



PROPOSED COMPULSORY DRUG TESTING SCHEME ‘RESCUE’ (“RDT”)

SUBMISSION

1. The Law Society is invited to consider and give its views on a consultation paper published by the Action Committee Against Narcotics (“ACAN”) in September 2013 proposing new powers to be given to the police to allow for comprehensive compulsory drug testing.
2. At the end of the consultation paper ACAN lists out eight questions on which it intends to seek views. The Law Society considers that these eight questions are structured in a way which is not conducive to a thorough review of the proposal. Instead of providing answers in a question-and-answer format, the Law Society sets out its views and comments in the following summary.
3. The following summary of the Law Society on the RDT outlines the background to the proposed scheme, the proposed scheme itself, the views expressed by medical profession as regards the scheme and identifies concerns about the proposal.
4. Documents the Law Society has considered in the course of deliberation of the consultation paper include:-
 - a. Consultation Paper on RESCUE Drug Testing Scheme (September 2013)
 - b. ACAN Press Release (25 September 2013)
 - c. South China Morning Post article of 4 November, 2013 “Compulsory drug tests violate basic human rights, doctors’ group says”
 - d. South China Morning Post article of 24 November, 2013 “Hong Kong police stop-and search tactics questioned after 1.6m spot checks last year”;

- e. Hong Kong Standard article of 30 December, 2013 “Tests will not work, claim drug abusers”.

5. **Background of the RDT**

- a. On 25 September 2013, ACAN issued the RESCUE Drug Testing Scheme Consultation Paper (the “**Consultation Paper**”) on the RDT, which proposes for the community to consider the RDT to empower law enforcement officers to require a person to undergo drug testing when there are reasonable grounds, based on circumstantial conditions, to suspect that person has taken drugs.¹
- b. The topic of compulsory drug testing originated from the Report of the Task Force on Youth Drug Abuse published in November 2008 (the “**Report of the Task Force**”), which recommended the introduction of new legislation to empower law enforcement officers to require a person reasonably suspected of having consumed dangerous drugs to be subject to a drug test.²
- c. In response to the Report of the Task Force, the Hong Kong Bar Association (“**HKBA**”) published its Position Paper on the Report of the Task Force on Youth Drug Abuse on 8 January 2009 (“**HKBA’s Position Paper**”), with regards to compulsory drug testing.
- d. HKBA’s Position Paper rejected compulsory drug testing suggested by the Report of the Task Force, stating that once test results obtained without consent of the person are used for the purposes of prosecution, a number of fundamental rights may be violated including:
 - i. the right to self-incrimination;³
 - ii. the right to privacy;⁴
 - iii. the right against unlawful or arbitrary search of the body;⁵ and
 - iv. the right to refuse medical treatment.⁶

¹ The Consultation Paper, §1.1 and §1.2

² Report of the Task Force, Recommendation 7.1

³ Hong Kong Bill of Rights, Art 11(2)(g)

⁴ Hong Kong Bill of Rights, Art 14

⁵ Basic Law, Art 28

⁶ HKBA’s Position Paper, §32

- e. Nevertheless, in July 2009, the Chief Executive set out directions for drug testing in public schools through the Trial Scheme on School Drug Testing in Tai Po District (the “**Trial Scheme**”), which was launched in December 2009.⁷
- f. With regards to the Trial Scheme, findings of a June 2010 survey revealed that 46% of parents and 40% of students supported *voluntary* drug testing, while only 23% of parents and 26% of students supported *compulsory* participation.⁸ As such, the overwhelming majority of parents and students did not support compulsory drug testing.

6. The stance of ACAN

- a. Public Consultation of the RDT was announced on 25 September 2013 and would last for 4 months. Following the end of the public consultation period, ACAN would summarize the views received and make recommendations for the Administration for further consideration.
- b. ACAN’s view is that the object of the RDT is to help identify as early as possible those abusing drugs, and referring them to social workers or health-care professionals to join counselling and treatment programs.⁹

7. The Proposed Scheme

- a. The Law Society acknowledges the problems ACAN identifies, and supports the principle underlining the proposed scheme, i.e. to combat drug abuse problems at early stage and to render early assistance.
- b. The proposed scheme unfortunately lacks specifics / definitions as regards applicability which allow for proper consideration of the detail and allow only for consideration of general principles.

⁷ Trial Scheme on School Drug Testing in Tai Po District (School Year 2009/10): Evaluation Research Report (November 2010), Policy 21 Limited; Commissioned by Narcotics Division, Security Bureau, §1.3

⁸ Trial Scheme on School Drug Testing in Tai Po District (School Year 2009/10): Evaluation Research Report (November 2010), Policy 21 Limited; Commissioned by Narcotics Division, Security Bureau, §17.13

⁹ §2.2, Consultation Paper

- c. There are two broad issues set out in the paper for consideration:
 - i. Identification of drug abusers, or potential drug abusers; and
 - ii. Rehabilitation of those drug abusers identified.

Identification of drug abusers

- d. From the papers provided it would seem that the basic proposal under the new RDT scheme is as follows:-

If any substance suspected to be dangerous drug is found at a location by a law enforcement officer, any person ‘in the near vicinity’ whose ‘physical state, behaviour and or belongings show that (s)he may have just taken drugs’ can be questioned and observed, arrested, detained at a police station and be required to undertake a drug test.¹⁰

- e. Impairment / drug tests
 - i. *Impairment test:*

Some specific tests such as eye examination for checking if the pupil is dilated or whether one could balance well on one leg are conducted. The process is to be conducted in a police station and video-recorded.¹¹
 - ii. *Rapid Oral Fluid Test:*

An oral fluid sample through a test kit.¹²
 - iii. Bodily sample for testing by the Government Laboratory.
- f. ACAN further proposes that it should be an offence if a person refuses to undergo the preliminary drug tests or provide bodily samples for laboratory analysis without a reasonable excuse.¹³

¹⁰ §3.5, Consultation Paper

¹¹ §3.15, Consultation Paper

¹² §3.16, Consultation Paper

¹³ §3.17, Consultation Paper

Rehabilitation

- g. If that drug test reveals that the person has taken dangerous drugs then the person may be diverted to counselling / treatment, rather than prosecuted.
- h. Paragraph 3.26 of the Consultation Paper states that:

“Drug abusers found under RDT, where applicable, would be given a chance of non-prosecution and referred to appropriate counseling and treatment services as soon as possible...”

8. Problems and concerns with the proposed scheme

- a. Human rights issues
 - i. Article 28 of the Basic Law provides that:
The freedom of the person of Hong Kong residents shall be inviolable. No Hong Kong resident shall be subjected to arbitrary or unlawful arrest, detention or imprisonment. Arbitrary or unlawful search of the body of any resident or deprivation or restriction of the freedom of the person shall be prohibited. Torture of any resident or arbitrary or unlawful deprivation of the life of any resident shall be prohibited.
 - ii. Article 5 of the Hong Kong Bill of Rights provides that (emphasis supplied):
 - (1) *Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*
 - (4) *Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.*
 - (5) *Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.*

- iii. Article 8 of the Hong Kong Bill of Rights provides that (emphasis supplied):
 - (1) *Everyone lawfully within Hong Kong shall, within Hong Kong, have the right to liberty of movement and freedom to choose his residence.*
 - (3) *The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in this Bill of Rights.*

- iv. Article 11(2)(g) of the Hong Kong Bill of Rights provides that
 - (2) *In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality –*

(g) not to be compelled to testify against himself or to confess guilt.

- v. Article 14 of the Hong Kong Bill of Rights provides that (emphasis supplied)::
 - (1) *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
 - (2) *Everyone has the right to the protection of the law against such interference or attacks.*

b. No legal basis for interception

The Consultation Paper has not provided for any legal basis for the stop and search powers by the Police. This is unlike, e.g. the drug-driving offence under the amended Road Traffic Ordinance, Cap 374 – a police officer may require a person to undergo preliminary tests prescribed under the ordinance, if he has reasonable cause to suspect that a person has committed an offence, viz. driving under the influence of drugs¹⁴.

¹⁴ Section 39M, RTO Cap 374 – see also sections 39J, 39K and 39L, RTO

- c. Practical / evidential problems – in considering a proposal that lacks definition and certainty

Subject to clarification of any legal basis for the triggering of the RDT scheme, as abovementioned, there are practical and evidential problems:

- i. ‘Substance suspected to be dangerous drug’
 - No details are provided as to what safeguards are in place to protect against abuse by a police officer,
i.e. A police officer who chooses to interpret spilt sugar / discarded cold and flu pill / discarded self-rolled cigarette- found on the floor of a bar / restaurant / Karaoke bar - as suspected dangerous drugs allowing him to then question and observe people in the near vicinity;
 - No details are provided for what recourse an innocent person would have for being disturbed by police – in the event that the substance which is found and used to justify the search activity, is found to be nothing more than sugar / a cold and flu pill / self-rolled cigarette or any other substance found ‘at the location’ but which is not a dangerous drug;
 - The Law Society notes, by way of examples, the queries and concerns on the police’s stops and searches of persons who act in a suspicious manner¹⁵.
 - Any inordinate or inappropriate stops and searches by the law enforcement agencies would easily add to the mistrust of Police by the younger generation.

- ii. ‘at a location’
 - No details or definition is given as to what amounts to location –
i.e. Does this include personal homes / parks / offices / chambers or simply places of entertainment?

¹⁵ According to the SCMP article of November 24, 2013 only one in 113 police stops and searches resulted in the detection of a crime.

- iii. 'In the near vicinity'
- No definition is given as to what amounts to be 'in the near vicinity'
i.e. Could this include all persons within a room, within a venue or within a building? What would amount to near vicinity in a public unenclosed space?
 - If a subjective test is envisaged by police constables at the scene - what protections are in place against misuse?
- iv. 'physical state... that show that (s)he may have just taken drugs'
- No details are provided as to how police constables at the scene are to be able to distinguish a person whose physical state is one of advanced alcoholic intoxication / under the influence of prescription drugs / over the counter medication and alcohol - from that of a person who is intoxicated by drugs.
i.e. Does this allow for police to arrest, detain and drug test every seriously drunken person found slumped on the curb, unable to communicate properly or slurring their words?
 - What safeguards will be put into effect against abuse of this power by police officers willfully misinterpreting signs of non-drug intoxication from drug intoxication?
- v. 'Behaviour ... that shows (s) he may have just taken drugs'
- No details are provided as to how police constables at the scene are to be able to distinguish a person whose behaviour is one of advanced alcoholic intoxication / under the influence of prescription drugs / over the counter medication- from that of a person who is intoxicated by drugs.
i.e. Does this allow for police to arrest, detain and drug test every seriously drunken person found stumbling around, unable to communicate properly or slurring their words?
 - What safeguards will be put into effect against abuse of this power by police officers willfully misinterpreting signs of alcoholic intoxication from drug intoxication?
 - The Law Society notes the difficulties the Hong Kong Medical Association already expressed for a medical doctor to determine

whether a person is under the influence of illicit drugs and not alcohol or prescription of medicines.

- vi. 'Questioning and observing to determine ... reactions, such as whether (s)he is able to respond in a normal way'
 - The proposal provides no details of what questions may be put, how many questions may be put and over what period of time the questioning and observing may take place.
 - The proposal provides no details of where the questioning may take place – whether police would be empowered to take a person to somewhere quieter to undertake the questioning – and if so what would be considered somewhere quieter – a police vehicle?
 - The proposal provides no detail as to what is deemed to be 'able to respond in a normal way' nor any safeguards against abuse by police officers who do not like the way a person answers the questions.

- vii. The person may be 'arrested'
 - No details are given as to what offence the person could be arrested for.
 - No consideration appears to have been given for the recourse that a wrongfully arrested person, whose drug tests show he had not consumed drugs, may have for damage to reputation / wrongful arrest and the risk that these proposals would have to open the floodgates for actions against the police.

- viii. 'Detained'
 - At a police station?
 - Given the clear focus of these proposals on young people - no consideration appears to have been given for the possibility of the need for 'appropriate adults' to be found – at unsociable hours – before any tests may be carried out.
 - No consideration appears to have been given for the recourse arising from the unlawful detention of a person wrongfully arrested person, whose drug tests show he had not consumed

drugs – nor to the risk that these proposals would have to open the floodgates for actions against the police.

- ix. If that drug test reveals that the person has taken dangerous drugs then the person may be diverted to counselling / treatment, rather than prosecuted¹⁶.
 - The justification for the prime facie infringement of Basic Law and BORO rights appears to be that these are proposals to divert young people from the criminal justice system but the use of the word “may” – appears to indicate the possibility that person would still be prosecuted.
- d. Number of drug abusers is actually decreasing
 - i. ACAN argues that it has taken longer and longer for drug abusers to be reached by the help networks. According to ACAN, half of the abusers newly reported to the Central Registry of Drug Abuse in 2012 had abused drugs for at least 4.0 years, compared with 1.9 years in 2008.¹⁷
 - ii. However, it must be noted that the overall number of drug abusers reported actually fell by 23% to 10,939 in 2012 from the peak of 14,241 in 2008, and the decline amongst aged under 21 decreased by 54% from 3474 to 1591.¹⁸ On the face of these figures, the numbers do not justify an infringement of our constitutionally guaranteed rights.
- e. Comparison to driving while intoxicated:
 - i. ACAN proposes that the mandatory screening tests under the RDT be referenced with the Road Traffic Ordinance, Cap. 374, which empowers police officers to require mandatory drug testing where they have reasonable cause to suspect that a person is intoxicated¹⁹.

¹⁶ See, e.g. § 3.23 Consultation Paper; see also §3.26 – “where applicable” drug abusers would be given a chance of non-prosecution

¹⁷ §2.6, Consultation Paper

¹⁸ §2.3, Consultation Paper

¹⁹ §2.26, 3.16, Consultation Paper

ii. However, driving while intoxicated involves a prescriptive licensed event, which is operating a potentially lethal piece of machinery on a public road. Public interest in preventing persons operating such a piece of machinery on a public road from being intoxicated is a proportionate and rational restriction on that licensed persons rights – this is in stark contrast to the proposal which involves the infringement of the rights of a person who is not engaged in any licensed event.

f. Expense in implementation

The Law Society anticipates much operation cost in implementing the proposed scheme.

g. Damages for wrongful identification

Under the current proposal by ACAN, it is possible and indeed quite easy for an innocent person to be wrongly identified as a drug abuser²⁰. For example, in a party the revellers could be consuming alcohol in a legitimate manner. Under alcoholic effects, the innocent revellers could not stay sober. One drug offender brings illicit drugs to the party and, during a police raid, discards the illicit drugs to avoid being caught. Under the proposal, all the revellers could be subject to drug testing procedures.

Apart from unlawful detention and invasion of privacy and breach of Basic Law rights, the wrong identification of the innocents could also cause serious reputational damage to the individual. This could lead to a plethora of unintended legal claims.

There is nothing in the Consultation Paper which addresses the above.

9. Overseas Experiences

a. The Law Society has reviewed some overseas jurisdictions for their drug policies.

²⁰ when the two conditions in § 3.5 Consultation Paper have been met

Sweden and Singapore

- b. We reserve comments on whether the experiences of Sweden and Singapore²¹ could be applicable to Hong Kong. We invite more information from ACAN on the drug policies of these two countries, including the background, any review of the schemes, statistics on prosecution relating to drugs offences for both young and adult offenders, the relevant offences and the penalties, the schemes on the rehabilitation of drug offenders, statistics on stops and searches by their police authorities etc.

United Kingdom

- c. As for the United Kingdom²², we note that the Drugs Act 2005, which amended the Police and Criminal Evidence Act 1984, is applicable *only upon the triggering of an offence*. In other words, the additional powers provided to the UK Police are triggered only with the commission of a separate criminal offence by the targeted individual. The Consultation Paper fails to highlight this salient issue. The UK position is therefore substantially different from the ACAN's current proposal, which suggests that the police could stop and search an individual *without separate offences having being committed*.
- d. For the sake of completeness, the relevant section of the Police and the Criminal Evidence Act 1984 (Section 63B) is attached to this paper.
- e. It is noteworthy that the Drugs Act applies only to people over 18. The age definition in the UK is clear.

New Zealand

- f. We note a proposal by the Law Commission of New Zealand, which is set out in its report "*Controlling and Regulating Drugs- A Review of the Misuse of Drugs Act 1975*" (published in April 2011).

²¹ See § 2.35 and 2.36 Consultation Paper

²² See § 2.37 Consultation Paper

- g. The Law Commission of New Zealand is an independent publicly funded advisory body established by statute to undertake systematic review, reform and development of law of New Zealand - akin to our Law Reform Commission.
- h. The Law Commission reviewed the drug legislation in New Zealand and in their abovementioned report, made proposals on various law reforms. Part of the report is available on the internet at:
http://www.lawcom.govt.nz/sites/default/files/publications/2011/05/part_1_report_-_controlling_and_regulating_drugs.pdf
- i. The Law Society notes with interest the Law Commission's proposed "mandatory cautioning scheme" (aptly described by commentators as a "three-strike" proposal). Under this New Zealand proposal police would issue a specified number of cautions to a drug user depending on the drugs involved (one for their Class A drugs, two for Class B drugs and three for Class C drugs). Cautions would be accompanied by educational information on the legal and health consequences of drug use as well as setting out contact details of social support services and treatment providers. The caution notice would expire, if a user does not come to police attention for a specified period of time, their record would be wiped clean and they would begin again at the first level of caution. A final caution would be accompanied by a brief intervention session. Only after an offender has received a final caution would (s)he be prosecuted
- j. Seemingly the above proposal has not yet been implemented in New Zealand, but we take the view that the above proposal merits consideration by ACAN.

10. Law Society Proposal

- a. The Law Society proposes a scheme as an alternative to the ACAN RDT, focusing on an effective and workable early assistance to persons who abuse drugs with a view to diverting them from such use.
- b. The Law Society proposal is for a scheme to divert from prosecution drug abusers who have no previous convictions for drug offences and who are found to be in possession of a small quantity of dangerous drugs (and would otherwise be prosecuted for possession of dangerous drugs). The facts of

the offence would be recorded and maintained by the police but the drug abuser would not be prosecuted but rather be encouraged to undergo relevant counseling, and drug rehabilitation. Social work and/or medical assistance would be made available if required but there would be no active monitoring on the part of the police or law enforcement agencies²³.

- c. If the same drug abuser is arrested a second time for drug offences, then the existence of the caution in respect of the original transgression would be revealed to the court in the event of conviction.
- d. The first time minor drug offender would therefore retain a clear record, be given positive encouragement towards drug rehabilitation of and hence be diverted from the criminal justice system for their first time offence.
- e. The above proposal could be based on suitable adaptation of prosecution policy and should not entail legislative amendments although it would entail the commitment by the administration to providing sufficient counseling and medical services if required. Subject to the provision by the administration of the aforementioned services the proposal could therefore be implemented within a relatively short period of time to address the problems of drug abuse.
- f. While the Consultation Paper apparently focuses on young drug abusers, the above proposal is not limited to any particular age group.

11. Conclusion

- a. The Law Society acknowledges the problems ACAN identifies but feels that the current proposals are not well-considered, lack particularity and offend against enshrined rights.
- b. The case to justify the apparent prima facie infringement of civil liberties, namely, an overwhelming societal need to deal with a problem of drug abuse that irrevocably and adversely affects the health of a sizable portion of the

²³ Compared to §3.36 Consultation Paper

community, does not appear to have been made out – especially in light of the quoted figures showing a decline in arrests for drug offences.

- c. The Law Society therefore objects to the ACAN RTD proposal and by way of alternative puts forward the above counter proposal that would achieve the apparently stated purpose of diverting young drug users from the criminal justice system whilst not infringing constitutionally protected human rights of all Hong Kong citizens.

The Law Society of Hong Kong
15 January 2014

**RESCUE Drug Testing Scheme
Overseas Practice
Relevant Provisions in the UK**

Police and Criminal Evidence Act 1984

Section 63B of the Police and Criminal Evidence Act 1984, as amended by Drugs Act 2005, states that:

- (1) A sample of urine or a non-intimate sample may be taken from a person in police detention for the purpose of ascertaining whether he has any specified Class A drug in his body if*
- (a) either the arrest condition or the charge condition is met;*
 - (b) both the age condition and the request condition are met; and*
 - (c) the notification condition is met in relation to the arrest condition, the charge condition or the age condition (as the case may be).*
- (1A) The arrest condition is that the person concerned has been arrested for an offence but has not been charged with that offence and either—*
- (a) the offence is a trigger offence; or*
 - (b) 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 and has authorized the sample to be taken.*
- (2) The charge condition is either —*
- (a) that the person concerned has been charged with a trigger offence; or*
 - (b) that the person concerned has been charged with an offence and a police officer of at least the rank of inspector, who has reasonable grounds for suspecting that the misuse by that person of any specified Class A drug caused or contributed to the offence, has authorized the sample to be taken.*
- (3) The age condition is—*
- (a) if the arrest condition is met, that the person concerned has attained the age of 18;*

- (b) if the charge condition is met, that he has attained the age of 14.*
- (4) The request condition is that a police officer has requested the person concerned to give the sample.*
- (4A) The notification condition is that—*
- (a) the relevant chief officer has been notified by the Secretary of State that appropriate arrangements have been made for the police area as a whole, or for the particular police station, in which the person is in police detention, and*
 - (b) the notice has not been withdrawn.*
- ...
- (5) Before requesting the person concerned to give a sample, an officer must—*
- (a) warn him that if, when so requested, he fails without good cause to do so he may be liable to prosecution, and*
 - (b) in a case within subsection (1A)(b) or (2)(b) above, inform him of the giving of the authorization and of the grounds in question.*
- ...
- (6A) The Secretary of State may by order made by statutory instrument amend—*
- (a) paragraph (a) of subsection (3) above, by substituting for the age for the time being specified a different age specified in the order, or different ages so specified for different police areas so specified;*
 - (b) paragraph (b) of that subsection, by substituting for the age for the time being specified a different age specified in the order.*
- (6B) A statutory instrument containing an order under subsection (6A) above shall not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.*

In section 63C(6) of the Police and Criminal Evidence Act 1984, it is stipulated that “trigger offence” has the same meanings as in Part III of the Criminal Justice and Court Services Act 2000. Schedule 6 of the Criminal Justice and Court Services Act 2000 lists the following offences as trigger offences:

Offences under the Theft Act 1968

Section 1 (theft)

Section 8 (robbery)

Section 9 (burglary)

Section 10 (aggravated burglary)

Section 12 (taking motor vehicle or other conveyance without authority)

Section 12A (aggravated vehicle-taking)

Section 15 (obtaining property by deception)

Section 25 (going equipped for stealing, etc.)

Offences under the Misuse of Drugs Act 1971

Section 4 (restriction on production and supply of controlled drugs)

Section 5(2) (possession of controlled drug)

Section 5(3) (possession of controlled drug with intent to supply)