

**COMMENTS OF THE HONG KONG BAR ASSOCIATION**

1. The Hong Kong Bar Association (“HKBA”) was on 19 August 2009 briefed by a delegation of the Administration (comprising officers of the Narcotics Division of the Security Bureau, the Education Bureau, and the Department of Justice) on the Trial Scheme on School Drug Testing in Tai Po District (“the Trial Scheme”).
2. The Bar Council of the HKBA discussed the Trial Scheme on 20 August 2009. The HKBA proposes to make the following observations on the Trial Scheme.
3. It is hoped that any scheme that might be implemented would not only be legally sound but would also be seen to have some likely practical benefit. The HKBA considers these two aims to overlap to at least some extent.
4. The HKBA recognizes that youth drug abuse is a social problem that should be tackled by a community-wide effort and through a combination of various means. The HKBA in principle strongly supports lawful, appropriate and proportionate measures to combat the problem. The HKBA also agrees that serious consideration should be given to any possible means as might reasonably, either alone or in combination with other means, assist in tackling the problem.
5. The HKBA recognizes that school-based drug testing has been proposed as one such means, and also that the Trial Scheme is sought to be implemented to facilitate the research study on the possible implementation of school-based drug testing in all schools in Hong Kong.
6. The HKBA has taken account of this context in formulating its approach to its consideration of the Trial Scheme.

7. The HKBA considers that the Trial Scheme, if implemented in the present formulation, may lead to legal issues that would undermine its intention and lead to undesirable results, including the violation of constitutionally protected fundamental rights. The HKBA proposes to highlight these legal issues to enable the Administration properly to address them before the Trial Scheme is put into operation. The HKBA considers that the proper addressing of the legal issues will also improve the potential practical benefits intended by the Trial Scheme.

#### Consent

8. The Trial Scheme is based on consent. The HKBA understands from the Administration that based on the practice of the education sector, it is proposed that the consent form for participation in the Trial Scheme would be signed by a parent of the secondary school student and only additionally by the student if he or she is aged 18 or above. Putting it in another way, participation of a secondary school student who is under 18 in the Trial Scheme, which involves the testing of the urine of the student, is based only upon the signature of a parent of the student.
9. The HKBA is concerned that this proposal may not serve the practical objective of promoting parent-child awareness, communication and discussion of youth drug abuse and the fostering of trust between parent and child that effective participation in the Trial Scheme needs.
10. The HKBA is also concerned that this proposal does not accord with what it understands to be the practice of the medical profession or in hospitals in Hong Kong for consent of treatment of a person under 18, namely that the signed consent of the person under 18 is required where “he/she is competent and understands fully the proposed treatment and intervention, its consequences and possible benefits and risks”: *Guide to Good Nursing Practice: Informed Consent* (Nursing Council of Hong Kong, September 2006) paragraph 8. Further, it is stated in the same paragraph that “[parental] involvement is suggested when a

minor gives consent, unless it is not in the minor's best interests to do so. A person with parental responsibility may give consent if a minor lacks the capacity”.

11. The HKBA notes that in the case of *Gillick v. West Norfolk AHA* [1986] 1AC 112, the House of Lords held that the parental right to control a minor child deriving from parental duty was a ‘dwindling right’.
12. In any event, the HKBA is further concerned that this proposal may not be compatible with the international obligations of the HKSAR under the Convention on the Rights of the Child. General Comment No 4 (2003) of the Committee on the Rights of the Child is concerned with adolescent health and development in the context of the Convention. The Committee stressed:
  - (1) In paragraph 1 of the General Comment that adolescents “are entitled to special protection measures and, according to their evolving capacities, they can progressively exercise their rights (art 5)”.
  - (2) In paragraph 8 that “[the] right to express views freely and have them duly taken into account (art 12) is also fundamental in realizing adolescents’ right to health and development. States parties need to ensure that adolescents are given a genuine chance to express their views freely on all matters affecting them, especially within the family, in school, and in their communities. In order for adolescents to be able safely and properly to exercise this right, public authorities, parents and other adults working with or for children need to create an environment based on trust, information-sharing, the capacity to listen and sound guidance that is conducive for adolescents’ participating equally including in decision-making processes.”
  - (3) In paragraph 11 that “[in] order to promote the health and development of adolescents, States parties are also encouraged to respect strictly their right to privacy and confidentiality, including with respect to advice and

counselling on health matters (art 16). Health-care providers have an obligation to keep confidential medical information concerning adolescents, bearing in mind the basic principles of the Convention. Such information may only be disclosed with the consent of the adolescent, or in the same situations applying to the violation of an adult's confidentiality. Adolescents deemed mature enough to receive counseling without the presence of a parent or other persons are entitled to privacy and may request confidential services, including treatment.”

- (4) In paragraph 32 in Part III dealing with Information, Skills Development, Counselling and Health Services that “[before] parents give their consent, adolescents need to have a chance to express their views freely and their views should be given due weight, in accordance with article 12 of the Convention. However, if the adolescent is of sufficient maturity, informed consent shall be obtained from the adolescent her/himself, while informing the parents if that is in the ‘best interest of the child’ (art 3).”
- (5) In paragraph 33 that “[with] regard to privacy and confidentiality, and the related issue of informed consent to treatment, States parties should (a) enact laws or regulations to ensure that confidential advice concerning treatment is provided to adolescents so that they can give their informed consent. Such laws or regulations should stipulate an age for this process, or refer to the evolving capacity of the child; and (b) provide training for health personnel on the rights of adolescents to privacy and confidentiality, to be informed about planned treatment and to give their informed consent to treatment.”

- 13. Given that the likely participants in the Trial Scheme are secondary school students aged 12 or above, the HKBA considers that the practice most consistent with the Convention would be to seek, in addition to parental consent, also the students' own informed consent to participation in the Trial Scheme. In addition, as a practical matter, the HKBA considers obtaining the students' consent may enhance the achievement of the Trial Scheme's objective.

14. The HKBA is furthermore concerned that the implications of consenting to participation in the Trial Scheme in terms of privilege against self-incrimination, personal data privacy and personal bodily privacy are such that a fully informed consent to participation is necessary. It is important to note that the giving of consent to participation in the Trial Scheme is tantamount to a waiver of protection against acts which if done compulsorily would impinge on constitutionally protected fundamental rights and would have required proportionate legislative sanction. The HKBA considers that any informed consent must include a recognition by the student of the legal consequences of participation.
15. Further, though the Trial Scheme is stated to be voluntary, the HKBA also identifies a possible concern whether the scheme may be coercive in effect. Because the targets are children, and schools and parents are involved, there is scope for pressure being applied. In that case there must be some re-assurance that those students that do not participate in the Trial Scheme will not be identified as such and that absolutely no adverse consequences will follow from refusing to participate. Also, careful consideration needs to be given to the identification and consequences flowing from any individual student's refusal to take the drug test if or when randomly selected for testing. Much will depend on how the scheme is advertised and explained.

#### Personal Data Privacy and Confidentiality

16. The HKBA is concerned that participation of a secondary school student in the Trial Scheme and the operation of the Trial Scheme involve the generation of personal data of and about the student. It appears that such personal data would include, for example, whether the student consented to participation and whether the student agreed to provide a urine specimen when randomly selected as well as the reasons for any refusal. Given the nature of the Trial Scheme, such personal

data must be very carefully and securely handled and should not be used for a purpose other than the purposes of the Trial Scheme disclosed to both the student and his or her parent prior to their giving the necessary informed consent.

17. The HKBA is also concerned that the Administration has not yet formulated a policy how the personal data already collected of a secondary school student would be subsequently handled if the student and/or his or her parent withdraws from participation in the Trial Scheme. The HKBA urges the Administration to put in place a policy of immediate recall from all parties all copies of such personal data for destruction in every case of withdrawal of participation.
18. The HKBA further urges the Administration to pledge and implement the policy of destruction of all personal data collected in the course of the Trial Scheme after completion of the scheme.
19. In this connection, the HKBA notes the recent case of *S and Marper v. United Kingdom* (Application No. 30562/04 and 30566/04, 4 December 2008), where the Grand Chamber of the European Court of Human Rights held that the retention by the United Kingdom authorities of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences failed to strike a fair balance between the competing public and private interests and such failure went beyond any acceptable margin of appreciation in context, thus constituting a disproportionate interference with the applicants' right to respect for private life and could not be necessary in a democratic society. The Grand Chamber was "struck" by the breadth of the power of retention, which made no distinction in terms of nature or gravity of the offence with which the individual was originally suspected or of the age of the suspected offender. There was no time limit and no independent review. Persons not convicted of any offence had been treated in the same way as convicted persons, raising the risk of stigmatization. Further the Grand Chamber considered that the retention of data of unconvicted persons who were *minors* was particularly harmful, given their special situation and the

importance of their development and integration in society, referring to the special position of minors in criminal justice specified by Article 40 of the Convention on the Rights of the Child.

20. The HKBA considers that a well publicized policy of destruction of all collected personal data after completion of the Trial Scheme is further commended. There is a concern that a participant in the Trial Scheme who has been tested may be asked in the future of whether he or she has been tested positive, for example, by an interviewing employer or in an insurance proposal form; and that in the absence of legislation similar to the Rehabilitation of Offenders Ordinance (Cap 297), the participant may be obliged to tell the truth, with results that may run contrary to the intentions of the Trial Scheme. Even if a policy of destruction of collected data is effected, the dilemma faced by a student who is later asked the factual question whether he had been tested before would still remain.
21. The HKBA suggests that the Administration should clarify whether information and personal data collected under the Trial Scheme would be reported to the Central Registry of Drug Abuse to form part of its records and if so, in what form.

#### Police and Prosecution

22. The HKBA is concerned that the Trial Scheme may involve the infringement of participants' constitutionally protected privilege against self-incrimination.
23. The participation in the Trial Scheme may result in the provision by the participants of information or evidence which may incriminate them in criminal proceedings. Examples of such information or evidence are:
  - (1) positive test results;

- (2) confessions to concerned parties (like staff of Student Drug Testing Teams, social workers and the Police School Liaison Officers) by participants that they have been in possession of dangerous drugs and are drug addicts;
  - (3) confessions to concerned parties by participants of the commission of other criminal offences, for example trafficking in dangerous drugs.
24. It should be noted that under the Dangerous Drugs Ordinance (Cap 134), trafficking in dangerous drugs includes the sharing of dangerous drugs that one has with another person.
25. The HKBA is given to understand that as a matter of prosecutorial policy, the authorities “*will not prosecute any student on the mere ground that he/she [has been tested] positive*”, and that “*Prosecution is not intended under the Trial Scheme*”.
26. The HKBA is however also given to understand that the prosecutorial policy is not such that participation in the Trial Scheme confers immunity from prosecution; whilst prosecution for the use of the drug giving rise to a positive test may not be intended, the intention does not cover other offences, and in particular, “*[t]rafficking of dangerous drugs may require separate consideration.*”
27. Thus, the prosecuting authorities might seek to rely upon a participating student’s confession for example that he has been sharing dangerous drugs which he had earlier bought with other students in a prosecution against that student for drug trafficking.
28. Such confessions might also be used derivatively against the student, in the sense that further incriminatory evidence obtained as a result of the confessions given might be used against that same student.



29. The HKBA understands the importance of combating the serious crime of drug trafficking. But the fundamental constitutional right of privilege against self-incrimination cannot be sacrificed in the process. A vicarious consent on the part of a parent or a personal consent on the part of the secondary school student to participate in the Trial Scheme is not a consent for the student to incriminate himself or herself.
30. Apart from confessions, the HKBA is concerned that a positive test result against a secondary school student is capable of founding a reasonable suspicion of possession of a dangerous drug justifying a body search on the spot by a police officer and, upon obtaining a search warrant, a house search, under the current Police Force Ordinance (Cap 232).
31. The permissible use of the information and evidence obtained in the course of the Trial Scheme can only be properly defined by legislation.
32. In the absence of such legislative provisions, the HKBA calls for a clear declaration of prosecutorial policy as to the intended use of such information or evidence.
33. Alternatively, the HKBA urges the Administration seriously to consider excluding the involvement of any police school liaison officer in the Trial Scheme.
34. Indeed, it seems to the HKBA that the currently proposed involvement of police school liaison officers is likely to discourage participation by students and parents in the Trial Scheme. Whilst it is recognized that there is a legitimate desire to investigate the source of drugs as might be abused by schoolchildren, that investigation can be pursued without the involvement of police school liaison officers under the Trial Scheme.

35. There is already considerable public expression of doubt as to the likely real practical benefit of an entirely voluntary drug-testing scheme. If the Trial Scheme is intended to facilitate research into but one potential means of tackling the problem of youth drug-taking, and if it is intended to provide for the promotion of a drug-free environment at schools and to assist students to avoid drug abuse (so as to reduce or remove demand), it would seem to be a mistake to damage the prospects of that scheme by seeking simultaneously within the scheme to investigate and attack the issue of supply.
36. The HKBA recognizes that it has voiced a number of concerns in this Paper which call for serious consideration and reflection. It is often tempting speedily to formulate and implement a policy on the ground of expediency and good intentions. However, it is the HKBA's firm position that considerations of expediency must give way to higher issues of fundamental principle.

**The Hong Kong Bar Association**

20th August 2009