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Reuben A. Hasson
Osgoode Hall Law School of York University

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THE CARRUTHERS REPORT —
A CRITICAL EVALUATION

Reuben A. Hasson*

If the quality of a report determined whether it deserved critical attention the Carruthers Report\(^1\) would assuredly not be commented on. However, since the Report considered a crucially important area of public policy, \textit{i.e.}, the regulation of the insurance industry,\(^2\) it is very important that its proposals should be examined, particularly since the proposals made might serve as the basis for future legislative action. It is my contention that the Report’s recommendations are very seriously flawed and that a fresh beginning needs to be made. I will discuss the Report under four headings:

1. Revision of the Insurance Act;
2. The Regulation of Intermediaries;
3. Price Disclosure in Insurance; and
4. The Use of Arbitration to Solve Insurance Disputes.

Before dealing in detail with each of these headings, it is necessary to point out that the Report is woefully short on scholarship. The author states that he has examined \textit{inter alia}, legislation in the United States, United Kingdom, Australia, West Germany and France, but there is not a single reference to the laws of these (or any other) countries in the body of the Report. There are passing references to two books\(^3\) and there is no mention of the outstanding contributions made

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* Professor, Osgoode Hall Law School, York University.


2 Premium income for the insurance industry in Ontario was in excess of two billion dollars in 1972; see Report, vol. 3, at p. 18.

by such scholars as Professors Belth, Kimball, Dennenberg. There is no reference to even helpful popular books, such as J. J. Brown’s Life Insurance — Benefit or Fraud? and Ellen Roseman’s chapter, “Life Insurance: Tyranny of the Experts”, in her book Consumer Beware! — A Guidebook to Consumer Rights and Remedies in Canada.

1. Revision of the Insurance Act

The author states that it is not his intention to deal with (a) problems of automobile insurance since a revision of this part of the Act is already under consideration by the department, and (b) sections which are “‘complex’”. The former limitation is understandable but the rationale for the latter one is impossible to fathom. At the least, areas of complexity should have been identified and possible directions of reform should have been indicated. I shall be selective in my comments on this part of the Report’s recommendations, in order to keep this comment within a manageable length.

The author points out that s. 87 of the Insurance Act (R.S.O. 1970, c. 224) provides that anyone may place insurance with an unlicensed fire insurer and he wonders why there is a special section dealing with unlicensed fire insurers. Attention should also be drawn to s. 349 which provides that an agent or broker is personally liable to the insured, if either places insurance with an unlicensed insurer. These two sections, read together, suggest that an unlicensed insurer (other than a fire insurer) might be able to resist a claim on the ground that it was unlicensed. That this is not a fanciful fear is shown by the horrific decision of the British Columbia Court of Appeal in Ames v. Investo-Plan Ltd. Clearly, what is needed is an express section providing that an

4 In addition to numerous articles, special mention should be made of Professor Belth’s Life Insurance: A Consumers’ Handbook (Bloomington, Indiana, Univ. Press, 1973).
7 (Toronto, Longmans Canada Ltd., 1972).
9 “There are other sections in the Act not considered here because of their complexity”. See Report, vol. 2, p. 2.
unlicensed insurer is liable to the insured on the same footing as a licensed insurer.

This difference between fire insurance and other kinds of insurance recurs several times in the Insurance Act but the Report offers no comment on these anomalous distinctions. To mention three examples, consider first, s. 125(b) of the Insurance Act which provides that an "exclusion, stipulation, condition or warranty is not binding upon the insured, if it is held to be unjust or unreasonable by the court before which a question relating thereto is tried". In no other field of insurance can the courts exercise a similar power. This leads to some surprising results. Thus, for example, a clause in an insurance policy which provided that the insurer was not to be liable if premises were "unoccupied for more than 96 hours" would be struck down as being unreasonable if the insured claimed in respect of a fire loss but the insured would get no relief if the loss occurred through theft, storm damage, etc. It is difficult to see any rationality in this distinction.

Second, before a fire insurer can avoid a policy for non-disclosure, it must prove that the insured was guilty of fraud and "fraud" in this context, has been interpreted strictly. The effect of requiring fraud has been, for practical purposes, to remove the duty of disclosure from the realm of fire insurance. In other fields of insurance, for example, life, automobile, and accident and sickness insurance, the insurer does not have to show that the insured acted fraudulently. Again, it...
seems to be impossible to provide a satisfactory rationale for treating the cases differently.\(^\text{18}\)

Third, the law relating to subrogation is different in fire (and automobile\(^\text{19}\)) insurance from subrogation as it is applied in other branches of insurance. Under the ordinary law of insurance, if an insured is under-insured and suffers a loss, he (the insured) will be able to maintain an action against the tortfeasor and the insured is entitled to be fully indemnified before handing over any excess amount recovered to the insurer.\(^\text{20}\) In the event of a loss being sustained by fire, however, s. 126(2) provides that in a case of under-insurance the insurer has carriage of the subrogation action and "where the net amount recovered, after deducting the costs of recovery, is not sufficient to provide a complete indemnity for the loss or damage suffered, that amount shall be divided between the insurer and the insured in the proportions in which the loss or damage has been borne by them respectively."\(^\text{21}\) It would be intriguing to know why fire insurance is treated differently from other kinds of insurance. The Report does not seem to have noticed such anomalies, although one of its stated aims was to remove anomalies.

The Report then deals with s. 98(5) of the Insurance Act which provides that an insurer may not avoid a policy unless there has been a material misrepresentation of fact in the application for insurance. The Report poses the question why by s. 98(6) this section is deemed to be inapplicable to contracts of automobile insurance and concludes by stating that the question of materiality is dealt with in the part of the Act dealing with automobile insurance.\(^\text{22}\) Unfortunately, this is incorrect. Section 204 of the Act — the section dealing with automobile insurance — does not contain any mention of materiality and the Ontario Court of Appeal has held that an insurer may avoid an automobile pol-

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\(^\text{18}\) The fact that there is a broad duty of disclosure in insurance law generally and a very narrow one in fire insurance does not mean that the fire insurance rule is wrong. I have argued, elsewhere, that the duty of disclosure in the general law of insurance is too broad and should be restricted; see R. A. Hasson, "The Doctrine of Uberrima Fides in Insurance Law — A Critical Evaluation", 32 Mod.L.R. 615 (1969).

\(^\text{19}\) R.S.O. 1970, c. 224, s. 240.

\(^\text{20}\) This proposition has recently been restated by the Supreme Court of Canada in Ledingham v. Ontario Hospital Services Commission, [1975] 1 S.C.R. 332, 2 N.R. 32, 46 D.L.R. (3d) 699.

\(^\text{21}\) Compare this with the common law rule as stated in Globe & Rutgers Fire Ins. Co. v. True-dell, [1927] 2 D.L.R. 659, 60 O.L.R. 227 (App. Div.).

The Report then expresses unhappiness with the wording of s. 106 of the Act which provides that where an accident victim has failed to recover against an insured, the accident victim may bring an action against the insurer but he (the accident victim) is "subject to the same equities as the insurer would have if the judgment had been satisfied." The word that causes Mr. Carruthers difficulty is "equities" about which the author says "I am not sure that it has any meaning in law". But, despite this statement, the author is able to work out that "What really is intended by the use of the word 'equities' is to put the judgment creditor in the same position as the insured, no higher or no lower, in dealing with the insurer in a claim under its policy". Perhaps "defences" would be a better term than "equities" but all of the above misses the real point and difficulty with the section. In an automobile liability policy, an insurer cannot set up as a defence against the judgment creditor: — "any act or default of the insured before or after that event in contravention of this Part or of the terms of the contract". It is extremely difficult to see why an insurer can raise defences, such as, for example, misrepresentation and non-disclosure to defeat an accident victim's rights in the case of an ordinary liability policy, when it is expressly forbidden to do so in the case of automobile insurance policies.

The Report also expresses its dissatisfaction with s. 114 of the Insurance Act which provides that "Any licensed insurer that discriminates unfairly between risks in Ontario because of the race or religion of the insured is guilty of an offence." The Report states "I do not know how anyone can discriminate unfairly. So to provide, suggests that one can discriminate fairly in matters of race or religion". This matter requires fuller discussion. There is a prima facie case for making Blacks and Indians pay more for life insurance if the life expectancy of these groups is lower than that of the general population but the problem with such a classification is that it is too crude. The matter has been put very well by Professor Kimball:

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24 Although this rule is stated in a statutory provision, it is essentially a restatement of the common law rule.
26 Ibid.
27 See s. 225(4)(b).
Negroes have often, for example, been "rated up" in life insurance, based on the undeniable fact that mortality experience for all Negroes is less favorable than experience for all whites. It requires little sophistication to appreciate the danger in using these categories . . . . While reliance on the race classification will protect the company, the classification is too crude, for it sweeps within the disfavored class many who should receive more favorable treatment. A desire to eliminate this particular inequity as in conflict with fundamental moral notions about equal treatment of races has led to statutes forbidding the use of race as a classification.  

It is necessary not only to penalize a company which uses a racial classification to increase an insured's rates but it is also essential to give the court power to rewrite the contract for the future and to order the repayment of extra premiums which have been paid by the insured.

The Report also has great difficulty with the interpretation of s. 118 which defines what losses are to be regarded as having been caused by "fire". The section states what losses are not to be treated as fire losses. Thus, if goods are damaged as a result of "their undergoing any process involving the application of heat",  that is not a loss caused by fire. However, the section provides that an insurer can agree to give "extended insurance".  The Report states that it does not know what "extended insurance" means.  All that is meant, surely, is that an insurer can cover a loss falling outside the definition of "fire" under s. 118(1). The Report would have been on stronger ground if it had recommended the abolition of the distinction between "friendly" and "hostile" fires—a distinction that does not exist in the Act but which is one that has been constructed by the courts.  Again, it should be made clear that damage caused by smoke following a fire is covered by the definition of "fire".

The Report also misunderstands the function of s. 154(1) of the Act

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30 S. 118(1)(a)(i).
31 S. 118(4).
32 See Report, vol. 2, p. 31 ("As it [the section] now stands, I do not know what it means").
34 Since "friendly" fires are not within the definition of "fire", it would seem to follow that smoke damage resulting from a "friendly" fire would not be covered.
which provides that a life insurance policy does not take effect unless the policy is delivered to the insured and payment of the first premium is made to the insurer. In addition, the insured must show that no change has taken place in his insurability between the time the application was completed and the time the policy was delivered. These cumulative requirements are very formidable and the opening words of s. 154 provides that: — "Subject to any provision to the contrary in the application or the policy, a contract does not take effect . . . ."

These words allow for insurance cover to be pre-dated so that the insured does not have to comply with the three conditions stated above. Incredibly, the Report recommends that these words should be removed from the section. If the Report had recommended that these words be redrafted so as to allow only for pre-dating of the policy, there would be some merit in the proposal but the proposed change, as it stands, is nothing short of absurd. It is suggested that the requirement that the insured prove his continued insurability between the time of application and the time the policy is delivered is an unreasonable one and should be removed. It is unreasonable enough that the insured should be held to have warranted he was in good health at the time of the application whether or not he knew (or had reason) to know that that was not the case. To require the insured to warrant his good health for a further unlimited period of time seems unconscionable.\(^\text{35}\)

The Report suggests, in dealing with insurance agents, that although an agent has to be a "suitable" person under s. 342 of the Act, there are no guidelines for determining whether an applicant is a "suitable" person. This is incorrect. Regulation 539 sets out in the greatest detail factors to be taken into account in determining whether an applicant should be given an agent's licence.\(^\text{36}\) What is remarkable is that the licensing requirements for brokers (and adjusters) seem to be far more lax than they are for agents. Thus, an agent must pass "a qualification examination as set by the Superintendent" \(^\text{37}\) and he must not be in a position where he can "offer inducement or use coercion or undue influence in order to control, direct or secure insurance business".\(^\text{38}\)

\(^{35}\) The problem may be a particularly difficult one since Canadian courts have not imposed an obligation on insurers to process applications for life insurance promptly. The vast majority of American jurisdictions recognize the existence of such a duty; see e.g., \textit{Duffy v. Bankers' Life Ass'n of Des Moines}, 160 Iowa 19, 139 N.W. 1087 (1913) (recognizing the existence of a duty in tort) and \textit{American Life Ins. Co. of Alabama v. Hutcheson}, 109 F.2d 424 (6th Cir. 1940) recognizing a right to recover on the basis of acceptance by silence).

\(^{36}\) Regulation 539 as amended by O. Reg. 281/71.

\(^{37}\) See s. 4(1)(d) of Reg. 539.

\(^{38}\) See s. 4(2) of Reg. 539.
Further, a prospective agent must show that he has had a satisfactory business and employment record. By way of contrast, all that the broker need do to obtain a licence is to state his occupation for the preceding five years and “furnish a statement as to his trustworthiness and competency signed by at least three reputable persons resident in Ontario.” It is impossible to understand why the qualifications required of a broker should be lower than those required of agents. What is even more ludicrous is that these minimal regulatory requirements can be avoided by someone who describes himself as a “consultant”. A consultant does not have to pass any examinations or obtain the signatures of “three reputable persons in Ontario” or meet any other requirement. This is because a consultant does not solicit or negotiate contracts of insurance; he merely “advises” clients as to their insurance needs and an insurance adviser does not have to obtain a licence of any kind. The Carruthers Report was of the opinion that: “Insurance consulting is a legitimate and necessary service providing there is the requisite independence”. Independence from an insurance company is to be shown by the fact that “the consultant [is to] be paid only by the client”. It is suggested that this kind of independence is not enough. Since the line between “advising” on insurance matters on the one hand and “soliciting and negotiating” on the other is an exceedingly fine one, consultants should be required to satisfy tests of competence and integrity.

The Report also has difficulty with s. 344(7) which provides in part that “a broker shall not be presumed to be the agent of the insurer or the agent of the insured by reason of the issue to him of a licence under this section.” The Report comments on this section: — “This section does not make much sense to me. In fact I cannot determine the purpose it is intended to serve”. The purpose of the subsection is to counter dicta in English cases which suggest that when a broker acts for the insured, he is to be regarded as the insured’s agent rather than the insurer’s agent. The virtue of this subsection is that it directs the

39 See s. 4(1)(c) of Reg. 539.
40 See s. 344(2), R.S.O. 1970, c. 224.
41 According to the Report there may be between 25 and 45 such consultants; See Report, vol. 3, p. 23.
courts that there is no such absolute rule and that, in certain cases, the broker may be acting as the insurer’s agent.\(^\text{46}\)

For myself, I think the purpose of the subsection is best achieved by amending s. 197 of the Insurance Act which at present provides:

\[197. \text{No officer, agent or employee of an insurer and no person soliciting insurance, whether or not he is an agent of the insurer, shall, to the prejudice of the insured, be deemed to be the agent of the insured in respect of any question arising out of a contract.}\]

I would amend this section in two ways. First, I would make it applicable to all classes of insurance, instead of limiting it, as at present, to life insurance.\(^\text{47}\) Second, I would add the word “broker” after the opening words of the section “No officer or agent”. This change makes sense since agents and brokers do the same work and, indeed, it is possible for an agent to call himself a broker as well without satisfying any additional requirements.\(^\text{48}\)

I have not listed all the sections with which the Report has dealt in an unsatisfactory manner,\(^\text{49}\) but enough has been said to show that the proposed amendments to the Insurance Act have not been carefully thought out and some of the proposed changes would be mischievous in their effect.

The Report also accepts certain abuses unquestioningly. For example, it seems to accept, without question, the power of insurance companies to cancel policies without any reason being given.\(^\text{50}\) Also, there

\(^{46}\)In *Canadian Indemnity Co. v. Okanagan Mainline Real Estate Board*, [1971] S.C.R. 493, 16 D.L.R. (3d) 715, [1971] 1 W.W.R. 289, the Supreme Court of Canada held that, in certain circumstances at least, a broker will be regarded as the agent of the insurer.

\(^{47}\)There is a section similar to s. 197 in the automobile insurance part of the Act; see s. 202 which provides:

\[202. \text{No person carrying on the business of financing the sale or purchase of automobiles and no automobile dealer, insurance agent or broker and no officer or employee of such a person, dealer, agent or broker shall act as the agent of an applicant for the purpose of signing an application for automobile insurance.}\]

\(^{48}\)See s. 342(12).

\(^{49}\)For example, it is rightly pointed out (Report vol. 2, p. 33) that s. 159 is defective in only allowing a two-year limitation period to an insured to whom material facts have been misrepresented by the insurer. But the Report does not deal adequately with the question of remedies. The Report would allow the insured the right to avoid the contract but it does not discuss the availability of the remedy of rectification, which may be a crucial remedy for the insured. Similarly, the discussion of s. 342(6) is inadequate. As the Report points out (vol. 2, p. 38) that subsection allows an insurer to withdraw an agent’s sponsorship merely by notifying the superintendent and giving him reasons for the termination. The Report rightly points out that this is an unsatisfactory state of affairs but it does not outline an alternative procedure to give the agent more protection.

\(^{50}\)A policy may be terminated during its currency by the insurer giving to the insured “fifteen days’ notice of termination by registered mail or five days’ written notice of termination per-
is no explanation as to why the Insurance Act deals with, say, the problem of insurable interest in life in some detail, but does not deal with the complicated and unsatisfactory rules relating to insurable interest in property.

2. The Regulation of Intermediaries

The Report takes the view that the present regulatory system is responsible for a number of ills. One of these ills is said to be the high cost of selling. The Report states that: "Commission rates alone in auto and property insurance range between 7% and 25% of premiums, with more business done at the higher end of that range. It seems reasonable to hope the industry might increase its efficiency if the regulatory system were altered to allow competitive pressures to be exerted more effectively on selling costs." It is impossible to believe that if the minimal regulatory measures requiring the licensing of intermediaries were to be abolished the cost of selling would be reduced. Indeed, the truth is, as the Report recognizes elsewhere, that: "Insurers using general agents find themselves unable to switch out of the general agency system to try other methods without risking the loss of large amounts of their present business."

Even more fantastic is the contention that: "Applications of computer technology, standardized contract terms and disclosure, and . . . low-cost distribution systems" are inhibited by the present regulatory system.

Another alleged evil of the regulatory system is that it "prompts intermediaries to act contrary to the interest of the consumer". Why a
system of licensing should encourage intermediaries to act against the interests of buyers of insurance is beyond my comprehension. The real problem here may well lie with the method of remuneration adopted by insurance companies. As Professor Kimball has pointed out: "Perhaps compensation by commission is inconsistent with real professionalism. On how many occasions does an agent now advise his potential client to buy his insurance elsewhere?" 57

The truth of the matter is that the present system of regulation is inadequate. As the Report states elsewhere agents are, for the most part, "poorly trained and educated individuals", 58 who have to pass an examination that is based on a "minimum level of product knowledge". 59 Those who are impatient of examinations can, if they can find three reputable citizens to vouch for them, set themselves up as brokers. Those who are impatient of any public regulation at all can set themselves up as "consultants".

None of these intermediaries, whether they be agents, brokers or consultants, is required to carry liability insurance. This is a frightening situation in view of the fact that the courts have recently been imposing high standards of care for intermediaries at the same time as they have been refusing to hold companies vicariously liable for the negligence of their agents. 60

The Report fails to make any mention at all of the two very serious restrictions imposed by the industry on the selling of insurance. These restrictions have now found their way into the Insurance Act. In the first place, no life insurance agent can be licensed to act as an agent for more than one insurer transacting life insurance. 61 Second, an insurance broker cannot negotiate a life insurance contract. 62 These restrictions mean that it is impossible for the prospective buyer of life insurance to get skilled independent advice.

57 See Kimball and Rapaport, "What Price 'Price Disclosure'? — The Trend to Consumer Protection in Life Insurance", Wis. L. Rev. 1025 (1972), at p. 1032; see also the article by Professor Norman Cameron advocating that "agents be paid more by fixed salary and less by commission than at present"; Permanent Life Insurance and the Public Interest, Canadian Forum, July 1975, 14, 17.


59 Ibid.


61 See s. 342(5).

62 See s. 344(1).
Finally, there is the restriction imposed by s. 357(1) of the Insurance Act — the so-called "twisting" section. As is well known, this section makes it an offence for anyone to persuade (or attempt to persuade) a policyholder to give up an existing policy for another policy even if, as a result of the change of policies, it can be shown that the insured would save a substantial amount of money. It cannot be argued that it is only in very exceptional circumstances that an insured will benefit from a switch from one policy to another. As Kimball and Jackson have pointed out,

... sample calculations made for us by a competent actuary suggest that there are a surprisingly large number of potential cases in which a "twist" would clearly be beneficial to the policyholder, if the agent of a low-cost company twisted the policy of a high-cost company.63

The Carruthers Report would like to see the law on "twisting" revised but, even with this revision,64 it would still be impossible, because of the restrictions mentioned earlier, for a consumer to get skilled independent advice regarding life insurance.

The Carruthers Report would restructure the organization of intermediaries so that an intermediary would be forced to choose between becoming a broker and becoming a "sales representative". The term "agent" would disappear. The broker would be remunerated by the buyer of insurance, whereas the sales representative would be remunerated by his company. Prima facie, the change appears to be a desirable one but, unfortunately, there remain some grounds for scepticism on how much good the proposed change will achieve. In the first place, unless the restriction on brokers placing life insurance is removed, the value of the change is seriously undercut. Second, although the broker is to be paid by the buyer of insurance, there seems to be nothing in the Report which would prevent the broker from also receiving commissions from the insurer. If this is the case, the insurance buyer would be the victim of a cruel hoax. The purpose of requiring the buyer to remunerate the broker is to assure the buyer that he is dealing with someone who is putting his (the buyer's) interest foremost. If commissions can be paid by the insurer, then the insured no longer has that assurance. Further, if the broker can receive both commissions and remuneration this may result in additional selling costs

64 See Report, vol. 2, pp. 45-6 where it is recommended that only "twists" which are to the advantage of the insured, should be allowed.
which the Report tells us are already unreasonably high. Third, under the existing law, there is no need for a broker to show anyone that he has access to a substantial section of the insurance market. Nothing in the Report would change this. Thus a broker can (and under the Report's recommendations would) continue to be able to hold himself out as an independent adviser, despite the fact that he had access to only a very few companies. What a prospective broker should be required to prove, to the satisfaction of a public official, is that he can place insurance with a large number of insurers.

Fourth, it is troubling that brokers are not required to show even the minimum level of knowledge of insurance which agents are required to demonstrate.

Fifth, so long as the present system of compensation by commission continues, one must expect the high drop-out rate among agents—estimated by the Report to be in excess of 40% per annum—to persist. It is very doubtful if a sales force with such a high turnover can develop any great expertise.

Finally, recruitment and training programmes for agents will continue to be biased towards the interest of the company with little regard being paid to the interests of consumers. What is needed is a publicly approved system of training and education for intermediaries which emphasizes the duties of intermediaries towards consumers. As Professor Kimball has observed: "Life insurance exists basically to serve the public welfare and only incidentally to provide a livelihood to agents and a profit to life insurance companies." The Carruthers Report also recommends that disciplinary powers over intermediaries should be exercised by a Self-Regulatory Council (S.R.C.) which is to exercise the powers previously exercised by the superintendent. I find the whole idea of the Self-Regulatory Council impossible to understand. Self-regulation is usually understood to mean that extra-legal sanctions (for example, expulsion from an association or bad publicity) will be employed instead of traditional legal

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65 See footnote 53, supra.
67 The Report in vol. 1, p. 23 states that one of the issues to be considered is "government involvement in training" at least to the extent of the "Approval of course material", but the matter is not discussed again in the rest of the Report.
68 See Kimball and Rapaport, op. cit., footnote 57, at p. 1026.
69 This kind of self-regulation (reliance on extra-legal sanctions) is used to control the behaviour of intermediaries in the United Kingdom.
sanctions such as fines or the cancellation of a licence. The Carruthers system of self-regulation will apply traditional legal sanctions but it will be self-regulatory because the sanctions will be imposed by representatives of the insurance industry association who will be assisted by "some representatives of the public interest". No reason of any kind is given for taking the disciplinary functions away from the superintendent and giving them to the S.R.C. There is a good argument for giving a body such as the Ontario Insurance Agents' and Brokers' Association standing as an advisory body to the superintendent. Similarly, a group of consumers (e.g., the Consumers' Association of Canada) should be given a similar advisory status. The danger with any group policing itself is that enforcement of the rules will be too lax, and, since there is no evidence that the superintendent is not enforcing the rules adequately, it is suggested that the idea of the Self-Regulatory Council should be rejected.

In short, the Report's recommendations on intermediaries do not seem well thought out and they should not be implemented.

3. Price Disclosure in Insurance

The Carruthers Report supports the idea of price disclosure but the method used is the discredited net-cost price measurement. The Report would require the insurer to disclose:

\[
\text{Expected benefit} = \frac{\text{Total amounts the insurer expects to pay out}}{\text{Total premiums the insurer expects to receive}}
\]

This method is seriously misleading because it ignores the enormously important interest factor. Consequently, some very harsh things have been said about this method of disclosure. Professor Kimball has observed that the use of this method can reach the absurd conclusion "... that the average price per $1,000 of life insurance coverage is..."

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70 See Report, vol. 4, p. 36. It is not stated what the proportion of "public interest" to insurance industry association members would be.

71 The Self-Regulating Council would also (see Report, vol. 4, p. 36) be responsible for "testing individuals for educational and other qualifications." Since we are told elsewhere in the Report that most intermediaries are "poorly trained and educated individuals" (Report, vol. 1, p. 19), one can only view this prospect with alarm.

negative". Another critic has described this technique as "a neat bit of arithmetic razzle-dazzle . . . . discredited years ago".

Using a complicated method which I will not reproduce here, Professor Belth, of the University of Indiana, has devised a formula which enables the buyer to be told how much he is paying for every $1,000 of insurance. It is suggested that a formula such as the one devised by Professor Belth should be used.

The Carruthers Report seems to assume that a single method of price disclosure can be used for all kinds of insurance. It is impossible to believe that the same method of price disclosure can be used for such widely differing contracts as, say, life insurance and fire insurance.

There is another difficulty with the Carruthers' proposals for disclosure. The cost of insurance is to be made available to the buyer of insurance when the contract is entered into. In my view, the buyer should be made aware of the cost of insurance before he enters into the contract. If price disclosure is to be made available only when the contract is entered into, the buyer will have no effective choice since most buyers, at least in the case of life insurance, will tend to feel "locked" into the choice they have made. What is needed is for every insurer and every intermediary selling insurance to have available a Shopper's Guide to Life Insurance similar to the one put out by Professor Dennenberg when he was Commissioner of Insurance in Pennsylvania. The law could then make it an offence for an insurer or intermediary to sell life insurance without first making available to the prospective buyer a copy of the Shopper's Guide and allowing him time to study it.

The Carruthers Report also falls into the danger of giving too much information. Among the things insurance companies would have to disclose are:

... stringency or liberality of the insurer in accepting an insured into a given risk

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73 See Kimball and Rapaport, op. cit., footnote 57, at p. 1038.
75 See his article, "Price Disclosure in Life Insurance", Wis. L. Rev. 1054 (1972), esp. at pp. 1064-6.
76 See Pennsylvania Insurance Commission, Shopper's Guide to Life Insurance (1972). The Guide revealed inter alia that there was a 170% spread between the lowest and highest-priced life insurance policies of comparable value, with many of the largest and best known companies' policies being the most expensive; see the Guide at pp. 14-5.
77 Alternatively, and/or additionally, the law could provide that a consumer who was not given a copy of the Guide might be able to avoid the contract and recover his premiums.
It is difficult to see what is gained by giving information such as "80% of our risks are accepted at normal rates" or "we settle 98% of our claims without resort to litigation and on average we pay claims in 137 days". In the first case, the insured will only want to know how much he is paying for $1,000 of insurance; information as to rating practices are, at best, unnecessary and, at worst, misleading. Similarly, the fact that a company settled 98% of its claims without resort to litigation and that it paid claims after (an average) delay of 137 days tells the insured nothing about the fairness of a company's settlement practices.

The problem created by excessive information has been forcefully put by Professor Leff:

"What does seem to me to be critically important to recognize from the beginning is that more information does not necessarily mean a better aggregate message. . . . too much information on a wavelength causes static. The new messages not only fail to get through, but garble the intelligible and relevant messages already there; and one of the normal results of sensory overload in a commercial context is impulse buying."

The Carruthers Report also recommends that exclusions from coverage should be clearly indicated in the policy. The buyer of life insurance may be left with some impossibly difficult decisions. Suppose a buyer has a choice between two policies A and B. The buyer would save $120 a year in premiums if he bought policy A but policy A contains an exclusion for death "caused by drowning", whereas policy B does not. The prospective buyer discovers, say, that an adult's chances of dying by drowning are one in several million. How does a rational adult decide, given these facts, which policy to buy? The truth

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79 If we want publicity focused on delinquent companies, there are better ways of doing this. For one thing, the superintendent could publish periodic reports showing which ten (or twenty) companies have had the most complaints (in relation to premium income) during a certain period.
81 See Report, vol. 3, p. 44.
82 Among other exclusions I have discovered in studying life insurance policies are, for example, death caused by "infection of any nature unless occurring simultaneously with or in consequence of, an accidental cut or wound". Another exclusion relates to death caused by "the taking, administration, inhalation or absorption of any poison, drug, medicine, gas or fumes, voluntarily or involuntarily, accidentally or otherwise".
of the matter is that no one should be forced to make such a decision.\textsuperscript{83} No valid social interest is being achieved by excluding death by "drowning" and other like causes of death. The exclusion is as arbitrary as if the insurer excluded deaths which occurred on Saturdays. The need to require insurance companies to justify the reasonableness of each exclusion from coverage becomes more urgent when it is realized that an increasing amount of life (and other) insurance is being bought on a group basis.\textsuperscript{84} In the group contract, the choice of what contract to buy is not made by the insured who will not even get a copy of the contract.\textsuperscript{85} Before any "application [form], policy, endorsement" for automobile insurance can be used it must be approved by the superintendent.\textsuperscript{86} If this degree of protection is extended to a fairly simple contract, it is impossible to see why the same protection cannot be given in the case of a life insurance contract which is a far more complex transaction and is one where the investment by an individual may well exceed the amount spent on automobile policies. It is suggested that, at a minimum, every exclusion in a life or accident policy (whether individual or group) should have to receive the express sanction of the superintendent.\textsuperscript{87} For other classes of insurance it might not be necessary or practicable to have the approval of the superintendent in every case. Perhaps it will be enough to give the courts the power to delete unreasonable and unfair clauses, a power they already have in the case of fire insurance.\textsuperscript{88}

In short, while it is difficult to quarrel with the idea of price disclo-

\textsuperscript{83} This is not to say that a buyer of life insurance is acting irrationally when he consciously buys a more expensive policy. Such a buyer may decide to pay more and be insured with a well-established company rather than with a newly-established company which has a bad complaints record.

\textsuperscript{84} In 1972, according to the Report (vol. 1, p. 28), individuals paid 480 million dollars for life insurance whereas premiums for group life insurance came to 172 million dollars. The figures for pensions and annuities, and for accident and sickness insurance show that the premium income for group insurance is in excess of premium income for individual insurance.

\textsuperscript{85} The courts seem to be recognizing that extra protection for the insured is needed in the case of group life insurance; see e.g., \textit{Bohl v. Great-West Life Assurance Co.} (1973), 40 D.L.R. (3d) 584, [1974] 1 W.W.R. 700 (Sask. C.A.) (holding that employer is agent of the insurer for purposes of misrepresentation in an application for group life insurance) and \textit{Lund v. Great-West Life Assurance Co.}, [1976] 3 W.W.R. 245 (Sask. Q.B.) (a decision construing an exclusion clause in a group life policy out of existence).

\textsuperscript{86} R.S.O. 1970, c. 224, s. 201(1).

\textsuperscript{87} There would also appear to be a very strong argument for giving the superintendent power to police sickness and disability policies as well, since sickness and accident policies are often written together.

\textsuperscript{88} See 125(b) and also cases noted in footnote 11, supra.
sure in insurance, the Carruthers Report does not compel meaningful price disclosure. Such disclosure as would be given would, in my view, be given too late. In addition, the consumer would be given some useless information which might have the effect of confusing him. All in all, there is a need to make a completely fresh start.

4. The Use of Arbitration to Resolve Insurance Disputes

The Insurance Act provides, by virtue of s. 102, for a system of arbitration to determine the quantum of the amount in dispute. The Carruthers Report would like to see the system of arbitration so that the arbitrator can "deal with more than the mere quantum of the loss". In my view, there are very serious dangers in extending the use of arbitration in this way. First, since an arbitrator's main clients will tend to be insurance companies, there is a danger that an arbitrator will develop a bias — albeit an unconscious one — in favour of insurers. Second, questions of insurance law may sometimes be as complex as, say, a difficult problem in tax law, and an ad hoc arbitrator might not be competent to deal with the matter. When a difficult matter is presented to a court, there is at least a guarantee of some competence. Third, an insurer arguing before an arbitrator is more likely to plead a technical defence than will be the case where the matter is heard before a public tribunal. Fourth, a consumer who has a valid claim may find that he recovers nothing because he has to pay his own costs. Fifth, an insured who wants to argue a legal point before an arbitrator will be unable to get legal aid.

I would recommend that legally trained officials should be ap-

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89 As might be expected, the usual arguments about the cost of disclosure and the impossibility of making meaningful price comparisons have been used. For a review of some of the objections, see Kimball and Rapaport, supra, footnote 57, at pp. 1026-35.
91 Without endorsing the present system of grievance arbitration in labour disputes, it should be pointed out that, at least in that context, the union sometimes exercises a veto over the employer's choice of an arbitrator.
92 In 1957, the British Insurance Association and Lloyd's underwriters agreed that "in general" they would not use arbitration clauses to dispute questions of liability as opposed to questions of quantum. See Law Reform Committee, Fifth Report, Cmd. 62, paras. 10, 13. This concession was made because it was felt that some insurers were using the arbitration system to raise technical defences.
93 I am indebted to my colleague, Professor Martin Teplitsky for emphasizing the importance of this point to me.
pointed to the superintendent's office. These people would decide questions of quantum as well as legal questions brought to them by consumers. Unless the dispute involved a particularly difficult question of law, legal representation should not be allowed. Appeals would lie from these officials, who would have the same tenure and be paid the same remuneration as Judges of the Supreme Court, to the Court of Appeal on questions of law. A body constituted along these lines would seem to offer the advantages of expertise and impartiality—advantages which seem to be conspicuously absent in a system of *ad hoc* arbitration.

**Conclusion**

For those people who are unaware of some of the controversial issues in insurance regulation, the Carruthers Report might serve as the basis for an introduction. As a foundation for future public policy, the Report is, without doubt, a failure. If its recommendations were to be implemented, nothing of value would be achieved and there is the danger that many people would be under the illusion that significant and beneficial changes had been made.

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94 I would make this tribunal a "consumer" court, because I do not perceive the same dangers which are inherent in the arbitration system for consumers, as existing when the dispute is between an insurance company and a commercial concern. If I am wrong in this, the jurisdiction of the insurance court could easily be extended.