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Comment Report of the Task Force on Youth Drug Abuse

Submission to Panel on Education, Legislative Council

Chong Yiu Kwong, Chairperson

Terminology

1. Recommendation 4.1 of the Report of the Task Force on Youth Drug Abuse (the “Report”) recommends that drug abuse (濫藥) should become “吸毒” in Chinese and drugs should be called “毒品” instead of “藥物”. “Psychotropic substances” should be referred to as “危害精神毒品”.
2. The Report does not define drugs. However, in footnote 1, it refers to the definition of dangerous drugs under the Dangerous Drugs Ordinance, Cap. 134. Do “drugs” equate to “dangerous drugs”? For a drug prevention policy, such a definition is a “must”.
3. In the United Nations Office on Drugs and Crime, “drug” is “a substance people take to change the way they feel, think and behave.”
4. In UK, the DfES (Department of Education and Skills) Guidance 92/2004 “Drugs: Guidance for Schools”, February 2004, the document refers drugs as illegal drugs (those controlled by Misuse of Drugs Act 1971); legal drugs, including alcohol, tobacco, volatile substances (those giving off a gas or vapour which can be inhaled), ketamine, khat and alkyl nitrites (known as poppers); and over-the-counter and prescription medicines.
5. According to paragraph 4.9 of the Report, “drug abuse” does not convey the same degree of seriousness as “吸毒” in Chinese. The Government may need to consider whether the current terminology used by non-Chinese speakers may have similar problems of underestimating the seriousness of the use of dangerous drugs and whether better wordings may be promoted. The Government should also study the situation of ethnic minorities to evaluate the seriousness of the drug abuse problems in different ethnic minority groups and to make sure that proper attention and services are not just given to the Chinese community.
6. The Task Force should mainstream the drug policy by race equality. The promotion and teaching materials should be as multilingual as possible (not just bilingual) and be accessible by all

regardless of their race.

Breakdown of the current mechanism?

7. Under section 34 of the Protection of Children and Juveniles Ordinance, Cap. 213, a child or juvenile in need of care or protection¹ can be brought before the Juvenile Court. The Court may order the child to conduct drug testing. Under section 45A², the Director of Social Welfare may require the child to do drug testing when he has reasonable cause to suspect that a child or juvenile is, or is likely to be, in need of care or protection.
8. Without analyzing the effectiveness of the present regime, the public has not got a full picture of the issue to form an informed view on the Government's proposals. Is there any study of the shortfall of resources provided to the Juvenile Court and Social Welfare Department in this regard? If so, how much resources have to be invested in different units (such as judiciary, Social Welfare Department and schools)? If sufficient resources are allocated, is the new drug testing proposal necessary?

Voluntary Drug Testing based on Consent

9. According to paragraph 7.41 of the Report, compliance to drug testing may be achieved by peer pressure or other means. The Task Force should realize that peer pressure may be one of the main causes for drug abuse. Should children submit to drug testing by peer pressure, how may they resist peer pressure for taking drugs? This illustrates that one of the problems is how our government and schools treat our children.
10. We question whether there is genuine consent by parents and students to this voluntary scheme. We also doubt the effectiveness of such a scheme. In reality, we understand that there are schools about to participating in this scheme. We make the following suggestions to improve the scheme.
11. Voluntary scheme may only achieve its purpose if there is genuine consent by parents and students through their active participation. Though parents or students may refuse drug testing under such a voluntary scheme, they may be suspected of taking drugs and be discriminated against by peers. Some parents therefore should be given a chance to opt for schools with voluntary drug testing while some may choose not to. In order to give a genuine choice to parents

¹ Section 34(2) of Cap. 213: "For the purposes of this Ordinance, a child or juvenile in need of care or protection means a child or juvenile-

- (a) who has been or is being assaulted, ill-treated, neglected or sexually abused; or
 - (b) whose health, development or welfare has been or is being neglected or avoidably impaired; or
 - (c) whose health, development or welfare appears likely to be neglected or avoidably impaired; or
 - (d) who is beyond control, to the extent that harm may be caused to him or to others,
- and who requires care or protection. (Replaced 25 of 1993 s. 6)"

² Section 45A(1) of Cap. 213 : Where the Director of Social Welfare has reasonable cause to suspect that a child or juvenile is, or is likely to be, in need of care or protection he may-

- (a) cause a notice to be served on any person having custody or control of the child or juvenile requiring that person to produce the child or juvenile for an assessment by a medical practitioner, clinical psychologist or an approved social worker of the state of his health or development or of the way in which he has been treated; or
- (b) require any person having the custody or control of the child or juvenile to allow the Director of Social Welfare to observe the condition of the child or juvenile.

and students, two important measures should be adopted by the Government. First, the **Education Bureau (EDB) should mandate that all the schools should disclose their drug policy publicly, including whether there is a voluntary drug testing scheme.** Second, in order to give a genuine choice to parents and students, the **EDB should request that schools draft a school parent agreement on the drug policy.** Parents should have the choice of signing or refusing to sign such an agreement before the commencement of every school year. The agreement should set out the details of the procedure of drug testing (such as how the sample be collected and how confidentiality would be protected) and what action will be taken. It should be made clear that the test results are not turned over to any law enforcement authority. In the U. S. leading authority *Board of Education v Earls*³, drug testing only applies to students who participate in extracurricular activities. The test results will not lead to investigation of law enforcement agencies. Neither do the test results lead to the imposition of discipline⁴ nor have any academic consequences.⁵ Even if the parents agree to such a scheme, before each testing, consent by the child should still be obtained. Reprisals or discrimination should be prohibited or prevented for those who refuse to undergo the drug test.

12. However, at paragraph 7.41 of the Report, it states that “[i]n any case, schools will be discouraged from dismissing students found to have abused drugs.” In other words, schools may impose any disciplinary punishment, including exclusion from school. It is submitted that the **drug testing results, if any, should not result in criminal investigations, school disciplinary action or any academic consequences.** We submit that the sole purpose of the test is to help and prevent drug abuse instead of punishment.
13. A drug policy cannot succeed without full participation of students. The EDB often emphasizes school based approach without ensuring students’ participation. School based approach will therefore probably be a top-down approach by imposing the decision of a school management committee without even listening to the views of students. Drug education is a key component of drug policy. In the UK, in the above DfES Guidance 92/2004, drug education should reflect the view of pupils so that it is relevant and appropriate. Pupils wanted “their views and opinions listened to”, “to engage in discussion and debate”, “as much information as possible; they do not want to be told just to “say no””; “how to cope with emergency, drug education to be given greater emphasis in primary schools”⁶. The EDB should ensure the full implementation of article 12 of the Convention on the Rights of the Child (CRC): “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child being given due weight in accordance with the age and maturity of the child.” After informed discussions of the students, secondary schools may be allowed to express their views on a confidential basis to ensure the fullest expression of their will, say through a

³ *Board of Education of Independent School District No. 92 of Pottawatomie County, et al. v Earls, Lindsay, et al.* (2002) 536 US 882, 153 L Ed 2d 735, 122 Ct 2559, 537. This case was cited by the Report at paragraph 7.7. A public school district requires all students who take part in competitive extracurricular activities to submit to urinalysis drug testing. A student challenged the policy by litigation. He won in the Court of Appeal but failed in the Supreme Court only by a 4 to 5 votes.

⁴ For a disciplinary procedure in school, in a recent UK reported case *R (on the application of M) v Independent Appeal Panel* [2004] EWHC 1831 Admin (27 July 2004), Newman J, a High Court judge held that the standard of proof of smoking of drugs on school premises is balance of probabilities. It does not follow the ruling of the Court of Appeal in *R (S) v The Governing Body of YP School* [2003] EWCA Civ 1306, that the criminal standard should be applied, i.e. the school had to be sure that the child had done what he had been accused of.

⁵ *Ibid.*, 536 US 836, 837

⁶ DfES (Department of Education and Skills) Guidance 92/2004, February 2004 [10918] For further information on pupil participation, see: www.wiredforhealth.gov.uk Information on the evidence base for drug prevention, see: www.hda-online.org.uk and www.drugs.gov.uk/NationalStrategy/Young People/Blueprint

referendum by all students by secret ballot whether to adopt such a voluntary scheme.

Compulsory Drug Testing

14. At Recommendation 7.2 of the Report, the Task Force consults the public as to whether the proposed compulsory drug testing scheme should apply.⁷
15. In the UK, according to Appendix 10: Guidance on the use of sniffer dogs and drug testing in schools of the above DfES Guidance, schools may invite the police or private companies to bring sniffer dogs onto school premises or [employ] drug testing. However, they should involve local partners, including the police and consider various factors set out in that Appendix. UK schools considering sniffer dog search without the authority of a police warrant have to exercise extreme caution before doing so. If there are no reasonable grounds for suspicion and prior consent has not been sought, those UK schools that use sniffer dogs as a deterrent are doing this at their own risk, exposing themselves to legal challenges by parents and pupils under the UK Human Rights Act.
16. It is submitted that **any drug testing involving no suspicion must not be adopted in Hong Kong**. Individualized reasonable suspicion of drug abuse and the consent of the subject should be conditions for every use of drug tests, even in a school setting. Attempts to rely on the US precedents, like *Board of Education v Earls*, for any drug test involving no suspicion have to be exercised under extremely caution because of the stringent restrictions for justifying such a kind of test imposed by the court.
17. We note that paragraph 7.34 and footnote 12 of the Report cited an example of a case requiring a driver to undergo a breathalyzer test, its result might be used as evidence. We opine that this example is not appropriate as it is much more difficult to collect evidence of any alcohol consumption without conducting the test on a timely basis.
18. In the US case *Board of Education v Earls*, the Supreme Court held that the school district policy does not violate students' privacy rights under the US Constitution (the Fourth Amendment's prohibition against unreasonable searches and seizures) because of a number of important factors:
 - a. The drug test only applied to those who took part in competitive extracurricular activities that they voluntarily participated in. They had therefore a limited expectation of privacy as did athletes.
 - b. The sample collection procedure was not intrusive. Test results were kept in confidential files separate from the student's other records and released to school personnel only on a "need to know" basis.
 - c. The invasion of privacy was not significant because if students failed the test, they would not be arrested nor dismissed. Hence, it was an administrative search instead of a criminal search. There would be no imposition of disciplinary measures nor would it have any academic consequences if a positive result was found. Repeated positive tests would only lead to restrictions on extracurricular activities.⁸

⁷ Under CRC, the definition of a children are those under 18, any special measures targeted at children should not cover any person who is 18 or above. Paragraph 7.51 of the Report to suggest drawing a line at 21 of age should not be considered.

⁸ After the first positive test, the school contacts parents for a meeting. The student may continue to take part in the activity if within five days of the meeting the students show proof of receiving drug counselling and submits to a second drug test in two weeks. For the second positive test, the student is suspended from participating in all extra-curricular activities for 14 days, must complete four hours of substance abuse counselling, and must submit to monthly drug tests. Only after a third

d. The District provided sufficient evidence of the need of the policy, which was a reasonably effective means of addressing the district's legitimate concerns in preventing, deterring, and detecting drug use.

19. The dissenting justices in this case expressed the view that the drug testing policy is not reasonable as the policy unfairly targeted a student population that was least likely to be at risk from illicit drugs and their damaging effects.⁹ It places an additional burden on teachers¹⁰ and the fear of lawsuits resulting from the test may chill enforcement of the program, rendering it ineffective in combating drug use. The student in this case argued that there should be a "real and immediate interest" to justify a policy of drug testing non-athletes. In order to justify the restriction of privacy rights under US Constitution, there should be in place a safety concerns or extraordinary safety or national security hazards.

Concluding Remarks

20. We note that at paragraph 52 of the Executive Summary of the Report, it states that "[t]here is no legal authority, whether under the existing legislation or at common law, for the law enforcement agencies to carry out the compulsory drug test, without the need for consent of the subject, for ascertaining whether a person has consumed dangerous drugs." We do not agree to extend the power to the law enforcement agencies. In our experience, it is easily subject to abuse, in particular, when the Independent Police Complaint Commission IPCC does not have any investigative powers.

21. It is important for all governmental bodies and public authorities involved in any drug testing and incidental measures to bear in mind that such policies and measures must be in line with the rights provisions in the Basic Law¹¹ and the Hong Kong Bill of Rights Ordinance.¹²

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positive test, the students will be suspended from participating in any extracurricular activity for the remainder of the school year, or 88 school days, whichever is longer. In other words, the only consequence of a failed drug test is to limit the students' privilege of talking part in extracurricular activities.

⁹ In UK, the DfES Guidance 92/2004, vulnerable groups are identified. They include those who are under Local Authority's care, truants and pupils excluded from schools, those who have been physically or sexually abused, homeless young people, those who are in contact with mental health services or the criminal justice system and those involved in prostitution. In Hong Kong, studies should be conducted to identify vulnerable groups and programs should be targeted at such vulnerable groups.

¹⁰ The samples are collected by a teacher who listens for the sounds of normal urination while the student is in a bathroom stall. Students were required to give a list of any prescription medications they are taking.

¹¹ Article 28 of the Basic Law protects privacy rights: "Arbitrary or unlawful search of the body of any resident or deprivation or restriction of the freedom of the person shall be prohibited."

¹² Article 14 of the Hong Kong Bill of Rights Ordinance, Cap. 383: "Article 17: "1.No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks." (cf. article 17 ICCPR)