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**Paper for the House Committee Meeting
of the Legislative Council
on 17 December 1999**

**Legal Service Division Report on
Education (Amendment) Bill 1999**

Objects of the Bill

To amend the Education Ordinance (Cap. 279) ("the Ordinance")
to -

- (a) prohibit the employment of a person as a teacher or principal of an aided school if the person is aged 60 or above when his employment commences;
- (b) provide that unless permitted by the Director of Education ("the Director"), no person shall continue to be employed as a teacher or principal of an aided school if the person would be aged 60 or above before the commencement of a school year;
- (c) provide that the Director may, upon application by the management committee, permit a serving teacher or principal of an aided school to continue to be employed for a period of not more than one school year, with a maximum aggregate period of 5 consecutive years; and
- (d) provide for a right to appeal against the decision of the Director to the Appeals Board and the Chief Executive in Council.

LegCo Brief Reference

2. EMB CR 2/2041/99III issued by the Education and Manpower Bureau on 30 November 1999.

Date of First Reading

3. 15 December 1999.

Comments

Judgment

4. In June 1999, the High Court held in the case of *Lau Chi Fai and Wong Chi Kin v Secretary for Justice and Director of Education* (HCMP No. 1198) that section 57 of the Code of Aid for Secondary Schools ("the Code") is unenforceable against principals of aided secondary schools by reason of the doctrine of privity of contract. A brief note on the judgment is at Annex B of the LegCo Brief.

5. Section 57 of the Code, set out in paragraph 2 of the LegCo Brief, contains the retirement policy for aided schools. It provides that a teacher shall retire at the end of the school year in which he reaches the age of 60, unless the Director permits him to continue in service for a period of one school year, and for further periods each of one school year up to the end of the school year when he reaches 65. Similar provisions are stipulated in the Code of Aid for Primary Schools and the Code of Aid for Special Schools. According to the LegCo Brief, the Bill proposes to give legal effect to the retirement policy set out in the three Codes of Aid.

6. We would advise Members that :

- (a) under section 53 of the Ordinance, a principal of a school must be a teacher of that school;
- (b) the judgment has not ruled that section 57 of the Code is unenforceable against the teachers of aided secondary schools; and
- (c) according to paragraph 3 of the LegCo Brief, the ruling is taken to be equally applicable to principals of aided primary and special schools.

Comparison between the Bill and the Codes of Aid

7. The Administration has been asked to clarify whether the proposals in Clause 7 of the Bill and the retirement policy in the Codes of Aid are different in the following aspects :

- (a) Section 57 of the Code does not prohibit the employment of a person as a teacher or principal of an aided school who is aged 60 or above when his employment commences (see new section 58A(1)).
- (b) Section 57 of the Code provides that the Director may permit a teacher to continue in service *for a period of one school year* after the end of that in which he reaches 60, and for further periods *each of one school year* up to the end of the school year in which he reaches 65 (italics added). The new section 58B, however, allows an application to be made for *a period of not more than one school year*, i.e. an extension for a period shorter than one school year may be allowed.
- (c) Section 57 of the Code of Aid prescribes that permission of the Director may be granted subject to the submission of a satisfactory medical certificate as to fitness. The Bill does not specify such requirement.

Appeal

8. Clause 8 of the Bill requires the Director to serve a notice in writing of her decision to the supervisor of the aided school, stating the grounds for her decision. Under section 61 of the Ordinance, the supervisor may within 21 days after the service of notice, appeal to the Appeals Board against the decision of the Director. The Appeals Board, established under section 59 of the Ordinance, comprises not less than 9 members appointed by the Chief Executive of whom at least 3 shall be registered teachers.

9. Section 65 of the Ordinance provides for a right of appeal against the decision of the Appeals Board by way of petition to the Chief Executive in Council. Clause 9 of the Bill empowers the Director to permit, on such conditions as she thinks fit, a person to continue to be employed as a teacher or principal of the aided school pending an appeal.

Transitional provision

10. The Bill does not have a transitional provision to provide for the event if there is insufficient time for the management committee of an aided school to make an application under section 58B and for the Director to determine whether or not to permit such application before the commencement of the next school year following the passage of the Bill.

Public Consultation

11. According to the Administration, public consultation has not been carried out.

Consultation with the LegCo Panel

12. The LegCo Panel on Education has been consulted on 5 November 1999. Members of the Panel supported the proposals in principle subject to the provision of a proper appeal mechanism. Paragraphs 8 and 9 of this Report describe the provisions in the Bill and the Ordinance concerning appeal.

Conclusion

13. The Legal Service Division is seeking clarification from the Administration on the queries set out in paragraphs 7 and 10 of this Report. A further report will be issued when we receive a reply from the Administration.

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