

VI. Issues and Concerns

15. Issues related to children's rights and privacy

15.1 When the Scheme was announced, a number of issues and concerns were raised by both proponents and opponents of the Scheme, making reference to experience overseas. Admittedly, these comments have helped refined the design and operational details of the Scheme, to the benefit of students, parents and schools. In the research, views of stakeholders and experts in the field were sought and a review of relevant discussions by experts overseas was made, with a view hopefully to throwing light on ways and means to further enhance the measures, in case school drug test is continued in schools in Tai Po or outside Tai Po, to address these issues and concerns.

Children's rights

Children's rights: what rights?

15.2 It is noted that to administer a drug test, consent of the student (and/or the parents) is required under the present law, unless there are clear justifications and overriding legal authority. Furthermore, drug testing inevitably requires the collection of body samples, intimate or non-intimate, and thus may give rise to privacy concern. Thus, even though consent has been obtained, some may still see it an unethical intrusion into the privacy of a person due to the possible group pressure if consent is not given. The above issues, in the context of children's rights under the United Nations Convention on the Rights of the Child (UNCRC), including their rights to express their views (Article 12)¹²³ and to protection of their privacy and reputation (Article 16),¹²⁴ are discussed in the paragraphs to follow.

123 "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."

124 "No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family or correspondence, nor to unlawful attacks on his or her honour and reputation."

15.3 In the UK, after the final version of the UNCRC was published in 1989, it was ratified by the UK Government in 1991. Since then, a number of policies and legislative changes were introduced by the UK Government covering every aspect of children's life. Researchers nevertheless noted that much of the changes were structural in nature and were adult-led and services oriented. More importantly, the UK had not incorporated UNCRC into its domestic law, making it unenforceable in the UK courts. For example, with regard to physical punishment of children in the home, the defense of "reasonable chastisement" had been restricted, but not removed from the laws covering England, Wales, Northern Ireland and Scotland.¹²⁵ In 1991 the People's Republic of China ratified the UNCRC. In 1994, UK extended its ratification of UNCRC to her dependent territories, including Hong Kong.

15.4 It is noted that UNCRC embodies three categories of rights, namely a) provision covering social rights of children to minimal standards of health, education, etc.; b) protection covering rights to be safe from discrimination, substance abuse, etc.; and c) protection covering civil and political rights, right to access to information, to freedom of speech and to challenge decisions made on their behalf.¹²⁶ Researchers were quick to point out that there was inherent contradiction in UNCRC between children's right to be protected and their right to express their opinion, to autonomous choice and decisions.¹²⁷

15.5 Furthermore, researchers also noted that from the perspectives of responsibilities of parents, children had the right to nurturing and protective parenting. While parents had the responsibilities, *inter alia*, to foster the intellectual, social and moral development of their children, children were expected to accept parental authority and behave in a manner acceptable to the community. Researchers warned that the "sole emphasis on individual freedom detracts from the principle of the common good with its responsibilities to others and its limitations on individual freedom."¹²⁸

125 Payne, Lisa (2009), "Twenty years on: the implementation of the UN Convention on the Rights of Children in the United Kingdom", in *Children & Society*, 23: 149 – 155.

126 Taylor, Nicola, et al (2002), "Rights important to young people: secondary students and staff perspectives", in *The International Journal of Children's Rights*, 9: 137 – 16.

127 Smiljka Tomanovic-Mihajlovic (2000), "Young people's participation in the family: parents' accounts", in *International Journal of Children's Rights*, 8: 151 – 167.

128 Westman, Jack C (1999), "Children's rights, parents' prerogatives and society's obligations", in *Child Psychiatry and Human Development*, 29(4): 315 – 328.

15.6 Furthermore, a researcher remarked that to justify a right as stipulated in human rights charters, one had to show that the interests of the right-holder were weighty enough to place some other persons under some obligation or duty, balancing the interests of both right-holder and duty-bearers. The systematic interpretations of human rights involved systematic discussion on basic political principles, underpinned by fundamental values and moral principles and midlevel principles that helped determine the scope and limits of rights and duties.¹²⁹

15.7 A number of researchers also argued that although children's participation rights were important, the protection of children should come first. The duty to protect children was not only for parents, but for other actors, including educators tasked to help children participate in society. It was also suggested that children's rights were to be shaped in a participatory manner and as a starting point for dialogue between children and other parties including parents and educators. Children might have different perception of what was in their best interests from that held by other parties, and the rights of children did not necessarily match the children's best interests. The rights of children had to be placed in a broader social context.¹³⁰

15.8 In addition, researchers cautioned that in both UNCRC, the duty to take account of children's views did not preclude the possibility that children's views could be outweighed by other considerations. Article 3 of UNCRC required that 'In all actions concerning children . . . the best interests of the child shall be a primary consideration'. Researchers also noted that it was difficult to determine what was in children's best interest. Invariably, there were likely to be differences between children and adults in their perception of what was in children's best interests. To resolve the difference, one suggestion was to allow children to influence outcomes of decisions affecting in a dynamic manner, adjusted continually as children grew up, in a process of dynamic self-determination. Other researchers pointed out that it was important to take account of the emotional context of children's wishes and feelings, and of working with them in a process which included explanation and reassurance, rather than simply asking children to

129 Chan, Joseph (1998), "Asian values and human rights: an alternative view", in Diamond, Larry and Plattner, Marc F (ed.) *Democracy in East Asia*, Chapter 3.

130 Roose, Rudi and Bouverne-de Bie, Maria (2007), "Do children have rights or do their rights have to be realized? The United Nations Convention on the Rights of the Child as a frame of reference for pedagogical action", in *Journal of Philosophy of Education*, 41(3): 431 – 443.

make a choice.¹³¹

15.9 In addition, a researcher in the US pointed out that rights were not absolute and had to be balanced against the need to preserve other children's rights. The researcher argued that privacy protection was considered necessary because unwanted disclosure might cause psychological or physical harm. However, this might contradict with other children's interests. For example, teachers had to know the students' medical or educational histories in order to provide care. Students in need could not receive extra help if teachers were not aware of the students' progress. In addition, schools had the responsibility to minimize risk to students. The researcher suggested that the principle should be minimal surveillance and the amount of surveillance should be proportional to the level of threat and to the evidence of active threat.¹³²

15.10 Another legal expert interviewed in the course of the research was also of the view that individuals' rights were not absolute. There was often a need to restrain the rights of individuals, in order to protect the rights of others and for public interests. Schools should convey the message to students that their rights were not absolute and they should respect the rights of others. Schools had various regulations on say school uniform, school attendance requirements, etc. and expected that students would abide by if they wished to remain in the schools, and some schools even had discretion on student admission.

Children's rights from American perspectives

15.11 As most of research and debates on school drug testing are conducted in the US, it may be worth reviewing discussions on children's rights in the US. Given that the US has not ratified the UNCRC, legal discussions and court decisions related to school drug testing mainly focus on the interpretation of the US and State Constitutions. With regard to children's rights, based on court decisions in the US, researchers opined that due to the nature of compulsory education and the role of state in ensuring students' entitlement to compulsory education, students might not enjoy the full extent of rights and privileges as

131 Thomas, Nigel and O'Kane, Claire (1998), "When children's wishes and feelings clash with their "best interests", in *The International Journal of Children's Rights*, 6: 137 – 154.

132 Warnick, Bryan R (2007), "Surveillance cameras in schools: an ethical analysis", in *Harvard Educational Review*, 77(3): 317 – 343.

adults. While student privacy rights should be respected, these rights were not without limits and had to be balanced against the needs of the public education system. Indeed the privacy rights of any persons were not without limits, and such limits were necessary in order to effectuate other interests. Children's privacy rights were much more curtailed than the rights of adults. In addition, children lacked some of the fundamental rights of adults, including the right to come and go at will, because they were subject to the control of their parents and guardians. In particular, under the doctrine of *in loco parentis*, students were expected to submit to school authority to maintain order, conducive to a proper learning environment. Furthermore, schools had to place a limit on students' privacy rights in order to maintain order and to protect the safety of school children. For example, drug abuse disrupted the educational learning process, thus affecting the entire student body.¹³³

15.12 The US Supreme Court had also considered the "nature and immediacy" of drug testing. It ruled that the need for deterring drug abuse by students was compelling given that drug use had profound effects on the students and substantial impact on the school community. As regards "efficacy" of drug testing programs, the Court concluded that because student athletes acted as role models for other students and that there was significant potential danger to students athletes using drugs, the drug testing program in a school district in Oregon, which was the case being reviewed, was effective.¹³⁴

15.13 The Court was also of the view that testing all students participating in extra-curricular activities was a reasonably effective means of addressing schools' concern. It was not necessary to find that drug problem was associated with those participating in extra-curricular activities. The Court also rejected that testing on suspicion was a better means given its legal and administrative implications.¹³⁵ Furthermore, the Court also considered it would make little sense to require a school district to wait for drug abuse problems among students become serious before instituting a drug testing program.¹³⁶

133 Higbee, Kari L (2005), "Student privacy rights: drug testing and Fourth Amendment protections", in *Idaho Law Review*, 41: 361 – 401.

134 Einesman, Floralyann and Taras, Howard (2007), "Drug testing of students: a legal and public health perspective", in *Journal of contemporary health law and policy*, 23: 231 – 271.

135 Loesevitz, Michael (2007), "Random drug testing in public schools", in *Journal of Law and Education*, 36(3): 453 – 460.

136 Rothgery, Katrin Miller (2003), "Kids, drugs and school intervention: how far can a public school go

15.14 Furthermore, one of the Justices of the US Supreme Court, while concurring with the Court's decision, noted that government's action with "supply side interdiction" had not resulted in a reduction in teenage drug abuse. The Justice believed that public schools had the responsibility to deal with the problem effectively and considered that drug testing provided an effective means to do so, by affording students a response to peer pressure.¹³⁷

The question of genuine and informed decisions

15.15 As emphasized by an academic researcher on human rights interviewed in the study, where there was a need to put a limit or restriction to human right, such restriction should be proper (e.g. in public interests) and proportional (in relation to the aims and objectives of such restriction), and that the whole process of imposing the restriction should be fair and transparent. In particular, in interpreting human rights for children, due consideration had to be taken of the decision-making ability of children.

15.16 As stated in the protocol adopted in the Scheme, parents and students have an absolute say over the decision to participate or not in the Scheme. While briefing sessions were arranged for parents and students to explain to them the purposes of the Scheme, it was up to the parents and students to decide whether to participate or not. No question was raised by schools if the parents and students decided not to participate. Teachers would not talk to students who had not participated, or to persuade them to participate. Principals and teachers only promoted the Scheme to students in groups, including students who had or had not participated in the Scheme, explaining the reasons why the schools had decided to adopt school drug testing.

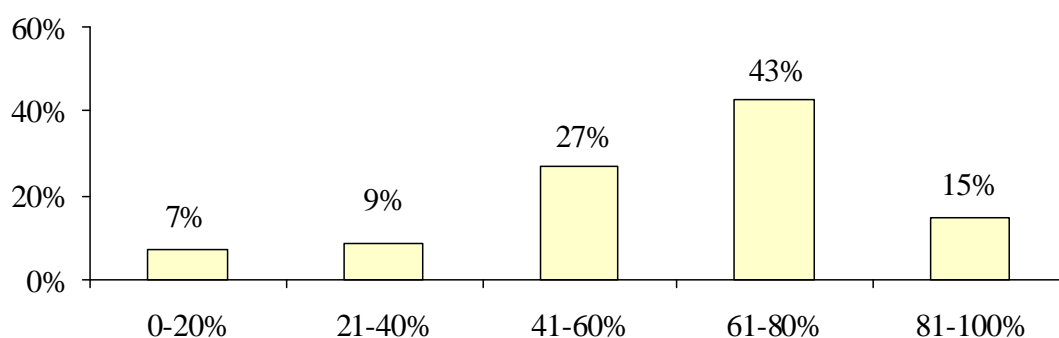
15.17 The June 2010 survey showed that only about 25% of teachers indicated that some of their students had proactively approached them to discuss the Scheme. In analyzing the proportion of students who had participated in the Scheme by individual class, it may be of interest to note that while the overall participation rate in the Scheme was around 60%, 15.7% of classes had an overall participation

in drug testing its students", in *Washington University Law Quarterly*, 81: 1123 – 1145.

137 Einesman, Floralynn and Taras, Howard (2007), "Drug testing of students: a legal and public health perspective", in *Journal of contemporary health law and policy*, 23: 231 – 271.

rate of 40% or below and around 14.8% of classes had an overall participation rate of more than 80%. It is likely that students in making up their mind to participate or not were influenced by views of their classmates. Needless to say, social cohesion of students in the same class and their attachment to schools would affect students' decision to participate. Nevertheless, in view of the survey findings discussed above, there is doubt as to whether all students have made an informed decision on whether to participate in the Scheme.

Percentage distribution of participation rate by class



Observations

15.18 In designing the operational details of the Scheme, thorough consultations were conducted with teachers, parents and students in Tai Po, experts in the field and other concern parties. The protocol subsequently drawn up for the Scheme inevitably benefited from views expressed by parties concerned. The Project Team is of the view that the Scheme placed more emphasis on respecting children's rights than protecting students' interests, though schools have not overlooked the need to protect children's rights and interests. Given the diverse and different needs of students, holding briefing sessions for them in a group may not be helpful to some students, especially those in need of closer attention and more intensive counselling. Waiting for students who have problems to proactively approach teachers for advice may not be the best arrangement, from an educational perspective. The Project Team believes that it is desirable for teachers and social workers to proactively approach students to offer advice and assistance, in order to protect both students' rights and interests, and to ensure that students are making genuine and informed decisions. Indeed, as noted by

researchers, it was important to take account of the emotional context of children's wishes and feelings, and of working with them in a process which included explanation and reassurance, rather than simply asking children to make a choice.¹³⁸

15.19 During discussions with students, the Project Team had the impression that students were fully aware of their rights, and felt strongly about this. Probably debates and discussions in the mass media and the Internet had helped reinforce their belief in children's rights, which was an encouraging sign. Nevertheless, the Project Team noted that students did not have a full understanding of various children's rights, apart from the right to autonomous choice and decisions, and the limits and constraints on the rights of not only children but also adults. Given the educational focus of the Scheme, there is obviously a need to encourage more discussions between schools and students and among students on the various aspects of children's rights.

Privacy of children

Overview

15.20 Issues related to children's privacy have been raised in connection with the Scheme as there are concerns over the protection of personal data collected by schools and the SDT team in implementing the Scheme, including personal data of those who have or have not given consent to participate in the Scheme and the drug test results. Concerns have also been raised that there may be labelling effects on students participating or not participating in the Scheme and students tested positive in the Scheme. In preparing for and implementing the Scheme, Government in consultation with schools concerned and the SDT team has meticulously drawn up a protocol, made available to all students and their parents, explaining in details how the Scheme, including drug testing, would be conducted. In accordance with the protocol, parties concerned have taken steps to ensure that the personal data of students participating or not participating in the Scheme are protected. In this section, issues related to children's privacy are examined and discussed, based on qualitative and quantitative information gathered in the study.

138 Thomas, Nigel and O'Kane, Claire (1998), "When children's wishes and feelings clash with their "best interests", in *The International Journal of Children's Rights*, 6: 137 – 154.

15.21 It was noted by researchers that among all human rights issues, privacy was the most difficult to define. Definitions of privacy varied widely according to context and environment. In many countries, the concept was fused with data protection, while others considered privacy in a broader context with privacy protection being a way of drawing the line at how far society could intrude into a person's affairs. It was suggested that privacy could be divided into the following four separate but related concepts:¹³⁹

- a) **Information privacy**, which involved the establishment of rules governing the collection and handling of personal data such as credit information, and medical and government records;
- b) **Bodily privacy**, which concerned the protection of people's physical selves against invasive procedures such as genetic tests, drug testing and cavity searches;
- c) **Privacy of communications**, which covered the security and privacy of mail, telephones, e-mail and other forms of communication; and
- d) **Territorial privacy**, which concerns the setting of limits on intrusion into the domestic and other environments such as the workplace or public space. This includes searches, video surveillance and ID checks.

15.22 In Hong Kong, invasion of privacy is not a tort at common law. Nevertheless, Article 28 of the Basic Law provides that "arbitrary and unlawful search of the body of any resident or deprivation or restriction of the freedom of the person shall be prohibited". Article 29 extends protection under Article 28 to search of or intrusion into the "home and other premises" of a resident. The freedom and privacy of communication is also protected under Article 30. Article 14 of the Hong Kong Bill of Rights in section 8 of the Hong Kong Bill of Rights Ordinance (Cap 383) also states that no person shall be subjected to "arbitrary or unlawful interference with his privacy, family, home or correspondence". The Ordinance only binds the Government and public authorities and hence the right to privacy under the Ordinance cannot be enforced against private persons.¹⁴⁰

139 Banisar, D. (2000), *Privacy and Human Rights 2000: An International Survey of Privacy Law and Developments*, Privacy International www.privacyinternational.org/survey/phr2000/overview.html, retrieved on 17 June 2010.

140 The Law Reform Commission of Hong Kong (2004), *Report: civil liability for invasion of privacy*,

Practices in the US

15.23 It was noted by researchers that US courts in general found it acceptable for a school to allow students' privacy behind closed doors in a restroom. Schools should also take measures to protect the identity of students with respect to urinalysis results which could only be released to certain school staff on a need-to-know basis. The US Supreme Court in its 2002 ruling considered that given measures to minimize intrusiveness of drug testing and the limited use of the test results, urine drug testing was only a minor invasion of students' privacy and not significant.¹⁴¹ The Court also considered that "students within the school environment have a lesser expectation of privacy than members of the population generally" as evidenced by the compulsory requirement that children should attend school.¹⁴²

Learning and teaching process in schools

15.24 In the case of Hong Kong, from discussions with principals and teachers, the Project Team also noted that in reality there are limitations to maintaining absolute privacy of information related to individual students. For instance, students with better performance are usually recognized and made known to other students, whereas those who are performing not so well will as an indirect consequence be known to students. Information related to students' participation in most, if not all, school activities is as a matter of practice not kept confidential. From the perspectives of principals and teachers, this does not amount to a breach of privacy on the part of individual students.

15.25 In addition, for schools where there is integrated education, students with special education needs are admitted to enable them to benefit from education in ordinary schools. In early years of primary schools, teachers have to identify students with special learning problems for early intervention. A system is in place for assessment and referrals of students with special educational needs. Teachers

Chapter 2.

141 Higbee, Kari L (2005), "Student privacy rights: drug testing and Fourth Amendment protections", in *Idaho Law Review*, 41: 361 – 401.

142 Australian National Council on Drugs (2008), *Drug testing in schools: evidence, impact and alternatives*.

have to adopt say differential teaching and student grouping to address student diversity.¹⁴³ For an inclusive school, “students with ‘special educational needs’ are seen as individuals with different interests, knowledge and skills rather than as part of a homogeneous group” and “support is seen as an entitlement for those students who need it rather than as a special addition to their education”.¹⁴⁴

15.26 From discussions with principals and teachers, it transpires that teachers are not expected to “hide” students with special needs and treat all students as if they belong to a homogeneous group. While acknowledging the need to respect students’ privacy and take care not to avoid stigmatization, causing emotional distress to students concerned, differential care and education have to be delivered to students. For example, in some schools, students are streamed into different classes according to ability in order to reduce student diversity within a class to increase the effectiveness of learning and teaching. Special remedial classes are often organized for students with less than satisfactory performance. Special classes are also organized for students with better performance. The strict confidentiality arrangement being put in place for drug testing is peculiar to the usual practices and culture of schools.

Views of students

15.27 With regard to drug testing, researchers admitted that drug testing was intrusive. Nevertheless, the degree of privacy intrusion depended on the manner in which drug testing was implemented. School should be cognizant of the need to provide as much privacy to students as reasonably possible in say collecting the urine sample and took measures to protect the identity of students with respect to the urine test results.¹⁴⁵

15.28 In the study, the Project Team was impressed by the extent of care and caution schools and the SDT team had taken to protect the personal data and privacy of students participating in the Scheme following the protocol. Nevertheless, during discussions with students, the Project Team was given to

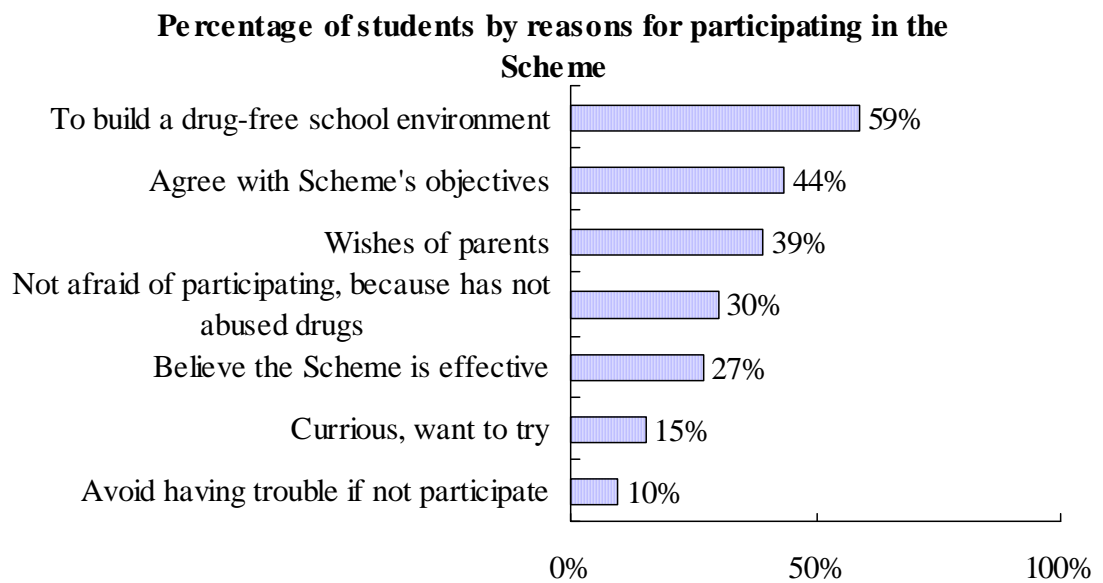
143 Please see for example Board of Education (2002), “Second interim report of the Board of Education Sub-committee on catering for students’ diverse learning needs”.

144 Education Bureau (2008), “Catering for student difference: indicators for inclusion”.

145 Higbee, Kari L (2005), “Student privacy rights: drug testing and Fourth Amendment protections”, in *Idaho Law Review*, 41: 361 – 401.

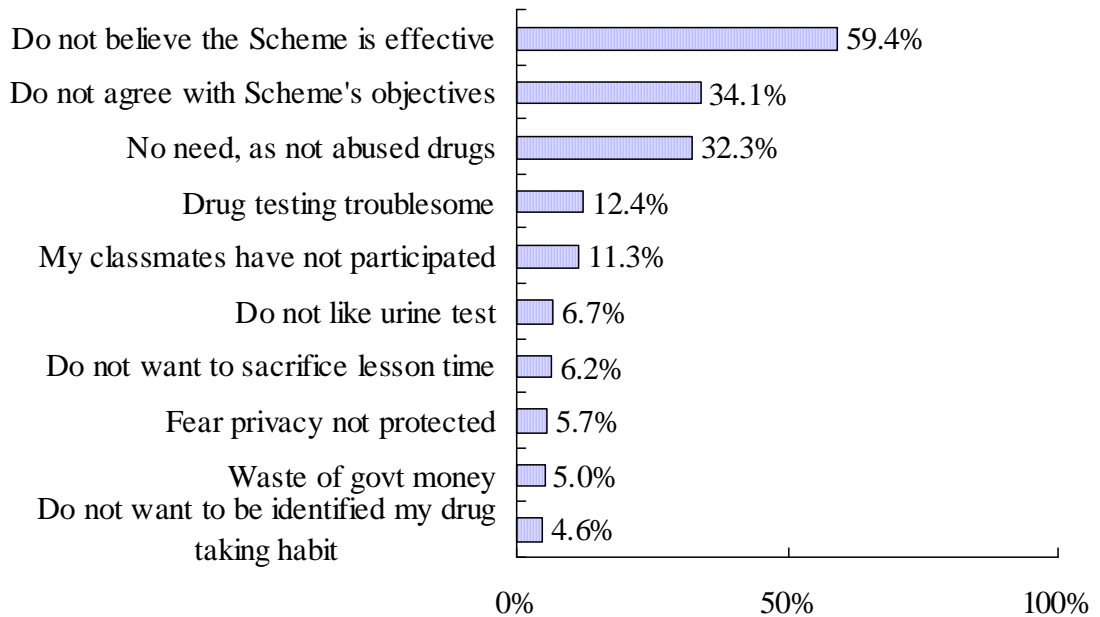
understand that nearly all students realized that when a classmate was asked by school staff to leave the class, the classmate concerned had participated in the Scheme and was sampled for drug testing. A few students also pointed that they had little difficulty noticing changes that had taken place on the date drug testing was going to be conducted (e.g. installation of partition in certain parts of the school building or temporary closure of certain places like toilet facilities, reading rooms or parts of the school halls). In short, it is very difficult, if not impossible, to conduct any school activity including drug testing in the school campus which involves groups of students, in a secretive manner completely unnoticed by other students.

15.29 During discussions with students, many of them were of the view that there was no need to keep the information related to their participation in the Scheme or their having been sampled to take the drug test confidential.



15.30 Besides, the December 2009 survey showed that for students who participated in the Scheme, the main reasons for doing so were that they were willing to work with their schools to build a drug-free school environment (59%), that they agreed with the objectives of the Scheme (44%) and that it was the wishes of their parents (40%). For those who did not participate in the Scheme, the main reasons were that they did not believe that the Scheme was effective (59%), that they did not agree with the objectives of the Scheme (34%) and that as they had not abused drugs, there was no need to do so (32%).

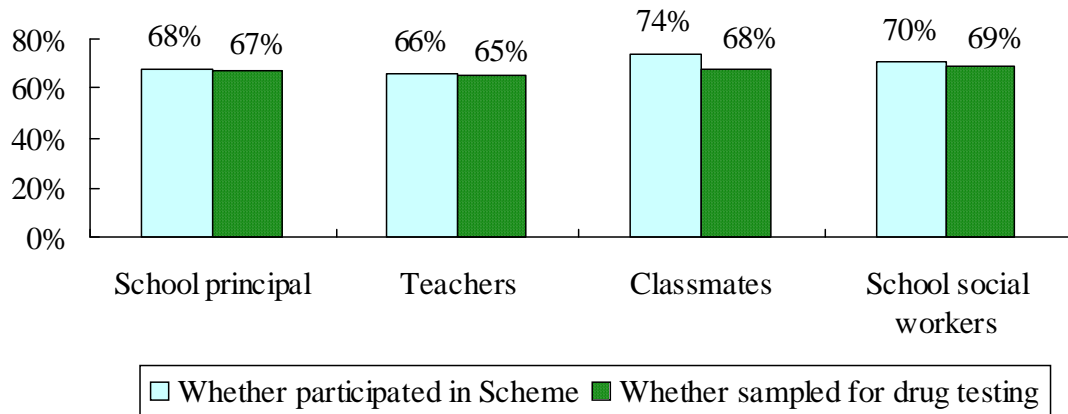
Percentage of students by reasons for not participating in the Scheme



15.31 In short, students participated or not in the Scheme for a variety of reasons. The fact that a student did not participate in the Scheme did not imply that he/she had abused drugs. In other words, participation or not in the Scheme is not likely to have any labelling effect on the students concerned. It follows that given sampling for drug testing is conducted randomly by the SDT team members who do not know the students, the Project Team believes that the mere carrying out of drug test on a student should not have any labelling effect on the student concerned. This view was also shared by students during focus group discussions.

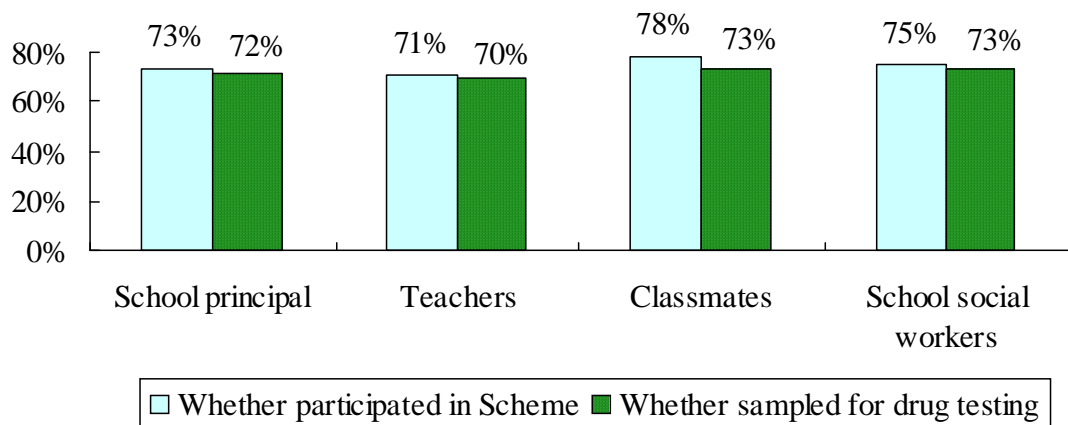
15.32 Findings of the June 2010 survey also confirmed this line of thinking. As shown in the chart below, most students agreed that their classmates could be informed of whether they had participated in the Scheme (74%) and whether they were sampled for drug testing (68%). More than half of students also agreed that such information could be made available to school principals, teachers and school social workers.

Percentage of students by views on parties who can have access to student information



15.33 In particular, for students who had participated in the Scheme, a higher proportion of them, as compared with students as a whole, agreed that their classmates could be informed of whether they had participated in the Scheme (78%) and whether they were sampled for drug testing (73%). A higher proportion of them also agreed that such information could be made available to school principals, teachers and school social workers.

Percentage of students who have participated by views on parties who can have access to student information



Views of other stakeholders

15.34 As noted by the Law Reform Commission, given that there is no tort of invasion of privacy in Hong Kong, “a person whose privacy has been intruded upon has to show that the conduct of the intruder amounts to the commission of a well-recognised tort for which the victim has a cause of action.”¹⁴⁶ Sharing similar views, a researcher interviewed by the Project Team in the course of conducting the research opined that any new tort of invasion of privacy should use an objective test that “the act/conduct is offensive or highly offensive to a reasonable person of ordinary sensibilities”. He referred to a report on the review of privacy law by the Australian Law Reform Commission which stated that an invasion of privacy could be determined if the person concerned “had, in all the circumstances, a reasonable expectation of privacy in relation to the relevant contact or information”, and/or “the invasion of that privacy in relation to that conduct or information is, in all the circumstances, offensive (or highly offensive to a reasonable person of ordinary sensibilities”.¹⁴⁷ In his opinion, disclosure of information related to students’ participation in drug testing, for example, should not be regarded as offensive or highly offensive to a reasonable person of ordinary sensibilities.

15.35 A legal expert interviewed by the Project Team pointed out that the extent of privacy concern depended on the sensitivity of personal data. For example, privacy protection requirement for the collection of finger print was more stringent than say gathering of personal data on whether students had participated in a school activity. The question that might need to be raised was whether the personal data collected were directly related to the activities of data users, as schools’ normal activities should be concerned with learning and teaching, rather than drug testing. On the other hand, it might be argued that it was related to school activities as whole person development was part of schooling functions. He recommended that the Privacy Commissioner may wish to issue guidelines for schools to follow.

15.36 The Project Team believes that the Guidelines on drug testing will be

146 The Law Reform Commission of Hong Kong (2004), *Report: civil liability for invasion of privacy*, p.19.

147 Australian Law Reform Commission (2007), *Review of Australian Privacy, Volume 1, Discussion Paper 72*, p.296.

useful to schools in conducting drug testing. The current protocol drawn up for the Scheme could serve as useful reference to schools. In any case, schools have to deal with personal data of students in all learning and teaching activities related to schools and needless to say have to take all necessary actions to protect the privacy of students.

15.37 Another legal expert interviewed by the Project Team pointed out that privacy was controversial concept. While admitting that there was no law on tort of privacy, remedies might be sought through other legal provisions. Citing the case of involving Naomi Campbell's claims against the Daily Mirror (*Campbell (Appellant) v. MGN Limited (Respondents) 2004, UKHL 22*), for publishing her photo after attending a Narcotics Anonymous meeting, the House of Lord ruled in favor of Naomi Campbell for breach of confidence on the grounds that the information was by nature confident and there was reasonable expectation of privacy. He said that the case was important as it extended the law on breach of confidence to cover persons where there was no formal relationship between the plaintiff and the defendant. He noted that there was no similar court case in Hong Kong, as a number of privacy cases which would potentially amount to a breach of the duty of confidence were either settled outside court or prosecuted for other charges like trespasses or theft.

15.38 A (third) legal expert interviewed stressed that although privacy protection was included in the Basic Law and Hong Kong Bill of Rights Ordinance, there was no definition of privacy in these legal documents. There was also no case law in Hong Kong to clarify precisely the meaning of privacy. Though one could rely on case law in the UK, he cautioned that while UK adopted the European Convention on Human Rights, Hong Kong followed the International Covenant on Civil and Political Rights. In connection with the Scheme, he pointed out that while the lists of students participating in the Scheme were personal data, the fact that the identity of students participating in the Scheme would be revealed when they were asked to leave the classroom to take the drug tests did not amount to disclosure of personal data, though it was related to the privacy of the students concerned. In his view, in considering the privacy of students sampled to take the drug tests, one had to take into account whether the students had a reasonable expectation that they should not be seen by other students when they were asked to take the drug tests.

15.39 Another legal expert advised that schools should make their best efforts in

protecting students' privacy, in a reasonable manner. Privacy in the end was what was considered reasonable and was not absolute. Measures to protect student privacy had to be balanced with other needs of schools and had to be justified. It was desirable for schools to treat drug testing as a normal school activity similar to other school activities such as extra-curricular activities.

15.40 A (fourth) legal expert interviewed in the study also suggested that efforts should be made by schools to promote the message to students and other stakeholders that participation or not in the Scheme did not indicate that the students had or had not abused drugs. In other words, participation in the Scheme did not have any labelling effect on students. Furthermore, in conducting drug tests, efforts should be made to minimize inconvenience to students (e.g. by asking students to take drug tests during school hours rather than outside school hours), rather than immunizing inconvenience to the SDT.

15.41 On a related issue, a (fifth) legal expert interviewed in the study cautioned that although students tested positive in the Scheme would not be prosecuted for consumption of drugs and information on students tested positive would not be passed to the Police, the student drug test results might still be accessed by law enforcement agencies. This was because information on students tested positive in the Scheme would be reported by NGO to the Central Register of Drug Addicts (CRDA), after obtaining consent from the students concerned and their parents or guardians, and information contained in the CRDA could be accessed by law enforcement agencies by order of the Secretary of Justice Section 49G of the DDO.

15.42 Another legal expert, on the other hand, believed that the chances of doing so by Secretary of Justice were very remote. He noted that DDO was enacted before school drug testing was introduced in Hong Kong and hence could not possibly take into consideration the need to keep student drug test results under the Scheme strictly confidential. Nevertheless, he cautioned that, based on a Court of Appeal ruling in Canada, the privilege against self-incrimination was not allowed if the evidence provided by a person was subsequently used to acquire further evidences independent of the evidence provided by the person to substantiate and prosecute other crimes committed by the person. He said such "derivative immunity" was allowed in Hong Kong courts in a number of local cases. He advised that the Department of Justice should issue a policy statement to the effect that information on students tested positive in the Scheme would not be

used for law enforcement purposes. This would provide the students with a defense, on grounds of abuse of process, if they were in the unlikely event of being prosecuted based on the information gathered in the Scheme.

Observations

15.43 The Project Team is of the view that in conducting drug testing reasonable measures should be in place to protect students' privacy as far as practicable. Such measures have to comply with provisions in the Personal Data (Privacy) Ordinance and the Dangerous Drugs Ordinance with regard to the drug test results. In this regard, it is noted that the Scheme protocol containing detailed provisions for such protection has been implemented diligently and faithfully. On the other hand, efforts should be made to alleviate inconvenience caused to students and disruption to learning and teaching. It follows that it is desirable to re-examine the drug testing procedures with a view to reducing the time required for conducting drug tests, such that students were only required to be absent from class for say a few minutes for drug testing, or that drug testing could be conducted during recess or outside school hours.

15.44 Indeed, as pointed out by a number of legal experts, the focus should be placed on putting extra efforts to convey the message to students that participation or not in the Scheme does not mean that the students concerned have or have not abused drugs. In other words, attempt should be made to remove labelling effect, if any, resulting from students' participation or non-participation in drug testing. In addition, drug testing should be regarded as one of the regular activities of schools, with the necessary precautionary measures that are normally in place to protect personal data and privacy of students. Admittedly, the specimen collection process warrants more stringent privacy protection measures and has to be conducted for individual students alone in a venue with absolute privacy. The drug test results should also be treated as strictly confidential.

15.45 The Project Team also notes that the SDT team has taken the opportunity during the drug testing process to convey anti-drugs messages to the students (e.g. by playing games or quiz with them), in order to emphasize the educational content of the drug testing process. Nevertheless, the Project Team believes that if such messages have to be conveyed to students, it should have been done so through briefings and counselling sessions already arranged for all students of the

school. Providing another round of briefings to students randomly selected for drug testing, with no regard to the needs of the students and at the expense of lesson time of the students, by social workers who know little about the background of the students might not be an effective means of transmitting knowledge on drugs.

16. Concerns over adverse impact on families and schools

Impact on families

16.1 Concerns had been raised on the possible adverse impact of drug testing on family relationship. In the course of discussions with students and parents, the Project Team was given to understand that nearly all students and parents did not think that the Scheme had affected relationship between the students and their families. All parents interviewed also considered that the Scheme had not adversely affected parents' trust in schools. Findings of the June 2010 survey showed that 90% of students considered that the Scheme had not damaged their relationship with their parents. 95% of parents also shared similar views. In addition, 94% of parents considered that the Scheme had not adversely affected parents' trust on schools.

16.2 Nevertheless, for students who had not participated in the Scheme, a lower proportion of them were of the view that the Scheme had not damaged their relationship with their parents.

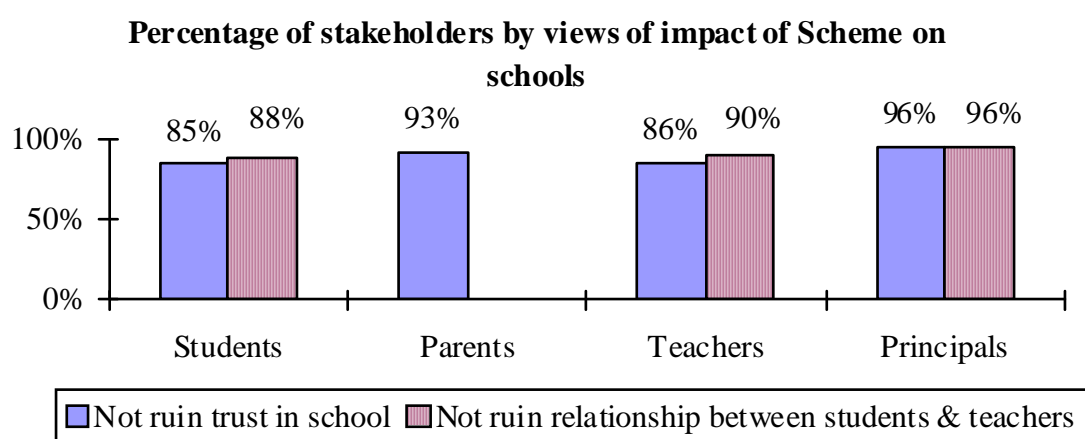
Impact on schools

16.3 One of the main criticisms directed against school drug testing was the possible undermining of trust that was expected between school personnel and students, in an educational setting, to the extent that it would adversely affect other aspects of students' education, including anti-drug education. It was argued that the perceived "policing" role of teachers might possibly create an environment of resentment, distrust and suspicion leading to loss of school connectedness. It might possibly aggravate truant behaviour, making it more difficult to reach out to students who had abused drugs.

16.4 During discussions with principals, teachers and students in the course of the research, none of them indicated that the Scheme had affected the mutual trust between schools and students. From the principals' and teachers' perspective, tests and assessments were normal in a school setting, based on which teachers could align their learning and teaching strategies to the different and diverse needs of students and review their effectiveness. There was no question of doing away with tests and assessments for fear that this would undermine mutual trust between students and teachers. Given schools' pastoral role over students, it was desirable for schools to identify as early as possible behavioural problems of students.

16.5 From the perspective of students, most of them indicated that they had nothing to worry about if they had not abused drugs, and drug testing gave them the opportunity to reinforce teachers' trust in them in staying away from drugs. Furthermore, most students pointed out that since drug testing was conducted by an independent, external body and teachers were not involved, they did not believe the Scheme would have an adverse impact on mutual trust between students and schools.

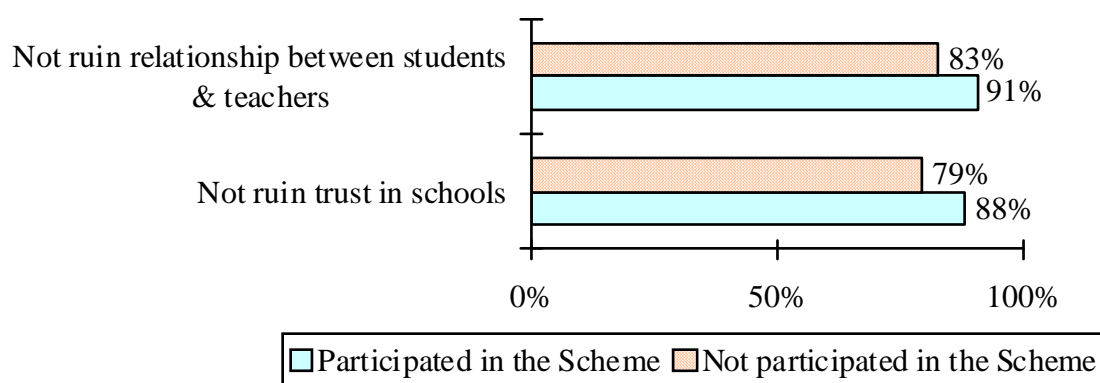
16.6 In short, based on qualitative information obtained through discussions with principals, teachers and students, the Project Team did not see any adverse impact the Scheme had on trust between students and schools. Indeed, findings of the June 2010 survey showed that the great majority of students, parents, teachers and principals shared these views.



16.7 Nevertheless, for students who had not participated in the Scheme, a lower proportion of them were of the view that that the Scheme had not adversely affected relationship between students and teachers and trust in schools. For

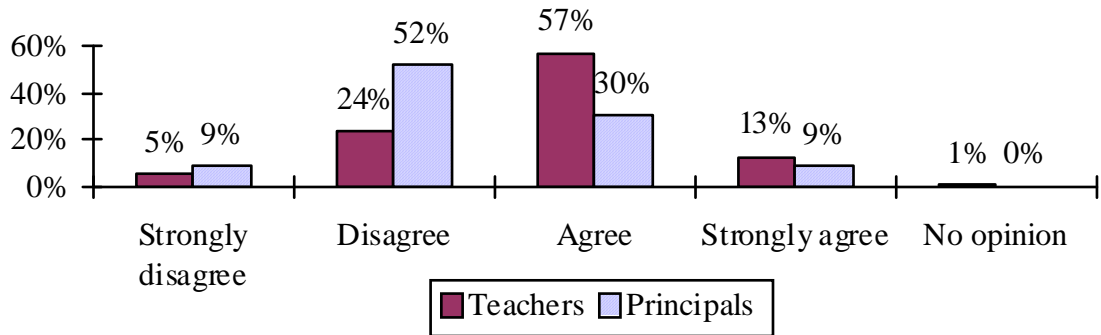
instance, 88% of students who had participated in the Scheme considered that the Scheme had not ruined their trust in schools and 91% considered that the Scheme had not ruined relationship between students and teachers, which were higher than the corresponding percentages of 79% and 83% respectively for those who had not participated in the Scheme.

Percentage of students by views of impact of Scheme on schools



16.8 Given that teachers' involvement in the Scheme was not significant, more than half of teachers in Tai Po (70%) agreed that the Scheme had not increased their workload. On the other hand, from discussions with principals in Tai Po, it transpired they had to devote a significant amount of their time in preparing for the launch of the Scheme and in overseeing its implementation. They had to personally attend to day-to-day operations of the Scheme because information related to students' participation in the Scheme was considered highly confidential. Indeed, more than half of principals (61%) considered that the Scheme had increased their workload. A principal opined that through personally taking up liaison work with parents, which was a fairly time-consuming task, it had helped foster closer home-school cooperation. Many parents contacted by the principal showed much appreciation for the personal attention given by the principal to the well-being of their children.

Percentages of respondents by whether agreed that the Scheme had NOT increased their workload



16.9 During discussions with principals, many of them stressed that drug abuse among students was not more serious in Tai Po compared with some other districts in Hong Kong. Their schools were willing to launch the Scheme on a trial basis because they believed that drugs had an irreversible, detrimental impact on students’ physical and mental health and that schools should act decisively to protect students from drugs. It was also stressed by several principals that over the years, it was increasingly recognized by schools that their role was not just restricted to learning and teaching, but should encompass providing pastoral care to their students and attending to their whole person development. In view of the seriousness of drug abuse among students, anti-drug education and prevention should become an important part of schools’ activities.

16.10 Most principals also pointed out that traditionally, secondary schools in Tai Po had close cooperation on educational issues and other matters that affected students’ wellbeing, and hence they had little problem in reaching consensus quickly to introduce school drug testing, the first of its kind in local schools in Hong Kong. In fact, feedback from parents was very positive, as they realized schools were taking prompt action to protect their children from drugs, and hence were more willing to send their children to attend schools in Tai Po.

Observations

16.11 On the basis of views expressed during discussions with students, parents, teachers and principals, as well as data obtained from the June 2010 survey, the Project Team is of the view that the Scheme has not adversely affected parent-children relationship and student-teacher relationship. The Scheme has

also not undermined trust of students on schools. The Project Team believes that mutual trust is cultivated between parents and children or between schools and students, over a number of years through different measures instituted by parents or schools. What count most are not only the measures, but also how these measures are implemented and the intention of schools or parents. As emphasized by a number of principals consulted in the course of the study, if principals and teachers cared about the students and any school measures or policies were introduced with the interests of students in mind, students affected would appreciate what schools had done for them.

16.12 Moreover, if the Scheme is introduced with the sole purpose of helping students, protecting them from drugs, opportunity could be taken, through the Scheme, to show that schools care not only about students' academic performance, but also their physical and mental well-being, going a long way to fostering an inviting and caring school atmosphere. If there is any lingering doubt on the part of students on the intents and purposes of the Scheme, schools should promptly address this, by proactively engaging students in a frank and open manner.

16.13 As the Scheme was implemented on a trial basis, the heavy involvement of principals was understandable. It might also be advisable for the principals to be personally involved in planning for and implementing the Scheme, in order to ensure the smooth operation of the Scheme. However, in the long run, the Project Team believes that the tasks of overseeing the operation of the Scheme can be taken up by other school staff. While there is still a need to safeguard students' personal data in the implementation of the Scheme, the Project Team considers that other school staff, with proper training if required, should be able to discharge their duties satisfactorily. After all, schools have to handle, almost on a day-to-day basis, personal data of students involved in students' participation in a variety of learning and teaching activities.

16.14 Noting that many international schools and ESF schools and a DSS school in Hong Kong had also introduced drug testing, apart from secondary schools in Tai Po, the Project Team believes drug testing has no labelling effect on schools. Given that students in nearly all secondary schools in Hong Kong had abused drugs, according to the 2008/09 survey¹⁴⁸, schools may decide to introduce drug testing to help students stay away from drugs, regardless of whether there is or the extent of drug abuse among students of the schools concerned. For other

148 Narcotics Division (2010), *The 2008/09 Survey on Drug Use among Student, Report*, p. 21

schools, they may decide to wait and see the outcome of the Scheme in Tai Po before introducing drug testing, or adopt other anti-drug measures. In short, conducting or not school drug testing does not imply that drug abuse among students of the schools concerned is more or less serious.