The Hong Kong Bar Association's Submission
on the Proposed RESCUE Drug Testing Scheme

Introduction

1. The Hong Kong Bar Association ("**HKBA**") makes these submissions in response to the RESCUE Drug Testing Scheme Consultation Paper issued by the Action Committee Against Narcotics ("**the Committee**") in September 2013 ("**the Consultation Paper**"), by which the Committee seeks to consult the public on a drug-testing scheme named the RESCUE Drug Testing Scheme ("**the RDT Scheme**").

2. In summary, under the RDT Scheme, law enforcement officers ("**LEO**") will be authorised to compel a person to undergo a drug test, which includes a screening test and a laboratory test, the latter requiring a urine or blood sample for analysis. If the test result is positive, under a three-tier system, the person would be subject to counselling and treatment programmes, voluntary for the first time, *mandatory* for the second time in lieu of prosecution, and *prosecution* for the third time; whereas under a two-tier system, the person would have to accept either mandatory counselling and treatment programmes or he would be prosecuted even if he is tested positive for the first time.[1] Presumably, if the person refuses to submit to the mandatory counselling and treatment programmes, he would be prosecuted. There is, however, no explanation of what the "treatment" might involve and whether the person would be detained during the treatment.

Summary of HKBA's position

3. The HKBA opposes the introduction of the RDT Scheme for the following reasons:

   (i) The extraordinary and draconian police powers sought to be provided under the RDT Scheme will seriously interfere with fundamental constitutional rights;

   (ii) While the claimed objective of reducing drug abuse may appear to be genuine and well intended, it is not shown that it is *necessary* to address the problem by introducing the RDT Scheme.

An overview of the RDT Scheme

4. The proposal of compulsory drug testing originated from a report issued by the Task Force on Youth Drug Abuse in November 2008 ("**the Task Force Report**"), in response to which the HKBA has issued a position paper on 8 January 2009 ("**the Position Paper**") making extensive observations on the recommendations contained in the Task Force Report. In particular, the HKBA provided in the Position Paper a survey of the case law concerning drug testing schemes in the jurisdictions of United States, Canada, United Kingdom and European Court of

[1] See para. 3.33 of the Consultation Paper. Unless otherwise stated, paragraph references herein are to the Consultation Paper.

Human Rights, and observed that in the case law examined compulsory drug testing is only permitted in respect of narrowly defined groups of persons, and for very limited purposes. The observations in the Position Paper remain valid and do apply to point out the inadequacies of the proposed RDT Scheme. The Position Paper is attached as an annex to this Submission.

5. In the RDT Scheme, the extraordinary police powers are being justified to address an apparent health problem, i.e. drug abuse by young people, and not for the detection and prevention of crime. However, the legislation to be enacted to implement the proposed RDT Scheme could be used against persons of all ages (para. 3.25). Once a LEO "reasonably suspects" that there are drugs in the vicinity of a person displaying symptoms suggesting that he has taken drugs, the person would be arrested (para. 3.14), detained and taken to a police station where they would be required to undergo tests. It is a compulsory and coercive process: if the person refuses to follow the police officer, then he or she commits an offence; if he or she resists the police officer's action, then he or she commits an offence. The tests would include observations and physical tests (para. 3.15) and provision of an oral fluid sample (para. 3.16). If these relatively less but nonetheless intrusive tests indicate that a person may have taken drugs, then the person must provide a bodily sample (para. 3.17). The Consultation Paper is unclear whether this would be a urine sample and/or a blood sample. This testing process could take hours, during which the person is detained. If the person refuses any of the above, then he commits an offence.

6. Drug testing would be authorized when the LEO "reasonably suspects the person has consumed dangerous drugs" (para 1.2).

Fundamental constitutional rights at stake

7. Article 28 of the Basic Law provides that the freedom of the person of Hong Kong residents shall be inviolable, and arbitrary or unlawful search of the body of any resident or deprivation or restriction of the freedom of the person shall be prohibited. Article 5(1) of the Hong Kong Bill of Rights ("**BOR**") likewise provides that everyone has the right to liberty and security of person. Article 14 of the BOR provides that no one shall be subjected to arbitrary or unlawful interference with his privacy and everyone has the right to the protection of the law against such interference. [2]

8. The Supreme Court of Canada states authoritatively in *R v Tessling* [2004] 3 SCR 432 at para. 21 that:

> "Privacy of the person perhaps has the strongest claim to constitutional shelter because it protects bodily integrity and in particular the right not to have our bodies touched or explored to disclose objects or matters we wish to conceal. ..."

Also, the Supreme Court of Canada underlined in *R v Shoker* [2006] 2 SCR 399 at para. 23 that:

[2] See also Article 30 of the Basic Law.

"The seizure of bodily samples is highly intrusive ... it is subject to stringent standards and safeguards to meet constitutional requirements."

In 2013, the Supreme Court of Canada affirmed the above statement in *Shoker*, adding that it "drew no distinction between drug and alcohol testing by urine, blood or breath sample": *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd* [2013] SCC 34 (14 June 2013) at para. 50.

9. It is clear that the RDT Scheme, if implemented, would lead to serious intrusion into the freedom and privacy of the person. Interference of fundamental constitutional rights must be prescribed by law, which means that the relevant measure must be legally certain (including the scope of any discretion to be exercised by public officers),[3] and justified by the "proportionality test", which means that there must be a *legitimate aim* for the interference, and the interference must be *rationally connected* and *proportionate* to the aim. In cases involving fundamental rights, the Court has regarded the restriction as disproportionate unless it goes *no further than necessary* to achieve the legitimate objective in question.[4]

Insufficient justifications

What triggers RDT power

10. As indicated above, drug testing would be authorized when the LEO "reasonably suspects the person has consumed dangerous drugs" (para 1.2). This test seems to have subjective and objective elements:

    (i) the LEO suspects that the person has taken dangerous drugs, and

    (ii) the grounds for the LEO to hold such suspicion are objectively reasonable.[5]

11. This test may be similar to the power of arrest under section 50(1)[6] of the Police Force Ordinance (Cap 232).[7] Contrary to the statement of a "high threshold to

---

[3] See the Court of Final Appeal's judgment in *Leung Kwok Hung & Ors v HKSAR* (2005) 8 HKCFAR 229 at paras. 25-29.

[4] See the recent judgment of the Court of Final Appeal in *Kong Yunming v Director of Social Welfare*, FACV 2/2013, 17 December 2013, at para. 40; see also the recent decision of the Supreme Court of United Kingdom in *Bank Mellat v HM Treasury* [2013] UKSC 39 (19 June 2013) at paras. 68-76.

[5] Para. 1.1

[6] "(1) It shall be lawful for any police officer to apprehend any person who he reasonably believes will be charged with or whom he reasonably suspects of being guilty of-
    (a) any offence for which the sentence is fixed by law or for which a person may (on a first conviction for that offence) be sentenced to imprisonment; or
    (b) any offence, if it appears to the police officer that service of a summons is impracticable because-
    ..."

[7] *Yeung May Wan & Others v HKSAR* (2005) 8 HKCFAR 137, paras. 57 and 71.

trigger the RDT power" in para. 3.7 of the Consultation Paper, the threshold is low in operational terms.

12. The power would be triggered when there are (i) substances suspected of being dangerous drugs in the "near vicinity" of the person and (ii) the person's physical state, behaviour, and/or belongings show that he "may" have "just" taken drugs. (para. 3.5) The Consultation Paper is unclear what all these means. What does "near vicinity" mean - is it within 10 feet, the same room? What are the person's "belongings" that would give rise to suspicion. What time frame is "just taken drugs"? Could all persons in the vicinity of the drugs and who display the described symptoms be compelled to undergo testing?

13. The terms of the conditions in paras. 3.4 and 3.5 which must be present before the power is triggered do not give any real measure of protection. The trained LEO can always justify in his mind why he suspected a person has taken drugs, and his belief could not be successfully challenged. A person's physical state, e.g. flushed face, glazed eyes, slurred speech and uncoordinated movements, could be the result of alcohol ingestion and not from the ingestion or inhalation of drugs. Yet, if the LEO suspects that the person has consumed drugs, he could be taken away, by force if necessary, for compulsory drug testing.

14. There is a real danger that these powers would be abused or used in an arbitrary fashion by police officers. For example, if there was a gathering of people where suspected substances were present in a night club or at an outdoor music festival, and the people nearby or therein displayed signs of drug use, then all of the persons present could be detained and required to undergo mandatory testing.

15. The above discussion indicates that statutory conditions in terms of paras 3.4 and 3.5 for triggering the police powers of detention for compulsory drug testing can hardly satisfy the constitutional requirement of "prescribed by law" applying to a restriction of a fundamental right, which stipulates that a statutory discretion conferred on a public officer "must give an adequate indication of the scope of the discretion with a degree of precision appropriate to the subject matter".[8]

16. Further, the risk of abuse can be seen from what is happening with police identity checks. The power to detain a person for an identity check is being abused: Hong Kong police carry out four times as many identity checks and on-the-spot searches as their counterparts in New York and London.[9] The power to stop, detain and search a person is under section 54(1) of the Police Force Ordinance.[10]

---

[8] See *Leung Kwok Hung & Ors v HKSAR* (above) at paras. 25-29, 76.

[9] "*Police tactics queried after 16m spot checks last year*", South China Morning Post (24 November 2013), pages 1 and 3

[10] Which provides that: "If a police officer finds any person in any street or other public place, or on board any vessel, or in any conveyance, at any hour of the day or night, who acts in a suspicious manner, it shall be lawful for the police officer.

(a) to stop the person for the purpose of demanding that he produce proof of his identity for inspection by
the police officer -
(b) to detain the person for a reasonable period while the police officer enquires whether or not the person is suspected of having committed any offence at any time; and
(c) if the police officer considers it necessary to do so-

RDT Scheme not necessary *response*

17. While the objective of reducing drug abuse may appear to be genuine and well intended, it is not shown that the RDT Scheme is a *necessary* response to the problem.

18. The Consultation Paper notes that the existing measures implementing the recommendations in the Task Force Report have remarkably improved the drug abuse situation. The number of drug abusers has dropped very significantly since 2008: the overall number of drug abusers fell by 23% and the decline among those aged under 21 amounted to 54%.[11]

19. On the other hand, the effectiveness of compulsory drug testing scheme in reducing the number of drug abusers is at least doubtful. Three examples of overseas practice are referred to in the Consultation Paper, namely, Sweden, Singapore and United Kingdom, but no data have been provided about how effective the particular compulsory drug-testing scheme has been able to help identification, treatment and reduction in the number of drug abusers. [12]

20. Further, the Consultation Paper states the prevalent drugs taken by drug abusers are psychotropic substances which do not lead to immediate withdrawal symptoms and they are consumed in an inconspicuous manner by snorting or swallowing without any paraphernalia.[13] The drugs may also be consumed at private premises. The Committee recognises that it is "increasingly difficult to detect problems"[14]. In such circumstances, it is highly questionable whether providing this extra draconian power to LEOs would significantly help identification, treatment and reduction in the number of drug abusers.

21. Furthermore, the Consultation Paper is vague on details, and uses exaggerated, unsupported statements for justification:

    (1) The Consultation Paper uses statistics that are not relevant or useful to Hong Kong. The statistics in paras. 2.3-2.5 do not support such an alarming drug problem that warrants the extraordinary and draconian legislation proposed. There is no comparison with other jurisdictions.

    (2) The justification in para. 2.8 that drug abuse affects a person's performance at work and their co-workers "and to a larger extent the public". It is not known what the latter portion is meant to refer to. The last sentence, which suggests that "our society as a whole is paying the price" begs the question of what

---

(i) to search the person for anything that may present a danger to the police officer; and

(ii) to detain the person during such period as is reasonably required for the purpose of such a search."

[11] Para. 2.3. See also paras. 2.4 & 2.5.
[12] Paras. 2.35-2.37.
[13] Para. 2.12.
[14] Para. 2.12.

price. For example, are the effects worse than alcohol abuse or excessive gambling?

(3) Paragraph 2.18 states that "we have seen more reported cases of suicidal acts and violent acts committed by individuals suspected of having been under the influence of drugs". There is no provision of numbers and citation of credible research. This claim simply begs the question of whether the abuse of drugs was the cause of the suicide or the incidental symptom of an underlying problem.

(4) The statistics in para 2.21 are questionable. There is no accurate estimate of the cost to GDP of drug use. The statistics for the USA and Canada represent total illicit drug use of all types of drugs. Using these countries as examples is meaningless. If the drug problems in these countries are so grave, then the Committee may need to explain why they have in fact not put in place laws similar to the proposed RDT Scheme. Upon what basis does the Consultation Paper assume that the impact of drug use in Hong Kong could be ½ as much as Canada's?

(5) Paragraph 2.24 speaks of the "worsening situation of hidden drug abuse over the past few years". There is no objective basis for such a claim.

(6) Paragraph 2.32(b) speaks of the "epidemic nature of drug abuse behaviour". There is no support for such an alarmist statement. Again there is no basis for the statement of "a degree of severity" justifying the implementation of a drug testing scheme.

(7) Paragraph 2.33 likens the proposed drug testing to that which is in place for the testing of drivers suspected of having taken drugs. The analogy is misplaced and wrong. A person driving a vehicle whilst under the influence of alcohol or drugs is a real and present danger to persons and property.

(8) Paragraphs 2.34-2.37 refer to supposedly similar laws in Sweden, Singapore and the UK. Are they the only jurisdictions with such statutory powers? How have these laws been enforced in the respective jurisdictions and whether there have been constitutional challenges to them? The UK law only authorizes drug testing after a person has been arrested for an offence. The proposed RDT Scheme would not require the person's prior arrest for an offence to trigger the testing.

Facilitating prosecution

22. The HKBA is seriously concerned that in the proposed RDT Scheme, it is envisaged that if "the same person is caught and tests positive for a third time or more, he would be prosecuted and the positive drug test result would be admissible evidence to prove consumption at trial"[15]. In this regard, the HKBA reiterates its observation made in the Position Paper that in the case law examined,

[15] See para. 3.33.

tests results are not to be used for prosecution.[16] Even in the said three examples of overseas practice referred to in the Consultation Paper, it does not appear that tests results are to be used for criminal prosecution.[17]

23. The Consultation Paper states that the "purpose of [the RDT Scheme], as stated at the outset, is to help drug abusers"[18]. If this is the case, the HKBA questions why positive test results would be used for prosecution, which is inconsistent with the general practice including the examples referred to by the Committee. Considering the serious intrusion into fundamental personal freedom and privacy, the HKBA has not seen sufficient justification for facilitating prosecution by introducing the proposed RDT Scheme.

New Offence

24. In view of the above, the HKBA is strongly against introducing the proposed new offence of presence of dangerous drugs in bodily examples, the successful prosecution of which obviously depends on positive test results obtained through the proposed RDT Scheme.

Data Protection

25. As the HKBA has indicated in the Position Paper, any bodily samples taken from a subject and test results (including that of a visual observation test) will be caught under data protection principle 3 in Sch. 1 of the Personal Data (Privacy) Ordinance (Cap.486). The Grand Chamber of the European Court of Human Rights deplored in *S and Marper v United Kingdom* (2009) 48 EHRR 50 the retention of bodily and other samples taken from unconvicted persons and specifically considered the particular harm retention of data of unconvicted persons who are minors, given their special situation and the importance of their development and integration in society, referring to the special position of minors in criminal justice stated in Art. 40 of the UN Convention on the Rights of the Child. The HKBA is dismayed to find that the Consultation Paper envisages in para. 3.23 the establishment under the proposed RDT Scheme of a "separate database with strict guidelines on when the information could be retrieved", which apparently would mean the creation and retention of unsavory data of unconvicted persons, including minors, for access by police officers and possibly other LEOs. The HKBA objects to the proposed establishment of this database.

Extra-territorial issue

26. As to the extension of the offence of consumption of dangerous drugs outside the territorial limits of the HKSAR, it will raise many problems such as double jeopardy and evidentiary problems as already commented by the HKBA in the Position Paper[19]. The Committee has not addressed those problems in the Consultation Paper.

---

[16] See para. 28 of the Position Paper.
[17] See paras. 2.35 to 2.37.
[18] Para. 3.26.
[19] See para. 39 onwards of the Position Paper.

27. Extra-territorial offences are an exception to the general rule that countries only criminalize conduct occurring within their borders. There is no strong justification in para.3.40 to give extra-territorial effect to the drug consumption offence.

Conclusion

28. To conclude, the proposed Scheme represents serious intrusion into fundamental personal freedom and privacy, its effectiveness to reduce drug abuse is doubtful, and the necessity to introduce such a draconian scheme has not been shown.

Dated 30th December 2013.

Hong Kong Bar Association

(Annex)

THE HONG KONG BAR ASSOCIATION'S POSITION PAPER ON THE REPORT OF THE TASK FORCE ON YOUTH DRUG ABUSE

1. The Report of the Task Force on Youth Drug Abuse issued in November 2008 ("Report") contains a number of recommendations to combat youth drug abuse. In principle, the Hong Kong Bar Association ("HKBA") supports lawful, appropriate and proportionate measures to combat problems arising from youth drug abuse. The observations set out in this Position Paper deal with various recommendations contained in the Report which raise issues of human right protection and other constitutional issues, namely:

(1) Compulsory drug testing scheme
   (i) **Recommendation 7.1**: Introduction of new legislation to empower law enforcement officers to require a person reasonably suspected of having consumed dangerous drugs to be subjected to a drug test.
   (ii) **Recommendation 7.2**: To consider whether the compulsory drug testing scheme is to extend to young persons or all ages.
   (iii) **Recommendation 7.3**: To consider whether to adopt a two-tier or three-tier system in the compulsory drug testing scheme.
   (iv) **Recommendation 7.4**: That the compulsory drug testing scheme should provide for taking of bodily samples from a minor in the presence of a parent or legal guardian or an independent person.

(2) Extra territorial and cross border measures
   (i) **Recommendation 7.5**: To consider whether the offence of consumption of drugs should be extended to have extra-territorial effect.
   (ii) **Recommendation 10.1**: To step up cooperation with Mainland authorities including Hong Kong police obtaining from Mainland authorities information of youngsters caught abusing drugs in the Mainland.
   (iii) **Recommendation 10.3**: Where a young person is obviously intoxicated or otherwise incapacitated upon his return from the Mainland via a boundary control point, and that his health and well being give rise to concern, the Police should make

enquiries of this person and contact his or her parents if necessary.

(iv) **Recommendation 10.4**: The Government will advise parents to keep their under-age children's home visit permits, and inform them of the availability of a statement of travel records in respect of their children at the Immigration Department.

(3) Voluntary drug testing

(i) **Recommendation 7.7**: To commission a research project to devise possible school-based drug testing schemes for voluntary adoption by schools.

(4) Cyber patrols

(i) **Recommendation 9.5**: Cyber patrols for intelligence on drug trafficking and abuse to be strengthened.

COMPULSORY DRUG TESTING SCHEME

2. The Report postulates that a drug testing scheme may serve 4 main objectives: Monitoring and deterrence, early intervention, preventing drug abuse, and crime investigation and prevention. [para 7.1]

3. The Report recognizes that there is currently no legal authority for compulsory drug testing without consent and proposes the introduction of legislation "to provide for compulsory drug testing by our law enforcement agencies for the lawful purposes of crime investigation and prevention and protection of public health". [para 7.32 -7.37]

4. The subject of compulsory drug testing is of great controversy. Since compulsory drug testing involves taking of bodily samples, whether intimate or not, there is arguably a violation of the right to privacy (which is guaranteed under Art 14 of the Hong Kong Bill of Rights and Art 17 of the International Covenant on Civil and Political Rights) and also arguably a violation of the protection accorded by Art 28 of the Basic Law of the HKSAR against arbitrary or unlawful search of the body of any HKSAR resident. Canadian cases (to be discussed below) have also indicated that such drug testing could amount to discrimination.

5. It should be noted that in the jurisdictions examined below, the Courts have not condoned a blanket compulsory drug testing. The Courts have been careful to restrict any compulsory drug testing to very limited groups in the population on the basis that the test results would be used for limited purposes. Moreover, the Courts in jurisdictions examined below have not condoned compulsory drug testing which would ultimately lead to criminal prosecution.

6. The HKBA notes the discussion in the Report [para 2.6 - 2.31] in respect of drug abuse trend in Hong Kong. The HKBA is not in a position to comment on the seriousness of youth drug abuse in Hong Kong. The point that the HKBA wishes to stress is that any proposed legislative measures should be proportionate to the problems arising from youth drug abuse, no matter how well intended the proposed legislative measures may be.

United States

7. There is much case law on the legality of compulsory drug testing in the United States and most challenges have been based on a violation of the rights protected by the Fourth Amendment of the United States Constitution, which seeks to secure the right of the person against "unreasonable searches and seizures".

8. In *Skinner v Railway Labor Executives Assn.* 489 U.S. 602 (1989) and *National Treasury Employees v Von Raab* 489 U.S. 656 (1989), the US Supreme Court held that the government was allowed to conduct compulsory drug tests on government employees without the need for an individualized suspicion requirement when there is a "special need" or when the compelling governmental interests served by the regulations outweigh employees' privacy concerns. Thereafter, the US Courts have generally upheld compulsory drug testing in cases of motor vehicle operators, transportation workers, medical officers, aviation employees, police officers, fire fighters, government employees handling sensitive information, and prison guards. However the Courts have generally subjected these cases to careful scrutiny and have only upheld compulsory drug testing where there was a clear nexus between the nature of the job and possible dangers presented by possible drug abuse.

9. It should be noted that some States[1] have enacted legislation to restrict drug testing on private sector employees.

10. The US Supreme Court case of *Board of Education of Independent School District No. 92 of Pottawatomie County, et al, v. Lindsay Earls et al.* 536 U.S. 822 (2002) has been cited by the Report [para 7.7] in support of compulsory drug testing in the school setting. However, it should be noted that the drug testing scheme in place in the relevant school district in Oklahoma only applied to student athletes competing extracurricularly and involved taking a urine sample without direct observation. Positive test results would not result in any disciplinary action or academic consequences. The test results were not handed over to any law enforcement agency. They were kept in a confidential file and were only released to personnel on a "need to know" basis. The only consequence of a failed compulsory drug test result was a restriction on the student's privilege to participate in extracurricular activities. Moreover, the school district was able to demonstrate that there was an increase in drug use problem in their district. In these circumstances, the Supreme Court held that the school district was reasonable and did not violate the Fourth Amendment. This judgment was subject to trenchant criticism in the leading text on Fourth Amendment jurisprudence[2].

11. In spite of the availability of federal, state and local funding to facilitate schools in the United States to introduce compulsory drug testing of students, many school officials and parents have opposed compulsory drug testing of students. A publication of the American Civil Liberties Union and the Drug Policy Alliance entitled *Making Sense of Student Drug Testing: Why Educators Are Saying No* (2nd Edition, January 2006), provides a case based on research of pediaetricians, public health experts and educationalists that, apart from the claim that a policy of compulsorily testing students for drugs is an unwarranted invasion of privacy, compulsory drug testing *does not* effectively reduce drug use among young people and has many risks and drawbacks and leads to unintended consequences.

12. Recently, the Supreme Court of the State of Washington held that the policy of a school district requiring compulsory drug testing of student athletes (which was modelled upon a policy that passed federal muster in an earlier

[1] Connecticut, Maine, Rhode Island, Montana, Minnesota, Iowa, Vermont, and Hawaii.
[2] See LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (4th Ed, 2004) §10.11(c).

case of the US Supreme Court) violated the protection of the Washington State Constitution against searches "without authority of law": *York et al v Wahkiakum School District No. 200 et al* 163 Wn. 2d 297 (2008). The Supreme Court focused upon an analysis that primarily requires constitutional justification of a search by a valid warrant subject to "a few jealously guarded exceptions". A student athlete had a genuine and fundamental privacy interest in controlling his or her own bodily functions. A compulsory requirement upon the student athlete to provide his or her urine was a significant intrusion of his or her fundamental right to privacy. The school district's argument by reference to the federal jurisprudence discussed above that the special needs in the context of public schools constituted an exception to the warrant requirement was rejected.

13. On the other hand, in *Ferguson et al. v. City of Charleston et al.* 532 U.S. 67 (2001), the US Supreme Court held that a state hospital's performance of a diagnostic test to obtain evidence of a patient's criminal conduct for law enforcement purposes is an unreasonable search if the patient has not consented to the procedure.

14. A survey of the US authorities show that compulsory drug testing has been generally limited to public sector employees whose job nature may put the lives of others at risk and therefore passes a "special need" criterion. The case law relating to school drug testing is still in a state of flux and in any event, only a very restricted policy had been found to be "reasonable". Those cases should not be interpreted as endorsing a blanket approval on all school-based drug testing programmes. Rather, two observations may be made. Firstly, it should be remembered that students "do not 'shed their constitutional rights' at the schoolhouse door": *Goss v Lopez* 419 U.S. 565 (1975) at 574, US Supreme Court. Secondly, the jurisprudence of Washington State may be more apposite to the HKSAR than the jurisprudence of the federal jurisdiction in light of the language of Art 28 of the Basic Law of the HKSAR.

Canada

15. The Canadian Courts have generally not endorsed random compulsory drug testing. Challenges have been based on sections 7 and 8 of the Canadian Charter of Rights and Freedom. Section 7 protects the right to security and

section 8 protects the right to be secure against unreasonable search and seizure.

16. The case of *Entrop v. Imperial Oil* (2000) 50 O.R. 3d 18 (C.A.) (applying the test set out by the Supreme Court in the case of *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union*, [1999] 3 S.C.R. 3) shows that the Courts were reluctant to uphold random testing of employees especially in cases where a positive test result lead to termination of employment.

17. In the case of *Canadian Civil Liberties Association v Toronto Dominion Bank* (1998) 163 D.L.R. (4th) 193, the Federal Court of Appeal held that TD Bank's drug testing policy on employees constituted employment discrimination against drug-dependent persons.

18. Compulsory drug testing is endorsed via Canadian legislation relating to impaired driving and tests administered by the Correctional Services Canada on inmates. However even under such legislation, compulsory drug testing is not random and is restricted to situations where specified criteria are met[3].

19. A general survey of the case law shows that the Canadian Courts require there to be, amongst other things, an objective element in any mandatory drug testing programme before it will be sanctioned.

United Kingdom

20. The legal position of the United Kingdom is set out in the Report [paras 7.8 and 7.14]. It should be added that the results from drug tests are protected by the Data Protection Act 1998, which states that data can be obtained only where there is a lawful purpose for their collection and processing of the information must be with the consent of the data subject[4]. The legality of the United Kingdom's retention of bodily samples taken in connection with the investigation into a criminal offence had been the subject of litigation, which

[3] For example s 54 of the Corrections and Conditional Release Act provides that an inmate may be tested within an institution where a staff member believes on reasonable grounds that the inmate has committed a disciplinary offence for which a urine sample is necessary to provide such evidence. See also the case of *R v Dion*, unrep, CAQ, 31 May 1990; and *Jackson v Joyceville Penitentiary* [1990] 3 FC 55 (TD).

[4] See Schedules 1 and 2 of the Act.

is to be discussed below under the jurisprudence of the European Court of Human Rights.

European Court of Human Rights

21. The challenges in the European Court of Human Rights ("ECtHR") in respect of compulsory drug testing have been made on the basis of Art 8 (right to respect for private and family life) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention").

22. The general view of the ECtHR is that compulsory blood and urine testing amount to "interferences" within the meaning of Art 8(1) of the European Convention[5]. However some cases have upheld compulsory testing on prisoners on the basis that the practice complied with Art 8(2) of the European Convention[6].

23. In *Wretlund v Sweden* (Application No. 46210/99, 9 March 2004), the ECtHR upheld the compulsory drug testing administered by an employer on an employee. The Court considered that since the applicant was an employee working in a nuclear plant, that the test results were limited to detecting cannabis, that the test results were disclosed only to personnel involved in the drug policy programme, and the test results were not to be used for any other purpose, the compulsory drug testing was justified on the legitimate grounds of public safety and the protection of the rights and freedoms of others, in particular other employees.

24. In *Jalloh v Germany* (2007) 44 E.H.R.R. 32 [Grand Chamber], it was held that forcible medical treatment by an emetic was a violation of Art 3 European Convention. It was also held at para 71, "[any] recourse to a forcible medical intervention in order to obtain evidence of a crime must be convincingly justified on the facts of a particular case. This is especially true where the procedure is intended to retrieve from inside the individual's body real evidence of the very crime of which he is suspected."

---

[5] See *X v Austria* (1979) 18 DR 154; and *Peters v Netherlands* (Application No. 21132/93, 6 April 1994).
[6] See *Peters v Netherlands* (Application No. 21132/93, 6 April 1994) and *Galloway v United Kingdom* (Application No. 34199/96, 9 September 1998).

25. In the recent case of *S and Marper v United Kingdom* (Application No. 30562/04 and 30566/04, 4 December 2008), a Grand Chamber of the ECtHR held that the retention by the United Kingdom authorities of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences failed to strike a fair balance between the competing public and private interests and such failure went beyond any acceptable margin of appreciation in context, thus constituting a disproportionate interference with the applicants' right to respect for private life and could not be necessary in a democratic society. The Grand Chamber was "struck" by the breadth of the power of retention, which made no distinction in terms of nature or gravity of the offence with which the individual was originally suspected or of the age of the suspected offender. There was no time limit and no independent review. Persons not convicted of any offence had been treated in the same way as convicted persons, raising the risk of stigmatization. Further the Grand Chamber considered that the retention of data of unconvicted persons who were minors was particularly harmful, given their special situation and the importance of their development and integration in society, referring to the special position of minors in criminal justice specified by Art 40 of the UN Convention on the Rights of the Child.

Discussion

26. The Report suggests that compulsory drug testing is to enable early intervention for treatment and rehabilitation.

27. It should be noted that any bodily samples taken from a subject will be caught under the Personal Data (Privacy) Ordinance (Cap 486). Principle 3 of the data protection principles provided in Schedule 1 of that Ordinance states: "Personal data shall not, without the prescribed consent of the data subject, be used for any purpose other than- (a) the purpose for which the data were to be used at the time of the collection of the data; or (b) a purpose directly related to the purpose referred to in paragraph (a)."

28. It can be seen that in the case law of the jurisdictions examined above, compulsory drug testing is only permitted in respect of narrowly defined groups of persons, for very limited purposes. Moreover case law has shown not only that the test results are not to be used for criminal prosecutions but

also that minors must not be stigmatized in their brush with the public order institutions and the criminal justice system.

29. The Report has merely suggested that its recommended compulsory drug testing scheme be operated on the basis of a law enforcement officer's "reasonable suspicion" that the subject had consumed a dangerous drug. This suggestion is unsatisfactory in light of the acknowledgement in the Report of difficulties in gathering "sufficient evidence to prove consumption nowadays, particularly because many dangerous drugs are consumed in a manner which is much more difficult to detect" [para 7.17]. Given the significant intrusion of the right to privacy by a drug test, there must be a properly formulated triggering threshold to minimize misidentification. The risk of misidentification appears to be substantial bearing in mind that the usual method utilized by the law enforcement officer to form a reasonable suspicion is visual observation, plus perhaps cursory questioning of the person concerned.

30. The Police Superintendent's Discretion Scheme already provides a mechanism for initial warning to youth offenders as envisaged in the proposed two or three tiered system. The only difference is that in the proposed tiered system the law enforcement officer can, on the second time a person is caught, make an offer of mandatory treatment in lieu of prosecution. On the other hand, the Report has not clarified whether the statutory and non-criminal scheme of care or protection orders administered by the juvenile courts have any role to play as a measure of intervention and why.

31. It is clear that the Task Force envisages that the test results can and will be used for criminal prosecution.

32. As recognized in the Report, once test results obtained without the consent of the person are used for the purposes of prosecution, a number of fundamental rights may be violated including the right to self-incrimination (Hong Kong Bill of Rights, Art 11(2)(g)). Other rights that may be violated by a compulsory drug testing scheme include the right to privacy[7] (Hong Kong Bill of Rights, Art 14; Basic Law of the HKSAR, Art 30), the right against

[7] For a discussion of the meaning of privacy by the Court of First Instance, see *The Democratic Party v Secretary for Justice* [2007] 2 HKLRD 804, CFI.

unlawful or arbitrary search of the body (Basic Law of the HKSAR, Art 28), and the right to refuse medical treatment.

33. Any compulsory drug testing scheme should be the last resort and other less draconian options must be first explored. The HKBA invites the Task Force to explain further what other options they have considered and why those options are not viable so as to conclude that compulsory drug testing is the only viable and effective means to achieve the aims set out in the Report.

34. There appears to have been no consideration as to whether and how data yielded from a compulsory drug testing scheme is to be retained. Recent and strong jurisprudential authority is against the integration of such data into databases primarily concerned with the storage of data of convicted persons. Bearing in mind that minors constitute the principal target group of the recommendation, it is considered that unless the recommended scheme is properly formulated to take account of special position of minors in criminal justice, it cannot possibly pass constitutional muster.

35. In respect of the recommendation to consider whether compulsory drug testing to extend to young persons or to the population at large, the Task Force has not expressed any preference. Yet, it would be difficult to justify compulsory drug testing on the population at large. As illustrated by the case law of other jurisdictions, compulsory drug testing has been limited to very narrowly defined groups and thus very small sector(s) of the population.

36. On the other hand, compulsory drug testing limited to young persons gives rise to possible discrimination arguments. Statistics on drug abuse indicate that in 2007 there were 2,919 out of the total 13,491 drug abusers who were under the age of 21. Even if the statistics show that young drug abusers are on the rise, it is difficult to see the justification for imposing compulsory drug testing limited to young persons when they only represent 22% of the total figure.

37. In respect of whether to adopt the two or three tiered system, the problem lies in the discretion of the law enforcement officer to offer either mandatory treatment or prosecution. There has been no discussion in the Report to indicate what criteria will govern the exercise of the discretion. The Task Force should consider carefully the criteria to be considered when exercising

such discretion so as to ensure that such discretion is not exercised arbitrarily. There should also be mechanisms in place to ensure that the discretion is exercised properly. In particular it would be dangerous if the discretion were to be exercised by one person alone.

38. In respect of the taking of bodily samples, other jurisdictions have limited compulsory drug testing to the taking of non-intimate samples, most commonly urine. The case law shows that Courts are unwilling to uphold "direct observation" cases, that is, cases where someone directly observes the taking of the sample. Hence although it is agreed that a parent or a legal guardian or an independent person should be present, there should not be any direct observation as it may amount to degrading treatment contrary to Art 3 of the Hong Kong Bill of Rights.

EXTRA TERRITORIAL AND CROSS BORDER MEASURES

39. The recommendation to consider extending the offence of consumption of dangerous drugs outside the territorial limits of the HKSAR raises many problems.

40. Firstly the legislative power of the HKSAR in respect of extra-territorial legislation may require clarification. Secondly, the precise scope of any extra-territorial legislation envisaged by the Task Force is unclear. Thirdly, the enactment of such laws may give rise to problems of double jeopardy and this issue should be expressly addressed.

41. The Basic Law of the HKSAR grants the HKSAR with legislative power without specifying the extent of such power. The fact that the Hong Kong legislature may enact extra-territorial legislation prior to 1 July 1997 is of no relevance since such legislative power was specifically granted pursuant to an Act of the United Kingdom Parliament. Whether the National People's Congress intended to grant the HKSAR with such legislative power as including the power to enact extra-territorial legislation is a question that requires careful consideration of constitutional law and practices of the People's Republic of China as well as the Central Authorities' policy of "One Country, Two Systems" with the HKSAR enjoying "a high degree" of autonomy.

42. Legislation enacted in Hong Kong cannot possibly direct on another country's exercise of criminal or administrative jurisdiction. This means that if the offence of consumption of dangerous drugs is to be extended beyond Hong Kong territory, the HKSAR Government has no authority to stop any drug offence related proceedings in the other country. This means that the offender may be subjected to 2 sets of criminal legal proceedings arising out of one set of facts, albeit in different jurisdictions.

43. Moreover, there are serious evidentiary problems arising from this recommendation. The safeguards relating to seizure and admissibility of evidence in our laws may not mirror those other jurisdictions. If evidence is seized by the authorities of another country where the safeguards available in HKSAR's system are lacking, this may present an admissibility problem in the HKSAR Courts.

44. The Task Force should justify that its recommendation is rational and proportional in all the circumstances.

45. In respect of Recommendation 10.1, the Task Force has not made clear how it envisages the Police will use the data exchanged with the Mainland authorities. If the information is solely used to inform the parents, there needs to be guidelines and mechanisms in place to ensure that the information will not be used to facilitate any prosecution. If the Task Force plans to advocate for extra-territorial legislation, the use of the information obtained through exchanges with Mainland authorities and the extent of its admissibility needs to be carefully considered.

46. In respect of Recommendation 10.4, the restriction of the young persons to cross the border is possibly a violation of the freedom of movement. Article 31 of the Basic Law of the HKSAR guarantees the freedom of movement of HKSAR residents, including the freedom to travel and to enter or leave the HKSAR. Article 10(2) of the Convention on the Rights of the Child states, "State Parties shall respect the right of the child and his or her parents to leave any country including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the

present Convention." Accordingly, such general advice from the Government should not be given lightly. Moreover, such general advice will affect non-drug abusers as well as drug abusers and is therefore much too broad to be justifiable. Any restriction of movement condoned by the Government without a proper legal basis is also vulnerable to criticisms.

VOLUNTARY DRUG TESTING IN SCHOOLS

47. While the research project is welcome, this should not be taken as endorsement of any school-based drug testing programme(s), bearing in mind the increased skepticism of such programmes in the United States and elsewhere.

CYBER PATROL

48. The Report does not make clear the method and extent of the cyber patrol to be undertaken by the Police. It is not clear if what is intended goes beyond monitoring by passive browsing or not.

49. In light of the success in the covert surveillance cases[8] in upholding the right to privacy, the extent and method of cyber patrol should be carefully considered. If such cyber "policing" is intrusive and is such as to monitor private conversations between individuals, then the Task Force will have show that such methods are rational and proportional. Moreover, such "cyber policing" will have to be in accordance with legal procedures, not arbitrary, and prescribed by law.

Hong Kong Bar Association
8 January 2009

[8] See *Koo Sze Yiu & Anor v HKSAR* (2006) 9 HKCFAR 441, CFA and *HKSAR v Chan Kau Tai*, [2006] 1 HKLRD 400, CA.