

SUMMARY OF CONSULTATIVE PAPER

ISSUED BY

SUB-COMMITTEE ON DESCRIPTION OF FLATS ON SALE

OF THE LAW REFORM COMMISSION OF HONG KONG

(This summary is intended to give an outline of the consultative paper issued by the sub-committee. While it includes the consultative paper's main recommendations, those wishing more detailed explanation should refer to the report itself. The references in this summary to paragraph numbers are to paragraphs in the consultative document.)

Introduction and Overview

Background

1. In recent years, many overseas uncompleted residential properties have been offered for sale or advertised in Hong Kong. Overseas properties in this sense include those situated in the People's Republic of China ("PRC"), Australia, Canada, New Zealand, Singapore, Malaysia, Macau, United Kingdom, United States, Taiwan and Thailand. The value of these property transactions is great. PRC is the most significant source of overseas properties.

2. Despite the growing importance of overseas properties to the average Hong Kong buyer, prospective purchasers are sometimes given inaccurate, insufficient or even misleading sales information. The problem of inadequate and misleading sales descriptions is borne out by the increasing number of complaints involving overseas properties. According to statistics provided to us by the Consumer Council, from January 1990 to December 1995, there were 891 complaints against development projects mostly relating to the sale of PRC properties.

Terms of reference

3. In June 1992, the then Acting Attorney General and the Acting Chief Justice made the following reference to the Law Reform Commission:

"Should the law governing the protection of prospective purchasers and purchasers of uncompleted residential property in relation to inadequate or misleading sales information or particulars be changed and, if so, in what way?"

4. In November 1992 the Law Reform Commission appointed a sub-committee under the chairmanship of Professor Derek Roebuck to consider the

above terms of reference and to make proposals to the Law Reform Commission for reform. In September 1994, the sub-committee completed their study on the first part of the reference relating to local uncompleted flats and made their proposals for reform to the Commission.

5. The present consultation paper covers the second part of the sub-committee's study under the above terms of reference, namely, **the sales descriptions of overseas uncompleted residential property**.

Sub-committee membership

6. The membership of the sub-committee (in respect of the second part of the reference) is:

Professor Derek Roebuck (Chairman)	Professor of Comparative Law, City University of Hong Kong Solicitor
Mr Tom Berry	Principal Solicitor, Lands Department
Ms Audrey EU Yuet-mee, QC	Barrister
Mr Andrew LEE King-fun	Principal Partner, Andrew LEE King-fun and Associates, Architects
Mr LIU Sing-cheong (since 27.1.1995)	Managing Director, Hang Cheong Surveyors Ltd Surveyor
Mr Patrick Sheehan	Lecturer in Law, University of Hong Kong Solicitor
Mr William SHIU Wai-chuen (since 19.11.1993)	Principal Assistant Secretary, Housing Branch, Government Secretariat
Mr Kennedy WONG Ying-ho (since 27.1.1995)	Managing Partner, Philip K H Wong, Kennedy Y H Wong & Co Solicitor
Mr Martin WONG Kwai-poon (since 27.1.1995)	Chief Complaints & Advice Officer Consumer Council

7. Mr Thomas LEUNG Moon-keung, Senior Crown Counsel, acted as the Secretary to the sub-committee.

Interim report

8. The consultative document contains the sub-committee's interim recommendations. The sub-committee shall present their final report to the Law Reform Commission after taking into account views on consultation.

9. Written comments should be sent to the Secretary, Sub-committee on Description of Flats on Sale, Law Reform Commission, 20th Floor, Harcourt House, 39 Gloucester Road, Wanchai, Hong Kong **on or before 18 November 1996**.

CHAPTER 1

The General Approach

Difficulties of controls over sales descriptions of overseas properties

(Paras 1.1 to 1.3)

10. Developers of overseas properties are mostly foreign companies which are not subject to Hong Kong laws. Advertisements for overseas properties often appear in foreign newspapers or magazines which are circulated in Hong Kong. It is difficult to control the contents of these advertisements.

11. Local estate agents sometimes organise guided tours for potential purchasers to the building sites in the foreign country. It is difficult for Hong Kong authorities to control the quality of sales information provided at the site in the foreign country.

Estate agent's responsibility for provision of basic sales information

(Paras 1.7 to 1.8)

12. **We recommend that any licensed estate agent in Hong Kong handling overseas uncompleted residential property must provide prospective purchasers with some basic sales information in sales brochures and price lists.**

(Para 1.9)

13. Making licensed estate agents primarily responsible for providing sales information will overcome many of the enforcement problems involved in regulating sales descriptions of overseas property. Furthermore, as estate agents are often the purchasers' only source of information on the overseas project, it is not unreasonable to expect estate agents to ensure that the sales information provided to prospective purchasers is accurate.

All sales must be handled by licensed estate agents in Hong Kong

(Paras 1.13 to 1.16)

14. **We recommend that any vendor of overseas uncompleted residential property must engage a licensed estate agent in Hong Kong. However, this requirement shall not apply to the sale of a single dwelling.** *(Para 1.18)* Licensed estate agents in Hong Kong will, under our proposal, be given a monopoly over the sale of overseas uncompleted residential property in exchange for the responsibility for the provision of sufficient and accurate sales descriptions to purchasers.

15. **We recommend that no media in Hong Kong (including television, radio and printed media) shall publish an advertisement for sale of overseas uncompleted residential property unless it refers to a licensed estate agent in Hong Kong, together with the estate agent's licence number. However, the requirements mentioned in this paragraph shall not apply to advertisements for the sale of a single dwelling, not to advertisements of overseas property not put up for sale in Hong Kong.** *(Para 1.19)*

16. **We recommend that the estate agent who is referred to in the advertisement shall be liable for all false or misleading information in the advertisement and in all sales brochures not forming part of the advertisement.** *(Para 1.21)*

Language ambiguities

17. There are cases in which language ambiguities are used in the sales brochure or advertisement to mislead purchasers. **We recommend that any ambiguity in any term used in any advertisement or sales brochure shall be construed in favour of the purchaser.** *(Para 1.22)*

18. **We recommend that anything in any advertisement or sales brochure which is false or misleading should constitute a breach of the proposed legislation.** *(Para 1.23)*

The availability of sales brochure *(Paras 1.24 to 1.27)*

19. We consider that sales brochures should be made available to purchasers. Licensed estate agents should have the responsibility to make the sales brochure available. This is in line with our general approach which puts primary responsibility for supplying sales information on licensed estate agents.

20. **We recommend that up-to-date sales brochures must be made available to prospective purchasers. It should be the licensed estate agent's responsibility to make available the sales brochure. If the developer does not compile the sales brochure, it will be the licensed estate agent's responsibility to prepare the sales brochure.** *(Para 1.28)*

21. **We recommend that the sales brochure must be available in Chinese. If there are discrepancies between the Chinese and any other**

version of the sales brochure, purchasers can choose which version or part thereof is applicable. *(Para 1.29)*

22. **We recommend that sales brochure must be available from the time the property is first advertised for sale. Moreover, any invitation to buy property can only be made if sales brochures are available to prospective purchasers at that stage.** *(Para 1.30)*

CHAPTER 2

Date of Completion and Date of being Ready for Occupation

Delay or total project failure *(Paras 2.1 to 2.2)*

23. A common complaint by purchasers of uncompleted overseas properties is that the development is delayed or worse still the project fails altogether. There is currently a local term called "lan mei" properties, which literally means "broken tail". This term refers to those developments which have failed to be completed for various reasons. The "tails" of the developments have broken and purchasers can never expect to see the property come into being.

Extension of date of completion *(Paras 2.5 to 2.6)*

24. Many sale and purchase agreements of overseas properties contain clauses allowing the extension of the date of completion in specified situations. Such special reasons are very much in the developer's favour. **We recommend that the sales brochure must state the grounds on which the date of completion can be extended.** *(Para 2.18)*

Measures to ensure development on schedule and to prevent project failure

(Paras 2.7 to 2.14)

25. In our view, nothing can really ensure a development progressing on schedule because there are many factors affecting the progress of construction which may be outside the developer's control. We consider that what purchasers need are some financial measures to protect the deposits and instalments paid by them in the event of delayed completion or project failure.

26. **We would make the observation that Government should undertake study to find out the appropriate financial measures (including stakeholding, trust account, insurance, bonds put up by developers) to protect all deposits and instalments paid by purchasers in the event of delayed completion or project failure.** *(Para 2.13)*

27. **We recommend that the sales brochure must state whether there are any mechanisms for protecting all deposits and instalments paid by purchasers in the event of delayed completion or project failure.** *(Para 2.19)*

Date of being ready for occupation

28. In our view, what really matters to the purchaser is the date by which the property will be ready for occupation.

29. **We recommend that the sales brochure must state the date of the property being ready for occupation. The term "ready for occupation" shall mean:**

- (i) all fittings and finishes which are specified in the list in paragraph 3.13 and which are applicable to the property concerned have been installed, unless they are stated to be excluded in the sales brochure; and**
- (ii) there is reasonable access to the property; and**
- (iii) the utilities stated to be available in the sales brochure have been connected; and**
- (iv) all local permission needed for occupation has been obtained.**

(Para 2.17)

CHAPTER 3

Fittings and Finishes

Problems with descriptions of fittings and finishes *(Para 3.4 to 3.6)*

30. Vague descriptions are often used in sales brochures. The exact types of fittings and finishes used are seldom specified. There are, for example, such vague descriptions as "in accordance with government standards", "good quality", "pretty", "deluxe", "high class" and "imported".

31. The brands and countries of origin of the fittings and finishes are seldom specified in the sales brochures. There have been cases in which developers have substituted materials of inferior quality because of unforeseen rises in the prices of the intended materials.

A reasonable level of disclosure is sufficient *(Paras 3.7 to 3.10)*

32. We do not consider it desirable to pitch the level of disclosure too high in the case of overseas property. A reasonable level of disclosure or description of the quality of fittings and finishes will suffice.

33. **We recommend that if the sales brochure states that certain fittings and finishes will be provided, it must also state the types of materials intended for the fittings and finishes. Moreover, the sales brochure must at least contain details of the following list of fittings and finishes:**

Exterior finishes

External walls, windows, verandah/balcony.

Interior finishes

Main entrance lobby, typical lift lobby, internal walls and ceilings, floors, bathroom, kitchen.

Interior fittings

Doors, bathroom, kitchen, bedrooms, telephone and aerials, electricity, gas/electricity supply, water supply and pipes.

Miscellaneous

Lifts, letter box, refuse collection, water/electricity/gas meters.

(Para 3.13)

34. We recommend that if the intended materials become unavailable, developers should be allowed to use substitute materials provided that the substitute materials are of comparable quality and standard to the intended materials.

(Para 3.14)

35. We recommend that any description of the fittings and finishes in the sales brochure must be accurate.

(Para 3.15)

Mock-up flats

36. Mock-up or sample flats are sometimes put up to show the quality of the fittings and finishes. The main problem with mock-up flats is that they are often pulled down before completion of the actual units. It is therefore difficult to ascertain any differences in the standard between mock-up flats and actual units. **We recommend that the standard of fittings and finishes in the mock-up flats, if any, must be consistent with that stated in the sales brochure and that of the actual units.** *(Para 3.16)*

CHAPTER 4

Utilities

Properties without water and electricity supplies *(Paras 4.3 to 4.5)*

37. There were some instances of a few overseas developments which were without water and electricity supplies when vacant possession was handed over to purchasers.

38. **We recommend that the sales brochure must state whether connection to water, sewage and drainage will be available upon the completion of the property. Unless water, sewage and drainage are provided by a public system, the type of water, sewage and drainage systems must be specified in the sales brochure.** *(Para 4.9)*

39. **We recommend that the sales brochure must state the source of electricity supply, its voltage and ampage.** *(Para 4.10)*

40. **We recommend that if fuel (other than electricity) is provided to the property, its sources and uses must be stated in the sales brochure.** *(Para 4.11)*

Costs of connection *(Para 4.6 to 4.8)*

41. There have been complaints from purchasers that they were unaware that connection fees for water and electricity were to be charged. In some cases, although purchasers knew of such charges, they were surprised with the level of the charges which amounted to several thousand dollars.

42. **We recommend that the sales brochure must state the current estimate of costs of connection, if any, to utilities at the time of sale together with a general warning that the costs may change. Unless the sales brochure has stated that the costs of connection are to be borne by purchasers, purchasers cannot be required to pay for them, or if purchasers are required to pay under the general law, they shall be entitled to reimbursement from the developer.** *(Para 4.12)*

CHAPTER 5

Location of Property and Transport Facilities

Misleading descriptions of location of property *(Paras 5.3 to 5.5)*

43. Advertisements and sales brochures of overseas properties may give a misleading impression of the location of the property. The proximity of the property to city centres and highways may be exaggerated. Location plans are sometimes provided in the sales brochures but without measurement scales. Purchasers thus form misleading impressions of the proximity of the property to city centres. The development's proximity to Hong Kong is also sometimes exaggerated.

Misleading descriptions of transport facilities *(Paras 5.6 to 5.9)*

44. Advertisements and sales brochures sometimes contain misleading descriptions of the availability of transport facilities. They state that the developments are close to major transport facilities and highways. But the transport facilities and highways are being planned or still under construction.

45. **We recommend that the sales brochure must contain a map/location plan which is accurate and drawn to scale and shows the orientation. Any statements about the travelling time, travel distance, and ground distance must be true and not misleading.**

Pictorial representation

46. The sales brochure sometimes contains a misleading artist's impression of the surroundings of the development. We have come across cases in which the artist's impression shows that the development is surrounded by trees but in fact it turns out to be among blocks of buildings. **We recommend that any pictorial representation of the location and surroundings of the development must be accurate and not misleading.** (*Para 5.15*)

Car-ports and car parks (*Para 5.13*)

47. We have considered whether or not the sales brochure should state the location of the car-ports and car parks. We have come to the view that in the case of overseas developments, it may be difficult for developers to state the whereabouts of the car-ports and car parks. We prefer not to make any recommendation on car-ports and car parks.

CHAPTER 6

Gifts and Benefits

Gifts and benefits for purchasers (*Paras 6.1 to 6.10*)

48. In order to promote sales, some advertisements for overseas properties contain promises for gifts or benefits for purchasers. Furniture items are the common promised gifts. The Consumer Council has found some examples of misleading promises of gifts or benefits contained in advertisements for overseas properties. The promised quantities of gifts were not available to every purchaser.

49. In order to attract purchasers, especially those who buy overseas properties for investment purposes, some advertisements stated the property's expected rental returns. However, the advertisements did not mention that the figures were for indication only and had no binding effect.

50. There are other forms of gifts and benefits being advertised. They include vehicle licences, cash coupons, air tickets, car park spaces or even another flat. But these gifts are usually given subject to conditions, such as participation in lucky draws, which are not stated in the advertisements.

51. To some purchasers, the most attractive form of benefit is that purchasers of property under the scheme will get foreign passports. The problem with some of these promises of passports is that the nationality scheme may be true at the time of the advertisement but fails to materialise later because of changes in conditions.

52. **We recommend that anything stated in advertisements or sales brochures about gifts and benefits including nationality schemes must be accurate and not misleading.** *(Para 6.13)*

53. **We recommend that if the advertisement or sales brochure states that nationality or right of residence can be acquired by buying the property, it must contain a general warning advising prospective purchasers to consult the relevant consulates on the validity of the nationality scheme and that the granting of nationality and residence or otherwise will depend on the individual's background.** *(Para 6.14)*

CHAPTER 7

Financing Arrangements

Availability of mortgage facilities *(Paras 7.1 to 7.4)*

54. In order to boost purchasers' confidence in the developments, some advertisements and sales brochures state that mortgage facilities are provided by banks in Hong Kong or overseas. Most of these advertisements and sales brochures, however, do not provide the mortgage details such as the name of the banks, mortgage ceilings, interest rates, maximum duration of loan. It is a common misconception held by many purchasers that they will always be able to obtain the maximum mortgage as advertised.

55. **We recommend that where an advertisement or the sales brochure states that mortgage facilities are available, it must carry a general warning advising prospective purchasers to find out from banks or other financial institutions the exact details of the mortgage facilities and that the granting of mortgage facilities or otherwise will depend on the individual's credit and other background.** *(Para 7.7)*

56. **We recommend that where an advertisement or the sales brochure states that mortgage facilities are available, the banks or other institutions providing such facilities must be identified.** *(Para 7.9)*

Costs of setting up mortgage facilities being passed onto purchasers *(Paras 7.5 to 7.6)*

57. **We recommend that where the developer arranges mortgage facilities for prospective purchasers and intends to pass on to purchasers the costs of setting up such facilities, the amount of such costs must be stated in the sales brochure. Unless the sales brochure has stated that such costs are to be borne by purchasers, purchasers cannot be required to pay for them, or if purchasers are required to pay under the general law, they shall be entitled to reimbursement from the developer.** *(Para 7.8)*

CHAPTER 8

Price of Property

Full information on price necessary (*Paras 8.3 to 8.4*)

58. To make an informed choice of whether to buy any property, the purchaser must be able to ascertain the price. There is, however, evidence that not all information given to prospective purchasers is reliable. **We recommend that the price list must state the price of all flats put up for sale. Moreover, if the price will vary or some premium be charged according to some characteristics of the purchaser, rather than the qualities of the property, then that difference or the premium must be stated in the sales brochure or price list.** (*Para 8.7*)

Cooling-off period

59. Some purchasers buy overseas property on the spur of the moment because of cheap prices (relative to local property) quoted in the advertisement or price list. Before committing themselves to the transactions, they may not have thoroughly considered relevant factors such as financial arrangements and location of the property. We take the view that purchasers should be given a chance to reconsider the transaction within a reasonable period after the preliminary agreement.

60. **We think it desirable to have a 3-day cooling-off period after signing of the preliminary agreement (which includes reservation agreement, memorandum of sale etc). If purchasers do not purchase the property after signing the preliminary agreement, they may have to pay such administrative fees as may be fixed by the appropriate authority. Licensed estate agents will be entitled to the administration fees.** (*Para 8.6*)

CHAPTER 9

Restrictions on Sale of Property to Foreigners

Restrictions on sale of property to non-residents or foreigners (*Paras 9.1 to 9.8*)

61. As there are no legal or other restrictions on the sale of Hong Kong properties to foreigners or non-residents, purchasers of overseas properties may be unaware that some overseas countries have imposed restrictions on land ownership by non-residents or foreigners. Few advertisements and sales brochures give details of such restrictions.

62. There are various restrictions on sale of property to foreigners or nationals resident outside a country. Broadly speaking, there are restrictions as to ownership, the tenure of the property and mortgage arrangements. Apart from these restrictions, a foreign purchaser is often faced with foreign exchange controls and special tax implications arising from the sale and purchase of property.

63. We recommend that the sales brochure must contain the following information:
- (i) **all legal restrictions on the eligibility of foreign purchasers or purchasers who are nationals but reside outside the country to purchase property and the legal nature and classification of such property in that country (for example, residential, farmland) and any restrictions on tenure which foreigners can acquire;**
 - (ii) **any restrictions on mortgage arrangements for foreign purchasers or purchasers who are nationals but reside outside the country; and**
 - (iii) **the tenure of the property (for example, whether it is freehold or otherwise).**

(Para 9.13)

CHAPTER 10

Miscellaneous Information

Transaction fees *(Paras 10.1 to 10.3)*

64. Transaction fees are legal costs and other fees arising in respect of the property transaction. These include costs of legal documentation (preparation, engrossment, execution and registration), plans, attestation fees, stamp duty, registration fees, any additional duties and sundry charges.

65. **We recommend that the sales brochure must state with whom the responsibility for legal costs, stamp duty and other transaction fees lies. Unless the sales brochure has stated that such legal costs, stamp duty and other fees arising in respect of the property transaction are to be borne by purchasers, purchasers cannot be required to pay for them, or if purchasers are required to pay under the general law, they shall be entitled to reimbursement from the developer. Information on the scales of legal costs, stamp duty and other fees arising in respect of the property transaction must be provided by estate agents to prospective purchasers and there must be a note to this effect in the sales brochure.** *(Para 10.4)*

66. **We recommend that details of any estate agents' commission payable by purchasers must be provided by the estate agents.** *(Para 10.5)*

Supplementary charges upon taking possession (*Para 10.6*)

67. Upon taking possession of the property, purchasers are often faced with various charges, including deposits for water, electricity and gas supplies. These supplementary charges are seldom stated in the sales brochure.

68. **We recommend that the sales brochure must provide an itemised list of supplementary charges payable by purchasers upon taking possession of the property. If the exact amounts of such charges are unknown, the fact that they are unknown and the obligation to pay them must be disclosed in the sales brochure. Unless the sales brochure has stated that such supplementary charges are to be borne by purchasers, purchasers cannot be required to pay for them, or if purchasers are required to pay under the general law, they shall be entitled to reimbursement from the developer.** (*Para 10.7*)

Liability for taxes (*Para 10.8*)

69. Purchasers of overseas property may face various taxes which are seldom, if ever, disclosed in the sales brochure. **We recommend that the sales brochure must state the purchasers' liability for any tax which may arise from the purchase of the property together with categories of the taxes liable.** (*Para 10.9*)

Tax implications (*Paras 10.10 to 10.13*)

70. In some countries there are special tax rates applicable to foreign buyers of property. For example, in buying PRC property foreigners have to pay a deed levy at 6 percent of the purchase price, whilst it will be 3 percent of the purchase price for purchasers who are Hong Kong, Macau or Taiwan residents.

71. As Hong Kong does not have a system of capital gains tax, few purchasers are aware of the possibility of such tax when they buy overseas properties. In some countries such as the PRC and UK, on resale of property, any chargeable gains are subject to capital gains tax.

Foreign exchange control (*Paras 10.14 to 10.15*)

72. Foreign purchasers may regard the acquisition of overseas properties as an investment and will expect to transfer the sales proceeds back to their home country or elsewhere after disposal of the property. However, in certain countries such as the PRC and Spain, there are exchange controls pursuant to which outward remittance requires prior government approval.

73. **We recommend that the sales brochure must contain a warning that there may be exchange controls and taxes arising from the sale and purchase.** (*Para 10.16*)

Date of printing of sales brochure

74. **We recommend that the date of printing of the sales brochure must be clearly set out.** (*Para 10.18*)

Saleable areas (*Paras 10.19 to 10.23*)

75. In our view, it should be mandatory to disclose the saleable area in the sales brochures because saleable area represents the actual floor space that purchasers can enjoy exclusively. However, there may not be a uniform definition of saleable areas among all overseas countries.

76. There are two ways to deal with possible differences in definitions. The first is to make it mandatory to adopt the definition used in Hong Kong. The second approach is to require the developers to adopt the definition of saleable area which is commonly used in the overseas country concerned.

77. The first approach has the advantages of being certain and familiar to local purchasers. But the definition may not be applicable to the special circumstances of overseas countries. Developers may have to re-calculate the saleable area to fit the Hong Kong definition. The second approach covers the situation in all countries. But the foreign definition is of no or little use to Hong Kong purchasers and in any event there is no certainty that it is satisfactory. In our view, the Hong Kong definition should be adopted in all sales brochure and advertisements.

78. **We recommend that the Hong Kong definition of saleable area must be adopted in all sales brochures and advertisements of overseas uncompleted residential property. The saleable area must be disclosed in the sales brochure.** (*Para 10.24*)

Fees charged by government authorities (*Para 10.25 to 10.26*)

79. **We recommend that unless the sales brochure has stated that any extra fees or charges payable by developers are to be borne by purchasers, purchasers cannot be required to pay for them, or if purchasers are required to pay under the general law, they shall be entitled to reimbursement from the developer.** (*Para 10.27*)

The tenure of the property

80. **We recommend that the sales brochure must state the nature and duration of the interests that purchasers will take in the property.** (*Para 10.29*)

Access and rights of way

81. **We recommend that where there are restrictions on the use of access or rights of way to the property or the site where the property is situated, the sales brochure must give details of the access and rights of way as well as the restrictions.**
(Para 10.31)

CHAPTER 11

Enforcement of the Recommendations

Legislation *(Para 11.4)*

82. Legislation is, in our view, the most effective way to enforce our recommendations. We propose that there should be new legislation giving effect to our recommendations.

Penalties *(Paras 11.5 to 11.11)*

83. We consider that the proposed legislation should carry the usual statutory sanctions of imprisonment and fines. In addition, there should, in our view, be statutory powers for the authorities to suspend, revoke or restrict an estate agent's licence.

(a) Intentionally or recklessly

84. In our view, a breach of the proposed legislation should carry a criminal sanction only if the breach is committed intentionally or recklessly. This will avoid developers or estate agents being penalised for unintentional errors or honest mistakes.

(b) Fines be the usual sanction

85. We take the view that fines should be the usual form of sanction. The maximum fine for an offence under our proposed legislation has to be very substantial to have sufficient deterrent effect.

(c) Imprisonment be available where fines not thought adequate

86. The majority of us have therefore come to the view that imprisonment should be available as a penalty only where fines are not thought adequate in all the circumstances of the case. It is the majority members' view that it is unlikely the Court will impose a prison sentence in most cases, but the fact that there is such a penalty available will serve as a deterrent.

(d) Suspension, revocation and restriction of licence

87. We consider that the appropriate body should have power to suspend, revoke or restrict the licence of an estate agent found in breach of the provisions of the proposed legislation. This sanction should, in our view, be available in addition to any other penalty that may be imposed by the Court.

(e) *"Due diligence" defence*

88. However, a defendant to a charge or an enquiry by the appropriate body under the proposed legislation should, in our view, be able to invoke the "due diligence" defence if he can show that he has taken all reasonable steps and exercised all due diligence to avoid committing the offence. Moreover, we consider that a defendant may also invoke the "due diligence" defence by showing his reliance on information given by another, provided he can show that it was reasonable for him to have relied on the information.

Civil remedies (*Paras 11.12 to 11.16*)

89. We take the view that the proposed legislation should provide for civil remedies which enable purchasers and sub-purchasers who buy before the time of completion to claim damages for loss suffered as a result of a breach of the proposed legislation. We also take the view that a breach of the proposed legislation should be a statutory tort.

The enforcement body

90. We will leave to Government to decide if the Estate Agents Authority, or indeed any other existing statutory body or one to be created, is the appropriate body for enforcing the proposed legislation.

Our recommendations on enforcement (*Paras 11.18 to 11.26*)

91. **We recommend that our recommendations should be enforced by legislation.**

92. **We recommend that a breach of the proposed legislation will carry criminal or other sanctions only if the breach is committed intentionally or recklessly.**

93. **We recommend that the proposed legislation should carry the usual statutory sanctions of imprisonment and fines.**

94. **We recommend that fines should be the usual form of sanction. The maximum fine for an offence under our proposed legislation should be very substantial to have sufficient deterrent effect.**

95. **We recommend that imprisonment should be available as a penalty only where fines are not thought adequate in all the circumstances of the case.**

96. **We recommend that there should be statutory powers for the appropriate body to suspend, revoke or restrict an estate agent's licence for acts or omissions in breach of the proposed legislation. This sanction should be available in addition to any other penalty that may be imposed by the Court.**

97. We recommend that a defendant to a charge or an enquiry by the appropriate body under the proposed legislation can invoke the "due diligence" defence if he can show that he has taken all reasonable steps and exercised all due diligence to avoid committing the offence, or has relied on information given by another, provided he can show that it was reasonable for him to have relied on the information.

98. We recommend that there should be civil remedies which enable purchasers, and sub-purchasers who buy before the time of completion to claim damages against the developer or the estate agent for loss suffered as a result of a breach of the proposed legislation. A breach of the proposed legislation should be a statutory tort. This remedy of damages for breach of the proposed legislation should only be available to purchasers, and sub-purchasers who buy before the time of completion but not potential purchasers even if they can show that they have suffered loss.

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