

Education (Amendment) Bill 1999
(Second submission by the Administration)

Purpose

At the Bills Committee meeting held on 14 February 2000, Members raised a number of issues. On 17 February 2000, the Clerk to the Bills Committee has forwarded to the Administration a joint Submission Two by a number of deputations. This paper sets out the Administration's response to the issues raised.

I. Response to deputations' submission

Whether there is a hidden agenda and whether the Bill seeks to overturn the Court's decision

Deputations argument

2. "It is wrong to seek to utilize the Education Ordinance which provides the legal underpinning for all educational institutions in Hong Kong to achieve what is really a hidden agenda, that is, forcing of teachers and principals of aided schools to retire at 60. It is also unjust to attempt to overturn the decision of the High Court in the case referred to (Lau Chi Fai and Wong Chi Kin v. Secretary for Justice and Director of Education, HCMP No. 1198) by using legislative means."

Administration's response

3. As explained in the Legislative Council Brief, and during our meetings with Members, the purpose of the Bill is to provide legal backing to enforce the retirement age policy among teachers and principals of aided schools.

4. The retirement policy has been stated in the relevant Codes of Aid for a long period of time. It has been accepted by the majority of members of the profession throughout the years. The Court ruled in June 1999 that the Government could not enforce the retirement policy as stated in the Code of Aid since the Government was not a contracting party in the employment of the principal concerned (i.e. on privity of contract grounds).

5. The Bill therefore seeks to provide for the necessary legal backing so that Government can enforce the retirement policy. The retirement policy is in line with public and private sector practice. There is no “hidden agenda” behind the Bill.

6. As we explained at the Bills Committee meeting on 14 February 2000, the Bill seeks to legislate for powers which the Government lacks (as found by the Court in June 1999 in this case) to implement a policy. The Bill does not seek any retrospective effect, nor does it attempt to overturn the decision of the High Court.

Setting a poor precedent by elevating a small section of the Code of Aid to the Ordinance

Deputations’ arguments

7. “It is unsafe in principle to seek to include what is basically just a small part of the Code of Aid, that is, a section concerning the retirement age of one group of employees, teachers and principals, into the Education Ordinance. The Ordinance is a serious document which covers all types of institutions ranging from independent schools, international schools, aided schools, caput schools, direct subsidy schools, tutorial schools and all age levels from kindergarten, primary and secondary to pre-university and adult education. It is therefore most inappropriate and sets a poor precedent to elevate just a small section of the Code of Aid which is relevant to only one type of schools to the level of such an important and all-embracing document as the Education Ordinance.”

Administration’s response

8. As explained in paragraph 4 above, the Court ruling is premised on the doctrine of privity of contract. The Administration is not, and does not intend to become, a contracting party in the employment of principals and teachers of aided schools. In these circumstances, the Administration can only seek legal backing of the retirement policy by way of legislation. The Education Ordinance is the most relevant piece of legislation for this purpose.

9. As different policies apply to different types of schools, it

is natural that provisions in the Ordinance do not apply indiscriminately. There is no legal objection to certain sections in the Ordinance applying only to particular types of schools. Indeed, there are precedents. For example, the provisions covering provident funds only apply to grant schools and subsidized schools, and Reg.99A of the Education Regulations (on business or trading operations) also applies only to specified categories of schools.

Distrust in SMCs

Deputations' arguments

10. "An important question needs to be asked and answered: 'Who is the employer of the teachers and the principal concerned?' There can only be one answer and one that has consistently been confirmed by the Education Department itself, and that is, the employer is the School Management Committee (SMC). The SMC is responsible for the hiring and firing of all school employees as well as all matters related to the smooth operation of the school. It is incomprehensible why the Education Department insists on robbing the power to extend service from the SMC. Does it not imply distrust?"

Administration's response

11. As explained above, the retirement policy has been in existence for many years, and is well accepted by the teachers and principals of aided schools. Section 57 of the Code of Aid for Secondary Schools, e.g., states that :-

- (a) a teacher shall retire at the end of the school year in which he reaches the age of sixty (underline added);
- (b) notwithstanding (a), the Director may, on the recommendation of the Management Committee of a school and subject to the submission of a satisfactory medical certificate as to fitness, permit a teacher to continue in service for a period of one school year after the end of that in which he reaches the age of sixty, and for further period each of one school year, up to the end of the school year in which he reaches the age of sixty-five.

12. What the Bill now seeks is nothing new. The Administration is not robbing anything from SMCs nor has distrust in SMCs. Indeed, as can be seen from paragraph 24 below, the SMCs will continue to play a central role in the whole process in future.

Practice of other organisations

Deputations' argument

13. “The Administration hints that the retirement age of aided school employees is linked to that of the civil service. This is a gross misrepresentation. The retirement arrangements in aided school have never been linked to the civil service. Up to just recently and for decades previously, civil servants had retired at 55. Then the retirement age was changed to 60. During this entire period, aided schools have always been treated as a separate system of its own. In any case, some categories of staff in aided schools retire at 65 or beyond, and among other subvented bodies, such as universities and technical institutions under the Vocational Training Council, entirely different arrangements apply. Extensions of service are not primarily viewed as benefits accorded to staff by the SMC. The chief consideration is what is in the best interest of the students and of the school.”

Administration's response

14. The Administration proposes setting the retirement age for aided school teachers and principals at sixty because :-

- (a) it has been stipulated in the Code of Aid for many years (see para. 11 above); and
- (b) it is in line with the practice in the civil service and over 80% of the private organisations covered by the Fringe Benefit Survey conducted in 1999 by the Standing Commission on Civil Service Salaries and Conditions of Service.

15. The Administration entirely agrees that in deciding whether the service of a teacher should be extended beyond 60, the chief consideration must be the interests of schools and students. This is reflected in the arrangements, outlined in paragraph 24, for

processing applications for service extension.

Abrupt change in policy

Deputations' argument

16. “SMCs and their parent sponsoring bodies need time for manpower planning, especially in selecting and preparing suitable successors. As the statistics provided by the Administration confirm, the Director of Education abruptly and unilaterally changed the policy for the worse about two years ago, thereby breaking a long-standing understanding with sponsoring bodies and SMCs and creating insuperable gaps in staff planning. The Administration gives the impression that the retirement policy it now proposes has been practice for a long time and that it is just seeking to give a legal basis to an existing policy. In fact the very opposite is true.”

Administration's response

17. There has been no change in policy. As explained above, the retirement policy has for many years been clearly stated in the Code of Aid, and SMCs have all along been submitting applications for extension of service to the Director for approval. The Bill merely seeks to provide a proper legal backing for the continuation of such a policy.

A transitional period of three to five years

Deputations' argument

18. “The present proposal by the Administration is full of inaccuracies and imperfections and it would be most unsafe to rush it through into legislation. No great problem will arise in a more natural pacing of the whole process, thereby allowing more time for clearer thinking. In any case sponsoring bodies and SMCs will need to have a transitional period of three to five years before any new arrangements can be taken on board.

Administration's response

19. The Administration does not understand what inaccuracies and imperfections the deputations are referring to. Nor does the

Administration see the case for a transitional period, given that the Bill seeks only to enshrine in law a policy which has been in practice for many years. If a SMC has genuine difficulties in finding suitable replacement for a principal or teacher reaching retirement age, the Bill already provides a mechanism for the SMC to recommend to the Director of Education that the service of the incumbent principal or teacher be extended.

Temporary teachers and teachers who are not remunerated from government subsidy

Deputations' argument

20. “We would reconfirm that we are strongly opposed to the suggested new and additional restriction on temporary teachers and teachers who are not remunerated from government subsidy.”

Administration's response

21. Subject to discussions at the Bills Committee, the Administration will consider introducing Committee Stage Amendments to the effect that aided schools may employ a person who is over 60 years old –

- (a) to discharge the duties of a teacher when the latter is, for whatever reason, temporarily unable to discharge his teaching duties; or
- (b) where such employment is not within the teaching staff establishment approved by the Director of Education and is not public funded.

II. Response to Members' concerns

Practical arrangements

22. Members requested that the practical arrangements for applications for extension of the service of serving principals and teachers beyond 60 years old be set out in greater detail. They are set out below.

23. If the Bill is passed, the Education Department will issue a

circular to all aided schools. The circular will require the schools concerned to conduct an open selection process before an application for extension of service should be made. The circular will also set out the recommended procedures and the recommended criteria for considering applications during the selection process.

24. The procedures the Administration intends to put into the circular are along the following lines -

- (a) The SMC should initiate an open selection procedure by inviting applications for the post of the principal/teacher concerned through advertisement.
- (b) The advertisement should set out, among other things, the selection criteria. In deciding the criteria to be adopted, SMCs are invited to make reference to the core attributes set out in Annex in addition to the minimum academic qualifications and working experience. A more detailed document elaborating on these core attributes will be prepared by ED for the SMC's reference.
- (c) The purpose of this round of selection is to ascertain if there are people other than the incumbent who are capable of taking up the principal/teacher post concerned. The incumbent therefore does not need to submit an application.
- (d) The SMC should constitute a selection panel involving the school sponsoring body and should involve parents and other independent members as far as possible to ensure that the interests of the school and impartiality are observed. If required, an Education Department representative will join the panel as an observer.
- (e) The selection panel should conduct the selection process in an open, fair and transparent manner. The process should be properly documented.
- (f) If the panel finds that an applicant possesses the

required qualifications, experience and the necessary core attributes, the post should be offered to him and the incumbent should step down. If the panel finds no suitable applicant, or if no successful applicant accepts the offer of the post, the SMC may, as provided in the Bill, apply to the Director of Education for the retention of the incumbent principal/teacher. The SMC should submit all relevant documentation including a medical certificate of fitness of the incumbent to the Director for consideration.

- (g) The applications will be considered by a panel appointed by the Director of Education, which will advise the Director on whether the applications should be approved. This panel will consist of officials of the Education Department and non-officials such as teachers, academics and other lay persons appointed by the Director. The main considerations the panel will take into account are (i) the procedural propriety of the whole selection process (e.g. properly constituted selection panel, advertisement requirements, selection criteria, avoidance of bias or conflict of interests, etc.), (ii) whether the core selection criteria have been properly applied and whether the panel has taken all relevant considerations into account during the selection process, and (iii) whether there is any evidence to contradict the selection panel's assessment. The purpose of this process is to ensure consistency across schools and that the process is open, fair and transparent.

Retirement of minor staff

25. Under the Code of Aid for primary schools, all clerical and minor staff employed from the Salaries Grant shall normally retire at the age of 60 except in special cases with the approval of the Director. However, for schools that have elected to receive the Administration Grant out of which the salaries of clerical and janitor staff are paid, no retirement age for such staff is stipulated.

26. Under the Code of Aid for secondary schools, all clerical

and minor staff are employed from the Administration Grant, and the Code does not specify the retirement age for such staff. The appointment, dismissal, salaries and terms of service for such staff are the responsibilities of the SMC.

27. Under the Code of Aid for special schools, clerical and minor staff should retire at the age of 60, except in special cases and with the approval of the Director.

III. Urgency

28. The Administration hopes that the second reading of the Bill can be resumed on 15 March 2000. This will allow just enough time for the Education Department to make the necessary preparations for schools to apply for extension of services for the 2000/01 school year. The Administration stands ready to meet with Members as frequently as necessary.

Education and Manpower Bureau
February 2000

**Core attributes a selection panel might consider in
assessing an applicant's suitability for appointment as a
principal/teacher**

This list is by no means exhaustive and is for reference only. SMC should set its own criteria for the selection of candidate to fill the post. The selection panel should aim at identifying candidates who possess as many of the core attributes listed below as possible. The panel may assign different weightings to the attributes taking into account the circumstances of the school and the post being applied for.

- A Beliefs and Outlook
- B. Health
- C. Personality, including attributes such as trust, generosity, assertiveness, fairness, honesty, openness, empathy, diligence, patience, etc.
- D. Knowledge and Skills in student learning, curriculum, technologies, quality assurance, staff management, general management, leadership, rules and regulations, communications, crisis management, personal organisation, living with others, visionary thinking, strategic thinking, organisation culture, etc.
- E. Experience
- F. Professionalism including self-motivation in continuing professional education, networking with peers to share professional growth and career planning.