

Bills Committee on Education (Amendment) Bill 2002
Administration's Response to Issues Raised at the Meetings
on 7 and 13 November 2003

Issues	Members' Concerns	Administration's Response
Power of incorporated management committee		
<i>Powers of IMC to use and invest its funds</i>	Define the meaning of "high-risk investment" referred in paragraph 34 of the Administration paper CB(2) 1723/02-03(01) and explain how the power of IMC to invest its funds would be monitored. (7.11.2003)	<p>Proposed section 40AE(3) provides that IMCs of aided schools will be subject to the Codes of Aid when exercising their powers, and they should follow the directions given by Permanent Secretary for Education and Manpower (PSEM) as provided under section 40CC.</p> <p>According to Education and Manpower Bureau (EMB) Circular No. 2/2003, in order to protect the interests of schools, all income derived by schools should be kept in a manner that involves the minimum risk. Surplus funds which are not immediately required for use by schools may be placed in banks for time deposits or savings accounts. Any other form of speculative investment (e.g. local equities) is not recommended because of the risk of financial loss.</p> <p>This circular also suggests that schools follow the guidance of the Hong Kong Monetary Authority on spreading their bank deposits among several licensed banks to ensure that the exposure to any one bank not exceeding, say, 50% of the funds. For fund size of over \$5 million, deposits with any one bank should be subject to a maximum exposure equivalent to 20% of the total funds under management.</p> <p>After the enactment of the Bill, EMB will issue advice to schools on how the IMC should handle the surplus funds of the school.</p>

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	<p>Consider whether an IMC should be required to seek the approval of the SSB before it could borrow money; and clarify whether an SSB would ultimately be held responsible for liabilities which had not been settled in full by an IMC. (7.11.2003)</p>	<p>When an IMC has been established, it is a separate legal entity and can be sued directly in its own right. Hence, the SSB will not be held responsible for unsettled liability of the IMC.</p> <p>If approval should be sought from the SSB before an IMC can borrow money, it means that the SSB may have to shoulder the liabilities involved.</p>
	<p>Re-examine the need to empower an IMC to solicit and receive gifts or donations; and re-consider the powers and responsibilities of SSB and IMC in solicitation of gifts or donations. (7.11.2003)</p>	<p>Since the IMC is responsible for managing the school, if the donor specifies clearly that the beneficiary is the school or the IMC, the donation should be vested in the IMC.</p> <p>Concerns have been raised by Members that if both the SSB and the IMC have power to raise fund, there will be competitions and disputes. There will be no confusion if the donor clearly identifies the beneficiary. An SSB may raise fund for itself or the school. In the former case, it will be up to the SSB to decide on the usage of the donation. In the latter case, the beneficiary would be the school and the IMC should manage the donation according to the stated purposes.</p> <p>Likewise, an IMC may also raise funds for the SSB or the school. If the beneficiary is the school, the donation would be vested in the IMC.</p>
Liability of manager		
<i>Rights and liability of manager and protection of legal liability</i>	<p>How the test of “acting in good faith” in new section 40BG could be satisfied, e.g. when a manager was not present at a meeting, or when he notified an act at a subsequent meeting, or an alternate manager voting at a</p>	<p>‘Acting in good faith’ is a common legal concept. In general terms, a person acts in good faith if he acts honestly and without ulterior motive. In relation to the discharge of public duties, it involves “giving one’s mind to the comprehension and one’s will to</p>

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	meeting. (7.11.2003)	<p>the discharge of the duty towards the public" (per Lord Sumner, <i>Roberts V Hopwood</i> [1925] AC 578).</p> <p>As IMCs are separate legal entities, they incur civil liabilities in their own names in respect of their own acts. Therefore, individual managers would not be held liable for the acts of IMCs. The protection from civil liability afforded by s.40BG is in fact an extra "shield" for individual managers in case they are personally involved in the act.</p> <p>If a manager is absent from a meeting during which an act is resolved by the IMC to be done, the protection afforded by s.40BG(2)(a) may not be relevant to the manager because the manager has not acted in relation to the act. The manager concerned would not be exposed to civil liability in respect of the act.</p> <p>For managers who are only notified of the act in question in a subsequent meeting, they will also not incur civil liability in respect of the act.</p> <p>If an alternate manager is allowed to vote and has actually voted during a meeting of the IMC, the legal liability of the alternate manager is the same as that of a manager who has voted.</p>
	Whether it would be relevant to compare the liabilities of a director of a limited company with the liabilities of a manager. (7.11.2003)	A director is a member of the governing body of a limited company of which he may or may not be a member. A director owes a duty to the members of the company. A school manager is always a member of the IMC. Thus, the situation of school managers and directors are not the same. The Companies Ordinance (Cap. 32) and the related company law do not apply to IMCs.

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		<p>Limited companies would pay their directors while managers generally offer voluntary service to a non-profit-making body. They should therefore not be expected to expose to the same legal liability risk as the company directors. It would be in the public interest to protect the liability of school managers in order to encourage participation in school governance.</p>
	<p>Whether the Administrator would consider providing an indemnity to a manager against any liability incurred by him in defending proceedings, whether civil or criminal, in which judgment was given in his favour or in which he was acquitted along the lines of section 165 of the Companies Ordinances. (7.11.2003)</p>	<p>Section 165 of the Companies Ordinance renders illegal any provision in the articles of a company (or in a contract with it) which exempts an officer or the auditor of the company from certain legal liabilities (relating to negligence, default, breach of duty or breach of trust) or indemnifies such persons against such liabilities. An example of such provision is one which stipulates that the company cannot sue its directors for negligence in performance of duties. Section 165(c) provides for an exception to the above prohibition. The objective of section 165 is to protect shareholders.</p> <p>There is no similar restriction under the Bill in relation to waiving claims against a manager in respect of the above-mentioned legal liabilities. The constitution of an IMC can therefore prohibit an IMC from suing the managers for breach of duty, etc. Proposed section 40BG offers protection to managers for acts done in good faith. They cannot be sued if they have acted without fraud or malice. If a manager acts in bad faith (e.g. stealing money belonging to the IMC), he probably commits a criminal offence. The prospect of being prosecuted and sentenced should be able to discourage managers from stepping across the line. It is not our policy to have the prohibition provided for in section 165 of the Companies Ordinance. Therefore, we do not consider it necessary to provide for the excepted indemnity mentioned above.</p>

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	<p>Clarify the burden and standard of proof in proceedings against a manager of the school under section 18A, section 87 and regulation 101; and explain why the liability of an IMC manager was different from that of a director or other officer concerned in the management of a company under section 101E of the Criminal Procedure Ordinance (Cap 221), i.e. the prosecution should prove that the offence was committed with the director's consent or connivance. (7.11.2003)</p>	<p>There are quite a number of provisions that impose criminal liability on the ground of 'consent or connivance', the most notable one being section 101E of the Criminal Procedure Ordinance. The expression of 'consent or connivance' covers two situations: (i) where a person has actual knowledge of the doing of the act; and (ii) where a person shuts his eyes to an obvious means of knowledge and thus deliberately refrain from making enquiries the results of which he might not care to have. (see <i>Mohan Gulabrai Mirchandani & ors v. R</i>, [1977] HKLR 523)</p> <p>We will move CSA to the new sections 18A(4), 87(10) and 101(9) so that a manager can only be charged with the relevant offence if the contravention in question has been committed by the IMC with the consent or connivance of the manager.</p>
	<p>The policy intent of the defence in section 18A(4)(a), section 87(10) and regulation 101(9); and clarify whether there was inconsistency between the English and Chinese versions, i.e. "without his knowledge or consent" and "既不知道亦沒有同意"; and clarify whether there was inconsistency with the existing section 87(10) and regulation 101(9). (7.11.2003)</p>	<p>CSA will be moved by the Administration and the relevant provisions would not be applicable anymore.</p>
	<p>How a person could satisfy the test of taking "all reasonable steps" to prevent the contravention in new section 18A(4)(b), section 87(10) and regulation 101(9), and whether the defence would be available to a principal. (7.11.2003)</p>	<p>CSA will be moved by the Administration and the relevant provisions would not be applicable anymore.</p>
	<p>Whether the reason for having members of an IMC held personally liable subject to the availability of statutory</p>	<p>The provisions in the Bill concerning criminal liability of managers are consistent with the existing provisions. We will move CSA to</p>

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	defence was to be consistent with the current policy in relation to members of a management committee. (7.11.2003)	the new sections 18A(4), 87(10) and 101(9) so that a manager can only be charged with the relevant offence if the contravention in question has been committed by the IMC with the consent or connivance of the manager.								
Insurance cover for liability										
Block Insurance Policy and additional insurance coverage	Clarify whether IMC managers in the discharge of IMC duties were covered by the Block Insurance Policy for aided schools	The Government has arranged for aided schools a Block Insurance Policy (BIP) to cover public liability, employees' compensation and group personal accident risks. The maximum limits for 2003/04 to 2004/05 school year are—								
	Describe the additional insurance that could be provided to IMC managers and clarify whether IMC managers should pay the costs of such insurance. (13.11.2003)	<table><tr><td><u>Class of Insurance</u></td><td><u>Limit of Indemnity</u></td></tr><tr><td>Public Liability</td><td>HKD 100 million per any one occurrence</td></tr><tr><td>Employees' Compensation</td><td>HKD 100 million per any one event for each insured school</td></tr><tr><td>Group Personal Accident</td><td>Up to HKD 100,000 per student</td></tr></table>	<u>Class of Insurance</u>	<u>Limit of Indemnity</u>	Public Liability	HKD 100 million per any one occurrence	Employees' Compensation	HKD 100 million per any one event for each insured school	Group Personal Accident	Up to HKD 100,000 per student
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		Activities organised by the school or activities organised by parent-teacher association or alumni association which are approved by the school management committee (SMC) will be covered by the BIP. Members of the SMC, employees of the school, voluntary helpers and students taking part in school activities would be covered by the Public Liability insurance. Additional items are included in the 2003 BIP under the Public Liability which cover the legal liability and third party claims in respect of impairment of any person's mental condition caused by anguish, shock or trauma and impairment of a student's mental condition arising from counseling activities conducted by professional counselors. The details on protection of school								

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		managers against legal liabilities are attached at <u>Annex</u> .
		In addition to the coverage provided by the BIP, managers may attract other legal liability when discharging their duties. If the IMC considers it necessary, it can make use of the general funds/subscriptions of the school to purchase additional insurance in order to protect managers and teaching staff from liability that may be incurred from the discharge of their duties.

Education and Manpower Bureau

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Protection of School Managers against Legal Liabilities

This paper gives an overview of the protection to school managers against legal liability accorded under the Education (Amendment) Bill 2002 (the Bill) and the Block Insurance Policy (BIP) for aided schools.

Liability protection provided by the Bill

2. At present, school management committees (SMCs) are not separate legal entities. The supervisor and managers of a school may therefore incur personal legal liabilities arising from the decisions of the SMC. Also, as the roles and functions of the school sponsoring body (SSB) and SMC are not clearly defined, the SSB sometimes may get involved in the legal liability of the school, which may as a consequence affect other schools operated by the SSB. Such a situation is highly undesirable.

3. The Bill provides for the incorporation of the managers of a school, to be known as an Incorporated Management Committee (IMC). It also clearly sets out the functions of the IMC in section 40AD, which are:

- (a) to formulate education policies of the school;
- (b) to plan and manage financial and human resources available to the school;
- (c) to account to the Permanent Secretary for Education and Manpower and the sponsoring body for the performance of the school;
- (d) to ensure that the mission of the school is carried out;
- (e) to ensure that the education of the pupils of the school is promoted in a proper manner; and
- (f) to be responsible for school planning and self-evaluation.

4. As an independent legal entity, the IMC will be held responsible for civil liabilities arising from its acts in its own name, making it justifiable for not holding individual managers or the SSB liable for the acts of the IMC. Section 40BG of the Bill offers an additional protection to individual managers in that they will not incur personal civil liabilities when discharging their duties as managers if they have acted in good faith. In general terms, a person acts in good faith if he acts honestly and without ulterior motive. To further protect IMC managers, the Administration will

move Committee Stage Amendment to specify in the Bill that any claim for liability shall be enforced against the IMC to the exclusion of managers.

5. On the other hand, in relation to certain provisions in the Education Ordinance, the Bill seeks to impose criminal liabilities on the individual managers of a school if the IMC of the school has contravened any of those provisions. In this connection, Committee Stage Amendments will be moved so that a manager will only be held responsible if the contravention is committed with his consent or connivance.

Liability protection provided by the Block Insurance Policy

6. To provide SMCs and school managers with suitable protection from legal liabilities, the Government has arranged a BIP for aided schools since 1988. The coverage and maximum indemnity limits of the BIP from the 2003/04 to 2004/05 school year are as follows:

Class of Insurance	Limit of Indemnity	Remarks
(a) Public Liability	HKD 100 million per any one occurrence	Negligence of the school has to be established
(b) Employees' Compensation	HKD 100 million per any one event for each insured school	—
(c) Group Personal Accident	Up to HKD 100,000 per student	No need to establish negligence on the part of the school

7. Public Liability covers the liabilities in respect of accidental injury to any person, and/or accidental loss of or damage to any property. Employees' Compensation covers the liability in respect of death or injury by accident or disease arising out of and in the course of employment either under the Employees' Compensation Ordinance or otherwise at law. Group Personal Accident covers the liability in respect of accidental death and disablement of students taking part in school activities. The BIP will also cover the cost of defence and legal representation.

8. In the current BIP, additional protection has been offered under Public Liability to cover legal liability and third party claims in respect of impairment of any person's mental condition caused by anguish, shock and trauma and impairment of a student's mental condition arising from counseling activities conducted by professional counselors.

9. When a school sets up an IMC, the BIP will protect the IMC and its managers in the same way as the SMC and its managers.

Other liability protection

10. From our experience, the current BIP offers quite a comprehensive protection to SMCs and school managers. However, there are possibilities that school managers might still be subject to the exposure of the following liabilities, which are not covered by the BIP:

- (a) Professional liability such as failure to act for the best interest of the school, wrongful educational instruction and breach of duty of care by the professional staff employed by the school.
- (b) Employment practices liability such as sexual harassment, wrongful termination of employment contract, failure to promote and discrimination.
- (c) Educators legal liability/Directors & Officers liability such as employment-related claims and third party discrimination/harassment claims, infringement of copyright, unintentional breach of confidentiality, libel and slander.

11. Depending on the situation and their own needs, individual IMCs may arrange additional insurance coverage to provide better protection to their managers or teaching staff in discharging their duties. The premium for the above insurance coverage could be paid from the school's General Funds/Subscriptions Account.