

**For Discussion
on 10 December 2012**

Legislative Council Panel on Education

Education (Amendment) Bill 2013

Purpose

This paper seeks Members' views on the Administration's proposal to amend the Education Ordinance (Cap. 279) and its subsidiary legislation (i.e. the Grant Schools Provident Fund (GSPF) Rules (Cap. 279 sub. leg. C) and Subsidized Schools Provident Fund (SSPF) Rules (Cap. 279 sub. leg. D)) to prevent the "benefits"¹ of GSPF and SSPF contributors from being vested in a trustee-in-bankruptcy in case of bankruptcy.

Background

The GSPF and SSPF Schemes

2. The GSPF and SSPF are statutory provident fund schemes established to provide, subject to the provisions of the GSPF Rules and the SSPF Rules, for payments upon resignation, retirement, dismissal or termination of contract, among others, to teachers employed in grant/subsidized schools or direct subsidy scheme schools who are contributors, or to their estates in case of death.

3. Similar to Mandatory Provident Fund (MPF) schemes, the GSPF and SSPF also operate as a sort of compulsory² savings schemes where contributions by the employees are matched by the Government/ schools (as the case may be), such that the contributors will receive a lump sum payment when they cease to be employed as a teacher. GSPF and SSPF are exempted³ from the provisions of the Mandatory Provident Fund Schemes

¹ Subject to conditions stipulated under GSPF and SSPF Rules, "benefits" normally compose of the teachers' contributions, Government donations/ schools' donations (as the case may be) and the dividends declared on the contributions/ donations.

² With the exception of certain types of teachers (e.g. temporary teachers and teachers who are members of missionary bodies, etc.) as provided in Rule 7 of the GSPF and SSPF Rules.

³ Section 4 (1) of Mandatory Provident Fund Schemes Ordinance (Cap. 485) provides that "*The persons specified in Part 1 of Schedule 1 are exempt from the provisions of this Ordinance to the extent described therein.*" and item descriptions No. 4 and 5 in Part 1 of Schedule 1 specify that "*Any person who is a teacher to which the Grant Schools Provident Fund Rules (Cap 279 sub. leg. C) apply*" and "*Any person who is a teacher to which the Subsidized Schools Provident Fund Rules (Cap 279 sub. leg. D) apply.*"

Ordinance (Cap. 485).

The Court Case

4. In 2008, in a bankruptcy case concerning a subsidized school teacher (Re. Ng Shiu Fan [2008] 4 HKLRD 813), the Court of First Instance ruled that section 85(3) of the Education Ordinance (Cap. 279)⁴ did not prevent the benefits under the SSPF from vesting in the trustee-in-bankruptcy by virtue of section 58(1) of the Bankruptcy Ordinance (Cap. 6)⁵. The judge further recommended that serious consideration be given to amending the law to extend the protection to retirement benefits generally in the event of bankruptcy. On appeal, the case was heard in the Court of Appeal in 2009 ([2009] 4 HKLRD 774) and it was held that the bankrupt is only entitled to the proportion of the benefits attributable to his service and contribution after his discharge from bankruptcy. On 13 April 2010, on his application, leave was granted to the bankrupt to appeal against the judgment of the Court of Appeal. The bankrupt's two applications to the Director of Legal Aid for legal aid were refused on 16 August 2010 and 11 January 2011 respectively.

5. Towards the end of August 2012, the Official Receiver's Office informed the Education Bureau (EDB) that the Director of Legal Aid had granted legal aid to the bankrupt appeal against the judgment of the Court of the Appeal. To date, as informed by Official Receiver's Office, the bankrupt has not yet proceeded with the appeal.

Current Practice in case of Bankruptcy

6. Before the Court of Appeal's judgment in Re. Ng Shiu Fan, the EDB had released GSPF and SSPF benefits of a bankrupt (or former bankrupt) teacher to the trustee-in-bankruptcy as required by the trustee-in-bankruptcy when the benefits were payable to the teacher-contributor. Since the Court of Appeal's judgment, payments of benefits attributable to post-discharge services are paid to the contributors who have since been discharged from bankruptcy and the pre-discharge benefits are paid to the trustee-in-bankruptcy.

⁴ Section 85(3) of the Education Ordinance (Cap. 279) stipulates that "*Subject to any rules made under subsection (1), no contribution or donation to or dividend or interest on a dividend from a provident fund shall be assignable or transferable or liable to be attached, sequestered or levied upon, for or in respect of any debt or claim whatsoever.*"

⁵ Section 58(1) of the Bankruptcy Ordinance (Cap. 6) stipulates that "*On the making of a bankruptcy order, the property of the bankrupt shall vest in the Official Receiver.*"

7. Having regard that the retirement benefits of teachers in government schools under the Pensions Ordinance (Cap. 89) and that of the major workforce under the Mandatory Provident Fund Schemes Ordinance (Cap. 485)⁶ are under protection in the event of bankruptcy, the EDB has reviewed the relevant provisions under GSPF and SSPF and considers that legislative amendment is necessary to effect similar protection to the benefits of GSPF and SSPF contributors in the event of bankruptcy, notwithstanding there is possible appeal in Mr. Ng's case. In this regard, the EDB is preparing the Education (Amendment) Bill 2013 (the Bill) and has secured a legislative slot for the legislative amendments in the second half of the 2012-13 legislative programme.

Legislative proposal

8. We propose to amend the Education Ordinance (Cap. 279) and its subsidiary legislation so that where a GSPF/SSPF contributor is adjudicated bankrupt, the right or entitlement of the contributor to any benefits in the GSPF and SSPF is excluded from the property of the contributor for the purposes of the Bankruptcy Ordinance (Cap. 6). The purpose of the amendment is to effect protection to the provident fund benefits of the GSPF and SSPF contributors against vesting in a trustee-in-bankruptcy so that the contributor may have his/her benefits preserved for retirement. The intended scope of protection would be consistent with those provided under the Mandatory Provident Fund Schemes Ordinance (Cap. 485)⁷.

Consultation

9. We have consulted the relevant Bureaux/Departments on the draft

⁶ Section 16 of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) has been amended (on account of the same court case) to put beyond doubt that the right or entitlement of a scheme member to any accrued benefits in a registered MPF Scheme derived from mandatory contributions is excluded from the member's property for the purposes of the Bankruptcy Ordinance (Cap. 6), as a result of which the accrued benefits in the Scheme do not vest in a trustee-in-bankruptcy in case of bankruptcy of the scheme member. The Mandatory Provident Fund Schemes (Amendment) Ordinance 2011 has come into operation since May 2011.

⁷ MPF Schemes and GSPF/SSPF are similar compulsory provident fund schemes which both aim to assist the scheme members and the aided school teachers to accumulate retirement savings. The policy of protecting the benefits of a bankrupt contributor is to ensure that the contributor will have benefits preserved for retirement.

Drafting Instructions⁸ and all of them did not raise objection to or have adverse comments on the proposal. We would further consult the relevant Bureaux/Departments and parties regarding the final draft of the Bill.

10. We have briefed the Boards of Control of GSPF and SSPF⁹ regarding the legislative proposal at the meetings on 1 November 2012 and 30 October 2012 respectively, and the two Boards indicated their support to the proposal.

Advice sought

11. Subject to Members' views on the legislative proposal, we aim to introduce the Bill into the Legislative Council in the second half of the 2012-13 legislative programme.

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⁸ Regarding implications of the legislative proposal in terms of human rights, Basic Law, financial resources (including staffing), economic, social, public relations and publicity, civil service, conflict of interests/corruption and privacy of individuals.

⁹ The Boards of Control of GSPF and SSPF are statutory boards established under the GSPF and SSPF Rules. The complete administration and control of the GSPF and SSPF are vested in the respective Boards of Control.