

**Description of Flats on Sale Sub-committee
of the Law Reform Commission of Hong Kong**

Consultation Paper

**Local Completed Residential Properties:
Sales Descriptions and Pre-contractual Matters**

Executive Summary

(This Executive Summary is an outline of the Consultation Paper issued to elicit public response and comment on the Sub-committee's preliminary recommendations. Those wishing to comment should refer to the full text of the Consultation Paper which can be obtained either from the Secretary, Law Reform Commission, 20/F, Harcourt House, 39 Gloucester Road, Hong Kong, or on the Internet at <<http://www.info.gov.hk/hkreform>>. Comments should be submitted to the Secretary by 31 March 2001. References in this Executive Summary to paragraph numbers are to paragraphs in the Consultation Paper.)

Preface

Terms of reference

1. In March 1996, the then Attorney General and the then Chief Justice made the following reference to the Law Reform Commission:

"Should the present laws governing the protection of prospective purchasers and purchasers of completed residential property in Hong Kong in relation to any pre-contractual matters and sales descriptions be changed and, if so, in what way?"

2. The reference refers to "pre-contractual" matters. It covers any sales matters before the time of contract, that is to say, the signing of the formal sale and purchase agreement.

The Sub-committee

Part I - Local uncompleted residential properties

3. The Law Reform Commission's Sub-committee on Descriptions of Flats on Sale ("the Sub-committee") was first appointed in November 1992 to consider the sales descriptions of uncompleted residential properties. The Sub-committee's proposals were largely adopted by the Commission and formed the basis of the Commission report published in April 1995 on the

sales descriptions of local uncompleted residential properties entitled, *Report on Description of Flats on Sale*, ("the First Report"). The Government published the Sales Descriptions of Uncompleted Residential Properties Bill as a White Bill on 7 April 2000. This incorporated the majority of the proposals in the Commission report.

Part II - Overseas uncompleted residential properties

4. In April 1995, the Sub-committee commenced consideration of the second part of their study, namely, the sales descriptions of overseas uncompleted residential properties put up for sale or advertised in Hong Kong. The Sub-committee's proposals were again largely adopted by the Commission and formed the basis of the Commission report published in September 1997 entitled, *Report on Sales Descriptions of Overseas Uncompleted Residential Properties* ("the Second Report").

Part III - Local completed residential properties

5. This is the third part of the study by the Sub-committee. It covers the sales descriptions and other pre-contractual matters of completed residential properties in Hong Kong.

Sub-committee membership

6. The membership of the Sub-committee (in respect of the third part of its reference) was:

Mr Kennedy WONG Ying-ho (Chairman)	Managing Partner Philip K H Wong, Kennedy Y H Wong & Co Solicitor
Mr Tom BERRY, JP (Represented by Mr John EDGE, JP, Acting Deputy Director (Legal) of Lands Department from 21 January 1999 to 26 August 1999)	Deputy Director (Legal) Lands Department
Ms Audrey EU, SC (up to 22 April 1998)	Senior Counsel
Mr Kenneth KWOK Wing-hon (from 16 July 1999)	Senior Development Manger Swire Properties Ltd
Mr Andrew LEE King-fun	Principal Partner Andrew LEE King-fun and Associates Architect

Mr LIU Sing-cheong	Managing Director Hang Cheong Surveyors Ltd Surveyor
Ms Rebecca PUN Ting-ting (from 28 July 1999 to 31 March 2000)	Principal Assistant Secretary Housing Bureau Government Secretariat
Mr Malcolm MERRY (from 30 June 1998)	Counsel
Ms June TENG (from 5 October 1998 to 3 June 1999)	General Secretary Real Estate Developers Association of Hong Kong
Ms Eva TO Hau-yin (up to 28 July 1999)	Principal Assistant Secretary Housing Bureau Government Secretariat
Mr WAI Siu-yu (up to 31 July 1998)	General Secretary Real Estate Developers Association of Hong Kong
Ms Lorna WONG Lung-shi (from 31 March 2000)	Principal Assistant Secretary Housing Bureau Government Secretariat
Mr Martin WONG Kwai-poon	Chief Complaints & Advice Officer Consumer Council
Mr Marco WU Moon-hoi, JP	Deputy Director/Management Housing Department

7. Mr Thomas LEUNG Moon-keung, Senior Government Counsel, was the Secretary to the Sub-committee.

Chapter 1

The case for the reference and the scope of deliberations (paragraphs 1.1 – 1.6)

Public responses

8. When the consultative document on local uncompleted residential properties was issued in April 1994, there was strong public demand in the responses for the introduction of controls over sales descriptions of completed residential properties.

Uniform standards for completed and uncompleted property

9. In the First Report, the Commission made a number of recommendations in respect of local uncompleted residential properties. It would create anomalies if some of these recommendations apply only to uncompleted but not completed properties.

Uncompleted flats become completed

10. There are a growing number of first-hand completed residential units being offered for sale. Although these flats have been "completed", they are offered for sale in much the same way as if they were still uncompleted. Prospective buyers may not be given the opportunity to view the particular flats themselves, but instead are usually only able to view one or more show or mock-up flats. As in the case of uncompleted properties, prospective purchasers have to rely largely on the information in the sales literature.

Scope of deliberations

11. The sales descriptions of completed flats are often provided by developers in much the same way as those for uncompleted flats. There is thus an obvious reason to regulate the sales descriptions and other pre-contractual matters of local completed flats in the first-hand market. The question is whether or not that regulation should extend to the second-hand market.

Views against regulating the second-hand market (paragraphs 1.7 – 1.8)

12. Reservations have been expressed in some quarters at extending the study to the second-hand market and to individual flat owners, on the grounds that the Government has introduced a scheme to regulate estate agents, and that it is doubtful whether individual owners would have the necessary time and resources to provide the required information.

13. Unlike purchasers of uncompleted properties, purchasers of second-hand completed flats can view or check the properties. In the second-hand market, purchasers are on an equal footing with the vendors.

Views in favour of regulating the second-hand market (paragraphs 1.9 – 1.12)

14. The Sub-committee takes the view that their terms of reference are wide enough to cover the second-hand market. Purchasers of second-hand completed flats, just like those buying in the first-hand market, are in need of protection. The present law does not provide enough positive protection for purchasers.

15. In the second-hand market, verbal representations are often made by vendors and estate agents. It is difficult and costly for purchasers to verify certain important property information, including the age and size of the property. The property is not always available to prospective purchasers for inspection. Investors may buy property subject to an existing tenancy without the chance of viewing the property.

16. We have therefore come to the view that the present study should cover completed residential properties offered for sale not only by developers in the first-hand market but also those offered for sale by private vendors in the second-hand market.

Definition of "completed residential property"

Recommendation 1

We recommend that "completed residential property" should refer to residential units in respect of which there is an Occupation Permit under the Buildings Ordinance or, in the case of the Housing Authority's Home Ownership Scheme, in respect of which the completion certificate has already been issued by the Director of Housing. This definition should be suitably modified in the case of exempted houses in the New Territories.

PART I – SECOND-HAND MARKET

Chapter 2

The general approach to the second-hand market

17. In the second-hand market, there rarely is a sales brochure as the vendors are mainly private individuals. Thus, the Sub-committee explores other means of imposing positive disclosure duties on private vendors. It looks at the feasibility of **introducing a Vendor's Information Form**. It also considers the possibility of **inserting certain standard clauses into the preliminary agreement**.

Chapter 3

Brief review of the existing law governing the protection of purchasers of completed units in the second-hand market

18. This chapter takes a brief look at the existing law governing the protection of purchasers in the second-hand market. The purpose is to try to

see if the existing law is adequate to protect purchasers. It covers misrepresentation, breach of contract, fraudulent behaviour, obtaining property or pecuniary advantage by deception, conspiracy to defraud, substantive offence of fraud, the Trade Descriptions Ordinance (Cap 362) (paragraphs 3.2 – 3.15).

Existing disclosure requirements under the Estate Agents Ordinance (Cap 511) (paragraphs 3.16 – 3.17)

19. Under section 36(2)(a) to (g) of the Estate Agents Ordinance, estate agents are required by law to provide seven basic property particulars to purchasers. These are:

- current ownership and encumbrances,
- total or entire area,
- year of construction completion,
- use restrictions,
- unexpired term of Government lease,
- term of new lease,
- vendor statement on known structural additions or alterations and repairs or improvements.

20. The estate agent is responsible for collecting these property particulars, except for the vendor statement on structural alterations and repairs. Hence, the vendor's existing duty under the Estate Agents Ordinance is confined to the provision of the statement on structural alterations and repairs. But even that vendor statement covers only any information "within the vendor's knowledge". If the vendor is not aware of the structural alterations or repairs, he is not obliged to make any vendor statement.

21. If the property particulars supplied by an estate agent are wrong, the estate agent may be able to rely upon the defence of due diligence. The Estate Agents Ordinance increases the transparency of transactions and provides more sales information to purchasers but falls short of giving them ultimate satisfactory protection.

Lack of vendor's duties of disclosure (paragraph 3.18)

22. The brief review of the existing law in chapter 3 indicates that there are few positive duties, if at all, on a vendor of second-hand property to disclose particulars of the property for sale. In second-hand sales, there is no sales brochure compiled by the vendor. While the vendor is, of course, obliged to provide basic information on the property in the preliminary agreement, it is of little assistance to the purchaser only to obtain this information after the preliminary agreement is signed.

Chapter 4

Disclosure of information by vendors

The Vendor's Information Form (paragraphs 4.3 – 4.12)

23. To overcome the lack of positive disclosure requirements imposed upon vendors, the Sub-committee proposes the introduction of a Vendor's Information Form (VIF). The VIF would be completed by the vendor and should be made available when the unit is put on the market for sale, whether through an estate agent or not. The VIF would contain particulars of the unit offered for sale to a prospective purchaser.

24. The VIF is not a new idea, and similar concepts have either been proposed or are already in place in some overseas jurisdictions. Chapter 4 contains a comparative study of the position in England and Wales, Idaho (USA), Virginia (USA), Ontario (Canada).

The four approaches to imposing positive disclosure duties on vendors (Paragraphs 4.13 – 4.15)

25. The comparative study of overseas practices shows that there can be four approaches to imposing duties of positive disclosure on vendors:

- The VIF is purely voluntary. (eg the Legal Information Form proposed by the English Law Society)
- The VIF is compulsory, backed by statute. (adopted, for instance, in Idaho, USA)
- A flexible statutory approach (this is followed by Virginia in the USA). Under the Virginia Residential Property Disclosure Act, the owner can furnish to a purchaser either a residential property disclaimer statement or a residential property disclosure statement. The residential property disclaimer statement states that the owner has made no representations or warranties as to the condition of the property and the purchaser would be receiving the property "as is".
- A code of practice for estate agents (used in Ontario). Under rule 11 of the Code of Ethics of the Real Estate Council of Ontario, a member (ie a real estate broker or salesperson) should consider requesting the seller to complete and sign a Seller Property Information Statement. If the seller refuses to, or is unable to complete the statement, that fact should be stated in the agreement. The statement is not a statutory form but is only part of a code of practice prescribed for real estate brokers and salespersons.

Should the Vendor Information Form be voluntary or compulsory?
(Paragraphs 4.42 – 4.43)

26. The Sub-committee considers that the relevant bodies in Hong Kong (such as the Law Society and the Estate Agents Authority) should endeavour to have VIF adopted as market practice on a voluntary basis. The Sub-committee is, however, conscious that a voluntary approach may not work and suggests that the Government should review the situation in due course. If a market practice has not been established voluntarily by then, the Government should introduce legislation requiring the completion of a Vendor's Information Form, at least in relation to newer buildings.

Recommendation 2

We recommend the introduction of a Vendor's Information Form for the sale of completed residential properties in the second-hand market. Relevant bodies in Hong Kong should be encouraged to make the Vendor's Information Form a market practice in the near future. The Government should monitor the situation at some stage later. Unless a market practice can be established by then, the Government should introduce legislation making it compulsory to provide a Vendor's Information Form.

We recommend that a vendor must make available a Vendor's Information Form when his unit is put on the market (whether through an estate agent or not). The proposed Vendor's Information Form should contain at least the following warning clauses and property particulars:

Warning clauses

- **It is only a summary of the main terms.**
- **It does not explain everything and purchasers should take legal advice.**
- **Circumstances may have changed since the date of the Vendor's Information Form.**
- **The purchaser should inspect the property before making an offer to buy.**
- **The state of repair and physical condition is not given. The purchaser should inspect the property and consult his professional advisors.**

- **Before making an offer to buy, the purchaser should make sure that the required borrowing will be readily available.**
- **It is a legal document and that the vendor will bear responsibility for its accuracy.**

Property particulars

- **The seven property particulars currently to be supplied by estate agents under section 36(2)(a) to (g) of the Estate Agents Ordinance.**
- **Details of the saleable area and any other statutory measurement methods that may eventually be enacted by the proposed Sales Descriptions of Uncompleted Residential Properties Bill.**
- **The availability of services known to the vendor (such as water (fresh/sea), drainage, gas (what kind) and electricity).**
- **The management fees for the current month.**
- **State the amount of Government rent so far as it is possible.**
- **Any notice received by the vendor from the Government, management office, neighbouring properties, or any relevant authority of expenditure requiring contribution from the owners.**
- **State whether there is an owners' corporation and, if so, its name, and the name of the management company.**
- **Any pending litigation known to the vendor affecting the property.**
- **A statement to the effect that the vendor will vacate the property and hand over vacant possession upon completion of the sale and purchase and that the property will then be free from mortgages and subsisting tenancies. However, if there are subsisting tenancies, the terms of those tenancies should be spelt out.**
- **Make reference to any septic tank if it is being used.**

- **State whether or not the vendor is operating under a Power of Attorney.**

We recommend that the vendor be required to update the information in the Vendor's Information Form if he knows of changes subsequent to the date of its preparation.

We recommend that if the Government should decide to make Vendor's Information Form compulsory, the Government should embark on a review of the Estate Agents Ordinance with a view to reconciling the disclosure duties of the vendor and the estate agent.

Centralised property information system (paragraph 4.44)

27. At present, different kinds of property information are provided by various Government departments. We consider that there is a need for a single Government body to collate these various kinds of property information so that the public could have access at one location.

Recommendation 3

We recommend that the Administration should consider exploring the option of establishing a centralised property information system.

Chapter 5

Standard clauses of preliminary agreements

Standard clauses for protection of homebuyers (paragraphs 5.2 – 5.6)

28. In Hong Kong, lawyers are usually appointed only after the preliminary agreement has been signed. The result may be that the terms of that agreement are not in the best interests of the purchaser. In order to enhance protection given to purchasers, we take the view that certain standard clauses should be included in a preliminary agreement.

Cooling-off period (paragraphs 5.7 – 5.14)

29. In Victoria, Australia, a cooling-off period applies to the sale of properties worth less than A\$250,000. Such a period allows a purchaser time to reflect on the transaction and serves to offset any undue pressure which may have been applied by the vendor or the estate agent.

30. The argument against a cooling-off period that it will fuel speculation would be answered by providing for the forfeiture of a specified percentage of the purchase price in the event that the purchase does not go ahead.

31. Contrary to the approach adopted in Victoria, we see no good reason to confine the benefit of a cooling-off period to purchasers of lower-end properties. **We would however like to hear the public's views as to whether any particular class of properties should be excluded from the cooling-off period.**

Recommendation 4

We recommend that the preliminary agreement for the purchase of second-hand completed flats should contain a standard clause giving the purchaser a cooling-off period of three working days. In exercising the right to rescind the preliminary agreement during the cooling-off period, the purchaser is liable to forfeit to the other party an amount equal to five percent of the purchase price or the preliminary deposit whichever is the lower. The purchaser should not have the right to sub-sell during the cooling-off period.

Contract subject to finance (paragraphs 5.15 – 5.25)

32. The standard form contracts of several jurisdictions in Australia contain a "subject-to-finance" clause. In Victoria, where the identity of the lender is stipulated in the contract, the purchaser can terminate the contract if the loan is not approved by the "approval date". However, in order to exercise this right to terminate the contract the purchaser must, *inter alia*, have made immediate application for the loan and done "everything reasonably required" to obtain approval of the loan.

33. In Hong Kong, sale subject to finance already applies in some special forms of contract. For example, the standard agreement for sale and purchase (ASP) used in the Home Ownership Scheme (HOS) contains a "subject to finance" clause providing that the ASP is conditional upon the purchaser being able to obtain a loan by "using due diligence and completing the necessary formalities". **We would welcome the public's views on the idea of including a "subject-to-finance" clause in the preliminary agreement.**

Survey report (paragraphs 5.26 – 5.34)

34. It has been suggested in Hong Kong that a vendor of second-hand property should provide the potential purchaser with a survey report on

the premises. This would identify not only any illegal construction work that has been carried out in the premises, but also other problems such as water leakage. The contrary argument is that the costs of a full survey report may be disproportionate to the benefits they bestow, and that both vendors and purchasers may be reluctant to shoulder this burden. Accordingly, **we would like to hear public views on the feasibility of having a standard clause in the preliminary agreement entitling the purchaser to a satisfactory survey report.**

Right of inspection (paragraphs 5.35 – 5.38)

35. In Hong Kong, a purchaser of a completed unit in the second-hand market is usually allowed to view the unit at least once before completion of the sale and purchase. This may not be the case, however, where the property is sold subject to an existing tenancy. Ideally, there should always be a right of inspection in order to give better protection for purchasers, but **we do not favour a right of inspection in respect of second-hand sales due to its impracticality, especially in the case of property sold subject to an existing tenancy.**

Recommendation 5

We recommend that the standard clause allowing a three-day cooling-off period to purchasers should be implied by legislation into preliminary agreements for sale and purchase of second-hand completed residential properties.

Chapter 6

36. This chapter gives a summary of the recommendations made in respect of completed units sold in the second-hand market.

PART II – FIRST-HAND MARKET

Chapter 7

The general approach to the first-hand market and the provision of sales brochures

The general approach to the first-hand market (paragraph 7.4)

37. Completed units in the first-hand market are those units which have become "completed" with the issue of the Occupation Permit. These units are offered for sale by developers in much the same ways as if they were still uncompleted. The Commission made a number of

recommendations in the First Report on ways to improve the quality of sales particulars and other matters relating to local uncompleted flats. The majority of those recommendations focus on the contents of the sales brochure. We are of the view that many of these recommendations can be extended to cover local completed flats in the first-hand market, subject to necessary modifications.

Availability of sales brochures to be mandatory (paragraphs 7.5 – 7.12)

38. We take the view that the provision of sales brochures for local completed residential properties sold for the first time should be made mandatory.

Recommendation 6

We recommend that sales brochures must be available from the time the completed properties are offered for sale. All information in sales brochures must be accurate at the time the completed properties are offered for sale.

Recommendation 7

We recommend that if there have been any material changes in the information in the sales brochure between the date of its printing and the time of sale, a note to that effect should be attached to the sales brochure or the price list.

Recommendation 8

We recommend that the developer may apply to the relevant authorities in certain circumstances for exemption from the requirement to produce a sales brochure. For instance, where a purchaser buys in bulk from the developer with no intention to re-sell any of those units to the public, there should not be any need for the developer to produce a sales brochure in respect of those units. The application for exemption should be accompanied by a written undertaking from the purchaser not to re-sell the units within a specified period to be determined by the Government.

Recommendation 9

We recommend that the definition of a developer should include someone buying in bulk from the developer at the first sale of completed residential properties involving strata title.

Advertisements other than sales brochures (paragraphs 7.13 – 7.14)

39. Publicity about properties often takes the form of newspaper advertisements and radio or television commercials. It is obviously not feasible to apply all the disclosure requirements for sales brochures to other means of advertising. To make sure purchasers do not rely on the limited sales information in such advertisements, we recommend that purchasers should be advised to refer to the sales brochure which contains fuller property information.

Recommendation 10

We recommend that if developers, by themselves or through estate agents, advertise the sale of local completed residential properties otherwise than by means of a sales brochure, the advertisement should advise purchasers to refer to the sales brochure. Information given in the advertisement must be consistent with that given in the sales brochure.

Chapter 8

Methods of measurement of floor area to be used by developers

Introduction (paragraphs 8.1 – 8.2)

40. Two types of measurement for floor area are generally used: gross floor area and saleable area. There is presently no legal requirement that the measurement adopted be disclosed in the sales literature. However, the Commission has made recommendations on the disclosure of measurements of floor area in their previous reports on the sale of uncompleted flats.

Saleable area (出售面積) (paragraphs 8.3 – 8.4)

41. The Commission recommended in the First Report that a standardised definition of saleable area be adopted for all local uncompleted residential properties. The Commission also recommended that it should be mandatory for the standardised definition to be used and disclosed in the sales literature. We take the view these recommendations should also be extended to local completed residential properties in the first-hand market.

Recommendation 11

We recommend that in respect of local completed residential properties offered for sale in the first-hand market, "saleable area" should mean:

- (1) in relation to any cockloft, the floor area of that cockloft measured from the interior of its enclosing walls;**
- (2) in relation to any bay window which does not extend to the floor level of a unit, the area of that bay window measured from the exterior its enclosing walls or glass windows and from the point where the bay window meets the wall dropping to the floor level of a unit, but excluding the thickness of that wall;**
- (3) in relation to any carparking space, the area of that carparking space measured from the interior of its demarcating lines or enclosing walls, as the case may be;**
- (4) in relation to any yard, terrace, garden, flat roof or roof, the area of that yard, terrace, garden, flat roof or roof measured from the interior of their boundary lines. Where the boundary consists of a wall, it shall be measured from the interior of that wall.**

We also recommend that where the property includes any incorporated item in the definition (such as a cockloft, bay window, carparking space, yards, terrace, garden, flat roof or roof), the saleable area of each of them should be specified and described separately in the sales literature.

Recommendation 12

We recommend that in respect of local completed residential properties offered for sale in the first-hand market, "saleable area" in relation to a unit enclosed by walls, should mean the floor area of that unit (which shall include the floor area of any balconies and verandahs), measured from the exterior of its enclosing walls except where those enclosing walls separate two adjoining units in which case the measurement shall be taken from the middle of those walls, and shall include the internal partitions and columns within such unit; but shall exclude the common parts outside its enclosing walls. Provided that if any of the enclosing walls abut onto a common area, then the whole thickness of the enclosing walls which so abut shall be included.

Recommendation 13

We also recommend that:

- (1) the above mentioned definitions of saleable area should be recognised in legislation as the standard method to describe saleable area in all sales literature in respect of local completed residential properties;**
- (2) the inclusion of saleable areas in sales literature should be made mandatory by legislation;**
- (3) any areas exempted from the calculation of gross floor area should be excluded from the calculation of saleable areas of the individual units.**

Gross floor area (建築面積) (paragraphs 8.5 – 8.7)

42. Although developers invariably state in the sales brochure the gross floor area of the units, there is no standardised definition of gross floor area. Gross floor area essentially means the saleable area plus a share of the common areas and facilities. At present, different developers (and even the Government) adopt different proportions of the common areas, thus leading to much confusion.

43. **Whilst we consider that the definition of gross floor area should be standardised, we take the view that the general use of saleable area should be the ultimate objective.**

Quotation of lowest price (paragraphs 8.8 – 8.9)

44. It is usual practice for developers to quote in advertisements and sales brochures the lowest price of the units being offered for sale. It is not uncommon to find such statements as "from X dollars per square foot" or "at Y dollars per square metre". Gross floor area is invariably the method of floor measurement being used in arriving at these prices because that area will give a lower price than saleable area, giving the impression that the properties represent good value. **We are of the view that the long-term objective should be that the lowest price stated is calculated on the basis of saleable area only.** That should not preclude a developer in addition quoting the lowest price calculated on the basis of gross floor area should he wish to do so. In our view, the more information which is provided to purchasers, the better.

Chapter 9

Disclosure requirements for completed units offered for sale by developers

Floor Plan (paragraphs 9.2 – 9.4)

45. We consider that all of the Commission's previous recommendations concerning floor plans of local uncompleted properties are equally applicable to the sale of completed units by developers. However, we do not think it necessary in the context of a completed unit to include a requirement that the sales brochure bring purchasers' attention to the fact that the purchase price will be adjusted in proportion to any variations in saleable area arising from amendment to the building plans.

Recommendation 14

We recommend that:

- (1) The sales brochure should contain floor plans which:**
 - (a) specify the external dimensions of individual units;**
 - (b) are presented according to conventionally accepted scales;**
 - (c) show separately non-typical floors, the entrance floors, and the roof;**
 - (d) show the location, the number and the minimum dimensions of the car parking spaces;**

- (e) show the orientation of the building and the location of ingress and egress points;
 - (f) show the structural walls; and
 - (g) show any known features within the unit that would materially affect a reasonable purchaser's enjoyment of the property, such as exposed pipes.
- (2) The sales brochure should also contain:
- (a) schedules listing the saleable area of the unit and of any bay window areas, roof areas, flat roof areas, open yard areas, air-conditioning plant within the building, etc; and
 - (b) a note that the internal area of units on the upper floors may be slightly greater than that of the lower floors, if that is the case.
- (3) Certified copies of the latest approved building plans should be made available for free inspection at the sales office during normal office hours.
- (4) There should be a legal obligation on the developer upon completion to inform purchasers of the saleable area (as provided by the Authorised Person).

Fittings and Finishes

Previous recommendations (paragraphs 9.7 – 9.8)

46. In its First Report, the Commission made some recommendations in respect of fittings and finishes for local uncompleted residential properties. These recommendations were largely modelled on the list of fittings and finishes contained in the Land Office Circular Memorandum No 101 (LOCM 101). On 28 May 1999, the Legal Advisory Conveyancing Office Circular Memorandum No 40 (LACO CM 40) replaced LOCM 101. LACO CM 40 contains essentially the same disclosure requirements as had been imposed by the superseded LOCM 101.

Right of inspection (paragraphs 9.9 – 9.13)

47. We take the view that if a prospective purchaser is given the opportunity to inspect a completed unit before entering into a purchase contract, he will be in a position to verify the make and quality of fittings and finishes on the premises. There would then be no need to change existing

requirements as to the contents of the sales brochure with regard to fittings and finishes, save that those contents should not be misleading. If, however, there is no right of inspection before entering an ASP, additional protection to the purchaser is necessary.

Recommendation 15

We recommend that *where there is no right of inspection before entering a preliminary sale and purchase agreement*, the sales brochure should contain:

- (i) at least details of the fittings and finishes as stated in Appendix XII B of Legal Advisory Conveyancing Office Circular Memorandum No 40 (LACO CM 40);**
- (ii) a description of air-conditioners where supplied and descriptions, such as locations, of air-conditioning plants;**
- (iii) information on the flush water/sewage treatment plants where they are supplied, including information on the maintenance of the treatment plants;**

The sales brochure should also state the brands and countries of origin of the fittings and finishes to be used.

In addition, photographs of the fittings and finishes should be shown on the sales brochure.

Discrepancies between languages (paragraph 9.14)

Recommendation 16

We recommend that if there are discrepancies between the Chinese and English versions of the specifications of fittings and finishes in the sales brochure, purchasers can choose which language version they rely on.

Mock-up flats (paragraph 9.15)

48. In the First Report, the Commission took the view that it was unreasonable to oblige developers to build mock-up flats. If developers chose to set up mock-up flats, however, they had to accurately reflect the materials to be used.

Recommendation 17

We recommend that *where there is no right of inspection* before entering into a preliminary sale and purchase agreement and mock-up or sample flats are provided, the mock-up of at least one flat should be accurately representative of the actual unit in all aspects including quality and dimensions. The Authorised Person of the development project should certify a schedule of specifications of such mock-up flats. The developer should have a duty to keep a record of the certified schedule.

Location and layout plans (paragraphs 9.18 – 9.21)

49. Location and layout plans in the sales brochure are the major sources of information on communal facilities and surroundings.

Recommendation 18

We recommend that :

Location plan

- (a) A location plan should be provided in all sales brochures. The location plan should include up-dated information on prominent environmental features in the vicinity, eg public park, swimming pool, refuse collection point etc.
- (b) The date and the reference number of the latest outline zoning plans at the date of printing of the sales brochure should be stated in all sales brochures. There should also be a note stating that outline zoning plans are subject to change and that the latest outline zoning plans at the date of printing of the sales brochure are available for free inspection during normal office hours at the sales office.

Layout plans

All sales brochures should provide a layout plan drawn to scale, showing communal facilities (and their completion dates if possible) undeveloped land and its *intended and permitted use* within the boundary of the development and the scale used. The layout plans provided in sales brochures should be the latest approved plans at the date of printing of the sales brochure. The expected completion dates of communal recreational facilities should be included in the layout plans.

Uses of land

- (a) If there are specific covenants in the Government Lease requiring the developer to put land inside or outside the boundaries of the development to particular uses, the developer should state accurately those particular uses in the sales literature.**
- (b) The developer should be required to state accurately in the sales brochure the intended uses of the land within the boundaries of the development which are known to the developer at the date of printing of the sales brochure.**
- (c) Except for specific uses required of developers by the terms of the Government Lease, developers should not be required to disclose the intended uses of land outside the boundaries of the development.**
- (d) If the developer chooses to disclose in the sales literature any information about the use of land outside the boundaries of the development, the information so disclosed must be accurate at the date of printing of the sales literature.**

Misleading artistic impressions (paragraph 9.22)

Recommendation 19

We recommend that artistic impressions in whatever form should give accurate representations of the surroundings of the property development.

Management of clubhouse and communal facilities (paragraphs 9.23 – 9.24)

50. Whilst sales brochures usually contain a general description of the clubhouse and the communal facilities, they seldom mention with whom lies the responsibility for managing the day-to-day affairs of these facilities.

Recommendation 20

We recommend that the sales brochures should give the following details about the clubhouse and other facilities in the development:

- (i) whether they are communal facilities;**
- (ii) who has ownership;**
- (iii) who has responsibility for their management; and**
- (iv) the duration of the management.**

Date of completion

The use of the occupation permit as the definition of building completion (paragraph 9.25)

51. A completed unit is defined as one with an occupation permit. It may therefore be only structurally in place but may not be fully fitted out with all the fittings and finishes. An occupation permit can be issued upon the completion of construction of the units and on general compliance with the requirements relating to lifts, fire service installations and connection to water supply. **We would observe that the existing law in relation to the use of the occupation permit as the definition of a building's completion should be reviewed.**

Date of completion of sale and purchase and date of vacant possession (paragraphs 9.28 – 9.29)

52. The importance of these two dates is that they give purchasers an idea as to when they are required to pay the balance of the purchase price and when they can take possession of the property. Purchasers can then make their accommodation and financial plans accordingly.

Recommendation 21

We recommend that all sales brochures should state the date of completion of sale and purchase and the date of vacant possession. The dates need not be expressed in terms of actual dates in the calendar. Instead, they can be expressed by reference to a time frame, such as, a certain period of time from the signing of the ASP.

We recommend that if any of the payment terms is dependent on the occurrence of a contingent event (such as execution of the assignment), the sales brochure or the price list should state the date of the happening of that event.

Sub-sale by original purchaser to sub-purchaser (paragraphs 9.30 – 9.31)

53. The procedures and administration fees for the cancellation of the agreement are not always indicated clearly in sales brochures.

Recommendation 22

We recommend that where developers impose any fees or charges on transfer of title from the original purchaser to a sub-purchaser, or on the cancellation of the purchase agreement, the amount of such fees or charges and the procedures for transfer should be specified clearly in the sales brochure.

Risk in confirmor sale (paragraphs 9.32 – 9.35)

54. If a completed unit is re-sold to sub-purchasers before the legal completion of the original sale, all sub-purchasers will sign in the capacity of “confirmors” in the assignment. The legal interests in the unit will pass direct from the developer to the sub-purchaser at the end of the chain. There is a risk that the sub-purchaser at the end of a chain of sub-sales cannot get good title to the property because of defaults by those further up the chain.

55. **We believe that, in order to protect sub-purchasers, the Law Society should consider (a) requiring solicitors to act as stakeholders of purchase monies in a sub-sale and (b) issuing practice directions requiring solicitors to warn purchasers of the risk inherent in confirmor sales.**

56. **We also consider that the Estate Agents Authority should require estate agents to remind purchasers of the risk involved in confirmor sales.**

Chapter 10

Disclosure requirements for completed units offered for sale by developers (continued)

Financing arrangements (paragraphs 10.2 – 10.3)

57. In the case of local completed residential properties, developers usually require the transaction to be completed within five weeks of signing the preliminary agreement. Purchasers are therefore under some pressure to arrange mortgage facilities. It is thus in purchasers' best interests that sales brochures give them sufficient information as to the terms of the mortgage loans that are offered by banks and other financial institutions.

Recommendation 23

We recommend that:

- (a) Where the developer quotes in any sales literature or advertisement a list of banks providing initial finance, the sales literature should contain a general description of the finance schemes available from the banks so quoted. Where the interest is specified, it should be the rate per annum.**
- (b) Where the developer arranges finance, whether solely or to top up other loans, details of those facilities and the interest rates per annum should be disclosed in the sales literature.**
- (c) Where the developer provides initial finance but later arranges for replacement finance, purchasers should be informed in the sales literature of the possibility of the costs of replacement finance which may be passed to them.**

Interest chargeable for late payment of purchase price (paragraph 10.4)

Recommendation 24

We recommend that the rate of interest per annum chargeable under the ASP for late payment of any part of the purchase price should be stated in the sales literature.

Cooling-off period (paragraph 10.6)

58. Under the existing LACO rule, a purchaser of a Consent Scheme flat is required to sign the formal agreement for sale and purchase within three working days of signing the preliminary agreement. He can withdraw from the preliminary agreement, subject to the forfeiture of five percent of the purchase price or the amount of the preliminary deposit, whichever is the lower. We understand that this LACO rule functions well and believe it can be applied to completed flats in the first-hand market.

Recommendation 25

We recommend that there should be a cooling-off period of three working days after signing the preliminary agreement for local completed residential properties in the first-hand market. A purchaser can elect to cancel the preliminary agreement within the cooling-off period, subject to forfeiture of five percent of the purchase price or the amount of the preliminary deposit, whichever is the lower.

Preliminary agreement for sale and purchase (paragraphs 10.7 – 10.10)

59. It is often difficult to determine from the terms in a preliminary agreement whether it is intended to be binding. It is in consumers' interests that the sales literature should spell this out clearly.

Recommendation 26

We recommend that sales brochures should state that the preliminary agreement or Memorandum for Sale is subject to a cooling-off period of three working days after signing the preliminary agreement. Sales brochures should also state that a purchaser can elect to cancel the preliminary agreement within the cooling-off period subject to forfeiture of five percent of the purchase price or the amount of the preliminary deposit, whichever is the lower.

Right of inspection prior to signing of preliminary agreement (paragraph 10.11)

60. In our view, where a purchaser has a right of inspection before signing the preliminary agreement and he elects to cancel the transaction during the cooling-off period, the preliminary deposits should be liable to forfeiture as mentioned above. If, however, a purchaser does not have the right to inspect the unit before signing the preliminary agreement, the preliminary deposits should not be liable to forfeiture. This would have the advantage of encouraging developers to allow purchasers to view the units before committing themselves to a binding preliminary agreement. For the avoidance of doubt, a purchaser who elects not to view the unit when offered the opportunity to do so by the developer should be treated as if he has viewed the unit.

Recommendation 27

We recommend that if there is no right of inspection prior to signing of the preliminary agreement, the purchaser of a completed residential unit in the first-hand market should not be liable to forfeiture of his preliminary deposits where he takes advantage of the cooling-off period to cancel the preliminary agreement.

Defect liability period (paragraphs 10.12 – 10.14)

61. **We consider that the Defect Liability Period of completed units should run from the date of the Assignment. By executing the Assignment, the purchaser becomes the legal owner of the unit he has bought. It is therefore fair that the Defect Liability Period should run from the date of the Assignment.**

Recommendation 28

We recommend that sales literature should state the duration of the Defect Liability Period and when it will start to run.

Warranties made to the developer by the contractor (paragraphs 10.14 – 10.17)

62. **Grantees of Government leases are often subsidiary shell companies of the developers. Some developers may evade their liability to make good defects in the property by winding up the subsidiary shell company after completion of the development.**

Recommendation 29

We recommend that if the developer is wound up, the benefits of any warranties made to the developer by contractors should be passed on to the Owners' Corporation or the Manager of the development.

We recommend that, notwithstanding any term in the building contract between the developer and the contractor prohibiting the assignment of the developer's rights against the contractor, the purchasers should have the right to take direct legal action against the contractor for any defects in the units.

63. We have considered the feasibility of requiring developers to provide bank bonds to cover defects. Such a requirement works well for projects in the Housing Authority's Private Sector Participation Scheme and **we would like to hear public comments on this issue.**

Deed of Mutual Covenant

DMC guidelines (paragraph 10.23)

64. At present, detailed provisions on the management of multi-storey buildings are contained in the two schedules to the Building Management Ordinance (Cap 344). Cap 344, however, does not contain provisions setting guidelines for the DMC. Instead, Government enforces DMC guidelines by administrative means through the Consent Scheme. We are of the view that the DMC guidelines require statutory backing because they are currently applicable to Consent Scheme properties only. **We consider that Government should set up a Building Management Working Group with a view to giving a statutory basis to the DMC guidelines.**

Salient provisions of the DMC (paragraphs 10.24 – 10.27)

Recommendation 30

We recommend that sales brochures should state the salient provisions of the Deed of Mutual Covenant (DMC). These should include those clauses in the DMC imposing financial obligations and those touching upon everyday usage of the property.

Availability of bilingual copies of DMC (paragraph 10.28)

Recommendation 31

We recommend that the developer should deposit copies of the English and Chinese versions of the DMC at the sales office or the solicitors' office for free inspection during normal office hours. The sales brochure should contain a statement to the effect that the English and Chinese versions of the DMC are so available for inspection.

Private slope maintenance (paragraphs 10.29 – 10.30)

65. The slope adjacent to a building is often owned by individual owners of the building under the terms of the Government Lease. The maintenance of these private slopes is the responsibility of the individual owners.

Recommendation 32

We recommend that if there is actual or potential responsibility for maintaining private slopes, there should be clear notification to purchasers in the sales brochure of that responsibility. The sales brochure should also disclose any existing notice from the authorities to repair and maintain private slopes at the date of its printing. Moreover, if there is responsibility in the Government Lease for maintaining private slopes, that responsibility should be spelt out in the sales brochure.

Duty to maintain terms of DMC unchanged (paragraph 10.31)

Recommendation 33

We recommend that if an uncompleted development has a DMC, developers should have an obligation to keep its terms unchanged when the development later becomes completed with the issue of the occupation permit.

Conditions of the Government lease (paragraphs 10.32 – 10.37)

66. The First Report made certain recommendations in relation to the conditions of the Government Lease. We consider that those recommendations can be extended to local completed residential properties.

Recommendation 34

We recommend that sales brochures should state the following:

- (1) the permitted uses of the individual units as stated in the approved building plans, together with any restrictions on use contained in the Government lease or Conditions of Grant of the land;**
- (2) the original term of the Government lease and its date of expiry;**
- (3) the rent provisions in the Government lease; and**
- (4) that the renewed Government rent may be an apportioned amount of three percent of the rateable value of the building.**

Sales brochures should also contain a general notification to the effect that the Government lease will impose various financial obligations on purchasers and that they are advised to consult their professional advisers accordingly.

Translation of extracts of Government lease into Chinese
(paragraph 10.38)

67. We consider that the Government should prepare a summary of extracts of the Government lease in plain language, in both English and Chinese.

Apportionment of Government rent (paragraph 10.39)

68. There have been complaints that solicitors acting for a purchaser sometimes fail to check whether Government rent is paid up to date before completing a sale and purchase. **We consider that the Law Society should encourage solicitors to properly apportion the respective liabilities of vendor and purchaser to pay Government rent at the time of conveyancing.**

Prices and number of units for sale (paragraph 10.40)

Recommendation 35

We recommend that the price lists of all units offered for sale should be made available to prospective purchasers by developers or their estate agent prior to the payment of any reservation fee or the signing of any preliminary agreement. We recommend that if developers advertise that a certain number of units will be offered for sale, that number of units should be available for sale to the public.

Miscellaneous matters (paragraph 10.41)

69. The First Report made a number of miscellaneous recommendations relating to local uncompleted flats. We consider similar recommendations should be made in respect of local completed units.

Recommendation 36

Name of main contractors, Authorised Person and his firm

We recommend that the names of the main contractors and the Authorised Person and his firm should be disclosed in the sales brochure. For the present purpose, the Authorised Person means the person occupying that position at the time of printing of the sales brochures.

Recommendation 37

Responsibility for transaction fee

We recommend that whenever the sales literature contains information about the prices of the units, it should also state with whom the responsibility for legal costs and stamp duties lies.

Scales of legal costs and stamp duties

We recommend that information on the scales of legal costs (if any) and stamp duties should be provided by developers to purchasers upon request and a note to this effect should appear in the price list or other sales literature containing information about the prices of the units.

Date of printing of sales brochure

We recommend that the sales brochure should carry its date of printing.

Supplementary charges upon taking possession

We recommend that the sales brochure should provide an itemised list of supplementary charges payable by purchasers upon taking possession of their units. If the exact amounts of such charges are unknown, the obligation to pay them should be disclosed in the sales brochure.

Licence fee to Government and charges for right of way

We recommend that where applicable, the sales brochure should state any way leave charges, licence fees or waiver fees payable to Government for water supply/drainage system going through Government land and/or pump room situated on Government land and any fees or charges payable to adjoining lot owners for right of way or easements. The amount of such charges or fees should also be stated, if known.

Recommendation 38

Car park spaces

We recommend that the sales brochure should contain a description of the car park spaces within the development, including their respective numbers for sale, for rent, and those for visitors. If the developer has not yet decided at the date of the printing of the sales brochure any of these matters, the sales brochure should clearly state this fact. Moreover, any descriptions of car park spaces in the sales brochure should be binding on the developer.

Enforcement of the recommendations (paragraph 10.42)

Recommendation 39

We recommend that our recommendations on local completed residential properties sold in the first-hand market should be enforced by legislation.

We recommend that the proposed legislation should have the following features:

- (1) Fines should be sufficiently high to be an adequate deterrent;**
- (2) Civil remedies should be available to enable purchasers to claim damages for loss suffered as a result of a breach of the proposed legislation. A breach of the proposed legislation should be a statutory tort. This remedy of damages for breach of the proposed legislation should only be available to purchasers and sub-purchasers but not to potential purchasers.**

We recommend that there should be clear provisions in the new legislation that nothing in the legislation will detract from the rights of the purchaser under the ASP, and that no clauses in the ASP will detract from the statutory remedies in the legislation.

Chapter 11

70. This chapter gives a summary of recommendations made for completed units sold in the first-hand market.

Chapter 12

The importance of public education

71. We take the view that the best way to protect purchasers is for the purchasers themselves to exercise due care before entering into a transaction. In this respect, public education is very important.

Recommendation 40

We recommend that the Government should launch publicity programmes to educate the public on the need to exercise due care in buying properties. The publicity programmes should alert the public to the need to:

- **Be aware that the purchaser may not be able to obtain the financing advertised.**
- **Note and report defects in the property as soon as possible and in any event within the Defect Liability Period.**
- **Check carefully the Deed of Mutual Covenant as it is an important document.**
- **Check the land uses carefully.**
- **Consider the inherent risks if it is a confirmor sale.**
- **Take note of the charge of Government rent in certain developments.**