

**PCPD’s Submissions in response to**  
**Public Consultation on RESCUE Drug Testing Scheme (“RDT”)**

The Action Committee Against Narcotics (“ACAN”) has prepared the captioned Consultation Paper to invite public discussion on whether and, if so, how legislation should be introduced to authorise drug testing on a person when there are reasonable grounds, based on circumstantial conditions, to suspect that the person has taken dangerous drugs. The purpose is to identify drug abusers early and refer them to counselling and treatment programs in a timely manner.

2. Drug testing is extremely intrusive to one’s privacy right. As the regulator to protect the privacy of individuals in relation to personal data, the Office of the Privacy Commissioner for Personal Data (“PCPD”) calls upon the Government to consider its impact on individual’s personal data privacy, the availability of other less privacy intrusive alternatives, and to provide more substantial evidence to justify the proposal.

**Overall comments**

3. Personal data concerning one’s bodily fluid (such as urine sample) showing that he/she may have drug abuse habit is highly sensitive and intrusive, and carry a long-term labelling effect on the individual. Furthermore, the manner of collection is another cause of concern. The Consultation Paper, however, does not go into the details of the collection procedure save that it would take place in a protected environment<sup>1</sup>. In a scheme like the RDI in question, the devil is in the detail. Hence, details of the operation of the proposed RDI should also be subject to public scrutiny to ensure they are privacy respectful and compliant with the letter and spirit of the Personal Data (Privacy) Ordinance (“PDPO”).

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<sup>1</sup> See paragraph 3.17 of the Consultation Paper.

4. Intrinsically, RDT involves compulsory surrender of bodily fluid against one's free will with possible adverse consequence that the test result will be used to incriminate him for criminal offence<sup>2</sup>. Hence, it is derogation from the common law privilege against self-incrimination.

5. PCPD notes that the common law privilege against self-incrimination can be expressly, or by necessary implication, abrogated by the legislature<sup>3</sup>. The Basic Law and the Bill of Rights impose limits on the legislative power to enact laws that compel self-incrimination<sup>4</sup>. In some circumstances the legislature may abrogate the privilege against self-incrimination and provide immunity on the use of one's compelled statement obtained during investigation in the subsequent legal proceedings brought under a particular legislation (direct use immunity). It is further noted that where legislation abrogates the common law privilege without including a direct use immunity provision, the Basic Law and Bill of Rights may require such immunity be implied. In addition, the exercise of compulsory powers without direct use immunity protection could be justified restriction on the right against self-incrimination, "...if it was not a disproportionate response to a serious social problem and did not undermine the defendant's right to a fair trial viewed in the round"<sup>5</sup>.

6. Hence, putting aside whether RDT would undermine one's right to a fair trial, it is of paramount importance to assess whether the abrogation of his right against self-incrimination as a result of RDT is a proportionate response to a "serious social problem". It has been explained in paragraphs 2.18 to 2.21 of

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<sup>2</sup> It is stated in paragraph 3.23 of the Consultation Paper that "LEAs would need to keep records to know the number of times a person had tested positive in order to choose between referral to counselling or considering prosecution".

<sup>3</sup> *Fu Kin Chi v. Secretary for Justice* [1998]1 HKLRD 271 at 279 and *HKSAR v Lee Ming Tee & Anor* (2001) 1 HKLRD 599 at 156-157.

<sup>4</sup> The right to fair trial protected under both Basic Law (Article 87) and the Bill of Rights (Article 10) includes a general right to be free from compelled self-incrimination.

<sup>5</sup> *Lee Ming Tee's case* at 172-176.

the Consultation Paper that drug abuse is a community problem, such as bringing about the possible suicidal acts and violent acts, adverse impact on family members of drug abusers, and economical problems. Whilst acknowledging that these problems should be tackled, the PCPD invites ACAN to provide more information to show that the proposed abrogation and intrusion to privacy is a proportionate response to these social problems. More evidence should be adduced to show that there are compelling grounds to believe that RDT can significantly reduce the risk to safety or physical health of the suspected person/ others and there is no less privacy intrusive alternative(s) (such as enhanced law enforcement against trafficking of dangerous drugs and outreach programmes of social workers) that may reduce such risk to safety or physical health of the suspected person/ others with the same or greater effectiveness. For example, the views of drug abusers and those who have ridded themselves of this vice could be sought to provide some insight on the comparative effectiveness of different options.

7. The Consultation Paper refers to the experience of some overseas jurisdictions (i.e. Sweden, Singapore and the UK) where drug test is part of their law enforcement efforts<sup>6</sup>. However, the effectiveness of this approach has not been explained. More information on how the drug test has been applied to achieve the desired results in these jurisdictions and how these jurisdictions' approach compare with that of other jurisdictions should be made available to demonstrate that RDT or drug test is a better or more effective option to tackle drug abuse. The proposed RDT is a draconian measure and can only be supported based on strong justifications and overriding reasons.

### **Specific Comments**

*[The question numbers below follow those mentioned in the Consultation Paper.]*

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<sup>6</sup> Paragraphs 2.34 to 2.37 of the Consultation Paper.

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

8. Collection of personal data by mandatory drug testing without cause to suspect drug use by or impairment of a person and without evidence to suggest that such impairment poses a threat to public safety would violate Data Protection Principle (“DPP”) 1(1) and (2) in Schedule 1 of the PDPO<sup>7</sup>. Unless there is a justified cause, the drug test will be a fishing expedition.

9. PCPD considers that there must be overriding public interest to justify the RDT (which is highly privacy-intrusive in nature). The observations on the overall justifications for RDT and its intrinsic privacy intrusiveness have been set out in paragraphs 3 to 7 above which will not be repeated here.

10. The present proposal is a draconian measure. While the alleged social problem is identified for the 21 to 30 age group, it is not clear why the measure should apply to individuals of all age groups and why it is not restricted to application to specific locations in public places or other more confined environment (e.g. night club, karaoke, etc.).

11. PCPD is concerned that drug testing (especially, so widely applied as proposed) is a “*red-herring*” and may draw attention away from the more fundamental contributing causes to drug abuse such as easy availability of drugs through personal networks or in cyberspace (as mentioned in paragraph 2.10 to 2.11 of the Consultation Paper), peer pressure, boredom, work and life pressure, etc. The underlying causes may be more effectively addressed or mitigated through other less privacy intrusive measures such as education, counselling, social services assistance or a combination of these. Worse still,

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<sup>7</sup> DPP1 (1) in Schedule 1 of the PDPO states that personal data shall not be collected unless the data is collected for a lawful purpose directly related to a function or activity of the data user and the collection of the data is necessary for or directly related to that purpose; and only adequate but not excessive personal data is to be collected. DPP1(2) in Schedule 1 of the PDPO states that personal data shall be collected by means which are lawful and fair in the circumstances of the case.

the possible criminal prosecution of drug consumption offence following RDT may even drive the persons further away from seeking help.

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

12. Leaving aside the overall justification and unresolved fundamental causes mentioned in paragraphs 8 to 11 above, it is necessary to confine the application of RDT to only those in need instead of many others who fall into the net incidentally. It is therefore important to set a high threshold for the triggering conditions to reduce the impact of intrusiveness to individual's privacy.

13. Both conditions (i) and (ii) seem relevant to form the reasonable grounds to believe that a particular person is using or is impaired by dangerous drugs. However, they need to be amplified to reduce the possibility of abuse of power on the part of the law enforcement officers ("LEOs").

14. Condition (i) merely requires the existence of drug in the near vicinity (as opposed to drugs found in the person's bag). In the circumstances, the drug may not be used by that particular person. The meaning of "*the near vicinity of a person*" is subject to interpretation and therefore leads to uncertainty. For instance, a large group inside a karaoke room where a pack of "Ice" was found in the en-suite toilet may be more suspicious than those inside a karaoke room where the pack of "Ice" was found in a common toilet on the same floor but outside the room.

15. The effectiveness of condition (ii) “*the person in question shows signs of having just taken drugs*” will depend on how one interprets the specific evidence on-site. Will all those who demonstrate slurred speech in the karaoke be suspected? The signs of slurred speech may well be the hangover effect of alcohol.

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

16. The recommended drug test procedure (i.e. Screening Test and then Laboratory Test) entails issues of validity and reliability. For example, individuals who have taken prescribed medicines or have been drinking alcohol may fail the Drug Influence Recognition Observation and the Impairment Test even though they have no connection with drugs.

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

17. As mentioned in paragraph 3 above, drug test is highly privacy-intrusive. Without prejudice to the PCPD’s position that this must be supported by overriding public interests, it is crucial to carry out a privacy impact assessment (“**PIA**”)<sup>8</sup> and adopt a *privacy-by-design* approach to build in personal data privacy protection throughout the development of RDT for the whole cycle of data collection, accuracy, retention, use, security and erasure so as to mitigate or avoid the privacy risks.

18. It is too early to provide detailed comments while the data collection and handling procedures of RDT are yet to be formulated. In 2012, the PCPD published a report on the “*Inspection of the Personal Data System of the Trial*

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<sup>8</sup> For detailed explanation on the PIA process, please refer to the “*Information Leaflet on Privacy Impact Assessments*” issued by the PCPD, available at [http://www.pcpd.org.hk/english/publications/files/PIAleaflet\\_e.pdf](http://www.pcpd.org.hk/english/publications/files/PIAleaflet_e.pdf)

*Scheme on School Drug Testing in Tai Po District*<sup>9</sup>. In that Report, the PCPD made a variety of recommendations to the Government and other stakeholders relating to the promotion of compliance with the provisions of the PDPO. PCPD stresses the importance of conducting PIA to systematically assess the potential risks before the launch of the scheme and build in privacy measures during every stage of data handling in the said scheme. PCPD believes that the approach and recommendations made therein regarding the data handling procedures are highly relevant to RDT as well.

19. At this stage, it will be useful for the Government to consider the following general requirements:-

(a) *Collection of adequate but not excessive personal data*

20. It is necessary to ensure that only adequate but not excessive personal data is to be collected<sup>10</sup> during the process. This is an important rule of thumb to minimise the privacy intrusiveness to individuals.

21. Furthermore, measures should be put in place to reduce the privacy intrusiveness of urine sample taking process. It is stated in paragraph 3.17 of the Consultation Paper that the collection of a urine sample for the laboratory test would take place in a protected environment like a designated toilet cubicle in a police station. PCPD would stress that any monitoring or supervision devices or measures exposing the individuals to visual scrutiny is highly intrusive and humiliating.

(b) *Notification*

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<sup>9</sup> The report is available for download in the PCPD's website ([http://www.pcpd.org.hk/english/publications/files/R12\\_5825\\_e.pdf](http://www.pcpd.org.hk/english/publications/files/R12_5825_e.pdf))

<sup>10</sup> DPP1(1) of the PDPO.

22. Any person responsible for collection of personal data from the suspected person for RDT should, immediately before collection, take all practicable steps to inform him the matters set out in DPP1(3) of the PDPO. The matters must include, among others, the purpose of use of the personal data as well as to whom the data will be transferred. The individuals must also be informed that the provision of the data is obligatory and the consequences of failure to provide. Such notification must be clearly communicated, preferably in writing, before obtaining his personal data. Where persons aged under 18 are involved and accompanied by parents or legal guardians (or relatives), such notice should also be provided to them as well.

(c) *Accuracy*

23. Accuracy affects reliability. Given the likely adverse consequence RDT may bring to the individuals, accuracy of any test to be applied on the body fluid is important<sup>11</sup>. Furthermore, the procedures to safeguard the samples collected to prevent them from being tampered with should be formulated and strictly complied with.

(d) *Use of personal data*

24. Unless with the express and voluntary consent of the relevant individuals, their personal data must not be used for a new purpose that is not the same as or directly related to the original purpose of collection of the data<sup>12</sup>. It is therefore important for the Government to clearly identify the possible use of the RDT result. In light of paragraphs 3.23 and 3.26 of the Consultation Paper, it appears that the purpose of RDT is to identify drug abusers and the consequences may be (i) provision of timely and appropriate counselling and

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<sup>11</sup> DPP2(1)(a) requires that all practicable steps shall be taken to ensure that personal data is accurate having regard to the purpose (including any directly related purpose) for which the personal data is or is to be used.

<sup>12</sup> See DPP3 and section 2(3) of the PDPO. "Prescribed consent" means express and voluntary consent which has not been withdrawn in writing.



treatment and rehabilitation services, or (ii) prosecution of drug consumption offence. In the absence of express and voluntary consent of the individuals, any use or disclosure of their personal data for a new purpose will amount to contravention of the requirement under the PDPO unless such use or disclosure is exempted.

25. In this connection, section 58(2) of the PDPO provides for an exemption when the use or disclosure of the personal data falls within any one of the purposes specified in section 58(1) and that the failure to so use or disclose such data would likely to prejudice such purposes. The purposes specified in section 58(1) include “*the prevention or detection of crime*”, “*the apprehension, prosecution or detention of offenders*” and “*the prevention, preclusion or remedying... of unlawful or seriously improper conduct... by persons*”.

26. In effect, that means the personal data of the relevant individuals collected through RDT, once goes into the database of the law enforcement agencies (“LEAs”), may further be used for the purposes specified in section 58(1) (even for purposes unrelated to RDT), for instance, detection of “other” crime or apprehension of offenders (not just referral to counselling or prosecution of drug consumption offence) without the express or voluntary consent of the relevant individuals. One should be mindful of the possibility of such further uses of the data.

(e) *Retention and Erasure*

27. A retention period for keeping the personal data collected during the RDT should be set out having regard to the purposes it seeks to attain<sup>13</sup>. Based on the information available, it appears that there is no justification to keep the

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<sup>13</sup> See DPP2(2) and section 26 of the PDPO. All practicable steps shall be taken to ensure that personal data is not kept longer than is necessary for the fulfillment of the purposes for which the data is or is to be used unless any such erasure is prohibited under any law or it is in the public interest (including historical interest) for the data not to be erased.

record of negative RDT results for longer than it is required to decide that no action is to be taken against the relevant individuals. Furthermore, positive test results and personal data of the relevant individuals should not be retained longer than it is necessary for fulfillment of the original purpose of data collection. LEAs should not be allowed to “haunt” people many years after the test. It would also be inappropriate for LEAs to stigmatise a person as a drug abuser just because of a positive test result against him years ago.

28. In order to comply with DPP2, it would be advisable for the responsible LEAs (who conduct RDT and collect personal data) to install a system and devise policies and procedures regarding the disposal of personal data collected under RDT. Such procedure should take into account the sensitive nature of the personal data involved (including the test result on individual’s body fluid) that warrants enhanced protection.

29. If a contractor is engaged to perform any of the tasks (e.g. testing or disposal procedures) on behalf of LEAs, they must adopt contractual or other means to prevent any personal data transferred to the contractor from being kept longer than is necessary for processing of the data<sup>14</sup>. PCPD has issued an “*Information Leaflet on Outsourcing the Processing of Personal Data to Data Processors*”<sup>15</sup> to provide information on such obligations and the recommended means of compliance with the requirements under the PDPO. The information leaflet also sets out some typical obligations that may be imposed on the data processors in the service contract or a separate contract.

30. PCPD has recently published an investigation report concerning the improper disposal of hospital waste containing personal data of patients by the contractor of Hospital Authority and made recommendations on the

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<sup>14</sup> Pursuant to DPP 2(3) of Schedule 1 of the PDPO

<sup>15</sup> [http://www.pcpd.org.hk/english/publications/files/dataprocessors\\_e.pdf](http://www.pcpd.org.hk/english/publications/files/dataprocessors_e.pdf)

improvement measures<sup>16</sup>. This should be of reference value to the Government in this regard.

(f) *Security*

31. A data user is required to take all reasonably practicable steps to ensure that the personal data it keeps is protected against unauthorised or accidental access, processing, erasure, loss or other use<sup>17</sup>. In ascertaining the appropriate steps to take, the data user has to consider, among other things, the kind of data and the harm that could result if the data is not securely kept. Keeping personal data strictly confidential is one of the guarding principles.

32. Security measures such as secure IT system (e.g. documents stored in electronic means should be protected with encryption, password, security software and audit trails) and other measures (e.g. documents in paper form must be properly attached and kept in locked cabinets) must be implemented to ensure safe custody of the personal data contained therein. In this regard, a policy or guidelines should be put in place to specify clearly what ranks of the LEOs and for what purposes they will be given access. Furthermore, given the sensitivity of such data, LEOs should not be allowed to take the personal data away from office. There should also be built-in technical measures to prevent unauthorised access, printing and copying. Furthermore, audit trail and spot checks should be conducted regularly on the access of such personal data to identify any abnormal access.

33. If contractors are engaged to design or maintain an IT system adopted in handling the personal data, LEAs should be reminded that they are responsible for the act or practice of their agents pursuant to section 65 of the PDPO. Furthermore, LEAs are also required to adopt contractual or other means to

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<sup>16</sup> See the PCPD's website for the press release and the full investigation report ([http://www.pcpd.org.hk/english/infocentre/press\\_20131024c.htm](http://www.pcpd.org.hk/english/infocentre/press_20131024c.htm) and [http://www.pcpd.org.hk/english/publications/files/R13\\_6740\\_e.pdf](http://www.pcpd.org.hk/english/publications/files/R13_6740_e.pdf)).

<sup>17</sup> Pursuant to DPP4(1) of Schedule 1 of the PDPO

prevent unauthorised or accidental access, processing, erasure, loss or use of the data transferred to the data processor for processing<sup>18</sup>. They should consider the recommendations in the PCPD's Information Leaflet mentioned in paragraph 29 above. In any event, a contractor must be carefully selected based on, among other things, the quality of services, expertise and level of data protection that can be provided. Also, systematic monitoring must be conducted on the contractor.

*(g) Devise data handling policies and procedures*

34. With regard the handling of personal data collected by LEAs through RDT, it is important to devise detailed data handling policies and procedures that cover various aspects including data collection, accuracy, erasure, use, security, access and correction so that the staff may follow with certainty<sup>19</sup>.

35. To enhance compliance and effective implementation, LEAs should arrange appropriate training for staff on data handling policies and procedures for personal data collected through RDT. Furthermore, audit should be conducted on the overall compliance of the system against its policies and procedures as well as the requirements under the PDPO.

*(h) Access and Correction*

36. An individual has the right of access to and correction of his/her personal data held by a data user<sup>20</sup>. The test result of RDT and other personal data collected throughout the testing procedure will contain the relevant individual's personal data. They should be given the right of access to and correction of the data if the same is inaccurate.

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<sup>18</sup> Pursuant to DPP 4(2) of Schedule 1 of the PDPO

<sup>19</sup> See DPP5 in Schedule 1 of the PDPO.

<sup>20</sup> See DPP6 in Schedule 1 of the PDPO.

37. However, we must be mindful that the individual's right of access to such personal data may be denied if the access would be likely to prejudice any of the matters as set out in section 58(1) which include "*prevention or detection of crime*", "*apprehension, prosecution or detention of offenders*", etc.

38. Due regard should be given to the possibility of the loss of such access right and whether that is intended. If not, specific provision is required in the future legislation.

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

39. Paragraph 3.25 of the Consultation Paper points out that drug consumption is a criminal offence regardless of the age of the offenders. Besides, there are practical difficulties for front-line LEOs in differentiating between adult and juvenile drug abusers on the spot. It appears that the Government gives relatively more weight to the practical reasons as alleged. However, the PCPD does not consider these practical difficulties provide sufficient justifications to apply the RDT across all age ranges.

40. It is relevant to note that the RDT is proposed to address the alleged social problem of the increase in drug abuse among the age group of 21 to 30. Besides, the Consultation Paper (see paragraphs 2.3 to 2.8) points out that the overall number of drug abusers fell by 23% to 10,939 in 2012 from the peak of 14,241 in 2008. The decline among those aged under 21 was more pronounced, having decreased by 54% from 3,474 to 1,591. Also, the "2011/2012 Survey of Drug Use among Students" confirmed the downward trend of drug-taking among students with declines in both the prevalence rate and the number of drug takers across all education levels. There is no analysis or statistics provided in the Consultation Paper to show the increase in drug abuse has spread to other age groups as well.

41. Further, it is stated in paragraph 2.3 of the Consultation Paper that various measures have been implemented since 2008 with the objective of tackling drug problems in a holistic manner. In light of the statistics mentioned in the preceding paragraph, it appears that the current measures which are premised upon voluntary drug testing are effective to those aged under 21 in tackling drug problems. This casts doubt on the imperative need to apply the proposed RDT across all age groups.

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

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

42. PCPD does not have any comments from a personal data privacy perspective on the above two questions.

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

43. PCPD does not have any comments from a personal data privacy perspective on the above question.

**Question 8: Do you have any other suggestions for us?**

44. PCPD calls upon the Government to carefully assess RDT against other options or programs that may be implemented to combat drug abuse. Even though the Consultation Paper points out that the Government has allocated new resources to various anti-drug and related service units to help those in need (see paragraph 2.20), and has undertaken publicity and media programs to

encourage seeking help voluntarily (see paragraph 2.23), the Government must also adopt and explore other measures to cope with the more fundamental contributing causes such as easy availability of drugs, etc. (as identified in paragraphs 2.10 to 2.11 of the Consultation Paper).

45. PCPD takes the view that other less privacy intrusive alternatives must first be explored. All in all, thorough consideration must be given to the personal data privacy implications raised above before deciding whether there is overriding public interest to be served by the proposed RDT. Even if the proposal is taken on board, the Government should carry out a PIA and adopt a *privacy-by-design* approach to introduce privacy protective measures throughout the development of the RDT.

*24 January 2014*

*Office of the Privacy Commissioner for Personal Data*