

Executive Summary
of
Report on The Regulation of Debt Collection Practices
issued by
Law Reform Commission of Hong Kong

(This Executive Summary is an outline of the Report. Copies of the Report can be obtained either from the Secretary, Law Reform Commission, 20/F, Harcourt House, 39 Gloucester Road, Hong Kong, or on the Internet at <<http://www.info.gov.hk/hkreform>>. References in this Executive Summary to paragraph numbers are to paragraphs in the Report.)

Preface

1. The Law Reform Commission has been asked *“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.”*

Chapter 1

Debt collection in Hong Kong (paragraphs 1.1 – 1.13)

2. 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.

3. According to data published by Credit Information Services Ltd, 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%.

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. 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, suggesting that the problem of harassment type collection tactics is worsening.

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.

6. The harassment tactics commonly employed against debtors, and innocent third parties such as friends, loan referees, family members or business partners are telephone nuisance, repeated personal visits, and posting of debt collection notices.

Industry overview (paragraphs 1.14 – 1.20)

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

Chapter 2

Some features of extra-judicial debt collection (paragraphs 2.1 – 2.13)

8. The debt collection process can usually be divided into 3 stages:

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

9. Given the terms of reference, this Report will examine only the first stage of debt collection.

10. 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.

What causes abusive debt collection? (paragraphs 2.14 – 2.20)

11. Factors which have led to abusive debt collection include -
- the nature of the debt collection process
 - the lack of professionalism among some debt collectors
 - loose-lending
 - economic downturn
 - the judicial process in debt recovery.

Chapter 3

Existing criminal sanctions against abusive debt collection

Criminal law sanctions (paragraphs 3.2 – 3.35)

12. Various criminal offences can be deployed against abusive debt collection. If a person threatens any other person with any injury to the person, reputation or property of such other person with intent to alarm the person so threatened or any other person, he shall be guilty of the offence of intimidation as set out in section 24 of the Crimes Ordinance (Cap 200). A recent case *R v Chan Kai Hing* [1997] 3 HKC 575 shows how section 24 applies to debt collection activities.

13. If a debt collector damages or destroys property belonging to another, or threatens to do so, such acts may be covered by sections 60 and 61 of the Crimes Ordinance (Cap 200) if the required intention or recklessness is proved. Arson charges under section 60 were, for example, brought for debt collection activities in *R v Shum Hon Kai & Another* [1988] HKC 279.

14. If any person maliciously sends any letter or writing threatening to kill or murder another, he may be guilty under section 15 of the Offences Against the Person Ordinance (Cap 212).

15. The offence of blackmail is applicable to debt collection cases. Since goods obtained by blackmail are to be regarded as stolen goods, debt collectors who recover debts by blackmail may also be convicted of theft. Under section 23 of the Theft Ordinance (Cap 210), 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. A demand with menaces is unwarranted unless the person making it does so in the belief that he has reasonable grounds for making the demand, and that the use of the menaces is a proper means of reinforcing the demand. The case of *R v Lam Chiu Va* [1996] 1 HKC 302 illustrates the application of the offence of blackmail to debt collection activities.

16. Offences relating to assaults are found 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. Even words may constitute an assault. Relevant offences under the Offences Against the Person Ordinance (Cap 212) are wounding with intent to do grievous bodily harm under section 17, wounding inflicting grievous bodily harm under section 19, assault occasioning actual bodily harm under section 39, and common assault under section 40.

17. False imprisonment is a common law offence which is committed if a defendant unlawfully and intentionally or recklessly restrains

another's freedom of movement from a particular place. *R v Chan Wing Kuen and Another* [1995] 1 HKC 470 can be considered as reference.

18. 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 makes it an offence to take away or detain against his or her will any man, boy, woman or female child, by force or fraud, with intent to procure a ransom or benefit for his or her liberation. In *R v Chan Yau Hang and Another* [1983] 1 HKC 107, for example, some debt collectors were charged with section 42.

19. If debt-collectors claim that they are triad members or office-bearers in the debt collection process, they may also be guilty of offences under sections 19 and 20 of the Societies Ordinance (Cap 151). Whether a defendant has joined a triad society is a question of fact, and a "bald admission" 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, would be required.

20. By virtue of section 20 of the Summary Offences Ordinance (Cap 228), any person who (a) sends any telephone message which is grossly offensive or of an indecent, obscene or menacing character; or (b) sends by telephone 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. However, the Summary Offences Ordinance is 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.

21. As for the Post Office Ordinance (Cap 98), 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 (paragraphs 3.36 – 3.41)

The principal

22. 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*. 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

23. 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”. 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.

24. 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. 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.

25. 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. 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.

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

27. 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. Hence, if a creditor hires some debt collectors to collect debt, and the creditor just stands by and watches while the debtor is being beaten up, the creditor may be liable for assault as a secondary party.

Vicarious liability (paragraphs 3.42 – 3.43)

28. An employer may be held vicariously liable for the criminal acts done physically by his employee. 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. There is 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 (paragraph 3.44)

29. 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. 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.

Chapter 4

Existing civil remedies for abusive debt collection

30. 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. Civil claims may be brought under numerous heads, and those often applicable to debt collection activities are described below.

Trespass to the person (paragraphs 4.2 – 4.4)

31. 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.

32. Threats may amount to assault not only when the plaintiff and the defendant are face to face, but also over the telephone. In *Wong Kwai Fun v Li Fung*, [1994] 1 HKC 549, the defendant endeavoured to recover debts by 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.

33. 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.

False imprisonment (paragraphs 4.5 – 4.7)

34. A false imprisonment is complete deprivation of liberty for any time, however short, without lawful cause. 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.

Intentional physical harm other than trespass to the person / Intentional infliction of emotional distress (paragraphs 4.10 – 4.15)

35. The tort of intentional infliction of physical harm other than trespass to the person 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. 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.

Trespass to chattels (paragraphs 4.16 – 4.17)

36. 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. The defendant may be liable even he does not appreciate that his interference is wrongful. 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. Full value is market price or the cost of replacement. 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.

Defamation (paragraphs 4.18 – 4.19)

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

Negligence (paragraphs 4.20 – 4.21)

38. 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*, [2001] 1 HKLRD 736. 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 debt collection agency to act for her, and that the duty of care had not been properly discharged.

Master and servant (paragraphs 4.23 – 4.34)

39. 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. 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.

40. 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 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, including whether the employer has the right to control the work method, 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. This approach was approved by the Privy Council in *Lee Tin Sang v Chung Chi Keung* [1990] 2 AC 374.

41. Where the relationship of employer and employee exists, the employer is liable for the torts of the employee only if they are committed in the course of the employee's employment. Even if the act in question is expressly prohibited by the employer, he may still be liable in some circumstances. In circumstances where the employer either expressly or by implication gave the employee a discretion which he must exercise in the course of his employment, the employer will be liable for the wrongful exercise of such a discretion. 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.

42. An employer would be able to avoid liability if it is shown that the employee was doing something totally unconnected with his job. The question depends on the degree of deviation by the employee.

Employer's liability for independent contractors (paragraph 4.35)

43. As a general rule, an employer is not liable for the tortious acts of an independent contractor in the course of execution of the work. The law has, however, imposed liability on employers in some circumstances. If the law imposes on an employer a strict or absolute duty, often described as 'non-delegable' duty, then he is liable even though the immediate cause of the damage is the contractor's wrongful act or omission. Such 'non-delegable' duties may arise either by statute or at common law.

Principal's vicarious liability for torts committed by agent
(paragraphs 4.36 – 4.41)

44. 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* [2001] 1 HKLRD 736. 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.

45. It seems 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. It is believed that in the latter case the law imposes liability on a principal for torts committed by

an agent.

46. The court also commented 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 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.

Personal Data (Privacy) Ordinance (paragraph 4.42)

47. If any data protection principle is contravened, victims of abusive debt collection activities may have a civil cause of action under section 66 of the Personal Data (Privacy) Ordinance (Cap 486).

Chapter 5

Other types of control on debt collection

Administrative control (paragraphs 5.1 – 5.2)

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

Self-regulation by authorized institutions

Code of Banking Practice – 1997 (paragraphs 5.3 – 5.7)

49. The Hong Kong Association of Banks and the DTC Association have jointly issued a non-statutory Code of Banking Practice 1997 (“the Code”). Although the Code was issued on a voluntary basis, the Hong Kong Monetary Authority (“the HKMA”) monitors its compliance as part its regular supervision. A comprehensive review of the Code was conducted in 2001 to ensure that it strikes a reasonable balance between consumer rights and efficiency of banking operations. Chapter 5 of the Code lays down guide-lines on debt collection work conducted by parties other than authorized institutions.

50. To monitor compliance with the Code, 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 (paragraphs 5.8 – 5.11)

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

52. Data Protection Principle 2(1) requires that all practicable steps be taken to ensure inaccurate personal data are not used. Consequently, a creditor should not disclose inaccurate personal data to a debt collection agency, and a debt collection agency should not use inaccurate personal data for debt collection. This could include disclosure by a creditor to a debt collector of a previous address of a debtor. It also includes the situation where a debt collection agency deliberately sends demand letters to neighbouring addresses to humiliate the debtor.

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

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

Code of Practice on Consumer Credit Data 2002 (paragraphs 5.12 – 5.14)

55. The Code of Practice on Consumer Credit Data issued by the Privacy Commissioner for Personal Data in February 1998 was revised in early 2002. 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). The Code is designed to generally promote good practice among data users involved in the handling of consumer credit data. The Code covers credit reference agencies, and credit providers in their dealings with credit reference agencies and debt collection agencies. With respect to debt collection agencies, the Code is only concerned with the disclosure of information by credit providers to such agencies and their use of such information.

Chapter 6

Deficiencies of the existing controls on abusive debt collection practices

Criminal law (paragraphs 6.1 – 6.2)

56. There is a range of criminal sanctions which can be deployed against abusive debt collection practices. These come with heavy custodial and financial penalties to deal with abusive debt collection practices. Criminal sanctions, however, cannot be the complete answer because:

- (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 for various reasons.

- (b) Whilst the criminal law is effective in dealing with outrageous debt collection practices, it is far less effective against nuisances caused by non-criminal tactics or those activities on the borderline of propriety.
- (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. There are problems in the identification of the offenders, because these activities are normally conducted late at night, and 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.

Civil claims (paragraphs 6.3 – 6.4)

57. Civil remedies are not usually useful to debtors because a civil action will involve expense and delays, as well as uncertainties as to a successful outcome. The average debtor is unlikely to have the courage, much less the means, to sue his creditors for damages for excessive or unreasonable collection practices.

Code of Banking Practice 2001 (paragraph 6.6)

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

Personal Data (Privacy) Ordinance (Cap 486) and the Code of Practice on Consumer Credit Data – 2002 (paragraph 6.7)

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

Chapter 7 **Comparative law**

60. Compared with Hong Kong, debt collectors and debt collection agencies are subject to more regulation and control in many other jurisdictions, including the United Kingdom, Australia, Canada and the United States of America. Apart from the traditional criminal and civil sanctions, debt collection is regulated by specific statutory provisions in these jurisdictions.

United Kingdom

The criminal offence of unlawful harassment of debtors

(paragraphs 7.2 – 7.8)

61. The Administration of Justice Act 1970 introduced the criminal offence of unlawful harassment of debtors which is set out in section 40(1) of the Act, which reads:

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

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

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

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

Protection from Harassment Act 1997 (paragraphs 7.9 – 7.20)

63. The Protection from Harassment Act 1997 was enacted to protect persons from harassment and similar conduct. Harassment of a person includes causing alarm or distress. 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.

Malicious Communications Act 1988 (paragraphs 7.21 – 7.24)

64. This Act 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. By virtue of section 1 of the 1988 Act, it is an

offence if any person with the purpose of causing distress or anxiety to another, sends to another person either a letter or other article which conveys (a) a message which is indecent or grossly offensive; (b) a threat; or (c) information which is false and known or believed to be false by the sender. Any other article which is, in whole or in part, of an indecent or grossly offensive nature is also covered by the section. A person would not be held guilty of conveying a threat if he could show that the threat was used to reinforce a demand which he believed he had reasonable grounds for making, and that he believed that the use of the threat was a proper means of reinforcing the demand.

Australia

Federal legislation (paragraphs 7.25 – 7.35)

65. The Trade Practices Act 1974 is the only federal legislation affecting general debt collection practices in Australia. Section 60 of the Act 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. The Act has not further defined what constitutes "physical force, undue harassment or coercion". The Act imposes both civil and criminal remedies for breaches of section 60.

66. Section 60 of the Trade Practices Act 1974 has been examined by the Federal Court of Australia in *Australian Competition & Consumer Commission v McCaskey & Cash Return Mercantile PTY Ltd* FCA 1037, in which the Australian Federal Court made some observations on what constitutes harassment and coercion.

Other provisions against abusive collection tactics (paragraph 7.36)

67. 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)

By all debt collectors

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

The United States of America

The Fair Debt Collection Practices Act 1977 (paragraphs 7.38 – 7.49)

68. In 1977, the Federal Government enacted the Fair Debt Collection Practices Act (“the FDCPA”), which 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. 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.

69. 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. 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.

70. 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. Usually, whether conduct harasses, oppresses or abuses any person is a question of fact. The FDCPA also prohibits a debt collector from using any false, deceptive, or misleading representation or means in connection with the collection of debt. 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.

Canada

Federal (paragraph 7.50)

71. The federal government had attempted to introduce a Borrowers and Depositors Protection Act in 1976, but did not succeed. Debt collection legislation in Canada, therefore, is a matter for the provinces.

Alberta (paragraphs 7.51 – 7.52)

72. In Alberta, as early as 1965, the Collection Agencies Act 1965 was enacted. The current legislation is the Collection Practices Act 1980, and a list of prohibited practices applicable to collection agencies is found in section 13 of the Act. For example, collection agencies are not allowed to:-

- *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;*
- *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;*

- *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;*
- *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;*
- *make any arrangement with a debtor to accept a sum of money that is less than the amount of the balance due and owing to a creditor as full and final settlement without the prior written approval of the creditor;*
- *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.*

73. If any collection agency or collector has contravened any provision of the Act, the Administrator may issue an order directing the agency or collector to stop engaging in any practice.

Other jurisdictions (paragraphs 7.53 – 7.55)

74. In Mainland China, there is no national legislation specifically dealing with abusive debt collection activities. There is, however, a provision in Article 238 of the Criminal Law stipulating that “whoever unlawfully detains or takes somebody into custody for the purpose of demanding the payment of a debt” may be duly punished with the offence of unlawful detention.

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

Chapter 8 **Licensing in other jurisdictions**

United Kingdom (paragraphs 8.2 – 8.12)

76. The Consumer Credit Act 1974 introduced a comprehensive regulatory regime by requiring all proprietors of consumer credit business or consumer hire businesses to be licensed. Debt collection agencies are required to be licensed because they fall within the definition of ancillary credit business. Debt-collecting is defined as the taking of steps to procure payment of debts due under consumer credit agreements or consumer hire agreements.

77. 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.

78. It is an offence to operate without a licence when one is required. The civil consequence of not obtaining a licence is that any agreement for the services is unenforceable against the other party without an order of the Director. Hence, a debt collector may not be able to collect his fees or commission without such an order from the Director.

Australia (paragraphs 8.13 – 8.33)

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

80. The Australian Law Reform Commission has compiled a summary of the licensing criteria in the different states:

- (a) Age requirements. (Generally required).
- (b) Residence requirements. (New South Wales, Queensland, South Australia and the Northern Territory; in New South Wales, the residence need only be in Australia).
- (c) An applicant should be of good fame and character and be a fit and proper person to hold a licence, and must not have been convicted of certain offences or disqualified from holding a licence. (Generally required).
- (d) Adequacy of educational attainments or experience. (Required in New South Wales, Queensland, South Australia and Tasmania. But there is no training or examination requirements in any State or Territory).
- (e) No previous record of harassment of debtors. (In New South Wales, Victoria and Tasmania, such a record is a ground for refusal of a licence).
- (f) Disqualification for bankruptcy. (In Victoria, Tasmania and the Northern Territory, applicants must not be bankrupt. In other jurisdictions, bankruptcy or entry into a composition or scheme of arrangement with creditors is a ground for discipline).

Canada

Alberta (paragraphs 8.34 – 8.43)

81. Under the Collection Practices Act 1980, 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. 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.

82. The Administrator under the Act 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. In addition, the Administrator may inquire into the affairs of any person who is believed to engage in the

business of debt collecting. 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.

South Africa (paragraphs 8.44 – 8.53)

83. In South Africa, the Debt Collectors Act 1998 regulates the licensing of debt collectors. A Council known as the Council for Debt Collectors (the “Council”) is established to exercise control over the occupation of debt collectors.

84. 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 circumstances -

- (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.

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

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

86. The Council may investigate any allegation of improper conduct of a debt collector. 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;
- (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

- (g) has been prejudiced by the conduct of such debt collector;
any combination of the above.

Chapter 9 Consumer credit data

Introduction (paragraphs 9.1 – 9.2)

87. 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. 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.

Code of Practice on Consumer Credit Data (paragraphs 9.3 – 9.5)

88. In Hong Kong, the handling of consumer credit data is subject to the Code of Practice on Consumer Credit Data ("the Code"). Apart from the types of personal data listed in clause 2.1 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, 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.

Sharing of positive credit data in other jurisdictions (paragraph 9.6)

89. The table below is a general guide to the kinds of positive credit data 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
Aggregate credit exposure [Information on each active loan including mortgage, instalment loans (like personal loans, tax loans, hire purchase) and revolving loans (like credit	Yes ^(f)	Yes	Yes	No	No ^(g)

cards and overdraft facilities)]					
General repayment manner ^(h)	Yes ⁽ⁱ⁾	Yes ^{(j)(k)}	Yes ^(l)	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.
- (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.

90. 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.

Situation in Hong Kong (paragraphs 9.19 – 9.22)

91. In Hong Kong, credit reports may include the following information:

- (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;
- (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 scoring to an individual;
 - (10) Charge data in respect of the creation and termination of a charge over equipment, vehicles or vessels.

92. It should be noted that the 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.

Chapter 10

Proposals for reform

Introduction (paragraphs 10.1 – 10.3)

93. In formulating proposals for reform, we recognise that debt collection is a legitimate and necessary business activity, and that creditors and their agents are entitled to take reasonable steps to contact a debtor to collect the debts.

94. The problem of abusive debt collection has a number of causes. There is no single solution to the problem. We have taken into consideration the various factors which have contributed to unreasonable methods of debt collection, the level of protection afforded by criminal sanctions, civil remedies, including the developments in vicarious liability and other types of controls, the deficiencies of existing controls, as well as measures taken in other jurisdictions. We have also given due regard to the views gathered from the consultation exercise.

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

95. We 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.

96. 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. 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.

97. 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.

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 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.

Licensing (paragraphs 10.21 – 10.26)

98. 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.

99. 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.

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.

Commercial vs consumer debts (paragraphs 10.29 – 10.31)

100. Only 8 responses were received in relation to Recommendation 3, with 5 responses in favour and 3 responses against.

101. We are 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. Abusive collection of commercial debts may well cause disturbance or anxiety of innocent third parties.

Recommendation 3

We recommend that:

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

Licensing authority (paragraphs 10.32 – 10.34)

102. 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.

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.

Collection agencies and collectors (paragraphs 10.35 – 10.38)

103. Among the 15 responses received, 12 were in favour of licensing individual collectors. 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.

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 (paragraphs 10.39 – 10.46)

104. A total of 18 responses were received on this recommendation. Most of the responses suggested additional categories of persons for exemption from licensing. Some of these suggestions have been adopted.

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 (paragraphs 10.47 – 10.48)

105. 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. We agree that without such an exception the licensing regime would be unnecessarily burdensome.

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 (paragraphs 10.49 – 10.57)

106. A total of 9 responses were received, the majority agreeing with the recommendations.

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.

Statutory powers and duties (paragraphs 10.58 – 10.63)

107. Five responses were received on this recommendation on statutory powers and duties. Four of the responses were supportive of the recommendation.

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 (paragraphs 10.64 – 10.77)

108. 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.

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 (paragraphs 10.78 – 10.92)

109. We 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.

110. 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. The revised Code took effect in March 2002. 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.

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

112. File activity data – 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 individual, or when it requires assistance in debt collection action. 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.

113. Consumer credit scoring – "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. 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.

114. 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.

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.

Conclusion (paragraph 10.101)

115. 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.