

## Chapter VII

### DRUG TESTING

#### (A) Overview

##### (a) Objectives of drug testing

7.1 Drug testing can reveal whether a person has used illicit drugs. Depending on the actual mode of operation, it may serve the following objectives<sup>1</sup> -

- (i) **Monitoring and deterrence** - Drug testing as a form of monitoring underlines the need to enquire into the more private areas of a person's life, and in doing so, reduces the likelihood of drug abuse. Its effectiveness will depend on a number of factors including the degree of social consensus as to what constitutes socially transgressive behaviour and the capacity to apply some kinds of negative sanction or punishment.
- (ii) **Early intervention** - Drug testing as a tool for early intervention highlights the importance of identifying drug abusers early so that they may be motivated and guided towards counselling or treatment as soon as possible to avoid the problem from further deteriorating.
- (iii) **Preventing drug abuse** - Drug testing prevents drug abuse because one can use potential testing as an excuse to refuse drugs when approached by a peer. Drug testing can also help create a culture of disapproval towards drugs e.g. in schools.

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<sup>1</sup> See, for example, "Random drug testing of school children – A shot in the arm or a shot in the foot for drug prevention?" by Neil McKeganey (2005), and US's National Drug Control Strategy 2007.

- (iv) **Crime investigation and prevention** – In countries and places where consumption of drugs is an offence, drug testing can be a tool to enforce the law and to deter offending. Separately, drug testing may also assist in preventing other crimes which may be committed to finance the habit (e.g. theft, prostitution, burglary and trafficking of drugs) by identifying offenders and suspects who are drug abusers for treatment options. This helps break the connection between drug abuse and crime.

7.2 The above objectives may be intertwined with one another. For example, development of the criminal justice system has been moving in the direction of rehabilitation rather than punishment, and seeking to divert juvenile offenders away from prosecution for alternative remedies of the delinquent behaviour. This is especially important in the youth drug abuse context when we come to devising a drug testing scheme.

7.3 In sum, drug testing, depending on the design of the scheme and the specific objectives it seeks to achieve, can be a powerful means to protect public health and maintain law and order.

7.4 Drug testing can be on urine, hair, blood and others. As background, the characteristics of various drug testing methods are set out in **Annex 4**.

#### **(b) Mainland and overseas examples**

7.5 Drug testing to identify drug abusers has been in place in different forms and to various extents in some jurisdictions. Notably, drug testing in schools and for law enforcement purposes has attracted considerable discussion.

(i) *Drug testing in schools*

7.6 Drug testing practice in schools differs in various jurisdictions and it remains a subject of debate. Issues of concern include privacy, confidentiality, consent, who should bear the cost, who should take up the role of conducting the tests, the process of selecting subjects for testing, the process of testing, drug testing methods, false positive problems, the consequences of a positive drug test, and so on.

7.7 In the United States (US), drug testing is widely available in the school setting and considered to be a key tool to address the youth drug abuse problem as it prevents drug use in the first place, helps users get the help they need and sends a message that drug use is not acceptable. Drug testing is underpinned by a US Supreme Court ruling in June 2002<sup>2</sup> which broadened the authority of public schools to test students for illegal drug use if they engage in competitive extracurricular activities. This ruling has greatly expanded the scope of school drug testing, which previously had been allowed only for student athletes. Although it is still up to individual schools to decide if drugs are a significant threat, and if testing is an appropriate response, the availability of federal, state and local funding to be used for drug testing underlines the priority accorded to the measure by the US administration.

7.8 In the United Kingdom (UK), cleaning up schools has been one of the priorities in the war on drugs. Although drug testing has been practised in the independent school sector for several years, the British Government openly supported random drug testing of students only in 2004, which started the availability of drug tests in state schools. The Department for Education and Skills has issued guidance<sup>3</sup> to schools on drug related matters, among others, the use of drug testing. Whether and how to implement student drug testing is up to each individual school. The guidance does not cite any legal authority overriding the need for consent when putting in place a drug testing scheme.

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<sup>2</sup> Board of Education of Independent School District No. 92 of Pottawatomie County et al. v. Earls et al., decided on 27 June 2002.

<sup>3</sup> “Drugs: Guidance for schools” issued by the Department for Education and Skills provides guidance on all matters related to drug education, the management of drugs within the school community, etc.

7.9 In Singapore, some schools also administer drug tests. It is for the individual school to decide whether or not drug tests should be administered, taking into account its individual circumstances. There is no need for schools to seek government's approval in relation to their internal drug testing procedures.

*(ii) Drug testing for law enforcement purposes*

7.10 Drug testing is also in place in some jurisdictions as part of their law enforcement efforts.

7.11 In the Mainland, pursuant to the Anti-drug Law, persons found suspected to be drug abusers can be required to provide a urine sample for testing. Should the person refuse to undergo such a test, compulsory drug testing can be administered. For those who are tested positive for drugs, they will be subject to a fine of 2,000 yuan and administrative detention for 10 to 15 days<sup>4</sup>. The Anti-drug Law also specifies three types of detoxification measures for drug addicts i.e. voluntary detoxification, detoxification in community and compulsory detoxification treatment in isolation. The latter two are compulsory in nature, and may be ordered by the public security authorities under different circumstances.

7.12 In Malaysia, by virtue of the Dangerous Drugs Act, it is lawful for a police officer not below the rank of sergeant or an officer of the Customs to require an arrested person to provide a specimen of his urine for the purposes of an examination of the person to afford evidence as to the commission of offences under the Act, including consumption and possession of dangerous drugs. Any person who, without reasonable excuse, fails to provide a specimen of his urine, shall be guilty of an offence.

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<sup>4</sup> In the Mainland, the act of taking drugs is regarded as an act against the administration of public security under the Law on Penalties for Administration of Public Security. The Criminal Law of the People's Republic of China does not provide that the taking of illicit drugs is a criminal offence.

7.13 In Singapore, under the Misuse of Drugs Act, consumption of controlled drugs is an offence<sup>5</sup>. There is a general provision whereby any Central Narcotics Bureau officer, immigration officer or police officer not below the rank of sergeant may require a person suspected of drug consumption to provide his urine sample for tests. Urine samples will first be tested on the Instant Urine Test (IUT) machine as preliminary screening. After a person has been tested positive on the IUT machine, two samples of his urine will be sent for confirmatory tests. A confirmed drug abuser may be required to be subject to supervision, or to be admitted and detained for treatment and rehabilitation.

7.14 In the UK, pursuant to the Police and Criminal Evidence Act, the police may require a person who is arrested for or charged with a trigger offence (e.g. robbery, burglary, and possession of controlled drugs) to provide a sample of urine or non-intimate sample for the purpose of ascertaining whether he has any specified Class A drug (heroin or cocaine) in his body. This power may also be exercised where a police officer of at least the rank of inspector has reasonable grounds for suspecting that the misuse by that person of a specified Class A drug caused or contributed to the offence for which he is arrested or with which he is charged. A person who fails without good cause to give any sample which may be taken from him is guilty of an offence. The information obtained from the sample may be used for the purpose of informing any decision about the giving of a conditional caution, for the purpose of informing any decision about the appropriate sentence and any decision about his supervision or release in case he is convicted of an offence, for the purpose of drug assessment which the person is required to attend, for the purpose of ensuring that appropriate advice and treatment is made available to the person concerned, etc. These provisions enable identification of problem drug users earlier in the criminal justice system and refer them to treatment and other support programmes, even if they do not go on to be charged with any offence<sup>6</sup>.

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<sup>5</sup> A citizen or a permanent resident of Singapore commits this offence even if the consumption takes place outside Singapore.

<sup>6</sup> Section 63B of Police and Criminal Evidence Act 1984 as amended by the Drugs Act 2005.

### **(c) Current position of drug testing in Hong Kong**

7.15 In Hong Kong, from a drug treatment and rehabilitation perspective, a drug test for screening and identification purposes is not readily available in the public sector. In the first place, a young person, or his or her parents, must take the initiative to seek medical consultation from a private doctor or a medical officer at an Out-Patient Clinic of the Hospital Authority. The need to administer a drug test is a professional matter for individual medical practitioners. While drug tests can be a common part of the medical procedures for diagnosis and treatment in a Substance Abuse Clinic (SAC), they are more for tertiary (late) intervention and treatment than for screening and early identification purposes. The use of quick test kits by layman social workers in Counselling Centres for Psychotropic Substances Abusers (CCPSAs) is subject to many limitations. There are perhaps more hurdles than incentives to undergo drug testing for even those who are willing to take the first step to seek help.

7.16 In the school setting, some international schools have on their initiatives put in place various drug testing schemes. For instance, parents may be asked to sign a consent form at the beginning of a school year for this purpose. Students may then be randomly, or with reasonable cause, selected to undergo a drug test. Those with a positive result will be requested to attend follow-up counselling or treatment. We are not aware of any mainstream schools instituting a drug testing scheme for students.

7.17 From the law enforcement perspective, consumption of dangerous drugs is an offence under the Dangerous Drugs Ordinance (Cap. 134)<sup>7</sup> (DDO). It is, however, difficult to gather sufficient evidence to prove consumption nowadays, particularly because many dangerous drugs

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<sup>7</sup> Section 8 of the Dangerous Drugs Ordinance (Cap. 134) provides that –  
“(1) Save under and in accordance with this Ordinance or a licence granted by the Director thereunder, no person shall –  
(a) have in his possession; or  
(b) smoke, inhale, ingest or inject, a dangerous drug.  
(2) Any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence and shall be liable –  
(a) on conviction upon indictment to a fine of \$1,000,000 and, subject to section 54A, to imprisonment for 7 years; or  
(b) on summary conviction to a fine of \$100,000 and, subject to section 54A, to imprisonment for 3 years.”

are consumed in a manner which is much more difficult to detect, e.g. by swallowing tablets, as compared with inhaling or injecting heroin.

7.18 Under section 59C of the Police Force Ordinance (Cap. 232), authorised police officers can take non-intimate samples (e.g. nails, saliva and hair) from a person suspected of having committed a serious arrestable offence<sup>8</sup> (including consumption of drugs). However, in practice, non-intimate samples are generally of low evidential value in proving to the satisfaction of the court that an offence relating to consumption of dangerous drugs has been committed.

7.19 Separately, intimate samples (e.g. urine and blood) can be collected by law enforcement officers with the person's consent. Specifically, under section 54AA of the DDO, authorised Police and Customs officers can take a urine sample from a person suspected of having committed a serious arrestable offence (including consumption of drugs), subject to the consent of the person (or, in the case of a minor, the consent of his or her parent or guardian) and judicial approval. In practice, the suspect is very unlikely to give consent and hence drug testing in this context is not common in Hong Kong<sup>9</sup>.

7.20 Section 52 of the DDO provides for the examination of a person's body cavities by a doctor or nurse, and this may be done without that person's consent. However this power may only be exercised where a Police or Customs officer (of or above the rank of inspector) has reason to suspect that the person has in his actual custody an article liable to seizure under the Ordinance. Mere suspicion that a person has consumed dangerous drugs is not sufficient for invoking this power.

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<sup>8</sup> An offence in relation to dangerous drugs for which a person may be sentenced to imprisonment for a term not less than 7 years.

<sup>9</sup> More generally, section 59A of the Police Force Ordinance (Cap. 232) also empowers authorised Police officers to take intimate samples from a person suspected of having committed a serious arrestable offence, subject to the consent of the person (or in the case of a minor, the consent of the person's parent or guardian) and judicial approval. It covers all serious arrestable offences not just those related to dangerous drugs.

7.21 An excerpt of statutory provisions which may be invoked for drug testing is at **Annex 5**.

7.22 For a young offender below the age of 18, the Police may place him under the Police Superintendent's Discretion Scheme instead of initiating a prosecution action, provided that certain criteria are met and the offence involved is of a less serious nature. The young offender must, with parental consent, agree and comply with the conditions a Superintendent of Police may impose in issuing a caution. For a youngster arrested for drug-related crimes, a possible range of measures may include undergoing a urine test to confirm whether he or she has a problem of drug abuse, receiving drug treatment, and post-caution visits by the Police's Juvenile Protection Section. One difficulty is that if the youngster subsequently fails to comply with the conditions (like attending the drug treatment programme), the range of sanctions may be limited and in particular prosecution action may be precluded given that a caution has been administered and there has been an elapse of time<sup>10</sup>.

7.23 As regards a person prosecuted and convicted of an offence, the Court may require reports in respect of various sentencing options. In preparing such reports, the relevant authorities may carry out drug tests on the convicted offender. For one reported to have drug abusing behaviour, the Court may at its discretion pass a sentence with a drug treatment element, notably detention in a Drug Addiction Treatment Centre (DATC) run by the Correctional Services Department or a Probation Order with a requirement to attend a drug treatment centre or participate in a drug treatment programme.

#### **(d) The case for provision of drug testing in Hong Kong**

7.24 Statistics show that 99% of the young drug abusers in Hong Kong abuse psychotropic substances. Unlike traditional drugs such as heroin which would require fume inhaling or injection, many psychotropic substances can readily be taken through snorting or swallowing without any paraphernalia. There may be few obvious withdrawal symptoms in the

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<sup>10</sup> See section 26 of the Magistrates Ordinance, Cap. 227 where a summary offence is statute barred after 6 months.



short term. There is also an increasing trend of abusing drugs at home or across the boundary, out of sight of public authorities or parents. This makes psychotropic substance abuse by youngsters difficult to detect by law enforcement officers, their parents, teachers or peers. As expounded in Chapter II, many abusers have remained out of reach of the existing help networks given the hidden nature of psychotropic substance abuse.

7.25 Early identification and intervention is thus a mainstay of our treatment and rehabilitation strategy to tackle the youth drug abuse problem. The Task Force considers that an appropriately designed drug testing regime has the potential of being a most powerful tool in such efforts. However, as noted in paragraphs 7.15-7.23 above, the present system is not conducive to drug testing.

7.26 From a law and order perspective, the nexus between problematic entertainment venues and drug abuse has been a major concern. The Task Force has recognised the intensified efforts by the Police in stepping up law enforcement operations in such premises to meet the challenge. The largest karaokes and discos in Kowloon in which drugs were often found have ceased business as a result of these operations. However, it has been a substantial commitment in terms of manpower and other resources, and drugs are still available in smaller entertainment venues. Police operations can be frustrated by the general alertness of traffickers and abusers nowadays, the connivance of venue staff in warning patrons of the police entry, and the dark and crowded environment enabling patrons to discard drugs before being searched.

7.27 Undercover operations are conducted, but they are mainly targeted at dealers rather than abusers. When the Police check the entertainment venues, persons are often found in a secluded area with drugs discarded onto the floor. Although the taking of urine sample is provided for in the DDO (paragraph 7.19 above), such power could seldom be exercised for proof of consumption of drugs since it requires consent of the person.

7.28 Without a voluntary self-admission, it is hardly possible to prove that a person is in possession of the discarded drugs or has consumed drugs, so no arrest can be made and the persons concerned continue to take drugs. This is dangerous as it is reinforcing the perception that consuming drugs is of no legal consequence.

7.29 In view of the above, the Task Force sees a strong need to look into whether and how further drug testing may be made available in Hong Kong for the purposes of health protection and law and order.

7.30 The Task Force is aware of the arguments against drug testing as raised by some quarters. Certain pertinent issues have to be considered very carefully before taking forward any proposals.

**(e) Issues for consideration**

7.31 Drug testing inevitably requires the taking of body samples, intimate or non-intimate, which may give rise to privacy concerns. Consent of the subject (and/or of the subject's parents) is required under the present law, unless there is clear justifications and overriding legal authority.

7.32 The Task Force notes that there is currently no legal authority, whether under the existing legislation or at common law, for the law enforcement agencies to carry out compulsory drug tests, without the need to obtain consent of the suspect, for ascertaining whether a person has consumed dangerous drugs<sup>11</sup>. Therefore, some form of legislative backing, and justification for such, would be required if compulsory drug testing is to be taken forward to help identify drug abusers.

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<sup>11</sup> See paragraphs 7.18 – 7.20 above. Separately, under Regulations 54 and 96 of the Education Regulations (Cap. 279 sub. leg.), the Permanent Secretary for Education has power to require a student to submit to medical examination and to require a principal to expel or suspend a student. In context this power is primarily for protecting health and well being of pupils and those coming into contact with them, and for determining their physical fitness (see sections 84(1)(f) and (g) of the Education Ordinance (Cap. 279)). It is doubtful whether this power may be invoked for ascertaining whether a pupil has taken drugs.

(i) *Compulsory drug testing*

7.33 Compulsory drug testing is potentially a very effective means of screening and identifying drug abusers for crime investigation, treatment and prevention.

7.34 However, compulsory drug testing may be argued as an interference with human rights, in particular the right to privacy, comprising the right to human dignity and bodily integrity (including right to refuse medical treatment). Some may argue that compulsory drug testing would lead to abuse of civil liberty by giving excessive powers to law enforcement agencies (or such other parties administering the test), particularly on juveniles who are vulnerable and would require special protection from those who may abuse their position of power. In addition, although consuming drugs is an offence under the DDO, it is for the prosecution to prove that a person has committed that offence. Some may argue that to use the result of drug testing obtained by compulsory power from an individual as evidence against the individual in a criminal charge may possibly infringe the right not to incriminate oneself<sup>12</sup>.

7.35 Even where a compulsory drug testing scheme only for identification and treatment purposes without involvement of law enforcement officers is carried out in, for example, schools, it still could give rise to concerns about privacy. Another objection is the undermining of the trust between staff and students that should be in place in an education setting, which would in turn impact negatively on other aspects of young people's educational work, including drug education. There are other difficult issues like possible stigmatisation of a student who has been tested positive, false positive and false negative results, cost-effectiveness and others<sup>13</sup>.

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<sup>12</sup> Legislative precedent exists for such compulsory powers, for example under the Road Traffic Ordinance (Cap. 374) which, under prescribed circumstances, requires a driver to undergo a breathalyzer test, the result of which may be used in evidence.

<sup>13</sup> Some may even query the underlying assumption of the proclaimed efficacy of drug testing in preventing drug abuse. See footnote 1.

7.36 Such an interference could only be justified if it is prescribed by law, for a lawful purpose, and rational and proportionate to the problem.

7.37 The Task Force has given the matter careful consideration. Given the grave harm caused by the abuse of psychotropic drugs to those who consume them and the community at large, the difficulties in detecting and proving consumption of dangerous drugs which is a serious arrestable offence, and the degree of seriousness of the whole youth drug abuse problem we now face, the Task Force believes that there is a strong case to pursue a legislative exercise 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. The statutory scheme must be designed carefully in a rational and proportionate manner, with built in safeguards against arbitrariness and for the protection of affected persons' rights. The various implications must be addressed fully.

7.38 The Task Force also considers that the proposed investigative powers through compulsory drug testing should be confined to law enforcement officers who have been given appropriate training and are subject to strict discipline.

*(ii) Voluntary drug testing based on consent*

7.39 There may be two approaches in devising a voluntary drug testing scheme based on consent. One is to make available a convenient drug test service and to offer the service on a purely voluntary basis. Another approach is to target the drug test at a certain population (like students of a school) and press for comprehensive compliance coverage<sup>14</sup> through various means.

7.40 The first approach is only effective in helping those who are willing to come forward for help (e.g. caring parents who are able to persuade their at-risk child to seek help). Indeed, if a person is willing to come forward for help, he or she may have, to a certain extent, already

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<sup>14</sup> Not necessarily physical administration of the test on each and every subject of the population. Compliance may be achieved by obtaining prior consent to a possible drug test in future under specified circumstances, as in randomised testing.

admitted using drugs. Drug testing may be seen as the beginning of a treatment process or a pre-requisite for further treatment and follow-up services. The Task Force considers that naturally, it is not as an effective tool for screening as the second approach below, but it can still play a useful role to offer help to those in need.

7.41 The second approach can be effective as far as the target population is concerned, if a reasonable level of compliance (i.e. in subjecting oneself to the test) can be achieved. Compliance may be achieved through possible incentives, appropriate sanctions when consent is not given, peer pressure and other means. In the school setting, it may be feasible in certain international schools as students (or parents on their behalf) who do not give consent to drug testing may ultimately be denied enrolment. However, this may not be workable for other schools where the same kind of competition in enrolment or parental attention may not be present. In any case, schools will be discouraged from dismissing students found to have abused drugs.

7.42 But even a scheme purely based on consent is not without criticisms if the second approach is followed. Some may see it an unethical intrusion into the privacy of a person, with the kind of pressure or sanction resulting if consent is not given. The various objections to compulsory drug testing (paragraphs 7.34-7.35 above) may also be applicable here, but probably not with the same degree of emphasis<sup>15</sup>.

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<sup>15</sup> More practically, a scheme based on consent will next invite the question of whether parental consent will be sufficient legal authority for a drug test to be carried out on a child. Parental consent alone provides that a drug test may be carried out lawfully but it does not determine that a drug test shall be carried out. The law also recognises that a child, depending on his or her age, may have the competence to determine his or her own well-being. In that case, parental consent would not suffice if the child refuses to undergo a drug test. The case law does not specify an age at which a child is recognised to have such competence. The older the child, the more likely he or she is to have such competence. Article 12 of the Convention on the Rights of the Child, an international human rights treaty applicable to Hong Kong, is also relevant - "... to assure to the child who is capable of forming his or her views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child".

7.43 The Task Force has carefully considered the whole matter and the many challenges presented. On balance, it considers the possible options under a voluntary approach should be further considered but a more in-depth investigation and analysis of the relevant environment and possible implications is necessary before these options can be usefully formulated. The availability of a drug testing scheme in the community can play a useful role in helping those who themselves are willing to come forward. A credible and effective drug test service targeting students, though ultimately based on consent, would enable the schools to tackle the youth drug abuse problem more effectively and send a strong message of our resolve.

### **(B) Possible Options under a Compulsory Approach**

7.44 As noted in paragraphs 7.33 to 7.38 above, the Task Force sees a strong need to look into how a compulsory drug testing scheme can be introduced with legislative backing.

7.45 The Task Force must emphasize at the outset that the purpose of introducing compulsory drug testing is not to facilitate prosecution for the sake of punishing offenders, but rather to enhance early intervention and rehabilitation. However, experience elsewhere shows that a degree of coercion and deterrence is necessary. Notably, if law enforcement officers are given the power to require a compulsory drug test, they would be in a better position to prove that an offence of consumption of dangerous drugs has been committed. This can then provide a concrete basis to identify the drug abuser and to exert background coercion to induce the drug abuser to undergo treatment in lieu of prosecution.

7.46 The Task Force fully recognises the sensitive issues and wide implications involved in seeking to introduce compulsory drug testing, particularly from a human rights perspective. A proper balance needs to be struck with legal and other pertinent issues adequately addressed. The community must be consulted in mapping out the way forward.

### **Recommendation 7.1**

As a matter of principle, the Task Force recommends the 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, although important issues including the extent of coverage, human rights concerns, read-across implications on law and enforcement, resources as well as implementation details have to be carefully considered. The primary purpose of the compulsory drug testing scheme is to enable early intervention for treatment and rehabilitation, instead of facilitating prosecution. A proposal for a compulsory drug testing scheme should be set out in a detailed consultation paper and public views should be invited before the proposal is taken forward.

7.47 The Task Force sets out below the key elements and related issues of the compulsory drug testing scheme, as well as the basis of our recommendation in respect of each of the same.

#### **(a) Age limit**

7.48 One major issue which has to be considered is whether compulsory drug testing should apply to young persons only or to persons of all ages, and if the former, where to draw the line.

7.49 The focus of the Task Force is admittedly on how best to tackle the drug abuse problem among our young people. Within its terms of reference, the proposed scheme should aim at protecting young people against the prevalent use of psychotropic substances in Hong Kong.

7.50 Young people belong to a vulnerable section of the community that need greater protection from bad influences including drugs. It is also commonly accepted that young people should be diverted from the courts to treatment and rehabilitation where possible. As stated before, the trend of psychotropic substance abuse among young people is such that more decisive measures are needed to arrest it. Because of these considerations, the Task Force believes that there is justification to offer young and especially first-time drug abusers separate treatment and rehabilitation options instead of resorting to immediate prosecution. This represents a departure from the more conventional criminal justice system and the justifications applicable to the young drug abusers may not necessarily apply to the case of older and traditional drug abusers<sup>16</sup>. There are precedents for different age limits in respect of various offences in Hong Kong and in different countries. It is therefore not a matter of legal necessity to apply the proposed compulsory drug testing scheme to persons of all ages.

7.51 If the proposed scheme is made applicable only to young persons, the next question will be whether the age limit should be set at 18 or 21. One may argue that the age of majority is 18 in Hong Kong and overseas which is recognised in the Convention on the Rights of the Child. Young persons or offenders are also generally defined as persons under the age of 18 or even younger in the criminal justice system in Hong Kong<sup>17</sup>. On the other hand, the age of 18 is not in line with ND's long-established definition of youngsters under the anti-drug policy and in its statistical records. The cut-off ages of various sentencing options and for other services for young offenders, though varied, are generally set higher than 18 to benefit more people<sup>18</sup>. Furthermore, the number of young drug abusers above 18 is significant and the rationale for alternative treatment for young offenders applies equally to those above 18. There is no simple

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<sup>16</sup> As among youngsters, psychotropic substance abuse is on the rise among adults, but is still trailing behind heroin abuse which remains dominant. Such heroin abusers are generally more easily identifiable. The argument for early identification and intervention is less strong.

<sup>17</sup> Protection of Children and Juveniles Ordinance (Cap. 213) (juveniles aged 14-18); Reformatory School Ordinance (Cap. 225) (young persons aged 14-16/ youthful offenders aged 10-16); and Juvenile Offenders Ordinance (Cap. 226) (young persons aged 14-16).

<sup>18</sup> Training centres (aged 14-21); detention centres (aged 14-25); rehabilitation centres (aged 14-21); young prisons (aged 14-21); Young Offender Assessment Panel (female aged 14-21/ male aged 14-25); and Community Support Service Scheme (aged below 25).



answer to the question as to where the line should be drawn. The Task Force sees merit to seek more views in this respect.

7.52 Nevertheless, the Task Force notes that there are also cogent arguments for making compulsory drug testing applicable to all ages. The Administration's anti-drug policy is not made exclusively for the young, and the same enforcement powers are usually applied to both minors and adults in respect of the same offence. Treatment and rehabilitation of drug abusers is provided to all ages. The international drug control conventions are also of general application. Persons of all ages should be treated equally. If a distinction is drawn in the law between adults and youngsters in terms of drug testing requirements, it would create enforcement difficulties. For instance, if a group of people are caught suspected of consuming dangerous drugs together, it would seem unreasonable to require the 'under aged' abusers to undergo drug testing with a prospect of prosecution and conviction but to allow the older group members to go away scot-free (which, as discussed above, results from the limited investigative power in the present law).

### **Recommendation 7.2**

The Task Force recommends that the Administration should consult the public as to whether the proposed compulsory drug testing scheme should apply to young people only or to persons of all ages, and if the former, what the age limit should be.

### **(b) Tiered intervention structure**

7.53 As the proposed drug testing scheme is primarily aimed to identify youngsters who have drug abuse problems for treatment and rehabilitation, the Task Force considers that a tiered intervention structure should be introduced whereby youngsters should be offered the chance of rehabilitation instead of prosecution for the first time they are caught and tested positive. The consequences should get more serious for persistent offending with prosecution as the last resort. In considering a tiered

structure, the Task Force reckons that there are different degrees of drug addiction among the abusers.

7.54 In order to set up a tiered structure with differentiations between different abusers, a central database of persons tested positive in compulsory drug tests would have to be set up. A person tested positive for the first time (“the first-timer”) would be given a warning and offered the service of voluntary treatment and rehabilitation programmes through information provision or assistance by social workers. Appropriate follow-up visits can also be considered. The evidence obtained by the compulsory drug test will not be admissible as evidence for any offence of consumption<sup>19</sup>. If the same person is caught and tested positive for consuming dangerous drug a second time (“the second-timer”), the law enforcement officer of a sufficiently senior rank has the discretionary power to offer the second-timer a mandatory treatment option in lieu of prosecution. If the same person is caught and tested positive for consuming dangerous drug a third time or more (“the third-timer” and beyond), he would be prosecuted and the positive drug test result would be admissible evidence to prove consumption at trial.

7.55 The warning given to the first-timer is the first step in the overall scheme for deterring or rehabilitating young drug abusers. Although the first-timer will not face prosecution for the consumption offence based upon the evidence obtained by the compulsory drug test<sup>20</sup>, in the case of a young offender, this first step would have alerted his parents/guardian of his drug problem (the drug test and/or the warning would have been administered with the knowledge of the parents/guardian). This prospect of itself will give rise to considerable deterrent effect. Further, upon being so alerted, most probably the parents/guardian would consider the treatment or rehabilitation programmes offered or at least would become more vigilant from then on. Therefore it may not be necessary to confront the first-timer at that stage with the choice between compulsory treatment and prosecution, which would involve considerable public resources.

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<sup>19</sup> This is without prejudice to the possibility of charging the consumption offence based on evidence other than the drug test result, or the charging of non-consumption drug-related offences.

<sup>20</sup> As mentioned, currently, consumption cases are difficult to prosecute in any event due to the difficulty of proof.

7.56            However, this treatment of first-timer is not without concerns. Some may argue that the first warning is feeble, and may even give a wrong message that a young person need not worry about the risk of being prosecuted unless and until he has been caught consuming dangerous drugs for the second time. This may also create a disparity with young persons caught in possession of dangerous drugs on the same occasion, with the first-timer not having to face prosecution, the second-timer at risk, and the third-timer definitely.

7.57            The alternative is to dispense with a first warning and directly offer a choice between mandatory treatment and prosecution to first-timers. Second-timers and subsequent offenders will be prosecuted right away. It should be noted that the person is prosecuted and convicted, sentencing options themselves can contain mandatory treatment and rehabilitation elements (paragraph 7.23 above).

7.58            The Task Force is in favour of a tiered intervention structure. In terms of protecting the welfare of youngsters, the criminal justice system tends to steer young offenders away from prosecution in favour of rehabilitation options. A tiered intervention structure may make the whole scheme of compulsory drug testing more acceptable by providing a further buffer from prosecution. As to whether a two-tier structure (paragraph 7.57 above) or a three-tier structure (paragraph 7.54 above) is more appropriate, the Task Force's preference is with the three-tier system especially if the scheme is confined to young people. However, this matter is debatable and the Task Force believes the public should also be consulted thereon.

7.59            Further, if it is ultimately decided that the proposed compulsory drug testing scheme should be made applicable to persons of all ages, it is possible for different tiers of intervention to be applied to youngsters and adults, with more lenient treatment for the former.

### **Recommendation 7.3**

The Task Force recommends that the proposed compulsory drug testing scheme for youngsters should comprise a tiered intervention structure offering a warning and/or treatment and rehabilitation option for those who test positive, diverting them away from possible prosecution which should be the last resort. The public should be consulted on the options of a two-tier or a three-tier intervention structure.

#### **(c) Presence of parents/legal guardians or an independent person**

7.60 As a safeguard against possible abuse of power by law enforcement agencies for the protection of a young person under the age of 18, the presence of a person independent of the law enforcement officers during the provision of the body samples by the young person can be considered.

7.61 Parents and legal guardians should assume parental responsibility for young persons aged under 18. They should attend to their needs and welfare. In case they cannot be reached, relatives should be contacted. To deal with those situations in which after a reasonable period of time, no one related to a minor is available, an independent person drawn from a stand-by pool should be present to oversee the taking of the body sample. The composition of the pool of independent persons can be further considered.

### **Recommendation 7.4**

The Task Force recommends that the proposed compulsory drug testing scheme should provide for the taking of body samples of a minor in the presence of his or her parent or legal guardian (or relatives), or an independent person in case the

former is not available. The public should be consulted on the possible pool of independent persons.

**(d) Extra-territorial effect for the consumption offence**

7.62 According to CRDA, a significant proportion (i.e. 11%) of all reported drug abusers had taken drugs in the Mainland in 2007. As regards those aged under 21, some 17% had taken drugs in the Mainland.

7.63 The Task Force notes that if we tighten control in Hong Kong by instituting compulsory drug testing, we would expect certain enforcement difficulties as some might argue that the drugs had been taken outside Hong Kong, especially those who frequent venues outside Hong Kong to take drugs. The “balloon effect”<sup>21</sup> might also see more going to Shenzhen to seek indulgence, exacerbating the current cross-boundary drug abuse problem. Although legislating with a view to regulating the behaviour of persons outside Hong Kong’s boundary is the exception rather than the rule, there should be a case to consider giving the offence of consumption of drugs extra-territorial effect as part of the package of the proposal for compulsory drug testing. After all, the harms to the offender himself and to the others in the Hong Kong community would be equally great even if drug consumption takes place outside Hong Kong.

7.64 The Task Force notes that the Basic Law does not prohibit the legislature from making law with extra-territorial effect. There are also recent legislative precedents of extra-territoriality, e.g. in respect of offences related to child sex tourism. From a legal policy point of view, there is a case for legislating with extra-territorial effect for the offence of consumption of drugs. There is, however, a need to demonstrate the nexus between the territory and the legislation, avoid undue intrusion into the jurisdictions of other territories, and consider whether the proposed extra-territoriality should apply only to Hong Kong residents or to any person regardless of his nationality or residency.

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<sup>21</sup> Enhanced efforts in one geographical area may result in greater illegal activities in neighbouring areas if not checked by comparable action at the same time.

7.65 Having regard to the substantially wider scope of change to the criminal justice system should the offence be legislated with extra-territorial effect, and the various complex issues involved, the Task Force considers that this is an important matter on which the public should be consulted.

**Recommendation 7.5**

The Task Force recommends consulting the public as to whether extra-territorial effect should be introduced to the offence of consumption of drugs (and the extent in terms of the degree of connection of the drug abusers to Hong Kong), or whether the status quo should be maintained (i.e. no extra-territorial effect).

**(e) Support services and other issues**

7.66 The use of compulsory drug testing to identify drug abusers is but the first step in the whole scheme of measures to drive a wedge into a problematic area not fully exposed hitherto. At present, we are unable to estimate precisely the number of young drug abusers and at-risk youth who may be uncovered by the new enforcement powers and schemes. However, if the compulsory drug testing scheme is to be implemented, there will be a huge demand for downstream support services which should be put in place in good time. It is also important that the mandatory treatment and rehabilitation programmes to be offered to youngsters in lieu of prosecution are of requisite quality and proven effectiveness, and are sufficiently wide to cater for the needs of youngsters with different backgrounds.

7.67 The need to strengthen support services applies not only to the new treatment and rehabilitation options to be provided under the compulsory drug testing scheme. It is applicable also more generally to the downstream service provision for drug abusers (such as CCPSAs, SACs and Drug Treatment and Rehabilitation Centres) and convicted offenders (e.g. probation service and DATCs) caught through other channels. The

possible impact on Government departments, subvented agencies and NGOs has to be carefully assessed and addressed.

7.68 In addition, there are other important issues that need to be considered, to name but a few: the circumstances under which the proposed new powers may be triggered, actual procedures of drug testing, possible technological neutrality of drug tests, procedural safeguards against arbitrary use of the powers and to protect affected persons' rights, and consequences of offenders failing to complete mandatory treatment programmes. Many of these do not admit easy answers. The Administration and the community need to carefully consider and deliberate through the whole matter to decide on how best to take forward this important next step in our war on drugs.

**Recommendation 7.6**

The Task Force recommends that alongside the formulation of a detailed proposal for a compulsory drug testing scheme, the Administration should conduct an assessment on the corresponding increase in the demand for downstream support services, including in particular the treatment and rehabilitation programmes, as well as the resource implications.

**(C) Possible Options under a Voluntary Approach**

**(a) School-based drug testing programmes**

7.69 As a matter of principle, as is the current practice in some international schools in Hong Kong, parents of students in other schools may be asked to sign a consent form pursuant to which students will be randomly selected, or with reasonable cause, to undergo drug tests as administered by the school itself or by other professionals as appropriate. Students may then be requested to attend follow-up counselling or treatment.

7.70 In reality, however, maintaining a reasonable level of compliance among parents and students will be far more complex and difficult in the local school setting. As set out in paragraphs 7.41 to 7.42 above, the administration of the tests by schools may lead to a number of complex social, ethical and technical issues as well as adding to the heavy workload of schools. In addition, strong resistance from schools and parents may be encountered. It may also be difficult to obtain parental consent especially from at-risk families.

7.71 In view of the above, the Task Force considers that making drug testing a mandatory requirement for all schools across the board may not be practicable. In line with the principle of school-based management, it may be better for the school authority itself to consider whether drug testing is a feasible and appropriate tool which it would like to adopt.

7.72 However, given the host of issues of concern identified, it is unlikely that the majority of schools would, on their own initiative, consider arranging school-based drug tests. In order to assist the schools to consider the feasibility of introducing drug tests on campus, the different means available, and to facilitate its adoption where appropriate, the Administration should undertake a more in-depth study into the relevant issues and suggest model schemes for reference. In particular, the study should draw up protocols tailored to the local school setting, identify critical success factors, suggest a promotion scheme for voluntary adoption by local schools, and address the various issues of concern including liberty of persons, possible labeling effect, ways to promote compliance among parents and students, the kind of sanctions and incentives to be provided, which party should conduct the drug tests, the funding of the scheme, support and referral services required, etc.

**Recommendation 7.7**

The Task Force recommends that, a research project should be commissioned to devise possible school-based drug testing schemes for voluntary adoption by schools, having regard to the practices in local international schools and those in overseas jurisdictions.



**Measures taken thus far:**

Plans are being drawn up by ND to invite research proposals on how a school-based drug testing scheme for voluntary adoption by local schools should be devised.

**(b) Providing drug testing in the Student Health Service**

7.73 The Task Force has considered whether it is desirable and cost-effective to add a drug test to the health check programme under the Student Health Service (SHS) which focuses on students.

7.74 Currently about 50% of Primary One to Secondary Seven students participate in SHS. Enrolled students annually attend an SHS centre for a series of health checks and physical examination, which screens for health problems related to growth, psychological health and behaviour etc. The idea is to invite parents to consent to adding a drug test to the series of health checks. They will then be notified of the test result, and, if positive, invited to refer the child to SWD or designated NGOs for voluntary follow-up services.

7.75 There are, however, concerns raised. Past experience has shown that students joining SHS normally have good family support. It may not be a good use of resources to screen those students who are unlikely to be a concern. Students may also feel intimidated by the drug test option and refuse to attend the health checks altogether, thereby jeopardising SHS itself.

7.76 Another pragmatic approach is to sever the drug test from the health check programme, and to locate a drug test service at SHS centres taking advantage of the infrastructure, core medical staff and wide regional network in place. Parents are therefore at liberty to bring their children to these premises for drug tests and screening, without any prior SHS enrolment. Again, there are concerns that co-locating the drug screening

service in SHS centres may undermine the smooth running of the normal programme. Students may still equate attending SHS centres as attending for drug screening and rather drop out instead, again hampering the level of participation in SHS.

7.77 The Task Force appreciates the validity of all these concerns which need to be fully addressed before any action can be taken. But as students are a primary focus of our help, the Administration should further explore ways to deliver a voluntary drug test service focusing on students to further supplement the current student health service and promotion programme.

**Recommendation 7.8**

The Task Force recommends that the provision of voluntary drug test service targeting students should be further explored by DH in the context of its endeavour to promote student and adolescent health.

**(c) Drug testing in CCPSAs**

7.78 As envisaged by the Task Force, CCPSAs should enhance collaboration with other services in the community as a first stop for psychotropic substance abusers seeking assistance, with established network with stakeholders within their service cluster and through various means of case intake.

7.79 As discussed in Chapter VI, the Task Force has recommended that medical support services should be introduced into CCPSAs to enable timely and early medical intervention to drug abusers who do not yet require specialist medical treatment at SACs. Apart from body checks and drug-related consultation, etc, such services should encompass drug testing to facilitate screening, early identification and assessment of the health conditions of the drug abusers for timely referrals.

**Recommendation 7.9**

The Task Force recommends that the provision of a voluntary drug test service, as part of the enhanced medical support enhanced in CCPSAs to identify and motivate drug abusers to receive early medical and social intervention and rehabilitation treatment, should be pursued.

