

THE LAW REFORM COMMISSION OF HONG KONG

REPORT

**THE REGULATION OF
DEBT COLLECTION PRACTICES**

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July 2002

The Law Reform Commission was established by the Executive Council in January 1980. The Commission considers such reforms of the laws of Hong Kong as may be referred to it by the Secretary for Justice or the Chief Justice.

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Report

The regulation of debt collection practices

CONTENTS

	Page
Preface	1
Terms of reference	1
The Sub-committee	1
1. Debt collection in Hong Kong	4
Introduction	4
<i>Statistics on personal credit delinquency</i>	4
<i>Statistics compiled by the Police</i>	5
<i>Statistics compiled by the Hong Kong Monetary Authority</i>	7
<i>Statistics compiled by the Privacy Commissioner for Personal Data</i>	8
Industry overview	9
2. Some features of extra-judicial debt collection	12
Stages of debt collection	12
Different types of debt collection activities	12
Non-judicial debt collection	13
What causes abusive debt collection?	15
<i>The nature of the debt collection process</i>	15
<i>The lack of professionalism among some debt collectors</i>	16
<i>Loose-lending</i>	17
<i>Economic downturn</i>	17
<i>The judicial process in debt recovery</i>	17
<i>Other factors</i>	18
3. Existing criminal sanctions against abusive debt collection	19
Criminal law sanctions	19
<i>Intimidation</i>	19

<i>Criminal damage to property</i>	21
<i>Threats to kill or murder</i>	22
<i>Theft and blackmail</i>	22
<i>Assault</i>	24
<i>Mens rea for assault</i>	25
<i>False imprisonment</i>	26
<i>Forcible detention</i>	28
<i>Triad offences</i>	29
<i>Summary Offences Ordinance (Cap 228)</i>	30
<i>Post Office Ordinance (Cap 98)</i>	31
Criminal sanctions for participation	31
<i>The principal</i>	31
<i>Secondary participation</i>	31
Vicarious liability	33
Corporate liability	33
4. Existing civil remedies for abusive debt collection	35
Civil remedies for abusive debt collection	35
<i>Trespass to the person</i>	35
<i>False imprisonment</i>	36
<i>Remedies for assault, battery and false imprisonment</i>	37
<i>Intentional physical harm other than trespass to the person /</i>	37
<i>Intentional infliction of emotional distress</i>	
<i>Trespass to chattels</i>	39
<i>Defamation</i>	40
<i>Negligence</i>	40
Liability for tortious acts committed by others	41
<i>Master and servant</i>	41
<i>Employer's liability for independent contractors</i>	45
<i>Principal's vicarious liability for torts committed by agent</i>	45
Personal Data (Privacy) Ordinance	49
5. Other types of control on debt collection	50
Administrative control	50
Self-regulation by authorized institutions	50
<i>Code of Banking Practice – 1997</i>	50
<i>Code of Banking Practice – December 2001</i>	50
Personal Data (Privacy) Ordinance (Cap 486) and the	56
Code of Practice on Consumer Credit Data 2002	
<i>Personal Data (Privacy) Ordinance</i>	56
<i>Code of Practice on Consumer Credit Data 2002</i>	57
6. Deficiencies of the existing controls on abusive debt collection practices	59
Criminal law	59
Civil claims	60
Self-regulation by authorized institutions	61

<i>Code of Banking Practice – December 2001</i>	61
Personal Data (Privacy) Ordinance (Cap 486) and the Code of Practice on Consumer Credit Data – 2002	62
7. Comparative Law	64
Introduction	64
United Kingdom	64
<i>The criminal offence of unlawful harassment of debtors</i>	64
<i>Protection from Harassment Act 1997</i>	66
<i>England and Wales</i>	67
<i>Offence of harassment</i>	67
<i>Offence of putting people in fear of violence</i>	67
<i>Civil remedy</i>	68
<i>Scotland</i>	68
<i>Malicious Communications Act 1988</i>	69
Australia	70
<i>Federal legislation</i>	70
<i>Australian Competition & Consumer Commission v</i> <i>McCaskey & Cash Return Mercantile PTY Ltd</i>	71
<i>Other provisions against abusive collection tactics</i>	74
The United States of America	75
<i>The Fair Debt Collection Practices Act 1977</i>	75
<i>Harassment or abuse</i>	75
<i>False, deceptive, or misleading</i> <i>representations or means</i>	77
<i>Unfair practices</i>	78
<i>Communications in connection with debt collection</i>	79
<i>Acquisition of location information</i>	79
<i>Further protection to consumers</i>	80
Canada	81
<i>Federal</i>	81
<i>Alberta</i>	81
Mainland China	83
Other jurisdictions	84
8. Licensing in other jurisdictions	85
Introduction	85
United Kingdom	85
<i>Criteria for licensing</i>	86
<i>Criminal sanctions for operating without a licence</i>	87
<i>Civil sanctions for operating without a licence</i>	88
Australia	88
New South Wales	89
<i>Licensing Police, NSW Police</i>	91
<i>Review of the present NSW legislation</i>	91
Victoria	92
<i>Similar Legislation</i>	93
Canada	95

<i>Alberta</i>	95
South Africa	97
9. Consumer credit data	100
Introduction	100
Personal Data (Privacy) Ordinance	100
<i>Code of Practice on Consumer Credit Data</i>	100
Sharing of positive credit data in other jurisdictions	101
<i>US Fair Credit Reporting Act</i>	102
<i>US Equal Credit Opportunity Act</i>	104
<i>Australian Commonwealth Privacy Act</i>	104
<i>United Kingdom Data Protection Act 1998</i>	105
<i>Situation in Hong Kong</i>	106
10. Proposals for reform	108
The criminal offence of unlawful harassment of debtors and others	108
<i>Responses</i>	109
<i>General or specific</i>	109
<i>Modifications</i>	110
<i>Law Reform Commission Report on Stalking</i>	111
<i>Other features of the offence</i>	113
<i>Criminal sanctions for participation</i>	114
Licensing	114
<i>Responses</i>	117
<i>UK Office of Fair Trading's review of the licensing system</i>	117
<i>Conclusion on Licensing</i>	119
<i>Whether a person who knowingly engages an unlicensed collection agency equally commits an offence</i>	119
<i>Civil liability of a creditor in respect of the acts of the debt collector</i>	119
Commercial vs consumer debts	120
<i>Responses</i>	120
Licensing authority	121
<i>Responses</i>	122
Collection agencies and collectors	122
<i>Responses</i>	123
Exemptions from licensing	124
<i>Responses</i>	124
<i>Should credit insurers be exempted?</i>	125
<i>Should companies within the same group be exempted?</i>	125
<i>Other exempted categories suggested</i>	126
<i>Named organisations</i>	126
<i>Collecting debts as a business or otherwise</i>	128
Criteria for licensing	128
<i>Responses</i>	129
<i>Residence status requirement</i>	129
<i>Other requirements</i>	130
<i>Appeal mechanism</i>	130
Statutory powers and duties	132

<i>Responses</i>	132
Code of practice	134
<i>Responses</i>	134
<i>Guideline of the Australian Competition and Consumer Commission</i>	134
Consumer credit data	139
<i>Responses</i>	139
Revision to the Code of Practice on Consumer Credit Data – 2002	140
<i>Credit application data</i>	140
<i>File activity data</i>	140
<i>Consumer credit scoring</i>	141
<i>Lenders' participation in the sharing of information</i>	141
<i>Way forward</i>	142
Efficiency of the judicial process	143
<i>Responses</i>	143
<i>Interim Report and Consultative Paper on Civil Justice Reform December 2001</i>	143
Self-regulation	144
<i>Responses</i>	144
Conclusion	145
11. Summary of recommendations	146
Annex 1 – Responses to Consultation Paper on Regulation of Debt Collection Practices	151
Annex 2 – ACCC' s Guidelines	153

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.”

2. The Law Reform Commission has been greatly assisted by the findings of the Sub-committee and wish to record here our appreciation of the hard work devoted to this reference by members of the Sub-committee.

The Sub-committee

3. 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:

The Hon Mr Justice Sakhrani
(Chairman since September 2000)

Judge of the High Court

Mr Robert G Kotewall, SBS, SC
(Vice-Chairman)

Senior Counsel

Mr Charles D Booth

Associate Professor
Department of Professional Legal Education
University of Hong Kong

Mr John R Brewer

formerly Secretary & Chief Financial Officer
First Ecommerce Asia Limited

Ms Carman Y F Chiu
*(member until March 2000
and then since October 2001)*

Senior Manager (Banking Development)
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 Companies Registry
Mr Robin McLeish	Barrister, Temple Chambers formerly Deputy Privacy Commissioner for Personal Data
Mrs Rita L Y Tong	Manager, Customer Assistance Standard Chartered Bank
Mr Tsang Wai-hung <i>(member since October 2001)</i>	Chief Superintendent (Organized Crime & Triad Bureau) Hong Kong Police Force
Miss Eliza K C Yau <i>(member since August 1999)</i>	Principal Assistant Secretary Security Bureau
Ms Cathy Wan <i>(Secretary)</i>	Senior Government Counsel Law Reform Commission

4. Former members who contributed to the work of the Sub-committee are:

Hon Mr Justice Litton, GBM <i>(Chairman until September 2000)</i>	Non-permanent Judge of the Court of Final Appeal
Mr Philip K Y Chan <i>(member until August 1999)</i>	(then) Principal Assistant Secretary Security Bureau
Mr Thomas Chan Wai-ki <i>(member until October 2001)</i>	Chief Superintendent Hong Kong Police Force
Miss Margaret Mary Y F Leong <i>(member from March 2000 until October 2001)</i>	Senior Manager Hong Kong Monetary Authority

5. The reference has been considered by the Sub-committee and the Law Reform Commission over the course of 18 formal meetings. Views have also been exchanged by circulation of correspondence and informal meetings.

6. On 28 July 2000, in order to seek views and comments from the community, the Sub-committee issued a Consultation Paper setting out its initial proposals on the reference. Over 60 written responses were received, many of these were substantive with practical comments on the issues

addressed in the Consultation Paper. While some reservations were expressed about certain of the initial proposals for reform, the proposals were generally welcomed. The consultation exercise elicited responses from a wide range of individuals and organisations, the list of which is at Annex 1.

7. We wish to express our thanks to all those who responded to the Consultation Paper. We would like to thank the UK Director General of Fair Trading, and the UK Information Commissioner (formerly, the Data Protection Commissioner) for providing assistance and information; and the Australian Competition and Consumer Commission for their assistance and kind permission to annex part of their guidelines to this Report. We thank Credit Information Services Ltd, the Hong Kong Monetary Authority, the Hong Kong Police Force, and the Privacy Commissioner for Personal Data for providing statistical data contained in this Report.

Chapter 1

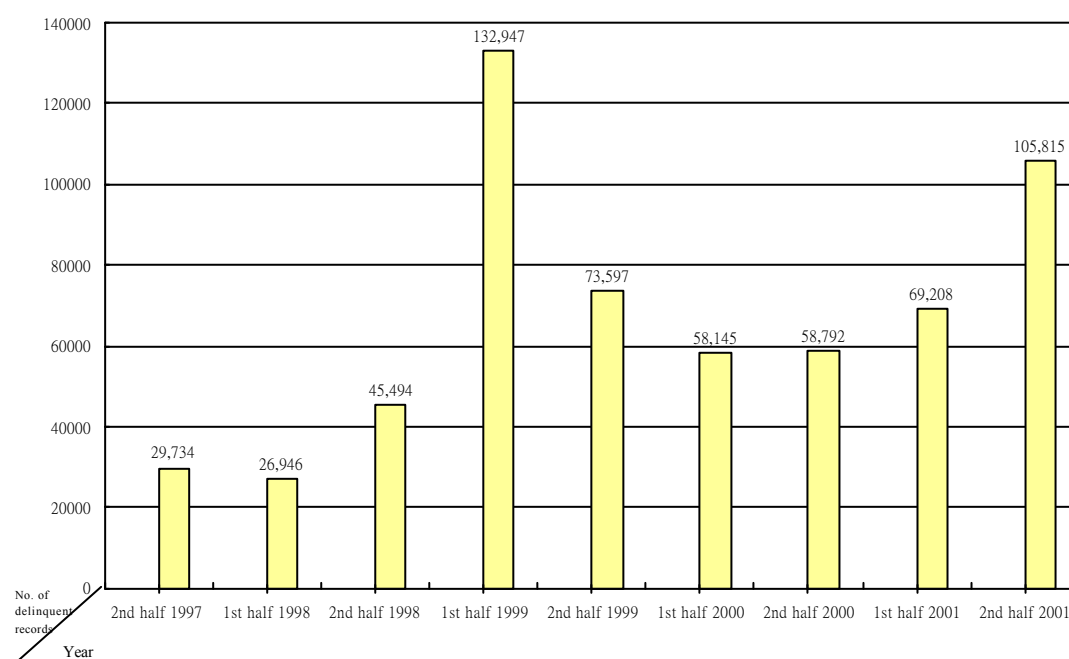
Debt collection in Hong Kong

Introduction

1.1 It is a fundamental precept in our society that individuals should honour their debt obligations. Yet, it is equally important that debtors and members of the public generally should be protected by law from debt collection methods that overstep the bounds of acceptable pressure.

Statistics on personal credit delinquency

1.2 According to data published by Credit Information Services Ltd ("CIS"),¹ the total number of records of personal credit delinquency reported to it rose from a total of 58,792 during the second half of 2000 to 69,208 during the first half of 2001, representing an increase of nearly 17.7%. The figure further rose to 105,815 during the second half of 2001, representing an increase of 53%. Details are given in the following chart:



¹ Credit Information Services Ltd is Hong Kong's main consumer credit bureau and its business is to maintain credit information database and to provide consolidated credit reports on individuals to its members for credit evaluation. Its members are mainly comprised of banks and major financial institutions.

1.3 Statistics compiled by CIS also showed that the total number of users of consumer credit reported as failing to meet their debt repayment obligations rose from 13,011 during the second half of 2000 to 17,149 during the first half of 2001, representing a growth rate of nearly 31.8%. The figure for the second half of 2001 rose further to 39,115, representing an increase of 128%. The table below shows the details:

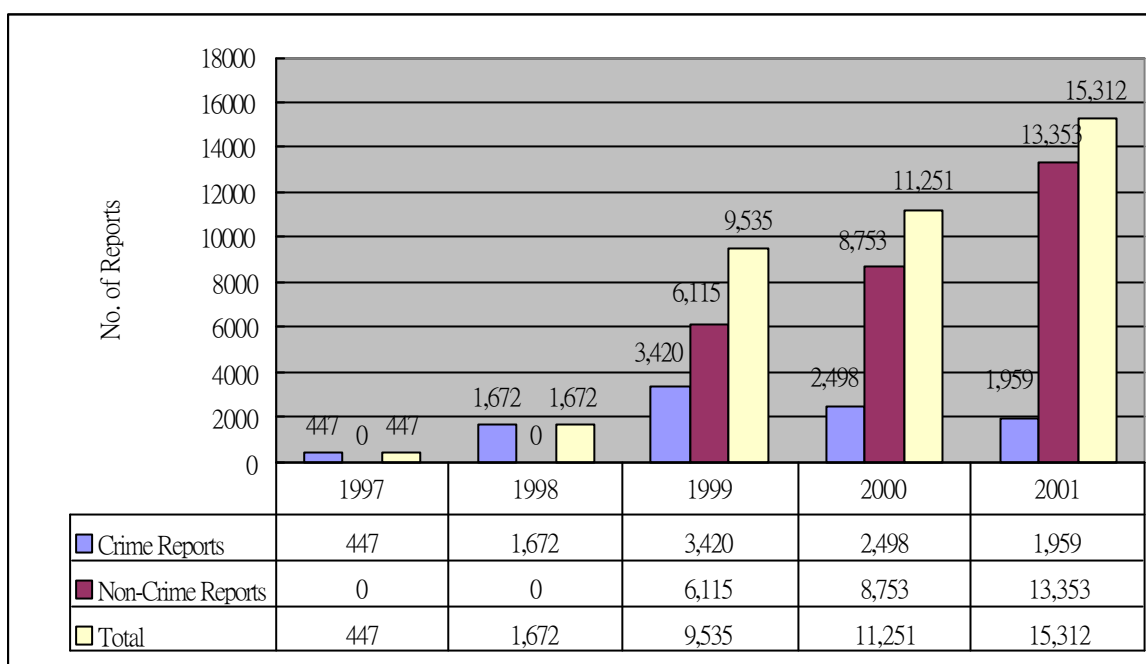
No. of loans carried by single consumer & being reported delinquent	No. of Consumers Being Reported Delinquent								
	2H 1997	1H 1998	2H 1998	1H 1999	2H 1999	1H 2000	2H 2000	1H 2001	2H 2001
	Individual	Individual	Individual	Individual	Individual	Individual	Individual	Individual	Individual
1	15,502	10,451	14,180	18,400	7,499	4,957	4,589	7,099	14,511
2	4,877	2,411	4,521	7,954	3,052	2,177	1,957	2,613	5,982
3	856	1,220	2,306	4,699	1,647	1,405	1,420	1,547	3,890
4	257	654	1,177	3,039	1,317	1,010	874	1,104	2,696
5	99	311	721	2,089	975	765	698	881	1,980
6	46	175	407	1,470	670	614	592	664	1,609
7	11	125	250	1,071	602	517	486	496	1,386
8	11	70	200	743	471	370	385	476	1,111
9 or above	4	156	471	3,008	2,333	1,870	2,010	2,269	5,950
Total no. of consumers being reported delinquent during the period	21,663	15,573	24,233	42,473	18,566	13,685	13,011	17,149	39,115
Total no. of delinquent records being reported during the period	29,734	26,946	45,494	132,947	73,597	58,145	58,792	69,208	105,815
Average no. of delinquent records per consumer	1.37	1.73	1.88	3.13	3.96	4.25	4.52	4.04	2.71

Statistics compiled by the Police

1.4 Statistics compiled by the Hong Kong Police on reports it receives from the public relating to debt collecting activities show an increase in non-criminal reports and a decrease in criminal reports. As can be seen from the chart below,² the number of crime reports has continued to decline since 1999, from 3,420 cases in 1999 to 2,498 in 2000, and to 1,959 cases in 2001. On the other hand, non-crime reports have been on the increase,³ suggesting that the problem of harassment type collection tactics is worsening.

² Compiled by the Organized Crime & Triad Bureau of the Hong Kong Police in October 2001.

³ Debt collecting related reports, including non-crime reports, have shown a substantial increase as a result of 'new data capture procedures' implemented since December 1998.



1.5 In 2001, criminal damage accounted for a majority (1,497 reports, 76.4%) of the 1,959 crime reports received. These crimes were usually in the form of splashing paint and jamming of door locks with glue at the victims' addresses. Criminal intimidation / blackmail (261 reports, 13.3%) came second and were usually committed by way of verbal abuses through the use of telephones. The remaining 201 reports (10.3%) involved assault, arson, false imprisonment, robbery / theft or other crimes. A breakdown of the crimes committed is shown in the table below:

<u>Crimes Committed (2001)</u>	<u>No. of Reports</u>	<u>Percentage</u>
Criminal Damage	1,497	76.4%
Criminal Intimidation / Blackmail	261	13.3%
Assault Occasioning Actual Bodily Harm / Wounding	90	4.6%
Arson	41	2.1%
Others	35	1.8%
False Imprisonment	23	1.2%
Robbery / Theft	12	0.6%
Total	1,959	100.0%

1.6 Among the 13,353 non-crime reports recorded in 2001, 32.6% of the cases involved unknown creditors: either because the debtor could not be located or was uncooperative, or because several loans were owed to different creditors. The remaining non-crime reports were mostly linked to loans made by finance companies, individuals, commercial companies, credit card companies, banks and Macau loansharks. Details can be found in the table below:

Non-crime Reports (2001)

<u>Creditors</u>	<u>No. of Reports</u>	<u>Percentage</u>
Unknown Creditors	4,354	32.6%
Finance Companies	2,612	19.6%
Individuals	1,393	10.4%
Commercial Companies	1,380	10.3%
Credit Card Companies	1,300	9.7%
Banks	931	7.0%
Macau Loansharks	991	7.4%
Telecommunication Companies	264	2.0%
HK Loansharks	75	0.6%
Cross Border Trade	53	0.4%
Total	13,353	100.0%

1.7 The harassment tactics commonly employed against debtors, and innocent third parties such as friends, loan referees, family members or business partners are shown in the table below:

<u>Harassment Tactics (2001)</u>	<u>No. of Reports</u>	<u>Percentage</u>
Telephone Nuisance (making numerous dunning telephone calls, sometimes during the early hours in the morning)	4,793	35.9%
Visit (making repeated visits to the debtor's / victim's home or office)	4,188	31.4%
Others (sending numerous dunning letters, posting of debt collection notices outside the debtor's address to cause embarrassment)	4,326	32.4%
Minor Assault	46	0.3%
Total	13,353	100.0%

Statistics compiled by the Hong Kong Monetary Authority

1.8 The Hong Kong Monetary Authority has compiled statistics on abuses in connection with debt collection reported to its debt-collection hotline, which was set up in April 1996 to provide advice to complainants. The chart below shows the total number of complaints received in each year, and the number in respect of the different types of complaints. Except for the year 1999 during which there was a marked decrease in the number of complaints, the number of complaints each year rose from over 200 in 1996 and 1997 to over 400 in 2001. The number of nuisance and intimidation complaints have risen while that of violence complaints have remained generally stable.

	Nuisance⁴	Intimidation⁵	Violence⁶	Posting Notice⁷	Total
1996 ⁸	200	70	10	2	282
1997	179	31	8	0	218
1998	245	46	10	0	301
1999	127	35	8	0	170
2000	252	66	21	0	339
2001	296	126	9	0	431
	1,299	374	66	2	1,741

1.9 A breakdown of the complaints according to the status of the complainants is shown in the chart below. In 1996, the majority of complaints were made by third-parties, including family members, friends and un-related parties. In 2001, however, the majority of complaints were made by debtors. This is due to an almost three times increase in debtors' complaints since 1996. The number of complaints made by referees have decreased.

	Debtors	Family members or friends of debtors	Non-related parties⁹	Referees	Total
1996 ¹⁰	95	147	18	22	282
1997	104	98	12	4	218
1998	173	105	19	4	301
1999	108	57	4	1	170
2000	231	83	23	2	339
2001	272	119	37	3	431
	983	609	113	36	1,741

Statistics compiled by the Privacy Commissioner for Personal Data

1.10 The Privacy Commissioner for Personal Data ("the Privacy Commissioner") also receives complaints concerning debt collection activities. In the period from 20 December 1996 to 31 December 2001, the Privacy Commissioner received a total of 2,783 complaints of suspected breaches of the Personal Data (Privacy) Ordinance (Cap 486). Of these, 325 complaints

⁴ Nuisance – such as phone calls using foul language, persistent phone calls, anonymous phone calls, phone calls at unreasonable hours, frequent visits, pestering the debtor's referees, family members, friends, employer, or colleagues for information about the debtor's whereabouts, putting up posters/writing on the walls (i.e. spray paint) in the vicinity of the debtor's residence.

⁵ Intimidation – such as making abusive or threatening remarks to the debtor/the complainant (e.g. threat to set fire, threaten the complainants' personal safety, etc).

⁶ Violence – such as jamming the door lock, kicking the door or gate with great force.

⁷ Posting notice to publicise the debtor's indebtedness in the vicinity of the debtor's residence or workplace.

⁸ Covering April – December only since the hotline was established in April 96.

⁹ Non-related parties include ex-tenant, ex-resident, debtor's employer or colleague.

¹⁰ See foot-note 8 above

involved practices of debt collection activities. The following table gives a yearly breakdown of the figures.

	Debt collection Complaints	Total Complaints	Percentage (%)
1996-1997	20	237	8%
1998	44	392	11%
1999	52	541	10%
2000	103	692	15%
2001	106	921	12%
Total	325	2,783	

1.11 Malpractices alleged by complainants included the following:

- Sending of unsealed correspondence concerning debts.
- Posting up of demand letters in public places.
- Posting up of copies of the debtor's identity card in public places.
- Mailing or faxing of demand notices to the debtor's employer or neighbours.
- Demanding repayment of a debt from person who is neither the debtor nor a guarantor.
- Abusive and threatening messages.

1.12 The Privacy Commissioner observed that complaints about debt collection activities engaged by mobile service operators have increased, and the majority of these complaints concerns the transfer of disputed overdue payments to appointed debt collectors.

1.13 It is worth mentioning, however, that of the 325 complaints, only 58 cases were found to have sufficient evidence to establish a breach under the Ordinance. So far, the Privacy Commissioner for Personal Data have issued 24 warning letters and one enforcement notice in relation to cases that were found in contravention of the Ordinance.

Industry overview

1.14 The debt collection industry in Hong Kong comprises a wide spectrum of market operators, including international and local agencies. There are also poorly managed and unscrupulous agencies some of which employ people who have, or claim to have, triad backgrounds.¹¹ There are no official statistics on the number of debt collection agencies operating in Hong Kong. According to one collection agency, there are now approximately 100 to 150 collection agencies, with five to ten major players. Another source believed that there are about 30 active collection agencies of

¹¹ According to Police figures 41 'improper' debt collection agencies were identified in 2001.

which not more than six are generally considered well-managed and sizeable with over 50 members of staff.

1.15 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 goodwill to protect. Strict policies are developed in 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.

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

1.17 The debt collection business has undergone rapid growth and changes in recent years. This is linked to the fact that in Hong Kong, as in other advanced economies, the extension and use of consumer credit have increased substantially. As at the end of 1996, consumer debt¹² extended by the banking sector¹³ stood at HK\$126,839 million. The figure grew to HK\$151,021 million as at end of September 2001. On credit card debt alone, the figure increased to HK\$53,007 million as at end of September 2001.

1.18 According to unofficial estimates¹⁴ the number of credit cards in circulation in Hong Kong in September 2000 amounted to 9.7 million, out of which 6.7 million were issued by authorized institutions.¹⁵ By end of 2001, the number of credit cards issued by authorized institutions had increased to 9.2 million. The default rate of repayments has increased since the economic downturn in late 1997. Figures collated by the Hong Kong Monetary Authority for the quarter ending December 2001 revealed a rise in the annualised charge-off ratio¹⁶ to 8.27% from 5.33% in the previous quarter.¹⁷ According to the Hong Kong Monetary Authority, the worsening of the figures reflects a deterioration in the quality of credit card portfolios, relating in

¹² Consumer debt here refers to loans incurred by private individuals and professionals in relation to credit card and for other purposes, but excluding those in relation to the acquisition of residential properties.

¹³ i.e. Authorized institutions as defined in the Banking Ordinance (Cap 155).

¹⁴ *Banking World*, Sept 2000 issue, Hong Kong Institute of Bankers.

¹⁵ As defined in the Banking Ordinance (Cap 155).

¹⁶ Charge-off ratio refers to the total amount of credit card receivables written off during a period as a percentage of the total credit card receivables at the end of that period. The charge-off policy may vary among authorized institutions. Normally, an account will be written off when the receivable has been overdue for more than 180 days or when the ultimate repayment of the receivable is unlikely (e.g. the cardholder is bankrupt or cannot be located). To facilitate comparison among authorized institutions (especially for those which may provide charge-offs at different intervals during the year), the charge-off ratio is annualised.

¹⁷ For the quarter ending December 2000, March 2001 and June 2001, the figures are 3.71%, 3.68% and 4.6%.

particular to the sharp rise in personal bankruptcies.¹⁸ Nevertheless, 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 as complete information on this is currently not available to them.

1.19 Another reason suggested for the rapid growth of the debt collection industry is that since June 1991, debtors could no longer be imprisoned for non-payment of debts following the enactment of the Bill of Rights Ordinance (Cap 383).¹⁹ Accordingly, whereas creditors relied mainly on the court system to recover debts in the past, they had relied more on extra-judicial means of debt recovery after the enactment of the Hong Kong Bill of Rights Ordinance (Cap 383).

1.20 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. A study²⁰ 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.

¹⁸ However, the figures have also been affected significantly by changes in the charge-off policy of a number of institutions which are now charging off bad debts earlier than before, in particular when a bankruptcy petition is presented rather than when a bankruptcy order is made. Without the change, the charge-off ratio would have been slightly under 7% for the December 2001 quarter.

¹⁹ By the enactment of the Hong Kong Bill of Rights (Cap 383) on 8 June 1991, certain provisions of the International Covenant on Civil and Political Rights were incorporated into the law of Hong Kong. By virtue of Article 7, no one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

²⁰ Australian Law Reform Commission, Report No. 36.

Chapter 2

Some features of extra-judicial debt collection

Stages of debt collection

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

- (1) the creditor or an agent acting on his behalf makes non-judicial 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 its terms of reference, this Report examines 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 involves the exertion of pressure on the debtor. There is sometimes only a fine line between acceptable and unacceptable debt collection activities. 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 encountered in Hong Kong that amount to criminal offences include:

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

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

- making threatening telephone calls;
- 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; and
- arson.

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 a tape-recorder used by a debt-collecting agency to monitor its staff before making abusive or threatening remarks to the debtor; and
- sub-contracting debt collection work to a third party known to use improper methods.

Non-judicial debt collection

2.7 The non-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

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

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 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 that stated:

"Creditors and collectors uniformly say that they are anxious to

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.

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

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 uses. In the following paragraphs we examine the factors which contribute to the occurrence of abuse.

What causes abusive debt collection?

2.14 Factors which contribute to improper debt collection practices include -

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

The nature of the debt collection process

2.15 Debt recovery or collection involves the exerting of pressure on the debtor. A debt-collection agency is likely to adopt more aggressive tactics than the creditor because the collection agency is often retained only after the creditor has made substantial efforts to collect the debt itself. 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%,¹¹ depending on the amount recovered, the age of the account, and the 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, therefore, largely depends on the ability to pressure debtors into effecting repayment after debtors have neglected or refused to pay creditors directly.

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

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

¹¹ Institute of Law Research and Reform of Edmonton, Alberta, cited above, at paragraph 2.9.

The lack of professionalism among some debt collectors

2.16 Whilst operators at the top-end of the debt collection industry may be reasonably well qualified and experienced, surveys indicate there is often a lack of professionalism among 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.¹² The Institute of Law Research and Reform of Edmonton, Alberta, found that collectors in general have no more than a grade 12 education,¹³ 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 newspaper article¹⁴ 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 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.

¹² As above, at paragraph 2.7.

¹³ As above, at paragraph 2.10. The equivalent of Grade 12 in Hong Kong is Form 6.

¹⁴ *Ming Pao Daily News*, 19 April 1998 at page F2.

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.¹⁵ 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 of applicants before granting loans or other credit. An aggressive provider of credit is a danger, not only to the debtor, but also to the debtor's other creditors whose loans or other credit may have been responsibly granted.

Economic downturn

2.19 A major cause of the increase in repayment defaults is the economic downturn, which has resulted in users of consumer credit who were credit-worthy at the time the credit was granted becoming unemployed or suffering pay-cuts. For example, the Australian Law Reform Commission in its Report on Debt Recovery and Insolvency¹⁶ found that the most important cause of non-business debt default was an unexpected change in economic circumstances.

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, similarly, if the preliminary stage is ineffective, more cases will proceed to the later stages.

¹⁵ In fact, it has been commented that the most effective debt recovery is the maintenance of good credit control. J Richardson, *Debt Recovery in Europe*, at page 150.

¹⁶ Australian Law Reform Commission, Report No. 36, at paragraph 21.

Although the efficiency of the judicial process for recovering debts is outside this Report's terms of reference, it is briefly discussed in Chapter 10 of this Report.

Other factors

2.21 We have set out above some factors that contribute towards the occurrence of defaults and may lead to abusive debt collection. Other factors, such as whether or not there are sufficient legal deterrents against abusive debt collection, are examined in Chapters 3 – 6 in this Report.

Chapter 3

Existing criminal sanctions against abusive debt collection

Criminal law sanctions

3.1 In this chapter, we examine various criminal offences that may be applicable to debt collection activities.

Intimidation

3.2 The offence of intimidation is provided for 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 In *R v Lo Tong Kai*¹ 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".*²

3.4 The case of *R v Chan Kai Hing*³ 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*,⁴ and the court decided to set aside the conviction due to a lurking doubt as to whether the conviction was safe or satisfactory.

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 1977 HKLR 193.

² As above, at page 196.

³ [1997] 3 HKC 575.

⁴ [1977] HKLR 193.

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.⁵

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,*

⁵

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.⁶

3.9 In *R v Shum Hon Kai & Another*,⁷ 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,⁸ but it is also applicable to debt collection cases. Since goods obtained by blackmail are to be regarded as stolen goods,⁹ debt collectors who

⁶ Section 63.

⁷ [1988] HKC 279.

⁸ M Findlay, C Howarth and I Dobinson, *Criminal Law in Hong Kong, Cases and Commentary* (2nd edition) at page 483. (‘M Findlay’)

⁹ Section 26 (4) of the Theft Ordinance (Cap 210).

recover debts by blackmail may also be convicted of theft.¹⁰

3.12 The offence of blackmail is provided for 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.¹¹ The demand need not be communicated to the victim, and it is not a requirement that the victim is threatened or intimidated.¹² In *R v Tsang Yip Fong*,¹³ 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.¹⁴ In *R v Lee Keng-kwong*,¹⁵ 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*¹⁶ 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 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

¹⁰ *R v Lam Chiu Va* [1996] 1 HKC 302.

¹¹ M Findlay, cited above, at page 483.

¹² As above.

¹³ [1993] 1 HKC 308.

¹⁴ M Findlay, cited above, at page 483.

¹⁵ Criminal Appeal No. 182 of 1992.

¹⁶ [1996] 1 HKC 302.

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 repaid within a month or they would be physically assaulted. The defendant was convicted of blackmail pursuant to section 23 of the Theft Ordinance (Cap 210). The defendant was also convicted of theft pursuant to section 26(4) of the Theft Ordinance which provides that goods obtained by blackmail shall be regarded as stolen. The defendant was sentenced for eight months. The defendant relied on *R v Skivington*¹⁷ 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 provided for 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.¹⁸ Even words may constitute an assault.¹⁹ 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 offence triable upon indictment, and shall be liable to

¹⁷ (1967) 51 Cr App R 167.

¹⁸ M Findlay, cited above, at page 378.

¹⁹ See the House of Lords decision in *R v Ireland & Burstow* [1998] AC 147, per Lord Steyn at 162.

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 inducement, 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.²⁰ An intention to frighten is insufficient, and so is recklessness as to whether grievous bodily harm will result.²¹ Where several defendants participate in a gang attack, as in *The Attorney General v Sin Wai Lun*,²² 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*²³ that for unlawful and malicious wounding or inflicting grievous bodily harm,²⁴ 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,²⁵ 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 whether such harm would be caused. The House of Lords also held that a

²⁰ *Halsbury's Statutes* Vol 12 at page 98.

²¹ As above.

²² [1988] HKC 431.

²³ [1991] 4 All ER 698.

²⁴ 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).

²⁵ 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).

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*,²⁶ in which the victim was beaten and burnt with cigarettes, the Court of Appeal pointed out that:

*“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.”*²⁷

3.19 Another example is *R v Choi Wai Kwong*.²⁸ The defendant was the victim's sub-contractor who was owed \$310,000 under the sub-contract. Amongst other attempts at 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 that is sometimes 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.²⁹

²⁶ [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.

²⁷ Per Roberts CJ, at page 110.

²⁸ [1989] 2 HKLR 31.

²⁹ *R v Rahman* (1985) 81 Cr App Rep 349, at 353.

There is little authority on the nature of the *mens rea* required, but it is believed that *Cunningham* recklessness³⁰ is required.³¹

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.”*³²

3.22 This requirement was overruled in *R v Chan Wing Kuen and Another*³³ 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.”*³⁴

Accordingly, *R v Cheung Wan Ing* was overruled as being contrary to the ruling on false imprisonment in *R v Rahman*,³⁵ which was cited with approval in *R v Hutchins*.³⁶

³⁰ Smith & Hogan, *Criminal Law* (8th edition) at page 454.

³¹ “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.

³² *R v Cheung Wan Ing* [1990] 1 HKLR 655.

³³ [1995] 1 HKC 470.

³⁴ As above, at page 477.

³⁵ (1985) 81 Cr App Rep 349.

³⁶ [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 decision³⁷ in the United Kingdom of a case relating to the latter section, which involved a father taking away his child.

3.25 The Hong Kong Court of Appeal decision in *R v Chan Yau Hang and Another*³⁸ illustrates the overlap between the common law offence of false imprisonment and section 42 of the Offences Against the Person Ordinance (Cap 212). 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 were inappropriate to either offence. Furthermore, the Court of Appeal found that the District Court

³⁷ *R v Austin* [1981] 1 All ER 374.

³⁸ [1983] 1 HKC 107.

did not have jurisdiction to try any offence which was punishable with life imprisonment, with the exception of a number of specific offences which did not include section 42.³⁹

Triad offences

3.26 Some debt-collectors claim that they are triad members during the debt collection process. As a result, 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.⁴⁰ 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

³⁹ 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.

⁴⁰ Societies Ordinance (Cap 151) section 2.

fact, and a “bald admission”⁴¹ may in some unusual circumstances be 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”,⁴² would be required.

Summary Offences Ordinance (Cap 228)

3.30 Criminal offences which may be applicable to some abusive debt collection activities can also be found in the Summary Offences Ordinance (Cap 228).

3.31 Section 4(22) of the Summary Offences Ordinance provides that:

“Nuisances and miscellaneous offences

4. *Any person who without lawful authority or excuse –*

...

(22) disturbs any inhabitant by pulling or ringing any door bell, or by knocking or striking at any door without lawful excuse; ...

shall be liable to a fine of \$500 or to imprisonment for 3 months”;

3.32 Section 8 of the Summary Offences Ordinance provides that:

“Other offences against good order

Any person who –

(a) ...

(b) without the consent of the owner or occupier writes upon, soils, defaces or marks any building, wall, fence or paling with chalk or paint or in any other way whatsoever; or wilfully breaks, destroys or damages any part of any building, wall, fence or paling, or any fixture or appendage thereof;

(c) ...

shall be liable to a fine of \$500 or to imprisonment for 3 months.”

3.33 Also, section 20 of the Summary Offences Ordinance stipulates that:

“Any person who -

⁴¹ “By a ‘bald admission’ we take to be meant a statement such as ‘I am a member of such and 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.

⁴² AG v Chik Wai-lun [1987] HKLR 41 per Cons VP.

- (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."

3.34 It should be noted that the above offences are not specifically designed to tackle abusive debt collection, and will not be able to cover the whole range of the relatively 'minor' improper collection tactics which are presently employed or are likely to be developed.

Post Office Ordinance (Cap 98)

3.35 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.

Criminal sanctions for participation

The principal

3.36 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*.⁴³ 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

3.37 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

⁴³ M Findlay, cited above, at page 39.

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.⁴⁴ 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.⁴⁵ 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.

3.38 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.⁴⁶ 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.

3.39 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.⁴⁷ Hence, if the creditor and the debt collector have the common purpose to cause grievous 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.

3.40 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 are liable for wounding under the doctrine of transferred malice.⁴⁸

3.41 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.⁴⁹ 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.

⁴⁴ As above, at page 40. See also Smith & Hogan, 8th edition, at pages 140 and 141.

⁴⁵ *R v Bainbridge* [1960] 1 QB 129. See also Smith & Hogan, 8th edition at page 142.

⁴⁶ 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 was convicted of aiding and abetting.

⁴⁷ Smith & Hogan, cited above, at page 142.

⁴⁸ As above. See, however, the old and famous case of *Saunders v Archer* (1573) 2 Plowd 473, where there was a deliberate, and not an accidental, departure from the agreed plan.

⁴⁹ Smith & Hogan, cited above, at page 136.

Vicarious liability

3.42 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.⁵⁰ Vicarious criminal liability is imposed in two ways. First, a person under certain statutory duties may be held liable for the acts of another⁵¹ 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*,⁵² 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.⁵³ 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.⁵⁴

3.43 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

3.44 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.⁵⁵ 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.⁵⁶ This was doubted in *ICR Haulage*

⁵⁰ M Findlay, cited above, at page 76.

⁵¹ 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.

⁵² [1930] 1 KB 211.

⁵³ Smith & Hogan, cited above, at page 177.

⁵⁴ M Findlay, cited above, at page 77.

⁵⁵ As above, at page 88. See also *Meridian Global Funds Management Asia Ltd. v Securities Commission*, [1995] 2 AC 500 PC.

⁵⁶ *Cory Bros Ltd* [1927] 1 KB 810.

Ltd,⁵⁷ where Stale 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*,⁵⁸ which held that an indictment for manslaughter would lie against a company.

⁵⁷ [1944] KB 551.

⁵⁸ (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 to commit a battery, coupled with the capacity of carrying that intention into

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.

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 General v Chan Yuen Lung*.¹⁷

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.

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

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 for 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:

"the defendant has ... wilfully done an act calculated to cause physical harm to the plaintiff – that is to say, to infringe her legal

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.

*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 *Burnett v George*,²⁶ the plaintiff was relentlessly harassed by a former boyfriend. It was held that an injunction to restrain harassment by telephone calls should only be granted if there was evidence that the health of the plaintiff was being impaired by molestation or interference calculated to cause such impairment. In the more recent case of *Khorasandijan v Bush*,²⁷ the Court of Appeal held that harassment not amounting to a threat but causing or likely to cause physical or psychiatric illness to the victim could be restrained *quia timet* by injunction.

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.²⁸ In the Australian case of *Bradley v Wingnut Firms Ltd*,²⁹ the plaintiffs sought an injunction to restrain the publication of a film, which was described as a “comedy horror” and which showed the tombstone marking the plaintiff’s family burial plot. 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.

²⁴ At 58-59.

²⁵ [1919] 2 KB 316.

²⁶ [1992] 1 F.L.R. 525.

²⁷ [1993] QB 727. In this case, the plaintiff, whose friendship with the defendant had broken down, claimed injunctive relief in respect of her complaints that the defendant had assaulted her, made threats of violence against her, and pestered her with unwanted phone calls. 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.

²⁸ Clerk & Lindsell, cited above, at 12-15.

²⁹ [1993] 1 NZLR 415.

4.14 In *Alcock v Chief Constable of South Yorkshire Police*,³⁰ which 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.

4.15 In the Hong Kong case of *Wong Kwai Fun v Li Fung*,³¹ 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 a 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 of 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, and 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*,³² 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.³³ 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

³⁰ [1992] 1 AC 310.

³¹ [1994] 1 HKC 549.

³² [1964] AC 1129.

³³ *National Coal Board v Evans (JE) & Co* [1951] 2 KB 861. Clerk & Lindsell, cited above, at 13-161.

chattels.³⁴

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.³⁵ Full value is market price or the cost of replacement.³⁶ 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.³⁷ Consequential loss which is suffered by the plaintiff is also recoverable provided that the loss is not too remote.³⁸ In *Liesbosch Dredger v The Edison*,³⁹ the plaintiff recovered for loss of profits of a profit-earning chattel. In *The Mediana v The Comet*,⁴⁰ 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.⁴¹ 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.⁴² Slander is defamation communicated in a non-permanent form by spoken words, or other sounds.⁴³

4.19 It should be noted that 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, known as justification, even if the publication was actuated by spite or malice.⁴⁴

Negligence

4.20 It is also possible that a debt collector or a creditor could be held liable for the tort of negligence. In *Wong Wai Hing & Fung Siu Ling v Hui Wei Lee*,⁴⁵ Le Pichon JA held, albeit *obiter*, that had the debtor pleaded negligence against the creditors in that case, the court could have found that the creditor owed the debtor a duty to take reasonable care in selecting and appointing a

³⁴ Clerk & Lindsell, cited above, at 13-161.

³⁵ *Wilson v Lombank*, [1963] 1 WLR 1294.

³⁶ *Hall v Barclay* [1937] 3 ALL ER 620.

³⁷ Clerk & Lindsell, cited above, at 13-162.

³⁸ As above.

³⁹ [1933] AC 449.

⁴⁰ [1900] AC 113.

⁴¹ Clerk & Lindsell, cited above, at 21-01 and 21-12.

⁴² As above, at 21-06.

⁴³ As above, at 21-28.

⁴⁴ *Alexander v North Eastern Rly Co* (1865) 6 B & S 340.

⁴⁵ [2001] 1 HKLRD 736. This case is further discussed later in this chapter.

debt collection agency to act for her, and that the duty of care had not been properly discharged. In determining the existence of a notional duty of care, the threefold test of foreseeability of damage, proximity and fairness had to be applied. Le Pichon JA found that the notional duty of care could easily have been established given the fine line between legitimate and illegitimate means of recovering debts, the fact that the majority of collection agencies in Hong Kong are poorly managed and unscrupulous, the notoriety of the illegal means the more unscrupulous agencies resort to, coupled with the financial inducement to the collection agency to produce results.⁴⁶ However, Rogers V-P, in his judgment in the same case, took the view, also *obiter*, that on the judge's findings, it would not be possible to say that it was reasonably foreseeable that the collectors would commit acts of assault or intimidation. Although some collectors might employ such tactics, others acted responsibly.

4.21 In deciding whether the duty of care has been properly discharged, the standard of care is to be determined objectively. Le Pichon JA mentioned the following facts as relevant in deciding that the duty of care would not have been discharged in *Wong Wai Hing & Fung Siu Ling v Hui Wei Lee*: the process of selection adopted by the creditor was no more than looking up an advertisement in a popular newspaper, the absence of an address, telephone and fax numbers in the letter of appointment and agreement, the collection agent was remunerated purely on a contingency basis, and no enquiries were made regarding the credentials of the collection agency, such as its size, its clientele, how long it had been established and its *modus operandi*.

Liability for tortious acts committed by others

4.22 Liability for torts committed by others can arise in three situations. The first is where there is a master and servant relationship. The second is an employer's liability in certain limited circumstances for torts committed by an independent contractor. And the third is where a principal is vicariously liable for torts committed by an agent.

Master and servant

4.23 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.⁴⁷ 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.

4.24 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

⁴⁶ See page 42 E – Q.

⁴⁷ Clerk & Lindsell, cited above, at 5-20.

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.⁴⁸ The inadequacy of the ‘control’ test was brought out in a series of cases.⁴⁹

4.25 The deficiencies of the ‘control’ test have led to attempts to formulate other criteria. In *Stevenson, Jordan & Harrison Ltd v Macdonald & Evan*⁵⁰ 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.”*⁵¹

4.26 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.⁵² In *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*,⁵³ 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.”*

4.27 In *Market Investigations Ltd v Minister of Social Security*,⁵⁴ 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.⁵⁵ This approach was approved by the Privy Council in *Lee Tin Sang v Chung Chi Keung*.⁵⁶

4.28 Where the relationship of employer and employee exists, the

⁴⁸ As above, at 5-05.

⁴⁹ As above, at 5-07.

⁵⁰ [1952] 1 TLR 101.

⁵¹ As above, at page 111.

⁵² Clerk & Lindsell, cited above, at 5-09.

⁵³ [1968] 2 QB 497.

⁵⁴ [1969] 2 QB 173.

⁵⁵ As above, at 185.

⁵⁶ [1990] 2 AC 374.

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 test⁵⁷ is given by Salmond,⁵⁸ 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.”

4.29 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 *Limpus v London General Omnibus Co.*⁵⁹ notwithstanding express instructions not to race with, or obstruct other omnibuses, the driver of the omnibus obstructed the plaintiff's omnibus and caused a collision. The defendants as employers were held liable for the damage caused to the plaintiff's omnibus. In *C.P.R. v Lockhart*,⁶⁰ 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 on the use of an uninsured car, the employers were liable for the damage caused. This should be contrasted with a case where there is express prohibition as to the sphere of employment rather than the mode of carrying it out. In *Kooragang Investments Pty Ltd v Richardson & Wrench Ltd*,⁶¹ the employer was not liable because the employee had been expressly prohibited from carrying out valuations for a particular group which was not then a client of the employer. In *Iqbal v London Transport Executive*,⁶² 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.⁶³

4.30 In circumstances where the employer either expressly or by implication gave the employee a discretion which he must exercise in the

⁵⁷ Clerk & Lindsell, cited above, at 5-21.

⁵⁸ *Salmond and Heuston on the Law of Torts* (20th edition, 1993) at page 457.

⁵⁹ (1862) 1 H & C 526.

⁶⁰ [1942] AC 591.

⁶¹ [1982] AC 462.

⁶² (1973) 16 KIR 39, CA.

⁶³ Clerk & Lindsell, cited above, at 5-25.

course of his employment, the employer will be liable for the wrongful exercise of such a discretion.⁶⁴ 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.⁶⁵

4.31 An employer would be able to avoid liability if it is shown that the employee was acting “on a frolic of his own”,⁶⁶ that is, doing something totally unconnected with his job. The question depends on the degree of deviation by the employee.⁶⁷ In *Dyer v Munday*⁶⁸ 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.⁶⁹

4.32 Whether or not an act is done in the course of employment may be a difficult question of fact⁷⁰ and much depends on the circumstances of the case.

4.33 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.⁷¹
- A solicitor’s clerk fraudulently induced a client to transfer property to him.⁷²
- 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.⁷³

4.34 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.⁷⁴

⁶⁴ As above, at 5-31.

⁶⁵ As above, at 5-34.

⁶⁶ *Joel v Morrison* (1834) 6 C & P 501 at page 503.

⁶⁷ Clerk & Lindsell, cited above, at 5-30.

⁶⁸ [1895] 1 QB 742.

⁶⁹ 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.

⁷⁰ Clerk & Lindsell, cited above, at 5-21 and 5-33.

⁷¹ *Poland v Parr* [1927] 1 KB 366.

⁷² *Lloyd v Grace, Smith & Co* [1912] AC 716.

⁷³ *Morris v C W Martin & Sons Ltd* [1965] 2 All ER 725.

⁷⁴ *Reilly v Ryan* [1991] 1 LRM 449.

- A barmaid threw a bottle at a customer who had provoked her.⁷⁵
- A bus conductor assaulted a passenger following an argument.⁷⁶
- A garage attendant assaulted a customer of the garage out of personal vengeance.⁷⁷

Employer's liability for independent contractors

4.35 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, except where the employer has authorised the wrongful act. 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.⁷⁸ Such 'non-delegable' duties may arise either by statute or at common law. Liability will also exist in relation to dangerous operations in the vicinity of a highway and also in respect of acts which are considered to be extra hazardous.⁷⁹ As for 'extra-hazardous' acts, it appears from *Honeywill and Stein Ltd v Larkin Bros Ltd*⁸⁰ 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".⁸¹ 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.

Principal's vicarious liability for torts committed by agent

4.36 Whether or not a principal is vicariously liable for torts committed by an agent in the absence of a "master and servant" relationship is less clear, and the issue was examined by the Court of Appeal in a debt collection context in *Wong Wai Hing & Fung Siu Ling v Hui Wei Lee*.⁸² It should be noted that the court gave leave to the defendant to appeal to the Court of Final Appeal against the decision. However, the defendant failed to comply in time with the conditions imposed on the granting of leave and the appeal was not proceeded with. The defendant, a creditor, believing she was entitled to be repaid C

⁷⁵ *Deaton v Flew* (1949) 79 CLR 370.

⁷⁶ *Keppel Bus Co Ltd v Sa'ad bin Ahmad* [1974] 2 All ER 700.

⁷⁷ *Warren v Henlys Ltd* [1948] 2 All ER 935.

⁷⁸ Clerk & Lindsell, cited above, at 5-47.

⁷⁹ *Per Rogers V-P in Wong Wai Hing & Fung Siu Ling v Hui Wei Lee*, cited above.

⁸⁰ [1934] 1 KB 191.

⁸¹ As above, at 197.

⁸² [2001] 1 HKLRD 736.

\$150,000 by the plaintiff, employed a debt collection agency to collect the debt for her. The defendant found the name of the collection agency from an advertisement in a popular Chinese newspaper. The written contract stipulated that “Party B agrees to collect the debt wholly by lawful means. ... if any illegal means is used or if any criminal liability is incurred, Party A shall not be held responsible”. Remuneration was on a contingency basis at 35% of whatever amount recovered. The collection agents committed acts of intimidation and assault in the course of attempting to collect the debts. The plaintiff sought damages and an injunction against further assault and intimidation. The Court of Appeal held that the defendant was liable for the torts of intimidation and assault which were committed by the collection agent by word of mouth.⁸³

4.37 In the judgment, Rogers V-P referred to *Atiyah’s Vicarious Liability in the Law of Torts*, 1967 which discerned three different theories in relation to whether a principal is liable for the torts of an agent. Rogers V-P said that:

*“First, there are those who assert that the law recognises a general principle of vicarious liability for the torts of an agent. Then there are those, comprising the majority of English writers who deny the relevance of the category of agents altogether. The third main theory is that, while there is no general principle of liability for agents there are certain exceptional cases, in particular those where one who delegates to another the function of representing him in the course of a transaction of a consensual, but not necessarily contractual, nature is liable for torts committed.”*⁸⁴

4.38 Rogers V-P went on to say that:

*“An extensive review of the authorities and of the textbooks has led me to the conclusion that whilst there is no general principle of liability for agency that is because the term agent can be used to cover a variety of different situations. To a large extent each case must be considered separately to determine whether the agent is truly acting in an independent way such that his actions as a contractor might be truly viewed as independent of the principal, or whether his actions are so intimately representative of the principal that the principal cannot be divorced from them. In the latter case I consider that the law imposes liability on a principal for torts committed by an agent.”*⁸⁵

⁸³ Rogers V-P held that the defendant was not liable for the act of spraying red paint at the plaintiff’s place of work. *“In my view the spraying of red paint at the plaintiff’s place of work cannot on any footing be considered to be part of the work undertaken by the debt collector unless it is considered that once a debt collector is engaged, any tactics employed by him fall within what would be contemplated as a normal course of conduct by a debt collector. I would categorise the spraying of red paint as one of physical violence. Obviously if a triad is engaged, such tactics may be contemplated. But this is not such a case”.*

⁸⁴ At 748 G.

⁸⁵ At 749 G.

4.39 Rogers V-P further said that:

“The defendant had asked Yue Hoi to represent her. She was not specific as to the methods that would be employed by Yue Hoi and its employees, including Mr Kwong. It can only be inferred that they would use such tactics as persuasion, embarrassment and even harassment. As the judge himself noted harassment is not illegal. Thus approaches to the plaintiffs, their employers and their staff could be said to be part of the expected armoury of the debt collector. In acting as a debt collector, Yue Hoi and its staff were empowered to collect the debt. Yue Hoi and its staff were representing the defendant when the plaintiffs were approached and spoken to. In my view, therefore, Mr Kwong and Mr Chan were doing that which the defendant had asked them to do, namely, to use colloquial terms, make such a nuisance of themselves that the 1st plaintiff would pay Yue Hoi, who would receive the money on behalf of the defendant. In a general sense that was the task that they were engaged to do.

...

The only question which remains, therefore, is whether the instructions and directions which the defendant gave, that only legal means were to be used, were sufficient to take Mr Kwong’s and Mr Chan’s conduct outside the scope of that which Yue Hoi and its servants had been engaged to do. ... But what seems to be critical is whether the directions given by the defendant, to use only legal means, limited the sphere of employment i.e. the class of acts which could be done or merely regulated the conduct within that sphere i.e. the mode in which those acts could be done. ... In my view, the undertakings given to the defendant were undertakings as to the mode of carrying out the debt collection, they did not restrict the sphere of employment or the class of acts which could be done.”⁸⁶

4.40 Le Pichon JA was of the view, with Keith JA agreeing that, a principal could be liable for the wrongful acts of its agents under the principles set out in *Colonial Mutual Life Assurance Society Ltd v Producers and Citizen’s Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 (“the Colonial Mutual principles”). In the Colonial Mutual case, the appellant had engaged R as a canvasser and agent under an agreement. R was not an employee but an independent contractor. The agreement expressly prohibited the agent from using defamatory language or writing. The agent, however, in attempting to obtain business for the appellant made defamatory statements concerning the respondent which was another assurance company. Gavan Duffy CJ and Starke J (citing *Barwick v English Joint Stock Bank* (1867)

⁸⁶

At 756 H – 757 G.

LR 2 Ex 259 and *Lloyd v Grace, Smith & Co* [1912] AC 716) held that a person:

“...is liable for another’s tortious act ‘if he expressly directs him to do it or if he employs that other person as his agent and the act complained of is within the scope of the agent’s authority.’ It is not necessary that the particular act should have been authorized: it is enough that the agent should have been put in a position to do the class of acts complained of ...”

Dixon J (with whose judgment Rich J agreed), also found against the appellant. Recognizing that normally an independent contractor carries out his work not as a representative but as a principal, he nevertheless held that:

“...when the function entrusted is that of representing the person who requests its performance in a transaction with others, so that the very service to be performed consists in standing in his place and assuming to act in his right and not in an independent capacity ...in performing these services for the [principal, the agent] does not act independently, but as a representative of the [principal], which accordingly must be considered as itself conducting the negotiation in his person.”

In such a situation, the effect was that the appellant:

“...in confiding to his judgment, within the limits of relevance and of reasonableness, the choice of inducements and arguments, authorised him on its behalf to address to prospective proponents such observations as appeared to him appropriate. The undertaking contained in his contract not to disparage other institutions is not a limitation of his authority but a promise as to the manner of its exercise. ...”

4.41 Le Pichon JA held that the case before the court appeared to be on all fours with *Colonial Mutual*, and said:

*“The principle of law that can be distilled from that case is that a principal may be liable for the torts of his agent where the agent was not acting in an independent capacity but in a representative one standing in the place of his principal and the very service to be performed consisted in standing in the principal’s place. The liability is therefore personal rather than vicarious. The function entrusted is that of representing the person who requests its performance, not merely in a transaction with others but is an activity where others can be seen to be closely affected. That which gives rise to liability must be done for and on behalf of another, which is not the same as saying simply that it is for his benefit or at his request. See per Eveleigh J in *Nottingham v Aldridge* [1971] 2 QB 739 at 752C.”⁸⁷*

⁸⁷

At 770 F.

Personal Data (Privacy) Ordinance

4.42 Victims of abusive debt collection activities may also have a civil cause of action pursuant to the Personal Data (Privacy) Ordinance (Cap 486).⁸⁸ This is discussed in the next chapter.

⁸⁸

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 statutory administrative requirement they face prior to commencing business is to obtain a business registration certificate under the Business Registration Ordinance (Cap 310).

5.2 Whilst there is no licensing requirement to operate a debt collection business, banks and other authorized institutions providing consumer credit are subject to regulation by the Hong Kong Monetary Authority and persons carrying on business as money lenders are required to be licensed annually under the Money Lenders Ordinance (Cap 163).¹

Self-regulation by authorized institutions

Code of Banking Practice – 1997

5.3 In 1997, the Hong Kong Association of Banks (“the HKAB”) and the DTC Association (“the DTCA”)² jointly issued a non-statutory Code of Banking Practice in 1997 (“the Code”). The aim of the Code is to foster customer confidence in the banking system through the promotion of good and fair banking practices. Although the Code was issued on a voluntary basis, the Hong Kong Monetary Authority (“the HKMA”) monitors its compliance as part of its regular supervision of authorized institutions.³

Code of Banking Practice – December 2001

5.4 A comprehensive review of the Code was conducted in 2001 by a working group comprising representatives of the HKMA, HKAB and the DTCA. The working group consulted industry associations and the Consumer Council with the objective of revising the Code to ensure that it

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.

strikes a reasonable balance between consumer rights and efficiency of banking operations. The revised Code took effect from 1 December 2001, and authorized institutions are expected to comply with the new provisions by 1st June 2002 at the latest, except for those provisions requiring system changes, in which case, another 6 months is allowed for compliance.

5.5 The Code contains seven chapters. Chapter 5 lays down guide-lines on debt collection work conducted by parties other than authorized institutions. The guide-lines have been expanded and improved in the revised Code.⁴ The relevant clauses are 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. In addition, institutions should require their debt collection agencies not to employ harassment or improper debt collection tactics such as the following:*

(a) Harassment tactics

- (i) putting up posters or writing on the walls of the debtor's residence or other actions designed to humiliate the debtor publicly;*
- (ii) pestering the debtor with persistent phone calls;*
- (iii) making telephone calls at unreasonable hours; and*
- (iv) pestering the debtor's referees, family members and friends for information about the debtor's whereabouts.*

⁴

Clauses marked with asterisks below are new provisions.

- (b) *Other improper tactics*
 - (i) *using false names to communicate with the debtor;*
 - (ii) *making anonymous calls and sending unidentifiable notes to the debtor;*
 - (iii) *making abusive or threatening remarks to the debtor; and*
 - (iv) *making false or misleading representations with an intent to induce the debtor to make a payment.*

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 authorization 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.

**36.12 Institutions should stop their debt collection activities on a debtor once they become aware that a bankruptcy order has been issued in relation to the debtor.*

37. Management of Relationship with Debt Collection Agencies

**37.1 Institutions should have proper systems and procedures in place for the selection of debt collection agencies and the monitoring of their performance. These systems and procedures should be subject to regular review and should consist of the following essential elements –*

- (a) a review of the background information of the debt collection agency including a company search to identify the owners and directors of the debt collection agency;*
- (b) a basic assessment of the financial soundness of the debt collection agency;*
- (c) a site visit to ascertain the business address of the debt collection agency;*
- (d) an evaluation of the operation of the debt collection agency; and*
- (e) in the case of appointing a new debt collection agency, a procedure to obtain references from at least two of the existing clients (preferably authorized institutions) of the agency.*

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

37.3 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.

**37.4 Institutions should evaluate on a regular basis whether the charges of the debt collection agencies employed by them are reasonable having regard to the prevailing market practices. They should assess the reasonableness of any charge before passing it on to the customer concerned.*

37.5 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.

- 37.6 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.*
- *37.7 Institutions should have established procedures to handle complaints received from debtors. They should carry out a careful and diligent inquiry into the complaint to check whether there is any misconduct on the part of the debt collection agency and whether there is any violation of the requirements contained in the Code. Institutions should require debt collection agencies to take appropriate remedial actions if necessary.*
- 37.8 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.*
- 37.9 Institutions should not delegate authority to the debt collection agencies to institute legal proceedings against customers without the institution's formal approval.*
- 37.10 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.*
- 37.11 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.*
- 37.12 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 Although the HKMA's principal function in relation to banking supervision is to promote the general stability and effective working of the banking system, it has also undertaken to promote and encourage proper standards of conduct and prudent business practices amongst authorized institutions. Failure by an institution to comply with the Code may call into question whether it continues to meet the criteria for authorisation.

5.7 Since the Code was introduced in 1997, the HKMA has undertaken to monitor compliance as part of its regular supervision. To step up its efforts in this aspect, a new self-assessment framework has been introduced and banks will be required to file annual assessment reports to HKMA starting in September 2002. In addition, the HKMA will continue to conduct special examinations on a selected basis if required, and monitor compliance through processing customer complaints lodged against banks.

Personal Data (Privacy) Ordinance (Cap 486) and the Code of Practice on Consumer Credit Data 2002

Personal Data (Privacy) Ordinance

5.8 The Personal Data (Privacy) Ordinance ("the Ordinance") lays down six data protection principles that provide for general requirements for parties that collect, hold, process or otherwise use personal data. Two of the data protection principles are of particular relevance to debt collection activities.

5.9 Data Protection Principle 2(1) requires that all reasonably practicable steps be taken to ensure that personal data are accurate and if personal data are known to be inaccurate, to ensure they are not used or are deleted. 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. The use of inaccurate personal data contrary to Data Protection Principle 2(1) could include disclosure by a creditor to a debt collector of a previous address of a debtor. It could also include the situation where a debt collection agency deliberately sends demand letters ostensibly addressed to a debtor to neighbouring addresses to humiliate the debtor.

5.10 Data Protection Principle 3 limits the use of personal data to purposes for which the data were to be used when they were collected, or purposes directly related thereto, unless the consent of the data subject has been obtained for some other use of the data. The use of personal data includes disclosure of the data. Subject to the data subject's consent, a creditor, therefore, should not disclose to a debt collection agency any personal data that were not collected for the purpose of debt collection or a purpose directly-related thereto. For example, information relating to loan referees is not collected by creditors for debt collection purposes and should therefore not be disclosed to debt-collectors.

5.11 Contravention of a data protection principle is not an offence,⁵ but an individual who suffers damage as a result of such a contravention in relation to his personal data has a civil cause of action⁶ entitling him to damages, including damages for injury to feelings. In addition, such an individual could make a complaint to the Privacy Commissioner for Personal Data (the Privacy Commissioner). On receipt of such a complaint, the Privacy Commissioner may carry out an investigation and, in an appropriate case may issue an enforcement notice⁷ containing specific directions requiring future compliance with the data protection principle that has been breached. Non-compliance with such an enforcement notice constitutes an offence.⁸

Code of Practice on Consumer Credit Data 2002

5.12 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. A revised version of the Code was gazetted by the Privacy Commissioner on 8th February 2002 and took effect on 1st March 2002.

5.13 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).⁹ The basic aim of the Code is to regulate the handling of consumer credit data by credit providers and credit reference agencies. The Code has no application to commercial credit.¹⁰ The Code covers the handling of consumer credit data by credit reference agencies,¹¹ and by credit providers in their dealings with credit reference agencies and debt collection agencies. With respect to debt collection agencies, the Code is concerned only with the disclosure of information by credit providers¹² to such agencies and their use of such information.

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

- *Clause 3.2: A credit provider should notify an applicant for*

⁵ Section 64(10).

⁶ Section 66.

⁷ Section 50.

⁸ Section 64(7).

⁹ Section 13 of the Personal Data (Privacy) Ordinance (Cap 486).

¹⁰ Clause 4.1

¹¹ This aspect will be discussed later in this Consultation Paper.

¹² "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."

consumer credit, at or before the time of collection of his personal data, that the data may be supplied to a debt collection agency in the event of default. 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.

- *Clause 3.4: A credit provider should only provide consumer credit data 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 debt collection agency, the credit provider should notify the debt collection agency promptly of such fact.*
- *Clause 3.8: Subject to clause 3.9 of the Code, 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.*
- *Clause 3.9: 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 follow such conduct as stipulated by the Banking Code¹³ 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.¹⁴*

¹³ Code of Banking Practice discussed earlier.

¹⁴ 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 that are applicable to debt collection activities. These include intimidation, criminal damage, theft and blackmail, assault, false imprisonment, triad offences, and certain 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, are not a complete answer for the following reasons:

- (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 fending 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 may be effective in dealing with the more extreme debt collection practices involving criminal acts, it is not 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 unable to follow up an allegation of an act on the borderline of legality.
- (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 relatively low detection rate of debt collection related cases. In 1999, the detection rate of debt collection related cases was only 8.4%, compared to 42.5% for overall crime. In 2000, the respective figures were 22.2%¹ and 43.6%. In 2001, the respective figures were 9.6% and 44%.

Civil claims

6.3 We have also examined in previous chapters a number of civil

¹ The high detection rate was attributed to the arrest of a large-scale syndicate in a police operation.

actions which may be of assistance to debtors, including assault and battery, false imprisonment, intentional physical harm other than trespass to the person, trespass to chattels, defamation, negligence, and employers' liability and principals' liability in civil claims. It remains to be considered how effective these remedies are as a control on abusive debt collection practices. If an aggrieved debtor has the resources, alternatively qualifies for and obtains legal aid, to bring a civil action, he may be awarded damages and an injunction. On the other hand, he also faces the possibility of losing the case and having to pay for his own legal costs and part of the opponent's legal costs.

6.4 Hence, civil remedies are not usually useful to the average debtor. As stated by the Institute of Law Research and Reform of Edmonton, Alberta:

"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."*²

Self-regulation by authorized institutions

6.5 We have examined in a previous chapter³ the non-statutory voluntary code issued jointly by the Hong Kong Association of Banks and the DTC Association, the Code of Banking Practice – 2001.

Code of Banking Practice – December 2001

6.6 The effectiveness of the guidelines in the Code of Banking Practice, albeit practical and useful, suffer from its limited scope of application. The Code regulates only a fraction of debt collection activities. It applies only to authorized institutions, that is, banks, restricted licence banks, and deposit-taking companies.⁴ Other creditors including individuals, trading companies,

² *Debt Collection Practices*, (Report No. 42, 1984), at paragraphs 4.2, 4.6.

³ See paragraphs 5.4 – 5.7.

⁴ The HK Association of Banks and the DTC Association have recently set up a Code of Banking

mobile telephone companies, estate agents and money lenders are not subject to the Code. It is clearly anomalous for debt collection agencies to abide by the guidelines only in those cases where the clients are authorized institutions. This may also result in unfair competition. Take the example of a debtor with \$100,000 worth of assets. He borrows \$100,000 from Creditor A, which is not bound by the Code, after borrowing \$100,000 from a bank. As Creditor A is not bound by the Code, it will be able to engage a debt collector who does not comply with the relevant requirements of the Code⁵ than one acting for the bank, which is bound by the Code. In such circumstances, the debtor is more likely to satisfy the debt owed to Creditor A 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. Creditor A might have been aggressive in granting the subsequent loan since the debtor's indebtedness had increased; yet, it is more likely to get his money back. This limited application of the Code may thus also lead to unfair competition among debt collectors. Accordingly, as most debt collectors earn their fees on a contingency basis, the restricted scope of application of the Code may work unfairly against those working for authorized institutions.

Personal Data (Privacy) Ordinance (Cap 486) and the Code of Practice on Consumer Credit Data – 2002

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 Ordinance is to protect the privacy of individuals in relation to personal data, the Ordinance, and hence the Code, are not intended to be a comprehensive 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 as such behaviour does not necessarily involve the use of personal data. Further, the requirements of the Ordinance that are most likely to apply to improper debt collection practices are the requirements of the data protection principles. However, these are stated in broad terms giving wide scope for interpretation. Even where it is clear that the requirements of the data protection principle apply and have been breached, the Ordinance may not always be an effective

Practice Committee which would provide guidance on interpreting the Code and undertaking future review of the Code. Although, the Committee will not enforce the Code as such, the guidance it offers on interpreting the Code should help improve compliance in general. Note that the Finance Houses Association has a code of practice, and the Moneylenders Association may issue one shortly.

⁵ Although the risk of this should be reduced to some extent by the provisions of clause 3.9 of the Privacy Commissioner's Code of Practice on Consumer Credit Data. In summary, this requires all credit providers using debt collection agencies to instruct them to follow the debt collection guidelines of the Banking Code. It also requires a credit provider not use a debt collection agency unless the credit provider is satisfied, on good grounds, that the debt collection agency will comply with the said guidelines.

⁶ See paragraphs 5.8 – 5.14 above.

means of protecting individuals from the abusive practices concerned. First, the only sanction for such a breach is a civil action to which the drawbacks identified above in relation to pursuing civil actions generally apply. Secondly, while the individual whose personal data is the subject of the breach may make a complaint to the Privacy Commissioner, his investigative powers are limited: he has no power, for example, to seize evidence of the breach. In addition, while the Privacy Commissioner has the power to prevent the repetition or continuation of a breach of the Ordinance through the issuing of enforcement notice, he has no power to award any compensation to the victim of such a breach or to institute civil proceedings in the victim's name to obtain such compensation.

Chapter 7

Comparative law

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 similar to, or the same as, those already surveyed in previous chapters on the law in Hong Kong, debt collection is regulated by specific statutory provisions in other jurisdictions. Such legislation, other than legislation providing for the licensing of debt collection agencies, will be examined in this chapter. In addition, this chapter contains an examination of other legislation in the UK of relevance to debt collection, although not specifically aimed at it. Legislation on 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. It 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 as follows:

“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;*

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

- (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."*

7.3 By virtue of 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 acts in concert 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 the phrases "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 that 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

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

³ [1995] 3 All ER 952.

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 debt that he *claims to be due under a contract* that 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

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.

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 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 following 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

¹¹ Section 7(4).

¹² Section 7(3).

¹³ Section 1(2).

¹⁴ Section 1(3).

¹⁵ Section 5.

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 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 of reasonable conduct 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

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).

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 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.

²³ Section 8(2).

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.

7.24 A defence is available for a person demanding repayment of a debt where the party making the demand believes he has reasonable grounds for doing so. 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*
- (b) *that he believed that the use of the threat was a proper means of reinforcing the demand.”*

As a general matter, abusive debt collection activities are unlikely to fall within the scope of the defence.

Australia

Federal legislation

7.25 The Trade Practices Act 1974 is the only federal legislation governing 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 does 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

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.

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 or deceptive conduct. In 1977, the section was amended to include conduct that is likely to mislead or deceive. This amendment makes clear that an 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.

Australian Competition & Consumer Commission v McCaskey & Cash Return Mercantile PTY Ltd

7.31 Sections 60 and 52 of the Trade Practices Act 1974 have been examined by the Federal Court of Australia in *Australian Competition & Consumer Commission v McCaskey & Cash Return Mercantile PTY Ltd* FCA 1037,³⁵ in which the Australian Federal Court made some observations on the sections. The case involved a collection agency, "Cash Return", and its employee, Ms Sharyn McCaskey, both of whom were sued by the Australian Competition & Consumer Commission ("the ACCC") and consented to the making of various orders by way of declaration and injunction. The task before the court was to consider whether the proposed orders were intra vires and appropriate. In connection with the interpretation of section 60 and 'harassment', French J observed:

"The word "harassment" as used in s 60 must serve two broad purposes. It describes a range of conduct, in connection with the supply of goods or services which involve, inter alia, applying repeated pressure to a consumer who is under no pre-existing obligation to acquire. It also describes conduct in relation to a consumer who is under an unfulfilled obligation to pay for goods or services. Given the range of cases that it can cover, the question whether or not there is harassment involves evaluative judgment. The word "undue" adds an extra layer of evaluation which is more relevant to the case of debt recovery than to the sale of goods or services. Repeated unwelcome approaches to

³² As above.

³³ As above.

³⁴ Section 79 of the Trade Practices Act 1974.

³⁵ Handed down in August 2000.

a potential acquirer of goods or services could qualify as harassment and, so qualified, require very little additional evidence, if any, to attract the characterisation of “undue harassment”. On the other hand a consumer who owes money to a supplier can expect repeated unwelcome approaches requesting payment of the debt if he or she does not pay. No doubt such approaches might also qualify as harassment. If legitimate demands are reasonably made, on more than one occasion, for the purpose of reminding the debtor of his or her obligation and drawing the debtor’s attention to the likelihood of legal proceedings if payment is not made, then that conduct, if it be harassment, is not undue harassment. If, however, the frequency, nature or content of the approaches and communications associated with them is such that they are calculated to intimidate or demoralise, tire out or exhaust a debtor rather than convey the demand and an associated legitimate threat of proceedings, the harassment will be undue.”

7.32 With regard to the meaning of ‘coercion’ in section 60, French J said:

“The collection of debts may involve coercion in the sense that the debtor is subjected to the pressure of the demand and the legitimate threat of civil process for recovery with the additional cost and damage to credit which that can involve. Such pressure may be thought of as coercion but is entirely legitimate and not “undue”. Where the demand includes content which does not serve legitimate purposes of reminding the debtor of the obligation and threatening legal proceedings for recovery but is calculated otherwise to intimidate or threaten the debtor, then the coercion may be undue. So if a threat is made of criminal proceedings, or of the immediate seizure and sale of house and property, a remedy not available in the absence of retention of title or some form of security, the coercion is likely to be seen as undue. The threat of criminal proceedings itself may be an offence against State laws. Quite apart from content the manner or circumstances of a demand or communication, including the language used, the time and place at which it is made and the person to whom it is communicated, may go beyond the legitimate purposes of drawing attention to the existence of the obligation and the consequences for non-compliance. Again such a communication may amount to undue coercion. Obvious examples include the use of personally abusive or obscene language, conveying the demand to uninvolved family members, particularly children, or conveying the demand through a third party in order to embarrass the debtor when the debtor could reasonably have been the subject of a direct communication. Each case will turn on its own facts. ...”

7.33 As for section 52 on misleading or deceptive conduct, French J declined to make an order in connection with one of the alleged incidents that constituted contravention of the section. He observed that:

“An agent who, on instructions, asserts that an alleged debtor is liable and seeks payment of the debt under threat of recovery action does not engage in misleading or deceptive conduct just because, on the true facts of the case, the alleged debtor is not liable. The assertion of liability if reasonably based on instructions, may be the statement of an opinion honestly held or a representation of the opinion of the creditor. A legal practitioner writing a letter of demand on instructions which there are no reasons to disbelieve, does not engage in misleading or deceptive conduct if a court subsequently finds there to be no liability. The declaration alleges simply that there was no legal liability on the part of the Campbells thereby falsifying the assertion to the contrary attributed to Ms McCaskey. It does not allege a statement by Ms McCaskey of an opinion which she did not hold or for which there could be no reasonable basis. On the face of it the third paragraph of the declaration does not identify a contravention of s 52 and I decline to make it.”

7.34 As against the debt collector, the court ordered that: (i) a declaration should be made that it had used undue harassment and coercion against certain named persons, contrary to sections 60 and 52; (ii) an injunction for three years restraining the collection agency from repeating conduct mentioned in the declaration; (iii) the debt collector should attend a Trade Practices Compliance Programme seminar; and (iv) she should pay the ACCC’s costs of proceedings.

7.35 As against the collection agency, in addition to items (i), (ii) and (iv) in the preceding paragraph, the court ordered that the agency should at its own expense publish an apology of specified contents and size. In connection with the publication of an apology or notice, French J said:

“In Australian Competition and Consumer Commission v Real Estate Institute of Western Australia at 132-133 I reviewed the authorities and principles governing the making of such orders. A legitimate purpose of an order for such advertisements flowing from contraventions of Part IV or Part V is to inform the relevant public or markets of the outcome of the litigation. In that way the public and those in the relevant markets for goods and services have at least a broad understanding of the way in which the particular contraveners have behaved and have had to change their conduct. They will increase the probability that the public and those in the relevant markets may be put on inquiry about the lawfulness of future conduct by the contravener which may be seen to breach the act and/or the injunctions which have been granted. In this way public advertising may assist in the enforcement of the injunctive orders and the prevention of

repetition of the contravening conduct. When there has been misleading or deceptive conduct, a notice may be ordered to correct what has been mis-stated.

Importantly it is not in my opinion appropriate to order such notices simply to announce a win for the ACCC or the contrition of the respondent. Nor is the general education of the public about the Trade Practices Act a price to be exacted from a respondent for transgressing. So the notice must be related to righting the wrong which has been done or aiding in the enforcement of the other orders made. As with the debt collection process itself, the test of the proposed course of action is whether it is calculated to serve and only to serve the legitimate purposes of the law.

In this case the notice proposed is headed "An Apology". Notwithstanding my reservations about the inappropriateness of orders for the publication of statements of contrition, the proposed notice is an appropriate way of drawing to the attention of those debtors whom it was sought to threaten, intimidate and abuse, that Cash Return accepts the inpropriety (sic) of that conduct. In my opinion the notice is within power and appropriate and orders will be made accordingly."

Other provisions against abusive collection tactics

7.36 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)³⁶

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

³⁶

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

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)³⁷

The United States of America

7.37 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 such as 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

7.38 In 1977, the Federal Government enacted the Fair Debt Collection Practices Act ("the FDCPA"), which took effect 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.³⁸ 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.³⁹

7.39 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.⁴⁰ 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

7.40 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.⁴¹ Usually, whether conduct

³⁷ Australian Law Reform Commission, cited above, at paragraph 33.

³⁸ *American Jurisprudence* Vol 17, 2nd edition, at paragraph 194.

³⁹ As above.

⁴⁰ 15 USC § 1692k.

⁴¹ Fair Debt Collection Practices Act 1977 15 USCS §§1692d.

harasses, oppresses or abuses any person is a question of fact.⁴² The following cases show some examples of words or activities that 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 afford them".⁴³
- 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".⁴⁴
- 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.⁴⁵

7.41 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.⁴⁶

⁴² *Jeter v Credit Bureau, Inc* (CA11 Ga) 760 F2d 1168.

⁴³ *Bingham v Collection Bureau, Inc* (DC ND) 505 F Supp 864, 67 ALR Fed 952.

⁴⁴ *Rutyna v Collection Accounts Terminal, Inc* (ND Ill) 478 F Supp 980.

⁴⁵ *Harvey v United Adjusters* (DC Or) 509 F Supp 1218.

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

False, deceptive, or misleading representations or means

7.42 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 conduct⁴⁷ is regarded as violation of the statute:

- 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.

7.43 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.⁴⁸ The “least sophisticated debtor” standard applies to an allegation that the debt

⁴⁷ 15 USCS §§1692c(1) to (16)

⁴⁸ As above §§ 1692e(5).

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”.⁴⁹

Unfair practices

7.44 The FDCPA provides that a debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt.⁵⁰ Without limiting the general application of the provision, the following conduct⁵¹ 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 cheque or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution;
- depositing or threatening to deposit any postdated cheque or other postdated payment instrument prior to the date on such cheque 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.

⁴⁹ *Swanson v Southern Oregon Credit Service, Inc* (CA 9 Or) 869 F2d 1222.

⁵⁰ 15 USCS §§1692f.

⁵¹ As above §§1692f(1) to (8).

Communications in connection with debt collection

7.45 *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;⁵²
- 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.⁵³

7.46 *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 give effect to a post-judgment 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.⁵⁴

7.47 *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.⁵⁵

Acquisition of location information

7.48 A debt collector who seeks to communicate with any person other than the consumer for the purpose of acquiring "location information"⁵⁶ about the consumer has to comply with the following requirements:⁵⁷

- identify himself and state that he is confirming or correcting

⁵² This usually means from 8 p.m. to 9 a.m.

⁵³ 15 USC § 1692c(a).

⁵⁴ As above § 1692c(b).

⁵⁵ As above § 1692c(c).

⁵⁶ I.e. information about a consumer's place of abode and his telephone number at such place, or his place of employment.

⁵⁷ 15 USC § 1692b.

- 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
- after the debt collector knows that the 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

7.49 The FDCPA further protects consumers by posting the following information on the Internet:⁵⁸

- *“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.*

⁵⁸

<http://www.webcom.com/~lewrose/brochure/fdcpa.html>.

- *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 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

7.50 The federal government attempted to introduce a Borrowers and Depositors Protection Act in 1976, but did not succeed.⁵⁹ 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.⁶⁰ Debt collection legislation in Canada, therefore, is confined to provincial legislation.

Alberta

7.51 Alberta enacted legislation governing the activities of debt collections as early as 1965. The legislation was Collection Agencies Act 1965.⁶¹ 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.⁶² 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.⁶³

7.52 In 1978, the 1965 Act was repealed and replaced by the

⁵⁹ Institute of Law Research and Reform of Edmonton, Alberta, *Debt Collection Practices* 1984, at paragraph 1.8.

⁶⁰ As above, at paragraph 1.9.

⁶¹ S A 1965, c 13.

⁶² Institute of Law Research and Reform Edmonton, Alberta, cited above, at paragraph 5.2.

⁶³ As above.

Collection Practices Act 1978,⁶⁴ which was slightly amended in 1980. In passing the 1978 Act, the Legislature voted against a provision against unreasonable oppression, harassment or abuse that 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. It is as follows:-

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

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

⁶⁴

S A 1978, c 47.

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."*

Mainland China

7.53 In Mainland China, there is no national legislation specifically dealing with abusive debt collection activities. Relevant provisions touching

on this matter can be found in the Criminal Law and the Civil Procedure Law of the People's Republic of China. Article 238 of the Criminal Law provides that whoever unlawfully detains or confines another person in order to get payment of a debt shall be punished in accordance with the offence of unlawful detention.⁶⁵ If illegal distraintment of property is involved, Article 270⁶⁶ of the Criminal Law may be applicable.

7.54 It should be noted that Article 106 of the Civil Procedure Law relates to debt collection. The Article provides that:

“Decision on the adoption of compulsory measures against obstruction of proceedings shall be made only by the People’s Court. Any unit or individual that extorts repayment of a debt by illegal detention of a person or illegal distraintment of property shall be investigated for criminal responsibility according to the law, or shall be punished with detention or a fine.”

The acts prohibited under Article 106 of the Civil Procedure Law may call for criminal sanction or administrative penalty, dependent upon the seriousness of the acts.

Other jurisdictions

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

⁶⁵ According to an Interpretation of the Supreme People’s Court on this article on 30 June 2000, the section is also applicable to demands for payment of unenforceable debts, for example, gambling and usury debts.

⁶⁶ Paragraph one of Article 270 provides that “Whoever unlawfully takes possession of another person’s money or property under his custody and refuses to return it, if the amount is relatively large, shall be sentenced to fixed-term imprisonment of not more than two years, or criminal detention or be fined; if the amount is huge, or if there are other serious circumstances, he shall be sentenced to fixed-term imprisonment of not less than two years but not more than five years and shall also be fined”.

Chapter 8

Licensing in other jurisdictions

Introduction

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

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 purpose of 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 businesses or consumer hire businesses to be licensed.¹ By virtue of section 147(1) of the Act, the licensing requirements for a 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 payment of debts due under consumer credit agreements or consumer hire

¹ Section 21.

² Section 145.

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 concerned, 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 includes 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 over debt collectors 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*, Report No. 36 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 Police of the NSW Police are informed.

²⁵

Section 10(6).

Licensing Police,²⁶ NSW Police

8.21 Regulation of debt collection agencies in New South Wales is also undertaken by the Licensing Police of the NSW Police. The Licensing Police is manned by a staff of about 12 and performs various functions including:

- (a) Investigative service – to ensure the integrity of the industries involved is maintained and to identify any involvement of organized crime within those industries.
- (b) Consultancy Service – providing advice to other Government departments and authorities on liquor licensing, legalized gaming, racing and film/literature classification.
- (c) Index of Licensees – the agency is responsible for maintaining a register of persons who are licensed under the Commercial Agents and Private Inquiry Agents Act 1963. Any member of the public may peruse the register with regard to the issue, renewal or cancellation of licences concerning commercial agents and their subagents.

8.22 The 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 legislation

8.23 The Licensing Police 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 is being reviewed, and drafting of the bill is under way. In the meantime, the 1963 Act is still current.

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

- (a) The issuing authority of a licence is to remain with the Licensing Court.²⁷

²⁶ Formerly called the Licensing Agency, the Licensing Police belongs to the 'Crimes Agencies : Organised Crime (Gaming and Liquor)' unit, which is responsible for the Commercial Agents and Private Inquiry Agents Act 1963. Incidentally, one of the duties of the Unit is to take part in the establishment of a State Licensing Council. Information on this part is provided by the Hong Kong Police.

²⁷ At earlier stage, it was contemplated that the issuing authority should be changed from the Court to the Commissioner of New South Wales Police.

- (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 are no training or examination requirements in any State or Territory).
- (e) No previous record of harassment of debtors. (In New South Wales, Victoria and Tasmania, such a record is a ground for refusal of a licence).
- (f) Disqualification for bankruptcy. (In Victoria, Tasmania and the

²⁸

Report on Debt Recovery and Insolvency, cited above.

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.

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.

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.

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).

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

³³ S A 1965, c 13.

³⁴ Section 4.

³⁵ Section 1(b).

³⁶ Section 1(c).

³⁷ Section 16.

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 into which all money collected from debtors is paid.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.

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

³⁸ Section 19.

³⁹ Section 20.

⁴⁰ Section 9.

⁴¹ Section 10.

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 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 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

⁴² Section 11.

⁴³ Section 1.

⁴⁴ Section 5.

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 which is binding on all debt collectors and publish that code in the Gazette.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) using force or threatening to use force against a debtor;
- (b) acting towards a debtor in an excessive or intimidating manner;
- (c) making fraudulent or misleading representations;
- (d) spreading or threatening to spread false information concerning the creditworthiness of a debtor;
- (e) contravening or failing 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 -

- (a) withdraw his registration;
- (b) suspend his registration;
- (c) impose on him a fine;
- (d) reprimand him;

⁴⁵ Section 10.

⁴⁶ Section 14.

⁴⁷ Section 15.

- (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 of unsound mind and is 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

Consumer credit data

Introduction

9.1 It has been suggested that indiscriminate 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 an increase in abusive debt collection activities. 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 higher default rates begetting unscrupulous debt collection activities.

9.2 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 relating to an individual's creditworthiness which is made available in other markets such as the United Kingdom and the United States by credit reference agencies or credit bureaux.

Personal Data (Privacy) Ordinance

Code of Practice on Consumer Credit Data

9.3 In Hong Kong, the handling of consumer credit data is subject to the Code of Practice on Consumer Credit Data ("the Code"). The Code is issued by the Privacy Commissioner for Personal Data pursuant to the powers conferred on him by Part III of the Personal Data (Privacy) Ordinance (Cap 486). The Code first took effect in November 1998. A revision of the Code was completed recently and took effect in March 2002.¹

9.4 The Code comprises guidelines to data users in the handling of consumer credit data, including the collection and use of personal data of individuals who are, or have been, applicants for consumer credit. The Code covers, on the one hand, credit reference agencies,² and on the other hand,

¹ See paragraphs 5.12 – 5.14 for other provisions of the Code.

² 'Credit reference agency' is defined in the Code of Practice on Consumer Credit Data as "any data user who carries on a business of providing a consumer credit reference service, whether or not that business is the sole or principal activity of that data user". 'Consumer credit reference service' is defined as "the service of compiling and/or processing consumer credit data, including consumer credit scoring, and disseminating such data to a credit provider". In other words, 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 providers³ in their dealing with credit reference agencies and debt collection agencies.

9.5 Apart from the types of personal data listed in clause 2.1⁴ of the Code, a credit provider should not provide, and a credit reference agency should not collect, any other types of consumer credit data. One consequence of these restrictions is that, credit providers in Hong Kong do not have reliable information on the debt to income ratio of individuals applying for credit,⁵ and such limitations have made it difficult for banks to make informed decisions on the credit exposure of applicants. Also, information on the repayment manner of individuals is not allowed to be collected by a credit reference agency and shared with other credit providers. For example, if a debtor chooses to repay only the minimum repayment amount of 5% of his credit card debts each month, this repayment information will not be available to other lenders. Some debtors have therefore relied on applying for new credit to repay the minimum repayment amount, until their indebtedness have built up to unmanageable amounts.

Sharing of positive credit data in other jurisdictions

9.6 The table below is a general guide to the kinds of positive credit data⁶ on individuals that are available to credit providers in other jurisdictions:

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 ^(e)	Yes	Yes	No	No

credit data to its member credit providers in response to their requests pursuant to specific credit applications they have received.

³ Here means (i) an authorized institution within the meaning of section 2 of the Banking Ordinance (Cap 155); (ii) a subsidiary of an authorized institution; (iii) a money lender licensed under the Money Lenders Ordinance (Cap 163); and (iv) a person whose business (whether or not the person carries on any other business) is that of providing finance for the acquisition of goods by way of leasing or hire purchase.

⁴ These include general particulars of an individual, account default data reported by a credit provider, public record data, credit application data, credit card loss data, charge data, watch list data, file activity data and credit score data. The latter two types of data are discussed in paragraphs 10.84 – 10.87.

⁵ 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.

⁶ 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 reference services.

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 ^(f)	Yes	Yes	No	No ^(g)
General repayment manner ^(h)	Yes ⁽ⁱ⁾	Yes ^{(j)(k)}	Yes ^(j)	No	No

- (a) The 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) The 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 the 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) Extended from 90 days to 5 years since March 2002.
- (e) The balance on a credit card and the minimum payment due will be shown.
- (f) The outstanding credit balance will be shown though not all mortgage providers will input information.
- (g) Information on leasing and hire-purchase transactions is available.
- (h) Information on general repayment manner is also available in Germany.⁷
- (i) Months-past-due information is shown in the report.
- (j) Days-past-due information for a number of previous months are shown in the report.
- (k) Monthly payment amount and payment pattern during the past several years are shown.

9.7 As shown in the table, Hong Kong is rather conservative in terms of sharing of positive consumer credit data as compared to the United States, Canada and the United Kingdom, but is similar to Australia in this regard.

US Fair Credit Reporting Act

9.8 In the United States, the importance attached to credit reporting is spelt out in the US Fair Credit Reporting Act. The preamble to the US Fair Credit Reporting Act provides that:

“(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.

⁷

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

- (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."*

9.9 Credit reference agencies are usually referred to as credit bureaux in the United States. The types of positive credit information that can be collected and stored are numerous if compared to Hong Kong. They include 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 may also state whether anyone else besides the individual concerned is responsible for paying the account. Information collected by the credit bureaux may include even overdue child support payments.

9.10 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 counter-intelligence

9.11 Individuals in the United States 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.

US Equal Credit Opportunity Act

9.12 This Act 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.

Australian Commonwealth Privacy Act

9.13 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.

9.14 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.

9.15 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.

9.16 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, and on the length of time 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.

United Kingdom Data Protection Act 1998

9.17 The UK Data Protection Act 1998 came into force on 1 March 2000.⁸ The Act is administered and enforced by the Information Commissioner⁹ who has a range of duties including the promotion of good information handling and the encouragement of codes of practice for data controllers, that is, anyone who decides how and why personal data are processed.

9.18 Debtors are afforded certain rights to information under the Consumer Credit Act 1974, the Data Protection Act 1998 and the Consumer Credit (Credit Reference Agency) Regulations 2000. For example, on receipt of the debtor's written request, the creditor has the duty to disclose the name and address of the credit reference agency from which information about the debtor's financial standing has been obtained.¹⁰ As for the credit reference agency, it also has the duty to disclose filed information to the debtor.¹¹ If a

⁸ The 1998 Act replaced the 1984 Data Protection Act to give effect to the 1995 EC Data Protection Directive (95/46/EC).

⁹ The Data Protection Commissioner is renamed as Information Commissioner by virtue of the Freedom of Information Act 2000.

¹⁰ Section 157 Consumer Credit Act 1974.

¹¹ Section 158 Consumer Credit Act 1974 (as amended by section 62 of the Data Protection Act

debtor finds that the filed information is not correct, there are mechanisms to correct the information.¹² The above provisions are supplemented by Consumer Credit (Credit Reference Agency) Regulations 2000 which prescribe further details¹³ to the relevant sections.

Situation in Hong Kong

9.19 Credit Information Services Ltd ("CIS") is the only major consumer credit reference agency operating in Hong Kong. CIS was formed by co-operation between finance houses and banks.¹⁴ The database of CIS had grown to over one million records by 1998, about two thirds of which were 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.

9.20 Credit reports may include the following information:¹⁵

- (1) General particulars, including name, sex, address, contact information, date of birth, Hong Kong identity card number or travel document number;
- (2) Account default data reported by a credit provider with details of the credit provider, date of default, type of account and the total amount owing on the account;
- (3) Public record, being writs for the recovery of debts, judgments for monies owed, and discharge of bankruptcy;
- (4) Credit application data reported by a credit provider including the type and amount of credit sought, the date of application, and the name of the credit provider;
- (5) Credit card loss data reported by a credit card issuer, being notice that the card issuer has suffered loss as the result of unauthorized transaction, and details of the event;

1998).

¹² Section 159 Consumer Credit Act 1974.

¹³ For example, the number of days during which the application for information must be complied with, and the manner in which the application must be made.

¹⁴ 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.

¹⁵ Please refer to clause 2.1 of the Code of Practice on Consumer Credit Data Feb 2002 for details.

- (6) Leasing and hire-purchase data, including data as to motor vehicle or equipment leasing or hire-purchase transactions including the value and other details of the goods;
- (7) Watch list data, that is, listing of credit providers who wish to be notified to assist in debt collection if an individual has reappeared in the system;
- (8) File activity data, that is, record of a credit provider accessing an individual's personal data held by the credit reference agency;
- (9) Credit score data, that is, the score that results from applying consumer credit scoring¹⁶ to an individual;
- (10) Charge data in respect of the creation and termination of a charge over equipment, vehicles or vessels.

9.21 It should be noted that CIS credit reports, albeit informative, cannot give a complete picture of an applicant's credit position because: first, not all lenders have chosen to participate in the sharing of information through credit reference agencies with regard to all types of consumer credit; and second, due to privacy concerns, limitations are placed on the type of information that is gathered.¹⁷

9.22 Changes have taken place since the publication of the Subcommittee's Consultation Paper with regard to the sharing of consumer credit data. These will be discussed in Chapter 10.

¹⁶ Consumer credit scoring means the process whereby personal data relating to an individual held in the record system of a credit reference agency (being information statistically validated to be predictive of future payment behaviour or the degree of risk of delinquency or default associated with the provision or continued provision of consumer credit) are used, either separately or in conjunction with other information held in the system, for the purpose of generating a score to be included in a credit report on the individual.

¹⁷ Apart from the data listed in clause 2.1 of the Code of Practice on Consumer Credit Data 2002, other types of consumer credit data cannot be collected.

Chapter 10

Proposals for reform

10.1 The use of unreasonable means to collect debts is a matter of general concern to the public. This concern is especially apparent during the current time of economic downturn when the number of individuals having difficulty meeting their financial obligations is on the increase. Although recent statistics¹ indicate that improper collection tactics amounting to criminal conduct have reduced in recent times due to the efforts of the Police, the same statistics show that harassment type collection tactics have become more prevalent. We are of the view that debtors, their family members and neighbours, as well as other innocent third-parties, should be afforded better protection from abusive collection tactics.

10.2 In formulating our proposals for reform, we fully recognise that credit providers and their agents are entitled to take reasonable steps to ensure that debtors meet their obligations. This is a necessary incident of the debtor-creditor relationship without which prudent credit providers would be discouraged from providing credit. Accordingly, our proposals seek to strike an appropriate balance between the legitimate needs of creditors to collect debts with the rights of debtors not to be subjected to unreasonable pressure and of third parties not to be unduly disturbed.

10.3 In formulating our proposals for reform, we have taken into consideration the various factors which have contributed to unreasonable methods of debt collection,² the level of protection afforded by criminal sanctions,³ civil remedies,⁴ including the developments in vicarious liability and other types of controls,⁵ the deficiencies of existing controls,⁶ as well as measures taken in other jurisdictions.⁷ We have also given due regard to the views gathered from the consultation exercise.

The criminal offence of unlawful harassment of debtors and others

10.4 In the Consultation Paper, the Sub-committee proposed the

¹ See Chapter 1.

² See paragraphs 2.14 – 2.21.

³ See Chapter 3.

⁴ See Chapter 4.

⁵ See Chapter 5.

⁶ See Chapter 6.

⁷ See Chapters 7 – 9.

enactment of a criminal offence of unlawful harassment of debtors modelled on section 40 of the UK Administration of Justice Act 1970,⁸ which was formulated with the specific aim of tackling common malpractices of debt collection.

Responses

10.5 The Sub-committee received forty-seven written responses on this recommendation in the consultation exercise. Sixteen of the responses were in favour of enacting the proposed criminal offence of unlawful harassment of debtors. Fourteen responses were either neutral or suggested some amendments to the proposed offence. Seventeen of the responses, mainly from credit providers and collection agencies, were against it.

General or specific

10.6 Most of the opponents of the proposal objected to it because of a lack of a precise definition of harassment. The main alternative to this would be to define harassment by reference to a list of permitted and prohibited conduct as has been done, for example, in legislation enacted in Alberta.⁹ The main drawback of such detailed provisions is the obvious difficulty in listing exhaustively every kind of unacceptable behaviour that is used to apply pressure on debtors to meet their financial obligations. Even if this could be done, the ability of debt collectors who engage in unreasonable practices to come up with new methods in order to circumvent the offence cannot be discounted. In this regard, it is notable that the Police believe that statistics¹⁰ showing a decline in criminal debt collection activities and an increase in non-criminal abusive activities indicate a premeditated strategy of debt collectors to operate in such a way as to take advantage of the current inadequate legal remedies.

10.7 A more ‘general’ criminal offence, although it may seem vague, has the advantage of flexibility and of being able to evolve through judicial interpretation to meet the needs of the time. Some reference can also be made to judicial decisions in other common law jurisdictions. For example, the Australian Federal Court has made useful comments on what constitutes “undue harassment” and “coercion” in *Australian Competition & Consumer Commission v McCaskey & Cash Return Mercantile PTY Ltd* FCA 1037.¹¹

10.8 To illustrate the point that a detailed and specific offence may not work as satisfactorily as a ‘general’ offence, especially for an offence which involves ‘reasonableness’, one may consider the example of a debt collector calling a debtor’s residential phone number late at night. This act may at first sight seem unreasonable, and under Alberta’s Collection Practices Act 1980,

⁸ See paragraphs 7.2 – 7.8.

⁹ See paragraphs 7.51 – 7.52.

¹⁰ See paragraphs 1.4 – 1.7.

¹¹ See paragraphs 7.31 – 7.35.

making a call after 10 p.m. for the purpose of demanding payment of a debt is prohibited. However, if the debt collector has already exhausted other less intrusive means of communication, like issuing reminder letters, warning letters, leaving messages at his mobile phone number and residential number, and the debtor has not responded or has not provided other effective means of communication, then the act of calling late at night may, in some limited circumstances, be considered reasonable. Under a 'general' offence a judge will be able to take all relevant factors into consideration, and a 'friendly' personal visit to remind the debtor of the debt at 11 a.m. may be considered a contravention of the proposed offence if, for example, the personal visit is conducted on the debtor's wedding day.

10.9 The judgment of the Federal Court of Australia in *Australian Competition & Consumer Commission v McCaskey & Cash Return Mercantile PTY Ltd* FCA 1037¹² shows how a 'general' offence works in reality and provides some useful observations on the issue. The facts and other details of the case are set out in Chapter 7.¹³ In short, the court observed that:

"...a consumer who owes money to a supplier can expect repeated unwelcome approaches requesting payment of the debt if he or she does not pay. No doubt such approaches might also qualify as harassment. If legitimate demands are reasonably made, on more than one occasion, for the purpose of reminding the debtor of his or her obligation and drawing the debtor's attention to the likelihood of legal proceedings if payment is not made, then that conduct, if it be harassment, is not undue harassment. If, however, the frequency, nature or content of the approaches and communications associated with them is such that they are calculated to intimidate or demoralise, tire out or exhaust a debtor rather than convey the demand and an associated legitimate threat of proceedings, the harassment will be undue."

10.10 In order to give some guidelines on behaviour which may be regarded as 'harassment', we recommend that a code of practice should be devised to work in conjunction with a general offence. Details are set out in Recommendation 10. Such guidelines should, we believe, go at least some way to meeting concerns about the lack of precision of the proposed 'general' offence. Having considered the above, we consider it is advisable to adopt the criminal offence of unlawful harassment of debtors modelled on section 40 of the UK Administration of Justice Act 1970, subject to some modifications.

Modifications

10.11 We propose various modifications to Section 40(1)(a) of the UK Act. First, we suggest that it be specified that, without affecting the generality

¹² As above.

¹³ See paragraphs 7.31 – 7.35 above.

of sub-paragraph (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.

10.12 Second, in view of the concerns raised about harassment of referees and other third parties by debt collectors, we propose 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”.

10.13 Third, in light of the judicial interpretation of section 40 in *Norweb plc v Dixon*,¹⁴ we propose 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).

10.14 We consider that sub-paragraphs (b), (c) and (d) of section 40(1), and section 40(3) of the 1970 Act can be adopted without substantial changes, except that modifications should be made to ensure harassment and representations conveyed by electronic means of communication would be covered by the proposed legislation.

Law Reform Commission Report on Stalking

10.15 Since the publication of the Consultation Paper in July 2000, the Law Reform Commission issued its Report on Stalking in October 2000. The Stalking Report recommended, among other things, a new offence whereby:

- “(a) a person who pursues a course of conduct which amounts to harassment of another, and which he knows or ought to know amounts to harassment of the other, should be guilty of a criminal offence;
- (b) for the purposes of this offence, the harassment should be serious enough to cause that person alarm or distress; and
- (c) a person ought to know that his course of conduct amounts to harassment of another if a reasonable person in possession of the same information would think that the course of conduct amounted to harassment of the other.”

The defendant would have a defence if:

- “(a) the conduct was pursued for the purpose of preventing or detecting crime;
- (b) the conduct was pursued under lawful authority; or

¹⁴ [1995] 3 All ER 952. See discussion in paragraphs 7.5 – 7.7.

- (c) the pursuit of the course of conduct was reasonable in the particular circumstances.

10.16 It is uncertain at the time of writing whether the recommendations would result in any legislation, and whether the recommendations would be subject to modification. Even assuming the recommendations will be enacted in their present form, the proposed stalking offence is designed to deal with stalking activities¹⁵ and would not operate satisfactorily if one relies on it to deal with debt collection cases. Take the example given above¹⁶ of a personal visit on a debtor's wedding day to collect the debt. The 'stalking' offence requires 'a course of conduct' which usually connotes repetition.¹⁷ It is doubtful whether an isolated but vigorous debt collection action would be covered by the proposed 'stalking' offence. Hence, it is necessary to formulate an offence to target debt collection activities specifically.

Recommendation 1

We recommend that:

A criminal offence of harassment of debtors and others should be created, such that it would 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**

¹⁵ Paragraph 1.1 of the Stalking Report reads: "Stalking, like shoplifting and vandalism, is a description rather than a legal concept. ...Celia Wells describes "stalking" as "the pursuit by one person of what appears to be a campaign of harassment or molestation of another, usually with an undertone of sexual attraction or infatuation. ... Tim Lawson-Cruttenden defines stalking as "behaviour which subjects another to a course of persistent conduct, whether active or passive, which taken together over a period of time amounts to harassment or pestering."

¹⁶ Paragraph 10.8.

¹⁷ The Stalking Report mentioned at paragraph 6.26 that " ...whether conduct on two or more occasions amounts to harassment depends on the circumstances of the case. To achieve flexibility, the legislation should neither specify the number of incidents involved nor specify the period of time within which the incidents should occur."

some official character or purporting to have some official character which he knows it has not.

Without affecting the generality of paragraph (a), provision should be made that 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, this would also constitute harassment.

Provision should also be made for paragraph (a) to have 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.

Further, that a person may be guilty of an offence by virtue of paragraph (a) above if he concert with others in the taking of such action as is described in that paragraph, notwithstanding that his own course of conduct does not by itself amount to harassment.

Express provision should be made to ensure that harassment and representations conveyed by electronic means of communication are covered by the proposed offence.

Other features of the offence

10.17 Other aspects of the proposed offence, such as the appropriate level of the penalty for its commission, are matters that we leave to the responsible policy bureau to decide in consultation with relevant government departments and bodies.

10.18 Nevertheless, we have the following observations on the more obvious matters for consideration:

- Maximum term of imprisonment and fine – The maximum term of imprisonment and amount of fine of the proposed offence could lie between those currently provided for in relation to criminal intimidation in section 24 Crimes Ordinance (Cap 200), a fine of \$2,000 and imprisonment for 2 years if convicted summarily and 5 years imprisonment if convicted on indictment and the offences in connection with telephone calls or messages or telegrams in section 20 Summary Offences Ordinance (Cap 228), a fine of \$1,000 and 2 months in prison. With regard to the level of fine, the suggested level of fine seems rather low for a crime that is

motivated by economic gain. The responsible bureau may consider adjusting the level of the fine in order to achieve appropriate deterrent effect.

- Accessory to offences committed outside Hong Kong – In view of the increase in trade and other activities between Hong Kong, the Mainland and Macau, and also the number of cross-border abusive debt collection complaints, it would appear to be advisable to include accessories to offences committed outside Hong Kong within the ambit of the proposed offence. An example of this can be found in section 22 Trade Descriptions Ordinance (Cap 362).¹⁸
- Criminal liability on directors and managers – In the event that a debt collection agency is convicted of the offence, there may be cases in which it would be appropriate to subject the directors and managers to criminal liability. Reference may be made to section 20 Trade Descriptions Ordinance (Cap 362)¹⁹ and section 36A Import and Export Ordinance (Cap 60).

Criminal sanctions for participation

10.19 A number of the responses received in the consultation exercise proposed the inclusion of detailed provisions on ‘participation’ in the proposed offence, in particular in relation to the liability of secondary parties, or to specify that creditors will not be held liable under the proposed offence.

10.20 We do not consider that the proposals put forward are supported by sufficiently strong arguments to justify the enactment of special provisions on ‘participation’ in relation to the proposed offence. Accordingly, we are of the view that the general law on criminal participation should apply to the proposed offence without modification.

Licensing

10.21 In the Consultation Paper, the main arguments against the introduction of a licensing system for debt collectors were summarised as follows:

¹⁸ Section 22 reads: “Subject to the provisions of this Ordinance, any person who, in Hong Kong, procures, counsels, aids, abets or is accessory to the commission outside Hong Kong of an act which, if committed in Hong Kong, would be an offence under this Ordinance, commits that offence as a principal and shall be liable to be prosecuted in Hong Kong as if the offence had been committed within Hong Kong.”

¹⁹ Section 20 reads: “Where a body corporate is convicted of an offence under this Ordinance, every person who, at the time of the commission of the offence, was a director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, shall be deemed to be guilty of that offence unless he proves that the offence was committed without his knowledge, or that he exercised all due diligence to prevent the commission of the offence.”

- (a) A licensing regime cannot curb illegal activities arising from 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 of law enforcement and providing an 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.

10.22
follows:

The arguments in favour of licensing were summarised as

- (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 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 range 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.

Responses

10.23 The Sub-committee received 41 written responses on the issue of licensing debt collectors. Of these, an overwhelming majority, 37 respondents, was in favour of the creation of a licensing regime. Even among credit providers and debt collection companies, parties who would have to bear most of the costs in a self-financing licensing regime, support for a statutory licensing system was overwhelming.

UK Office of Fair Trading's review of the licensing system

10.24 In 1988, the UK Government proposed that the licensing of 'ancillary credit businesses',²⁰ including debt collection businesses, should be removed from the licensing system provided for in the UK Consumer Credit Act 1974. It was proposed that instead of such businesses having to be licensed as a condition of being able to trade (positive licensing), they should become subject to a negative licensing system under which they would be allowed to trade freely, without having to apply for a licence, unless and until something was found against them sufficient to justify, after due process, their no longer being allowed to trade. The proposal was not implemented.

10.25 In 1993, the UK Office of Fair Trading issued a Consultation Document on the Working and Enforcement of the Consumer Credit Act 1974. The review²¹ was completed in June 1994, and the conclusions reached by the Director-General of Fair Trading included the following:

"9.5 Licensing does impose some burden on business. ...

9.6 This fairly small burden must be set against the benefits. A number of unfit traders are refused licences and – possibly more importantly – some with unsuitable backgrounds will not even bother to apply. ... For established traders, the mere threat that their continued fitness to hold a licence could be in question may cause them to cease practices possibly detrimental to consumers and which may have arisen from incompetence or slack management rather than dishonesty, as soon as the issues are addressed with them by my Office or by a local trading standards officer. Moreover, the system enables me, with the important

²⁰ Other ancillary credit business includes credit brokerage, debt-adjusting, debt-counselling, and credit reference business.

²¹ Document named 'Consumer Credit Deregulation – A review by the Director General of Fair Trading of the scope and operation of the Consumer Credit Act 1974 : June 1994'.

support of trading standards officers, to promote acceptable standards of behaviour, since I have a wide discretion under the Act as to what constitutes fitness.

- 9.7 Overall my clear impression is that responsible business people in the credit and hire industries regard the costs of the licensing system as being more than balanced by the benefits of having standards maintained. The confidence of customers in their type of business, which can readily be undermined by a few unscrupulous or oppressive traders, is a positive business asset and I judge that they are prepared to accept the minor burdens on them which are necessary to achieve this objective. This message emerged clearly from the consultation. There are no calls from within the credit industry for an end to, or a diminution of licensing. Indeed, several credit industry respondents said that they would have no concern about a wider extension of licensing to cover those entering into business agreements, whether regulated or not; their concern lay with the impact upon their business of the detailed rules under the Act.*
- 9.11 ... Credit broking and debt collecting, in particular, are activities which may require little or no capital investment and no fixed premises, and for which no test of competence is required. They are thus activities into which people can move with ease using aliases and different legal identities, and from which they could move on before a negative licensing system, which could only be operated in retrospect, could catch up with them. A negative system is therefore likely to be less effective overall than a positive one in assuring high standards of fitness.*
- 9.14 It is also worth approaching the matter by considering the particular categories of activity which it was proposed in 1988 should move to negative licensing. In actual fact they are the main problem sectors. A relatively small proportion of my Office's regulatory activity under the Act is directed at activities in categories A and B (lending and hiring); most is aimed at C and E (credit brokerage and debt collection).*
- 9.15 Taking debt collection first, it is an activity which experience shows can be carried on by unacceptable methods particularly against those for whom indebtedness has become, unfortunately, a regular state of affairs. Furthermore consumers have no choice: they cannot choose their collectors, nor go to different ones. A number of unsavoury cases of strong-arm tactics in this*

area come to my Office's attention and these are reported in the media too from time to time. The nature of this element of ancillary credit business therefore strongly suggests that it should remain subject to a positive licensing system."

Conclusion on Licensing

10.26 In view of the overwhelming majority of responses in favour of licensing, and having regard to the conclusion of the UK Office of Fair Trading that debt collection is an activity for which positive licensing is particularly appropriate, we propose that a statutory system of licensing for debt collection should be introduced. In making this proposal, we recognise nevertheless that licensing is not a universal panacea and other measures, as proposed in this report are required to tackle the full range of problems associated with debt collection. In order to make the licensing system effective, it is necessary to make it a criminal offence to collect debts as a business or profession without a licence.

Recommendation 2

We recommend that:

Debt collection agencies should be subject to a statutory licensing system under which it should be a criminal offence to collect debts as a business without a valid licence.

Whether a person who knowingly engages an unlicensed collection agency equally commits an offence

10.27 Some of the responses received in the consultation exercise suggested that a person who knowingly engages an unlicensed debt collector should be guilty of an offence. We believe it is not necessary to make any such express provision for this because it is already catered for by the general law on secondary participation.²²

Civil liability of a creditor in respect of the acts of the debt collector

10.28 The law on vicarious liability for torts committed by an agent is still developing as is illustrated by *Wong Wai Hing and Fung Siu Ling v Hui Wei*

²²

Section 89 of the Criminal Procedure Ordinance (Cap 221) provides that any person who 'aids, abets, counsels or procures the commission by another person of any offence shall be guilty of the like offence'.

Lee.²³ There are also suggestions in *Wong Wai Hing* case that, depending on the facts of the case, a creditor may be liable in negligence to an aggrieved debtor if the creditor has not exercised reasonable care in its choice of debt collector. We believe the issue of vicarious liability for torts committed by an agent is an area of general law which is applicable also to activities other than debt collection, and would be more appropriately dealt with by the courts.

Commercial vs consumer debts

10.29 It was recommended in the Consultation Paper that the proposed licensing regime should cover both commercial and consumer debts for the following reasons:

“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 Subcommittee 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 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.”

Responses

10.30 Only 8 responses were received in relation to Recommendation 3, with 5 responses in favour and 3 responses against. The reasons put forward by those against the Recommendation can be summarised as follows:

- There is no question of unequal bargaining positions in a commercial debt situation. If, however, collection of commercial debts is also to be regulated, only the small scale companies should be regulated. Hence, a distinction should be drawn according to debt size, assets, or issued share capital of the company.
- Licensing commercial debt collection is not a common practice in most developed countries. Debt collectors involved in the collection of commercial debts are generally of higher personal quality and education level. The activity requires a specialist knowledge of the commercial sector to complete each assignment. The risk of such debt collectors resorting to abusive tactics is low. Such tactics would only jeopardize the recovery potential of a commercial claim.

²³

[2001] 1 HKLRD 736. See paragraphs 4.36 – 4.41.

- Commercial debts are by nature different from consumer debts. The payment liability of a debt lies on the entity instead of the individual. Collectors of commercial debts tend to play the role of mediators rather than simply debt collectors. Personal guarantees on commercial debts other than those to banks are rare. In addition, banks seldom require assistance in collecting commercial debt on their behalf.

10.31 We are not convinced by these arguments and do not accept the bare assertion that personal guarantees are rare other than in respect of bank loans. For the reasons given in paragraph 10.29 and to avoid the anomaly that the use of unreasonable measures to collect commercial debts falling short of a civil wrong or criminal offence would result in no sanction against the debt collector concerned, we recommend that the proposed statutory licensing regime for debt collector include the collection of commercial debts.

Recommendation 3

We recommend that:

The proposed licensing regime should cover both consumer debts and commercial debts.

Licensing authority

10.32 In the Consultation Paper, the view was expressed that the Administration was best placed to decide on the appropriate body to undertake the role of licensing authority under the proposed statutory licensing regime. However, the following observations were made on this topic:

- 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;²⁴ in Alberta, the Administrator of Collection Practices;²⁵ in Queensland, the Auctioneers and Agents Committee;²⁶ in South Australia, the Office of Consumer and Business Affairs;²⁷ and in South Africa, the Council for Debt Collectors.²⁸
- Administrative bodies have also been created for the security and guarding services industry and the estate agency business

²⁴ See paragraph 8.6.

²⁵ See paragraph 8.34.

²⁶ See paragraph 8.33.

²⁷ As above.

²⁸ See paragraph 8.45.

in Hong Kong. As regards the 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.

- 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.²⁹
- Another possibility is to vest the police with powers as the licensing authority directly, given that the investigation and vetting work is carried out by the police. This approach was once contemplated in New South Wales.³⁰

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.

Responses

10.33 A total of 18 responses were received on this issue. Most of the responses expressed concerns about the need for the licensing regime to be cost-effective. Other responses mentioned that there should be consultation with the collection industry before a decision is made on the issue.

10.34 We agree with the responses and, in line with the relevant recommendation in the Consultation Paper recommend that the Administration have due regard to the experience of other jurisdictions in determining the appropriate body to carry out the licensing of debt collectors and in devising an efficient and cost-effective licensing regime.

Recommendation 4

We recommend that:

The Administration should have due regard to the experience of other jurisdictions in determining the appropriate body to carry out the licensing of debt collectors and in devising an efficient and cost-effective licensing regime.

²⁹ See paragraph 8.17.

³⁰ See paragraph 8.24.

Collection agencies and collectors

10.35 The Consultation Paper recommended that the requirement for licensing under the proposed licensing regime should include debt collection agencies and individual debt collectors. The recommendation was based on the following:

- 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.
- Individual debt collectors should be required to obtain a licence since a major reason for licensing is to exclude persons of questionable integrity from entering the business.

Responses

10.36 Among the 15 responses received, 12 were in favour of licensing individual collectors. The other 3 responses were against the idea for the following two main reasons:

- It is more cost-effective to license only the agencies.
- Individuals of questionable integrity are already subject to the criminal law in respect of any illegal activities that they may perform.

None of the responses suggested licensing individual debt collectors and not licensing debt collection agencies.

10.37 We are of the view that the licensing of individual debt collectors is the most effective way of ensuring that such persons pursue their occupation responsibly and professionally. This view accords with the overwhelming majority of responses on this issue, which were supportive of the recommendation.

10.38 One of the responses suggested that clarification be given that support staff of collection agencies should not be required to be licensed. We agree that support staff who are not involved in communicating with any debtors, referees or their family and friends, should not require licensing. Communication in this context should include written, verbal, electronic and personal visits forms of communication.

Recommendation 5

We recommend that:

The licensing requirement of the proposed statutory licensing regime should include individual debt collectors as well as debt collection agencies, but support staff of collection agencies who are not involved in communicating with any debtors, referees or their families and friends, would not require licensing. Communication in this context includes written, verbal, electronic and personal visits forms of communication.

Exemptions from licensing

10.39 It was recommended in the Consultation Paper that the following categories of creditors or persons should be exempted from obtaining a licence under the proposed statutory licensing scheme for debt collectors -

- (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; and
- (vi) authorized institutions.

Responses

10.40 A total of 18 responses were received on this recommendation. Most of the responses suggested additional categories of persons for exemption from licensing.

10.41 We agree that exemption from licensing should be extended to include:

- Legal officers, as defined in section 2 of the Legal Officers Ordinance (Cap 87), and
- Receivers, liquidators and trustees in bankruptcy.

We are not aware of any incidents suggesting that unreasonable collection tactics have been employed by these persons. Hence, there is no need to over-burden the licensing regime with the regulation of these persons.

Should credit insurers be exempted?

10.42 One of the responses suggested that ‘credit insurers’ should be exempted from licensing because they should be regarded as ‘creditors collecting their own debts’. The position in relation to a credit insurer is that it has a right of subrogation after making a payment given that the doctrine of subrogation applies to ‘contingency insurance covering non-payment of money’³¹ (i.e. credit insurance). A right of subrogation is “a right to be placed in the position of the assured so as to be entitled to the advantage of all the rights and remedies which the assured possesses against third parties in respect of the subject matter.”³² Nevertheless, a credit insurer is still required to bring any action for recovery of the debt concerned in the name of the assured, and cannot do so in the absence of a formal assignment of the right of action.³³ We do not believe that the case of credit insurers justifies any derogation from the general principle that a party who seeks to collect a debt by way of assignment should not be regarded as collecting its own debt and hence escape the licensing regime (paragraph 10.39(i) above refers). We also note that credit insurers are more likely than not to engage third parties to collect their debts who would need to be licensed in any event.

Should companies within the same group be exempted?

10.43 Some of the responses suggested that ‘a company collecting debts for other companies within the same group of companies’ should be exempted from licensing. It appears that this proposal is based on the fact that some banks, or other creditors, have a practice of using a different corporate entity to chase debts. This may be done to convey a message to debtors that their debts are in a serious stage of delinquency. As the choice to use another corporate entity, albeit within the same group, is one taken by the creditor for its own benefit, we consider that the other entity should be required to obtain a licence. In any event, we have reservations about the practicality of defining what constitutes ‘a company within the same group of companies’. Accordingly, we conclude that the proposed exemption is neither

³¹ Halsbury’s Laws of England, Butterworths Direct Online version, para 505. Note that subrogation does not apply to some insurance, for example, life insurance.

³² As above, at para 506.

³³ As above, at para 509.

justified nor practical and should not be included in the proposed licensing regime.

Other exempted categories suggested

10.44 Other categories of persons that were suggested in the responses for exemption from the licensing requirement include factoring houses and licensed money lenders. We consider that the suggested exemptions are not justified for the reasons given below:

- Factoring houses – These are chiefly finance companies that purchase another firm's or company's account receivables, and then endeavour to process and collect the balances of these accounts. The factoring house assumes the risk of not being able to collect the balance in return for some agreed discount. In many cases, their work cannot be clearly distinguished from that of debt collection agencies, which sometimes also purchase the debts by way of assignment.
- Licensed money lenders – If a licensed money lender is collecting its own debt, it is already covered by the exemption for such persons (paragraph 10.39(i) above refers). If it is collecting a debt on behalf of another, there is no good reason for it to be exempted.

Named organisations

10.45 Certain named organisations were suggested in the responses for exemption from licensing:

- The HK Mortgage Corporation Ltd³⁴ ("the HKMC"): this purchases mortgage loans from authorized institutions, governmental entities and real estate developers and securitizes mortgage loans on its retained portfolio. Upon the purchase by the HKMC of the mortgage loans from an authorized institution, the HKMC appoints the same authorized institution as servicing agent to service the mortgages. In relation to the mortgage loans which the HKMC purchases from the governmental authorities and developers, the HKMC will normally appoint an authorized institution as its servicer in respect of such mortgage loans. Most, if not all, the debt collecting activities to date are carried out by authorized institutions as HKMC's servicers. The types of debt collection activities undertaken by HKMC servicers include both judicial and non-judicial measures. Should the HKMC decide to service the mortgages itself in future, the HKMC will not fall within any of the exempted category.

³⁴

The HKMC was set up in March 1997 and is 100% owned by the Hong Kong SAR Government through the Exchange Fund. The shares of HKMC are 100% held by the Financial Secretary who is the Chairman of the Corporation.

- The Hong Kong Export Credit Insurance Corporation (“the HKECIC”): this is a statutory body established in 1966 by the Hong Kong Export Credit Insurance Corporation Ordinance (Cap 1115) to encourage and support export trade through the provision of insurance protection for Hong Kong exporters against non-payment risks arising from commercial and political events. Its capital is wholly-owned by the Government which also guarantees its contingent liability, currently standing at \$10 billion.

10.46 We are of the view that the exemption of such bodies from licensing is justified given their unique status and public interest characteristics. In order to provide for this and for the exemption of other bodies of a similar nature that are, or may come into existence, we recommend that the legislation establishing the proposed licensing scheme include a list of named organisations considered to be worthy of specific exemption from licensing. Further, in order to provide flexibility, the legislation should make provisions for amendments to the list to be made by, say, the Chief Executive in Council or Secretary for Financial Services.

Recommendation 6

We recommend that:

The categories of creditors and persons listed below be exempted from the requirement to obtain a licence under the proposed licensing scheme for debt collectors:

- (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) legal officers, as defined in section 2 of the Legal Officers Ordinance (Cap 87);**
- (iv) barristers acting in that capacity;**
- (v) solicitors acting in that capacity;**
- (vi) receivers, liquidators and trustees in bankruptcy;**
- (vii) court bailiffs;**
- (viii) authorized institutions, as defined in the Banking**

Ordinance (Cap 155).

Provision be made for particular organisations to be exempted from the licensing requirement by inclusion in a list in the legislation that is subject to amendment by a suitable body or official.

Collecting debts as a business or otherwise

10.47 Some responses suggested that persons or corporations undertaking isolated or one-off collection work for another should not be subject to the licensing requirement of the proposed new legislation.

10.48 We agree that without such an exception the licensing regime would be unnecessarily burdensome. To cater for this, we recommend that only persons or corporations carrying on business as debt collectors in Hong Kong or advertising, announcing or holding itself out as so conducting itself, should require to be licensed. There is ample authority upon the question of what constitutes the carrying on of a business within a particular jurisdiction. We recommend, therefore, that the general law should be relied upon to determine whether a debt collector is carrying on business as such.

Recommendation 7

We recommend that:

Only a person or corporation carrying on business as a debt collector in Hong Kong, or advertising, announcing or holding itself out as so conducting itself, should require to be licensed under the proposed licensing scheme. The general law may be relied upon to determine what constitutes carrying on business in this context.

Criteria for licensing

10.49 It was recommended in the Consultation Paper that the criteria for determining whether a person is fit and proper to engage in debt collection under the UK Consumer Credit Act 1974 could be used as a basis for equivalent provision for Hong Kong. In addition, it was recommended that there should be residence status and age requirements, and that the licensing authority should take into consideration whether the applicant or its employees have committed any triad-related offences.

10.50 Under the criteria set out in the UK Consumer Credit Act 1974, 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 associates³⁵ 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).³⁶*

10.51 In relation to sub-paragraph (a) above, given that some poorly managed debt collection agencies in Hong Kong are suspected of employing persons with, or claiming to have, a triad background, it would be useful if the licensing authority were empowered to take into consideration whether the applicant or, where the applicant is a business, its employees has committed any triad-related offences.

Responses

10.52 A total of 9 responses were received, the majority agreeing with the recommendations. One of the responses, however, did not endorse a residency requirement.

³⁵ The term “associates” is given a wide meaning. See section 184 of the Consumer Credit Act 1974. 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.

³⁶ 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.

Residence status requirement

10.53 The grounds given against a residence status requirement were:

- Certain institutions may employ overseas agents to pursue debts; for example, debts owed by debtors previously resident in Hong Kong who have left to live overseas.
- The collection industry is becoming more international as financial institutions extend their product offerings globally. This gives rise not only to “mobile” debtors, but also to issues of both language and currency in relation to the extension of credit and to its repayment and collection. Hence, debt collection agencies may be required to employ non-residents with particular language skills, or who are resident in remote locations.

10.54 We are in favour of retaining a Hong Kong residential requirement because it would assist the enforcement of the licensing authority’s powers, and would afford better protection to debtors and the public. Adding a residence requirement to the licensing criteria would enable the relevant authority to invoke its powers against the collection agency for breach of licensing condition. Given the circumstances in Hong Kong that collection agencies could easily engage non-residents from Shenzhen or Macau to undertake debt collection activities, the residence requirement should be recommended.

Other requirements

10.55 We note that the Security and Guarding Services Ordinance requires a licence holder to be able to provide suitable training for its security staff, and to formulate appropriate supervisory methods. A similar requirement would be appropriate for a licensed debt collection agency.

10.56 For individual debt collectors, the Australian jurisdictions generally have licensing requirements relating to age, residence and educational attainments or experience. We consider that it would be appropriate to impose an age requirement that individual debt collectors should be at least 18 years of age. However, we do not consider that educational and experience requirements are appropriate to Hong Kong’s current circumstances. Of course, as the debt collection industry develops there may come a time when such requirements become feasible in which the case the licensing authority could propose that they be incorporated into the licensing criteria.

Appeal mechanism

10.57 We are of the view that appeal mechanisms should be in place so that applicants who are refused licences by the licensing authority can have their applications re-considered. One approach would be to provide that any

applicant aggrieved by the decision of the licensing authority in respect of the refusal, suspension or revocation of a licence, or the imposition of conditions on a licence may appeal to the Administrative Appeals Board³⁷ within a prescribed period. A consequential amendment to the Schedule to the Ordinance will extend the application of the Administrative Appeals Board to the proposed legislation. The Schedule may be amended by order of the Chief Executive in Council, and the order shall be published in the Gazette.³⁸ Alternatively, the proposed legislation may provide for a stand-alone appeal body. For example, applicants for licences under the Estate Agents Ordinance (Cap 511) have a right to appeal to the Secretary for Housing, who shall appoint a panel of persons to hear the appeal. The Chairman of the panel will appoint a tribunal whose decision shall be final.³⁹

Recommendation 8

We recommend that:

An applicant for the granting or renewal of a debt collection licence should be required to satisfy the licensing authority that it, in the case of a corporate applicant, or he, in the case of an individual applicant, is a fit and proper person to engage in debt collection activities, having regard to all relevant circumstances, and in particular whether the applicant, and, in the case of a corporate applicant, his employees, agents or associates have –

- (a) contravened the offence of unlawful harassment of debtors and others, or any offence involving fraud or dishonesty, or violence;**
- (b) committed any triad-related offences;**
- (c) carried on business under a name which is misleading or otherwise undesirable; or**
- (d) committed any breach of code of practice.**

In addition, an individual debt collector should be required to be at least 18 years of age, and a resident of Hong Kong. As for a corporate applicant, it should be required to provide suitable training to its collection staff and to formulate effective supervisory methods.

An appropriate appeal mechanism against the decision of the licensing authority should also be devised.

³⁷ See Administrative Appeals Board Ordinance (Cap 442).

³⁸ Section 4 of Cap 442.

³⁹ Sections 31-32 Estate Agents Ordinance. Disputes with regard to other matters, for example, the commission payable will be decided by the Estate Agents Authority with a mechanism for appeal to the District Court. Section 50 refers.

Statutory powers and duties

10.58 In the Consultation Paper, certain statutory powers and duties commonly found in other jurisdictions were commended for consideration.

Responses

10.59 Only five responses were received on this recommendation on statutory powers and duties. Four of the responses were supportive of the recommendation. One of the responses suggested that the licensing authority should have the duty to exercise its powers of granting or declining the application or renewal of a licence within a specified period.

10.60 The statutory powers commonly given to the licensing authority in other jurisdictions are:

- to make inquiries regarding the applicant before issuing or renewing a licence and should have statutory powers to investigate;
- to refuse the granting or renewal of a licence and to suspend or revoke a licence;
- to inquire into any complaint or alleged contravention of the legislation or code of practice, and require any person to provide any information the licensing authority considers relevant;
- to 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, documents or things which are relevant.

10.61 Legislation in other jurisdictions often imposes certain statutory duties on debt collection agencies. For example, debt collection agencies are required:

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

10.62 Collection agencies in other jurisdictions are subject to trust account requirements which may be included either in statutes or in a code of practice. These usually include requirements that:

- collection agencies deposit all money collected from debtors in

trust accounts maintained in banks;

- collection agencies 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 pay such money and interest to the person on whose behalf the money is received within a reasonable time.

10.63 One of the responses raised the query whether a collection agency should maintain only one trust account covering all creditors, or one account for each creditor. We are of the view that the issue is a refinement that could be decided at the implementation stage.

Recommendation 9

We recommend that:

The licensing authority should be vested with statutory powers:

- to make inquiries regarding the applicant before issuing or renewing a licence and should have statutory powers to investigate;
- to refuse the granting or renewal of a licence and to suspend or revoke a licence;
- to inquire into any complaint or alleged contravention of the legislation or code of practice, and require any person to provide any information the licensing authority considers relevant;
- to 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, documents or things which are relevant.

Certain statutory duties should be imposed on debt collection agencies:

- to provide the licensing authority with reports of their financial affairs signed by auditors;
- to provide the auditors with access to books and records of the business;
- to maintain all their records, files, documents, etc

created or received in their business for a prescribed period;

- **to deposit all money collected from debtors in trusts accounts maintained in banks. This, however, does not preclude direct payment of funds by the debtor into the creditor's own account.**

Code of practice

10.64 In the Consultation Paper, the Sub-committee recommended that a code of practice should be formulated in tandem with the licensing system specifically to address the nuisance-type of debt collection activities. Further, that provision should be made that a breach of the code of practice by a licensed debt collector might lead to the suspension or revocation of the licence. It was recommended that the code of practice should be drawn up by the licensing authority after consultation with market operators and a review of similar codes of practice adopted in other jurisdictions.

Responses

10.65 A total of 18 responses were received on this recommendation. Nearly all of them supported the proposal for such a code of practice, though some credit providers and debt collection agencies expressed a concern that the code should not be overly restrictive. The responses also revealed a general preference for more detail rather than less.

Guidelines of the Australian Competition and Consumer Commission

10.66 The Australian Competition and Consumer Commission ("the ACCC") saw the need to formulate some guidelines on debt collection in 1999 ("the ACCC guidelines"). The ACCC guidelines do not have legal force. However, full compliance with the guidelines can help minimise the risk of breaching the law.

10.67 The ACCC guidelines contain conduct principles on the following aspects of debt collection:

- (i) communicating with the debtor at his workplace;
- (ii) communicating with the debtor away from his workplace;
- (iii) personal visits;
- (iv) frequency of communications;
- (v) allowing informal repayment arrangements and legal processes to work;
- (vi) communicating with a debtor's representatives;

- (vii) communicating with third parties;
- (viii) misleading or deceptive conduct;
- (ix) coercion; and
- (x) language, violence, and physical force.

10.68 Examples are then given in respect of the conduct principles. In relation to ‘communicating with the debtor at his workplace’, for example, the conduct principle states 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.

10.69 In relation to ‘communicating with the debtor away from his workplace’, the conduct principle stated is:

“A collector has a right to communicate with a debtor to facilitate collection. However, all communications should be made for reasonable purposes, and the debtors should not be unduly harassed, or subject to communications at unreasonable hours.”

Some of the examples given are:

- A collector can assume that the convenient time for communicating with a debtor is after 7.30 a.m. and before 9.00 p.m. local time at the debtor’s location, unless the collector is informed otherwise.
- A collector should not attempt to communicate with a debtor before 7.30 a.m. or after 9.00 p.m. unless either the debtor has authorised it, or the collector has made reasonable efforts, over a reasonable period of time, to contact the debtor during the

permitted hours, and the collector has made reasonable attempts to contact the debtor using other less intrusive methods of communication.

- A collector should not communicate with a debtor at any time or place where the debtor has requested that no communication be made, unless the debtor has not provided an alternate and effective contact mechanism, or the debtor does not respond through the agreed contact mechanism within a reasonable time.

10.70 In relation to ‘frequency of communications’, the conduct principle stated is:

“Collectors are entitled to make reasonable efforts to contact debtors; however, debtors are entitled to be free from unnecessary communications. ... Whether frequency of communication is considered to be reasonable will be assessed in light of the purpose of the communications.”

Some of the examples given are:

- A collector should not make more than three unsolicited (answered) telephone calls per week to a debtor, or more than 10 unsolicited telephone calls per calendar month to a debtor unless they can show a legitimate reason for doing so.
- A collector should not make unsolicited visits to a debtor more frequently than is reasonable and necessary, and no more than once per week.

10.71 Although not every conduct principle and example may be considered appropriate to Hong Kong’s circumstances by the authority under the proposed licensing system, the ACCC guidelines are a model that we believe are worthy of consideration. The full guidelines are annexed to this Report. Another set of guidelines that is worthy of consideration is the code of practice formulated by the Credit Services Association Ltd, which is the trade association for debt collectors in the United Kingdom. Copy of their guidelines may be obtained by writing to Ensign House, 56 Thorpe Road, Norwich NR1 1RY, United Kingdom.

10.72 In the light of the foregoing, we recommend that the licensing authority be required to formulate a code of practice for debt collection following consultation with representative bodies of credit providers, debt collectors, consumers and other relevant bodies. Such a code should provide practical guidance on the standard of conduct that individual and corporate debt collectors are expected to meet.

10.73 With regard to the status of the proposed code of practice and the consequences of breach of the code, various options are available:

- (a) A code may be of an advisory character and for guidance only and therefore no consequence will flow directly from a breach.⁴⁰
- (b) Failure to observe the provisions of any such code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may, in any civil or criminal proceedings and including proceedings for an offence under this Ordinance, be relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings.⁴¹
- (c) Although failure to comply with a code shall not of itself render a person liable to any criminal or civil proceedings, the code shall be admissible in evidence in all criminal and civil proceedings; and if any provision of the code appears to the court or tribunal conducting the proceedings to be relevant to any question arising, it shall be taken into account in determining that question.⁴²
- (d) Breach of a code may be taken into account in disciplinary proceedings although a breach does not of itself constitute unprofessional conduct.⁴³
- (e) Evidence of breach of a code may be relied on by the prosecution as tending to establish the guilt of a person in proceedings for an offence against an ordinance under which the code is issued.⁴⁴
- (f) Conversely, evidence of compliance with a code may constitute a defence in some cases. It may be desirable to state that compliance with a code is not the only way a provision may be complied with.⁴⁵
- (g) Breach may be taken into account in consideration of the cancellation or suspension of, or failure to renew a licence.

⁴⁰ GC Thornton, *Legislative Drafting*, 4th edition, at page 247. For example: "A failure of a person to follow any guidance contained in a code issued under this section does not of itself render that person liable to proceedings of any kind".

⁴¹ Section 37(2) Air Pollution Control Ordinance (Cap 311).

⁴² UK Police and Criminal Evidence Act 1984 sections 66, 67.

⁴³ Section 19(4) UK Chiropractors Act 1994: "Where any person is alleged to have failed to comply with any provision of the Code, that failure (a) shall not be taken, of itself, to constitute unacceptable professional conduct on his part; but (b) shall be taken into account in any proceedings against him under this Act."

⁴⁴ "If in a proceeding against a person for a contravention of a provision of this Act it is shown that the person failed at a material time to follow any guidance contained in a code issued under this section, being guidance relevant to the provision concerned, that failure may be relied on by the prosecution as tending to establish the person's guilt." Thornton, cited above.

⁴⁵ "If it is alleged in a proceeding that a person has contravened a provision of this (Ordinance) in relation to which a code of practice was in effect at the time of the alleged contravention, the code of practice is admissible in evidence in that proceeding and proof that the person complied with the relevant provision of the code or complied with the provision of the (Ordinance) otherwise than observing that provision of the code of practice is a satisfactory defence".

10.74 It is also possible to give the code statutory status by requiring the code to be approved or laid before the legislature, as in section 17 of the UK Food and Environment Protection Act 1985.

10.75 Another option is the model adopted for the Code of Practice on Consumer Credit Data issued pursuant to Part III of the Personal Data (Privacy) Ordinance (Cap 486). Section 12 of the Ordinance empowers the Privacy Commissioner for Personal Data to issue codes of practice “for the purpose of providing practical guidance in respect of any requirements under this Ordinance imposed on data users”. The Code itself is non-statutory and a breach of the Code by a data user will give rise to a presumption against the data user in any legal proceedings under the Ordinance. Section 13 of the Ordinance provides that:

- (a) where a Code of Practice has been issued in relation to any requirement of the Ordinance;
- (b) the proof of a particular matter is essential for proving a contravention of that requirement;
- (c) the specified body conducting the proceedings (a magistrate, a court or the Administrative Appeals Board) considers that any particular provision of the Code of Practice is relevant to that essential matter; and if
- (d) it is proved that that provision of the Code of Practice has not been observed;

then that essential matter shall be taken as proved unless there is evidence that the requirement of the Ordinance was actually complied with in a different way, notwithstanding the non-observance of the Code of Practice.

10.76 The consequences for breach of the proposed code of practice will have to be formulated in tandem with the content of the code. Codes of practice usually adopt a more discursive style, a looser structure, with more practical detail. However, the degree of looseness and informality that is appropriate will depend on the consequences of a breach of a code in that, the more serious the consequences, the tighter the language will need to be.⁴⁶

10.77 We further recommend that breach of the code may in an appropriate case, entitle the authority to revoke, suspend or decline to renew the licence of the party in breach, and also to impose other penalties, such as reprimands⁴⁷ and fines.

⁴⁶ GC Thornton, cited above, at page 246.

⁴⁷ The Hong Kong Monetary Authority, for example, does not have any specific power under the Banking Ordinance to disclose the names of individual banks against which debt collection complaints are made. Disclosing the names of debt collection agencies which have engaged in abusive debt collection practices would not only help to curb malpractices, it would be useful to creditors in their selection of debt collection agencies.

Recommendation 10

We recommend that:

The licensing authority should be required to formulate a code of practice for debt collection following consultation with representative bodies of credit providers, debt collectors, consumers and other relevant bodies. Such a code should provide practical guidance on the standard of conduct that individual and corporate debt collectors are expected to meet. The consequences of breach of the code should be formulated by the relevant authority following consultation as aforesaid, and having regard to the contents of the code. We further recommend that, in an appropriate case, breach of the code should entitle the authority to revoke, suspend or decline to renew the licence of the party in breach, and to impose other penalties such as reprimands and fines.

Consumer credit data

10.78 In the Consultation Paper, the Sub-committee had reviewed the types of positive credit data available to credit providers in other jurisdictions.⁴⁸ The Sub-committee urged the relevant authorities to review the then 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. The Sub-committee also urged credit providers to make efforts to increase the sharing of information through credit reference agencies.⁴⁹

Responses

10.79 The Sub-committee received 28 responses on this recommendation concerning allowing greater freedom in the collection and use of consumer credit data. Of these responses, 20 supported the recommendation. We note that 8 among the 20 responses in favour of the recommendation were from the 'smaller' credit providers who would stand to benefit most from increased information sharing. Responses that expressed reservations did so on privacy grounds.

⁴⁸ See Chapter 9 and paragraph 9.6.

⁴⁹ See foot-note 2 in Chapter 9 for definition of credit reference agency.

Revision to the Code of Practice on Consumer Credit Data – 2002

10.80 Subsequent to the Sub-committee's Consultation Paper, the Privacy Commissioner for Personal Data has recently completed a review of the Code of Practice on Consumer Credit Data ("the Code") which first took effect in 1998.⁵⁰ The revised Code took effect in March 2002.

10.81 The revised Code has brought about a considerable increase in the scope of data that credit reference agencies are allowed to hold, and we welcome these changes.

Credit application data

10.82 Before the revision, credit application data were allowed to be retained by the credit reference agency for only 90 days from the date of application. Therefore, if an individual applies for a new credit card or other credit facilities every 90 days, no warning signal will be revealed even if a bank conducts a credit check on the individual. Coupled with the fact that data on the repayment manner⁵¹ of the individual are not allowed to be collected, an individual who chooses to pay only the 5% minimum repayment amount of his credit card bills will be able to rely on new credit to repay the outstanding amount for a number of years. By then, the debt incurred by the individual may well be unmanageable. As shown in the table in Chapter 1,⁵² the average number of delinquent records per consumer was only 1.37 in the second half of 1997. The figure grew to 4.52 in the second half of 2000, and then eased off a little to 4.04 in the first half of 2001. This shows the problem of individuals incurring multiple debts has grown several-folds in the last few years.

10.83 With the revised Code, instead of 90 days, credit application data are allowed to be retained by the credit reference agency for 5 years.⁵³ This would go some way to enable credit providers in identifying individuals who may have or are having difficulty in managing their finances.

File activity data

10.84 Every time a credit provider requests access to an individual's personal data held by the credit reference agency, it will be recorded in the system. A credit provider may access the data in a number of cases, for example, when it is considering the grant or renewal of credit facilities to the

⁵⁰ See paragraphs 9.3 – 9.7.

⁵¹ See the table in paragraph 9.6.

⁵² See paragraph 1.3.

⁵³ Note, however, that credit application data which are created more than 2 years can be used only for generating consumer credit scoring; that is, raw data over 2 years old cannot be released directly to the credit provider.

individual, or when it requires assistance in debt collection action.

10.85 Before the revision of the Code, file activity data are released only to the relevant individual himself. Now, file activity data can also be released to credit providers.⁵⁴

Consumer credit scoring

10.86 “Consumer credit scoring” means the process whereby personal data relating to an individual held in the record system of a credit reference agency (being information statistically validated to be predictive of future payment behaviour or the degree of risk of delinquency or default associated with the provision or continued provision of consumer credit) are used, either separately or in conjunction with other information held in the system, for the purpose of generating a score to be included in a credit report on the individual.

10.87 In order to address the privacy concerns raised regarding the disclosure of raw data of an individual for up to 5 years ago, the Code allows the release of a processed statistical score in the form of high, medium or low risks indicating an individual’s likely ability of fulfilling repayment obligations in future. The rationale is that each individual will be given an objective assessment based on one’s own current and historical information, and taking into account the analysis of thousands of individuals with similar financial characteristics.

Lenders’ participation in the sharing of information

10.88 In the past, the problem of inadequate credit data was exacerbated by the policy of some major retail banks to limit its supply of data to the credit reference agencies.⁵⁵ We are pleased to see that positive action has been taken in this area. In September 2001, a high-level roundtable discussion took place to discuss the issue of consumer debt and bankruptcy. Participants of the discussion include representatives from the Hong Kong Monetary Authority, the Hong Kong Association of Banks, the Deposit-Taking Companies Association, the Financial Services Bureau, the Official Receiver’s Office, Police and the Office of the Privacy Commissioner for Personal Data. The issue of enhancement of the sharing of credit data was one of the discussion topics.⁵⁶

⁵⁴ Although file activity data can be retained by the credit reference agency for 5 years, data which are created more than 2 years can be used only for generating consumer credit scoring. In other words, raw data on file activity over 2 years old cannot be released directly to the credit provider.

⁵⁵ According to information from Credit Information Services Ltd., a credit reference agency, although there are over one hundred licensed banks in Hong Kong, several major players are dominating the market. With regard to credit card business, three major banks dominate 60% to 70% of the market share. Hence, they may not regard sharing information with other competitors as to their advantage.

⁵⁶ Other issues include a debt relief plan, tightening banks’ lending policy, and enhancement of

10.89 We note that the Hong Kong Monetary Authority has in its paper dated 9 April 2002 to the Legislative Council Panel on Financial Affairs set out the grounds for increased sharing of positive consumer credit data in the banking sector. The paper mentioned that the Hong Kong Association of Banks, the Deposit-taking Companies Association, the SAR Licensed Money Lenders Association Ltd and the Finance Houses Association have now reached consensus in devising an 'Industry Proposal'.

Way forward

10.90 The Hong Kong Monetary Authority's paper to the Legislative Council Panel on Financial Affairs also mentioned that "Shanghai has already launched a comprehensive credit bureau, and the Chinese authorities are now planning to establish a centralised credit bureau for the whole country. Singapore also intends to do so in September 2002". We are pleased to see that considerable efforts and progress have been and still are being made to enhance the sharing of consumer credit data. Without adequate positive credit data, credit managers can only rely on an individual's income proof to assess his credit position. Assessment as such may not be accurate as the individual's credit position depends also on the amount of his indebtedness and his past repayment record. In other words, a person with a high level of income may not necessarily be regarded as having a high level of credit worthiness, and vice versa.

10.91 As from the consumers' point of view, whilst some consumers are skeptical of increased sharing of their data due to privacy reasons, others may well benefit from more preferential treatment in terms of lower interest rates, better service and other favourable terms if their good repayment records are made available to credit reference agencies. According to the estimation of Credit Information Services Ltd., at least 95% of the consumers in Hong Kong have good repayment records; that is, without any negative or derogatory credit data. Unlike other countries where positive credit data,⁵⁷ is available, consumer lending in Hong Kong is not priced based on individual risk. Credit providers price their financial products based on total risk exposure, which means that the 95% good consumers are subsidising the 5% delinquent consumers.⁵⁸

10.92 We appreciate that there are understandable concerns from consumer and privacy bodies about the potential misuse of personal data. These are legitimate issues that need to be addressed. It is perhaps beneficial to all concerned that this issue should be kept under review so that the sharing of positive data may be expanded on a gradual incremental basis.

cooperation between banks and government departments.

⁵⁷ Positive credit data includes repayment manner, and aggregate credit exposure.

⁵⁸ Views expressed by Credit Information Services Ltd.

Recommendation 11

We recommend that:

Whilst we welcome the progress made in terms of expanding the sharing of consumer credit data, the matter should be kept under review with a view to further alleviate bad debts and abusive debt collection practices.

Efficiency of the judicial process

10.93 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.

Responses

10.94 Thirteen responses were received in relation to the issue of efficiency of the judicial process. Eight have expressed the view that abusive debt collection practices could be alleviated if the judicial process could be strengthened both in terms of adjudication and enforcement. A number of these were credit providers who further mentioned that they would prefer to utilise the judicial process to collect their debts if legal action could be speedier and less costly.

10.95 One of the responses noted the recent reforms in the judicial system, including the increase of jurisdiction in the Small Claims Tribunal and the District Court, computer-assisted listing procedures, and the greater use of Chinese in courts. It was remarked that as a result of the reforms, many creditors are now more inclined to use the judicial process for recovering their debts.

Interim Report and Consultative Paper on Civil Justice Reform December 2001

10.96 In December 2001, the Chief Justice's Working Party on Civil Justice Reform issued an Interim Report and Consultative Paper on Civil Justice Reform on the following terms of reference:

"To review the civil rules and procedures of the High Court and to recommend changes thereto with a view to ensuring and improving access to justice at reasonable cost and speed."

10.97 In view of the comprehensive nature of this review, and further in view that the issue is beyond the ambits of our terms of reference, we do not propose to make recommendations on this issue.

Self-regulation

10.98 We have considered the possibility of encouraging self-regulation amongst debt collection agencies to solve the problem of abusive collection practices. Advocates of self-regulation mentioned as an example the Code of Banking Practice⁵⁹ 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. Self-regulating associations for debt collection agencies are operating in the United Kingdom,⁶⁰ the United States⁶¹ and other countries.⁶² In Hong Kong, we learnt that the Hong Kong Credit and Collection Management Association was set up in December 1999 as an industry association.

Responses

10.99 Only four responses were received on this issue. These were from a credit card company, a credit investigation/debt collection company, a district councillor, and the Consumer Council. All four responses were in favour of encouraging self-regulation.

10.100 Although self-regulation alone would not be sufficient to totally safeguard the interest of the wider community, an industry association can often work in tandem with a government-funded authority to make enforcement of legislative standards more effective, for example, by disseminating information amongst members on how to best observe legislative standards, and by operating training courses.⁶³ We agree that self-regulation could serve a purpose in enhancing professionalism amongst its members and the relevant authorities should render necessary assistance.

⁵⁹ See paragraphs 5.3 – 5.7.

⁶⁰ 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.

⁶¹ American Collectors Association.

⁶² For example, the Australian Collectors' Association. Also, the League International for Creditors in Germany.

⁶³ Views of the Consumer Council.

Conclusion

10.101 We believe that our proposals would go some way to address the problem of abusive debt collection. We have devised a criminal offence of harassment of debtors and others to deal with the bottom end of debt collection agencies while the recommendations on licensing and a code of practice are aimed at regulating the average collection agencies. The top end of collection agencies will benefit from the more level playing field, which hopefully would encourage more collection agencies to operate at the top end of the market. The recommendation on consumer credit data aims to improve the credit origination process. It is hoped that the level of bad debts, and hence, abusive debt collection, can be alleviated.

Chapter 11

Summary of recommendations

(The recommendations of this report are to be found in Chapter 10)

Recommendation 1 : The criminal offence of unlawful harassment of debtors and others (paragraphs 10.4 – 10.20)

A criminal offence of harassment of debtors and others should be created, such that it would 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 paragraph (a), provision should be made that 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, this would also constitute harassment.

Provision should also be made for paragraph (a) to have 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.

Further, that a person may be guilty of an offence by virtue of paragraph (a) above if he concert with others in the taking of such action as is described in that paragraph, notwithstanding that his own

course of conduct does not by itself amount to harassment.

Express provision should be made to ensure that harassment and representations conveyed by electronic means of communication are covered by the proposed offence.

Recommendation 2 : Licensing (paragraphs 10.21 – 10.28)

Debt collection agencies should be subject to a statutory licensing system under which it should be a criminal offence to collect debts as a business without a valid licence.

Recommendation 3 : Commercial vs consumer debts (paragraphs 10.29 – 10.31)

The proposed licensing regime should cover both consumer debts and commercial debts.

Recommendation 4 : Licensing authority (paragraphs 10.32 – 10.34)

The Administration should have due regard to the experience of other jurisdictions in determining the appropriate body to carry out the licensing of debt collectors and in devising an efficient and cost-effective licensing regime.

Recommendation 5 : Collection agencies and collectors (paragraphs 10.35 – 10.38)

The licensing requirement of the proposed statutory licensing regime should include individual debt collectors as well as debt collection agencies, but support staff of collection agencies who are not involved in communicating with any debtors, referees or their families and friends, would not require licensing. Communication in this context includes written, verbal, electronic and personal visits forms of communication.

Recommendation 6 : Exemptions from licensing (paragraphs 10.39 – 10.46)

The categories of creditors and persons listed below be exempted from the requirement to obtain a licence under the proposed licensing

scheme for debt collectors:

- (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) legal officers, as defined in section 2 of the Legal Officers Ordinance (Cap 87);
- (iv) barristers acting in that capacity;
- (v) solicitors acting in that capacity;
- (vi) receivers, liquidators and trustees in bankruptcy;
- (vii) court bailiffs;
- (viii) authorized institutions, as defined in the Banking Ordinance (Cap 155).

Provision be made for particular organisations to be exempted from the licensing requirement by inclusion in a list in the legislation that is subject to amendment by a suitable body or official.

Recommendation 7 : Collecting debts as a business or otherwise
(paragraphs 10.47 – 10.48)

Only a person or corporation carrying on business as a debt collector in Hong Kong, or advertising, announcing or holding itself out as so conducting itself, should require to be licensed under the proposed licensing scheme. The general law may be relied upon to determine what constitutes carrying on business in this context.

Recommendation 8 : Criteria for licensing (paragraphs 10.49 – 10.57)

An applicant for the granting or renewal of a debt collection licence should be required to satisfy the licensing authority that it, in the case of a corporate applicant, or he, in the case of an individual applicant, is a fit and proper person to engage in debt collection activities, having regard to all relevant circumstances, and in particular whether the applicant, and, in the case of a corporate applicant, his employees, agents or associates have –

- (a) contravened the offence of unlawful harassment of debtors and others, or any offence involving fraud or dishonesty, or violence;
- (b) committed any triad-related offences;
- (c) carried on business under a name which is misleading or

- otherwise undesirable; or
- (d) committed any breach of code of practice.

In addition, an individual debt collector should be required to be at least 18 years of age, and a resident of Hong Kong. As for a corporate applicant, it should be required to provide suitable training to its collection staff and to formulate effective supervisory methods.

An appropriate appeal mechanism against the decision of the licensing authority should also be devised.

Recommendation 9 : Statutory powers and duties (paragraphs 10.58 – 10.63)

The licensing authority should be vested with statutory powers:

- to make inquiries regarding the applicant before issuing or renewing a licence and should have statutory powers to investigate;
- to refuse the granting or renewal of a licence and to suspend or revoke a licence;
- to inquire into any complaint or alleged contravention of the legislation or code of practice, and require any person to provide any information the licensing authority considers relevant;
- to 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, documents or things which are relevant.

Certain statutory duties should be imposed on debt collection agencies:

- to provide the licensing authority with reports of their financial affairs signed by auditors;
- to provide the auditors with access to books and records of the business;
- to maintain all their records, files, documents, etc created or received in their business for a prescribed period;
- to deposit all money collected from debtors in trusts accounts maintained in banks. This, however, does not preclude direct payment of funds by the debtor into the creditor's own account.

Recommendation 10 : Code of practice (paragraphs 10.64 – 10.77)

The licensing authority should be required to formulate a code of practice for debt collection following consultation with representative bodies of credit providers, debt collectors, consumers and other relevant bodies. Such a code should provide practical guidance on the standard of conduct that individual and corporate debt collectors are expected to meet. The consequences of breach of the code should be formulated by the relevant authority following consultation as aforesaid, and having regard to the contents of the code. We further recommend that, in an appropriate case, breach of the code should entitle the authority to revoke, suspend or decline to renew the licence of the party in breach, and to impose other penalties such as reprimands and fines.

Recommendation 11 : Consumer credit data (paragraphs 10.78 – 10.92)

Whilst we welcome the progress made in terms of expanding the sharing of consumer credit data, the matter should be kept under review with a view to further alleviate bad debts and abusive debt collection practices.

Responses to Consultation Paper on Regulation of Debt Collection Practices

1. Administration Wing, Chief Secretary for Administration's Office
2. AIG Credit Card Company (HK) Ltd
3. American Collectors Association, Inc
4. American Express Bank, Ltd. Hong Kong
5. American Express International, Inc.
6. BOC Credit Card (International) Ltd
7. Carlye Chu, High Court Registrar
8. CEF Lend Lease Life Assurance Limited
9. Chase Manhattan Card Company Limited
10. Citibank N A, Hong Kong
11. Citizens Party
12. Commercial Credit Bureau Ltd
13. Communication Business Consulting Ltd
Risk Management Advisors Ltd
14. Consumer Council
15. Credit Information Services Limited
16. Dao Heng Bank Ltd
17. debis Financial Services China Limited
18. Democratic Alliance for Betterment of Hong Kong
19. Denis W S Lau (Magistrate, Kwun Tong Magistracy)
20. Department of Justice, Civil Division
21. Department of Justice, Prosecutions Division (John Reading)
22. DTC Association
23. Dun & Bradstreet (HK) Ltd
24. Economic Services Bureau
25. Fight Crime Committee
26. Finance Houses Association of Hong Kong Limited
27. Financial Services Bureau
28. Henry Fung
29. HKSAR Licensed Money Lenders Association Ltd
30. Ho Chi Cheung
31. Home Affairs Bureau

32. Home Affairs Department
33. Hong Kong Association of Banks
34. Hong Kong Bar Association
35. Hong Kong City Credit Management Ltd
36. Hong Kong Credit and Collection Management Association Ltd
37. Hong Kong Monetary Authority
38. Hong Kong Police Force
39. Hutchison Telephone Company Ltd
40. InformLink Consultancy Ltd
41. International Bank of Asia Limited
42. Judiciary Administrator's Office
43. Kwun Tong Resident Association
44. Law Society of Hong Kong
45. Life Insurance Council of the Hong Kong Federation of Insurers
46. Master Christine Barbara Chan, High Court
47. New Territories West District Residents Association Ltd
48. New World PCS Limited
49. Noble Fund Limited
50. Office of the Privacy Commissioner for Personal Data
51. PrimeCredit Limited
52. Rich Prosper Limited
53. Robertsons (Solicitors acting for Gold Partners Credit Management Limited)
54. Security Bureau
55. Sham Shui Po District Fight Crime Committee
56. Social Welfare Department
57. Social Welfare Department Working Group on Battered Spouses
58. Thomas Law (Prosecutions Division, Department of Justice)
59. United Asia Finance Limited
60. William Lai (General Manager, HK City Credit Management Ltd)
61. Working Committee of Professional Credit Management Companies in Hong Kong
62. Yau Tsim Mong District Fight Crime Committee
63. Young Siu Chuen (Member, Central & Western District Council; Member, Central & Western District Fight Crime Committee)

ACCC's Guidelines

1. Communicating with the debtor away from their workplace

Principle

A collector has a right to communicate with a debtor to facilitate collection. However, all communications should be made for reasonable purposes, and debtors should not be unduly harassed, or subject to communications at unreasonable hours.

Example ...

- A collector should not communicate with a debtor at any unusual time or place, or at any time or place that the collector knows or should know, would be unreasonable or substantially inconvenient to the debtor unless the debtor has given prior consent directly to the collector.

A collector can assume that the convenient time for communicating with a debtor is after 7.30 a.m. and before 9 p.m. local time at the debtor's location, **unless** the collector is informed otherwise.

A collector should not communicate, or attempt to communicate, with a debtor before 7.30 a.m. or after 9 p.m. **unless**:

- the debtor authorises communication at other hours; or
 - the collector has made reasonable efforts, over a reasonable period of time, to contact the debtor after 7.30 a.m. and before 9 p.m., and the collector has made reasonable attempts to contact the debtor using other, less intrusive, methods of communication.
- A collector should not communicate with a debtor at any time or place where the debtor has requested that no communication be made, or using any mechanism that the debtor has requested not be used, **unless**:

- the debtor has not provided an alternate and effective contact mechanism; or
- the debtor does not respond through the agreed contact mechanism within a reasonable time.

2. Communicating with the debtor at the debtor's workplace

Principle

Collectors should attempt to communicate with debtors outside of work where appropriate and possible, particularly for the initial contacts. Collectors should ensure that where communications or visits need to be made to a debtor's workplace, those contacts are handled discretely and with care. Debtors should be able to request that no communications be made at the workplace, provided that an alternative and effective contact mechanism is available.

Example ...

- A collector should not communicate with a debtor at the workplace, or visit the debtor at the workplace **unless**:
 - the debtor has specifically requested or authorised communications to be made at the workplace; or
 - the debtor has not provided an alternate and effective contact mechanism; or
 - the debtor is the proprietor or a director of a corporate proprietor of a business to which the debt relates.
- A collector should not communicate with, or attempt to communicate with, a debtor at the workplace in a manner that:
 - is likely to inform third parties of the existence of a debt; or
 - discloses more than the name and contact details (including company name only if specifically requested by the third party) of the collector to third parties.

3. Personal visits

Principle

Where necessary a collector is entitled to communicate with the debtor by visiting in person. However, a collector should respect the debtor's own, and the household's privacy and security. Generally a collector should not use personal visits as the initial step in communicating with the debtor, and personal visits should not be used if other, less intrusive, means of communication are available and effective.

Example ...

- A collector should not visit a debtor in connection with the collection of any debt at any unusual time or place, or any time or place known or which should be known to be substantially inconvenient to the debtor, without the prior consent of the debtor given directly to the collector.

A collector can assume that the convenient time for making a personal visit to a debtor away from the workplace is after 7.30 a.m. and before 9 p.m. local time at the debtor's location, **unless** the collector is informed otherwise.

A collector can assume that the convenient time for making a personal visit to a debtor at the workplace is during normal business hours (9 a.m. to 5 p.m.), **unless** the collector is informed otherwise.

- A collector should not visit a debtor at the workplace if the debtor has so requested, and has provided an alternative and effective contact mechanism.
- A collector should immediately leave private property or the debtor's workplace if requested to do so by the debtor or another person.
- A collector should not remain in the vicinity of the debtor's location for an extended length of time for the purpose of:
 - intimidating or embarrassing a debtor; or
 - creating an impression that the debtor is under surveillance.

4. Frequency of communications

Principle

Collectors are entitled to make reasonable efforts to contact debtors; however, debtors are entitled to be free from unnecessary communications. A collector should not make unsolicited communications with the debtor more frequently than is reasonable and necessary according to the circumstances. Whether frequency of communication is considered to be reasonable will be assessed in light of the purpose of the communications.

Example ...

- A collector should not make more than three unsolicited (answered) telephone calls per week to a debtor, or more than 10 unsolicited telephone calls per calendar month to a debtor (including telephone calls where the debtor terminates the call), unless they can show a legitimate reason for doing so.
- A collector should not, in relation to a consumer debt, cause a telephone to ring, or engage any person in telephone conversation, repeatedly or continuously if it is reasonably likely to unduly abuse, or harass the person at the called number.
- A collector should not make unsolicited visits to a debtor more frequently than is reasonable and necessary, and no more frequently than once per week.

5. Allowing arrangements and other processes to work

Principle

A collector should generally not contact a debtor if an informal arrangement has been made for payment of the debt, and is being complied with, or if other legal processes or arrangements exist which make it inappropriate for the debtor to be contacted.

Example ...

- A collector should not communicate with a debtor whilst an arrangement to pay is in place and being complied with, unless the communication is made:
 - at the request of the debtor;
 - to confirm the details of the arrangement and to advise the debtor of the consequences of not complying with the arrangement;
 - to provide a statement of the debtor's account;
 - to advise the debtor of any legal remedies the collector intends to pursue whilst the arrangement is in place;
 - to make a legitimate offer of an alternative arrangement of benefit to the debtor; or
 - to review the arrangement (not more frequently than every three months).
- A collector should not communicate with a debtor after the debtor has (in writing) denied liability or stated an intention to defend any legal proceedings brought against them and has requested that no further communication be made, except for:
 - written communication that advises the debtor of the steps the collector intends to take with respect to legal proceedings;
 - written communication that is genuinely designed to facilitate settlement of the matter;
 - communication with respect to any part of a debt that is not denied;
 - communication where a judgment for that debt has been obtained against the debtor, and has not been set aside; or
 - further communication that is authorised by the debtor.
- A collector should not communicate with a debtor or Third party for payment of the debt or to assert a right for payment once the collector becomes aware that the debtor is bankrupt or has entered into a Part IX or Part X agreement under the

Bankruptcy Act, **unless** the communication is in accordance with that Act.

6. Communicating with a debtor's representative

Principle

A debtor is entitled to have another party represent them and/or advocate on their behalf when communicating with the collector. In turn, representatives must act reasonably, and the collector should be entitled to contact the debtor directly in appropriate circumstances.

Example ...

- A collector should not communicate directly with a debtor once the collector knows, or should know, that another person (e.g. solicitor, financial counsellor) represents the debtor in the matter, **unless**:
 - the debtor's representative does not respond to communications from the collector within a reasonable time (normally 14 working days);
 - the debtor's representative advises that he or she does not have instructions from the debtor in respect of this matter;
 - the representative does not consent to act;
 - where the representative is not a solicitor, the collector advises that written authority for the collector to communicate through the debtor's representative is required, and the debtor does not provide that authority; or
 - the debtor specifically requests communication from the collector.

7. Communicating with third parties

Principle

Collectors are entitled to contact third parties in order to facilitate communication with the debtor. However, third parties are not liable for the debt, and are under no obligation to provide

information to the collector. They are entitled to similar (if not greater) protection from undue harassment. A collector should only make unsolicited communications to third parties as are reasonable and necessary according to the circumstances.

A collector should not assume that any member of the debtor's family or household is aware of, or privy to, information about the debt situation, or that the debtor wants such persons to be informed.

Example ...

- A collector should communicate with a third party only in relation to a debt to seek location information or to leave a message for the debtor.
- A collector should not communicate with or visit a third party between the hours of 9 p.m. and 7.30 a.m. **unless** the communication or visit is authorised by the third party.
- A collector should not repeatedly communicate with a third party to leave a message for the debtor if the collector knows or should know that the third party does not live or work with the debtor, **unless**:
 - the third party has agreed to further contact; or
 - the third party has requested the contact.
- A collector should not communicate with a third party to seek location information about the debtor on more than one occasion within a six month period, **unless**:
 - the third party has agreed to further contact; or
 - the third party has requested the contact.
- A collector should not make misleading or deceptive statements to a third party in order to obtain the debtor's location or other information about the debtor from that third party.
- A collector should not disclose (or threaten to disclose) information about the debt (including the existence of the debt) to a third party, **unless** disclosure is permitted by the Privacy Act.

- A collector should not communicate with the debtor's child or children (under the age of 18) about the debt, **unless**:
 - communication with that child is specifically authorised by the debtor; or
 - the debtor asks the child to act as a translator.

8. Misleading or deceptive conduct

Principle

A collector must not engage in any other conduct that is misleading or deceptive or is likely to mislead or deceive.

Example ...

- A collector must not make a false or misleading representation about the nature of a collector's identity.
- A collector must not make a false or misleading representation about the consequences of non-payment. However, a collector is entitled to accurately explain the consequences of non-payment.
- A collector must not give information about the consequences of legal action that is misleading or deceptive or likely to mislead or deceive. However, a collector is entitled to accurately explain the consequences of legal action.
- A collector must not use documents that could mislead the debtor into believing they are court documents.
- A collector must not make false or misleading representations about the amount, character, or legal status of a debt.
- A collector must not threaten criminal action if a debt is not paid or engage in conduct that is likely to lead a debtor to believe that criminal action could be a consequence of non-payment, if the alleged conduct does not amount to a criminal offence.
- A collector must not threaten action (legal or otherwise) that a collector is not legally permitted to take or does not have the

instructions or authority to take, either at any time or at the time that the representation is made.

9. Coercion

Principle

A collector should not exercise unacceptable or illegitimate pressure on a debtor or third party in order to persuade the recipient of the conduct to undertake a particular course of action.

Example ...

- A collector should not lead a debtor to believe that the collector's decision to report an alleged criminal offence will depend on whether or not a payment is made.
- A collector should not threaten to list a debtor on a blacklist or bad debts database or otherwise threaten to take action which purports to affect a debtor's credit rating or ability to obtain credit, **unless** such listing is permitted under the credit reporting provisions of the Privacy Act.

10. Language, violence and physical force

A collector should not use abusive, threatening, offensive, obscene, or discriminatory language to a debtor or a third party.

A collector must not use, or threaten to use, violence or physical force to any person.

A collector must not use, or threaten to use, violence or physical force to property.

(N.B. The guidelines do not have legal force and do not represent a definitive interpretation of the law which is the role of the courts.

However, as an enforcement agency the ACCC considers it useful to identify the type of conduct it considers may be at risk contravening s. 60 of the Trade Practices Act (and/or other legislation). To decide whether the legislation has been breached the ACCC approaches each matter on a case by case basis, taking into account all relevant circumstances. Compliance with the guideline is only one factor to be considered. This means that full compliance with the guideline can help minimise the risk of breaching the law, but cannot provide businesses with a guarantee against litigation.)