.

- While Insurance With Rent (IWR) for social housing tenants does exist and is often affordable, it provides limited cover, is poorly delivered and only has a 4% uptake at present. Versions of this product are available from Housing Associations via a Lloyd's insurance, and are profiled by the National Housing Association.

DISCUSSION: Fair Finance representative, Faisel Rahman (continued):

- In the views of Fair Finance, there is a great need for BTE cover for this type of client — as part of an insurance product that also insures their goods under hire-purchase arrangements, and which provides some funeral cover (one in seven loans by Fair Finance clients is for funeral expenses of a loved one). A cheaper, one-stop, and accessible insurance product for this clientele is urgently required. In addition many of Fair Finance's customers are working on short term contracts and in low pay. They often see clients in their debt advice team dealing with many employment related issues - lack of final pay, dismissal etc. In many ways their customers are managing financial vulnerabilities as well as housing, status and employment vulnerabilities. Fair Finance can see the benefits of a BTE type product if designed well and delivered appropriately to this group.

- Many clients had never considered BTE because: they weren't aware of it as little is sold to them directly; have a distrust of insurance; and, due to a lack of choice, end up with poor, expensive and inappropriate insurance deals. BTE would be helpful to many, to help them cope with claims for eviction, unfair dismissal, and/or repossession of white goods.

- One avenue being considered by Fair Finance is to provide BTE as an add-on to loans which are provided to them. This would be a way of ensuring that they could get the product to people who they already know need it and through a trusted intermediary. The costing and design of such a product is currently being investigated by Fair Finance.

The Working Group noted that this initiative is a work-in-progress, and shows the work being done to provide cover for legal assistance to those who most need it, and for whom legal aid may (despite their circumstances) remain unavailable. The experiences of Fair Finance suggest that tailoring the terms of a BTE policy to the needs of a target market may encourage the take-up of such insurance.

10. Mandatory BTE insurance

The Working Group considered the thorny issue as to whether certain 'common categories' of potential defendants (e.g., the drivers of motor vehicles, employers) should be compelled to take out BTE insurance which covers their own legal costs, and also the legal costs of those whom they may negligently injure, or who may otherwise have claims against them.

The Working Group noted that this proved to be a very controversial topic in the Jackson report,

Review of Civil Litigation Costs: Final Report (at ch 8, para 3.7) and ***Preliminary Report*** (at ch 13, para 4.6). The notion of compulsory BTE insurance being imposed upon a range of potential defendants was strongly resisted by several respondents to that review.

The so-called 'Bar CLAF proposal' — the work of the Policy Advisory Group of the Bar Council, under the chairmanship of Guy Mansfield QC — focussed on a number of categories of potential defendant. It involved the following premises, per the ***Preliminary Report***, ch 13, para 4.6:

The CLAF proposal: the Jackson Preliminary Report:	
the CLAF Group make a proposal which merits serious consideration. The proposal is that compulsory BTE should be introduced, which would cover a wide range of accidents. The mechanism would be as follows:	
(i)	Motorists should be required to take out BTE insurance in addition to third party liability insurance. Such BTE insurance would cover themselves, their passengers and any pedestrians whom they might injure;
(ii)	Employers, occupiers of business premises, operators of trains and others required to have public liability insurance should also be required to take out BTE cover in respect of personal injury claims suffered by themselves, employees, visitors, or customers;
(iii)	Such insurance would cover legal expenses only, not damages. Claims would be supported by insurers, subject to a merits test;
(iv)	BTE insurers will recover their costs, but no success fee or ATE premium, in respect of cases won. BTE insurers would pay the defence costs in respect of cases lost.

However, in his ***Final Report*** (ch 8, para 2.5), Sir Rupert Jackson noted that most respondents to the proposal opposed this proposal, and he concluded (at para 2.7) that:

> I do not recommend that motorists or any other potential tortfeasors be compelled to take out BTE insurance on behalf of those whom they might injure.

(The Working Group understands that, in July 2016, the Bar Council established a 'Joint CLAF Working Group' with the Chartered Institute of Legal Executives and the Law Society, under the chairmanship

of Justin Fenwick QC, 'to examine the viability of a Contingent Legal Aid Fund (CLAF)', including, inter alia, how such a Fund could be funded, in what areas of law it would be viable and self-sustaining, and what legislative changes (whether to primary or secondary legislation) may be required to facilitate such a CLAF fund. The terms of reference for that Working Group are reproduced at: http://www.barcouncil.org.uk/media-centre/news-and-press-releases/2016/july/joint-claf-working-group-established/. The Joint CLAF Working Group is not reconsidering the quite separate proposal of mandatory BTE insurance which was put forward at part of the Bar Council's contribution to the Jackson Costs Review.)

The Working Group noted that some academic commentators have strongly argued in favour of such a mandatory BTE insurance scheme. For example, Professor Richard Lewis argued, in his article, '***Litigation Costs and Before-the-event Insurance: The Key to Access to Justice?***' (2011) 74 *Modern L Rev* 272, that a scheme of mandatory BTE insurance which was limited to drivers of motor vehicles, as part of their compulsory insurance arrangements, would enable 75% of all personal injury tort claims to be litigated efficiently and with ready access to legal advice. However, the Working Group concluded that the case for such a scheme has not been made to date. Any decision to implement a mandatory BTE scheme of this sort would require a detailed study of the potential costs (in particular, the potential impact on motor insurance premiums) and offsetting benefits (considering, inter alia, the potential benefits of BTE insurance protection for those who might not otherwise have such cover, i.e., those injured by the insured driver). Such an assessment was beyond the scope of the terms of reference for this Working Group.

11. The 'block insurance' proposal

It was also noted by the Working Group that housing associations and social housing landlords — as well-resourced potential defendants for a large number of persons who may have a fairly similar type of grievance — might be encouraged to take out block BTE insurance to mandatorily cover social housing and other tenants. On this point, the Working Group invited Eddie Coppinger and Elizabeth Davey as visitors, to explain the work that is being undertaken by the Legal Advice Centre (University House):

DISCUSSION: Legal Advice Centre (University House), Eddie Coppinger and Elizabeth Davey:

- Most local authorities and housing associations negotiate block insurance agreements on behalf of their tenants and leaseholders, and typically use the same insurance company. Such policies typically cover property damage (water egress and damage being a large problem in social housing tower blocks), but do not presently include BTE insurance cover. Given their vast purchasing power, it is conceivable that councils and housing associations could insist that their block contract insurance providers include free BTE insurance, or at very low additional cost. They would certainly be in a position to obtain BTE insurance on a mandatory basis more cheaply than for tenants to obtain BTE insurance via other avenues;

- such mandatory BTE cover via block insurance would further many councils' aims to benefit community and to provide greater access to justice for many of their residents who have grave social and/or health needs. It would provide reputational goodwill for many local authorities and housing associations if they facilitated a regime whereby their tenants are able to secure their rights against third parties;

- although enquiries about taking this proposal forward have occurred with at least one council, it is likely that the notion will take some time to consider and implement. These discussants were unaware of any local authorities or housing associations in London or beyond that use block BTE cover;

- it should be noted that not all beneficiaries of a block BTE insurance policy would necessarily represent the lower socio-economic demographic. The right-to-buy scheme means that many councils have a significant number of leaseholders — indeed, some local authorities now have more leaseholders than 'renters';

- on a practical note, a great deal of public housing is multiple occupancy tower blocks, where water damage is a constant problem — so much so that some public body landlords will not compensate tenants affected by water egress for loss and/or damage to their goods, but will only rectify structural deficiencies. Given that many tenants do not carry contents insurance, this leaves such tenants with no compensation, and no insurance that would cover that property damage. If everyone in that tower block had BTE insurance, facilitated by the public body, then they would have an avenue for redress;

- the difficulties arising for council and other tenants arising out of the Grenfell Tower disaster is a good example of where a mandatory block BTE insurance policy could have assisted.

Regarding the proposal about 'block insurance', views across the Working Group were quite mixed.

(a) The proponents' views

According to some on the Working Group, and others, these are the arguments in favour of the proposal about 'block insurance':

i. claims by tenants of housing associations and council landlords are among the socio-economic demographic which is least likely to access BTE insurance via any other avenue. As the UNISON paper noted ('***UNISON***', 30 March 2017), 'BTE insurance can not effectively plug an increasing access to justice gap. Those who are low paid or vulnerable consumers are the least likely to have BTE, they may not be homeowners or car owners';

ii. it would be technically possible for housing associations to take out block insurance to cover tenants' claims — although whether the policy should exclude claims against the housing association itself (to increase the affordability of the policy) is a contentious point. It has been proposed that such a block policy should include claims that may be made by the tenants against that housing association (e.g., housing disrepair claims) — and that it would be in the best interests of the housing association, as the BTE panel law firms would be in a position to filter out the vexatious claims and only permit the reasonably-grounded claims to proceed;

iii. the proposal should also be considered against a backdrop that claims to the Housing Ombudsman for redress are unlikely to garner real redress; legal aid availability is shrinking; and access to a legal remedy is a significant problem for that demographic. The lack of availability of redress was discussed by the departing Law Society president, Mr Robert Bourns, who has stated (per '***Parting Shots***', *Law Society Gazette*, 26 June 2017):

'What has come through clearly from voluntary organisations – legal advice centres, Citizens Advice and others – is that they are having to work so much harder,' Bourns says. 'In the past they were able to grab the attention of, for example, a statutory authority by writing a letter stressing that a person has a right that is not being respected.

'Now, they are not even getting a response, because it is recognised by the [authority] that the risk of a claim is much reduced. If the risks of being held to account are diminished, that changes behaviour.'

So where does the problem go? Often, it is simply displaced, Bourns replies: 'The problem doesn't go away. It manifests in the areas of welfare, domestic violence, educational difficulty, exclusion orders and so forth.'

One example is a slew of reports from medical professionals, showing that a person's inability to enforce a basic legal right, perhaps in employment, welfare or benefits, can have a knock-on effect on their health and therefore the NHS.

The lack of viable avenues of litigation available to many of those housed in the Grenfell Tower was also the subject of that article — a situation which a block BTE policy taken out by the relevant council landlord could rectify.

iv. since so many social housing tenants do not have contents insurance; do not own a car; and do not travel; there is an argument that BTE insurance could be an opt-in product associated with:

– utilities service providers, such as electricity accounts;

– mobile phone providers; or

– via opening a bank account.

However, the insurance representatives on the Working Group noted that legal helplines are quite expensive to maintain, such that 'free accounts' of the type described above are not going to offer BTE insurance as an add-on (BTE insurance may be available for a fee, but social housing tenants are unlikely to pay a fee for that add-on). Similarly, social housing tenants may not choose to pay the additional costs that would be associated with providing BTE insurance as an optional extra in electricity accounts. Mobile phone insurance also tends to be quite expensive, and so may be beyond the reach of many in this demographic. Hence, that is a further impetus that, in order to cover this demographic, a block policy taken out by a housing association or local authority was the more feasible way to cover these claims. Further, the purchasing power of a large client such as a local authority, so as to obtain an affordable BTE premium, was adverted to in the meeting with Eddie Coppinger and Elizabeth Davey.

(b) The opponents' views

The various problems and/or issues that would potentially be generated by the proposal for 'block insurance' were identified, by those on the Working Group and others, to be as follows:

i. As noted above, the view expressed by Eddie Coppinger and Elizabeth Davey was that, given their vast purchasing power, councils and housing associations could insist that their block contract insurance providers include free BTE insurance, or at very low additional cost. However, in the view of the insurance representatives on the Working Group, this assumption is not necessarily correct. The cost of BTE insurance in such context could be relatively high, at least if designed to deal with the issues that are likely to be faced by the relevant group, because it is likely that it would be used commonly by the BTE Insureds – e.g., if a housing association took out such a policy to cover social housing tenants, the likely frequency (and hence cost) of the claims could render the BTE insurance cover unviable. Most claims brought by the BTE Insureds would be against that housing association (e.g., re rent payment disputes, housing disrepair claims, payment of benefits disputes); a block BTE policy would facilitate more claims than currently are brought; this type of BTE Insured is likely to require more assistance (whether by a legal helpline or by face-to-face assistance); and adverse selection is such that the very need for block insurance is because such claimants tend to have grievances by virtue of housing disrepair, debt problems, and so on (the issue of 'problem clusters' referred to earlier in this report). If that is right, then the provision of block BTE insurance in this way could have a significant impact on the rent payable by the insured tenants. Therein lies the tension in developing a product which provides both appropriate cover and affordability;

ii. BTE insurance taken out by the defendant, to cover the claimant's legal costs incurred in claiming against that defendant, could give rise to actual or theoretical conflicts of interest for the BTE Insurer. The Working Group noted that this potential problem arose in one notable case in the RTA context:

Sarwar v Alam [2002] 1 WLR 125 (CA):

FACTS: Mr Sarwar, a passenger in a car being driven by the defendant driver, was injured by reason of the driver's negligence. Was it reasonable for Mr Sarwar to enter into a CFA and/or ATE policy (thus incurring a success fee and ATE premium – this was in pre-LASPO days, when those were recoverable from the defendant)? BTE insurance cover had been available to Mr Sarwar, as he could have made a claim on the driver's own BTE insurance policy, but he didn't enquire about that. The driver's BTE policy covered the costs and expenses of both sides in a claim brought by a passenger in the car against the driver himself, up to a limit of £50,000.

FIRST INSTANCE: On 5 July 2001, HHJ Halbert in the Chester County Court disallowed the cost of the ATE premium because there had been alternative cover available under a pre-existing BTE policy. Mr Sarwar should have availed himself of it.

COURT OF APPEAL: That decision was reversed on appeal on 19 September 2001. It was reasonable not to use the driver's BTE policy. Accordingly, the success fee and ATE premium were, in principle, recoverable.

The Court of Appeal accepted the submission by MASS as follows (at [54]):

'Moreover, there are obvious concerns as to conflict of interest in any case where a defendant is being sued via his own policy of insurance. It is not enough to say that any damages recovered will be paid by a liability insurer which is a separate legal entity from the BTE insurer. Where liability is disputed, the defendant may very well have a strong personal motivation in resisting the claim (payment of an excess; loss of a no-claims bonus; a stiff-necked refusal to accept the possibility that he drove carelessly – the last can generate remarkable passions). Moreover, it is probable that many claimants would feel uneasy in entrusting the conduct of their claim to the insurer of the opposing party, and would distrust its advice where adverse to their private expectations. Justice should be seen to be done, and the rules of court should support a claimant who elects to fund his claim from a source which is not only neutral and objective, but is seen to be so."

The Court of Appeal noted that representation arranged by the insurer of the driver, to which Mr Sarwar had never been a party, and where the opposing insurer reserved to itself the full conduct and control of the claim, was not a reasonable alternative to representation of Mr Sarwar by a lawyer of his choice, backed by an ATE policy.

iii. it is possible that the BTE Insurer would insist that claims by the BTE Insured against the client (i.e., a housing association) who was taking out the group BTE insurance policy should be excluded —

which would render BTE insurance unavailable in the circumstances in which it would be most needed;

iv. BTE insurers appoint their own panel solicitors to act, who may be geographically far removed from the BTE Insured;

v. a mandatory BTE policy would no doubt benefit from covering mediation services, given the types of disputes that may arise in housing developments, for example. Mediation may be particularly effective for disrepair claims, troublesome neighbours, etc. However, if the BTE insurance cover is 'cut down' to merely cover mediation and not litigation, then without the 'stick' of litigation, mediation may not be particularly effective. It would potentially provide a disincentive for a defendant to be interested in remedying the grievance, if that defendant knew that the BTE Insured was covered for mediation, but for nothing else.

G. AWARENESS OF BTE INSURANCE

1. The importance of awareness

Awareness of BTE insurance is an important issue in two separate contexts, discussed below.

(a) Existing cover

It is important to ensure that those who have existing cover are aware that they have it and of the cover it provides, so that they can make use of it when needed.

As noted earlier in this report, BTE Insurance is perceived to have a 'transparency issue', particularly among consumers, in that BTE is invariably sold to the consumer market together with some other insurance product, either as an "add-on" or as part of a bundled product. This means that many who have BTE may have little or no awareness of that fact or, if they are aware in general terms that they have such cover, of its precise scope and extent. Individuals who are covered as part of a policy taken out by a family member may be particularly unlikely to be aware of such cover.

The Working Group noted that awareness of BTE is likely to be much higher among businesses that have such cover, particularly where they have purchased BTE as a stand-alone product and so can be expected to know that they have done so. Where businesses have acquired BTE cover as part of a wider insurance product or in some other way, eg as a benefit of membership of a trade body, there may be a lower level of awareness than when a stand-alone policy is purchased. However, as the cost attributable to BTE cover is typically higher for business policies, and BTE is more likely to be seen as a significant benefit (given that the potential risks of litigation are likely to be of greater concern to businesses than consumers), the Working Group considers that the issue of awareness is more acute for consumers than businesses.

An ***All Party Parliamentary Group on Public Legal Education***, chaired by Mr Tom Tugendhat MP, was held on 19 July 2017 at 1 Parliament Street, at which the following topic was discussed:

> Discussion topic: Unlocking Legal Expenses Insurance (LEI) – heightening consumer awareness of LEI products and cover, understanding the benefits of LEI and extending coverage as a route to improving access to justice.

At that meeting, a number of attendees expressed concern about the lack of awareness by many individuals that they have BTE insurance; and if they are aware of it, that they do not know what it provides. Hence, clearly other interested parties in the legal marketplace are also concerned about this difficulty that afflicts BTE insurance in this jurisdiction — largely, as noted above, a by-product of the fact that there is such a tiny market in stand-alone BTE policies (and what exists is invariably for business BTE policies).

As noted later in this report, it is sometimes said that BTE is cheap because it is not widely used by those who have it, and that if there were improved awareness of this cover, the price would rise. The Working Group was not in a position to assess whether, or to what extent, such fears are well-founded; that is something that would need appropriately funded research. In the view of the Working Group, however, a potential increase in BTE premiums in the event of its greater use is NOT a reason to withhold efforts to ensure that those who have such cover are aware it and can make proper use of it.

(b) Available products

Equally, it is important to ensure that businesses and consumers are aware of the products that exist and their potential benefits, so that they are able to make appropriate decisions as to whether to purchase such products.

The Working Group noted that consumers and (to a lesser extent) businesses who do not already have BTE cover may be unaware of the advantages of BTE cover, which means that the distribution of BTE in this jurisdiction may be less than it could otherwise be.

Many may simply believe that they will never be party to a legal dispute and so have no need for costs protection.

Others may believe that, if they are ever party to a legal dispute, they will be able to instruct a solicitor to take on the case under a "no win, no fee" agreement, so that they will not bear any cost risk. The Working Group noted that this perception may be common, particularly among consumers, given the widespread practice (noted earlier in this report) of solicitors advertising such arrangements – in particular for personal injury work, though consumers may not appreciate that they will not apply to all forms of dispute.

This perception may gradually diminish, once the reforms to the small claims limit for personal injury claims (referred to earlier in this report) are implemented, if solicitors are less willing to take on claims falling within the increased limit under a CFA. However, this perception may be more persistent; the possibility of cost-free litigation is arguably quite an ingrained notion for consumers after years of advertisements for "no win, no fee" deals (and such advertising will no doubt continue, as CFAs will continue to be offered at least for cases above the small claims limit).

2. Potential measures to increase awareness

The Working Group discussed a number of measures that could potentially be taken to increase levels of awareness among both consumers and businesses. These are considered below.

(a) An advertising campaign

The Working Group discussed whether some form of advertising campaign about BTE insurance (whether by television, print media or other) could be run by BTE Insurers, to improve awareness of this product, and/or to enhance/distinguish their own BTE insurance product from those of their competitors.

Some members of the Working Group envisaged that a concerted and deliberate campaign to raise awareness of the actuality, or potentiality, of BTE cover may ensure a better take-up of the product (or raise awareness amongst the population to check whether they already have existing BTE insurance cover).
However, the prospect of any such advertising campaign by BTE Insurers appears to be remote, principally for two reasons:

i. BTE policies in this jurisdiction are ‘white label’ products, and do not depend upon brand recognition in the same way that occurs in, say, Germany (where BTE Insurers advertise extensively,

and are brand recognised); and

ii. the purchaser of BTE insurance (particularly for consumer BTE policies in which the BTE insurance is bundled or is taken out on an 'opt-in' basis) does not choose his home and contents policy on the basis of which insurer is providing the BTE insurance cover; and further, that consumer would not realistically switch his home and contents policy in order to be able to take advantage of one particularly BTE Insurer over another. The selection of the BTE Insurer occurs at the intermediary point in this jurisdiction, and is not dependent upon the purchaser's selection of, or loyalty to, a particular brand of insurer.

The Working Group also discussed whether some sort of advertising campaign might be funded by the government, in the public interest. In the Working Group's view, a properly run and funded campaign could play an important part in increasing awareness among both businesses and consumers, which could potentially lead to greater take-up and use of BTE. While the government may be unlikely to fund a formal advertising campaign in current circumstances, it may be able to take a greater role in raising awareness of the value of BTE in enabling access to justice.

(b) Policy wording

The Working Group discussed whether any lack of awareness of existing cover could be improved by changes to the approach to policy wording.

The Consumer Focus study: L Bello, ***In Case of Emergency: Consumer analysis of legal expenses insurance*** (2011) made a recommendation that the ABI should encourage the improvement of key facts and other marketing communications, so that they are more balanced and easier for consumers to identify important exclusions.

The response by legal expenses insurers (***Promoting Access to Justice through Before the Event Legal Expenses Insurance*** (Jan 2012)) noted that most BTE Insurers (and insurers generally) used a clear or plain English approach in their policy wordings and associated literature, and that best practice required that literature was tested to ensure it was clear and did not mislead consumers. It stated that BTE Insurers would "continue to their best ability to improve key facts summaries and policy wordings as a priority"; however such policies could be complex and in many cases it was "difficult to see how existing items of literature could

actually be made any clearer or more explicit".

The Working Group noted that this area has moved on even further since the reports referenced above. There are numerous requirements on BTE Insurers (in common with other insurers), including under consumer protection legislation and the FCA principles, to ensure that policy documentation is clear, fair and not misleading.

In light of these existing requirements, it is not clear to the Working Group that further regulation in this area would assist.

(c) Solicitors' obligations re BTE insurance

The discussion of solicitors' duties to check for the availability of BTE cover before taking on a case (in chapter A of this report) is of course relevant to the question of awareness of existing cover.

The Working Group noted, however, that this can never be a complete solution, even if solicitors were invariably to comply with their duties in this regard. That is because there may be large numbers of consumers who would approach a solicitor for help if they knew they had BTE cover, but who will not do so otherwise.

This is particularly so in the non-RTA context. Where an individual suffers an injury in a road accident, he or she is likely to go to a solicitor, and may well assume that the solicitor will take on the case under a "no win, no fee" deal. That may be less likely if (for example) a consumer has a problem with a defective washing machine and is told the (perhaps very short) warranty has expired. In that situation, if the consumer knew about existing BTE cover, he or she might well approach a solicitor, perhaps most obviously by phoning a helpline provided under the BTE policy. Without such awareness, the consumer might simply assume that nothing can be done.

(d) Other measures

The Working Group noted a number of other potential sources of information in relation to the existence of, or potential for, BTE insurance, including:

- those acting at pro bono clinics and Citizen's Advice centres, who could make checking for BTE cover part of their standard procedures (to the extent they do not already do so);

- the designers of the portals for the forthcoming Online Court, who could ensure that information about BTE is part of the "triage" process so that users are asked about their insurance cover and prompted to check whether they might have a relevant policy;

- brokers and online providers of insurance products (including those who design cost comparison websites);

- the Law Society, in terms of enhancing the familiarity of BTE in the legal marketplace in particular.

(e) Individual responsibility

The Working Group noted that individual responsibility also has a role to play, for most consumers and businesses – subject of course to the discussion in Chapter F of the challenges in making BTE available to the lower socio-economic demographic.

In particular, if sufficient information is made available about BTE insurance products and their potential benefits, to consumers and businesses who are able to afford them, the question of whether they actually choose to buy these products – either as a stand-alone policy (for businesses) or as an optional "add-on" or part of a broader insurance product – is a matter for them. BTE Insurance is a commercial product which is available at a relatively modest cost; if properly informed potential customers decide not to purchase it, then that is their decision. The challenge, as noted above, is how to ensure that sufficient information is available to them.

Similarly, when it comes to awareness of existing cover, there is only so much that can be done for individual consumers (and businesses), if for example they do not approach a solicitor or advice centre. The

provision of information and documentation to the end customer – no matter how clear it is regarding the cover and its benefits, such as for example the availability of a legal helpline – will not assist if the end customer does not read it, and so is not aware of the cover and does not take any steps to seek assistance. The Working Group noted that this issue is of course not exclusive to BTE insurance; similar challenges exist for other forms of insurance and other financial products.

H. THE PRICING OF BTE: SOME RELEVANT ISSUES

Nothing is value for money if it is paid for, required, but never used. Even allowing that the purchase of any insurance product is considered by many to represent prudent and careful management of their financial and other affairs, a problem arises if a person with a grievance or concern simply does not know that they have BTE insurance cover at all. A longstanding criticism of BTE insurance is that, if there was a greater awareness of BTE in the marketplace, that would cause its premiums to rise, and that, paradoxically, BTE is cheap as it is not oft-used. For example, UNISON makes this point (per '***UNISON***', paper prepared for the visitors' meeting, 30 Mar 2017):

> current BTE policies sold as an "add on" to individuals can be done so on a low premium basis as policy holders are often unaware they have the cover, so they are unused. They may also only offer limited cover by type of claim, by level of indemnity, or involve other restrictions, such as notification restrictions. Should many more claimants seek to rely on this type of policy or more comprehensive cover be sought the costs would invariably significantly increase.

However, for some claims, BTE insurance offers incredible value. One Working Group member cited an example of a BTE Insured who suffered from a critical illness which constituted an insurable event, and for the payment of a £25 premium, was assisted in recovering £625,000 in damages.

The view was also expressed, by some Working Group members, that BTE policies would represent better value if more BTE policy-holders were aware, and made use, of the legal helplines which commonly accompany the BTE insurance cover. For £25, the BTE Insured is usually entitled to unlimited phone assistance per grievance, which is often effective in preventing a potential dispute from escalating into costly legal claims or defences.

This section of the report draws out some aspects of the pricing of the BTE premium, in the modern litigation landscape.

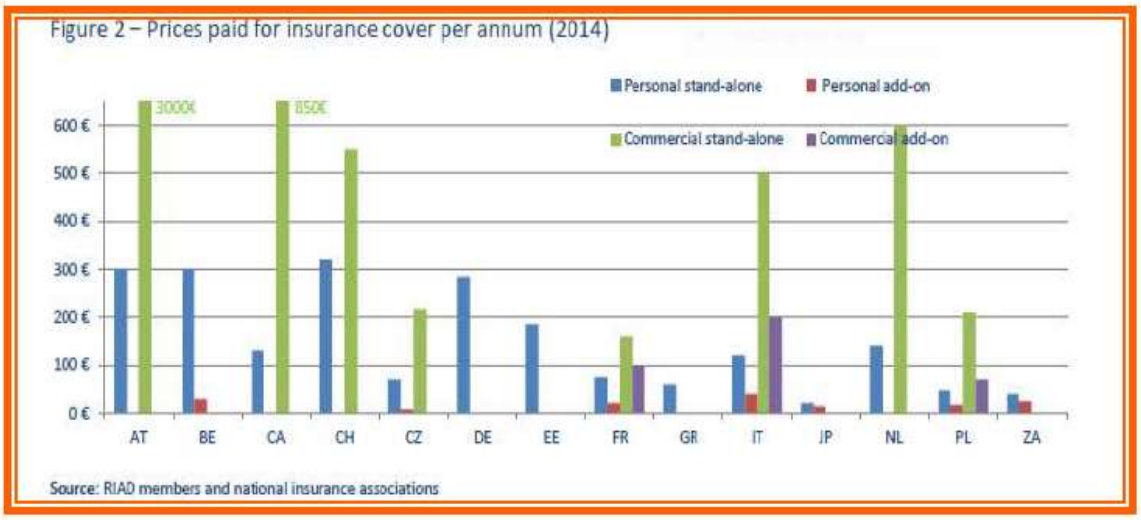
1. Observations about the BTE premium

(a) An international comparison of pricing

The Working Group was informed by its insurance representatives that add-on BTE insurance to a household and/or contents policy costs approximately £25 (or less) to purchase approximately £50,000–£100,000 of legal costs cover in the UK. Stand-alone consumer policies are, as already discussed, virtually non-existent in the UK.

Commercial BTE policies are individually priced, depending on the wage-roll and/or turnover of the business. The minimum premium for a business's stand-alone BTE insurance policy would be around £150 to reflect a 'sole trader risk'. Hence, for example, for a business with a wage-roll of £1M and turnover of £3M, a BTE insurance policy, excluding contract disputes and debt recovery, would be procurable for a premium for about £1,400. If contract disputes and debt recovery were included in the BTE policy, the quote would be approximately £2,400. According to ARAG's figures (kindly provided by Working Group member, Lesley Attu), a mean average BTE policy premium across 50 policies — some with and others without contract dispute cover — is approximately £1,500.

As already mentioned previously in Chapter F, other European jurisdictions take quite a different approach to the acquisition of BTE insurance protection. Not only are stand-alone BTE policies far more common there, but both individuals and businesses are prepared to pay far more for their BTE insurance policies in countries such as Austria, Belgium, Germany, and Switzerland than are their UK counterparts. The graph below, provided by RIAD (per its paper, '***How can 'before-the-event' legal protection insurance be made more effective across the population of England and Wales?***', 30 March 2017), sets out the average prices paid for insurance cover per annum in 2014:



(b) Pricing the premium

The Working Group took note of the fact that the premium price which is paid by the consumer or SME is **not** set exclusively by the BTE Insurer. Working Group insurance representatives clarified that, of any BTE premium, the BTE Insurer typically receives less than half, and the remainder of the premium is paid to intermediaries and/or distributors of the insurance products.

Although it varies hugely, it was estimated that a £25 annual premium which was paid as part of a household contents policy may be split, revenue-wise, in the following fashion, where the BTE Insured either opts into, or participates in a mandatory, BTE insurance policy:

The BTE Insurer receives between £4–9
The intermediaries receive between £16–21, by way of commission, for distributing the product

Some of the insurance representatives of the Working Group stated that BTE Insurers make minimal profit (if any) from consumer BTE policies, whereas commercial BTE policies are more profitable; whilst other insurance representatives of the Working Group stated that all of their BTE policies are underwritten with the intention of making a profit.

The Working Group noted that the pricing of BTE policies depends hugely upon the 'insurable events' contained within the cover. An example of this was the BTE cover contained in the Federation of Small Business (FSB) ***Legal Protection Scheme*** package. That policy excludes debt recovery proceedings which the SMEs and micro-businesses may wish to bring, rendering it more affordable than it would otherwise be.

The Working Group also noted that, for consumer BTE policies and affinity group BTE insurance, in which such insurance is taken out 'en bloc', these policies do not price the individual risk that certain insureds pose. The reality is that BTE policies do not adjust their premiums to fit the 'bad risk' circumstances of some insureds (e.g., a history of poor book-keeping or bad driving). This adage remains true, whether the BTE policy is being taken out by an SME or a consumer.

The credit-worthiness of the opponent is always verified in the case of BTE insurance claims, as a 'straw defendant' is a ground for not funding the claim, explicitly, under BTE policies (as discussed previously). Whilst such 'enforceability enquiries' are also customarily undertaken by solicitors who act on a CFA, the BTE policies expressly provide this as an 'escape hatch', where there would be no point in proceeding with the claim.

(c) Filing fees

The BTE Insured will typically be able to claim the cost of court filing fees under the BTE policy, given that these policies cover 'reasonable disbursements'. Hence, these will be paid by the BTE Insurer.

Notably, when the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013, SI 2013/1893 came into effect, a claimant had to pay a fee in order to commence proceedings in the Employment Tribunal and to appeal to the Employment Appeal Tribunal. Until that date, no fees were payable.

However, in ***Unison (on the application of) v Lord Chancellor*** [2017] UKSC 51 (26 Jul 2017), the Supreme Court heard a judicial review application brought by the trade union Unison, supported by the

Equality and Human Rights Commission and the Independent Workers Union of Great Britain as interveners. The Court upheld the challenge to the lawfulness of the Fees Order, which had been made by the Lord Chancellor in the exercise of statutory powers, on the basis that the Order was not a lawful exercise of those powers. The prescribed fees interfered unjustifiably with the right of access to justice under both the common law and EU law, frustrated the operation of Parliamentary legislation granting employment rights, and discriminated unlawfully against women and other protected groups.

In *Unison*, the Supreme Court made the following notable comments in relation to the importance of access to justice:

> "… the value to society of the right of access to the courts is not confined to cases in which the courts decide questions of general importance. People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations. That is so, notwithstanding that judicial enforcement of the law is not usually necessary, and notwithstanding that the resolution of disputes by other methods is often desirable."

It has since been suggested that the Government will be obliged to repay up to £32M in filing fees. Some of this payment will be due to BTE Insurers, who 'took a hit' under BTE policies which covered employment disputes after these fees were introduced.

2. The impact of the Jackson reforms on pricing

As noted earlier in this report, Sir Rupert Jackson's ***Review of Civil Litigation Costs: Final Report*** (Dec 2009) (at [3.8] of the Final Report) stated that, post the LASPO reforms, the world in which BTE insurers operated in the future would be "very different from the present world".

One feature noted already is the ban on referral fees for personal injury claims and the resultant disappearance, or near disappearance, of what Sir Rupert called "BTE2" arrangements, where the insurer would "sell" a claim to a solicitor to take on under a CFA in return for a referral fee paid to the insurer. Sir Rupert noted his understanding that, overall, as a result of BTE2 type arrangements, BTE insurers received

more money than they paid out in respect of RTA claims made by their insured.

In the Working Group's view, however, the end to recoverability of CFA success fees and the ban on referral fees, together with the consequent move away from BTE2 type arrangements, have not had a significant impact on the pricing of BTE insurance.

3. The potential impact of fixed recoverable costs on BTE

During the course of this Working Group's deliberations, the Jackson review of fixed recoverable costs (FRC) was ongoing, and that report was delivered on 31 July 2017: the Rt Hon Lord Justice Jackson, ***Review of Civil Litigation Costs: Supplemental Report: Fixed Recoverable Costs*** (July 2017). It was ultimately recommended, in that report (at ch 11, para 2.2), that:

(i)	All recoverable costs in the fast track should be fixed as set out in chapter 5 and the figures should be reviewed every three years.
(ii)	A new 'intermediate' track with a streamlined procedure should be created for monetary relief cases above the fast track, which are of modest complexity and up to a value of £100,000.
(iii)	There should be a grid of FRC for intermediate track cases as set out in chapter 7 and the figures should be reviewed every three years. In broad terms, based on this initial grid of costs, the costs recoverable under the scheme would range from around £19,000 for a straightforward £30,000 claim to around £68,000 for a £100,000 claim at the upper end of the scale of complexity.

Sir Rupert Jackson also mentioned, in this report, that it had been a plank of his previous recommendations that a 'greater use' of BTE insurance should be encouraged, as an example of a funding option 'which does not drive up costs' (at ch 2, para 2.8).

(a) The impact of FRC

The Working Group considered whether the potential extension of FRC would have any effect upon the pricing of BTE insurance, and whether any BTE product changes would be likely as a result of those potential reforms. Obviously, the behaviour of the market will require observing closely by BTE Insurers, after the introduction of FRC. The interplay between FRC and BTE will take some time to play out — it will be an immature market for a few years.

Of course, the real impact of FRC on BTE is likely to be (depending on the precise levels adopted) that, where the BTE Insured wins, then the client will not recover as much by way of adverse costs; and where the BTE Insured loses, then he won't need to pay as much to the winning opponent.

The views among the Working Group as to the potential impact of FRC were as follows:

i. Under FRC, if a BTE Insured loses the claim, then the adverse costs for which the BTE Insurer will be liable will be: (1) potentially lower than the current rate of adverse costs, and (2) more predictable. Presently, the amount of adverse costs is unknown; but if FRC are introduced, that will be quantifiable, depending upon the level of claim (and counter-claim, if any). That enhanced certainty will be attractive to BTE insurers. The insurance representatives on the Working Group predicted that this may have an impact, by either raising the limit of BTE cover per policy, or reducing the premium for the same level of BTE cover.

iii. Some other Working Group members, however, doubted whether the introduction of FRC would have any impact upon BTE pricing, pointing out that three other factors are far more important to pricing**:**

(1) the pricing of BTE premiums includes the costs of operating legal helplines;
(2) most BTE insurance policies cover employment claims, and these constitute quite a significant ratio of the claims made, wherein no costs-shifting applies in the Employment Tribunal; and
(3) so few cases go to actual trial that the impact of FRC on BTE pricing was likely to be negligible.

iv. In relation to (3) above, however, some members of the Working Group predicted that all insurers

(including BTE insurers) may be more likely to litigate, because they will know the amount of adverse costs for which they will be 'on the hook', should they lose (whether the BTE Insurer is funding the claimant or the defendant to the proceedings). If that's right, FRC may result in more cases litigating, resulting in an upward pressure on pricing – but quite how that plays out in the BTE market remains to be seen.

iv. notwithstanding FRC, some Working Group members considered that BTE panel law firms will charge fees to the BTE Insured which may exceed the FRC for the matter. Whilst FRC may set costs as a proportionate level, Working Group members noted that it does not necessarily mean that the case can be conducted for that price. Accordingly, BTE panel law firms may have to charge their BTE Insured client more than the FRC that they would recover in the event of a win, in order to make their business models workable. Where that is the case, this will leave a gap, and it will be the function of BTE insurance to make up that difference.

Some Working Group members considered that the impact of FRC would be to make BTE insurance more attractive, as a vehicle by which to fill the gap between FRC and the actual own-costs charged by the BTE panel law firm (or perhaps by own appointed solicitor, following the commencement of proceedings).

Other Working Group members considered that there will be pressure on BTE panel law firms to reduce their rates to those equivalent to FRC levels, so that there is **no** gap between the FRC and what the BTE Insurer would have to pick up by way of the BTE panel law firms's charges. These Working Group members considered that, if this is the way that the BTE market plays out, then BTE Insurers will find that prospect attractive, as they will know that the actual costs incurred in prosecuting or defending the BTE Insured's case will be recoverable in full, if the BTE Insured succeeds;

v. 'higher net worth' individuals, or major businesses, can afford to pay their own solicitor higher costs, which can potentially result in a 'ramping-up' effect so that the opponent has to incur an increased level of costs — and hence, where the opponent is BTE Insured, how BTE Insurers handle that potential difference between FRC (should the BTE Insured win the claim) and the amount of costs incurred by the BTE Insured in pursuing or defending that claim, remains for further consideration. The prospect of deep-pocketed parties increasing the costs of BTE-funded parties gave rise to some

cause for concern among some Working Group members.

FRC are unlikely to provide certainty in the short-term. If Lord Justice Jackson's proposals are implemented, even partially, there is likely to be a case law vacuum, for example if a new intermediate track is introduced. It may take several years before we understand how the different bands play out in practice; therefore, any impact on BTE insurance will be delayed**.**

Hence, it was clear that there were a variety of views across the Working Group as to the likely impact of FRC on the BTE insurance market.

(b) 'CPR-Lite'?

The Working Group noted that the subject of disclosure was presently under consideration by a Working Group chaired by Lady Justice Gloster, and that recommendations for simplifying disclosure may emanate from that study. Further, Sir Rupert Jackson has recommended (in the ***Supplemental Report***) the control of disclosure for the intermediate track cases (per ch 11, para 1.3(vi)), together with a number of other streamlined procedures (outlined in detail in ch 7, section 4, 'Procedure for cases in the intermediate track').

The insurance representatives on the Working Group referred to a number of 'CPR-Lite' suggestions which flow from the call by the then-MR, Lord Dyson, that the existing Civil Procedure Rules could be simplified (per: Dyson: '***We must simplify Civil Procedure Rules***', *Law Society Gazette*, 23 Apr 2015). These suggestions could include, suggested Working Group members:

- sequential experts' reports;
- limited disclosure, limited to those specific documents upon which the parties seek to rely;
- preliminary hearings on determinative points, rather than taking every point;
- speedier settlement negotiations;
- more active judicial case management (e.g., resolving disputes about the addition versus substitution of parties earlier in the proceedings); and
- increased digitilisation.

The insurance representatives suggested that a 'CPR-lite' approach may assist the pricing of BTE insurance premiums — although that discussion remains for another day.

4. Potential impact of anticipated rise in small claims limit and whiplash reforms

The government has recently proposed reforms to the system of damages for soft-tissue injury claims (in essence, whiplash claims), which will introduce a new fixed tariff of compensation for whiplash injuries with a duration of up to 2 years – ultimately reducing very significantly the amounts of compensation available for such injuries.

According to the notes to the Queen's Speech which announced the government's intention to introduce these changes under a Civil Liability Bill, the legislation will "crack down on fraudulent whiplash claims", and is expected to reduce motor insurance premiums by about £35 per year.

At the same time, there is a proposal to amend the small claims limit for RTA-related personal injury claims to £5,000 and for other personal injury claims to £2,000. In the Working Group's view, these proposed increases to the small claims limit may increase the need for BTE, as they could mean that (in the absence of a recoverable costs regime for small claims) there will be large numbers of lower value personal injury claims that lawyers are no longer willing to take on under a CFA. Accordingly, unless litigants have the benefit of BTE cover, it may be more difficult to pursue these sorts of claims.

There is also the question of whether the rise in the small claims limit will increase BTE premiums. Some commentators have expressed this view, on the basis that BTE insurers will no longer be able to recover costs in the band of cases that will fall within the small claims limit. This impact may however be counter-balanced, at least to some extent, by a reduction in claim numbers following the whiplash reforms. In the Working Group's view, it is not possible to anticipate precisely how these factors will play out until the reforms are introduced and the market has had a chance to react to them.

5. Tax implications

(a) IPT tax

There was a change in the standard rate of insurance premium tax (IPT) in the ***Autumn Budget Statement*** dated 23 November 2016. Chancellor Philip Hammond announced a 2.0% increase of IPT paid on premiums which are taxed at the standard rate, as of 1 June 2017 — which effectively increased the IPT rate from 10.0% to 12.0% (see, for further information, e.g.: ***Brokers – Important notice in BTE policies: Change to the rate of IPT***' (*ARAG News*, 8 May 2017)).

The Working Group's view was that there was no prospect of the IPT being removed (or even reduced) on BTE premiums by the Government in the foreseeable future.

(b) Tax deductibility

The Working Group considered whether there was merit in BTE premiums being made tax deductible for consumers, to enhance the attractiveness of this insurance. This possibility was flagged up by the Council of Her Majesty's Circuit Judges in the ***Jackson Final Report*** (ch 8, para 3.6), wherein it was noted that BTE insurance 'could readily be encouraged by making the premiums tax deductible'.

It was generally considered that tax deductibility was not a 'carrot' for individual taxpayers. For those who can afford the £25 premium, the consequences of tax deductibility were not likely to be considered attractive enough to make a difference; and for the lower socio-demographic part of the consumer market, any premium of £15–£25 was likely to be unaffordable, and tax deductibility would have no impact whatsoever.

I. FREEDOM OF CHOICE OF LAWYER

The freedom of choice by the BTE Insured of his own solicitor, to represent him in the grievance, is a controversial legal and practical point. The Working Group sought to explore some of the contentions surrounding this issue.

1. The relevant legislative provision

Regulation 6 of the ***Insurance Companies (Legal Expenses Insurance) Regulations 1990*** (SI 1159/1990) provides as follows:

Freedom to choose lawyer

6(1)	Where under a legal expenses insurance contract recourse is had to a lawyer (or other person having such qualifications as may be necessary) to defend, represent or serve the interests of the insured in any inquiry or proceedings, the insured shall be free to choose that lawyer (or other person).
(2)	The insured shall also be free to choose a lawyer (or other person having such qualifications as may be necessary) to serve his interests whenever a conflict of interests arises.
(3)	The above rights shall be expressly recognised in the policy.

Regulation 6 represents the transposition, into English law, of Article 4 of the ***European Council Directive 87/344 EEC***. That Directive made provision for the co-ordination of laws, regulations and administrative provisions relating to legal expenses insurance. It was superseded by the general Insurance Directive 2009/138/EC, Arts 198–205, which provided for legal expenses insurance in the same terms. It is unclear whether or how these provisions will be impacted by Brexit.

On the face of it, this provision appears to permit the BTE Insured to choose his own lawyer to represent him throughout his grievance. However, the key phrase of Reg 6(1) is 'any inquiry or proceedings'.

The view adopted by UK insurers is that an 'inquiry or proceedings' is triggered at the point that the claim is commenced, i.e., that the claim form is issued. Prior to that, the BTE Insured is not at liberty to choose his own lawyer. That includes any activities taken pursuant to the pre-action protocol procedure. Freedom of choice of solicitor is not required until a claim form is actually issued. This means that the BTE Insurer may appoint their own choice of panel solicitors (and the BTE Insured is precluded from choosing his own solicitor) right up to the stage that legal proceedings commence.

Hence, this interpretation means that the BTE Insured does not have the freedom that Reg 6 superficially suggests. By the time that the claim form is issued, a BTE panel solicitor has been representing the BTE Insured for probably quite some time, and a change to the BTE Insured's own solicitor, at that point, is a rare practice.

There have been various reservations about the prevailing interpretation of Reg 6. Canvassing the principal exponents of these views:

2. Reservations and concerns about the interpretation of Reg 6

(a) Judicial uneasiness

Some judges have noted the tension that arises from the insurance industry's interpretation of Regulation 6. This was particularly evident in ***Sarwar v Alam*** [2001] EWCA Civ 1401, [26], [38], [44]:

[26]	It appears that the Insurance Ombudsman has consistently interpreted regulation 6(1) as meaning that the obligation to permit the insured to select a lawyer of his choice is triggered at the time when efforts to settle a claim by negotiation have failed and legal proceedings have to be initiated. ...
[38]	... senior representatives of DAS had a meeting with the former insurance ombudsman, at which two principles emerged, which DAS has followed ever since. ... The second was that [Reg 6] required freedom of choice of lawyer at and from the time that proceedings are issued. It has been DAS's experience that very few complaints are made about freedom to choose a lawyer. Of those that are made, the great majority appear to DAS to have been generated by the solicitor who runs the risk of not being instructed.
[44]	During the course of the hearing, ... members of the court made critical observations from time to time about the size of some of the BTE insurers' panels, and the possible inappropriateness in these post-Woolf days of a BTE claimant being denied freedom of choice of solicitor ... at the time the procedures in a pre-action protocol come to be activated. We also saw correspondence (which DAS's representatives sought to explain away) that left us uneasy about the terms on which DAS is in practice willing to allow a claimant's solicitor of choice to act for their insured. We do not have to decide any of these matters on the present appeal, however.

Although this judgment was described, years later, as a 'warning shot delivered to legal expenses insurers' (per ***Brown-Quinn v Equity Syndicate Management Ltd*** [2012] EWCA Civ 1633, [33], the Insurance Ombudsman's interpretation has not been refuted, and continues to be the practice in BTE insurance.

In ***Brown-Quinn*** itself, the Court of Appeal determined that two clauses in the BTE insurance policy at issue in that case did not comply with Reg 6, and would have to be re-drafted:

[8]	The facts of this case have revealed that the insurers exhibit an insouciance to their obligations under the Directive and the Regulations which leaves one quite breathless. The Regulations (and the Directive) make it entirely clear that the insured's freedom to have the lawyer of his choice is to be expressly stated in the contract made with the insured. What the contracts in the present case provide in General Condition 2.3 is almost the opposite:	
		We may choose not to accept the choice of representative, but only in exceptional circumstances,
	which are left completely undefined.	
	To make matters worse, General Condition 5 provides that if the insured's appointed representative refuses to continue acting or is dismissed,	
		the cover we provide will end at once, unless we agree to appoint another appointed representative.
	This provision was highly relevant to the cases of Ms Brown-Quinn and Ms Baxter [the BTE Insureds] who wanted to continue to instruct the same person after that person had left the firm whom they originally instructed [to move to Webster Dixon]. That was an entirely reasonable wish on their part, and yet the insurers in pre-trial correspondence relied on this clause, in clear breach of the Regulations, to argue that they would not pay any of Webster Dixon's fees, thus denying the insureds the freedom of choice the existence of which they ought to have made clear in the contract.	
[33]	It is quite wrong that ... insurers should many years later be issuing policies which do not comply with the Regulations. General conditions 2.3 and 5 are in breach of the Regulations ... and must be either deleted or comprehensively re-drafted.	

Earlier, in ***Brown-Quinn v Equity Syndicate*** [2011] EWHC 2661 (Comm), Burton J noted (at [5]), that:

> BTE insurers traditionally, as did this Insurer, retain a panel of solicitors, with whom they have been able to negotiate reasonable, and no doubt discounted or reduced, fees for acting for their insured, in return for an expectation of receiving a quantity of such work, through clients being referred to them on a regular basis. I have not seen evidence of what these rates are, but I shall call them 'panel rates'.

In other words, BTE Insurers have their own fixed rates, because they purchased legal services in bulk — and, in practice, if non-panel firms wish to act for the BTE Insured, that firm must accept that payment of its fees will be at panel rates too.

Earlier, in his report, ***Review of Civil Litigation Costs: Final Report*** (Dec 2009), ch 8, [6.3], Sir Rupert Jackson had also expressed serious reservations about the current interpretation of Reg 6, which restricts choice of lawyer until a claim form is issued:

> In my view, those concerns [of the Law Society] would all, in substance, be met if Reg 6 were amended to provide that the insured's right to choose a lawyer arises when a letter of claim is sent on his or her behalf to the opposing party. [fn: Insurers may still use their own panel solicitors to investigate and assess the merits of claims. In practice, no doubt many insureds would be content to proceed thereafter using the same panel solicitors.]
>
> However, before any such amendment of Reg 6 is considered, the effect upon BTE insurance premiums must first be considered. BTE insurers maintain that the present panel arrangements are beneficial in keeping costs down. I do not make this issue the subject matter of a recommendation. However, I place on record my support for making an amendment to Reg 6, as suggested, if the impact of such an amendment on premiums turns out to be modest.

(b) The Council of Bars and Law Societies of Europe

The Council of Bars and Law Societies of Europe (CCBE) produced a paper in 2017, ***CCBE Position on Legal Expenses Insurance*** (draft on file, with no wider circulation of the entire paper permitted at this stage, but short excerpts are reproduced below with permission). The Council concluded, from a questionnaire sent to CCBE representatives across 25 jurisdictions, that BTE Insurers have very diverse practices on the question of freedom of choice of lawyer — with the principle of freedom of choice of lawyer most 'rigorously and strictly respected in five countries: Finland, Estonia, Iceland, Luxembourg and Sweden' (at p 1).

On the topic of freedom of choice, the CCBE expressed four viewpoints (at p 3):

> Free choice is a fundamental rule so protective of the interests of citizens that it cannot bear exceptions and cannot be waived by the insured.
>
> (a) Consequently, an insurance company cannot, even indirectly, attempt to infringe this principle or incite the insured not to avail themselves of it or to waive it by asserting any advantages, including financial advantages (such as excess or a reduced contribution).
>
> (b) This principle should apply as soon as a consultation occurs if the insured wishes it to be entrusted to a lawyer, and again in case of proceedings being launched. The insurance company cannot oppose the choice of its insured, who can change their options at any time.
>
> (c) Only as a service rendered to the insured, and on the absolute condition that they have expressly requested it in writing, the insurance company may suggest the name of at least two lawyers who are competent in the relevant area of law.
>
> (d) Agreements between law firms and legal expenses insurance companies are highly discouraged. In any case, such agreements shall have no direct or indirect impact on the above-mentioned principles and shall most notably not affect the free choice of the insured, or the freedom of determining the fees between the lawyer and the insured or the management or conduct of the case.

(c) The Law Society of England and Wales

The Law Society was represented on the Working Group, and drew several documents to the attention of the Working Group on this issue.

In its ***Access to Justice Review: Final Report*** (Nov 2010), the Law Society set out its concerns in the pre-Jackson era (at p 25):

> "At present legal expenses insurance (LEI) comes as a relatively cheap add-on to many household and motor policies. They can provide significant assistance to policy holders in a number of areas, but

we believe that there are substantial difficulties with them:

- They cover a relatively small number of cases and exclude many (e.g. family, crime, and most aspects of social welfare law) that are currently covered by legal aid;
- The limit of the expenses that can be incurred is usually £50,000 which is not adequate to cover complex cases;
- Many of those who rely on legal aid will not buy the cover either because they do not have household or motor insurance or because they cannot afford the additional cost;
- There is a serious lack of transparency about the way in which the policies are managed. First, through a misinterpretation of the relevant EU directive, insurers frequently refuse to allow claimants to use their choice of solicitor. …..."

The Law Society's concerns in the fourth bullet-point remain current to this day. During the course of the Working Group discussions, the Law Society's representatives reiterated the three points that the Society made during the course of the ***Jackson Cost Review***, *viz*:

i. the BTE Insured is not involved in setting the terms of the retainer between the BTE insurer and the panel solicitor, and hence, has less influence on the resolution of his grievance than does a client who does not have a BTE policy;

ii. BTE panel solicitors restrict the freedom of choice to the BTE Insured, and it is against the public interest — principally because the BTE Insured should feel confidence in his legal advisors, have an opportunity to directly assess their competence, and have the power to terminate that retainer if he is not satisfied with the representation;

iii. the Law Society's strongly-put position is that Reg 6 is being interpreted wrongly, and that either it must be re-interpreted by the insurance industry, or it must be legislatively redrafted, so that 'proceedings' include the pre-action protocol stage — so that, even during that earlier stage, prior to the issue of proceedings, the BTE Insured should have the freedom to choose his own solicitor. Otherwise, argues the Law Society, there is no meaningful freedom of choice at all.

The Law Society has also expressed concern about the hourly rates charged by panel law firms — what Burton J called 'panel rates' in the case of ***Brown-Quinn v Equity Syndicate*** [2011] EWHC 2661 (Comm), reproduced above. The Law Society was permitted to intervene in the appeal hearing of that case, by permission of Ward LJ granted on 15 June 2012. The Law Society's concerns in this case were directed

to the panel rates, rather than to the interpretation of Reg 6. However, of course, the two are inextricably linked. Two paragraphs of those submissions clearly make that point:

> 7. However, the attempted restriction of hourly rates by BTE insurers to those described by Burton J as "panel rates" raises very similar practical concerns. The BTE insurers frequently desire that any litigation is conducted by panel solicitors, at low panel rates. Those solicitors will frequently be in a part of the country remote from the claimant. Even if the BTE insurer can be persuaded to allow a solicitor to conduct the litigation, it will only do so on terms that provide for payment at panel rates. The result is that the terms on which the "freely" chosen solicitor is remunerated by the BTE insurer will not be appropriate to either the expertise of the solicitor or his or her geographical location. Frequently, as the facts of the instant appeals demonstrate, the disparity will be very marked. It is the compatibility of this effect with the Directive (and accordingly Regulation 6) that raises the legal issue; and these submissions now turn to that.

Referring to the case of the European Court of Justice in ***Stark v DAS Osterreichische Allgemeine Rechtsschutzversicherung AG***, the Law Society submitted that the ECJ was dealing with a scenario (in Austria) which was entirely different from that which applied in the UK, and that panel firm arrangements in the UK posed an unacceptable limitation on the freedom of choice of lawyer for the BTE Insured:

Note: The question of freedom of choice of lawyer under the European Council Directive 87/344/EEC and the general Insurance Directive 2009/138/EC was considered very recently by the European Free Trade Association (EFTA) Court in the case of *Nobile v DAS Rechtsschutz-Versicherungs AG* (Case E-21/16). The court found that Article 201(1)(a) of the general Insurance Directive (and the equivalent provision in its predecessor Directive) "precludes terms and conditions in a legal expenses insurance contract that release the

insurance company from its obligations under the contract if the insured person mandates an attorney to represent his interests, without the consent of the company, at a point in time when the insured person would be entitled to make a claim under the contract". This appears to be contrary to the current interpretation of Reg 6 outlined above."

15. Any limitation must not render freedom of choice meaningless – see paragraph 33. Freedom of choice would be meaningless if *"the restriction imposed on the payment of those costs were to render de facto impossible a reasonable choice of representative by the insured person."* This phrase must mean at least a choice made from a reasonable range of representatives. The vice of the system of panel rates is that it will render impossible the selection of an appropriately qualified specialist solicitor. There will not be a reasonable range of solicitors to choose from. The situation contemplated in England is completely different from the situation in *Stark*. In the latter, the working assumption is that there would be a pool of appropriately qualified lawyers with chambers at the local court. There is no suggestion that the BTE insurer in *Stark* was seeking to apply a discounted rate negotiated with a panel, and based on assumptions about the level of fee earner who will in practice do the work. In contrast, that discounted rate lies at the heart of the Society's concerns. The Society supports the submissions of the Claimants in paragraphs 39 to 42 of their skeleton.

(d) Non-panel law firms

Some law firms who are not BTE panel solicitors suggest, on their websites, what arguments a BTE Insured

may put forward to seek to have their own solicitor appointed, before the commencement of legal proceedings. Truth Legal solicitors explain this as follows (***'Legal Expenses Insurance Explained'***):

> If you are adamant that you want a particular firm of solicitors – such as Truth Legal – to represent you from the beginning of your case, then you should make these arguments in writing to the case handler at the insurer. Your arguments might include, for example, that your preferred solicitors:
>
> 1. Have been instructed by you before proceedings and therefore fully understand the issues.
> 2. Are nearer to you and it is important that you meet your solicitor in person.
> 3. Have a particular expertise in the area of law which you need.
> 4. Are already representing other clients who have similar claims to you.
> 5. Have been acting for you on a related matter and therefore have special knowledge of your case.
> 6. Can communicate with you better than a panel firm of solicitors due a language requirement.
> 7. You are likely to get a more experienced solicitor in your preferred firm than in the panel firm.

However, the Financial Ombudsman Service — which supports the prevailing interpretation of Regulation 6 — notes, on its website (reproduced below) that such arguments are **not** necessarily going to give rise to a successful complaint if the BTE Insured cannot use a solicitor of his own choice.

3. The BTE insurers' view

The prevailing interpretation of Reg 6 draws strong support from BTE Insurers. The comments by one of the Working Group members, Lesley Attu, writing previously on this point, illustrate:

‘***Putting the record straight on Legal Expenses Insurance***’ (*ARAG News*, 14 May 2015):
‘All legal expenses insurers throughout Europe comply with legislation which allows a claimant to choose their own solicitor when proceedings need to be issued. The law may not work well for non- panel law firms, however it gives rights to both policyholders and insurers and protects policyholders from the effect of significantly higher premiums that would be needed to insure the risk were non-panel firms able to insist on charging insurers exorbitant levels of fees.LEI panel solicitors are selected for their expertise in matters covered by policies and their service levels are monitored and audited. The Financial Ombudsman Service (FOS) and courts acknowledge that individuals who appoint a panel solicitor firm do not suffer detriment and there is no empirical evidence to support the allegation that panel-solicitor cases result in poorer-than-average outcomes.’

In relation to the above quote, however, the Law Society noted that the *Brown-Quinn* case, referenced above, demonstrates that insurers do not always ensure the insured’s right to choose their own solicitor when proceedings are issued. The Law Society also disputed the implication that non-panel firms will necessarily charge "exorbitant" levels of fees; in many cases they are just ordinary commercial rates for the work involved.

4. What BTE policies provide

Amongst the BTE insurance policies reviewed for this report, there seemed to be quite a variance as to how BTE Insurers spelt out the freedom of choice of lawyer for the BTE Insured. Two examples will illustrate. The ***HSBC Home Insurance Policy*** states (at p 27) that:

- As soon as **you** become aware of a situation that may lead to a claim **you** should call **us**.
- If **your** claim is accepted **we** will provide **you** with a **lawyer** who specialises in the law relating to **your** claim. **You** do not have to find **your** own **lawyer**.

— followed later in the policy by this more explicit statement of the Reg 6 ramifications (at p 33):

a. Freedom to choose **your lawyer**

(i) If court proceedings are issued, there is a conflict of interest or if **we** consider the claim to be complex and requiring a specialist lawyer, **you** are free to choose **your** own **lawyer** by sending **us** their name and address.

(ii) **We** will appoint that **lawyer** subject to their acceptance of **our** standard terms of appointment which are available on request.

(iii) Subject to the terms and conditions of this policy **we** will pay their **costs and expenses** up to the maximum shown on **your schedule**.

By comparison, the ***Cornish Home Insurance Policy*** sets out the position in these terms (at p 41):

2. Freedom to choose an appointed advisor

(a) In certain circumstances as set out in 2(b) below **you** may choose an **appointed advisor**. In all other cases no such right exists and **we** shall choose the **appointed advisor**.

(b) **You** may choose an **appointed advisor** if

(i) **we** agree to start proceedings or proceedings are issued against **you** or

(ii) there is a conflict of interest

except where **your** claim is to be dealt with by the **small claims court** where **we** shall choose the **appointed advisor**.

(c) Where **you** wish to exercise **your** right to choose you must write to **us** with **your** preferred representative's contact details. Where **you** choose to use **your** preferred representative the **insurer** will not pay more than **we** agree to pay a solicitor from **our** panel. (**Our** panel solicitor firms are chosen with care and **we** agree special terms with them which may be less than the rates available from other firms.)

(d) If **you** dismiss the **appointed advisor** without good reason or withdraw from the claim without **our** written agreement unless or if the **appointed advisor** refuses with good reason to continue acting for **you** cover will end immediately.

(e) In respect of a claim under What is covered 1. Employment 2. Contract 4. Personal injury or 5. Clinical negligence **you** must enter into a **conditional fee agreement** or the **appointed advisor** must enter into a **collective conditional fee agreement** where legally permitted.

5. The Financial Ombudsman's view

The FOS has a section which is devoted to complaints involving BTE insurance. The site (available at: http://www.financial-ombudsman.org.uk/publications/technical_notes/legal-expenses.html) outlines a number of concerns that arise in the marketplace about this form of insurance, and which are commonly drawn to the FOS's attention. On the question of freedom of choice of lawyer, the FOS states:

FOS, ***Online Technical Resource***:

Once proceedings start (when the legal "claim form" is issued) - or if there is a conflict of interest - the law (regulation 6 of the Insurance Companies (Legal Expenses Insurance) Regulations 1990 [SI 1159]) allows policyholders to choose their own solicitors. These regulations are wide enough to include legal proceedings pursued and defended in tribunals - for example, employment tribunals - as well as proceedings in courts.

Insurers usually have panel solicitors whom they regularly instruct. We sometimes see disputes where a policyholder wants to appoint their own solicitor from the start (or have already instructed their own solicitor prior to making the claim). Insurers sometimes have no objection to using a policyholder's own solicitor. But for legitimate commercial and quality-control reasons, insurers often prefer to use their solicitors from their own panel.

We look at each case on its own individual merits. However, we are likely to decide that the policyholder should be able to appoint their own solicitors from the start only in exceptional circumstances.

Whether we decide the individual circumstances are exceptional is a question of fact and degree in each particular case. We have published some case studies in ombudsman news (issue 26 - March 2003) showing our approach in this area. In the cases we see, the terms of a legal expenses policy do not generally guarantee any particular firm of solicitors, any specific location or any minimum size of firm. All they promise is a panel firm of solicitors prior to legal proceedings being issued. After legal proceedings have been issued - and to comply with statutory regulations - the policyholder can choose their own solicitor.

With modern communications, the location of a panel solicitor should not affect the way the case is actually handled. If a face-to-face meeting is required, lawyers can travel to meet the clients (or vice versa depending on individual preferences).
...
We have seen cases where policyholders claim that they have a right to choose their own solicitors before proceedings - because the regulations allow freedom of choice where there is a conflict of interest. Policyholders sometimes claim that their disagreement with the appointed solicitor's legal advice is a conflict of interest.

We do not view these kinds of disputes as conflicts of interest. A conflict of interest arises only if the solicitor would be in breach of their code of conduct, or would be "professionally embarrassed" if they continued to act - for example, if the solicitor: (1) previously acted for the policyholder's opponent; (2) knew the policyholder personally; was privy to confidential information about the opponent; or (3) made a damaging mistake that would constitute professional negligence, such as inadvertently disclosing privileged material or missing a procedural deadline.

Hence, the basis for complaining that the BTE Insured did not enjoy a freedom of choice of lawyer is fairly restricted, according to this note.

6. The quality of BTE panel solicitors

(a) The arguments against panel law firms

The Working Group took note of the several criticisms which were made of panel solicitor representation in the Jackson Costs Review reports (ch 13, para 2.1 of the ***Preliminary Report***, and ch 8, para 6.2 of the ***Final Report***), and by the Law Society in its contributions to the Working Group discussions. These included the following:

i. the BTE Insured is often located geographically remote from the panel solicitor, with little-to-no communication between them;

ii. the BTE Insured has no practical say about the terms of that representation;

iii. funding may be denied to a BTE Insured unless they agree to instruct a panel solicitor for the duration of their claim at the outset;

iv. concerns that the system can lead to a denial of justice to BTE Insureds who lose, under-settle, or do not pursue meritorious cases, as a result of the nature of the representation provided (a view expressed by the Association of District Judges to the Law Society, cited in the ***Jackson Final Report***, above);

v. the BTE Insured may have a longstanding pre-existing professional association with a non-panel solicitor, which he is unable to pursue under the new grievance in light of the Financial Ombudsman Service's interpretation of Reg 6;

vi. the public's confidence in the integrity of the legal system requires that the BTE Insured has confidence that his solicitor is acting for his benefit, and not for the benefit of the BTE Insurer for whom the firm is a panellist;

vii. the panel solicitor who acts for the BTE Insured at the outset of the grievance should be required to instruct the BTE Insured that it is not necessary to retain that panel solicitor, once the claim form is filed;

viii. in reality, the Law Society representatives on the Working Group noted that, whilst some BTE Insureds do change representation from a panel solicitor to their own non-panel solicitor once the claim form is issued, very few BTE Insureds actually 'jump ship' to a new solicitor in practice, emphasising the effect of Reg 6, which is to restrict the choice of solicitor;

ix. if the BTE Insured did choose his own solicitor (a non-panel firm) once the claim form was issued, then the terms upon which that BTE Insured's own solicitor could do the legal work on behalf of the BTE Insured could be restricted, or tightly controlled. By corollary, the BTE Insurer may have more stringent reporting requirements for a non-panel law firm, which can make it more expensive for the BTE Insurer — that expense being passed on the form of higher premiums.

(b) The arguments in favour of panel law firms

However, some members of the Working Group refuted these contentions, and disagreed with the sentiments expressed above. These points of refutation consisted of the following:

i. the professional duty of a BTE panel solicitor is to the client, the BTE Insured — and not to the BTE Insurer — as required under the ***Solicitors' Code of Conduct***;

ii. following the issue of the claim form, the BTE Insured has freedom of choice of his own solicitor. At that stage, the rates of complaints by BTE Insureds against their legal representative are higher for non-panel solicitors than for panel solicitors. According to figures provided for the ARAG Insurance Group, the following table contains data on complaints — comparing customer dissatisfaction levels between panel and non- panel cases. Dissatisfaction levels were higher where non-panel firms were instructed, despite the fact that these firms had been chosen by the BTE Insured:

DATA ON COMPLAINTS: Panel versus non-panel firms					
Complaints frequency		2014	2015	2016	2014–16
Commercial	Non-panel	0.4%	0.6%	3.3%	1.6%
	Panel	0.0%	0.0%	0.0%	0.0%
Family	Non-panel	1.6%	1.2%	3.0%	2.0%
	Panel	0.0%	0.0%	1.2%	0.2%

iii. BTE panel solicitors are monitored closely and continuously throughout the proceedings, by a number of entities:

A. The Solicitors' Regulation Authority;

B. The BTE insurer who has approved of the panel solicitor; and

C. Peer reviews of the panel solicitor by auditors (whether internal or external),

reviewing data such as: how the BTE Insured's correspondence was responded to; how long the panel solicitor took to return the call of the BTE Insured; and the terms and quantum of settlements reached. The monitoring of BTE panel solicitors takes the form of capability studies, performance charts, and team overviews. Both insurers and solicitors operate in a highly-regulated market these days;

iv. the predominant market in which BTE insurance operated, at the time of the Jackson Costs Review (2009) was motor vehicle claims, where the concerns expressed in that Review may have manifested. However, the BTE market has significantly matured since then, to incorporate the household and commercial markets. As a result, the extent of ongoing monitoring and oversight of panel firms has substantially increased. Those who tender for BTE panel solicitor work have to detail the type and extent of monitoring which will be undertaken within, and outside of, the firm. This oversight has been driven, in part, by the Financial Conduct Authority's role as insurance regulator;

v. where a BTE Insured's claim is adjudged by the BTE Insurer and/or the panel solicitor to have doubtful prospects of success (< 50%), it is compulsory that a counsel's opinion should be obtained

by the BTE Insurer for another opinion. The BTE Insured can also obtain his own counsel's opinion on the merits, if the BTE Insurer and/or panel solicitor and/or counsel has indicated that it does not consider the claim to have sufficient merits. If the counsel opinions obtained by the BTE Insured and the BTE Insurer differ, then a third counsel's opinion must be obtained. This provided a considerable level of protection for the BTE Insured. It also removes the degree of control that the BTE panel solicitor can feasibly exercise over the progress of the proceedings.

J. MISCELLANEOUS MATTERS

1. Alternative business structures

The Working Group took note of the fact that some BTE Insurers now have their own law firms, under Alternative Business Structures (ABS) set-ups. For example:

- Abbey Protection Group Ltd has acquired LHS Solicitors. That firm of solicitors handles the FSB's Legal Advice Helpline, together with the BTE claims made by members under the ***FSB's Legal Protection Scheme***.

- DAS has acquired its own law firm, DAS Law. It recently published a research report: ***DAS Market Barometer: SME*** (May 2017), in which it notes (at p 3):

DAS pioneered the introduction of legal expenses insurance (LEI) in 1975, protecting individuals and businesses against the unforeseen costs involved in a legal dispute. It has grown to become the market leader and today has over 9 million policyholders.

DAS is part of the ERGO Group, one of Europe's largest insurance groups. The majority shareholder in ERGO is Munich Re, the world's largest reinsurer.

In 2013, DAS acquired its own law firm, DAS Law. DAS leverages the law firm's expertise to provide its customers with access to justice, from legal advice to representation with a legal issue.

Some members of the Working Group expressed concerns about the theoretical possibility (rather than, perhaps, the likelihood) of some claims being under-settled or of other conflicts arising, where these ABS structures are used. The Law Society supports the establishment of ABSs — but not if they give rise to actual or potential conflicts of interest.

On the other hand, these ABSs are authorised and regulated by the Solicitors' Regulation Authority; must fulfill the ongoing licensing requirements of the SRA; and are typically subject to peer/audit review by virtue of the overarching requirements applied to the BTE insurer itself by virtue of the FCA. Some Working Group members also noted that, by dealing with BTE insurance products 'in-house', costs can be contained.

This development in the BTE landscape marks a further evolution in the provision of legal services.

2. Dual insurance cover

Dual BTE insurance cover can occur in one of two ways.

(a) Multiple BTE policies

Given the ready availability of BTE insurance under motor vehicle, contents, or travel insurance, it is common for UK householders to have BTE cover under more than one BTE policy.

Whilst dual claims against different BTE Insurers do not happen that frequently, according to insurance representatives on the Working Group, it is certainly possible for the BTE Insured to aggregate the limits of indemnity which he holds under various BTE policies. In the event of such dual insurance claims, it is usual for one of the BTE Insurers to 'take the lead'.

Some BTE policies provide explicitly for this scenario. For example, the ***Amtrust Motor Legal Protection Policy*** provides, at cl 6:

> **6. Dual insurance**
>
> 6.1 If **You** have another policy of legal expenses insurance that provides cover for **Your Claim** and **Litigation**, **We** will only cover **Our** proportionate share of the **Claim** and **Litigation** assuming that the other policy of legal expenses insurance had paid out in full.

Where such dual insurance applies — and it does happen in practice — then the relevant insurers will typically resolve the division of liability among them, by virtue of the protocols that apply in the industry. As each has received a premium from the Insured, it is necessary that each assume some acceptance of liability, where liability is proven or conceded. As far as the Working Group is aware, there is no legislative requirement that the insurers liaise with each other, where dual insurance applies. However, in practice, fractional contributions to the Insured's damage typically occur, where a successful claim is made on various policies held by the Insured.

(b) Different types of insurance

In some cases, the BTE Insured may also have cover for the relevant dispute, not only under his BTE insurance policy, but under a professional indemnity insurance policy, and/or under a public liability insurance policy.

However, the Working Group noted that, in some circumstances, the BTE Insured may be able to cover more under the BTE Insurance policy than under a public liability insurance policy. Take the example of a defective product, which explodes in the face of the BTE Insured:

- the public liability insurance policy will typically cover loss or damage caused by the defective product; however, it won't cover the costs of replacing or repairing the defective product itself;
- however, the BTE insurance policy may cover proceedings for the costs of replacing or repairing the defective product itself;
- in this scenario, the public liability insurer and the BTE Insurer will be liable for differing aspects of the BTE Insured's claim.

3. Making a complaint about BTE insurance

All the BTE policies which the Working Group examined for the purposes of this project stated, with varying degrees of clarity, what avenues of complaint were available to the BTE Insured.

Where the BTE Insured has a complaint about how his claim has been handled, the BTE policies generally set out the two-step process that applies: first, an internal complaints procedure, and failing resolution via that avenue, a complaint to the Financial Ombudsman Service. However, some BTE policies articulate a middle-ground — a complaint to the insurer underwriter itself. The ***Family Prosecution Defence Policy*** is illustrative of this three-step process:

How we handle complaints

Step 1

ARAG is committed to providing a first class service at all times. However, if a complaint arises, this should be addressed to our Customer Relations Department who will arrange to have it reviewed at the appropriate level. We can be reached in the following ways:

0117 917 1561 (hours of operation are 9am-5pm, Mondays to Fridays excluding bank holidays. For our mutual protection and training purposes, calls may be recorded).

customerrelations@arag.co.uk

ARAG plc, 9 Whiteladies Road, Clifton, Bristol, BS8 1NN.

Step 2

Should you remain dissatisfied you may be entitled to pursue your complaint further with Lloyd's. They can be reached in the following ways:

0207 327 5693, Fax: 0207 327 5225

complaints@lloyds.com

Lloyd's, One Lime Street, London EC3M 7HA.

Step 3

If Lloyd's is not able to resolve the complaint to your satisfaction then you may refer it to the Financial Ombudsman Service (FOS) provided that it falls within their jurisdiction. They can be contacted at:

0800 0234 567 or 0300 123 9123

complaint.info@financial-ombudsman.org.uk

Financial Ombudsman Service, Exchange Tower, London, E14 9SR.

The FOS is an independent service in the UK for settling disputes between consumers and businesses providing financial services. You can find more information on the Financial Ombudsman Service at www.financial-ombudsman.org.uk

he FOS's decision is binding upon the insurer, but you are free to reject it without affecting your legal rights.

The FOS website clarifies that a number of matters will **not** justify the FOS's intervention. However, where a complaint is upheld, then the FOS has the power to, inter alia, make awards in favour of the BTE Insured for distress or inconvenience:

FOS, ***Online Technical Resource***:

Maladministration:

Consumers sometimes complain to us about maladministration and delays by their insurer and/or its solicitors - in relation to legal expenses insurance. When we decide these cases, we take account of the fact that legal action can be a lengthy, complex process - and that the parties are restricted, to a large extent, by the timetables dictated by the courts.

We do not usually hold insurers responsible for the way their panel solicitors carry out litigation on a day-to-day basis. And if the policyholder has instructed their own solicitor, the insurer will have no responsibility - unless it has actively tried to influence or control the course of proceedings.

If consumers are unhappy with the quality of the legal services provided, they may be able to take their complaint to the Legal Ombudsman. The Legal Ombudsman is a completely separate organisation from the Financial Ombudsman Service, with its own rules and procedures. It covers England and Wales - and there are equivalent bodies in other UK jurisdictions.

However, if a solicitor is responsible for gross maladministration in relation to a claim - and the insurer was aware of this but failed to intervene - we may consider telling the insurer to compensate the policyholder for distress and inconvenience. If the legal action is still running, we may consider asking the insurer to appoint alternative solicitors - although this could cause further delay.

If we decide that an insurer has handled a claim poorly, we may tell them to compensate the policyholder for any financial loss, distress and inconvenience or for damage that was caused by the poor handling.

4. Conflicts of interest on the part of BTE Insurers

The scenario may arise under for a BTE Insurer, for a solicitor under a CFA or a damages-based agreement, for an ATE insurer, or for a third party funder — there comes a point where that party may wish for the case to settle (a bird in the hand being more assured than the bird in the bush), whereas the insured or client would prefer to press ahead. This potential conflict of interest is by no means limited to BTE insurance.

BTE policies typically require that the BTE Insured cannot settle the claim without the BTE Insurer's consent; and if there is a conflict between the BTE Insurer and BTE Insured about whether or not the action should settle, then BTE policies typically provide the BTE Insured to obtain a third lawyer's opinion. That provides a further level of protection for the BTE Insured, in precluding the BTE Insurer's ability to control the conduct of the claim and outcome of the litigation to the detriment of the BTE Insured.

The ***HSBC Home Insurance Policy*** provides a good example:

3. What can I do if I do not agree with the lawyer's opinion?

We have confidence in the opinion of **our** appointed **lawyer** and rely on this when deciding if **we** should continue to pay the **costs and expenses** towards **your** claim.

If **you** do not agree with **our lawyer's** opinion and **you** find a different **lawyer**, at **your** own cost, or **you** already have a **lawyer** who supports **your** view, then **we** will be happy to offer a review of the case. The opinion of **your** chosen **lawyer** must be based on the same information regarding the claim that **you** provided to **us**.

28

The **lawyer** conducting the review will be chosen jointly by **you** and **us**. If **we** cannot agree on who this **lawyer** should be then **we** will ask a relevant law society to appoint one. The reviewing **lawyer** will assess the case and **we** will abide by their decision. **We** will pay for the cost of this review and should they decide in **your** favour **we** will also pay any cost that **you** incurred for **your** chosen **lawyer's** second opinion.

This review and any resulting decision will not affect **your** rights to make a complaint as detailed in the complaints procedure section.

The BTE Insured may also have recourse to the Financial Ombudsman Service (FOS), if the degree of control which the BTE Insurer exercises over the claim is considered to have been inappropriate and/or adverse to the interests of the BTE Insured.

Potential conflicts of interest may also arise where the same BTE Insurer is funding both the defendant's legal costs, and the claimant's legal costs (as discussed in Chapter H). The Working Group reiterates that, in such cases, various partition exercises must be imposed, *viz*: different physical locations; different handlers; Chinese walls; protection of emails, and the use of different email servers; and password-protected computer desktops.

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