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The Hong Kong Medical Association

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**Legislative Council Panel on Security**  
**Meeting on 7 January 2014**  
**RESCUE Drug Testing Scheme: Public Consultation**

**Views of the Hong Kong Medical Association**

With reference to the Consultation Paper: RESCUE Drug Testing Scheme (RDT), the Hong Kong Medical Association is of the opinion that legislation should not be introduced to authorize drug testing on a person as outlined in the Consultation Paper for the following reasons:

- (a) The proposed RDT fails to protect basic human rights and we see no justification that such infringement is legitimate.
- (b) The triggers to RDT are disproportionately low. They are inappropriate and inadequate to protect human rights.
- (c) The consultation paper fails to give evidence of the effectiveness of RDT in early identification and treatment for substance abusers.
- (d) The current measures are effective in view of the declining number of drug abusers. Also combating drug trafficking and controlling the source of dangerous drugs can be a more effective approach than RDT.

**Question 1: Do you agree that, as a matter of principle, Hong Kong should have RDT?**

**HKMA Response**

We do not agree that Hong Kong should have RDT as outlined in the consultation paper.

As doctors, we are very concerned about human rights. Patients rely on our respect of their basic human rights to guard against invasive procedures without their informed consents. RDT infringes basic human rights. It is a proposal to change the present law, so as to empower the police and other law enforcement officers to require a person to undergo a drug test (mainly urine test) when there is so called "reasonable suspicion" that he has taken dangerous drugs. This is not to clarify any ambiguity in the present law. Instead, it involves a major change to it. Currently, in the Dangerous Drugs Ordinance there is a specific section (section 54AA) that prohibits the test of urine from a suspected person except when the person appropriately consents to the test. This urine-testing-matter is taken so seriously that there is another section (section 54AB) in the Ordinance detailing the use of information gathered from the urine test (done under consent of the person), and the use and disposal of the urine sample collected.

These sections are in place to protect basic human rights. Article 6 of the European Convention on Human Rights is the provision to protect the right to a fair trial. Article 6(2) states that: "*Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*" The burden of proof rests totally on the prosecution to prove beyond reasonable doubt that the defendant is guilty. The defendant needs to do nothing to prove his innocence. Even in a charge of murder, the defendant can remain silent. If the prosecution cannot prove his case, the defendant is innocent, as he always is. To guard against torture and coercion, the English common law and the Fifth Amendment to the United States Constitution spell out the right against self-incrimination. The prosecution is required to prove his case without the cooperation or provision of any evidence from the defendant.

It is against human rights to require a person to provide a urine sample for drug testing so as to prove that he is guilty or innocent. It reverses the burden of proof from the prosecution to the defendant. When the police makes a so-called "reasonable suspicion", the person suspected cannot do nothing. He is statutorily required to provide a urine sample to prove his innocence. Refusal to do so is guilty per se. We agree that it is not absolutely contraindicated for legislations to infringe basic human rights. We are not going into all the technicalities of the requirements to do so. We seek to see that such infringement is justified. They are the exceptions. It has to be proved that such provision is necessary, useful and proportionate to combat the threat faced by the society. We see no such justification.

Chapter 2 of the consultation paper intends to make the case to support RDT. However, we do not see any imminent need to have RDT here and now. Dangerous drugs abuse has been a long standing problem in Hong Kong. There was a rise in the number of abusers especially young people abusing psychotropic substances in 2008. Various measures were introduced to combat such rising trend. The consultation document tells us that there is "remarkable improvement" in the drug situation. Comparing 2012 and 2008, the total number of abusers has fallen by 23%. For abusers under 21 years old, the number has actually decreased by 54%. Thus, there is no imminent need here.

Dangerous drugs are mentally and physically harmful to the abusers. Abusers affect their family members and friends. They are a burden to the society. However, the question we need to consider is whether drug abuse stands out uniquely to other threats to the society to the extent that a provision infringing human rights has to be passed. Compared to drug trafficking and drink driving, the harms of drug abuse mainly affect the abusers than the others. The threat to society is minimal. Compared to other addiction problems such as alcoholism and pathological gambling, drug abuse is not uniquely and excessively harmful.

Actually discussion should stop here as there is no imminent need to violate human rights. For the sake of analysis, we continue to analyze the usefulness of compulsory drug testing. We find that one important link is missing. As doctors, we value evidence-based practice. Using RDT to help early identification of substance abusers is at its best a hypothesis. Reading through the consultation paper, we cannot identify any evidence put forward to show its effectiveness. No statistic or study is quoted. Even the theoretical basis of RDT is not thoroughly analysed. There is no mention of why and how compulsory drug testing is helpful in early identification of drug abusers. There is even no estimation of how effective compulsory drug testing will be.

With such reckless assumption, it is amazing to read in the consultation paper a fact that 80% of the drug abusers are "hidden" in the sense that they take drugs in their own homes or in friends' homes. Obviously these 80% of the abusers will not be silly enough to revert their hidden nature when there is compulsory drug testing. It is also reasonable to predict that many of the remaining 20% will turn hidden. Compulsory drug testing in public areas will not be useful at all.

We then turn to look at the effectiveness of RDT in terms of treatment. In the legal perspective, consumption of dangerous drugs is illegal. It is a criminal offence and the person is liable to punishment. However, in the medical perspective, addiction is a disease. The etiology of addiction to dangerous drugs is not unique to other addictions such as alcoholism and pathological gambling. The person suffering from addiction problem is a patient. Consent from the patient for diagnostic procedures and treatment is important. Apart from medico-legal considerations, consent also means understanding and agreement to treatment. For psychotropic substance abuse, pharmacological dependence and withdrawal symptoms are not the major obstacles to successful treatment. Underlying psychological and psychiatric problems of the abuser and his motivation to change are important factors in treatment. Punishment does serve a deterring effect. However, forcing a patient to undergo treatment without the means to tackle his motivation and cooperation to change is unlikely to be fruitful.

*Question 2: Do you agree that RDT power should be triggered, only when (i) substances suspected of being drugs are found in the near vicinity of a person; AND (ii) the person in question shows signs of having just taken drugs? Do you consider it acceptable that some obvious cases would not be covered by RDT for the purpose of maintaining a high threshold in triggering RDT power?*

#### **HKMA Response**

We are of the opinion that the triggers to RDT are disproportionately low. They are inappropriate and inadequate to protect human rights.

The desirable effect of RDT is small in terms of the number of substance abusers identified and the prevention of harms to the public. Any infringement to human rights is already not justified. For the sake of discussion, we state our opinions on the suggested measures to limit the harm of legislation to the society.

To fulfill the requirement of "being proportionate", the consultation paper proposes several measures to limit the power of law enforcement officers under the RDT. Among the measures, the most concern is on the trigger to the new power of forcing a citizen to prove himself innocent. It is suggested that two conditions need to be satisfied: 1) there are substances suspected of being dangerous drugs present in the near vicinity of the person concerned; AND 2) the person's physical state, behavior and/or belongings show that he may have just taken drugs. The consultation document describes this trigger as "a high threshold" and even poses a question to ask whether people would agree to scarify catching some obvious cases for adopting such a high threshold.

This is the most wrongful description of the trigger threshold. Consider that there is no imminent threat to society and the ineffectiveness of compulsory drug testing, this

trigger is disproportionately low for an infringement on basic human rights. Both limbs of the trigger test rest on subjective opinions from law enforcement officials. The first requirement is only a suspicion on the finding of dangerous drugs. Whether the substance turns out to be dangerous drug or not doesn't matter. From the point of view of the one who is suspected, he has no means to challenge the finding of "suspected dangerous drug in his near vicinity".

For the second requirement, it is a subjective, coarse, on-site assessment by a non-medically trained person on the mental status of the subject. Any condition that affects the mental status would render the test positive. It is fictitious to believe that a police officer can distinguish drug abuse from other conditions such as alcohol consumption, side-effects of medications, mental illnesses or even agitation from being questioned by the police. Think about inside a crowded bar, with a pack of any powder in hand, the police can invoke the new power and force literally all the customers who have consumed alcohol to the police station.

With such low threshold trigger, a citizen who is having a drink at a bar after work can be forced to the police station for further testing. He has no choice. He is not free to go. He might face a criminal charge unless and until he can prove to the police's satisfaction that he is innocent. The impairment test performed in the police station is also a test for impaired mental status. It cannot distinguish the causes for the impairment of the mental status. Therefore, it would yield positive results for person who has taken dangerous drugs, alcohol, other non-dangerous drugs which can cause impairment to the mental status and any other psychiatric or psychological conditions that can cause impairment to the mental status alike. After spending much time in the police station for the impairment test, the suspected person will be forced to spend more time to do the urine test, which in current law is specifically prohibited without the person's consent.

So far, we have only stated the case under normal circumstances. We have not considered the possibility and the effect of abuse of power by the police. We are not going into details of such arguments as they would be based on assumptions.

***Question 3: Do you have any comments on the proposed two-stage drug testing procedures?***

**HKMA Response**

We are of the opinion that the proposed two-stage drug testing procedure is disproportionate to the threat of drug problems to the society. It is also inadequate to limit the harms done to the society by RDT. It fails to protect basic human rights.

***Question 4: Do you have any suggestions on how to safeguard individual rights?***

**HKMA Response**

We have a simple suggestion on how to safeguard individual rights: DO NOT LAUNCH RDT.

**Question 5: Should drug testing be applicable to people of all ages?**

**HKMA Response**

Drug testing as proposed should not be applied to people of any age.

**Question 6(a): Do you agree that drug abusers, irrespective of age, should be eligible for a chance to receive counseling and treatment programmes in place of prosecution?**

**Question 6(b): How many chances of counseling and treatment should be given under RDT? Should people below a certain age be eligible for more chances?**

**HKMA Response**

We are of the opinion that whether to give a chance to drug abusers in lieu of prosecution concerns the philosophy and strategy behind the whole action of combating dangerous drug. It warrants a separate consultation with more information on the pros and cons from different legal, social, psychological and medical aspects. It should not be changed just to accommodate RDT.

We object to changing the existing strategy if it is for RDT to justify its infringement on human rights. It is suggested that one or more chances will be given to substance abusers identified from RDT. They will not be charged and punished according to present provisions. Instead, they will be referred to treatment and rehabilitation services. Of course this would make the person subjected to RDT face less serious consequences. No criminal charge is involved. However, practically this raises another problem which is likely to make the drug scene worse.

The one or more chances will not be given to substance-abusers identified by RDT only. Offences of similar nature, such as people admitting taking drugs and people found possessing drugs not to the amount of trafficking, will be treated alike. This will create a loophole for drug trafficking in small amounts. Each newbie without record will be given a chance of facing treatment and rehabilitation services instead of being prosecuted. This might encourage people to take risk in drug trafficking until they are caught. Also, officially declaring that consuming dangerous drug is not criminal for the first time might send a wrong message to people. They might be more willing to try for the first time. And people might not be as willing to enter voluntary treatment services until they are caught.

**Question 7: Do you think RDT should apply to drug consumption that happened outside Hong Kong?**

**HKMA Response**

This question is irrelevant as we are of the opinion that RDT should not be applied in Hong Kong.

**Question 8, other suggestions:**

**a. Allow time for present effective measures to act**

In recent years, various measures have been implemented to combat drug abuse. Statistics show that there is a steady falling trend both in the total number of abusers and the number of new abusers. We suggest allowing time for these measures to act. Launching RDT now might have a negative effective on these measures. All the present measures are based on a clear message that drugs should never be used for even once. For those who are already addicts, encouragement and facilitation are provided for voluntary engagement in treatment and rehabilitation.

RDT is different from all these measures. It has a strong compulsory component that violates human rights. This would create opposition feelings and risk taking behaviors. However, at the same time, RDT comes together with a mixed message of a chance in lieu of prosecution. All these tend to blur the clear message that has been established by previous efforts.

**b. Strengthen the control on the supply of dangerous drugs**

We are alarmed by the fact that dangerous drugs are so easily available. We read in the consultation paper which describes the easy availability of drugs in a matter-of-fact manner. We would like to stress the obvious importance of the control of sources of dangerous drugs.

The consultation paper also describes the easy availability of drugs at homes through personal networks or by home delivery through phone calls or text messages to drug dealers. If these are the situations, there is much room for the police to enforce law and order. There need to be very frequent illegal deliveries everyday to sustain the abuse of dangerous drugs at homes. It would be much more meaningful to use the manpower intended for the RDT to intercept and to search for suspicious dangerous drugs traffickers. The Dangerous Drugs Ordinance spells out clearly that possessing dangerous drugs is a criminal offence. There is no need to test urine for dangerous drugs. Dangerous drug trafficking is much more blame-worthy than consuming of dangerous drugs. Given the hidden nature of drug abusers, the chance of police identifying a large number of drug abusers in public areas is quite low. If police needs to approach individual abusers with RDT, why not have better planned actions to combat traffickers?

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