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Education and Manpower Bureau
9/F Central Government Offices
West Wing, Ice House Street
Central
Hong Kong

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BY FAX

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(Attention : Mr Andrew CS Poon
Principal Assistant Secretary)

Dear Mr Poon,

Education (Amendment) Bill 2002

I am scrutinizing the legal and drafting aspects of the Bill on behalf of Members and shall be grateful if you could clarify the following :

General observations

You have confirmed at the previous Bills Committee meeting that Committee Stage amendments would be introduced to replace the term "Director" with "Secretary".

It would be helpful to members if you could set out the types of offences, the persons liable, the defences available and the penalties imposed in section 87, Regulations 101 and 102 as amended by the Bill.

Has the Administration considered providing an indemnity by the incorporated management committees ("IMC") to a manager against any liability incurred by him in defending proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted along the lines of section 165 of the Companies Ordinance (Cap. 32)?

Clause 2 (section 3) Interpretation

Does the repeal of the definition of "registered manager" and its consequential amendments involve any change in policy?

What is the purpose of designating school management companies under the proposed section 2(2)?

Clause 3 (section 8) Secretary to maintain registers

What is the intended manner of making the register of IMC available for public inspection that would ensure transparency and accountability of the IMC?

Clause 7 (section 18A) Approval of Secretary required for post secondary education

Please clarify the burden and standard of proof in proceedings against a manager of the school under section 18A. Why is the liability of a manager in IMC school different from the liability of a director or other officer concerned in the management of a company under section 101E of the Criminal Procedure Ordinance (Cap. 221) in that the latter requires the prosecution to prove that the offence was committed with his consent or connivance?

The effect of the English version of section 18A(4)(a) is that it would be a defence if the manager proves the lack of either knowledge or consent. The effect of the Chinese version is that both lack of knowledge and consent need to be proved. Please clarify the policy intent and remove the inconsistency.

How does a person satisfy the test of taking "all reasonable steps" to prevent the contravention? How would the defence be available to a principal?

Clause 12 (section 30) Grounds for refusal to register manager

Why does the Administration propose to repeal section 30(1)(f)?

Please confirm that section 30(1) and (1A)(a) applies to an applicant for registration of manager of an IMC school. Section 30(1A)(a) is different from section 30(1) in that the former does not contain the words "if it appears to the Secretary". Has the Administration considered that the grounds in section 30(1)(c) and (d) are more appropriate under section 30(1A)(a)?

Why does the Secretary have the discretion to register an applicant as a manager under section 30(1A)(b)(ii) if he fails to produce a medical certificate certifying that he is fit to perform the functions of a manager? Under what circumstances would the Secretary request for medical certificate?

Clause 13 (section 31) Grounds for cancellation of registration of manger

Would the proposed section 31(1)(h), (i) and (j) duplicate section 31(1)(b) as amended?

What does the expression "absent without leave" mean in section 31(1)(g)(i)? From whom should leave be sought?

Clause 17

a. new section 40AD Functions of sponsoring body and IMC

What are the funds and assets owned by the sponsoring body referred to in the new section 40AD(1)(c)? Is there any overlap with the funds and assets owned by the IMC or received from the Government referred to in the new section 40AE(2)(d)? Please clarify if the property and subsidy referred to in the new section 40AF belong to neither category.

The new section 40AD(1)(g) provides that the sponsoring body shall be responsible for drafting the constitution. Is there any requirement for the sponsoring body to consult the recognized parent-teacher association, alumni association (if any) and teachers during the drafting process?

b. new section 40AH General requirement of composition

In terms of drafting, is there any difference between the expression "not less than one" in subsection (2)(c),(d) and (f) and "one or more" in subsection (2)(e)?

How would "the maximum number of managers" that an IMC may have under the constitution referred to in subsection (3) be calculated? Why would subsection (3) not apply in relation to a school in the first 3 years of its operation?

c. new section 40AJ Functions of chairperson

We note that the functions set out in subsection (1)(b) are similar to the duties of a supervisor under the existing section 39(2). Has the Administration considered the

need to require notice to be given to the Secretary if any supervisor appointed under section 40AX ceases to hold office as such?

d. new section 40AM Nomination of parent manager

How does an IMC recognize a body of persons as recognized parent-teacher association and why is recognition required? What is the requisite composition of an IMC before it can recognize a parent-teacher association?

What is the difference between "election" and "nomination"? Why does subsection (4) refer to nomination when subsection (3) refers to election conducted for the purpose of making nomination?

Subsection (5) provides that a person nominated must be "elected in that behalf by the members of the parent-teacher association". Please clarify whether the person must be nominated by parent-members of the association directly, or whether the person may be nominated by members of an executive committee elected by parent-members. The English version is inconsistent with the Chinese version in that it has not qualify members by "有關". A teacher-member who is not the parent of a current pupil has no right to vote.

e. new section 40AN Nomination of alumni manager

How does an IMC recognize a body of persons as recognized alumni association and why is recognition required? What is the requisite composition of an IMC before it can recognize an alumni association?

Please clarify the intended effect of subsection (5).

f. new section 40AO Nomination of independent manager

Who does the Administration envisage meeting the requirements of subsection (2) and taking an interest in being a manager of an IMC school?

g. new section 40AP Exemption from composition requirements

Please confirm that the exemption in subsection (1) applies to both operating and planned schools.

h. new section 40AQ Provisions applicable to alternate managers

Please clarify whether an alternate parent manager is nominated or an alternate teacher manager is elected according to the same procedures and conditions as the nomination of a parent manager or election of a teacher manager. Has the Administration considered the need to make express provision to such effect?

Please clarify whether an alternate manager has any liability for an act done other than the act referred to in subsection (6).

i. new section 40AS Filling of vacancies to maintain full composition

What constitute "good grounds" for extension of the one month period under subsection (3)? What are the consequences if the vacancy cannot be filled? Would the Administration considered granting extension of time under subsection (3) to facilitate amendment of the Constitution?

What is the term of office of the person filling the vacancy? Is it also to be provided in the constitution?

j. new section 40AV Vacation of office of teacher manager, etc.

It is stated in paragraph 26 of the Administration's response (CB(2)1723/02-03(01)) that managers serve on IMC in their personal capacity and shall be accountable to IMC instead of their respective constituencies. However, under the new section 40AV, teachers, recognized parent-teacher association, recognized alumni association or the sponsoring body may make written request to the IMC to issue notice to the Secretary as regards the cancellation of registration of the manager concerned. Please clarify whether there is any inconsistency in policy.

k. new section 40AX Delegation of functions

What is the liability of an IMC if a manager fails to perform a function delegated, or fails to report to the IMC on any act done, or fails to make a report following the doing of an act? What if the manager acts outside his scope of delegation?

l. new section 40BJ Establishment of IMC in respect of operating school

Should the heading be amended by adding "aided" before school?

m. new section 40BO Transitional provisions for establishment of IMC

Please clarify whether the notice amending Schedule 1 is subsidiary legislation.

n. new section 40BP Dissolution of school management company

Has the Administration considered the need to require notification of dissolution of school management company by the school to the Registrar of Companies?

o. new section 40BQ Transitional provisions for dissolution of school management company

Please clarify whether the notice amending Schedule 2 is subsidiary legislation.

p. new section 40BU Sponsoring body to establish IMC in respect of planned school

Is it the policy of the new section 40BU to require all planned schools (other than DSS and non-aided schools) to establish IMC, or is it the policy to require all planned aided schools only? If the latter is the policy intent, please amend the heading as well.

Clause 22 (section 57A) Principal selection committee

Please clarify who the Administration has in mind under subsection (3)(c).

Clause 32 (section 87) Offences and penalties

Please explain the policy for not holding an IMC liable for any offence under the Ordinance in the proposed subsection (1A).

What does "all reasonable steps" mean? Kindly confirm that the policy of having members of an IMC held personally liable subject to the availability of statutory defence is consistent with the current policy in relation to members of a management committee.

Has the Administration considered the principles of (a) limited liability of a limited company and (b) personal liability of directors who consent or connive to the offence committed by the company under section 101E of the Criminal Procedure Ordinance (Cap. 221)?

Should subsection (3)(g) be amended by adding "or incorporated management committee" after "a management committee"?

Clause 33 Schedules 1 and 2 added

a. Schedule 1

The expression "incorporated committee" in paragraphs 2(c) and 3(1) should be amended.

Has the Administration considered providing expressly for exemption of liability of members of the IMC in respect of acts or omissions prior to the transition date on the part of the person entering pre-incorporation contracts?

Please clarify the legal position of contracts (other than pre-incorporation contracts) entered into for the benefit of the school prior to the transition date.

What would happen to the pending civil proceedings in respect of disputes arising from employment contracts?

b. Schedule 2

Has the Administration considered the need to register in the Land Registry a copy of the certificate of incorporation of the IMC issued under the new section 40BM?

Clause 56 and Schedule 2 Substitution of "responsible person" for "supervisor" (Regulations 3, 20, 21, 23, 52, 57, 79, 82, 89 and 92 of the Education Regulations)

Please explain the reasons for transferring the duties of the supervisor to the principal of an IMC school.

Clause 38 (Regulation 66) Prohibition of collections without permission of Secretary

Should "supervisor," be added after "incorporated management committee," in subsection (2)?

Clause 44 (Regulation 76) Majority vote in certain cases

Please explain the Administration's interpretation of "a majority vote of all managers" in Regulation 76 and how it applies to the appointment and dismissal of any member

of the teaching staff. Why is contravention of Regulation 76 not an offence under Regulation 101?

Clause 45 (Regulation 81) Secretary may disapprove

Should the reference to "supervisor and principal" be amended?

Yours sincerely,

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