

**THE LAW REFORM COMMISSION
OF HONG KONG**

SUB-COMMITTEE ON DEBT COLLECTION

CONSULTATION PAPER ON

**THE REGULATION OF
DEBT COLLECTION PRACTICES**

This consultation paper can be found on the Internet at:
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This Consultation Paper has been prepared by the Debt Collection Sub-committee of the Law Reform Commission. It does not represent the final views of either the Sub-committee or the Law Reform Commission, and is circulated for comment and criticism only.

The Sub-committee would be grateful for comments on this Consultation Paper by 30th September 2000. All correspondence should be addressed to:

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THE LAW REFORM COMMISSION OF HONG KONG

Consultation paper on the regulation of debt collection practices

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Preface

Terms of reference

1. On 30 July 1998, the Chief Justice and the Secretary for Justice referred the following matter to the Law Reform Commission:

“To consider the adequacy of the existing law governing the way in which creditors, debt collection agencies and debt collectors collect debts in Hong Kong without recourse to the court system, and to recommend such changes in the law as may be thought appropriate.”

The Sub-committee

2. The Sub-committee on Regulation of Debt Collection Practices was appointed in November 1998 to consider and advise on the present state of the law and to make proposals for reform. The sub-committee members are:-

Hon Mr Justice Litton PJ, GBM (Chairman)	Permanent Judge of the Court of Final Appeal
Mr Robert G Kotewall, SC (Vice-Chairman)	Senior Counsel
Mr Charles D Booth	Associate Professor Department of Professional Legal Education University of Hong Kong
Mr John (R) Brewer	Secretary & Chief Financial Officer First Ecommerce Asia Limited
Mr Thomas Chan Wai-ki	Chief Superintendent (Crime)(Headquarters) Hong Kong Police Force
Ms Carman Y F Chiu (from November 1998 to January 2000)	Senior Manager (Banking Development) Hong Kong Monetary Authority
Miss Margaret Mary Leong Yuen-fun (from February 2000)	Senior Manager (Licensing & Compliance) Hong Kong Monetary Authority

Mr Junius K Y Ho	Council Member The Law Society of Hong Kong
Ms Rita S C Ho	Assistant Principal Solicitor Money Lenders Section Companies Registry
Mr Robin McLeish	Barrister former Deputy Privacy Commissioner for Personal Data
Mrs Rita L Y Tong	Credit Control Manager (Card Centre) Standard Chartered Bank
Mr Philip K Y Chan (from November 1998 to August 1999)	Principal Assistant Secretary Security Bureau
Miss Eliza K C Yau (from September 1999)	Principal Assistant Secretary Security Bureau
Ms Cathy Wan (Secretary)	Senior Government Counsel Law Reform Commission

3. The Sub-committee considered the reference over the course of ten meetings between 1 December 1998 and 25 November 1999. It will hold further meetings to discuss and evaluate comments on this Consultation Paper.

Chapter 1

Debt collection in Hong Kong

Introduction

1.1 Debt collection often involves the exertion of pressure on the debtor. There is sometimes only a fine line between lawful and unlawful debt collection activities. Every now and then, there are media reports on collection tactics employed by debt collectors. Some of the tactics employed are outrageous, and such incidents are often reported in the headlines.¹ Concern has been expressed that the activities of debt collection agencies are not sufficiently regulated.

1.2 The range of debts referred to debt collection agencies is wide, and includes gambling debts incurred locally and in Macau, commercial debts, defaults on personal loans, credit card accounts, mobile phone accounts, and commission owed to estate agents and others. In 1996, the Police began to compile statistics on debt collection dating back to November 1994. In 1997, there were 447 cases of criminal complaints relating to debt collection activities. The figures rose to 1,672 in 1998 and 3,323 in 1999. These figures do not include nuisance-type complaints. The Police have also done a breakdown of the types of creditors in the debt collection complaints.² 21.4% of the creditors were loansharks in Hong Kong and Macau. 12.8% were banks, financial institutions and credit card companies. About 24% were traders and merchants. In over 40% of the cases the creditors could not be classified due to the debtors' inability or unwillingness to provide information.

1.3 The Hong Kong Monetary Authority has also compiled some statistics on abuses in connection with debt collection. A hotline was set up in April 1996 to provide advice to complainants. From April 1996 to February

¹ For example, on 25 January 1999, it was reported that a fire broke out at around 3:45 a.m. on 24 January in a public housing unit in Kwai Chung, causing the evacuation of about 150 inhabitants. It was found that the water supply and the telephone lines of the unit were disconnected. The nozzle of the water hose in the public corridor was also removed. Inflammable substance and a plastic tube were found at the main door of the unit. It was suspected that the substance was poured into the unit through the letter-box opening in the door. The incident was suspected to be related to debt collection activities as the inhabitants of the unit were indebted to several credit card companies and finance companies. Also, on 10 January 1998, there was extensive media coverage of a police crackdown of a debt collection agency which used intimidatory telephone calls and pornographic fax transmissions to put pressure on debtors and their families. This debt collection agency had operated under the guise of an investment consultancy company since 1995, and by the time of the crackdown, its business volume had reached 20 million dollars owed by about 200 debtors. This debt collection agency charged its fees on a contingent basis, ranging from twenty to forty per cent of the debt.

² Figures for 1999.

1999, a total of 834 complaints were received : about 78% (i.e. 648 cases) complained of nuisance, including repeated phone calls with foul language, frequent visits, the sticking up of posters and spraying paint; about 18% (i.e. 154 cases) related to intimidation, including the use of intimidatory words and threats of arson; and about 4% (i.e. 30 cases) involved the use of violence, including throwing toxic substance, jamming door locks and actual arson. There were also 2 complaints of defamation. As for the status of the complainants, 46.6% were debtors, whereas the others were third-parties including family members and friends of the debtors (43.8%); non-related parties, such as landlords and new tenants occupying premises formerly occupied by the debtors (6%); and referees (3.6%). Although the number of authorised institutions³ against whom complaints have been made is relatively small, the figure rose from 21 (5.7%) in 1996 to 24 (6.6%) in 1997 and to 28 (8.4%) in 1998.

1.4 The Office of the Privacy Commissioner for Personal Data has also received complaints concerning debt collection activities. Malpractices alleged include passing excessive personal data to debt collection agencies, posting debt notices, sending demand letters to non-parties, making nuisance calls, continuing demand after the settlement of debts, and sending open faxes to debtors' workplaces. Twenty complaints were received in 1997. The number rose to 44 in 1998.

1.5 In a survey conducted locally by John Bacon-Shone and Harold Traver, 82% of the respondents said that they would be very concerned or extremely worried if a debt collection agency posted notices in their neighbourhood saying that they owed money. Eighty-nine per cent thought that such activities should be controlled or limited by law.⁴

Industry overview

1.6 The debt collection industry in Hong Kong comprises a wide spectrum of market operators, including large reputable international and local agencies, medium sized agencies, as well as some poorly managed and unscrupulous agencies which might have employed people with triad background.⁵ Although the authorities do not have official statistics on the number of debt collection agencies operating in Hong Kong, it is believed by some market operators that there are about 30 active operators of which not more than 6 operators are generally considered well-managed and sizeable with over 50 members of staff.

1.7 The top end of the debt collection industry is run in a professional and ethical manner. These agencies usually have many years of experience and have a goodwill to protect. Strict policies are developed in

³ Includes licensed banks, restricted licence banks and deposit-taking companies.

⁴ The Law Reform Commission of Hong Kong, *Report on Reform of the Law Relating to the Protection of Personal Data* (Topic 27, 1994), Appendix 2, Question 49. A similar survey conducted in 1996 confirmed this finding.

⁵ According to Police figures about 57 'improper' debt collection agencies were identified in 1999.

matters of recruitment, training, supervision, and the handling of complaints. Stringent and detailed codes of practice for collection are also laid down for the collection staff, covering different aspects of debt collection including the manner in which telephone calls and personal visits should be conducted, the contents and signing authority of demand letters, the way in which payments made by debtors should be handled, and the obtaining and security of personal data.

1.8 The success rate of these well-managed debt collection agencies is generally not very high. One established debt collection agency revealed that their successful collection rate is about 20% and 10% for telecommunications assignments and bank/finance assignments respectively.

1.9 The debt collection business has undergone rapid growth and changes in the past two or three decades. This perhaps is not a coincidence given Hong Kong's emergence as a financial and commercial centre. Like other advanced economies, the extension and use of consumer credit have multiplied over the past thirty years. As at the end of 1996, consumer debt was estimated to be HK\$129,322 million; whereas the figures were only HK\$29,410 million and HK\$19,932 million for 1986 and 1981 respectively.⁶ The fastest growing unsecured credit facility was the credit card which grew from HK\$1,056 million in 1986 to HK\$23,707 million in 1996.⁷

1.10 Unofficial estimates suggest that there are now about 7.3 million credit cards issued in Hong Kong. About 5 million credit cards are issued by authorised institutions⁸ and 2.3 million credit cards are issued by non-authorised institutions. The default rate of repayments has increased since the economic downturn in late 1997. Due to intense competition, banks are still actively promoting their credit card business by means of gifts and other incentives, and new credit cards are issued by banks largely without knowledge of the number of other credit cards already held by their customers. The rate of interest charged by credit card companies is generally between 18% to 30% per annum. For overdue debts in excess of a year, the rate can rise to above 30% per annum.

1.11 Another reason suggested for the rapid growth of the debt collection industry is that, whereas creditors in the 1970's relied mainly on the court system to recover debts, they had by the mid-1980's begun relying more on extra-judicial means of debt recovery since debtors could no longer be imprisoned for non-payment of debts.

⁶ Office of the Privacy Commissioner for Personal Data, Hong Kong, *Consultation Paper on Draft Code of Practice on Personal Data Privacy : Consumer Credit Reference Services*, April 1997 at page 2.

⁷ As above.

⁸ See foot-note 3 above.

Chapter 2

Some features of extra-judicial debt collection

Stages of debt collection

2.1 The debt collection process can usually be divided into three stages:¹

- (1) the creditor or an agent acting on his behalf makes informal attempts at collection;
- (2) the creditor brings a court action for recovery of the debt; and
- (3) the court makes an order for payment, which is followed by attempts at enforcement.

2.2 The whole process of debt recovery may be, and sometimes is, protracted. This protracted process, however, has a useful “filter effect”. At each stage, there should be and are fewer cases than at the previous stage, either because of settlement of the debt or the creditor’s decision to abandon pursuit.² Given the Sub-committee’s terms of reference, this Consultation Paper will examine only the first stage of debt collection. It is, however, useful to bear in mind that the stages of debt collection are inter-related. The effectiveness of the later stages of debt collection have a bearing on an earlier stage. Conversely, if the preliminary stage is ineffective or stifled, more cases would have to continue on to the later stages.

Different types of debt collection activities

2.3 Debt collection activities can be broadly categorised into three types : those which are legitimate, those which include some form of harassment, and, lastly, those which involve activities which are clearly criminal in nature.

2.4 Collection tactics which amount to criminal offences include:

- making threatening telephone calls;

¹ Scottish Law Commission, *Report on Diligence and Debtor Protection* (1985) at page 9.

² Scottish Law Commission, cited above, at page 11.

- sending obscene or offensive fax messages;
- jamming glue into door locks of the debtor's home;
- splashing paint outside the debtor's home;
- chaining up the door or gate of the debtor's home;
- obtaining by bribery the debtor's particulars from public utility companies;
- intimidation;
- false imprisonment;
- assault;
- arson; and
- murder.

2.5 Harassment or nuisance type tactics are often employed to collect debts. Although less dangerous in nature than the clearly illegal debt collection tactics, the use of harassment is widespread and a cause for serious concern in Hong Kong. Examples are:

- pestering the debtor with persistent phone calls;
- embarrassing the debtor by publicising his particulars and information on the outstanding debt;
- sending open faxes to the debtor's office or workplace; and
- pestering the debtor's referees, family members and friends either for repayment or information about the debtor's whereabouts.

2.6 Other improper practices in debt collection include:

- using false names to communicate with the debtor;
- making anonymous calls and sending unidentifiable notes to the debtor to avoid being traced by police;
- switching off any tape-recorder before making abusive or threatening remarks to the debtor; and
- sub-contracting debt collection work to outsiders or gangsters.

Extra-judicial debt collection

2.7 The extra-judicial debt recovery process is sometimes referred to as the pre-action stage or the informal collection stage. In one study³, the following observations were made on extra-judicial debt recovery:

“The vast majority of outstanding debts are collected by the efforts of the creditor himself or his agent without the commencement of an action against the debtor. The principal reason is economic; debt collection by one's own collection department or by a collection agency is likely to be much cheaper than debt collection by a lawyer. The creditor may

³ Institute of Law Research and Reform of Edmonton, Alberta, *Debt Collection Practices* (Report No 42 June 1984).

steer away from legal action for other reasons, including a desire to keep the debtor as a potential customer, but the cost factor is probably the most important reason for using some form of extra-judicial collection method in preference to an expensive lawsuit.”⁴

2.8 The Creditors Survey⁵ compiled by the Central Research Unit (“the C.R.U. Creditors Survey”) of the Scottish Office yielded similar findings:

“When default in payment of a debt occurs, the creditor usually pursues its recovery by means of ‘informal’ techniques such as reminders or letters threatening legal proceedings. In the early stages, the creditor normally has an interest in retaining the debtor as a customer and will usually be anxious not to dissipate goodwill, at least until more information becomes available on the nature of the default and the debtor’s intentions or ability to pay.”⁶

2.9 The same survey further found that the scale of default which required some form of pursuit varied from one in four of all accounts to one in ten. After creditors have exhausted their own informal recovery procedures, about three-quarters of them passed over the details of the debt to a debt collection agency or a solicitor. Debt collection agencies usually write further letters and may visit the debtor before deciding whether a court action is worthwhile.⁷

2.10 Further, according to the C.R.U. Creditors Survey:

“All creditors said that while their aim was to secure as quick and inexpensive settlement as possible, they wish to retain customers, and they are sympathetic to debtors’ genuine problems, such as bereavement, illness and unemployment. All creditor organisations stressed how difficult it is for them to know the debtor’s circumstances, and that the initiative lies with the debtor to inform the creditor of the reasons for default. All creditors said they were prepared to agree to alternative payment arrangements if the debtor was unable to pay at once.”⁸

2.11 The same view was echoed in a Canadian study which stated:

“Creditors and collectors uniformly say that they are anxious to discover why the debt is not being paid, and if the reason is misfortune or some defence to the claim, this information will be taken into account.”⁹

⁴ As above, at paragraph 2.1.

⁵ Report No. 8, Central Research Unit Papers (1981).

⁶ Scottish Law Commission, *Report on Diligence and Debtor Protection* (1985) at paragraph 2.16.

⁷ As above.

⁸ As above.

⁹ Institute of Law Research and Reform of Edmonton, Alberta, cited above, at paragraph 6.28.

2.12 Although empirical data was not available, the C.R.U. Creditors Survey found that informal recovery procedures resulted in satisfactory arrangements for payment in the great majority of default debts, and estimated that in many organisations the proportion of default debt cases reaching the court stage was less than 1%.¹⁰

2.13 These studies indicate that the extra-judicial debt collection process is beneficial to society at large. Debts are repaid more speedily without immediate recourse to the judicial system. Considerable public resources can be freed for other causes. In the following paragraphs we examine the factors which contribute to the occurrence of abuse.

What causes abusive debt collection?

2.14 A consumer's failure to repay a debt may arise from a variety of circumstances. In some cases a consumer may deliberately try to avoid repayment. In others, default arises from over-commitment or changes in financial circumstances resulting from unemployment, business failure, health problems or divorce. Default may also arise because of dispute as to the validity or amount of the debt.¹¹ A study¹² found that the causes of default included initial misjudgement of the ability to repay, the incurring of additional obligations, extravagance by the debtor and, in some cases, plain dishonesty.¹³ Factors which have led to abusive debt collection include -

- the nature of the debt collection process
- the lack of professionalism among some debt collectors
- loose-lending
- economic downturn
- the judicial process in debt recovery.

The nature of the debt collection process

2.15 Debt recovery or collection may involve exerting pressure on the debtor. A collection agency collecting a debt is often more aggressive than the creditor because the collection agency is often retained only after the creditor has made substantial efforts to collect the debt himself. Collection agencies usually charge their clients on a "no collect, no pay" contingency basis. In the event that a debt is successfully collected, the collection agency will retain a percentage of the amount. The percentage may range from 10% to 60%,¹⁴ depending on the amount recovered, the age of the account, and the

¹⁰ Scottish Law Commission, cited above, at paragraph 2.17.

¹¹ Australian Competition and Consumer Commission, *Report on Undue Harassment and Coercion in Debt Collection*, May 1999 at page 31.

¹² Australian Law Reform Commission, Report No. 36.

¹³ As above, at paragraph 21.

¹⁴ Institute of Law Research and Reform of Edmonton, Alberta, cited above, at paragraph 2.9.

value of the business between the agency and the client. Since collection agencies charge clients on a contingency basis, individual debt collectors are usually paid a small salary plus commissions or bonuses. An individual debt collector's monthly remuneration, as well as the agency's earnings, may therefore depend on the ability to pressure debtors into effecting repayment after debtors have neglected or refused to pay creditors directly. The work of a debt collector is thus not usually pleasant. It has to be result-oriented and is likely to involve high tension.¹⁵

The lack of professionalism among some debt collectors

2.16 Whilst operators in the top-end of the debt collection industry are usually well qualified both in terms of experience and qualifications, surveys indicate there is often a lack of professionalism among other debt collection agencies. In Alberta, for instance, where debt collectors are required to be licensed, there is no educational requirement to become a debt collector.¹⁶ The same survey found that collectors in general have no more than a grade 12 education,¹⁷ and complaints have been received about the absence of training for would-be collectors.

2.17 We are not aware of any formal survey conducted in Hong Kong on the educational level of debt collectors, but a recent newspaper article¹⁸ found that debt collectors come from all walks of life. The background of three debt collectors was considered:

Case No. 1

This debt collector graduated from a Canadian University with a degree in economics in 1997. He was introduced by a friend to a debt collection agency and became a debt collector because he had difficulty finding other jobs. Since he had only six months' experience in the debt collection business, he was responsible only for collecting small debts. His clients were mainly credit card companies, mobile phone companies and money-lenders. He had a basic salary of five thousand dollars, and would get a commission of three to four per cent of any recovered debt. The amount of commission he received would not exceed one thousand dollars a month on average. His collection method was to phone up the debtors constantly to annoy them, and to use foul language to intimidate them. He claimed he had never employed illegal tactics.

Case No. 2

This debt collector was a Form 5 graduate, and, like the collector in

¹⁵ As above, at paragraph 2.13.

¹⁶ As above, at paragraph 2.7.

¹⁷ As above, at paragraph 2.10. The equivalent of Grade 12 in Hong Kong is Form 6.

¹⁸ *Ming Pao Daily News*, 19 April 1998 at page F2.

Case No. 1, was introduced by a friend to a debt collection agency because he was unable to find other employment. He had been a debt collector for three years and his average earnings did not exceed seven thousand dollars a month. Although he was eligible for a commission of five to six per cent of the recovered debt, he mentioned that the rate of successful recovery was less than ten per cent given the economic downturn. He admitted he had occasionally resorted to illegal tactics to recover debts. His usual collection tactic was to pay personal visits to the debtors together with two other colleagues.

Case No. 3

This collector has been in the business for ten years and claimed to be a senior member of the debt collection agency. He had a basic salary of eight thousand dollars and a commission of six to eight per cent of the recovered debt. His average monthly earnings amounted to around twenty thousand dollars. He had many ways of obtaining the contact details of debtors, such as bribing the staff of some telephone companies, pager companies and even some government departments. Other sources of information include the Marriage Registry, Companies Registry and car-dealers. This collector usually paid personal visits to the debtors and claimed a success rate of between 10 per cent to 20 per cent. He admitted he had used illegal tactics, and he claimed that debtors were usually reluctant to report them to the police.

Loose-lending

2.18 There is a view that part of the reason for defaults in repayment lies in the availability of easy credit. Certain financial institutions are willing to accept high risks in return for the high profit margin of credit cards and the personal loan business. Some creditors do not exercise sufficient care to ascertain the financial standing or even the solvency of applicants before the loans or credit are granted. An aggressive provider of credit is a danger, not only to the debtor, but also to the debtor's other creditors whose loans may have been responsibly granted.

Economic downturn

2.19 From the point of view of financial institutions, the increase in repayment defaults is mainly caused by the economic downturn in that customers, who were credit-worthy at the time the credit was granted, may have become unemployed or have suffered pay-cuts. The Australian Law Reform Commission in its Report on Debt Recovery and Insolvency¹⁹ found that the most important cause of non-business debt default was an unexpected change in economic circumstances.

¹⁹

Australian Law Reform Commission, Report No. 36, cited above, at paragraph 21.

The judicial process in debt recovery

2.20 At the beginning of this chapter, we mentioned that the stages of debt collection are inter-related in that, the effectiveness of the later stages of debt collection have a bearing on that of the preliminary stage; and if the preliminary stage is ineffective, more cases will proceed to the later stages. During the course of the Sub-committee's deliberation, some members expressed the view that a long-term solution to debt collection problems would be to improve the efficiency of the judicial process both in terms of adjudication and enforcement. This issue will also be discussed later in this Consultation Paper.

Other factors

2.21 We have set out above some factors which contribute towards the occurrence of defaults and may lead to abusive debt collection. There are other factors, such as whether or not there is sufficient legal deterrent against abusive debt collection, and whether or not those deterrents are sufficiently clear. These will be separately examined later.

Chapter 3

Existing criminal sanctions against abusive debt collection in Hong Kong

Criminal law sanctions

3.1 In this chapter, we examine various criminal offences which are often applicable to debt collection activities.

Intimidation

3.2 The offence of intimidation is set out in section 24 of the Crimes Ordinance (Cap 200):

“Any person who threatens any other person -

- (a) with any injury to the person, reputation or property of such other person; or*
- (b) with any injury to the person, reputation or property of any third person, or to the reputation or estate of any deceased person; or*
- (c) with any illegal act,*

with intent in any such case -

- (i) to alarm the person so threatened or any other person; or*
- (ii) to cause the person so threatened or any other person to do any act which he is not legally bound to do; or*
- (iii) to cause the person so threatened or any other person to omit to do any act which he is legally entitled to do,*

shall be guilty of an offence.”

3.3 The recent case of *R v Chan Kai Hing*¹ shows how section 24 applies to debt collection activities. The appellant was a debt collector who, together with another colleague, went to the home of a debtor who owed a bank a sum of money. An argument ensued at the door, and the debtor alleged that the debt collector had uttered a threat that if the debtor did not repay, then the debt collector would set fire to the flat. The debt collector maintained that there was some dispute but no utterance as alleged, and that the visit was a lawful debt collection exercise. The debt collector was convicted by the magistrate of one count of criminal intimidation. The magistrate, however, made some inconsistent remarks concerning the *mens rea* of the debt collector. At one point, the magistrate said that the debt collectors' comments were said "in the heat of the moment (and) that there was no premeditation". Later, on sentencing, the magistrate said that at the time the debt collector made the threats, he made them with the intent of alarming the debtor. Given the inconsistent remarks, the High Court, on appeal, held that there was some doubt as to whether the magistrate had considered the issues raised in the case of *R v Lo Tong Kai*,² and the court decided to set aside the conviction due to a lurking doubt as to whether the conviction was safe or satisfactory.

3.4 In *R v Lo Tong Kai* a defendant was convicted of criminal intimidation and sentenced to three months' imprisonment. The conviction was set aside on appeal because of doubts concerning the extent to which the surrounding circumstances were taken into consideration. McMullin J made some observations on the requirements of section 24:

*"To my mind therefore it was of the greatest importance that the court should have considered whether the words used were 'wild and whirling words' uttered in exasperation by a man driven beyond the point of endurance by opposition offered to him in his legitimate rights as owner of premises, and signifying nothing more than an instinctive outburst of spleen, or whether they were uttered with a genuine intention of causing fear or were, in the circumstances of their utterance, likely to produce that effect".*³

3.5 While section 24 of the Crimes Ordinance (Cap 200) deals with threats, Section 25 deals with assaults and reads:

"Assaults with intent to cause certain acts to be done or omitted

Any person who beats or uses any violence or force to any person with intent in any such case to cause such person or any other person to do any act which he is not legally bound to do, or to omit to do any act which he is legally entitled to do, shall be guilty of an offence."

¹ [1997] 3 HKC 575.

² [1977] HKLR 193.

³ As above, at page 196.

3.6 Any person who is guilty of section 24 or 25 is liable on summary conviction to a fine of \$2,000 and to two years' imprisonment and is liable on conviction upon indictment to five years' imprisonment.⁴

Criminal damage to property

3.7 If a debt collector damages or destroys property belonging to another, or threatens to do so, such acts are covered by sections 60 and 61 of the Crimes Ordinance (Cap 200):

“60. Destroying or damaging property

(1) A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.

(2) A person who without lawful excuse destroys or damages any property, whether belonging to himself or another -

- (a) intending to destroy or damage any property or being reckless as to whether any property would be destroyed or damaged; and*
- (b) intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered,*

shall be guilty of an offence.

(3) An offence committed under this section by destroying or damaging property by fire shall be charged as arson.

61. Threats to destroy or damage property

A person who without lawful excuse makes to another a threat, intending that other would fear it would be carried out, -

- (a) to destroy or damage any property belonging to that other or a third person; or*
- (b) to destroy or damage his own property in a way which he knows is likely to endanger the life of that other or a third person,*

⁴

Section 27.

shall be guilty of an offence.”

3.8 Contravention of these sections carries heavy penalties. A person guilty of arson under section 60 or of an offence under section 60 (2) (whether arson or not) is liable on conviction upon indictment to imprisonment for life, whereas a person guilty under other sections in the same Part is liable on conviction upon indictment to imprisonment for ten years.⁵

3.9 In *R v Shum Hon Kai & Another*,⁶ arson charges were brought for debt collection activities. The facts concerned a Miss Lau who was the girlfriend of the second appellant. During the course of their relationship, the second appellant lent \$7,000 to Miss Lau's cousin, who did not repay the loan. After the second appellant's relationship with Miss Lau had ended, he held her responsible for the loan. The second appellant discussed the matter with his friend, the first appellant, and they agreed to set fire to the entrance of Miss Lau's flat in a multi-storey building. They did so at about 1 am. The first appellant lit the fire while the second appellant acted as lookout. The first appellant burned himself accidentally and suffered serious burns. Both pleaded guilty to the charge of arson but appealed against the sentence of eight years' imprisonment. The Court of Appeal expressed the view that as the degree of seriousness in arson cases might vary considerably, it would be unwise to lay down any sentencing guidelines. The court did not doubt the seriousness of the offence committed, but said that mitigating circumstances should have been taken into consideration. These included the age of the first appellant, that he surrendered himself and that he pleaded guilty. The first appellant's sentence was reduced to six years. As for the second appellant, he was already 23 years of age and did not have a clear record. Although he merely acted as the lookout, no distinction was made between him and the first appellant, and he also received a reduced term of six years.

Threats to kill or murder

3.10 Section 15 of the Offences Against the Person Ordinance (Cap 212) stipulates that any person who maliciously sends any letter or writing threatening to kill or murder another shall be guilty of an offence triable upon indictment and shall be liable to imprisonment for ten years.

Theft and blackmail

3.11 The offence of blackmail is said to be usually associated with triad activity,⁷ but it is also applicable to debt collection cases. Since goods

⁵ Section 63.

⁶ [1988] HKC 279.

⁷ M Findlay, C Howarth and I Dobinson, *Criminal Law in Hong Kong, Cases and Commentary* (2nd edition) at page 483. (‘M Findlay’)

obtained by blackmail are to be regarded as stolen goods,⁸ debt collectors who recover debts by blackmail may also be convicted of theft.⁹

3.12 The offence of blackmail is set out in section 23 of the Theft Ordinance (Cap 210):

“(1) A person commits blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces; and for this purpose a demand with menaces is unwarranted unless the person making it does so in the belief -

(a) that he has reasonable grounds for making the demand; and

(b) that the use of the menaces is a proper means of reinforcing the demand.”

3.13 The elements of the offence are that there must, first, be a demand, which can be expressed or implied.¹⁰ The demand need not be communicated to the victim, and it is not a requirement that the victim is threatened or intimidated.¹¹ In *R v Tsang Yip Fong*,¹² for instance, the demand and menaces were communicated to an undercover police officer instead of the intended victim. Apart from a demand, there must be menaces or threats which are such that an ordinary person would be influenced or made apprehensive and therefore willing to accede to the demand.¹³ In *R v Lee Keng-kwong*,¹⁴ for instance, claiming to be a member of a triad society was held to be an implied menace for the purposes of blackmail.

3.14 The case of *R v Lam Chiu Va*¹⁵ illustrates the application of the offence of blackmail to debt collection activities. The defendant invested \$200,000 in a company in 1992. By 1993, the defendant wanted to withdraw from the company and sought the return of his investment in full. Other members of the company claimed that because of trading losses, he could only have \$60,000 back. However, company accounts were not produced and no money was returned to the defendant. In April 1994, the defendant went to the company's premises together with five men to demand repayment. The defendant remained for most of the time at the door of the office whilst the men entered and made demands for the return of \$200,000, using threats and minor assaults. As a result, two of the partners of the company drew several cheques in favour of the defendant. One cheque was for \$10,000, representing the aggregate balance in the company account. Four other

⁸ Section 26 (4) of the Theft Ordinance (Cap 210).

⁹ *R v Lam Chiu Va* [1996] 1 HKC 302.

¹⁰ M Findlay, cited above, at page 483.

¹¹ As above.

¹² [1993] 1 HKC 308.

¹³ M Findlay, cited above, at page 483.

¹⁴ Criminal Appeal No. 182 of 1992.

¹⁵ [1996] 1 HKC 302.

cheques, each for \$50,000, were drawn. The men directed the two partners to obtain loans from friends and relatives, which the partners did to the extent of \$100,000. The defendant cashed three cheques from the bank. Before leaving the company premises, the men obtained IOUs from the two partners for the remainder of the demand, and warned that the sum must be repayed within a month or they would be physically assaulted. The defendant was convicted of blackmail and theft pursuant to sections 23 and 26(4) of the Theft Ordinance, and a sentence of eight months was imposed. The defendant relied on *R v Skivington*¹⁶ and appealed on the ground that he honestly believed that he had a just claim to the money, and could not be convicted of theft simply because the means of obtaining the money were improper. The appeal was dismissed because first, *R v Skivington* has been superseded by section 26(4) of the Theft Ordinance (Cap 210); and second, a defence of claim of right, which allows a defendant to seize or reclaim property over which he honestly believes he has rights, did not avail the defendant.

Assault

3.15 Various offences relating to assaults are in the Offences Against the Person Ordinance (Cap 212). Assault is an act by which the defendant intentionally or recklessly causes a person to apprehend immediate and unlawful physical violence; and if physical violence does occur, it amounts also to the offence of battery.¹⁷ Even words may constitute an assault.¹⁸ Relevant sections of the Offences Against the Person Ordinance (Cap 212) are set out:

“17. ... wounding ... with intent to do grievous bodily harm.

Any person who –

(a) unlawfully and maliciously, by any means whatsoever, wounds or causes any grievous bodily harm to any person; ...

(b) ...

(c) ...

with intent in any of such cases to maim, disfigure, or disable any person, or to do some other grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detain of any person, shall be guilty of an offence triable upon indictment, and shall be liable to imprisonment for life.

19. Wounding or inflicting grievous bodily harm

Any person who unlawfully and maliciously wounds or inflicts any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of an

¹⁶ (1967) 51 Cr App R 167.

¹⁷ M Findlay, cited above, at page 378.

¹⁸ See the House of Lords decision in *R v Ireland & Burstow* [1998] AC 147, per Lord Steyn at 162.

offence triable upon indictment, and shall be liable to imprisonment for 3 years.

39. Assault occasioning actual bodily harm

Any person who is convicted of an assault occasioning actual bodily harm shall be guilty of an offence triable upon indictment and shall be liable to imprisonment for 3 years.

40. Common Assault

Any person who is convicted of a common assault shall be guilty of an offence triable either summarily or upon indictment, and shall be liable to imprisonment for 1 year.”

Mens rea for assault

3.16 As for the required intention to cause grievous bodily harm under section 17, regard must be had to the weapon, if any, used and the manner in which it was used. Striking with the fists *per se* is not sufficient evidence of an intent to cause grievous bodily harm, even though this may in fact result.¹⁹ An intention to frighten is insufficient, and so is recklessness as to whether grievous bodily harm will result.²⁰ Where several defendants participate in a gang attack, as in *The Attorney General v Sin Wai Lun*,²¹ no distinction would normally be drawn between those who actually use violence and those who are in the vicinity ready to perform other tasks. All would be equally guilty because without each playing his full part, the crime would be less likely to be perpetrated.

3.17 With regard to the *mens rea* required under sections 19 and 39 of the Offences Against the Person Ordinance (Cap 212), it was held in the House of Lords in *R v Savage* and *R v Parmenter*²² that for unlawful and malicious wounding or inflicting grievous bodily harm,²³ the prosecution must prove that the defendant either intended or actually foresaw that his act would cause harm. It is not sufficient to show merely that he ought to have foreseen that his act would cause harm. It is unnecessary for the prosecution to show that the accused intended or foresaw that his unlawful act might cause physical harm of the gravity described in the section, that is, either wounding or grievous bodily harm. As for assault occasioning actual bodily harm,²⁴ the prosecution has to prove that the defendant committed an assault and that actual bodily harm was occasioned by the assault. There is no need to prove that the defendant intended to cause some bodily harm or was reckless as to

¹⁹ *Halsbury's Statutes* Vol 12 at page 98.

²⁰ As above.

²¹ [1988] HKC 431.

²² [1991] 4 All ER 698.

²³ Section 20 of the Offences Against the Person Act 1861. Its wording is similar to section 19 of the Offences Against the Person Ordinance (Cap 212).

²⁴ Section 47 of the Offences Against the Person Act 1861. Its wording is similar to section 39 of the Offences Against the Person Ordinance (Cap 212).

whether such harm would be caused. The House of Lords also held that a verdict of assault occasioning actual bodily harm under section 47 is a permissible alternative verdict on a count alleging unlawful wounding under section 20 of the Offences Against the Person Act 1861.

3.18 Assaults in connection with debt collection activities have received judicial consideration. In *R v Chan Yau Hang and Another* the Court of Appeal pointed out that:²⁵

*“We agreed with the view of the trial judge that there is a public interest in deterring those who might seek to collect debts by these appalling methods.”*²⁶

3.19 Another example is *R v Choi Wai Kwong*.²⁷ The defendant was the victim's sub-contractor who was owed \$310,000 under the sub-contract. Amongst other attempts of recovering the debt, the defendant and three other men went to the victim's office to make demands for repayment. When the victim refused to pay, the men began to assault him. It was alleged by the victim that he was hit with a hammer. Medical reports showed only relatively minor injuries. The defendant was convicted by the magistrate of assault occasioning actual bodily harm. On appeal by the defendant, the appeal was allowed in part, and a conviction of common assault was entered in substitution for assault occasioning actual bodily harm. Whether the bodily harm inflicted amounted to 'actual bodily harm' was a question of degree, and actual bodily harm meant a harm that was more than trifling. Transitory pain was not enough. A cut, or an area of burning, was actual bodily harm unless it was very minor.

False imprisonment

3.20 Apart from being a tort, false imprisonment is also a common law offence which is often relevant to debt collection activities. False imprisonment is committed where a defendant unlawfully and intentionally or recklessly restrains another's freedom of movement from a particular place.²⁸ There is little authority

²⁵ [1983] 1 HKC 107. The victim incurred a heavy gambling debt in Macau which, together with interest, amounted to \$165,000. When the victim failed to effect repayment as scheduled, he was seized by a number of men in Kowloon and beaten, as a result of which he sustained a black-eye. The victim was then taken to a room where he was burnt with a cigarette, leaving five burn marks on his body, one of which penetrated all layers of the skin, although the others only penetrated the first layer of the epidermis. The defendants were convicted in the District Court on two charges of assault occasioning actual bodily harm, and one charge of false imprisonment/forcible detention under section 42 of the Offences Against the Person Ordinance (Cap 212). The defendants were acquitted of the latter charge on appeal because the District Court did not have jurisdiction to try any offence punishable with life imprisonment, subject to a few specific exceptions. In relation to the first assault charge in respect of which they received a term of imprisonment of 18 months, the Court of Appeal dismissed the appeal and said: “Had the first assault been an isolated matter, without any background, such as there was to this case, a term of imprisonment of 18 months would have been a very severe one for two men who, for practical purposes, were without previous convictions. However, it is necessary, when determining the correct sentence, to take into account the fact that this was part of a course of conduct which was designed to terrify a debtor and to force him under threat of assault, and under actual assault and ill-treatment, to repay the loan which had been made to him.

²⁶ Per Roberts CJ, at page 110.

²⁷ [1989] 2 HKLR 31.

²⁸ *R v Rahman* (1985) 81 Cr App Rep 349, at 353.

on the nature of the *mens rea* required, but it is believed that *Cunningham* recklessness²⁹ is required.³⁰

3.21 To establish false imprisonment, the case of *R v Cheung Wan Ing* decided that:

*“Where there has been no physical restraint placed upon a person’s movements, a court must, at the very least, need cogent evidence of some real danger threatened by the culprit and feared by the victim in exercising freedom of movement before finding the offence of false imprisonment has been established.”*³¹

3.22 This requirement was overruled in *R v Chan Wing Kuen and Another*³² by the Court of Appeal. The case concerned a victim who incurred a gambling debt in Macau and was accompanied back to Hong Kong by the first defendant in order to collect the debt. At the Hong Kong Macau Terminal, they were met by the second defendant and two other men. The victim was told to board a taxi and was taken to Chai Wan where, after he had made some unsuccessful calls to raise money, he was taken to a karaoke bar and kept there until 4 am the following morning, while more unsuccessful calls were made. The four men then rented two rooms at a hotel in Chai Wan which they and the victim occupied for several hours. The first defendant was arrested when he was accompanying the victim to meet a friend of the victim to collect some money. The second defendant was arrested some time later. The defendants were convicted of false imprisonment and appealed on the ground that, if the victim had remained with the defendants because he felt he had a moral obligation to repay the debt, it was impossible to say that he had been falsely imprisoned. The appeal was dismissed. The Court of Appeal held:

*“For the offence to be committed it is not necessary that there be evidence that the defendant or defendants uttered a threat to the victim that he was in ‘some real danger’ or indeed that any threat was uttered.”*³³

Accordingly, *R v Cheung Wan Ing* was overruled as being contrary to the ruling on false imprisonment in *R v Rahman*,³⁴ which was cited with approval in *R v Hutchins*.³⁵

²⁹ Smith & Hogan, *Criminal Law* (8th edition) at page 454.

³⁰ “Broadly, the distinction is that *Cunningham* recklessness requires proof that the defendant was aware of the existence of the unreasonable risk whereas *Caldwell/Lawrence* recklessness is satisfied if either (i) he was aware of its existence, or (ii) in the case of an obvious risk he failed to give any thought to the possibility of its existence. Some offences require proof of *Cunningham* recklessness. Others are satisfied by proof of *Caldwell/Lawrence* recklessness.”
Smith & Hogan, cited above, at page 64.

³¹ *R v Cheung Wan Ing* [1990] 1 HKLR 655.

³² [1995] 1 HKC 470.

³³ As above, at page 477.

³⁴ (1985) 81 Cr App Rep 349.

³⁵ [1988] Crim LR 379.

Forcible detention

3.23 The common law offence of false imprisonment has some overlap with section 42 of the Offences Against The Person Ordinance (Cap 212) on forcible detention, which reads:

“Any person who, by force or fraud, takes away or detains against his or her will any man, boy, woman or female child, with intent to sell him or her, or to procure a ransom or benefit for his or her liberation, shall be guilty of an offence triable upon indictment, and shall be liable to imprisonment for life.”

3.24 Section 42 of the Offences Against the Person Ordinance (Cap 212) is similar to section 56 of the United Kingdom Offences Against the Person Act 1861 which has been repealed. There is one reported decision³⁶ in the United Kingdom which involved a father taking away his child.

3.25 There is, however, a Hong Kong Court of Appeal decision in *R v Chan Yau Hang and Another*³⁷ which illustrates the overlap of the common law offence of false imprisonment and section 42. Debt collectors forced a debtor to repay a gambling debt by detaining the debtor in a room and assaulting him. The debt collectors were convicted of false imprisonment in the District Court, but the false imprisonment charge was drafted in such a way that elements of both false imprisonment and section 42 forcible detention were included in the charge. The defendants appealed against conviction on the grounds that first, the particulars of the charge did not satisfy either the common law or statutory offence; and second, the District Court did not have jurisdiction to try the offence under section 42. The appeal against the false imprisonment conviction was allowed. The charge as drafted was:

“False imprisonment, contrary to common law and section 42 of the Offences Against The Person Ordinance (Cap 212).

Particulars of offence:

Chan Yau-hang, Ho Lai-man and Hoi Su-kun, on or between 18 October 1982 and 20 October 1982, in this colony, together with other persons unknown, by force, detained Tong King-yiu against his will.”

The charge was mis-described as false imprisonment because the defendants were actually charged with two offences. Also, although it is usual in charging the common law offence of false imprisonment to assert that the victim was unlawfully and injuriously imprisoned and detained against his will, on closer examination it is apparent that such particulars of offence were inappropriate to either offence. Furthermore, the Court of Appeal found that the District Court did not have jurisdiction to try any offence which was punishable with life imprisonment with the exception of a number of specific

³⁶ *R v Austin* [1981] 1 All ER 374.

³⁷ [1983] 1 HKC 107.

offences which did not include section 42.³⁸

Triad offences

3.26 Some debt-collectors claim that they are triad members in the debt collection process. They may also be guilty of offences under the Societies Ordinance (Cap 151). Under section 20(2) of the Societies Ordinance (Cap 151):

“Any person who is or acts as a member of a triad society or professes or claims to be a member of a triad society ... shall be guilty of an offence and shall be liable on conviction on indictment -

- (a) in the case of a first conviction for that offence to a fine of \$100,000 and to imprisonment for 3 years; and*
- (b) in the case of a second or subsequent conviction for that offence to a fine of \$250,000 and to imprisonment for 7 years.”*

3.27 Apart from section 20, the more serious offence under section 19 would be applicable to office-bearers of triad societies. Section 19(2) of the Societies Ordinance (Cap 151) reads:

“Any office-bearer or any person professing or claiming to be an office-bearer and any person managing or assisting in the management of any triad society shall be guilty of an offence and shall be liable on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 15 years.”

3.28 The term ‘office-bearer’ is defined, in relation to triad societies, as any person holding any rank or office other than that of any ordinary member.³⁹ In triad societies, a hierarchy of authority and control exists whereby senior office-bearers direct the activities of lesser members, and the heavier penalties under section 19 reflects the increased culpability of those who are in control.

3.29 Whether a defendant has joined a triad society is a question of fact, and a “bald admission”⁴⁰ may in some unusual circumstances be

³⁸ This latter point was further explained in *R v Wong Kwok Lun* [1984] HKC 50. The Court of Appeal mentioned that because of a lacuna in the law, there was no jurisdiction in the District Court to try this offence. This came about when, in 1982, the previous maximum term of 14 years’ imprisonment was altered by the legislature to one of life imprisonment. Pursuant to section 88 of the Magistrates Ordinance (Cap 227), and Pt III of the Second Schedule, the Secretary for Justice may apply to transfer to the District Court for trial of offences listed therein which carry a sentence of life imprisonment. The schedule has not been amended to permit section 42 offence to be so transferred and tried.

³⁹ Societies Ordinance (Cap 151) section 2.

⁴⁰ “By a ‘bald admission’ we take to be meant a statement such as ‘I am a member of such and

regarded as sufficient evidence that an offence under section 20(2) has been committed, though in most cases “proof of other facts to indicate membership, whether by way of admission by the defendant or otherwise”,⁴¹ would be required.

Summary Offences Ordinance (Cap 228)

3.30 Another criminal offence which may be applicable to some abusive debt collection activities is found in section 20 of the Summary Offences Ordinance (Cap 228) which reads:

“Any person who -

- (a) sends any message by telegraph, telephone, wireless telegraphy or wireless telephony which is grossly offensive or of an indecent, obscene or menacing character; or*
- (b) sends by any such means any message, which he knows to be false, for the purpose of causing annoyance, inconvenience or needless anxiety to any other person; or*
- (c) persistently makes telephone calls without reasonable cause and for any such purpose as aforesaid,*

shall be liable to a fine of \$1,000 and to imprisonment for 2 months.”

3.31 Making persistent telephone calls is a common technique employed by debt collectors. However, section 20 is not designed to tackle abusive debt collection, and it is likely that a fine of a few hundred dollars would be imposed in most cases brought under section 20. The scope of the section is also somewhat restrictive. As long as a debt is in fact outstanding, there is a reasonable cause to make the call, and if the telephone messages are not indecent or of a menacing character, a debt collector can persistently make telephone reminders without violating this section.

Post Office Ordinance (Cap 98)

3.32 By virtue of section 32(1)(f) of the Ordinance, a person who sends by post “any obscene, immoral, indecent, offensive or libellous writing, picture or other thing” is guilty of an offence punishable by a fine of \$20,000 and imprisonment for 6 months.

such a society’ and no more, which we assume that the magistrate would reject as being a matter of mere hearsay or belief.” Per Cons V-P in AG v Chik Wai-lun [1987] HKLR 41.

⁴¹ AG v Chik Wai-lun [1987] HKLR 41 per Cons VP.

Criminal sanctions for participation

The principal

3.33 Abusive debt collection activities are often carried out by more than one person. Where there are several participants in a crime, the principal is the one whose act is the most immediate cause of the *actus reus*.⁴² It is possible to have two or more principals in the first degree to the same crime. Hence, if two debt collectors both agree to attack and do attack a victim to pressure the victim into repaying a loan, then both are guilty of assault as joint principals.

Secondary participation

3.34 In other cases, where there is participatory conduct by one person, another may have to bear or share criminal responsibility under section 89 of the Criminal Procedure Ordinance (Cap 221). This states that any person who “aids, abets, counsels or procures the commission by another person of any offence shall be guilty of the like offence”. The mental state required for aiding and abetting involves actual knowledge of, or wilful blindness towards, the circumstances which constitute the offence, which is not the same as the *mens rea* required of the principal party.⁴³ Knowledge of the offence is sufficient if the offence committed is of the type contemplated by the secondary party, and knowledge does not have to be complete in detail.⁴⁴ There is a large body of case law on this area of law and application of the principles is not free from difficulty. Applied to debt collection cases, a creditor or other party may be liable in various situations.

3.35 Intention to aid – As long as it is proved that a person intended to do the acts which he knew to be capable of assisting or encouraging the commission of the crime, it is not necessary to prove his intention that the crime be committed.⁴⁵ Therefore, a creditor or other person who knew that the debt collectors would employ illegal means to collect debts, and either drove the debt collectors to commit the crime or provide weapons and tools to the debt collectors, that person may be liable as a secondary party.

3.36 Common Purpose – A secondary party will be liable for the acts of the principal party if the principal party has in the course of endeavouring to carry out the common purpose committed another crime.⁴⁶ Hence, if the creditor and the debt collector have the common purpose to cause grievous

⁴² M Findlay, cited above, at page 39.

⁴³ As above, at page 40. See also Smith & Hogan, 8th edition, at pages 140 and 141.

⁴⁴ *R v Bainbridge* [1960] 1 QB 129. See also Smith & Hogan, 8th edition at page 142.

⁴⁵ Smith & Hogan, 8th edition, at page 137. See *Lynch v DPP for Northern Ireland* [1975] AC 653, where D2 drove D1 to the place where he knew that D1 intended to murder a policeman, D2's intentional driving of the car was aiding and abetting.

⁴⁶ Smith & Hogan, cited above, at page 142.

bodily harm to the debtor, and the debt collector, endeavouring to do so, kills the debtor, both the creditor and debt collector are guilty of murder.

3.37 Transferred malice – If a secondary party has a common purpose with the principal party to injure A, and the principal party, endeavouring to injure A, wounds B accidentally, then both the secondary party and the principal party is liable for wounding under the doctrine of transferred malice.⁴⁷

3.38 Participation by inactivity – Where one person has the right to control the actions of another and he deliberately refrains from exercising it, his inactivity may be a positive encouragement to the other to perform an illegal act, and, therefore, an aiding and abetting.⁴⁸ Hence, if a creditor hires some debt collectors to collect debt, and the creditor just stands by and watches while the debtor is being beaten up, the creditor may be liable for assault as a secondary party.

Vicarious liability

3.39 In some limited circumstances, the law holds a defendant criminally responsible even where there is no direct *actus reus* committed or *mens rea* possessed by him.⁴⁹ Vicarious criminal liability is imposed in two ways. First, a person under certain statutory duty may be held liable for the acts of another⁵⁰ if he has delegated to that other person the performance of the statutory duty. Second, an employer may be held vicariously liable because acts done physically by his employee may, in law, be treated as the employer's act. Unlike the law of tort, an employer is not generally liable for the acts of the employee performed in the course of employment under the criminal law. An employer may, however, be held vicariously liable for the criminal acts of an employee under the "delegation" principle. In *Allen v Whitehead*,⁵¹ the act of the employee and his *mens rea* were both imputed to his employer, not simply because he was an employee, but because the management of the business had been delegated to him.⁵² The rationale seems to be that the employer is responsible for appointing the employee and ensuring that no criminal offences are committed by the employee within the course of employment. If this were not the case, employers could easily avoid prosecution by deliberately avoiding personal knowledge of illegal activities.⁵³

⁴⁷ As above. But see exception as in the old and famous case of *Saunders v Archer* (1573) 2 Plowd 473, where there is a deliberate, and not an accidental, departure from the agreed plan.

⁴⁸ Smith & Hogan, cited above, at page 136.

⁴⁹ M Findlay, cited above, at page 76.

⁵⁰ The other person may or may not be the employee. In *Linnett v Metropolitan Police Commissioner* [1946] KB 290, one of two co-licensees was held liable for the acts of the other in knowingly permitting disorderly conduct in licensed premises.

⁵¹ [1930] 1 KB 211.

⁵² Smith & Hogan, cited above, at page 177.

⁵³ M Findlay, cited above, at page 77.

3.40 There is thus a real possibility that a debt-collector's employer may be held vicariously liable for the illegal acts of the debt-collector if the debt-collector is given full conduct of the debt collection work and decisions are delegated to the employee.

Corporate liability

3.41 Corporate liability stems from the legal principle that a corporation is a legal person. A corporation acts through its controlling officers whose acts and states of mind are imputed to the corporation whenever they are acting in their capacity as controlling officers.⁵⁴ Therefore, corporations may be liable for an offence which requires *mens rea*. There are certain limitations on corporate liability, the major one being that a corporation can only be convicted of offences which are punishable with a fine. It has been held that a corporation may not be indicted for manslaughter or an offence involving personal violence.⁵⁵ This was doubted in *ICR Haulage Ltd*,⁵⁶ where Stabile J thought that "if the matter came before the court today, the result might well be different". The point has now been clarified in *P & O European Ferries Ltd*,⁵⁷ which held that an indictment for manslaughter would lie against a company.

⁵⁴ As above, at page 88. See also *Meridian Global Funds Management Asia Ltd. v. Securities Commission*, [1995] 2 AC 500 PC.

⁵⁵ *Cory Bros Ltd* [1927] 1 KB 810.

⁵⁶ [1944] KB 551.

⁵⁷ (1990) 93 Cr App Rep 72. Also [1991] Crim LR 695.

Chapter 4

Existing civil remedies for abusive debt collection

Civil remedies for abusive debt collection

4.1 If any person is wronged by abusive debt collection activities, that person may bring civil proceedings seeking civil remedies, which are likely to include damages and injunctive relief. If a person suffers any personal injury (including physical or psychological injury), pecuniary loss, or damage to property, that person has the right to claim compensation which would put him in the same position as he would have been in, if he had not been wronged. The injured person may also apply to court for an injunction restraining the commission or continuance of the wrongful act. An injunction, however, cannot be demanded as of right, and one will not, in general, be granted where damages would be a sufficient remedy. Civil claims may be brought under numerous heads, and those often applicable to debt collection activities are described below.

Trespass to the person

4.2 The tort of trespass to the person includes assault, battery and false imprisonment. This tort has its counterpart in the criminal law. In many situations involving this tort, the claimant has the choice of seeking redress in tort, or under the criminal law or both.

4.3 The direct and intentional application of unwanted physical contact on another person may constitute the tort of battery.¹ There is no requirement to prove that the physical contact caused or threatened any physical injury or harm. Examples of battery from some old cases include touching another in a rude and offensive manner,² spitting in another's face,³ throwing water upon somebody,⁴ or pulling a chair from under another whereby that person falls to the ground.⁵

4.4 As for assault, it is an overt act indicating an immediate intention

¹ Clerk & Lindsell, *Torts*, 17th edition at 12-05.

² *Cole v Turner* (1704) 6 Mod 149.

³ *R v Cotesworth* (1704) 6 Mod 172.

⁴ *Pursell v Horn* (1838) 8 A & E 602.

⁵ *Hopper v Reeve* (1817) 7 Taunt 698.

to commit a battery, coupled with the capacity of carrying that intention into effect.⁶ In other words, an assault is an act causing reasonable apprehension of a battery. Blackstone defined assault as “*an attempt or offer to beat another, without touching : as if one lifts up his cane, or his fist, in a threatening manner at another; or strikes at him but misses him*”.⁷ Salmond and Heuston took the view that words alone probably did not constitute an assault because the intent to do violence must be expressed in threatening acts.⁸ However, Glanville Williams believed that “*a verbal threat of immediate force has all the essential elements of an assault, particularly where it is uttered with the intention of imposing a present restraint upon the conduct of the victim. There is nothing in the English decisions contrary to this view*”.⁹ This view now has the support of the House of Lords.¹⁰ Threats may amount to assault not only when the plaintiff and the defendant are face to face, but also over the telephone.¹¹ In *Wong Kwai Fun v Li Fung*,¹² a debt collection case, the defendant uttered threats of physical violence and death on various occasions including in the presence of the plaintiff and his family, on the telephone and the intercom system. The defendant had struck the plaintiff and members of his family on previous occasions. The court held that the threats constituted actionable wrongs and amounted to assault. It is believed that the emphasis on acts rather than words reflects the conditions of earlier times when means of communication were more restrictive.¹³

False imprisonment

4.5 “A false imprisonment is complete deprivation of liberty for any time, however short, without lawful cause”.¹⁴ It appears that neither the use of force nor any direct physical contact is necessary to constitute false imprisonment, and neither is the plaintiff’s present knowledge of the confinement. Well known *dicta* support this view:

*“It appears to me that a person could be imprisoned without his knowing it. I think a person can be imprisoned while he is asleep, while he is in a state of drunkenness, while he is unconscious, and while he is a lunatic Of course, the damages might be diminished and would be affected by the question whether he was conscious of it or not.”*¹⁵

4.6 These *dicta* were approved *obiter* by the House of Lords in *Murray v Ministry of Defence*¹⁶ and by the High Court of Hong Kong in *Attorney*

⁶ Clerk & Lindsell, cited above, at 12-12.

⁷ BI Com iii, 120.

⁸ Salmond & Heuston, *Law of Torts*, (20th edition) at page 127.

⁹ Glanville Williams, *Assault and Words*, (1957) Criminal L Rev 219, 224.

¹⁰ *R v Ireland & Burstow*, [1998] AC 147, per Lord Steyn at 162.

¹¹ *Barton v Armstrong* [1969] 2 NSW 451.

¹² [1994] 1 HKC 549.

¹³ D K Srivastava & A D Tennekone, *The Law of Tort in Hong Kong*, 1995 at page 56.

¹⁴ Clerk & Lindsell, cited above, at 12-17.

¹⁵ *Meering v Grahame-White Aviation Co* (1919) 122 LT 44 per Atkin LJ.

¹⁶ [1988] 1 WLR 692.

General v Chan Yuen Lung.¹⁷ It would constitute false imprisonment to chain and padlock a demented person in a home for the aged.

4.7 The action for false imprisonment allows redress to victims of unlawful incarceration.¹⁸ It is in line with the importance attached to the individual's freedom of the person and movement as guaranteed under the Bill of Rights Ordinance (Cap 383).¹⁹

Remedies for assault, battery and false imprisonment

4.8 For assault and battery, if no actual injury has been caused, only nominal damages can be awarded. If some actual physical injury has been caused, damages will be assessed in accordance with law. If a plaintiff has suffered humiliation and ridicule caused by the defendant's intentional act or conduct, aggravated damages may be awarded in addition to damages for the actual injury.²⁰ Assessing damages may be problematic since quantum is not as easily determinable as personal injury and damage to property. In *William Alan Terence Crawley v the Attorney General*,²¹ for example, though the plaintiff did not suffer any physical injury, the manner of his arrest was humiliating, and he was awarded HK\$4,500 as damages, after taking into account injury to his reputation and humiliation.

4.9 With regard to false imprisonment, damages are given to vindicate the plaintiff's rights even though no pecuniary damage has been suffered.²² In exceptional cases, the courts will issue an injunction to restrain future assaults.

Intentional physical harm other than trespass to the person / Intentional infliction of emotional distress

4.10 The tort of intentional infliction of physical harm other than trespass to the person is illustrated in the case of *Wilkinson v Downton*.²³ The tort covers any act or statement of the defendant which is intended to cause physical harm to the plaintiff and which in fact causes illness or injury. Wright J said:

¹⁷ (Unreported) HC Crim App 220 of 1989. Cited by D K Srivastava, cited above, at page 63.

¹⁸ Fleming, *The Law of Torts*, (8th edition 1992), at page 27.

¹⁹ Article 5(1): "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." Article 5(5): "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

²⁰ *Rookes v Barnard* [1964] AC 1129.

²¹ [1987] HKLR 379.

²² Clerk & Lindsell, cited above, at 12-80.

²³ [1897] 2 QB 57. The case involved a practical joke in which the defendant falsely informed a woman that her husband was badly injured in a traffic accident. The woman suffered serious nervous shock which affected her for weeks. It was held that the defendant was liable on the ground that where a person makes a false statement which is intended to be acted on, he must make good damage naturally resulting from its being acted on. An objective test is applied to determine the defendant's intention.

*“the defendant has ... wilfully done an act calculated to cause physical harm to the plaintiff – that is to say, to infringe her legal right to safety, and has in fact thereby caused physical harm to her. That proposition without more appears to state a good cause of action, there being no justification alleged for the act.”*²⁴

4.11 *Wilkinson v Downton* was applied by the Court of Appeal in *Janvier v Sweeney*.²⁵ This case involved private detectives seeking letters from the plaintiff falsely accusing her of being in correspondence with a German spy. The plaintiff suffered severe nervous illness, and the defendants were held liable even though they could not have foreseen the illness and had no motive to cause that illness. The decision was based on the fact that the defendants had intentionally conducted themselves in such manner as to terrify and frighten the plaintiff and they would be presumed to have intended the natural consequences of their conduct.

4.12 In the more recent case of *Khorasandijan v Bush*,²⁶ the same principle was applied by the Court of Appeal, and an injunction was granted to restrain a campaign of harassment which was calculated to and was likely to cause harm to the plaintiff's health.

4.13 Mere shock, fear or mental suffering is not enough; some outward and physical result of that emotion, for example, illness resulting from nervous shock is required.²⁷ In the Australian case of *Bradley v Wingnut Firms Ltd*,²⁸ the plaintiff sought an injunction to restrain the publication of a film, which was described as a “comedy horror” and which showed the plaintiff's tombstone for a total of 14 seconds. The plaintiffs alleged that they were “shocked and upset” by the tombstone's association with the film, especially given the film's extreme and sometimes offensive nature. The court held that a cause of action for intentional infliction of emotional distress required a plaintiff to establish something more than a transient reaction of emotional distress, however initially severe. That reaction must translate into something physical, and the plaintiff had to show that the defendant had wilfully done an act calculated to cause physical harm to the plaintiff and to show that the shock and illness were natural consequences of the wrongful act or default.

4.14 In *Alcock v Chief Constable of South Yorkshire Police*,²⁹ which incidentally concerned a claim for negligence, the House of Lords stated that in order to establish a claim in respect of psychiatric illness resulting from shock, something more than purely mental distress is required.

²⁴ At 58-59.

²⁵ [1919] 2 KB 316.

²⁶ [1993] QB 727. To the extent that this case developed the tort of private nuisance to protect someone without an interest in the land affected, it was overruled by the House of Lords in *Hunter v Canary Wharf Ltd*. [1997] 2 WLR 684.

²⁷ Clerk & Lindsell, cited above, at 12-15.

²⁸ [1993] 1 NZLR 415.

²⁹ [1992] 1 AC 310.

4.15 In the Hong Kong case of *Wong Kwai Fun v Li Fung*,³⁰ the plaintiff brought an action for possession of the defendant's residential premises on the basis of an alleged sale and purchase agreement. The defendant resisted the claim on the ground that the property was put up as security for an unenforceable money lending transaction in which the rate of interest amounted to 400% per annum. One of the issues was whether damages or exemplary damages should be awarded in view of the lender's repeated threats of violence to him and his family which caused the defendant to attempt to commit suicide. The defendant felt a strong sense of guilt towards his family whom he believed would be killed. After writing a note to the plaintiff requesting him to spare his children, the defendant attempted suicide by swallowing a whole bottle of about 100 sleeping pills mixed with detergent and coca cola. Although the defendant's life was saved, he made another attempt at suicide and had to undergo psychiatric treatment from 1987 to 1991. The court applied *Wilkinson v Downton and Janvier Sweeney*, and held that damages were payable since the requirements of the tort were met: the threats of violence by the plaintiff and his agents or servants were calculated to be believed by the defendant who had reasonable basis to believe that the threats would be carried out, and the defendant did suffer fear and depression as a result. With regard to the question whether exemplary damages should be awarded, the court found that the plaintiff, with a cynical disregard for the defendant's rights, had calculated that the excessive interest to be made out of his wrongdoing would probably exceed the damages at risk, which interest the plaintiff knew to be unenforceable and illegal. The court also found that, alternatively, the plaintiff sought to gain at the expense of the defendant his residential property, which the plaintiff coveted, which he could not obtain or could not obtain except at a price greater than he was prepared to pay. The court applied *Rookes v Barnard*³¹, and held that it was an apt case for exemplary damages to be awarded so that the plaintiff and people like him would be apprised of the policy and attitude of the court in dealing with such torts.

Trespass to chattels

4.16 If a debt collector dispossesses the plaintiff of his chattel or damages it, he may be liable for trespass to chattels. The act of the defendant must be intentional, and there is no liability for accidental acts.³² On the other hand, the defendant may still be liable even he does not appreciate that his interference is wrongful. If a defendant uses a chattel, erroneously believing that it is his, his act would still constitute trespass to chattels.³³

4.17 If a plaintiff's goods are destroyed or disposed of by the defendant, the plaintiff is entitled to recover the full value of the goods.³⁴ Full

³⁰ [1994] 1 HKC 549.

³¹ [1964] AC 1129.

³² *National Coal Board v Evans (JE) & Co* [1951] 2 KB 861. Clerk & Lindsell, cited above, at 13-161.

³³ Clerk & Lindsell, cited above, at 13-161.

³⁴ *Wilson v Lombank*, [1963] 1 WLR 1294.

value is market price or the cost of replacement.³⁵ If a plaintiff's goods are merely damaged but not destroyed, the normal measure of damages is the amount by which their value is diminished.³⁶ Consequential loss which is suffered by the plaintiff is also recoverable provided that the loss is not too remote.³⁷ In *Liesbosch Dredger v The Edison*,³⁸ the plaintiff recovered for loss of profits of a profit-earning chattel. In *The Mediana v The Comet*,³⁹ the plaintiff recovered damages for loss of use of the chattels.

Defamation

4.18 A person is liable for defamation if he communicates to another any matter which is untrue and which lowers or tends to lower a person in the estimation of right-thinking members of society generally or which tends to make them shun or avoid that person.⁴⁰ Defamation may take one of the two forms - libel or slander. Libel occurs when the defamatory statement is made in some permanent form, usually in writing or print. It can also be a painting or picture, effigy, caricature, advertisement or any disparaging object.⁴¹ Slander is defamation communicated in a non-permanent form by spoken words, or other sounds.⁴²

4.19 The tort of defamation is unlikely to be too useful to debtors in debt collection cases. First, if the contents of a defamatory statement are true (i.e. if the debtor is in fact indebted to the creditor) the debt collector has a complete defence even if the publication was actuated by spite or malice.⁴³ Second, the cost of bringing a defamation case is likely to be high, and legal aid is generally not available for defamation cases.

Employer's liability

4.20 The employer is liable for the torts of the employee so long as they are committed in the course of the employee's employment. The nature of the tort is immaterial and the employer is liable even where liability depends upon a specific state of mind and his own state of mind is innocent.⁴⁴ In the context of debt collection, if a debt collector is the employee of ABC Ltd, and a tort is committed by the debt collector in the course of his employment, then both ABC Ltd and the debt collector are regarded as joint tort-feasors.

³⁵ *Hall v Barclay* [1937] 3 ALL ER 620.

³⁶ Clerk & Lindsell, cited above, at 13-162.

³⁷ As above.

³⁸ [1933] AC 449.

³⁹ [1900] AC 113.

⁴⁰ Clerk & Lindsell, cited above, at 21-01 and 21-12.

⁴¹ As above, at 21-06.

⁴² As above, at 21-28.

⁴³ *Alexander v North Eastern Rly Co* (1865) 6 B & S 340.

⁴⁴ Clerk & Lindsell, cited above, at 5-20.

4.21 Difficult questions may arise as to whether or not a person is an employee of another. There are various tests to determine the matter. The classic test for distinguishing an employee from an independent contractor is the ‘control’ test, i.e. the employer’s right to control the method of doing the work.⁴⁵ The inadequacy of the ‘control’ test was brought out in a series of cases.⁴⁶

4.22 The deficiencies of the ‘control’ test have led to attempts to formulate other criteria. In *Stevenson, Jordan & Harrison Ltd v Macdonald & Evans*⁴⁷ Denning LJ suggested the so-called ‘organisation’ or ‘integration test’, and said:

*“under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.”*⁴⁸

4.23 The more modern approach is to abandon the idea of a simple test and to take a ‘multiple factor’ approach by taking into consideration all aspects of the relationship.⁴⁹ In *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*,⁵⁰ after a full review of the authorities, it was held that a contract of service exists if:

- “(i) the servant agrees that in consideration of a wage or other remuneration he will provide his own work and skill in the performance of some service for his master;*
- (ii) he agrees, expressly or impliedly, that in the performance of that service he will be subject to the other’s control in a sufficient degree to make that other master;*
- (iii) the other provisions of the contract are consistent with its being a contract of service.”*

4.24 In *Market Investigations Ltd v Minister of Social Security*,⁵¹ Cooke J set out a non-exhaustive list of factors to be taken into account, in addition to that of control, including whether the worker provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.⁵² This approach was approved by the Privy Council in *Lee Tin Sang v Chung Chi Keung*.⁵³

⁴⁵ As above, at 5-05.

⁴⁶ As above, at 5-07.

⁴⁷ [1952] 1 TLR 101.

⁴⁸ As above, at page 111.

⁴⁹ Clerk & Lindsell, cited above, at 5-09.

⁵⁰ [1968] 2 QB 497.

⁵¹ [1969] 2 QB 173.

⁵² As above, at 185.

⁵³ [1990] 2 AC 374.

4.25 Where the relationship of employer and employee exists, the employer is liable for the torts of the employee only if they are committed in the course of the employee's employment. The most frequently adopted test⁵⁴ is given by Salmond,⁵⁵ namely that an act is deemed to be done in the course of employment,

"if it is either (1) a wrongful act authorised by the master, or (2) a wrongful and unauthorised mode of doing some act authorised by the master. It is clear that the master is responsible for acts actually authorised by him : for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes – although improper modes – of doing them."

4.26 Even if the act in question is expressly prohibited by the employer, he may still be liable, and the test stated in the previous paragraph will have to be applied. In *C.P.R. v Lockhart*,⁵⁶ an employee was authorised to use his own car on certain jobs, provided his car was properly insured. The employee caused damage whilst driving an uninsured car for the purposes of his work. The Privy Council held that, despite the employer's express prohibition to use an uninsured car, the employers were liable for the damage caused. In *Iqbal v London Transport Executive*,⁵⁷ however, a bus conductor was ordered to get an engineer to move a parked bus. Although the bus conductor was expressly prohibited from driving buses, he attempted to drive the bus himself, and the court found that his acts were outside the course of his employment. The effect of any prohibition placed by the employer actually depends on analysis of the nature of the employee's duties, the prohibition, and what actual breach of the prohibition is committed.⁵⁸

4.27 In circumstances where the employer either expressly or by implication gave the employee a discretion which he must exercise in the course of his employment, the employer will be liable for the wrongful exercise of such a discretion.⁵⁹ If tasks have been delegated to the employee in very general terms, then the implication is that the employee is granted the discretion to decide how the tasks may best be completed.⁶⁰

4.28 An employer would be able to avoid liability if it is shown that the employee was acting "on a frolic of his own",⁶¹ that is doing something totally

⁵⁴ Clerk & Lindsell, cited above, at 5-21.

⁵⁵ *Salmond and Heuston on the Law of Torts* (20th edition, 1993) at page 457.

⁵⁶ [1942] AC 591.

⁵⁷ (1973) 16 KIR 39, CA.

⁵⁸ Clerk & Lindsell, cited above, at 5-25.

⁵⁹ As above, at 5-31.

⁶⁰ As above, at 5-34.

⁶¹ *Joel v Morrison* (1834) 6 C & P 501 at page 503.

unconnected with his job. The question depends on the degree of deviation by the employee.⁶² In *Dyer v Munday*⁶³ a hire-purchase furniture dealer sent its employee to recover certain furniture. The employee was prevented from doing so by a third party, who was then assaulted by the employee. The court held that the employee remained within the course of his employment, and the employer was liable for the assault because the assault was committed in furtherance of the employer's business, and not for the employee's private purposes.⁶⁴

4.29 Whether or not an act is done in the course of employment may be a difficult question of fact⁶⁵ and much depends on the circumstances of the case.

4.30 The employer has been held liable in the following cases:

- An employee struck a boy under the mistaken belief that the boy was stealing the employer's goods.⁶⁶
- A solicitor's clerk fraudulently induced a client to transfer property to him.⁶⁷
- A fur garment was sent to a furrier for cleaning. The furrier, with the customer's consent, sent it to the defendant company and the garment was stolen by an employee of the defendant company.⁶⁸

4.31 The employer, on the other hand, was not liable in the following instances:

- A bar manager grabbed a customer to shield himself from assaults by a robber, and caused the customer to be stabbed in the arm.⁶⁹
- A barmaid threw a bottle at a customer who had provoked her.⁷⁰
- A bus conductor assaulted a passenger following an argument.⁷¹
- A garage attendant assaulted a customer of the garage out of personal vengeance.⁷²

⁶² Clerk & Lindsell, cited above, at 5-30.

⁶³ [1895] 1 QB 742.

⁶⁴ The case may also be analysed on the basis of the wrongful exercise of the discretion vested in the employee. See Clerk & Lindsell, cited above, at 5-34.

⁶⁵ Clerk & Lindsell, cited above, at 5-21 and 5-33.

⁶⁶ *Poland v Parr* [1927] 1 KB 366.

⁶⁷ *Lloyd v Grace, Smith & Co* [1912] AC 716.

⁶⁸ *Morris v C W Martin & Sons Ltd* [1965] 2 All ER 725.

⁶⁹ *Reily v Ryan* [1991] 1 LRM 449.

⁷⁰ *Deaton v Flew* (1949) 79 CLR 370.

⁷¹ *Keppel Bus Co Ltd v Sa'ad bin Ahmad* [1974] 2 All ER 700.

⁷² *Warren v Henlys Ltd* [1948] 2 All ER 935.

Employer's liability for independent contractors

4.32 As a general rule, an employer is not liable for the tortious acts of an independent contractor in the course of execution of the work. The law has, however, imposed liability on employers in some circumstances. If the law imposes on an employer a strict or absolute duty, often described as 'non-delegable' duty, then he is liable even though the immediate cause of the damage is the contractor's wrongful act or omission.⁷³ Such 'non-delegable' duties may arise either by statute or at common law. As for 'extra-hazardous' acts, it appears from *Honeywill and Stein Ltd v Larkin Bros Ltd*⁷⁴ that a 'non-delegable' duty exists whenever an independent contractor is employed to perform an 'extra-hazardous' act. Difficulty, however, arises in determining what constitutes 'extra-hazardous'. According to Slesser LJ, 'extra-hazardous' acts were "acts which, in their very nature, involve in the eyes of the law special danger to others; of such acts the causing of fire and explosion are obvious and established instances".⁷⁵ There is an unavoidable degree of uncertainty surrounding this issue because what might be inherently hazardous previously may no longer be so regarded given technological advancement.

Liability for an agent

4.33 The relationship between the creditor and the debt collector is often regarded as one of principal and agent. However, both employees and independent contractors may be classified as 'agents', for they are both persons who do work for another. Clerk & Lindsell submits that there are no special rules in the law of tort peculiar to 'principal and agent' except for fraud cases.⁷⁶ Another author⁷⁷ also believes that "agency in its most precise legal sense is a predominantly contractual concept ...".⁷⁸ Nevertheless, numerous *dicta* can be found equating agency with a contract of service for the purpose of deciding vicarious liability.⁷⁹ In *Armstrong v Strain*,⁸⁰ for example, where the principal holds a person out as his agent, he is estopped from denying his liability for any torts committed by the agent within the ostensible scope of his authority.

4.34 In a recent case *Wong Wai Hing and Fung Siu Ling v Hui Wei Lee*,⁸¹ the defendant had previous business dealings with the plaintiff, and felt

⁷³ Clerk & Lindsell, cited above, at 5-47.

⁷⁴ [1934] 1 KB 191.

⁷⁵ As above, at 197.

⁷⁶ As for cases in which a defendant may be vicariously liable when he lends his chattel (usually his car) to another, Clerk & Lindsell prefers to view this category as *sui generis*, instead of regarding this category of vicarious liability as depending on principles of agency. At 5-65.

⁷⁷ Winfield & Jolowicz, *Torts*, 15th edition, at page 716.

⁷⁸ Clerk & Lindsell, cited above, at 5-69.

⁷⁹ As above.

⁸⁰ [1952] 1 KB 232.

⁸¹ (March 29, 2000) HCA 2901/1998.

cheated after an investment went bad. The defendant hired a debt collection agency to recover the sum invested. In the letter appointing the collection agency, it was stated that no illegal means were to be used to collect the debt. The plaintiffs sued the defendant for the assaults committed by the debt collectors. The court found that the defendant was not liable for the torts committed by the debt collectors, since the unlawful acts were committed outside the scope of the express authority. As the unlawful acts were neither necessary nor incidental to the express authority, the court ruled that the unlawful acts were also not within the scope of the agent's implied authority, and the defendant was held not liable for the acts of the debt collectors.

Personal Data (Privacy) Ordinance

4.35 Victims of abusive debt collection activities may also have a civil cause of action pursuant to the Personal Data (Privacy) Ordinance (Cap 486).⁸² This is discussed in the next chapter.

⁸² Section 66.

Chapter 5

Other types of control on debt collection

Administrative control

5.1 At present, debt collection agencies and debt collectors operating in Hong Kong are not required to be registered or licensed. The only administrative requirement is to obtain a business registration certificate under the Business Registration Ordinance (Cap 310).

5.2 There are no official statistics on the number of debt collection agencies or debt collectors operating in Hong Kong. A representative of one of the debt collection agencies indicated that the debt collection industry has grown tremendously in the past decade or so. While there were only a few debt collection agencies in 1982, there are now approximately 100 to 150 agencies, with five to ten major players.

5.3 Whilst there is no licensing requirement to operate a debt collection business, persons carrying on business as money lenders are required to be licensed annually under the Money Lenders Ordinance (Cap 163).¹

Self-regulation by authorised institutions

Code of Banking Practice 1997

5.4 The Hong Kong Association of Banks and the DTC Association² have seen the need to foster customer confidence in the banking system through promoting good and fair banking practices, and jointly issued a non-statutory Code of Banking Practice 1997 ("the Code"). Although the Code was issued on a voluntary basis, the Hong Kong Monetary Authority ("the HKMA") monitors its compliance as part its regular supervision.³

5.5 The Code contains five chapters. Chapter 5 lays down guidelines on debt collection work conducted by parties other than authorized

¹ The annual licence fee is at present HK\$8,800. The processing time of first-time applications is normally 3 months.

² The Hong Kong Association of Restricted Licence Banks and Deposit-taking Companies.

³ Paragraph 1.4 of the Code of Banking Practice 1997.

institutions. The guide-lines are practical and written in simple effective language. There are 20 clauses on the use of debt collection agencies. The clauses are set out as follows:

“36. Debt collection by third party agencies

- 36.1 It is essential that debt collection agencies should act within the law, refrain from action prejudicial to the business, integrity, reputation or goodwill of the institutions for whom they are acting and observe a strict duty of confidentiality in respect of customer information. Institutions should enter into a formal, contractual relationship with their debt collection agencies which, among other things, enforces these requirements. The contract should make it clear that the relationship between the institution and the debt collection agency is one of principal and agent.*
- 36.2 Related to the above, institutions should specify, either in the contract or by means of written instructions, that their debt collection agencies must not resort to intimidation or violence, either verbal or physical, against any person in their debt recovery actions. This includes actions designed to humiliate debtors publicly, for example, by putting up posters or writing on the walls of their residence, and harass debtors, for example, by making telephone calls at unsociable hours.*
- 36.3 Institutions and their collection agencies should not try to recover debts, directly or indirectly, from third parties including referees, family members or friends of the debtors if these persons have not entered into a formal contractual agreement with the institutions to guarantee the liabilities of the debtors. Institutions should issue written instructions to their debt collection agencies, or include a clause in the contract with their agencies, to this effect.*
- 36.4 Institutions should not pass information about referees or third parties other than debtors or guarantors to their debt collection agencies. If the referee is to be approached for information to help locate the debtor or guarantor, this should be done, without causing nuisance to such third parties, by staff of the institution.*
- 36.5 Institutions intending to use debt collection agencies should specify in the terms and conditions of credit or credit card facilities that they*

may employ third party agencies to collect overdue amounts owed by the customers. Institutions which reserve the right to require customers to indemnify them, in whole or in part, for the costs and expenses they incur in the debt recovery process should include a warning clause to that effect in the terms and conditions.

36.6 Institutions should remain accountable to customers for any complaints arising out of debt collection by third party agencies and should not disclaim responsibility for misconduct on the part of the debt collection agencies.

36.7 Institutions should give the customer advance written notice (sent to the last known address of the customer) of their intention to commission a debt collection agency to collect an overdue amount owed to the institution. The written notice should include the following information -

- (a) the overdue amount repayable by the customer;*
- (b) the length of time the customer has been in default;*
- (c) the contact telephone number of the institution's debt recovery unit which is responsible for overseeing the collection of the customer's debt to the institution;*
- (d) the extent to which the customer will be liable to reimburse the institution the costs and expenses incurred in the debt recovery process (if the institution requires the customer to indemnify it for such costs and expenses); and*
- (e) that the customer should in the first instance report improper debt recovery actions taken by the debt collection agency to the institution.*

36.8 Institutions should not engage more than one debt collection agency to pursue the same debt in one jurisdiction at the same time.

36.9 Institutions should require their debt collection agencies, when collecting debts, to identify themselves and the institution for whom they are acting. Institutions should issue authorisation

documents to their debt collection agencies which should be presented to the debtor for identification purposes when required to do so.

36.10 Institutions should establish effective communication with their debt collection agencies and systems for prompt updating of the agencies on the amount of repayment made by customers so that the agencies will stop immediately all recovery actions once the debts are settled in full by the customers.

36.11 If a customer owes several debts to more than one institution that are being collected by the same debt collection agency, the customer has the right to give instructions to apply repayment to a particular debt.

37. Management of relationship with debt collection agencies

37.1 Institutions should encourage their debt collection agencies to aspire to the highest professional standards and, where appropriate, to invest in suitable systems and technology.

37.2 Debt collection agencies should not be given a free hand as to recovery procedures. Institutions should establish effective procedures to monitor continuously the performance of their debt collection agencies, particularly to ensure compliance with the provisions in paragraphs 36.2 and 36.3 above.

37.3 Institutions should require debt collection agencies to inform customers that all telephone communication with customers will be tape recorded and the purpose of doing so, and to keep records of all other contacts with customers. Such records should include information on the agency staff making the contact; the date, time and place of contact; and a report on the contact. Both the tape and the records should be kept for a minimum of 30 days after the contact is made.

37.4 Institutions should make unscheduled visits to the agencies to inspect their professionalism, operational integrity, the involvement of suitably trained personnel and the adequacy of resources to cope with the business volumes assigned to them and to ensure agencies' compliance with their contractual undertakings.

37.5 Institutions should maintain a register of complaints about improper actions taken by their debt

collection agencies and should respond promptly to the complainants after investigation.

- 37.6 Institutions should not delegate authority to the debt collection agencies to institute legal proceedings against customers without the institution's formal approval.*
- 37.7 Institutions should specify in their contracts with debt collection agencies that the agencies should not sub-contract the collection of debts to any other third parties.*
- 37.8 Where institutions are aware that their debt collection agencies perform similar functions for other institutions, the sharing of information as to their performance, approach, attitude, behaviour etc is encouraged.*
- 37.9 Institutions should bring apparently illegal behaviour by debt collection agencies to the attention of the Police. Institutions should also consider whether to terminate the relationship with a debt collection agency if they are aware of unacceptable practices of that agency or breaches of its contractual undertakings."*

5.6 To monitor and improve compliance with the Code, the HKMA conducts regular surveys which require authorised institutions to file returns on their compliance level with the clauses above. Since April 1999, the HKMA has started to conduct on-site examinations on authorised institutions' compliance with the Code, in particular, the provisions on their monitoring of debt recovery by debt collection agencies. The HKMA also monitors compliance through processing customer complaints on authorised institutions. If a complaint reveals weakness(es) in controls and/or non-compliance with the Code, the HKMA will pursue this with the authorised institution concerned.

Personal Data (Privacy) Ordinance (Cap 486) and the Code of Practice on Consumer Credit Data 1998

Personal Data (Privacy) Ordinance

5.7 The Personal Data (Privacy) Ordinance ("the Ordinance") lays down six data protection principles which are essentially general statements of some breadth. Two of the data protection principles are of particular relevance to debt collection activities.

5.8 Data Protection Principle 2(1) requires that all practicable steps be taken to ensure inaccurate personal data are not used. Consequently, a creditor should not disclose inaccurate personal data to a debt collection

agency, and a debt collection agency should not use inaccurate personal data for debt collection. This could include disclosure by a creditor to a debt collector of a previous address of a debtor. It also includes the situation where a debt collection agency deliberately sends demand letters to neighbouring addresses to humiliate the debtor.

5.9 Data Protection Principle 3 limits the use of personal data to purposes for which the data are to be used when collected unless the consent of the data subject has been obtained. A creditor, therefore, should disclose to a debt collection agency only data necessary for carrying out debt collection. Copies of the debtor's identity card and the referee's information, for example, are generally considered not necessary for debt collection.

5.10 Contravention of a data protection principle is not an offence,⁴ but the data subject suffering damage has a civil cause of action⁵ which would include damages for injury to feelings. On receipt of a complaint, the Privacy Commissioner would investigate and would in an appropriate case issue an enforcement notice⁶ containing specific directions requiring future compliance with a data protection principle. Non-compliance with an enforcement notice constitutes an offence.⁷

Code of Practice on Consumer Credit Data 1998

5.11 A Code of Practice on Consumer Credit Data was issued by the Privacy Commissioner for Personal Data in February 1998 pursuant to the powers conferred on him by Part III of the Personal Data (Privacy) Ordinance (Cap 486). The Code took effect on 27 November 1998. Although the provisions of the Code are not legally binding, breach of any provision by a data user will give rise to a presumption against the data user in any legal proceedings under the Personal Data (Privacy) Ordinance (Cap 486).⁸ The Code is designed to generally promote good practice among data users involved in the handling of consumer credit data. The Code covers credit reference agencies,⁹ and credit providers in their dealings with credit reference agencies and debt collection agencies. With respect to debt collection agencies, the Code is only concerned with the disclosure of information by credit providers¹⁰ to such agencies and their use of such information. The

⁴ Section 64(10).

⁵ Section 66.

⁶ Section 50.

⁷ Section 64(7).

⁸ Office of the Privacy Commissioner for Personal Data, *Code of Practice on Consumer Credit Data*, at page 1.

⁹ This aspect will be discussed later in this Consultation Paper.

¹⁰ "Credit provider" is defined as "any data user who carries on a business involving the provision of consumer credit to individuals, whether or not that business is the sole or principal activity of that data user."

"Consumer credit" is defined as "any loan, overdraft facility or other kind of credit provided by a credit provider to an individual in his personal capacity, not for the purpose of or related to any commercial enterprise. In this context, an individual acquiring consumer goods from a credit provider on lease or on hire-purchase is deemed to be provided with credit by the credit provider to the extent of the value of those goods, any amount overdue under the lease or hire-purchase agreement is deemed to be an amount in default under the individual's account with the credit provider, and all related terms and expressions are to be construed accordingly."

Code has no application to commercial credit.¹¹

5.12 If a credit provider uses the service of a debt collection agency, the following provisions have to be compiled with:

- *A credit provider should notify an applicant for consumer credit, at or before the time of collection of his personal data, that the data may be supplied to a credit reference agency and in the event of default to a debt collection agency, if such be the case. The notification should also mention that the individual applicant has the right, upon request, to be informed which items of data are routinely so disclosed, and be provided with further information to enable the making of an access and correction request to the relevant credit reference agency or debt collection agency, as the case may be.*¹²
- *A credit provider should only provide consumer credit data to a credit reference agency or to a debt collection agency after checking the data for accuracy. If the amount in default is subsequently repaid or written off in full or in part, or if any scheme of arrangement is entered into with the individual, or if the credit provider discovers any inaccuracy in the data which have been provided to and which the credit provider reasonably believes are being retained by the credit reference agency or the debt collection agency, the credit provider should notify the credit reference agency or debt collection agency promptly of such fact.*¹³
- *Subject to clause 3.8, if a credit provider decides to use a debt collection agency for collection against an individual in default, it should only provide to the agency information relating directly to the individual. That information should only consist of particulars to enable identification and location of the individual, including address and contact information, the nature of the credit, amount to be recovered and details of any goods subject to repossession.*¹⁴
- *A credit provider should not provide any consumer credit data to a debt collection agency for debt collection unless:*
 - *a formal contract has been executed to require, or written instructions have been issued under such a contract to require, the debt collection agency to*

¹¹ Clause 4.1.

¹² Clause 3.1.

¹³ Clause 3.3.

¹⁴ Clause 3.7.

follow such conduct as stipulated by the Banking Code¹⁵ in relation to debt collection agencies instructed by authorised institutions; and

- *the credit provider is satisfied, on the basis of previous dealings with the debt collection agency, the reputation of such debt collection agency or other reasonable grounds, that the agency will fully comply with the requirement as aforesaid.¹⁶*

¹⁵ Code of Banking Practice 1997 discussed earlier.

¹⁶ Clause 3.8.

Chapter 6

Deficiencies of the existing controls on abusive debt collection practices

Criminal law

6.1 We examined in Chapter 3 the criminal offences which are applicable to debt collection activities. These include intimidation, criminal damage to property, theft and blackmail, assault, false imprisonment, triad offences, and offences under the Summary Offences Ordinance (Cap 228). We have also discussed how both corporate and non-corporate employers of debt collectors may be held criminally liable for the acts of debt collectors. There is thus a range of criminal sanctions which can be deployed. These come with heavy custodial and financial penalties to deal with abusive debt collection practices. Criminal sanctions, however, cannot be the complete answer:

- (a) Many crimes involving debt collection are not reported to the Police. Debtors and victims may also be reluctant to co-operate with the Police. There are several possible explanations for this -
 - (i) Debtors may fear reprisals and retaliation.
 - (ii) There are a considerable number of people who try to delay paying their debts and who are prepared to be pushed a considerable distance before they pay. Intimidation may be regarded as part of the negotiation process and debtors would therefore be unwilling to take the matter up with the Police.
 - (iii) Some debtors are unwilling to divulge the full picture. They make reports to the Police only with a view to fend off debt collectors for the time being, but with no intention of taking further action against the perpetrators.
 - (iv) Some debtors are genuinely hard-pressed financially and feel that they are in the wrong when they cannot repay their loans. Some debtors may even feel that debt collectors have the right to take some abusive action to recover debts.
 - (v) Some debtors may neither be aware of the extent of the

protection afforded by the criminal law nor that intimidation and persistent nuisance calls may constitute criminal offences.

- (vi) In cases where the abused person is not the debtor himself, he or she may not be able to provide sufficient information to the Police.
- (b) Whilst the criminal law is effective in dealing with outrageous debt collection practices, it is far less effective against nuisances caused by non-criminal tactics or those activities on the borderline of propriety. These may include posting of posters and repayment notices outside the debtor's home and office; alleging that the debtor is in financial difficulty or making false accusations; making persistent but non-threatening telephone calls and personal visits, and generally harassing debtors' neighbours and family members. Such nuisance tactics fall within the grey areas which are not adequately defined or regulated. Such grey areas are undesirable, since debtors, creditors and debt collectors alike are not certain of their rights and obligations. The Police may be reluctant to get involved in a matter which they perceive to be a possibly civil matter.
- (c) The onus of proving a crime is high and the prosecution has to prove beyond reasonable doubt all the required elements of the crime. Because of these safeguards, it may often be difficult to secure convictions.
- (d) There are also enforcement problems. As mentioned by the representative of the police at a meeting of the Legislative Council Panel on Security meeting on 10 June 1996, there were problems "particularly in the identification of the offenders, because : (a) these activities were normally conducted late at night; and (b) when debt collectors resorted to illegal tactics, the debtors would normally repay the debt immediately and would then be reluctant to pursue the case further."

6.2 These factors perhaps account for the low detection rate of criminal debt collection cases. For example, it was reported¹ that the successful detection rate for debt collection related cases was only 10%, compared to 45.7% for general crime for the first seven months 1998.

Civil claims

6.3 We have also examined in the previous chapter a number of civil actions which may be potentially of assistance to debtors, including assault and battery, false imprisonment, intentional physical harm other than trespass to the

¹ Sing Tao Daily 25.1.99.

person, trespass to chattels, defamation, and employers' liability in civil claims. It remains to be considered how effective these remedies are as a control on abusive debt collection practices. An outrageous case, such as *Wong Kwai Fun v Li Fung*² discussed in Chapter 4,³ would clearly be covered.

6.4 In less outrageous cases, civil remedies are not usually useful to debtors. The Institute of Law Research and Reform of Edmonton, Alberta held the same view and mentioned:

"The legal system does not operate by itself; it must be triggered by the victim commencing and carrying forward a law suit against his defendant. Such an action will involve expense and delays, as well as uncertainties as to a successful outcome. Nor is the average debtor likely to have the courage, much less the means, to turn the tables on his creditor and sue for damages for excessive or unreasonable collection practices. The paucity of reported cases in Canada appears to support the conclusion that most cases of creditor harassment are unlikely to lead to a lawsuit, unless the facts are extraordinary and the potential damage award is large.

*The upshot is that a debtor who has been subjected to unreasonable collection efforts is unlikely to commence a common law action and carry it to judgement unless the case is an extraordinary one. Effective controls over the collection practices of creditors or their agents must be sought elsewhere."*⁴

Self-regulation by authorised institutions

6.5 We have examined in the previous chapter⁵ a non-statutory voluntary code, namely the Code of Banking Practice 1997, issued jointly by the Hong Kong Association of Banks and the DTC Association.

Code of Banking Practice 1997

6.6 The guidelines in the Code of Banking Practice, albeit practical and useful, suffer from several deficiencies:

- (a) Limited scope of application - The Code applies only to authorised institutions, that is, banks, restricted licence banks, and deposit-taking companies. Other creditors including individuals, trading companies, mobile telephone companies, and even money lenders are not subject to the Code. Even if

² [1994] 1 HKC 549.

³ See paragraph 4.12.

⁴ *Debt Collection Practices*, (Report No 42, 1984), at paragraphs 4.2, 4.6.

⁵ See paragraphs 5.4 – 5.6 above.

the Code does bring about an improvement of the work ethic of debt collectors, the Code regulates only a fraction of debt collection activities. It would also be anomalous where a debt collection agency abides by the guidelines only in those cases where the clients are authorized institutions.

- (b) Unfair competition - The limited application of the Code may also lead to suggestions of unfair competition. Take the example of a debtor with \$100,000 worth of assets. He borrows \$100,000 from a money lender after borrowing \$100,000 from a bank. The debt collectors acting for the money lender may be able to take stronger measures towards the debtor than those acting for the bank, which is bound by the Code. The debtor is likely to satisfy the debt owed to the money lender first, given the potentially more compelling collection tactics, and the bank may not be repaid at all. This would be all the more unfair to the bank which may have acted prudently when the bank loan was granted, especially since the debtor had at that time \$100,000 worth of assets. The money lender might have been aggressive in granting the subsequent loan since the debtor's indebtedness had increased. Yet, the money lender is more likely to get his money back. This limited application of the Code may thus also lead to unfair competition among debt collectors. As most debt collectors earn their fees on a contingency basis, the restricted scope of application of the Code may work unfairly on those working for authorised institutions.
- (c) Uncertainty as to effectiveness - Surveys on compliance with the Code of Banking Practice are based on returns completed by authorised institutions themselves. Information on the second compliance survey on the Code of Banking Practice shows that there is still room for improvement in some aspects. The primary objectives of the Hong Kong Monetary Authority ("the HKMA"), the body responsible for monitoring compliance with the Code, are to protect depositors and to promote the general stability and effective working of the banking system. Since the problem of abusive debt collection affects primarily the banker-customer relationship, and not banking stability, the HKMA has relied largely on moral suasion to ensure compliance.

Personal Data (Privacy) Ordinance (Cap 486) and the Code of Practice on Consumer Credit Data 1998

6.7 We examined in the previous chapter⁶ the Personal Data (Privacy) Ordinance ("the Ordinance") and the Code of Practice on Consumer Credit Data ("the Code"). Given that the primary legislative intent of the

⁶ See paragraphs 5.7 – 5.12 above.

Ordinance is to protect the privacy of individuals in relation to personal data, the Ordinance, and hence the Code, are not an effective general means of regulating debt collection activities. The requirements of the Ordinance are by no means applicable to the whole range of abusive behaviour in which some debt collection agencies engage. When the requirements apply, they may not always be an effective means of protecting individuals from the abusive practices concerned. The investigative powers of the Privacy Commissioner's Office are limited, and the Ordinance has only limited deterrence against malpractices in debt collection.

Chapter 7

Legislation in other jurisdictions

Introduction

7.1 Compared with Hong Kong, debt collectors and debt collection agencies are subject to more regulation and control in many other jurisdictions, including the United Kingdom, Australia, Canada and the United States of America. Apart from the traditional criminal and civil sanctions, debt collection is regulated by specific statutory provisions which will be examined in this chapter. Legislation relating to the licensing of debt collection agencies will be discussed in the following chapter.

United Kingdom

The criminal offence of unlawful harassment of debtors

7.2 The Administration of Justice Act 1970 introduced the criminal offence of unlawful harassment of debtors which is punishable on summary conviction by a fine of not more than level 5 on the standard scale, which is £5,000 at present.¹ The offence is aimed at tackling the common malpractices of debt collection. The requirements of the offence are set out in section 40(1) of the Act, which reads:

“A person commits an offence if, with the object of coercing another person to pay money claimed from the other as a debt due under a contract, he -

- (a) harasses the other with demands for payment which, in respect of their frequency or the manner or occasion of making any such demand, or of any threat or publicity by which any demand is accompanied, are calculated to subject him or members of his family or household to alarm, distress or humiliation;*
- (b) falsely represents, in relation to the money claimed, that criminal proceedings lie for failure to pay it;*

¹ But different amounts may be substituted by order under the Magistrates' Courts Act 1980, section 143.

- (c) *falsely represents himself to be authorised in some official capacity to claim or enforce payment; or*
- (d) *utters a document falsely represented by him to have some official character or purporting to have some official character which he knows it has not."*

7.3 According to section 40(3), sub-paragraph (a) has no application in respect of anything done which is reasonable (and otherwise permissible in law) for the purpose of:

- (i) securing the discharge of an obligation due, or believed by him to be due, to himself or to persons for whom he acts, or protecting himself or them from future loss; or
- (ii) the enforcement of any liability by legal process.

7.4 On the other hand, the scope of sub-paragraph (a) is extended by section 40(2), which stipulates that a person may be guilty of an offence under sub-paragraph (a) if he consents with others in the taking of such action as is described in sub-paragraph (a), notwithstanding that his own course of conduct does not by itself amount to harassment. Depending on the facts of the case, there is an argument that a creditor's employment of a debt collection agency whose methods are known to be offensive, may amount to "concerting with others".²

7.5 The case of *Norweb plc v Dixon*³ explains two aspects of section 40(1), namely, what is meant by "money claimed from the other as a debt due under a contract" and "calculated to subject". On 17 February 1992, Dixon became the tenant and occupier of premises in Manchester, and was on that date supplied with electricity at his request. In May 1993, the electricity company sent Dixon a letter alleging that he owed £677.86 for electricity which had been supplied to another address where he had never lived. Dixon took steps to inform the electricity company of the mistake by making telephone calls and paying personal visits. On 29 July 1993, Dixon's electricity meter was recalibrated without his knowledge. After the electricity company finally accepted that Dixon was not responsible for the debt, Dixon filed an action under section 40(1)(a), claiming that, as he was in receipt of income support of only £33 per week, he had to go without food on occasions to meet the increased electricity meter payments, and he was also worried and shocked by the electricity company's letters and actions. The magistrate found there was a contractual relationship between the parties and the electricity company had unlawfully harassed Dixon.

7.6 The conviction was quashed on appeal. It was held that, given the wording "money claimed ... as a debt due under a contract", the offence does not require proof of the existence and terms of a contract which has in fact been concluded, any more than it requires proof that the debt is in fact due. What is required is proof that the supplier has made demands for payment of a

² J K Gatenby, *Park's Collection of Debts*, 1976 at page 71.

³ [1995] 3 All ER 952.

debt which he *claims to be due under a contract* which he claims to exist. There were no findings of such claims. The electricity company had purported to act under the powers conferred by statute. It was also held that there was, in fact, no contract between the parties because the legal compulsion both as to the creation of the relationship and the fixing of its terms is inconsistent with the existence of a contract.

7.7 With regard to the meaning of “calculated to subject”, the court held that the phrase did not mean “intended to subject”, but meant “likely to subject”. In *McDowell v Standard Oil Co (New Jersey)*,⁴ it had been held that the words “calculated to deceive” under section 11 of the Trade Marks Act 1905 did not mean “intended to deceive” but “likely (or reasonably likely) to deceive or mislead the trade or the public ...”. A similar meaning of “calculated” was adopted in *Turner v Shearer*⁵ involving an offence under section 52(2) of the Police Act 1964 of wearing articles of police uniform “calculated to deceive”.

7.8 There is no reported case on sub-paragraphs (b), (c) and (d). The meaning of the word “knows” in sub-paragraph (d) has been subject to much judicial attention in different contexts. Knowledge has been held to include the state of mind of a person who shuts his eyes to the obvious.⁶ There is also authority for saying that where a person deliberately refrains from making inquiries the results of which he might not care for, this constitutes in law actual knowledge of the facts in question.⁷ The mere neglect, however, to ascertain what could have been found out by making reasonable inquiries is not tantamount to knowledge.⁸

Protection from Harassment Act 1997

7.9 The Protection from Harassment Act 1997 was enacted on 21 March 1997. The aim of the Act, as stated in its preamble, is to make provisions for protecting persons from harassment and similar conduct. Harassment of a person includes causing alarm or distress.⁹

7.10 Sections 1 to 7 of the Act apply to England and Wales, and sections 8 to 11 extend to Scotland. The Act is generally not applicable to Northern Ireland.¹⁰

England and Wales

7.11 The Act creates two criminal offences and one civil remedy. The criminal offences are for harassment and for putting people in fear of

⁴ [1927] AC 632.

⁵ [1973] 1 All ER 397.

⁶ *James & Son Ltd v Smeeth* [1955] 1 QB 78 at 91.

⁷ Halsbury's Statutes (4th edition) vol 12 at page 545.

⁸ As above. See also *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 PC.

⁹ See sections 7(2) and 8(3).

¹⁰ Section 14.

violence. The civil remedy is for harassment.

Offence of harassment

7.12 The requirements of the offence of harassment are set out in sections 1 and 2 of the Act. If a person pursues a course of conduct¹¹ (that is, by speech or by behaviour on at least two occasions¹²), which amounts to harassment of another, and which he knows or ought to know amounts to harassment of the other, that person is guilty of the offence of harassment.

7.13 A person ought to know his course of conduct amounts to harassment if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.¹³

7.14 A person has a defence if he is able to show the course of conduct was pursued under any of the three grounds:

- (a) for the purpose of preventing or detecting crime,
- (b) under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
- (c) in the particular circumstances the pursuit of the course of conduct was reasonable.¹⁴

7.15 A person guilty of the offence of harassment is liable on summary conviction to imprisonment for a maximum term of six months and/or a maximum fine of £5,000. The court may also make a restraining order against the defendant either for a specified period or until further order.¹⁵ Breach of the terms of a restraining order without reasonable excuse is punishable on indictment with imprisonment for a maximum term of five years and/or a fine.

Offence of putting people in fear of violence

7.16 Compared with the offence of harassment, this is a more serious offence punishable on indictment with a maximum term of five years and by a fine. The requirements of the offence of putting people in fear of violence are set out in section 4 of the Act. If a person whose course of conduct (that is, by speech or by behaviour on at least two occasions) causes another to fear that violence will be used against him, and that person knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions, that person is guilty of the offence. As with the offence of harassment, the standard of the reasonable person in possession of the same

¹¹ Section 7(4).

¹² Section 7(3).

¹³ Section 1(2).

¹⁴ Section 1(3).

¹⁵ Section 5.

information is adopted to determine whether the defendant ought to know his acts would cause another to fear violence.

7.17 As with the offence of harassment, a defendant has a defence if his course of conduct was to prevent or detect crime or was pursued under any enactment, rule of law, or to comply with any condition or requirement imposed by any person under any enactment. The third defence - if the pursuit of the defendant's course of conduct was reasonable for the protection of himself, another, or for the protection of his or another's property - is more restrictive than the defence available to the offence of harassment.¹⁶

7.18 In sentencing or otherwise dealing with a person convicted of the offence of harassment or the offence of putting people in fear of violence, the court has the jurisdiction to make restraining orders prohibiting the defendant from doing anything described in the order.¹⁷ Breach of the terms of a restraining order without reasonable excuse is punishable on conviction on indictment with imprisonment for a maximum of five years and by a fine.¹⁸

Civil remedy

7.19 Any actual or apprehended commission of the offence of harassment may give rise to a claim in civil proceedings whereby damages may be awarded for, *inter alia*, anxiety caused by the harassment and any financial loss resulting from the harassment.¹⁹ The plaintiff may also apply to the court for an injunction to restrain the defendant from pursuing any conduct which amounts to harassment.²⁰ The plaintiff may further apply to court for an arrest warrant if the defendant is in breach of the injunction.²¹ If a defendant is in breach of an injunction without reasonable excuse, he may be liable, on conviction on indictment, to imprisonment for a maximum of five years and to a fine; and on summary conviction, to imprisonment for a maximum of six months and to a fine.²²

Scotland

7.20 The provisions applicable to Scotland are generally similar to those for England and Wales, except that they are simpler. Instead of creating two criminal offences and one civil remedy, the Protection from Harassment Act 1997 creates for Scotland only a civil remedy for any actual or apprehended breach of the prohibition against pursuing a course of conduct which amounts to harassment.²³ The requirements of the civil remedy, as well as the available defences, are similar to those for England and Wales. The court has power to award damages for anxiety and financial loss and to

¹⁶ Section 4(3)(c).

¹⁷ Section 5(1) and (2).

¹⁸ Section 5(6).

¹⁹ Section 3(1) and (2).

²⁰ Section 3(3)(a).

²¹ Section 3(3).

²² Section 3(6) and (9).

²³ Section 8(2).

grant interdict²⁴ or a non-harassment order.²⁵ Breach of a non-harassment order is punishable by a maximum term of five years and by a fine.²⁶ The court may grant a non-harassment order if it is satisfied on a balance of probabilities that it is appropriate to do so in order to protect the victim from further harassment.²⁷

Malicious Communications Act 1988

7.21 The preamble of the Malicious Communications Act 1988 states that it was enacted to make provision for the punishment of persons who send or deliver letters or other articles for the purpose of causing distress or anxiety.

7.22 By virtue of section 1 of the 1988 Act:

- “1. (1) Any person who sends to another person -*
- (a) a letter or other article which conveys -*
 - (i) a message which is indecent or grossly offensive;*
 - (ii) a threat; or*
 - (iii) information which is false and known or believed to be false by the sender; or*
 - (b) any other article which is, in whole or in part, of an indecent or grossly offensive nature,*
- is guilty of an offence if his purpose, or one of his purposes, in sending it is that it should, so far as falling within paragraph (a) or (b) above, cause distress or anxiety to the recipient or to any other person to whom he intends that it or its contents or nature should be communicated.”*

7.23 Although the above provisions are applicable to certain debt collection activities, Hansard records that the Act is aimed at affording more protection to victims of ‘hate mail’ or ‘poison-pen letters’, including public figures, families of non-striking miners, and ethnic minorities, and that it seeks to make provision for offensive articles or messages sent other than by post or by telephone.

7.24 A defence is available to exonerate legitimate debt collection activities. A person would not be held guilty of subsection (1)(a)(ii) if he shows -

- “(a) that the threat was used to reinforce a demand which he believed he had reasonable grounds for making; and*

²⁴ Interdict is a remedy by decree of Court, either against a wrong in the course of being done or against an apprehended violation of a party's rights, only to be awarded on evidence of the wrong or on reasonable grounds of apprehension that such violation is intended.

²⁵ Section 8(5)(b)(ii).

²⁶ Section 9.

²⁷ Section 11. Also, section 234A of the Criminal Procedure (Scotland) Act 1995.

- (b) *that he believed that the use of the threat was a proper means of reinforcing the demand.”*

Abusive debt collection activities are unlikely to fall within the scope of the exoneration.

Australia

Federal legislation

7.25 The Trade Practices Act 1974 is the only federal legislation affecting general debt collection practices in Australia²⁸. It applies to:

- a) corporations;
- b) individuals engaged in international, interstate or territory trade or trade with the Commonwealth;
- c) individuals using postal, telegraphic or telephonic services.²⁹

7.26 Most creditors collecting their own debts, professional debt collectors and collection agencies would fall within categories (a) and (c). An instance not covered would be one in which only personal visits are made by an individual creditor or by an individual debt collector, in the course of collecting a debt from another individual in respect of a debt which does not arise from international or interstate or Commonwealth trade and commerce.³⁰ Relevant provisions of the Trade Practices Act 1974 are sections 52, 53 and 60.

7.27 Section 60 provides that the use of physical force, undue harassment or coercion in connection with the supply of or payment for goods or services by or to a consumer is prohibited. The prohibition, it seems, is not limited to conduct directed to the debtor only, but extends to conduct directed to the debtor's family or associates.³¹ The Act has not further defined what constitutes “physical force, undue harassment or coercion”.

7.28 Section 53 prohibits the making of a false or misleading statement concerning “the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy” in connection with the supply of goods or services. Although it is possible that this prohibition extends to the making of false or misleading statements concerning a creditor's remedies upon default, it is more likely that the section is limited to false or misleading statements concerning the debtor's rights as a purchaser.³²

7.29 Section 52 prohibits the use in trade or commerce of misleading

²⁸ Australian Law Reform Commission, *Report on Debt Recovery and Insolvency*, Report No. 36 at paragraph 27.

²⁹ Sections 6(2), (3) of the Trade Practices Act 1974.

³⁰ Australian Law Reform Commission, cited above, at paragraph 170.

³¹ As above, at paragraph 27.

³² As above.

or deceptive conduct. In 1977, the section was amended to include conduct which is likely to mislead or deceive. This amendment makes clear that intention to deceive is not necessary, nor is it necessary that any person is in fact deceived. It is, however, unclear whether the standard of the average person or that of the defendant's actual or constructive knowledge would be adopted to determine whether the conduct is likely to mislead or deceive.³³ It is probable that an objective standard is applicable.

7.30 The Trade Practices Act 1974 imposes both civil and criminal remedies for breaches of sections 53 and 60, but only civil remedies are available for breaches of the general prohibition on misleading or deceptive conduct referred to in section 52. The criminal sanctions are fines of up to AUD\$20,000 for an individual or up to AUD\$100,000 for a corporation.³⁴ The civil remedies include damages, injunctions and ancillary orders.

Provisions against abusive collection tactics

7.31 There are various sanctions against abusive debt collection practices. Criminal penalties are imposed for the following activities:

By licensed debt collectors

- Entry onto private premises without lawful authority. (In Queensland and Victoria)
- Suggesting to debtors that additional authority is conferred upon a licensee by reason only of his licence. (In all jurisdictions)³⁵

By all debt collectors

- Demanding payment of money by threatening detriment to any person's credit rating or eligibility for credit, except where the money is owed to the person by whom or on whose behalf the demand is made and the threats relate simply to future extension of credit by that person. (In Queensland)
- Misleading conduct, which includes disguising the creditor's own collection department as independent debt collection agencies, and using debt collection agencies stationery when creditors write their own debt collection letters. (In South Australia)
- The deceptive collection tactic of using forms of demand which resemble court forms. (In all jurisdictions except Tasmania and the Australian Capital Territory)³⁶

³³ As above.

³⁴ Section 79 of the Trade Practices Act 1974.

³⁵ Australian Law Reform Commission, cited above, at paragraph 30.

³⁶ Australian Law Reform Commission, cited above, at paragraph 33.

The United States of America

7.32 The United States of America started to tackle the problems arising from abusive debt collection practices through legislation in the 1970's. Provisions against abusive debt collection practices were included in some model statutes like the Uniform Consumer Credit Code (1974), the more pro-consumer National Consumer Act (1970), and the Model Consumer Credit Act (1973). These model statutes were enacted in some states with or without local variations.

The Fair Debt Collection Practices Act 1977

7.33 In 1977, the Federal Government enacted the Fair Debt Collection Practices Act ("the FDCPA"), which became effective in 1978. The FDCPA is applicable only to the collection of consumer debts by collection agencies. It does not apply to collection of commercial accounts, or to creditors collecting their own debts.³⁷ Under a 1986 amendment to the FDCPA, attorneys who collect debts on a regular basis are also covered by the FDCPA. The FDCPA was enacted to eliminate abusive debt collection practices, to ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent state action to protect consumers against debt collection abuses.³⁸

7.34 A debt collector may be subject to civil liability under the Act. A debt collector who fails to comply with any provision of the Act with respect to any person is liable for the actual damage sustained by that person as a result of such failure.³⁹ A person allegedly harmed by proscribed debt collection practices directed towards the collection of *another person's* debt has standing to sue under the Act.

Harassment or abuse

7.35 A debt collector is generally prohibited from engaging in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt.⁴⁰ Usually, whether conduct harasses, oppresses or abuses any person is a question of fact.⁴¹ The following cases show some examples of words or activities which are caught by the provisions against harassment:

- A debt collector enquired during a telephonic contact with the debtor, about the debtor's personal jewellery, which included references to highly personal items like wedding rings, and remarks that the debtor "should not have children if she could not

³⁷ *American Jurisprudence* Vol 17, 2nd edition, at paragraph 194.

³⁸ As above.

³⁹ 15 USC § 1692k.

⁴⁰ Fair Debt Collection Practices Act 1977 15 USCS §§1692d.

⁴¹ *Jeter v Credit Bureau, Inc* (CA11 Ga) 760 F2d 1168.

afford them” .⁴²

- A collection agency sent a letter to an elderly disabled widow stating that “our field investigator has now been instructed to make an investigation in your neighbourhood and to personally call on your employer,” and that “the immediate payment of the full amount, or a personal visit to this office, will spare you this embarrassment” .⁴³
- A collection agency sent to the debtor a letter implying that the debtor ignored her mail and her bills, and lacked the common sense to handle her financial matters properly, when in fact the debtor had called the collection agency in response to an earlier letter, and the collection agency never returned her call.⁴⁴

7.36 The following conduct is covered by the general prohibition against harassment by debt collectors:

- the use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person;
- the use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader;
- the publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency;
- the advertisement for sale of any debt to coerce payment of the debt;
- causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number; and
- the placement of telephone calls without meaningful disclosure of the caller’s identity.⁴⁵

False, deceptive, or misleading representations or means

7.37 The FDCPA prohibits a debt collector from using any false, deceptive, or misleading representation or means in connection with the collection of debt. Without limiting the generality of the provisions, certain conduct⁴⁶ is regarded as violation of the statute:

⁴² *Bingham v Collection Bureau, Inc* (DC ND) 505 F Supp 864, 67 ALR Fed 952.

⁴³ *Rutyna v Collection Accounts Terminal, Inc* (ND Ill) 478 F Supp 980.

⁴⁴ *Harvey v United Adjusters* (DC Or) 509 F Supp 1218.

⁴⁵ 15 USC § 1692d, at <<http://www.law.cornell.edu/uscode/15/1692d.html>>.

⁴⁶ 15 USCS §§1692c(1) to (16)

- The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any state, including the use of any badge, uniform, or facsimile thereof;
- The false representation of the character, amount, or legal status of any debt, or any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt;
- The false representation or implication that any individual is an attorney or that any communication is from an attorney;
- The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to lose any claim or defence to payment of the debt or become subject to any practice prohibited by the Fair Debt Collection Practices Act;
- The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer;
- The false representation or implication that accounts have been turned over to innocent purchasers for value;
- The false representation or implication that documents are legal processes;
- The false representation or implication that documents are not legal process forms or do not require action by the consumer;
- The false representation or implication that a debt collector operates or is employed by a consumer reporting agency.

7.38 The threat to take any action which cannot legally be taken or which is not intended to be taken constitutes a prohibited false, deceptive, or misleading representation or means in connection with the collection of debt.⁴⁷ The “least sophisticated debtor” standard applies to an allegation that the debt collector made a threat to take any action that could legally be taken. Thus, in evaluating the tendency of language to deceive, the court looks to the least sophisticated readers; the standard of ability and conduct to which a debtor should be held is only the low end of the spectrum of the “reasonable person”.⁴⁸

Unfair practices

7.39 The FDCPA provides that a debt collector may not use unfair or

⁴⁷ As above §§ 1692e(5).

⁴⁸ *Swanson v Southern Oregon Credit Service, Inc* (CA 9 Or) 869 F2d 1222.

unconscionable means to collect or attempt to collect any debt.⁴⁹ Without limiting the general application of the provision, the following conduct⁵⁰ is designated as violation of the statute:

- the collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorised by the agreement creating the debt or permitted by law;
- the solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution;
- depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument;
- causing charges to be made to any person for communication by concealment of the true purpose of the communication. Such charges include, but are not limited to, collection telephone calls and telegram fees;
- taking or threatening to take any non-judicial action to effect dispossession or disablement of property if there is no present right to possession of the property claimed as collateral through an enforceable security interest, there is no present intention to take possession of the property, or the property is exempt by law from such dispossession or disablement;
- communicating with a consumer regarding a debt by postcard;
- using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.

Communications in connection with debt collection

7.40 *Communications with the consumer* : Without the prior consent of the consumer given directly to the debt collector or the permission of a court, a debt collector may not communicate with a consumer in connection with the collection of any debt -

- at any unusual time or place or a time or place known to be inconvenient to the consumer;⁵¹

⁴⁹ 15 USCS §§1692f.

⁵⁰ As above §§1692f(1) to (8).

⁵¹ This usually means from 8 p.m. to 9 a.m.

- if the debt collector knows that the consumer is represented by an attorney and has knowledge of the attorney's name and address, unless the attorney fails to respond within a reasonable time to a communication from the collector or unless the attorney consents to direct communication;
- at the consumer's place of employment if the collector knows or has reason to know that the employer prohibits the consumer from receiving such communication.⁵²

7.41 *Communications with third parties* : Without the prior consent of the consumer given directly to the debt collector or the permission of a court, or unless reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate in connection with the collection of the debt with any person other than the consumer, his attorney, a consumer reporting agency, the creditor, the creditor's attorney, or the collector's attorney.⁵³

7.42 *Ceasing communications* : If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that he wishes the collector to cease further communication with him, the collector must not communicate further with the consumer with respect to such debt except to advise the consumer that the collector's further efforts are being terminated, to notify the consumer that the collector or creditor may invoke specified remedies ordinarily invoked by them, or to notify the consumer that the collector or creditor intends to invoke a specified remedy.⁵⁴

Acquisition of location information

7.43 A debt collector who seeks to communicate with any person other than the consumer for the purpose of acquiring "location information"⁵⁵ about the consumer has to comply with the following requirements:⁵⁶

- identify himself and state that he is confirming or correcting location information concerning the consumer;
- not state that the consumer owes any debt;
- not communicate with any such person more than once unless requested to do so by such person;
- not communicate by post card;
- not use any language or symbol on any envelope or in the contents of any communication effected by the mails or telegram that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt; and

⁵² 15 USC § 1692c(a).

⁵³ As above § 1692c(b).

⁵⁴ As above § 1692c(c).

⁵⁵ I.e. information about a consumer's place of abode and his telephone number at such place, or his place of employment.

⁵⁶ 15 USC § 1692b.

- after the debt collector knows that consumer is represented by an attorney with regard to the subject debt, not communicate with any person other than that attorney.

Further protection to consumers

7.44 The FDCPA further protects consumers by posting the following information on the Internet:⁵⁷

- *“A collector may contact you in person, by mail, telephone, telegram, or FAX. However, a debt collector may not contact you at unreasonable times or places, such as before 8 am or after 9.00 p.m., unless you agree. A debt collector also may not contact you at work if the collector knows that your employer disapproves.*
- *You may stop a collector from contacting you by writing a letter to the collection agency telling them to stop. Once the agency receives your letter, they may not contact you again except to say there will be no further contact. Another exception is that the agency may notify you if the debt collector or the creditor intends to take some specific action.*
- *If you have an attorney, the debt collector may not contact anyone other than your attorney. If you do not have an attorney, a collector may contact other people, but only to find out where you live and work. Collectors usually are prohibited from contacting such permissible third parties more than once. In most cases, the collector is not permitted to tell anyone other than you and your attorney that you owe money.*
- *Within five days after you are first contacted, the collector must send you a written notice telling you the amount of money you owe, the name of the creditor to whom you owe the money, and what action to take if you believe you do not owe the money.*
- *A collector may not contact you if, within 30 days after you are first contacted, you send the collection agency a letter stating you do not owe money. However, a collector can renew collection activities if you are sent proof of the debt, such as a copy of a bill for the amount owed.*
- *You have the right to sue a collector in a state or federal court within one year from the date you believe the law was violated. If you win, you may recover money for the damages you suffered. Court costs and attorney’s fees*

⁵⁷

<http://www.webcom.com/~lewrose/brochure/fdcpa.html> (Last modified on 7/2/95).

also can be recovered. A group of people also may sue a debt collector and recover money for damages up to \$500,000, or one percent of the collector's net worth, whichever is less."

Canada

Federal

7.45 The federal government had attempted to introduce a Borrowers and Depositors Protection Act in 1976, but did not succeed.⁵⁸ In 1933, the Conference of Commissioners on Uniformity of Legislation in Canada had considered the desirability of preparing a uniform collection agents Act. The Conference, however, decided in 1934 not to proceed with the matter.⁵⁹ Debt collection legislation in Canada, therefore, is a matter for the provinces.

Alberta

7.46 In Alberta, as early as 1965, the Collection Agencies Act 1965⁶⁰ was enacted. The Act was primarily concerned with the regulation of the relationship between agencies and their creditor clients, though sections 13 and 14 empowered the Administrator of the Act to prohibit the use of misleading collection letters by collection agencies, individual collectors, and other persons including creditors collecting their own debts.⁶¹ Barristers and solicitors were excluded from the application of the 1965 Act. Offences under the 1965 Act were punishable by fine or imprisonment and might be taken into account in the grant or renewal of a licence, or its suspension or cancellation.⁶²

7.47 In 1978, the 1965 Act was repealed and replaced by the Collection Practices Act 1978,⁶³ which was slightly amended in 1980. In passing the 1978 Act, the Legislature deleted a provision against unreasonable oppression, harassment or abuse which contained a list of 13 prohibited practices applicable to all persons. What survived the Legislature's amendments was a list of prohibited practices for agencies and collectors. This list is found in section 13 of the Collection Practices Act 1980, which is set out below:-

"13(1) No collection agency or collector shall -

(a) enter into any agreement with a person for whom

⁵⁸ Institute of Law Research and Reform of Edmonton, Alberta, *Debt Collection Practices* 1984, at paragraph 1.8.

⁵⁹ As above, at paragraph 1.9.

⁶⁰ S A 1965, c 13.

⁶¹ Institute of Law Research and Reform Edmonton, Alberta, cited above, at paragraph 5.2.

⁶² As above.

⁶³ S A 1978, c 47.

he acts unless a copy of the form of agreement is filed with and approved by the Administrator;

- (b) use any form or form of letter to collect or attempt to collect a debt unless a copy of the form or form of letter is filed with and approved by the Administrator;*
- (c) collect or attempt to collect money for a creditor except on the belief in good faith that the money is due and owing by the debtor to the creditor;*
- (d) charge any fee to a person for whom he acts in addition to those fees provided for in the form of agreement or in the information pertaining to fees filed with the Administrator;*
- (e) if a collection agency, carry on the business of a collection agency in a name other than the name in which he is licensed, or invite the public to deal anywhere other than at a place authorized by the licence;*
- (f) if a collector, collect or attempt to collect a debt without using his true name and the name of the collection agency that employs or authorises him to act as a collector, as that collection agency's name is shown on the collection agency's licence;*
- (g) collect from a debtor any amount greater than that prescribed by the regulations for acting for the debtor in making arrangements or negotiating with his creditors on behalf of the debtor or receiving money from the debtor for distribution to his creditors;*
- (h) make any arrangement with a debtor to accept a sum of money that is less than the amount of the balance due and owing to a creditor as full and final settlement without the prior written approval of the creditor;*
- (i) fail to provide any person for whom he acts with a written report on the status of that person's account in accordance with the regulations;*
- (j) make any personal call or telephone call for the purpose of demanding payment of a debt on any day except between 7.00 a.m. and 10.00 p.m.*

- (2) *Subsection (1) applies to a collection agency or collector notwithstanding that he is collecting or attempting to collect a debt that has been assigned to him by a creditor.*
- (3) *The Administrator may refuse to approve any form, form of agreement or form of letter that he considers to be objectionable and, without restricting the generality of the foregoing, he may refuse any form, form of agreement or form of letter that -*
 - (a) *misrepresents the rights and powers of a person collecting or attempting to collect a debt,*
 - (b) *misrepresents the obligations or legal liabilities of a debtor, or*
 - (c) *is misleading as to its true nature and purpose.*
- (4) *When, in the opinion of the Administrator, a collection agency or collector is contravening or has contravened any provision of this Act or the regulations, the Administrator may issue an order directing that collection agency or collector, as the case may be, to -*
 - (a) *stop engaging in any practice that is described in the order, and*
 - (b) *take such measures specified in the order that, in the opinion of the Administrator, are necessary to ensure that this Act or the regulations will be complied with, within the time specified in the order.”*

Other jurisdictions

7.48 In Mainland China, there is no national legislation specifically dealing with abusive debt collection activities. There is, however, a provision⁶⁴ stipulating that “whoever unlawfully detains or takes somebody into custody for the purpose of demanding the payment of a debt” may be duly punished with the offence of unlawful detention or deprivation of personal freedom. Withholding personal property for the purpose of debt collection is also a criminal offence.⁶⁵

7.49 Singapore, New Zealand and the Republic of Ireland do not have specific legislation dealing with debt collection agencies or debt collection practices.

⁶⁴ Article 238 of the Criminal Law.

⁶⁵ Article 106 of the Civil Procedure Law.

Chapter 8

Licensing

Introduction

8.1 In the previous chapter, we examined different pieces of legislation regulating debt collection activities in other jurisdictions. Debt collection agencies are also subject to licensing control in many jurisdictions.

United Kingdom

8.2 On 31 July 1974, the Consumer Credit Act 1974 ("the Act") was enacted and came into force on the same date. As stated in its preamble, the Act is -

"to establish for the protection of consumers a new system, administered by the Director General of Fair Trading, of licensing and other control of traders concerned with the provision of credit, or the supply of goods on hire or hire-purchase, and their transactions, in place of the present enactments regulating money lenders, pawnbrokers and hire-purchase traders and their transactions, and for related matters".

8.3 The Act introduced a comprehensive regulatory regime by requiring all proprietors of consumer credit business or consumer hire businesses to be licensed.¹ By virtue of section 147(1) of the Act, the licensing requirements for consumer credit business are extended to ancillary credit business. Debt collection agencies are required to be licensed because they fall within the definition of ancillary credit business,² which includes -

- (a) credit brokerage,
- (b) debt-adjusting,
- (c) debt-counselling,
- (d) debt-collecting, or
- (e) the operation of a credit reference agency.

8.4 Debt-collecting is defined as the taking of steps to procure

¹ Section 21.

² Section 145.

payment of debts due under consumer credit agreements or consumer hire agreements.³ However, for the purpose of the Act, it is not debt-collecting for a person to do anything in relation to a debt if:

- “(a) he is the creditor or owner under the agreement, otherwise than by virtue of an assignment, or*
- (b) he is the creditor or owner under the agreement by virtue of an assignment made in connection with the transfer to the assignee of any business other than a debt-collecting business, or ...”*⁴

8.5 Barristers or advocates acting in that capacity or solicitors engaging in contentious business⁵ are not to be treated as doing so in the course of any ancillary credit business.⁶

Criteria for licensing

8.6 To obtain the necessary licence, the applicant must satisfy the Director General of Fair Trading (“the Director”) that : (a) he is a fit person to engage in the activities covered by the licence, and (b) the name under which he applies to be licensed is not misleading or otherwise undesirable.⁷

8.7 In determining whether an applicant is a fit person to engage in the activities, the Director must have regard to all relevant circumstances, and in particular any evidence tending to show that the applicant, his employees, agents or associates⁸ whether past or present have -

³ Section 145(7). A “consumer hire agreement” is an agreement made by a person with an individual (“the hirer”) for the bailment or (in Scotland) the hiring of goods to the hirer, being an agreement which - (a) is not a hire-purchase agreement, and (b) is capable of subsisting for more than 3 months, and (c) does not require the hirer to make payments exceeding £15,000. See section 15. Examples are bailment, leasing, hiring out or renting of goods. Hire purchase agreements are not included as they are consumer credit agreements.

⁴ Section 146(6).

⁵ Section 86(1) of the Solicitors Act 1957. “Contentious business” means business done, whether as solicitor or advocate, in or for the purposes of proceedings begun before a court or before an arbitrator appointed under the Arbitration Act 1950, not being business which falls within the definition of non-contentious or common form probate business contained in subsection (1) of section one hundred and seventy-five of the Supreme Court of Judicature (Consolidation) Act 1925.

⁶ Section 146(1), (2).

⁷ Section 25(1).

⁸ The term “associates” is given a wide meaning. See section 184. For an individual, “associates” include spouse, former spouse, reputed spouse, relative, spouse of relative, business partner, spouse of business partner, and relative of business partner. “Relative” means brother, sister, uncle, aunt, nephew, niece, lineal ancestor, and lineal descendant. For a body corporate, a body corporate is an associate of an individual if that individual is a controller of the body corporate, or if that individual and his associates together are controllers of the body corporate. A body corporate is an associate of another body corporate - (a) if the same person is a controller of both, or a person is a controller of one and persons who are his associates, or he and persons who are his associates, are the controllers of the other; or (b) if a group of two or more persons is a controller of each company, and the groups either consist of the same persons or could be regarded as consisting of the same persons by treating (in one or more cases) a member of either group as replaced by a person of whom he is an associate.

- “(a) *committed any offence involving fraud or other dishonesty, or violence,*
- (b) *contravened any provision made by or under this Act, or by or under any other enactment regulating the provision of credit to individuals or other transactions with individuals,*
- (c) *practised discrimination on grounds of sex, colour, race or ethnic or national origins in, or in connection with, the carrying on of any business, or*
- (d) *engaged in business practices appearing to the Director to be deceitful or oppressive, or otherwise unfair or improper (whether unlawful or not). ”*⁹

8.8 If the applicant is a body corporate, the above considerations would be applied to the controller of the body corporate or an associate of such person.¹⁰

8.9 Powers are also given to the Director to renew, vary, suspend, and revoke licences.¹¹ The Director has a duty to consider representations by applicants and licence-holders, who have a right of appeal to the Secretary of State.¹²

Criminal sanctions for operating without a licence

8.10 Pursuant to section 39(1) of the Act, it is an offence to operate without a licence when one is required. Pursuant to section 147 of the Act, the criminal sanctions which apply to unlicensed consumer credit business also apply to unlicensed ancillary credit business, which include debt collection. If tried summarily, the offence carries a fine of up to £2,000; and if tried on indictment, up to two years’ imprisonment and/or a fine can be imposed.¹³ It is also an offence for a licensee to carry on a business under a name not specified in the licence,¹⁴ or to fail to notify the Director of changes in particulars entered in the register within 21 working days.¹⁵

⁹ Section 25(2).

¹⁰ As above.

¹¹ Sections 29-32.

¹² The Secretary of State here concerned is the Secretary of State for Trade and Industry. See Interpretation Act 1978 section 5, schedule 1. See also section 41 of the Act. For a discussion of the appeals filed with the Secretary of State, please see article by David Foulkes in New Law Journal (February 11, 1983) at page 135.

¹³ Section 167, and Schedule 1. In *R v Curr* (1980) 2 Crim App R(S) 153 the defendant was sentenced to 12 months’ imprisonment and a fine of £2,400 for six offences of carrying on a consumer credit business without a licence, contrary to Consumer Credit Act 1974, section 39(1).

¹⁴ Section 39(2).

¹⁵ Section 39(3).

Civil sanctions for operating without a licence

8.11 The civil consequence of not obtaining a licence is that any agreement for the services of a person carrying on an ancillary credit business¹⁶ (the “trader”), if made when the trader was unlicensed, is unenforceable against the other party (“the customer”) without an order of the Director¹⁷. Hence, a debt collector may not be able to collect his fees or commission without such an order from the Director. The Director must act judicially and consider representations by the trader, as well as how far debtors have been prejudiced.¹⁸ Unless the Director determines to issue an order that an agreement for ancillary credit business is to be treated as if made when the trader was licensed, he must : (i) inform the trader that he is minded to refuse the application or grant in terms different from those applied for, together with his reasons; and (ii) invite the trader to submit representations in support of the application.¹⁹ The Director must consider whether or not to grant an order having regard to all relevant factors, including:

“In determining whether or not to make an order under subsection (2) in respect of any period the Director shall consider, in addition to any other relevant factors, -

- (a) how far, if at all, customers under agreements made by the trader during that period were prejudiced by the trader’s conduct,*
- (b) whether or not the Director would have been likely to grant a licence covering that period on an application by the trader, and*
- (c) the degree of culpability for the failure to obtain a licence.”²⁰*

8.12 If any applicant is aggrieved by the decision of the Director, he may appeal to the Secretary of State for Trade and Industry.²¹

Australia

8.13 Licensing control systems are present in all Australian jurisdictions except in the Australian Capital Territory.²²

¹⁶ Includes debt collection.

¹⁷ Section 148.

¹⁸ Brian Harvey and Deborah Parry, *The Law of Consumer Protection and Fair Trading*, (3rd edition) at page 263.

¹⁹ Section 148(3).

²⁰ Section 148(4).

²¹ Section 150.

²² Australian Law Reform Commission, *Report on Debt Recovery and Insolvency*, at paragraph 28.

New South Wales

8.14 The Commercial Agents and Private Inquiry Agents Act 1963 No. 4²³ provides for the licensing and control of commercial agents, private inquiry agents and their subagents.

8.15 Commercial agent means any person (whether or not the person carries on any other business) who exercises or carries on any of the following functions, namely:

- (a) serving any writ, summons or other legal process,
- (b) ascertaining the whereabouts of, or repossessing, any goods the subject of a lease, hire-purchase agreement or bill of sale or taking possession of any goods the subject of a mortgage within the meaning of the *Credit Act* 1984, or

- (c) collection, or requesting or demanding payment of debts,

on behalf of any other person and for or in consideration of any payment or other remuneration (whether monetary or otherwise), but does not include any employee of a licensed commercial agent.²⁴

8.16 Commercial subagent basically refers to one who works for a commercial agent and carries out the functions of a commercial agent. A person who first joins the industry may only apply as a subagent. Only after he has worked for 12 months, and has undertaken certain training courses, would he be eligible to apply for a licence as a commercial agent.

8.17 Unlicensed persons are prohibited from acting as commercial agents or private inquiry agents. An application for a licence may be lodged with the clerk of the Local Court for the district within which the applicant proposes to exercise or carry on the business of a commercial agent. Upon receiving an application the court refers it to the local police for comment. The local police must then inquire whether there are grounds for objecting to the granting of the application and forward a report to the clerk of the Local Court.

8.18 Objection may be made only on one or more of the following grounds, namely:

“(a) *where the applicant is a natural person:*

- (i) *that the applicant is not of good fame or character,*
- (ii) *that the applicant is not a fit and proper person to hold a licence,*

²³ Reprinted 20 February 1997.

²⁴ Section 4.

- (iii) *that the applicant does not have the prescribed qualifications or experience,*
 - (iv) *that the applicant has not attained the age of 18 years,*
 - (v) *that, except in the case of an application for a subagent's licence, the applicant has not been continuously resident in Australia during the period of twelve months immediately preceding the making of the application,*
 - (vi) *that the applicant is disqualified under this Act from holding a licence,*
 - (vii) *that, within the period of 10 years immediately preceding the date of the application, the applicant has been convicted of an offence punishable on indictment, and*
- (b) *where the applicant is a corporation:*
- (i) *that any of the directors or the secretary of the corporation, or any person employed as its manager to be in charge of the carrying out of its functions as the holder of a licence is a person referred to in subparagraph (i), (ii), (iv), (v), (vi) or (vii) of paragraph (a), or*
 - (ii) *that the person to be in charge of the carrying out of its functions as the holder of a licence is a person²⁵ referred to in subparagraph (iii) of paragraph (a)."*

8.19 Where the local police objects to the granting of an application, the court would arrange a hearing by a magistrate, to be attended by both the applicant and a representative of the local police. The magistrate then makes his decision after the hearing.

8.20 A licence, be it a commercial agent or subagent licence, is valid for 12 months, and upon expiry a fresh application has to be made. Whenever a licence is issued, both the local police and the Licensing Agency of the NSW Police are informed.

Licensing Agency, NSW Police

8.21 Regulation of debt collection agencies in New South Wales is

²⁵

Section 10(6).

also undertaken by the Licensing Agency of the NSW Police.²⁶ The Licensing Agency is manned by a staff of about 12 and performs various functions including:

- (a) Investigative service – to ensure the integrity of the industries involved are maintained and to identify any involvement of organized crime within those industries.
- (b) Consultancy Service – provides advice to other Government departments and authorities on liquor licensing, legalized gaming, racing and film/literature classification.
- (c) Index of Licenses – the agency is responsible for maintaining a register of persons who are licensed under the Commercial Agents and Private Inquiry Agents Act. Any member of the public may pursue the register with regard to the issue, renewal or cancellation of licences concerning commercial agents and their subagents.

8.22 Control of commercial agents in some other states of Australia is undertaken by other statutory bodies. In Queensland, for example, the administration of the licensing regime is handled by the Office of Fair Trading. In South Australia, the same work is undertaken by the Office of Consumer and Business Affairs.

Review of the present NSW legislation²⁷

8.23 The Licensing Agency does not see any major problems with debt collection agencies and believes the legislation has worked satisfactorily. As, however, the legislation was enacted in 1963, it is now considered not entirely up to date and improvements may be made. The Commercial Agents and Private Inquiry Agents Act 1963 has been reviewed, and a new bill has been drafted. The draft bill and its related papers have not yet been made public.

8.24 It is, however, understood that the new bill will make, *inter alia*, the following changes:

- (a) The issuing authority of a licence is to be changed from the Court to the Commissioner of New South Wales Police. This change is intended to serve several purposes: (i) to avoid the situation where different courts may have different standards in granting a licence and to ensure that a common standard will be adopted by the NSW Police as a centralized issuing authority; (ii) to avoid papers being mislaid when they were conveyed

²⁶ This part is extracted from a paper by CHUNG Siu-yeung, Chief Inspector of Police, Overseas Liaison, Sydney.

²⁷ As above.

between the Court and the NSW Police; (iii) to relieve the Court from routine licensing work.

- (b) To address some grey areas relating to the conduct of some commercial agents and subagents.
- (c) To improve the procedures dealing with complaints filed against commercial agents and subagents.

Victoria

8.25 The Private Agents Act 1966 was originally introduced in Victoria in 1956 to regulate inquiry agents, private detectives, and security guard companies. The Act was then broadened and currently establishes occupational regulation on the debt recovery and private security industries. The current legislation includes six categories of private agents which are required to be licensed:

- (a) “commercial agent”, which includes a debt collector and/or repossession agent;
- (b) “commercial subagent”, which includes an employee or person acting on behalf of a commercial agent;
- (c) “crowd controller”, colloquially known as a bouncer;
- (d) “security guard”, i.e. a person paid to watch or protect property;
- (e) “security firm”, i.e. a person or partnership supplying security guards and/or crowd controllers; and
- (f) “inquiry agent”, colloquially known as a private detective.

8.26 Part II of the 1966 Act prohibits any person from acting as a commercial agent or commercial subagent, unless licensed. It also prohibits a commercial agent from employing any unlicensed commercial subagent. Corporations or partnerships seeking a commercial agent's licence are required to appoint as nominee the officer or person residing in Victoria who is in bona fide control of the business in Victoria.

8.27 An application for a commercial agent's or subagent's licence (which may be made by an individual or corporation) must be made in triplicate to the Magistrates' Court in the prescribed form. It must be accompanied by three testimonials in duplicate signed by different reputable persons as to the character of the applicant, or the nominee in the case of the corporation or firm, and be accompanied by three passport-sized photographs. An application for a commercial agent's licence must be accompanied by proof that a surety has been or will be lodged as required by Division 1 of Part IV of the Act.

8.28 The Registrar at the relevant Magistrate's Court is required to forward a duplicate of the application to the officer in charge of the police station nearest to that Court for investigation and report. Any person is entitled to object on the grounds specified in the Act, which essentially mirror those matters to be taken into account by the Court in considering the grant or refusal of the licence. These matters include issues of age, character and competency.

8.29 A commercial agent's or subagent's licence remains in force for one year and may, subject to satisfaction by the Court and payment of the renewal fee, be renewed without the applicant having to personally attend before the court.

8.30 The Act further provides that upon application by any person, a commercial agent or subagent may be called on to attend before the court and show cause not only why the licence should not be cancelled, but why permanent or temporary disqualifying orders ought not be made. The grounds on which such an application may be lodged include those on which an initial grant is made.

Similar Legislation

8.31 Other states in Australia have similar legislation for the regulation of commercial agents. Also, under Mutual Recognition legislation, commercial agents and subagents registered in one jurisdiction may be able to obtain registration in another jurisdiction through an administrative process.

8.32 The Australian Law Reform Commission²⁸ has compiled a summary of the licensing criteria in the different states:

- (a) Age requirements. (Generally required).
- (b) Residence requirements. (New South Wales, Queensland, South Australia and the Northern Territory; in New South Wales, the residence need only be in Australia).
- (c) An applicant should be of good fame and character and be a fit and proper person to hold a licence, and must not have been convicted of certain offences or disqualified from holding a licence. (Generally required).
- (d) Adequacy of educational attainments or experience. (Required in New South Wales, Queensland, South Australia and Tasmania. But there is no training or examination requirements in any State or Territory).
- (e) No previous record of harassment of debtors. (In New South

²⁸ Report on Debt Recovery and Insolvency.

Wales, Victoria and Tasmania, such a record is a ground for refusal of a licence).

- (f) Disqualification for bankruptcy. (In Victoria, Tasmania and the Northern Territory, applicants must not be bankrupt. In other jurisdictions, bankruptcy or entry into a composition or scheme of arrangement with creditors is a ground for discipline).

8.33 Licensing applications are, however, handled by different bodies in different States:

New South Wales

- Application is lodged with the clerk at the Local Court for the district. The matter is then referred to the police for inquiry and report. Any objection relating to the grant of a licence is heard by a stipendiary magistrate in open court.²⁹

Queensland

- Application is lodged with the Auctioneers and Agents Committee, an administrative body.³⁰ The Committee consists of a registrar and 8 other members appointed by the Governor in Council. The Committee has delegated its licensing powers to a sub-committee which conducts background checks on the applicant with the police. Any objection will be lodged with the District Court. The administration of the licensing regime is handled by the Office of Fair Trading.

South Australia

- Application is lodged with the Office of Consumer and Business Affairs, and any objection will be heard by the District Court.³¹ The police are responsible for conducting criminal record check on the applicant.

Victoria

- Although an administrative body has been established, application decisions are made by the courts.³² The arrangement is similar to that of New South Wales.

Western Australia

- The arrangement is similar to that of New South Wales and Victoria. There is a Commercial Agents Squad within the Western Australia Police.

²⁹ Commercial Agents and Private Inquiry Agents Regulation 1995 under the Commercial Agents and Private Inquiry Agents Act 1963 (NSW) section 10.

³⁰ Auctioneers and Agents Act 1971 (Qld) section 17.

³¹ Security and Investigation Agents Act 1995.

³² Private Agents Act 1966 (Vic) sections 8, 11, 13.

Northern Territory

- Application is lodged with the Office of Court. Copy of the same is forwarded to the police, the Solicitor for Northern Territory, and will be gazetted. The Office of Court maintains the licence register.

Tasmania

- Application is lodged with the Court of Petty Sessions. The Clerk of Court handles the basic administration of the licence. A magistrate has the power to revoke a licence upon a complaint made against the licensee.

Canada

Alberta

8.34 In Alberta, as early as 1965, debt collection agencies and individual debt collectors working as employees of the agencies were required to be licensed pursuant to the Collection Agencies Act 1965.³³ In 1978, the 1965 Act was repealed and replaced by the Collection Practices Act 1978 which was slightly amended in 1980. In the Collection Practices Act 1980, there are provisions governing the licensing of debt collectors. An Administrator of Collection Practices (the “Administrator”) is appointed under section 2 to administer the implementation of the Act.

8.35 A collection agency and a collector must have a licence before embarking on the business of a collection agency and acting as a collector respectively.³⁴ No collection agency can employ or authorise any person who does not have a licence as a collector. Certain categories of persons are exempted under the Act. They include barristers and solicitors in practice and civil enforcement bailiffs.

8.36 “Collection agency” is defined³⁵ to mean “a person, other than a collector, who carries on the business (i) of collecting or attempting to collect debts for other persons, (ii) of collecting or attempting to collect debts under any name which differs from that of the creditor to whom the debt is owed ...”. “Collector” is defined³⁶ as “a person employed or authorized by a collection agency to (i) collect or attempt to collect money ... (iv) deal with or locate debtors, for the collection agency ...”.

8.37 An application for the grant or renewal of a collection agency licence or collector’s licence has to be made to the Administrator in the prescribed form together with the licence fee, security and affidavit (in the case of a collection agency licence) or employment/authorization letter (in the case of a collector’s licence).

³³ S A 1965, c 13.

³⁴ Section 4.

³⁵ Section 1(b).

³⁶ Section 1(c).

8.38 Any person who has been refused a licence or the renewal of a licence or whose licence has been cancelled or suspended may appeal³⁷ to the Minister who appoints an appeal board to hear the appeal. The appeal board consists of an independent person appointed by the Minister as the chairman and other persons who are licensed under the Act. The appellant or the Administrator may appeal against the decision of the appeal board to the Court of Queen's Bench.

8.39 Before issuing or renewing a licence, the Administrator may make inquiries regarding the applicant and each partner of the partnership or each director of the corporation. Pursuant to section 15(2), the Administrator may refuse to issue or renew a licence or may suspend or cancel a licence if the applicant or licensee -

- (a) makes an untrue statement or a material omission knowingly;
- (b) refuses or neglects to comply with this Act;
- (c) in the opinion of the Administrator, is not a financially responsible person, or in view of his past record, the Administrator considers it appropriate in the public interest.

8.40 The Administrator has statutory powers to investigate and make inquiries. The Administrator may inquire into any complaint or alleged contravention of the Act, and require any person to provide any information he considers relevant.³⁸ In addition, the Administrator may inquire into the affairs of any person who is believed to engage in the business of debt collecting.³⁹ He may also apply to court for an order to enter relevant premises to search, examine, remove, take extracts from or obtain copies of any records, books, document or things which are relevant. A certified true copy of a record, book or document obtained under this section shall be admissible in evidence in a court.

8.41 Collection agencies are required to keep proper accounting and other records of the business including a register of the trust accounts in which all money collected from debtors are entered.⁴⁰ Collection agencies must acknowledge the receipt of any money collected from debtors by means of consecutively numbered vouchers containing details such as the date the amount was received and the names of debtors.

8.42 Collection agencies are also required to deposit all money collected from debtors in trust accounts maintained in banks, loan corporations, trust corporations, etc.⁴¹ Collection agencies cannot withdraw money from trust accounts except for the purpose of paying creditors or deducting the commission and disbursements of the collection agencies, etc.

³⁷ Section 16.

³⁸ Section 19.

³⁹ Section 20.

⁴⁰ Section 9.

⁴¹ Section 10.

8.43 Collection agencies are further required to provide the Administrator with reports of their financial affairs signed by acceptable auditors, and also provide the auditors with access to books and records of the businesses.⁴² The Administrator may order a collection agency to correct any defect or deficiency in the form or maintenance of any book or record.

South Africa

8.44 In South Africa, the newly enacted Debt Collectors Act 1998 regulates the licensing of debt collectors. "Debt collector" is defined⁴³ to mean a person -

- (a) other than an attorney or his employee, who for reward collects debts owed to another on the latter's behalf;
- (b) who, in the course of his business, for reward takes over debts referred to above in order to collect them for his own behalf;
- (c) who, as an agent or employee of a person referred to in (a) or (b), collects the debts on behalf of such person.

8.45 A Council known as the Council for Debt Collectors (the "Council") is established to exercise control over the occupation of debt collectors. Under section 3, the Council shall consist of not more than 10 members appointed by the Minister of Justice, including -

- (a) a chairperson, any fit and proper person with a suitable degree of skill and experience in the administration of civil law matters;
- (b) an attorney;
- (c) 2 to 4 debt collectors, 2 of whom, being natural persons with at least 3 years experience, shall be appointed after consulting the trade of debt collectors;
- (d) 2 persons, in the opinion of the Minister of Justice, being fit and proper;
- (e) a person nominated by institutions representing consumer interests and whom the Minister of Justice is satisfied is a fit and proper person.

8.46 The Council may appoint 3 of its members as an executive committee of the Council to perform or exercise all the powers and functions of the Council during the periods between meetings of the Council.⁴⁴ The Council may also under section 7 appoint such personnel for the efficient performance of its functions and management.

8.47 According to section 8, no person can act as a debt collector unless he is registered under the Act as a debt collector. An attorney or his employee is exempted from the Act. In the case of a company or close

⁴² Section 11.

⁴³ Section 1.

⁴⁴ Section 5.

corporation carrying on business as a debt collector, apart from the company or corporation itself, every director of the company, member of the corporation and every officer of such company or corporation concerned with debt collecting, must also be registered as debt collectors under the Act. Any person who contravenes this section is guilty of an offence and liable on conviction to a fine or imprisonment for 3 years. The Minister of Justice may exempt any person from the provisions of the Act.

8.48 An application for registration as a debt collector shall be lodged with the Council in the prescribed form and with the prescribed fee. A person can be disqualified from registration in any of the following circumstances⁴⁵ -

- (a) convicted of an offence with violence, dishonesty, extortion or intimidation as an element in the preceding 10 years;
- (b) guilty of improper conduct;
- (c) unsound mind and so declared or certified by a competent authority;
- (d) under the age of 18 years;
- (e) unrehabilitated insolvent; or
- (f) in the case of a company or close corporation, a director of the company or a member of the corporation is so disqualified from registration in the above terms.

8.49 The Council is required to keep a register of the name and prescribed particulars of every debt collector, and publish it in the Gazette and allow the public to inspect it.

8.50 The Council is also empowered, subject to the approval of the Minister of Justice, to adopt a code of conduct for debt collectors and publish such code in the Gazette which is binding on all debt collectors.⁴⁶ The Council may, subject to the approval of the Minister of Justice, amend or repeal the code. Section 15 sets out certain conduct which may be regarded by the Council to be improper conduct, for example -

- (a) use force or threaten to use force against a debtor;
- (b) act towards a debtor in an excessive or intimidating manner;
- (c) make fraudulent or misleading representations;
- (d) spreads or threatens to spread false information concerning the creditworthiness of a debtor;
- (e) contravenes or fails to comply with any provisions of the Act; etc.

8.51 The Council may investigate any allegation of improper conduct of a debt collector. The debt collector may refute such allegation either in person or through a legal representative.⁴⁷ If the Council finds a debt collector guilty of improper conduct, the Council may -

⁴⁵ Section 10.

⁴⁶ Section 14.

⁴⁷ Section 15.

- (a) withdraw his registration;
- (b) suspend his registration;
- (c) impose on him a fine;
- (d) reprimand him;
- (e) recover from him the costs incurred by the Council in connection with the investigation;
- (f) order him to reimburse any person whom the Council is satisfied has been prejudiced by the conduct of such debt collector;
- (g) any combination of the above.

8.52 The Council may withdraw the registration of a debt collector if he has given false information in his application for registration, or after his registration, he -

- (a) is convicted of an offence of which violence, dishonesty, extortion or intimidation is an element;
- (b) is found guilty in terms of section 15 of improper conduct;
- (c) becomes unsound mind and so declared or certified by a competent authority;
- (d) becomes insolvent; or
- (e) in the case of a company or close corporation, the registration of a director of the company or a member of the corporation is so withdrawn in the above terms.⁴⁸

8.53 Debt collectors may only recover from a debtor the capital amount of a debt and any interest legally due and any necessary expenses and fees.⁴⁹ Debt collectors are required under section 20 to deposit the money received from debtors into a separate trust account and pay such money and interest to the person on whose behalf the money is received within a reasonable time.⁵⁰ Debt collectors are also required to keep proper accounting records in respect of all money received and the accounting records and annual financial statements are required to be audited annually by a person appointed by the Council.⁵¹

⁴⁸ Section 16.

⁴⁹ Section 19.

⁵⁰ Section 20.

⁵¹ Section 21.

Chapter 9

Proposals for reform

Introduction

9.1 Harassment and coercion are widespread abuses in the area of debt collection. Users of consumer credit, as well as innocent third-parties, should be protected from abusive collection tactics. Whereas consumer protection in other areas can often be addressed by improved information disclosure, enabling consumers to choose the supplier that best meets their particular needs, these mechanisms are less effective in addressing abusive debt collection, as a debtor is not in a position to choose his preferred collector.¹

9.2 In formulating proposals for reform, the Sub-committee also recognises that debt collection is a legitimate and necessary business activity, and that creditors and their agents are entitled to take reasonable steps to contact a debtor to collect the debts.

9.3 The problem of abusive debt collection has a number of causes. There is no single solution to the problem. The Sub-committee has taken into consideration the various factors which have contributed to the debt collection problem,² the deficiencies of existing controls,³ as well as measures taken in other jurisdictions,⁴ and recommends a range of measures to address the problem.

Criminal law

9.4 The Sub-committee has considered various pieces of legislation in other jurisdictions including the United Kingdom's Administration of Justice Act 1970, section 40, Protection from Harassment Act 1997, and the Malicious Communications Act 1988, Australia's Trade Practices Act 1974, section 60, and Alberta's Collection Practices Act 1978. In order to strengthen the criminal law to deal with debt collection activities, the Sub-committee believes that section 40 of the UK Administration of Justice Act 1970,⁵ which was formulated with the specific aim of tackling common malpractices of debt collection, would cover most of the situations with which the Sub-committee is concerned.

¹ Australian Competition and Consumer Commission, *Report on Undue Harassment and Coercion in Debt Collection*, May 1999 at page 2.

² See Chapter 2 above.

³ See Chapter 6 above.

⁴ See Chapters 7 and 8 above.

⁵ See paragraphs 7.2 - 7.8 above.

The criminal offence of unlawful harassment of debtors

9.5 Pursuant to section 40(1) of the UK Administration of Justice Act 1970:

“A person commits an offence if, with the object of coercing another person to pay money claimed from the other as a debt due under a contract, he -

- (a) harasses the other with demands for payment which, in respect of their frequency or the manner or occasion of making any such demand, or of any threat or publicity by which any demand is accompanied, are calculated to subject him or members of his family or household to alarm, distress or humiliation;*
- (b) falsely represents, in relation to the money claimed, that criminal proceedings lie for failure to pay it;*
- (c) falsely represents himself to be authorised in some official capacity to claim or enforce payment; or*
- (d) utters a document falsely represented by him to have some official character or purporting to have some official character which he knows it has not.”*

9.6 According to section 40(3), sub-paragraph (a) above has no application in respect of anything done which is reasonable for the purpose of either securing the discharge of an obligation due, or believed to be due, or the enforcement of any liability by legal process.

9.7 The Sub-committee would propose some modifications to Section 40(1)(a). Given that section 40(1)(a) is general in nature, it may be useful to specify that, without affecting the generality of sub-section (a), it is harassment if any person in making demands for payment sends to another a letter or any article which : (i) is, in whole or in part, of an indecent or grossly offensive nature; or (ii) conveys information which is false and known or believed to be false by the sender.

9.8 In view of the concerns raised about harassment of referees and other third parties by debt collectors, the Sub-committee proposes to extend the scope of application of sub-paragraph (a) to include alarm and distress suffered by third parties. This can be achieved by adding “or any other person” after “family or household”.

9.9 In light of the judicial interpretation of section 40 in *Norweb plc v*

Dixon,⁶ the Sub-committee also proposes to substitute the words “pay money claimed from the other as a debt due under a contract” in section 40(1) with “repay a debt”, and to replace the word “calculated” with “likely” in sub-paragraph (a).

9.10 As for sub-paragraphs (b), (c) and (d) of section 40(1), as well as section 40(3) of the 1970 Act, these provisions can be adopted without substantial changes, except that modifications should be made to ensure harassment and representations conveyed by modern electronic means of communication would be covered by the proposed legislation.

Recommendation 1

The criminal offence of harassment of debtors to be created, so that it will be an offence if a person, with the object of coercing another person to repay a debt –

- (a) harasses the other with demands for payment which, in respect of their frequency or the manner or occasion of making any such demand, or of any threat or publicity by which any demand is accompanied, are likely to subject him or members of his family or household or any other person to alarm, distress or humiliation;**
- (b) falsely represents, in relation to the money claimed, that criminal proceedings lie for failure to pay it;**
- (c) falsely represents himself to be authorised in some official capacity to claim or enforce payment; or**
- (d) utters a document falsely represented by him to have some official character or purporting to have some official character which he knows it has not.**

Without affecting the generality of sub-section (a), it is harassment if any person in making demands for payment sends to another a letter or any article which : (i) is, in whole or in part, of an indecent or grossly offensive nature; or (ii) conveys information which is false and known or believed to be false by the sender.

Sub-section (a) has no application in respect of anything done which is reasonable for the purpose of either securing the discharge of an obligation due, or believed to be due, or for the enforcement of any liability by legal process.

Harassment and representations conveyed by modern electronic means of communication should be covered by the proposed legislation.

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[1995] 3 All ER 952. See discussion in paragraphs 7.5 - 7.7 above.

Licensing

9.11 The Sub-committee examined licensing regimes in the United Kingdom, New South Wales, Victoria, Alberta and South Africa in Chapter 8 of this Consultation Paper. The Sub-committee has considered different views on the effectiveness and the need of a licensing regime in addressing the problem of abusive debt collection practices. Those against licensing have put forward arguments as follows:

- (a) A licensing regime cannot curb illegal activities in debt collection, because delinquent operators would not offer themselves for licensing, either knowing that they would not be granted a licence, or believing that it would more advantageous for them to operate outside the licensing regime. Hence, licensing should not be seen as a tool capable of combating directly the criminal activities associated with debt collection.
- (b) A licensing regime would only be effective to regulate prudent and ethical market operators who are prepared to abide by the rules. Such prudent and ethical operators would not engage in illegal activities whether or not a licensing regime is in place.
- (c) Although it is envisaged that under the licensing scheme, those who operate without a licence will be identified and prosecuted, licensing cannot put an end to illegal debt collection practices which are already sanctioned under existing laws. The problem lies in the difficulty of detecting the perpetrators. As these perpetrators are likely to continue to work for unlicensed agencies, it is unlikely that licensing would facilitate detection.
- (d) A licensing regime would have significant resource implications on public revenue and create unnecessary bureaucracy. Even though a licence fee may be charged to recover full administration costs of the licensing authority, other costs are not recoverable. These include costs for implementation of the scheme, law enforcement and appeal mechanism, which will have to be supported by public funds.
- (e) Reputable market operators would have to bear extra costs in the form of licensing fees, which may be passed on to client financial institutions or to consumers ultimately. Given the relatively small number of agencies involved in debt collection, the licence fee may be substantial.
- (f) Licensing leads to further problems as it will be necessary to devise an appropriate regulatory system which would be cost-effective.

9.12 Views in favour of licensing may be summarised as follows:

- (a) Governments sometimes have to intervene in markets to achieve certain social goals that are not achieved by ordinary market mechanisms. In the context of debt collection, occupational licensing which imposes security checks on entrants should reduce the risk of harm to the public by excluding practitioners likely to engage in harmful activities.
- (b) If it is an offence to operate as a debt collector without a licence, then unless an identified delinquent operator refrains from demanding repayment of debts, the Police have the power to take action against him as soon as he demands repayment. A delinquent operator who chooses not to apply for a licence can be convicted for operating without a licence.
- (c) Many prudent and ethical operators are in favour of licensing because in the absence of a licensing system, they have to face unfair competition from operators who engage in abusive or harassment type of activities.
- (d) A licensing system will give strong incentives to debt collectors to abide by the rules so that their licences will not be revoked and will be renewed on expiry.
- (e) Whilst it may be that licensing would not materially affect the collection manner of operators at the top-end of the industry, the middle of the range group of operators can be regulated and improved by licensing. The bottom end, if they remained at that end, should not be allowed to operate as debt collectors. In other words, licensing would reduce malpractices even if it could not curb illegal activities.
- (f) Even assuming that a licensing regime is not strictly necessary, it would be a useful corollary to any proposed statutory offence. If breach of the statutory offence may result in revocation of the licence, debt collection agencies and debt collectors are likely to be more cautious before undertaking over-aggressive action.
- (g) A licensing system would provide the authorities with valuable and comprehensive information about the debt collection industry. Such information would be useful in the formulation of policies, as well as in the fight against crime.
- (h) Persons of questionable integrity or with previous convictions would be disallowed from engaging in such activities, and thereby safeguarding the interests of debtors and third parties.
- (i) Infiltration by triad groups and loansharks in the debt collection industry could be curbed, which would indirectly debilitate triad groups and make it more difficult for them to profit from loansharking business.

- (j) The formulation of licensing requirements could raise the standards of entrants to the industry, and thereby encourage professionalism. It could also help the image of legitimate licensed debt collectors.
- (k) Measures could be taken to minimize the administrative costs of a licensing regime, including renewing licences bi-annually instead of annually. In addition, the Administration may consider full-cost recovery financing, in which case more of the administrative costs will be borne by the market operators instead of the general public.

9.13 The Sub-committee is aware of the resource implications of a licensing regime, and has carefully considered the efficacy of a licensing regime in curbing abusive debt collection. At the present stage, the Sub-committee is more convinced by the arguments in favour of licensing. The fact that, despite the administration costs, many other jurisdictions have in place a licensing regime has also weighed in the Sub-committee's deliberation. The Sub-committee believes that a licensing regime, jointly with other measures, would help to curb both criminal and nuisance-type of debt collection activities. We note that in New South Wales,⁷ the Licensing Agency is manned by a staff of 12 and they seem capable of carrying out the various functions expected of them. Having said the above, the Sub-committee is aware that licensing is not a panacea for all the problems associated with debt collection, and has recommended other measures to work in conjunction with licensing.

Recommendation 2

Balancing the arguments for and against the setting up of a licensing regime, the Sub-committee recommends that debt collection agencies should be licensed, and it should be a criminal offence to operate a debt collection agency or undertake debt collection work for others without a valid licence.

Commercial vs consumer debts

9.14 The Sub-committee has also considered the issue whether the proposed licensing regime should cover both commercial and consumer debts. It has been suggested that commercial debts should not be covered by the proposed licensing regime because commercial debtors are capable of protecting their own interests. The Sub-committee is of the view that no distinction should be made between consumer and commercial debts. Whilst some well-established commercial entities can handle debts effectively, many

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See discussion in paragraph 8.21 above.

corporate entities are vulnerable small-scale operators. The fact that personal guarantees are often provided as security to commercial loans further blurred the distinction between the two types of loan. Abusive collection of commercial debts may well cause disturbance or anxiety of innocent third parties.

Recommendation 3

The Sub-committee recommends that the proposed licensing regime should cover both consumer debts and commercial debts.

Licensing authority

9.15 It is observed that the licensing authority for debt collectors in other jurisdictions is often an administrative body. In the United Kingdom, it is the Director General of Fair Trading;⁸ in Alberta, the Administrator of Collection Practices;⁹ in Queensland, the Auctioneers and Agents Committee;¹⁰ in South Australia, the Office of Consumer and Business Affairs;¹¹ and in South Africa, the Council for Debt Collectors.¹²

9.16 Administrative bodies have also been created for the security and guarding services industry and the estate agency business in Hong Kong. As regards money lending business, the arrangement involves three relevant authorities in the administration of the Money Lenders Ordinance, namely, the Registrar of Companies, the Commissioner of Police and the licensing court.

9.17 The Sub-committee noted that it is also feasible to dispense with an administrative body as in New South Wales. Applications are lodged with the Local Court which then refers the applications to the police for comment. Another possibility is to vest the licensing authority with the police directly, given that the investigation and vetting work is carried out by the police. This approach is now being contemplated in New South Wales. The Administration should consider the pros and cons of creating an administrative body to oversee the licensing work, as well as the possibility of streamlining the licensing regime as far as practicable. Consideration should also be given to whether the merging of licensing of debt collectors into any existing licensing regime would achieve savings in resources.

⁸ See paragraph 8.2 above.

⁹ See paragraph 8.34 above.

¹⁰ See paragraph 8.33 above.

¹¹ As above.

¹² See paragraph 8.45 above.

Recommendation 4

Since the Administration is better placed than the Sub-committee to decide on the appropriate licensing authority, the Sub-committee has refrained from making recommendations on this matter. The Administration is urged to consider the experience of other jurisdictions and to devise a licensing regime which can be run efficiently and economically.

Collection agencies and collectors

9.18 In the United Kingdom, only one licence is required for each debt collecting business; there is no need for the employee debt collectors to be licensed. In New South Wales and Victoria, however, the business owner as well as the employees are required to obtain commercial agent licence and subagent licence respectively. The same is also true for Alberta and South Africa in that both the collection agency and its individual collectors must be licensed. In Hong Kong, the Security and Guarding Services Ordinance requires the business owner to obtain a security company licence and the employees to obtain security personnel permit. The Estate Agents Ordinance also requires both company licences and individual licences. On the other hand, both the Money Lenders Ordinance and the Travel Agents Ordinance require only the business owner to be licensed.

Recommendation 5

Although the licensing regime would be more elaborate if both individual debt collectors and collection agencies are required to be licensed, we recommend that individual debt collectors should be required to obtain licences since a major reason in favour of licensing is to exclude persons of questionable integrity from entering the business.

Exemptions

9.19 The following categories of creditors or persons should be exempted from obtaining a licence -

- (i) a creditor collecting his own debt, provided he did not become a creditor by an assignment of the debt;
- (ii) a creditor who became a creditor by virtue of an assignment of debt, provided the assignment was made in connection with a

transfer of business, other than a debt collecting business;

- (iii) barristers acting in that capacity;
- (iv) solicitors acting in that capacity and their employees;
- (v) court bailiffs;
- (vi) authorised financial institutions.

Recommendation 6

We recommend that the above listed categories of creditors and persons be exempted from obtaining a licence.

Collecting debts as a business / profession or otherwise

9.20 Related to the above recommendation on exempted persons, is the issue whether the licensing regime should cover only those who engage in debt collection as a business / profession or whether it should apply also to persons or companies undertaking isolated or one-off collection work for another. The major advantage of exempting 'non-business' debt collection is to avoid the licensing regime becoming too onerous for persons who have the occasional need to collect debt for another, whether for profit or otherwise. On the other hand, exempting 'non-business' debt collection may render the licensing regime less effective in dealing with abusive debt collection, as it may be difficult for the prosecution to prove that a business is being carried on.

9.21 Since the Sub-committee has proposed that both individual debt collectors and collection agencies should be licensed, the issue will have to be considered on two different levels. On the 'individual level, there are situations which clearly should not be covered by licensing: for instance, if a friendly neighbour helps an old lady to recover rent from a delinquent tenant. On the other hand, if the rules are too lax, individual debt collectors may try to abuse the exemption and claim to be friends of the creditor to avoid the need to be licensed. It is, therefore, crucial to formulate rules which can cater for the different situations. A possible approach is to require individuals who collect debts for another to be licensed if the individual is doing so for remuneration or as a business, and there is a rebuttable presumption that an individual is collecting debts as a business if he is collecting more than one debt at any particular time.

9.22 As for the 'corporation' level, the approach set out in the previous paragraph may also be adopted. If different considerations ought to be applied, the Sub-committee would be pleased to hear the views of the public.

9.23 The Sub-committee would defer making a recommendation on this issue of whether the licensing regime should cover only those who engage in debt collection as a business / profession, until the public's views are received and considered by the Sub-committee.

Criteria for licensing

9.24 The criteria set out in the UK Consumer Credit Act 1974 should be considered. The applicant has to satisfy the licensing authority that he is a fit person to engage in debt collection activities, and that the name under which he applies to be licensed is not misleading or otherwise undesirable. The licensing authority has to determine whether an applicant is a fit person to engage in the activities having regard to all relevant circumstances, and in particular whether the applicant, his employees, agents or associates have -

- (a) *committed any offence involving fraud or other dishonesty, or violence,*
- (b) *contravened any provision made by or under the UK Consumer Credit Act 1974, or by or under any other enactment regulating the provision of credit to individuals or other transactions with individuals,*
- (c) *practised discrimination on grounds of sex, colour, race or ethnic or national origins in, or in connection with, the carrying on of any business, or*
- (d) *engaged in business practices appearing to the Director of Fair Trading to be deceitful or oppressive, or otherwise unfair or improper (whether unlawful or not).¹³*

9.25 In relation to sub-paragraph (a) above, given that some poorly managed debt collection agencies are suspected to have employed people with triad background,¹⁴ it would be useful if the licensing authority is empowered to take into consideration whether the applicant or its employees has committed any triad-related offences.

9.26 The Security and Guarding Services Ordinance further requires a licence holder to be able to provide suitable training to its security staff, and to formulate appropriate supervisory methods and equipment. Similar requirements may also be considered for debt collectors.

9.27 The Australian jurisdictions generally have additional licensing requirements relating to age, residence and educational attainments or experience. Apart from the age requirement that debt collectors should be at

¹³ Section 25(2). Under the UK Act, if the Director of Fair Trading is minded to refuse the application, he is obliged to give reasons for his decisions and to consider the written or oral representations of the applicant, who can further make use of the appeal mechanisms, if required, within the prescribed period. See sections 33-34, and 41.

¹⁴ See paragraph 1.6 above.

least 18 years of age, and a residential requirement, it may be that some of the other requirements are not necessarily appropriate for Hong Kong.

Recommendation 7

The licensing criteria set out in the UK Consumer Credit Act 1974 are satisfactory and should be considered as a basis for equivalent provision in Hong Kong. The Sub-committee further recommends that the licensing authority should be empowered to take into consideration whether the applicant or its employees has committed any triad-related offences, in addition to the types of offences mentioned in the UK licensing criteria. The Administration should consider including a residence requirement and an age requirement as is the case of some other jurisdictions.

Powers of the licensing authority

9.28 Certain statutory powers are commonly given to the licensing authority in other jurisdictions. For example, the licensing authority:

- may make inquiries regarding the applicant before issuing or renewing a licence and should have statutory powers to investigate;
- may refuse to issue or renew a licence and may suspend or cancel a licence;
- may inquire into any complaint or alleged contravention of the legislation, and require any person to provide any information the licensing authority considers relevant;
- may apply to a court for an order to enter relevant premises to search, examine, remove, or take extracts from or obtain copies of any records, books, document or things which are relevant.

Statutory duties of collection agencies

9.29 Legislation in other jurisdictions often imposes certain statutory duties on collection agencies. For example:

- collection agencies are required to provide the licensing authority with reports of their financial affairs signed by auditors, and to provide the auditors with access to books and records of the business;
- collection agencies are required to maintain all their records, files, documents, etc created or received in their business for a prescribed period.

9.30 The Sub-committee is aware that collection agencies in other jurisdictions are subject to some trust account requirements which may be included either in statutes or in a code of practice. The trust account requirements usually include:

- collection agencies are required to deposit all money collected from debtors in trust accounts maintained in banks;
- collection agencies must not withdraw money from trust accounts except for the purpose of deducting their commission and disbursements and paying the person on whose behalf the money is received;
- collection agencies are required to pay such money and interest to the person on whose behalf the money is received within a reasonable time.

Recommendation 8

As for the details of the licensing regime such as statutory powers and duties, we commend those referred to in paragraphs above for the Administration's consideration.

Code of practice

9.31 To specifically address the nuisance-type of debt collection activities, a Code of Practice should be formulated in tandem with the licensing system, such that breach of the Code may also lead to the suspension or revocation of the licence. The Sub-committee does not envisage that the Code of Practice has to be written into the statute books. Instead, it should be drawn up by the regulatory body after consultation with market operators and a review of similar codes of practice adopted in other jurisdictions. The Code of Practice need not and should not be a static document, and its operation should be monitored on an ongoing basis. The regulatory body may wish to consider the Guideline compiled by the Australian Competition and Consumer Commission ("the ACCC") in 1999.¹⁵ Although it is difficult to make hard and fast rules about the type of conduct which is unacceptable, since much will depend on the circumstances of the case, the ACCC has managed to draw up useful broad guidelines about the types of conduct which would be inappropriate in most cases.

9.32 The Guideline formulated by the ACCC contains conduct principles on the following aspects of debt collection:

¹⁵ Australian Competition and Consumer Commission, *Report on Undue Harassment and Coercion in Debt Collection*, May 1999 at pages 30-41.

- communicating with the debtor at his workplace;
- communicating with the debtor away from his workplace;
- personal visits;
- frequency of communications;
- allowing informal repayment arrangements and legal processes to work;
- communicating with a debtor's representatives;
- communicating with third parties;
- misleading or deceptive conduct;
- coercion;
- language, violence, and physical force; and
- documentation and information.

9.33 For example, in relation to 'communicating with the debtor at his workplace', the Guideline specifies that:

"Collectors should attempt to communicate with debtors outside of work where appropriate and possible, particularly for initial contacts. ... Debtors should be able to request that no communications be made at the workplace, provided that an alternative and effective contact mechanism is available."

Examples are then supplied to illustrate the conduct principle:

A collector should not communicate with a debtor at the workplace, or visit the debtor at the workplace unless:

- the debtor is the proprietor or director of a corporate proprietor of a business to which the debt relates; or
- the debtor has not provided an alternative and effective contact mechanism; or
- the debtor has specifically requested or authorised communications to be made at the workplace.

9.34 Apart from the Guideline issued by the ACCC, codes of practice have been drawn up by some voluntary associations including the Credit Services Association, which is the trade association for debt collectors in the United Kingdom.

Recommendation 9

A code of practice should be formulated, the breach of which may result in the suspension or revocation of a debt collector's licence. The provisions in the code of practice should be drawn up by the regulatory body after consultation with market operators and a review of similar codes of practice adopted in other jurisdictions.

Consumer credit data

9.35 During the course of the Sub-committee's deliberations, it has been suggested that over-aggressive lending and the proliferation of credit cards and other forms of credit have contributed towards the defaults by many debtors, which have, in turn, led to abusive debt collection activities. There is a body of opinion to the effect that the root of the problem lies in part in the indiscriminate provision of easy credit. Given the high profit margin of the credit card business and other forms of credit facilities, lenders are willing to accept high risks in extending credit, which tends to lead to high default rates begetting unscrupulous debt collection activities.

9.36 Financial institutions, on the other hand, maintain that, as a result of the operation of the Personal Data (Privacy) Ordinance and the Code of Practice on Consumer Credit Data, they do not have access to important information which is made available in other markets such as the United Kingdom and the United States by credit reference agencies or credit bureaux. Lenders in Hong Kong do not have reliable information on the debt to income ratio of individuals applying for credit,¹⁶ and such limitations have made it difficult for banks to make informed decisions on the credit exposure of applicants. It is noted that if a debtor chooses to repay 5% of his credit card debts each month, this repayment information will not be available to other lenders until the problem has become unmanageable when the debtor cannot repay even the 5% minimum.

Positive credit data in other jurisdictions

9.37 The table below is a general guide to the kinds of positive credit data¹⁷ that are available in other jurisdictions:

¹⁶ Although the lenders can request credit applicants to disclose their total credit exposure during a credit application, information obtained this way is not regarded by lenders as reliable as lenders cannot find out whether the disclosure is full and accurate. Credit information provided by other lenders and processed by credit reference agencies, on the other hand, is regarded as reliable.

¹⁷ Positive credit data are data relating to the financial circumstances of individuals that do not involve a failure to repay. Examples are an individual's overall income or credit exposure and repayment records. Negative credit data are generally data relating to a failure by an individual to meet his obligations with regard to a financial liability. Examples are failure to repay a loan. From a privacy point of view, it is generally acceptable for negative data to be collected for credit

Data	UK	US	Canada	Australia	HK
Credit application / Inquiries	Yes ^(a)	Yes ^(b)	Yes	Yes ^(c)	Yes ^(d)
Repayment manner of paying only the minimum repayment amount	Yes	Yes	Yes	No	No
Aggregate credit exposure [Information on each active loan including mortgage, instalment loans (like personal loans, tax loans, hire purchase) and revolving loans (like credit cards and overdraft facilities)]	Yes	Yes	Yes	No	No ^(e)
General Repayment manner ^(f)	Yes ^(g)	Yes ^{(g)(h)}	Yes ^(g)	No	No

- (a) Lender's copy of the credit report does not show which company has accessed the information, but lenders can see what type of credit was involved e.g. personal loan, mortgage, credit card or charge card. Names are shown on the individual's copy of credit report.
- (b) Lender's copy shows also the names of those who have accessed the information, provided the transactions or activities were initiated by the individual. On the individual's copy of credit report, addresses of those who have accessed the information are also included.
- (c) But only for the past 5 years; cannot disclose whether application was successful.
- (d) But only for the past 90 days.
- (e) Information on leasing and hire-purchase transactions is available.
- (f) Information on general repayment manner is also available in Germany.¹⁸
- (g) Days-past-due information for a number of previous months are shown in the report.
- (h) Monthly payment amount and payment pattern during the past several years are shown.

The United Kingdom - further information

9.38 There are two major credit bureaux in the UK: Equifax Plc and Experian Ltd. The central database maintained by Experian, for example, is accessible by banks, building societies, finance houses and major retailers.¹⁹

reference services.

¹⁸ <http://www.experian.com/corporate/press-releases/060/98.html>.

¹⁹ <http://www.experian.com/uk/consumer/index.html>.

Apart from these organisations which are classified as contributing users, there are other non-contributing users who have access to a restricted set of agency data without having to contribute any data about their customers. These include credit brokers, tracing and collection agents, and police forces.²⁰

9.39 Major lending companies in the UK have agreed to share with each other details of their customers' credit agreements, and this is done by storing details of these agreements with the credit reference agency. This allows them to check, when someone applies for credit, how that person has repaid other lenders in the recent past or is repaying any current credit commitments. Ownership of the credit information remains with the credit providers, with the credit reference agency acting as a go-between in the sharing process only.

9.40 Consumers can check which company has obtained a credit report on them as a "footprint" is marked in the computer. This record of searches can be seen by the consumer concerned and, to a limited extent, by other lenders. Other lenders need to look at the record of searches because it allows them to identify "abnormal activity" such as a large number of applications for credit made by the same person in a short space of time. This could signify fraud or over-commitment by a consumer. Lenders do not see which company has accessed the information, but they see what types of application were involved (e.g. personal loan, mortgage, credit card or charge card).

9.41 The UK Consumer Credit Act 1974 gives individuals the right to see, for £2, the information held about them by a credit reference agency. In 1996, Experian sent information to more than 650,000 individuals – a number which is growing by more than 20 percent every year. A leaflet, *Helping You To Understand Your Credit File*, is provided along with the credit report. The staff at Experian will go through the information with the individuals if necessary.

The United States - further information

9.42 Credit reporting in the US is governed largely by the Fair Credit Reporting Act and also the Equal Credit Opportunity Act.

9.43 According to the Congressional findings stated in the preamble of the Fair Credit Reporting Act:

"(1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system."

²⁰

<http://www.open.gov.uk/dpr/dpframe/a.htm>

- (2) *An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.*
- (3) *Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.*
- (4) *There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy."*

9.44 It is also stated in the preamble that the purpose of the Act is:

"to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, ...and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information"

9.45 Positive credit information is collected and stored by the credit bureaux. This includes specific information about each account such as the date opened, credit limit or loan amount, balance, monthly payment amount, and payment pattern during the past several years. The credit report also states whether anyone else besides the individual concerned is responsible for paying the account. Information collected by the credit bureaux includes even overdue child support payments.

9.46 The Fair Credit Reporting Act stipulates that a credit report can be obtained only in the following situations:

- in accordance with the individual's written instructions
- in response to a court order or federal grand jury subpoena
- to manage the risk of current or potential credit or insurance accounts that were initiated by the individual
- for employment purposes such as hiring or promoting, with the individual's written permission
- in connection with the individual's application for a licence or other benefit granted by the government, when consideration of financial responsibility is required by law
- in connection with a business transaction initiated by the individual
- in connection with a child support determination, under certain circumstances
- in connection with a credit or insurance transaction initiated by the individual, when a "firm offer" of credit or insurance is extended and certain other restrictions are met
- by the FBI in connection with issues such as counterintelligence

9.47 As in the UK, individuals in the US have access to their own data collected by the credit bureaux. Access to one's own data costs about US\$8 in most states, and a credit report will be made free of charge if the individual is unemployed, on public assistance, has been denied credit within the last 60 days, is suspected to be a victim of fraud, or is resident of a state that requires credit reporting agencies to provide one or more complimentary reports annually.

9.48 As for the Equal Credit Opportunity Act, it requires the credit provider to give reasons for refusing a credit application if the individual requests such information. For example, the creditor must specify whether credit was denied because an individual has "no credit file" with a credit bureau, or the credit bureau reports that the individual has "delinquent obligations". The Act also requires credit providers to consider additional information which the individual may supply about his credit history.

Australia - further information

9.49 Consumer credit information in Australia is regulated by the Commonwealth Privacy Act 1988 although the main thrust of the Act is to lay down privacy safeguards which the government must observe when collecting, storing, using and disclosing personal information.

9.50 As from 1990, the privacy aspects of credit reporting and data matching were overseen by the Privacy Commissioner. Under s. 18A of the Act, the Privacy Commissioner issues a Code of conduct for credit reporting. Unlike the relevant Code in Hong Kong, the Code of conduct for credit reporting formulated by the Privacy Commissioner in Australia is legally binding.

9.51 Part IIIA of the Privacy Act provides safeguards for individuals in relation to consumer credit reporting. In particular, Part IIIA governs the handling of credit reports and other credit worthiness information about individuals by credit reporting agencies and credit providers. The Act ensures that the use of this information is restricted to assessing applications for credit lodged with a credit provider and other legitimate activities involved with giving credit. The legislation does not directly affect commercial credit information.

9.52 The key requirements of Part IIIA include:

- strict limits on the type of information which can be held on a person's credit information file by a credit reporting agency. There are also limits on how long the information can be held on file.
- limits on who can obtain access to an individual's credit file held by a credit reporting agency. Generally only credit providers may obtain access and only for specified purposes. Real estate agents, debt collectors, employers, general insurers are barred from obtaining access.

- limits on the purposes for which a credit provider can use a credit report obtained from a credit reporting agency. These include:
 - ~ to assess an application for consumer credit or commercial credit (but they must seek consent if they are using the individual's consumer credit report to assess an application for commercial credit, or using the individual's commercial credit report to assess an application for consumer credit)
 - ~ to assess whether to accept a person as guarantor for a loan applied for by someone else
 - ~ to collect overdue payments
- prohibition on disclosure by credit providers of credit worthiness information about an individual, including a credit report received from a credit reporting agency, except in specified circumstances. These include:
 - ~ where the disclosure is to another credit provider and the individual has given consent
 - ~ to a mortgage insurer
 - ~ to a debt collector (but credit providers can only give limited information contained in or derived from a credit report issued by a credit reporting agency)
- rights of access and correction for individuals in relation to their own personal information contained in credit reports held by credit reporting agencies and credit providers.

9.53 The Commissioner has also issued a number of credit reporting determinations in accordance with the Act. The determinations among them deal with:

- classes of credit providers for the purposes of the Act;
- identifying particulars permitted to be included in a credit information file;
- allowing businesses which take assignment of loans to be considered as credit providers for the purposes of the Act.

Situation in Hong Kong

9.54 Credit Information Services Ltd ("CIS") is the main consumer credit reference agency operating in Hong Kong. The business of a credit reference agency is to compile a central credit database using the data supplied to it by its member credit providers, and then supply the processed credit data to its member credit providers in response to their requests pursuant to specific credit applications they have received. Credit reference agencies are sometimes called national credit bureaux in other jurisdictions.

While the size of the credit market in the United States supports three consumer credit bureaux, and that in the United Kingdom supports two, Hong Kong has only one comparable consumer credit bureau which is CIS. Like credit bureaux in other countries, CIS was formed by co-operation between finance houses and banks.²¹ The database of CIS had grown to over one million records by 1998, about two thirds of which are in respect of individuals. In 1998, over two million enquiries were made through CIS by its members, and the same number of credit reports was produced for the year.

9.55 Credit reports usually include the following details: account seriously past due, account under legal action, bankruptcy or winding up, and finance-related writs, for example, taxation defaults, personal injury claims, construction claims and commercial claims.

9.56 It should be noted that CIS credit reports, albeit informative, cannot give a complete picture of an applicant's credit position because: first, some major retail banks have chosen to confine their sharing of information to certain types of debts only; and second, due to privacy concerns, limitations are placed on the type of information that is gathered.²²

9.57 According to statistics compiled by CIS, the average number of delinquent accounts held by individual consumers rose from 1.37 to 3.96 between the 2nd half of 1997 and that of 1999, representing an increase of almost two times. While such increases may be attributed partly to the economic downturn, it is likely that the problem can be alleviated if lenders can make more informed decisions on individual credit applications. Suggestions have been made that the rules should be slightly relaxed so that credit reference agencies in Hong Kong would have access to information on an individual's aggregate active loans on hand.

9.58 On the other hand, there are those who believe that the easy credit situation cannot be improved even with more data being made available. They believe that regardless of improvements, some lenders, especially less reputable ones and new entrants, would try to compete and gain a larger share in the consumer credit market by targeting the bottom end of the market and extend high risk consumer credit at high interest rates.

9.59 The Sub-committee is of the view that the lack of reliable information on the credit exposure of debtors may well be a cause for the availability of easy credit. Lending decisions are made partly based on credit reference data and partly based on the individual lender's lending policy at the time.

²¹ CIS was established in 1982 by 12 finance houses which were the major players in the vehicle and equipment financing market. At that time, serious frauds were committed in relation to collateral financing and the need was seen for a centralised database to be created in order to curb double or multiple financing. Gradually, the database of CIS expanded to include negative default data. In the late 1980's, with the development of unsecured credit like the credit card business, the importance of the central database grew and major credit card companies and banks joined as CIS shareholders. CIS members provide information on delinquent accounts to CIS on a monthly basis. In respect of the collection of consumer credit data, certain restrictions are imposed by the Code of Practice on Consumer Credit Data.

²² See Code of Practice on Consumer Credit Data.

9.60 It is true that credit providers in Hong Kong are receiving less positive data than their counterparts in the UK,²³ US and Canada, and that it is difficult for even the most prudent credit providers to avoid extending credit to the already over-extended borrowers. The existing limitations imposed on data sharing may thus operate unfairly against the prudent credit providers. By the same token, the availability of positive data to lenders would enable individuals to receive fairer assessment of their credit standing to the extent that it is possible for customers with a good credit history to obtain credit on more favourable terms.

9.61 It is possible to say that even with better access to information, a borrower will try to borrow from other sources if he is turned down by the prudent credit provider. However, borrowers borrow for different reasons. It is likely that at least some borrowers would be discouraged from taking out further credit if their applications are turned down by a couple of credit providers.

9.62 Another factor which has contributed to the inadequate information available to credit providers is that not all lenders have chosen to participate in the sharing of information through credit reference agencies with regard to all types of consumer credit. Some major retail banks have confined their sharing of information to credit card debts only.²⁴ Unless all types of loan information are shared, a lender cannot obtain a complete picture of an applicant's credit position since he can, for instance, pay off a credit card loan by obtaining a tax loan, overdraft facilities, or a home equity loan. The situation has also to do with the fact that credit information obtained by authorised institutions,²⁵ licensed money lenders, department stores, and other retailers is not shared amongst one another. Relevant bodies are urged to look into this issue.

Recommendation 10

The relevant authorities should review the existing limitations imposed on the collection and use of certain positive credit data from the angle of alleviating bad debts and abusive debt collection practices, and to take into consideration the types of positive credit data available to credit providers in other major financial centres. Efforts should also be made to increase participation in the sharing of information by increasing the type of information shared, as well as the categories of credit providers sharing information. Credit providers have to be convinced that sharing such information will be beneficial to their risk exposures without compromising their competitiveness in the market.

²³ In the UK, for example, lenders would be aware of the percentage of debt which a debtor chooses to repay each month, and also the number of credit cards a debtor has obtained.

²⁴ In relation to unsecured consumer credit.

²⁵ Licensed banks, restricted licence banks, and deposit-taking companies.

Efficiency of the judicial process

9.63 During the course of the Sub-committee's deliberation, views were submitted to the effect that the long-term solution to the problem of abusive debt collection lies in strengthening the judicial process both in terms of adjudication of debts and enforcement of judgments, so that creditors will rely more on the judicial process than collection agencies to collect debts. As efficiency of the judicial process is outside the terms of the Sub-committee's reference, we feel able to offer only some general observations.

9.64 We observe that the adjudication process in the Small Claims Tribunal can be strengthened. It has been suggested that since a substantial number of hire-purchase and credit card default payment cases are uncontested, the Judiciary Administrator can be urged to consider whether these cases can be more expeditiously dealt with, for example, by setting aside one or more of the courts to deal with these cases. In addition, creditors will be more inclined to utilise the judicial process if : (1) the number of attendances at the Tribunal can be reduced, (2) some privacy can be provided at the 'mediation' stage conducted by lay tribunal officers, and (3) the practice of asking parties to all the cases fixed for the day to attend the Tribunal simultaneously at 9:30 a.m. can be modified in order to shorten waiting time.

9.65 It has also been suggested to the Sub-committee that the rule requiring a body corporate to commence legal action by a solicitor should be relaxed, so that the costs for utilising the judicial process can be reduced.

9.66 As for the enforcement of court orders, the number of which rose by 27% from 25,344 in 1997 to 32,258 in 1998, the following ways have been suggested to improve the efficiency of the Bailiff Office:

- (a) by granting more authority to the Bailiff, for example, by empowering him to check the identity card of a person to ascertain whether he is the judgment debtor (since those found at the premises visited usually deny that they are the judgment debtor);
- (b) by granting the Bailiff statutory protection (at present they only have common law protection);
- (c) by updating the execution rules (for example, the "sun rise and sun set rule" .
- (d) by reviewing the supervision mechanism and case management system of officers working away from the office.

9.67 The Sub-committee is aware of the proposals to enhance the efficiency of the judicial process. Proposals have been made to increase the financial jurisdiction of the Small Claims Tribunal and the District Court, and to appoint additional judges and adjudicators to the District Court and the Small Claim Tribunal respectively. The Sub-committee is also aware of the

proposal to substantially increase the number of bailiffs in order to speed up the enforcement of court orders. The Sub-committee welcomes these measures and believes that the situation would be substantially improved with the implementation of the proposals.

Self-regulation

9.68 It has been suggested to the Sub-committee that self-regulation by debt collection agencies should also be considered as an economical and flexible option. Advocates of self-regulation mentioned as an example the Code of Banking Practice²⁶ which applies to banks and deposit-taking companies on a voluntary basis. It is suggested that it is worth exploring whether a similar code may be developed to cover not only banks, but also trading, mobile telephone and credit card companies to promote some guidelines on fair trade practices for debt collection.

9.69 The effectiveness of self-regulation schemes are sometimes questioned, given that they cover only those companies which choose to abide by the rules of the scheme.²⁷ Although the Code of Banking Practice has achieved results, it should be noted that it is closely monitored by the Hong Kong Monetary Authority which is vested with extensive powers and resources. It remains to be considered whether a less powerful monitoring body will be able to achieve the same results. The Sub-committee is aware that self-regulating associations for debt collection agencies are operating in the United Kingdom,²⁸ the United States²⁹ and other countries,³⁰ and that there have been some attempts in Hong Kong to set up a self-regulation association.³¹ The Sub-committee invites views from the public and market operators on the effectiveness and desirability of self-regulation as a means to address debt collection problems.

Conclusion

9.70 There is a justifiable level of concern amongst sectors of the community to warrant consideration of the issue of abusive debt collection. Since abusive debt collection has a number of causes, the Sub-committee has recommended a range of measures to address the problems. Some of our recommendations are aimed at deterring the bottom end of debt collection agencies (Recommendations 1 and 2), while other recommendations are aimed at regulating the average collection agencies (Recommendations 2 and 9). The top end of collection agencies will benefit from the more level playing

²⁶ See discussion in Chapter 5 above.

²⁷ See discussion in paragraph 6.6 above.

²⁸ The Credit Services Association Ltd of Ensign House, 56 Thorpe Road, Norwich, is the trade association for debt collectors in the United Kingdom. Non-compliance with the code of practice may result in the matter being referred to a specially convened disciplinary committee for consideration and action. Among other powers, the disciplinary committee can issue a warning or a recommendation of expulsion from membership.

²⁹ American Collectors Association.

³⁰ For example, the Australian Collectors' Association. Also, the League International for Creditors in Germany.

³¹ The Hong Kong Credit & Collection Management Association has been set up recently.

field, which hopefully would encourage more collection agencies to operate at the top end of the market. Another recommendation (Recommendation 10) aims to improve the credit origination process. It is hoped that the level of bad debts, and hence, abusive debt collection, can be alleviated. The Subcommittee invites comments on the matters contained in, or on the issues raised by, this Consultation Paper.

Chapter 10

Summary of recommendations

Recommendation 1

The criminal offence of harassment of debtors to be created, so that it will be an offence if a person, with the object of coercing another person to repay a debt –

- (a) harasses the other with demands for payment which, in respect of their frequency or the manner or occasion of making any such demand, or of any threat or publicity by which any demand is accompanied, are likely to subject him or members of his family or household or any other person to alarm, distress or humiliation;
- (b) falsely represents, in relation to the money claimed, that criminal proceedings lie for failure to pay it;
- (c) falsely represents himself to be authorised in some official capacity to claim or enforce payment; or
- (d) utters a document falsely represented by him to have some official character or purporting to have some official character which he knows it has not.

Without affecting the generality of sub-section (a), it is harassment if any person in making demands for payment sends to another a letter or any article which : (i) is, in whole or in part, of an indecent or grossly offensive nature; or (ii) conveys information which is false and known or believed to be false by the sender.

Sub-section (a) has no application in respect of anything done which is reasonable for the purpose of either securing the discharge of an obligation due, or believed to be due, or for the enforcement of any liability by legal process.

Harassment and representations conveyed by modern electronic means of communication should be covered by the proposed legislation.
(paragraphs 9.4 – 9.10)

Recommendation 2

Balancing the arguments for and against the setting up of a licensing regime, the Sub-committee recommends that debt collection agencies

should be licensed, and it should be a criminal offence to operate a debt collection agency or undertake debt collection work for others without a valid licence. *(paragraphs 9.11 – 9.13)*

Recommendation 3

The Sub-committee recommends that the proposed licensing regime should cover both consumer debts and commercial debts. *(paragraph 9.14)*

Recommendation 4

Since the Administration is better placed than the Sub-committee to decide on the appropriate licensing authority, the Sub-committee has refrained from making recommendations on this matter. The Administration is urged to consider the experience of other jurisdictions and to devise a licensing regime which can be run efficiently and economically. *(paragraphs 9.15 – 9.17)*

Recommendation 5

Although the licensing regime would be more elaborate if both individual debt collectors and collection agencies are required to be licensed, we recommend that individual debt collectors should be required to obtain licences since a major reason in favour of licensing is to exclude persons of questionable integrity from entering the business. *(paragraph 9.18)*

Recommendation 6

We recommend that the following listed categories of creditors and persons be exempted from obtaining a licence –

- (iii) a creditor collecting his own debt, provided he did not become a creditor by an assignment of the debt;
- (iv) a creditor who became a creditor by virtue of an assignment of debt, provided the assignment was made in connection with a transfer of business, other than a debt collecting business;
- (iii) barristers acting in that capacity;
- (iv) solicitors acting in that capacity and their employees;
- (vii) court bailiffs;
- (viii) authorised financial institutions. *(paragraph 9.19)*

Recommendation 7

The licensing criteria set out in the UK Consumer Credit Act 1974 are satisfactory and should be considered as a basis for equivalent provision in Hong Kong. The Sub-committee further recommends that the licensing authority should be empowered to take into consideration whether the applicant or its employees has committed any triad-related offences, in addition to the types of offences mentioned in the UK licensing criteria. The Administration should consider including a residence requirement and an age requirement as is the case of some other jurisdictions. (*paragraphs 9.24 – 9.27*)

Recommendation 8

As for the details of the licensing regime such as statutory powers and duties, we commend those referred to in paragraphs 9.28 to 9.30 for the Administration's consideration. (*paragraphs 9.28 – 9.30*)

Recommendation 9

A code of practice should be formulated, the breach of which may result in the suspension or revocation of a debt collector's licence. The provisions in the code of practice should be drawn up by the regulatory body after consultation with market operators and a review of similar codes of practice adopted in other jurisdictions. (*paragraphs 9.31 – 9.34*)

Recommendation 10

The relevant authorities should review the existing limitations imposed on the collection and use of certain positive credit data from the angle of alleviating bad debts and abusive debt collection practices, and to take into consideration the types of positive credit data available to credit providers in other major financial centres. Efforts should also be made to increase participation in the sharing of information by increasing the type of information shared, as well as the categories of credit providers sharing information. Credit providers have to be convinced that sharing such information will be beneficial to their risk exposures without compromising their competitiveness in the market. (*paragraphs 9.35 – 9.62*)