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Report of the Bills Committee on Private Columbaria Bill

Purpose

This paper reports on the deliberations of the Bills Committee on Private Columbaria Bill ("the Bill").

Background

2. In June 2014, the Administration introduced the Former Private Columbaria Bill ("the Former Bill") into the Fifth Legislative Council ("LegCo") for regulating private columbaria. A Bills Committee ("the Former BC") was then formed to study the Former Bill. Members of the Former BC raised various concerns on the Former Bill. In response to their concerns, deputations' views and enquiries made by the legal adviser to the Former BC, and for implementing the Administration's revised or further proposals, the Administration proposed a total of 547 Committee stage amendments ("CSAs") to the Former Bill.¹

3. In June 2016, the Former BC completed scrutiny and supported the resumption of the Second Reading debate on the Former Bill at the Council meeting of 6 July 2016. The resumption of the Second Reading debate, Committee stage and Third Reading on the Former Bill were put on the Agendas of the Council meetings of 6 July 2016 and 13 July 2016 but were not reached before the Fifth LegCo stood prorogued. As the consideration of the Former Bill lapsed at the end of the Fifth LegCo pursuant to section 9 of the Legislative Council Ordinance (Cap. 542) and in accordance with Rule 11(4) of the Rules of Procedure, the Administration introduced the Bill into the Sixth LegCo in November 2016. The Bill is based on the Former Bill and incorporates all the aforesaid CSAs. The Administration has also made minor technical details and stylistic polishing to the Bill.

¹ Members may refer to the Report of the Former Bills Committee for the views given by it on the Former Bill (including the Administration's Committee stage amendments ("CSAs"), LC Paper No. CB(3)772/15-16 for the full set of the Administration's CSAs, and the Administration's paper (LC Paper No. CB(2)1860/15-16(01)) for the Administration's explanations of those CSAs. Soft copies of these papers are available at the website of the Legislative Council.

The Bill

4. The Bill seeks to:
- (a) provide for the licensing of private columbaria for keeping ashes resulting from the cremation of human remains, including the establishment of the Private Columbaria Licensing Board ("the Licensing Board");
 - (b) enhance consumer protection through provisions governing agreements for sale of interment rights ("the agreements");
 - (c) impose obligations relating to the disposal of ashes; and
 - (d) make other provisions to deal with related matters such as the enforcement and the appeal mechanism under the Bill, and provide for consequential or related amendments to other Ordinances.

The Bills Committee

5. At the House Committee meeting on 25 November 2016, Members agreed to form a Bills Committee to study the Bill. Under the chairmanship of Hon CHAN Hak-kan, the Bills Committee held eight meetings with the Administration. The membership of the Bills Committee is in **Appendix I**. The Bills Committee has also received written views from 17 organizations/individuals. A list of organizations/individuals which/who have given written views to the Bills Committee is in **Appendix II**.

Deliberations of the Bills Committee

6. The salient points of deliberations of the Bills Committee are set out in the following paragraphs. A table of contents is set out below.

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Domestic keeping of synthetic materials

7. Clause 7(1) of the Bill provides that the Bill does not apply to the keeping of ashes in domestic premises where no more than 10 containers of ashes are kept in the premises and that each container contains, or is claimed, represented or held out to be containing, the ashes of only one person. Members note that the Former BC was concerned that since synthetic materials, which were regarded as ashes, could take different forms (one set of ashes transformed into multiple items of synthetic materials or two sets of ashes merged into one item of synthetic materials), it was difficult to enforce as far as keeping of synthetic materials was concerned. The Former BC took the view that transforming ashes into synthetic materials would become more common and restricting the quantity of synthetic materials to be kept in domestic premises might not be necessary. Given that keeping of synthetic materials transformed from ashes of more than one person in one container in domestic premises contravened clause 5(1) of the Former Bill (i.e. clause 7(1) of the Bill), the Former BC had expressed concern that there would be a lot of disputes in this regard in future.

8. The Administration had advised the Former BC that there were practical difficulties in quantifying synthetic materials to be kept in domestic premises for the purpose of the Former Bill. The Administration did not envisage strong public views against domestic keeping of synthetic materials and considered that keeping a large quantity of synthetic materials in domestic premises unlikely. As such, the Administration was inclined towards adopting a lenient approach towards domestic keeping of synthetic materials. That said, it would act on complaints about domestic keeping of synthetic materials. Should instances of abuse come to light after the enactment of the Private Columbaria Ordinance ("the Ordinance"), the Administration would swiftly initiate amendments to the relevant provisions.

9. The Former BC was of the view that it was difficult to come up with a perfect solution on this issue at the moment and supported keeping to the Administration's proposal put forward in the Former Bill. It, however, had requested the Administration to review and propose amendments, in a timely manner, to these provisions as well as other provisions if the Licensing Board or enforcement authorities encountered enforcement difficulties in implementing the Ordinance after its enactment. The Administration should also conduct a comprehensive review of the Ordinance after its enactment for a period of time, say, three years.

10. As requested by the Bills Committee, the Administration has undertaken to keep in view the implementation of the Ordinance, propose amendments to the Ordinance as and when necessary, and conduct a review of the Ordinance in any event around three years after its enactment. The Administration has also agreed that the Secretary for Food and Health will give the undertakings in his speech for resumption of the Second Reading debate on the Bill ("SFH's speech").

Domestic keeping of ashes

11. Some members including Mr LEUNG Kwok-hung take the view that ashes kept in domestic premises should be confined to those of family members of the occupiers, in order to prevent domestic premises from being used as private columbaria in disguise. The Administration has advised that clause 7 seeks to cater for keeping ashes in domestic premises (i.e. premises used solely or principally for residential purposes and constituting a separate household unit).

12. Taking the view that the New Territories ("NT") Small House Policy ("the Policy") requires NT small houses to be for residential use only, some members including Mr CHAN Chi-chuen consider that allowing NT small houses which have been used as private columbaria to apply for regularization is a deviation from the Policy. According to the Administration, generally speaking, the user clause of leases of NT small houses is for "non-industrial" purpose. The relevant government departments and the Licensing Board would take into account a number of factors (e.g. whether the applicants meet the requirements for regularization mentioned in paragraph 14 below) in considering the applications.

Pre-cut-off columbaria

Occupation of unleased land for use as private columbaria premises

13. Some members including Mr LEUNG Yiu-chung, Mr LEUNG Kwok-hung and Dr KWOK Ka-ki call on the Administration to endeavour to tackle pre-cut-off columbaria (i.e. private columbaria that were in operation, and

in which ashes were interred in niches, immediately before the cut-off time which is 8 am on 18 June 2014) located on unlawfully-occupied unleased land rather than allowing operators of these columbaria to apply for regularization. The Administration is also requested to take measures to prevent operators of such columbaria from making profit by way of selling interment rights. These members consider that columbarium operators whose columbarium premises are occupying government land under a short term tenancy ("STT") granted by the Administration should not be allowed to sell interment rights for a duration exceeding the term of STT.

14. The Administration has advised that stringent requirements have been imposed for the regularization of unlawful occupation of unleased land and/or lease breach by pre-cut-off columbaria, details of which are set out in **Appendix III**. Under these requirements, applications for regularization by pre-cut-off columbaria will be processed on a case-by-case basis having regard to their individual merits. Licence applicants are subject to payment of full market value ("FMV") premium, waiver fee or STT rental as well as administrative fee for regularization under the prevailing policy. Dated private columbaria (i.e. pre-cut-off columbaria which have commenced operation before 1 January 1990) applying for the issue of an exemption are required to cease selling or new letting of niches from the cut-off time onwards, and hence there has been no more income from sale of niches since then. Insofar as a pre-cut-off columbarium is concerned, irrespective of whether the columbarium is applying for the issue of a licence as modified by clause 18 or an exemption under clause 19, the extent of "occupation of land as is necessary for, or ancillary to, the operation of the columbarium" is limited to that as was necessary for, or ancillary to, its operation as at the cut-off time. Private columbaria that are not pre-cut-off columbaria are not eligible for applying for the issue of a temporary suspension of liability ("TSOL"), and they should be in compliance with the land-related, planning-related and building-related requirements as well as the on-leased-premises requirements (clause 17(1)(a) and (b) referred to in paragraph 2 of Appendix III) and obtain a licence, in order to be able to sell or newly let niches. Amongst these, for columbaria not in operation immediately before the enactment of the Ordinance, their columbarium operations (including sale or new letting of niches and interment of ashes) could start only after having obtained a licence, while for columbaria in operation immediately before the enactment of the Ordinance, their columbarium operations after the grace period could continue only after having obtained a licence.

15. The Administration has further advised that in parallel, government departments with enforcement powers have been staying vigilant in their enforcement actions to contain the problem of unauthorized private columbaria. They have been nipping in the bud unauthorized private columbaria which have yet to start columbarium operations, so as to help contain the proliferation of newly-emerging cases.

Allowing interment of ashes into pre-cut-off-time-sold niches in dated private columbaria which have not yet been filled or have only been partially filled as at the cut-off time

16. Under clauses 19(2)(a), 20(4)(a), 53 and 54 of the Bill, subject to the fulfilment of conditions to forestall abuse (e.g. any such columbarium must properly keep the relevant records of interment for future examination by the Licensing Board and the enforcement authority) :

- (a) a dated private columbarium with ashes newly interred into unfilled or partially filled pre-cut-off-time-sold niches after the cut-off time but before the enactment date may still be eligible for an exemption; and
- (b) a dated private columbarium having obtained an exemption may still newly inter ashes in pre-cut-off-time-sold niches while the exemption is still in force.

17. According to the Administration, allowing bona fide consumers and operators to inter ashes into niches that were sold before the cut-off time but yet to be filled is considered a reasonable arrangement made on compassionate grounds. After all, these are valid contractual obligations and to qualify for an exemption, a columbarium must cease the selling or new letting of any niches after the cut-off time. Hence, its scale of operation will still be frozen at the level prevailing at the cut-off time and subject to control through the regulatory regime.

18. Some members including Mr CHAN Chi-chuen are concerned that some operators of dated private columbaria may overstate the number of pre-cut-off-time-sold niches. These members ask whether the Administration would examine all agreements. They are also concerned about the purchase of unsold niches in dated private columbaria by a person or a company for the purpose of reselling them later. These members further asked whether transfer of niches is allowed under the Bill.

19. The Administration has advised that it would be neither practical nor feasible to examine each and every agreement. That said, information on niches (including the number of sold and occupied niches, sold but not yet occupied niches, and niches available for sale) is collected through the administrative Notification Scheme ("the Notification Scheme"). Operators of dated private columbaria are required to keep the agreements and records of interment for future examination by the Licensing Board. This would help forestall abuse of the arrangements applicable to pre-cut-off-time sold niches of dated private columbaria seeking exemption. To qualify for exemption, dated private columbaria are required to cease the selling or new letting of any niches after the cut-off time. There are also restrictions in the Bill on the change of

dedicated persons in the endorsed register in respect of pre-cut-off-time-sold niches in private columbaria granted with exemption.

Particulars of registers of pre-cut-off columbaria to be specified by Licensing Board

20. Clause 22(1)(b)(ii) of the Bill stipulates that an application for the issue of an exemption in respect of a pre-cut-off columbarium must be accompanied by the registers required under clause 23. According to the Administration, the provision seeks to prevent abuse of the arrangement for allowing columbaria applying for exemption to arrange interment of ashes after the cut-off time in niches sold before the cut-off time, by requiring any such columbarium to properly keep the relevant records of interment for future examination by the Licensing Board and the enforcement authority. The formulation allows the Licensing Board to be able to tackle unforeseen evolvment of dubious commercial practices. Specifically, clause 23(2)(b) requires the registers to "contain the particulars specified by the Licensing Board". Contravention of this provision itself does not attract criminal liability and sanction (imprisonment or fine).

21. Noting that the aforesaid particulars would not be provided for in subsidiary legislation and therefore would not be subject to amendment by LegCo, Dr KWOK Ka-ki suggests empowering LegCo to do so.

22. The Administration has advised that the Licensing Board should be provided with the necessary flexibility in specifying the particulars to be contained in the registers for individual cases. There are examples in other legislation which require a person to provide certain information "specified by" an authority together with an application, contravention of which does not attract criminal liability and sanction. For instance, section 19(4)(b) of the Electronic Health Record Sharing System Ordinance (Cap. 625) requires an application for registration as a healthcare provider to be accompanied by "the information specified by the Commissioner".

Updating of registers of pre-cut-off columbaria

23. Clause 54(2)(a) of the Bill requires the holder of an exemption in respect of a pre-cut-off columbarium to update the register as endorsed by the Licensing Board ("the endorsed register") of the columbarium as soon as practicable after effecting the changes of a dedicated person. The Legal Adviser to the Bills Committee ("the Legal Adviser") has pointed out that for such purpose, the particulars required to be contained in the endorsed register have to be updated under clause 54(2)(a). Under clause 23(2)(b), these particulars would be specified by the Licensing Board. They would not be provided for in subsidiary legislation and therefore would not be subject to amendment by LegCo. Non-compliance with clause 54(2) would be an offence punishable

with a fine and imprisonment under clause 54(4) of the Bill.

24. The Legal Adviser has further pointed out that given that the requirements so imposed were not subject to amendment by LegCo, the Former BC was concerned about the serious consequence (i.e. criminal sanction) for non-compliance. The Former BC was, however, also aware that criminal sanction was necessary in order to have sufficient deterrent effect. It considered that as non-compliance cases would be handled by the court, it could play the role of "gatekeeper" in deciding the penalty to be imposed on the offenders concerned. Taking into account the above factors, the Former BC accepted the relevant provisions and suggested that its concerns, factors for consideration and acceptance of the arrangements should be covered in the SFH's speech.

25. The Administration has advised the Bills Committee that it is desirable to accord the Licensing Board necessary flexibility in specifying the particulars to be contained in the registers for individual cases given that the circumstances of each columbarium could vary greatly.

26. The majority of members of the Bills Committee have agreed to adopt the Former BC's approach to the relevant provision. Ms Tanya CHAN, however, opines that members may need to consider whether the inclusion of members' concerns, factors for consideration and acceptance of the arrangements under the proposed arrangements in the SFH's speech is sufficient. She would consider whether to propose amendments to the relevant provision.

Information on applications for specified instruments

Notification of changes of information on applications for specified instruments

27. Clause 42(3)(b) of the Bill requires the holder of a specified instrument (i.e. a licence, an exemption or a TSOL) to provide information required by the Licensing Board within the time specified by it when a change occurs that materially affects the accuracy of the information provided by the holder in connection with the application for the specified instrument on the basis of which the specified instrument has been issued, renewed or extended. Clause 42(3)(b)(ii) empowers the Licensing Board to specify the information to be provided by the holder and the time frame for such provision. Members note that such requirements imposed by the Licensing Board are not provided for in subsidiary legislation and therefore would not be subject to amendment by LegCo. Non-compliance with the Licensing Board's requirements would constitute an offence punishable with a fine and imprisonment under clause 42(6) of the Bill. Members also note the Former BC's concerns and its acceptance of the relevant provisions as well as its suggestion which are the same as those mentioned in paragraph 24 above.

28. The majority of members of the Bills Committee have agreed to adopt the Former BC's approach to the relevant provisions. Ms Tanya CHAN, however, considers that while the Licensing Board should have flexibility in deciding a reasonable time for the provision of the information required by the Licensing Board under clause 42(3)(b)(ii), a time frame for providing the information should be added to that clause. She has indicated that she would consider whether to propose amendments to clause 42(3)(b)(ii) to specify such a time frame.

Uploading information on applications for specified instruments onto Licensing Board's website

29. Under section 4(1)(a) of Schedule 3 to the Bill, the Licensing Board may publish a notice of an application for the issue of a licence in respect of a private columbarium through the Internet or a similar electronic network or in any other manner that the Licensing Board considers appropriate. Some members including Ms Tanya CHAN and Mr LEUNG Kwok-hung have suggested that in addition to the notice of a licence application, other information on the application should also be uploaded onto the Licensing Board's website. Such online publication should also cover information on applications for the other two types of specified instruments (i.e. exemption and TSOL). The Administration has advised that the suggestion would be relayed to the Licensing Board.

Power to enter and search, etc.

30. Clause 58 of the Bill gives the Director of Food and Environmental Hygiene ("DFEH") or an authorized officer the powers to enter and search as well as other powers prescribed in subclause (2) in respect of any premises on obtaining a search warrant or without a search warrant issued if the conditions provided for in subclause (3) are met (including where there are reasonable grounds for suspecting that there is in the premises any thing which is or contains evidence of an offence under the Ordinance and it would not be reasonably practicable in the specific circumstances to obtain a search warrant). Noting that the prescribed powers include the power to detain a person found on the premises until the premises have been searched, Ms YUNG Hoi-yan is concerned about the risk of unlawful detention of that person if the search of the premises is carried out without a search warrant and a detention period is not provided for in the Bill. The Administration has advised that clause 58(3) of the Bill has imposed conditions on searching the premises without a search warrant. In light of the size of the existing private columbarium premises, it is not expected that the search of private columbarium premises will take an exceedingly long time.

Ash disposal requirements

Claim for return of ashes

31. Part 7 of, and Schedule 5 to, the Bill provide for, among other things, the arrangements that an ash handler must follow in the disposing of the ashes interred in a private columbarium to which Part 7 and Schedule 5 apply ("the prescribed ash disposal procedures"). As explained by the Administration, the prescribed ash disposal procedures would not be triggered under normal circumstances if the relevant private columbarium continues to operate with a valid specified instrument issued under the Bill. It will however be triggered when the private columbarium has ceased operation, has been abandoned or has continued operating after the grace period without any valid specified instrument. In such case a "prescribed claimant" may claim for the return of ashes interred in the columbarium. "Prescribed claimant", in relation to the ashes of a deceased person, is defined in section 6(2) of Schedule 5 to the Bill to mean, in descending order of priority of claim:

- (a) an "authorized representative";
- (b) a "personal representative" or "relative"; or
- (c) the "purchaser of the interment right".

32. The Administration has advised that to facilitate the return of ashes and related items to claimants by an ash handler, section 6(2) of Schedule 5 to the Bill stipulates the definition of "relative", which lists out various persons (including spouse). Such formulation is based on existing Hong Kong legislation. Should there be competing claims from two or more "prescribed claimants" of the same priority, their claims would be determined by the court.

33. According to the Administration, with a view to further facilitating the return of ashes to relevant persons related to the deceased, it proposes to move a CSA to add "related person" as an additional category of "prescribed claimant" under section 6(2) of Schedule 5 to the Bill. The definition of "related person", in relation to a deceased person, means a person who (a) was living with the deceased person in the same household immediately before the date of the death of the deceased person; and (b) had been living with the deceased person in the same household for at least two years before that date. On the priority of claims, the claim of the "related person" would be lower than that of an "authorized representative" and a "personal representative" or "relative", but higher than that of the "purchaser of the interment right". Section 9(5) of Schedule 5 to the Bill would accordingly be revised to reflect this proposition. This new category of "prescribed claimant" will allow a person to lodge claim provided that the "living with" requirements are met.

34. Some members including Mr CHAN Chi-chuen ask about the reasons for not combining the two elements under the definition of "related person", the basis of requiring a person to live with a deceased person in the same household for at least two years before the date of the death of the deceased person ("the prescribed living period") in order to qualify as a "related person" and the Administration's stance on shortening the prescribed living period to one year. They also ask about verification of the status of a "related person" and the rationale for according lower priority to a "related person" than a "relative" in claiming for the return of ashes of a deceased person. Mr CHAN Chi-chuen has indicated that he may consider proposing CSAs to further amend the Administration's proposed definition of "related person" and the relevant priority of claims.

35. The Administration has advised that it has made reference to other existing legislation, including the Fatal Accidents Ordinance (Cap. 22) and the Law Amendment and Reform (Consolidation) Ordinance (Cap. 23), in formulating the definition of "related person". Reference to relevant legislation would also be drawn with respect to verification of the status of a "related person". Members have noted that a related person may make a statutory declaration in support of his or her claim. A "related person" will have the highest priority if he/she is also an authorized representative. The Administration considers its proposed order of priority for claiming for the return of ashes appropriate.

36. Dr Fernando CHEUNG considers that a deceased person's same-sex partner in a marriage, civil partnership or civil union in any jurisdiction outside Hong Kong should also be a "relative" and therefore be eligible to claim for the return of the deceased person's ashes. In this connection, Dr CHEUNG proposes to move a CSA to extend the definition of "relative" accordingly.

37. The Administration has advised that according to the current provisions in the Bill, a same-sex partner married at a place outside Hong Kong may already claim for the return of the ashes of the deceased person in the capacities of (a) "authorized representative"; (b) "personal representative"; or (c) "purchaser of the interment right", which do not require the claimant to have any connection with the deceased person by blood or marriage. A same-sex partner, depending on the actual circumstances, may also be an "eligible claimant" (see its definition in section 6(2) of Schedule 5 to the Bill) and as such claim for the return of a related item together with the ashes, as provided in section 9(8) of Schedule 5 to the Bill. In the circumstances provided for in section 13 of Schedule 5 to the Bill, namely that the ashes are in the possession of DFEH and no legal proceedings are pending, DFEH may, by exercising her discretion, hand the ashes to, among others, a same-sex partner married at a place outside Hong Kong as she deems appropriate.

38. According to the Administration, with its proposed CSA mentioned in paragraph 33 above, different "related persons" may come forward to claim for the return of the deceased person's ashes so long as he/she could meet the above "living with" requirements. This will provide an opportunity to the "related persons" to make a claim for the return of the deceased person's ashes, and whether a "related person" would eventually make such a claim is a matter of personal choice. The Administration therefore considers that the current provisions in the Bill, together with its proposed CSA mentioned above, are sufficient to facilitate the return of ashes to the relevant "related persons". It would hence be unnecessary to further amend the definition of "relative" under section 6(2) of Schedule 5 to the Bill, which will arouse serious controversy in society and the Bill is not a suitable forum to tackle such controversy.

Public access to records and information concerning ash disposal

39. Section 10 of Schedule 5 to the Bill requires an ash handler to keep a record of the steps that the handler has taken to carry out the prescribed ash disposal procedures. The record must contain information about ashes and claims handled in carrying out the procedures and such record must be delivered to DFEH. Section 12(3) of Schedule 5 to the Bill requires DFEH to keep a record of the process of the steps that she has carried out for disposal of ashes under clause 74(1) of the Bill if the prescribed ash disposal procedures have, or any step in them has, not been carried out in respect of the private columbarium. Section 15 of Schedule 5 to the Bill requires DFEH to keep information relating to ash disposal as stipulated in subsection (1) and provide such information for public inspection during normal office hours free of charge.

40. Some members including the Chairman and Dr Helena WONG consider that the Bill should provide for making public the records and information concerning ash disposal unless such records and information contain personal data, and that the Administration should make available the aforesaid information as much as practicable for public access in a convenient way. While expressing support for enhancing transparency of the relevant information, some other members including Dr Priscilla LEUNG remind the Administration to study carefully the information to be made public and the possible legal disputes arising from such public disclosure. The Administration has reiterated that it has undertaken to keep in view the implementation of the Ordinance and propose amendments to the Ordinance as and when necessary. A review of the Ordinance would in any event be conducted around three years after enactment.

Private Columbaria Appeal Board

Background of proposing appointment of a legal adviser to Appeal Board

41. Clause 81(3) (read with clause 80) of the Bill provides that only a panel

member who is qualified for appointment as a District Judge under section 5 of the District Court Ordinance (Cap. 336) ("legally qualified") may be appointed to be the Chairperson or Deputy Chairperson of the Private Columbaria Appeal Board ("the Appeal Board"). In view of such a requirement, some members including Mr Holden CHOW enquire about the background of the need to appoint a legal adviser to the Appeal Board.

42. The Administration has advised that it is common for the Chairperson or Deputy (or Vice) Chairperson of an appeal board to serve as the presiding officer to hear an appeal. There are examples of statutory appeal boards and tribunals in Hong Kong for which the Chairperson and Deputy (or Vice) Chairpersons are required to be legally qualified.² Similar to many other appeal boards and tribunals, the Appeal Board is a quasi-judicial body. The Chairperson and Deputy Chairperson are required to preside at the hearing of an appeal. The presiding officer may be called upon to determine a question of law in an appeal and should steer the proceeding and deliberation in such a way as to be able to withstand legal challenges. Hence, it is vital for him/her to be equipped with the necessary legal expertise and experience and of the right calibre to perform such roles.

43. The Administration has further advised that there are examples of statutory appeal boards in Hong Kong where the Chairman has to be legally qualified and a legal adviser may be appointed to advise the appeal board.³ Normally, a legal adviser assumes an advisory role and provides advice on legal matters to the appeal board or tribunal. In the Court of Appeal case *Longstaff v. Medical Council of Hong Kong* [1980] HKLR 858, Huggins VP made the following comment at p.865:

"Primarily the legal adviser's duty is to tender advice when asked. In addition he must not allow the Council to be misled and, if a party advances a submission which is bad in law or if he becomes aware that the Council in the course of their deliberations are misdirecting themselves, it is his duty of his own motion to put matters right."

44. The Administration considers the appointment of a legal adviser to advise the Appeal Board on legal matters relating to an appeal is in the interest of upholding the competence, independence and impartiality of the Appeal Board, which are qualities which the process of courts and tribunals must have in order

² These include, for instance:

- (a) the Municipal Services Appeals Board (see section 6(6) of the Municipal Services Appeals Board Ordinance (Cap. 220)); and
- (b) the Buildings Appeal Tribunal (see section 48(2) of the Buildings Ordinance (Cap. 123)).

³ These include, for instance:

- (a) the Municipal Services Appeals Board (see sections 6(1)(a) and 12(3) of the Municipal Services Appeals Board Ordinance (Cap. 220)); and
- (b) the Entertainment Special Effects Appeal Board (see sections 35(1) and 40(3) of the Entertainment Special Effects Ordinance (Cap 560)).

for justice to be done, especially when it is anticipated that the legal issues involved could be quite diversified and complicated. It would also be desirable to have a legal adviser offering consistent advice across all appeals heard by Appeal Boards under different presiding officers, who may be the Chairperson, Deputy Chairpersons or Members who are legally qualified, as on occasion some may be precluded from acting as a presiding officer at an appeal hearing if he/she has a direct or indirect interest in the appeal.

Advice from legal adviser of Appeal Board on a legal matter relating to an appeal

45. Clause 84(6) to (8) of the Bill contains requirements relating to the advice given by the legal adviser of the Appeal Board on a legal matter relating to an appeal:

- (a) clause 84(6) provides that the legal adviser must advise the Appeal Board on legal matters relating to an appeal in the presence of every party to the appeal (or the party's representative);
- (b) clause 84(7) provides that if the advice is tendered after the Appeal Board has commenced to deliberate on its findings, every such party or representative must be informed afterwards of the advice; and
- (c) clause 84(8) provides that in case where the Appeal Board does not accept the advice of the legal adviser on a legal matter relating to an appeal, every party to the appeal (or the party's representative) must be informed of this fact.

Some members take the view that such disclosure of the advice of the legal adviser to the Appeal Board is a breach of the duty of confidentiality under common law. The legal adviser is not representing the Appeal Board at a hearing if he/she is not required to comply with that duty.

46. The Administration has advised that the statutory provisions will override common law and the policy intent of clause 84(6) to (8) is to enable a fair hearing for the parties concerned. Both the Appeal Board and the legal adviser are neutral in a hearing. There are other appeal boards which have adopted arrangements similar to those set out in clause 84(6) to (8), examples of which are provided in **Appendix IV**.

47. The Administration has further advised that in a recent Court of Final Appeal case *Medical Council of Hong Kong v. Helen Chan* [2010] 3 HKLRD 667, the practice of the Medical Council to inform the parties in open hearing of the advice given by the legal adviser to the Council has been mentioned in the case, without objection from the Court (see paragraphs 37-40 of the judgment). Specifically at paragraph 40 of the judgment, Mr Justice Bokhary PJ made the

following comment on the case *Lam Kwok Pun v. Dental Council of Hong Kong* [2000] 4 HKC 181 –

"The Court of Appeal's concern in that case was not mainly with the fact that the legal adviser had been present at the tribunal's deliberations. It was mainly with the fact that she had advised the tribunal in private so that the dentist's counsel had no opportunity to address the tribunal on the accuracy or otherwise of such advice. As it turned out, the advice was in error. And it was for such error that the dentist's appeal was allowed."

Finality of decisions of Appeal Board

48. Clause 84(12) of the Bill provides that "[t]he decision of an Appeal Board on any appeal is final" (in Chinese, "上訴委員會對上訴的決定，屬終局決定。"). Some members including Mr LEUNG Yiu-chung are concerned that the phrase "終局決定" might be interpreted by a party to the appeal that he/she has no other avenue to pursue the case further after the Appeal Board has made a decision. The Administration has advised that the word "final" implies that after an appeal is determined, all administrative appeal channels will have been exhausted for the case, and a party to the appeal might still make application to the court for judicial review according to the general principles applicable if he/she is aggrieved by the Appeal Board's decision. The phrase "終局決定" is commonly used in Hong Kong legislation⁴ and it is not necessary to provide in legislation the availability of judicial review of an administrative decision. The appeal procedures and the right of a party to the appeal to seek judicial review would be included in the Administration's publicity.

Imposing requirements not in subsidiary legislation but entail criminal sanction for non-compliance

49. Apart from empowering the Licensing Board to impose requirements mentioned in paragraphs 23 and 27 above, the Bill also confers power on the Licensing Board or other authorities (e.g. DFEH) to impose requirements which are not provided for in subsidiary legislation but entail criminal sanction imposed in the event of non-compliance. They include, for example:

⁴ According to the Administration, examples on the use of the phrase "終局決定" in legislation concerning other appeal boards are:

(a) section 23(4) of Schedule 1A to the Immigration Ordinance (Cap. 115) concerning the Torture Claims Appeal Board, which provides that:

"The Appeal Board's decision is final." "上訴委員會的決定屬終局決定。"

(b) section 122 of the Lifts and Escalators Ordinance (Cap. 618), which provides that:

"Subject to subsection (2), a decision of an appeal board is final and is not subject to further appeal."

"除第(2)款另有規定外，上訴委員會的決定屬終局決定，不得對之提出進一步的上訴。"

(c) section 38(2) of the Property Management Services Ordinance (Cap. 626), which provides that:

"The decision of the tribunal is final." "上訴審裁小組所作的決定，屬終局決定。"

- (a) the particulars specified by the Licensing Board of each of the agreement to be entered into the relevant register within the period specified by the Licensing Board under clause 49(2)(b) of the Bill;
- (b) delivery of the ashes that are not returned to an eligible claimant to DFEH in a manner specified by DFEH mentioned in section 7(2)(b) of Schedule 5 to the Bill; and
- (c) information about ashes and claims handled in carrying out the prescribed ash disposal procedures required by DFEH to be contained in the record of the steps that an ash handler has taken to carry out the procedures under section 10(1)(b) of Schedule 5 to the Bill as revised by the Administration's proposed CSAs to that provision.

As the concerns relating to these requirements are similar to those mentioned in paragraph 24 above, the Bills Committee accepts the relevant provisions based on the same rationale explained in that paragraph. Regarding the requirement set out in paragraph 49(c) above, the Bills Committee has also requested the Administration to reaffirm its undertaking given to the Former BC that it will brief the relevant Panel after the implementation of the Ordinance on the difficulties encountered, if any, in enforcing that provision and on the information referred to therein. The Administration is also requested to include such undertaking in the SFH's speech.

Handling enquiries from the public and operators of private columbaria

50. Some members including Dr KWOK Ka-ki are concerned about how the Administration would handle enquiries from members of the public and operators of private columbaria after enactment of the Ordinance. The Administration has advised that to facilitate members of the public to gather information about the proposed licensing scheme under the Bill, the Food and Environmental Hygiene Department ("FEHD") has already set up a dedicated website on the regulation of private columbaria (www.rpc.gov.hk), providing targeted information for consumers and operators respectively. The website would be updated whenever necessary with a view to providing the latest information to the public. Since December 2016, FEHD has put in place a dedicated email address (rpc@fehd.gov.hk) and a fax number (2893 7683) for receiving enquiries relating to the regulation of private columbaria, and will respond to those leaving their contact information. Such service will continue to be made available to members of the public, purchasers and operators on an on-going basis.

51. The Administration has further advised that upon the enactment of the Ordinance, FEHD will further step up its publicity and public education efforts on the licensing scheme, including broadcasting new Announcements in the

Public Interest on television and radio and distributing pamphlets through various channels and at various locations specifically those relating to after-death arrangements, etc. Briefing sessions for operators would also be arranged to help facilitate their understanding of the provisions and requirements under the Ordinance. Information on the following:

- (a) for applications for specified instruments received by the Licensing Board – their status (i.e. pending determination, approved or rejected); and
- (b) for specified instruments issued – their corresponding validity period,

will be made available online for public information (subject to the Licensing Board's acceptance of the suggestion mentioned in paragraph 29 above, other information on applications for specified instruments will also be made available online). In this way, consumers can have access to data to better protect themselves from untrue claims by operators regarding whether they have been duly authorized to sell niches under a licence. As suggested by members, the Administration would explore with the parties concerned on the public's access to legal advice in respect of purchase of niches from private columbaria after the enactment of the Ordinance.

Supply position after gazettal of Private Columbaria Ordinance

52. Ms Alice MAK is concerned about the press report which alleges the existence of an 18-month vacuum period upon the gazettal of the Ordinance, during which there will be no supply of niches in the market. In this connection, she asks about the supply of public niches in that period and how the public demand for niches therein could be met. The Administration has advised that the allegation is unsubstantiated, and it intends to provide a detailed response to her concerns at a meeting of the Panel on Food Safety and Environmental Hygiene. As explained in the reply from the Administration in **Appendix V**, the Administration's paper on "Supply of Niches and Related Issues after the Enactment of the Private Columbaria Bill" will be issued before 31 March 2017 and, subject to the agreement of the Panel, it will arrange for it to be discussed at the meeting of the Panel on 9 May 2017.

Committee stage amendments

Committee stage amendments proposed by the Administration

53. Apart from the CSAs mentioned in paragraph 33 above, the Administration has agreed to move a number of CSAs in response to comments and suggestions from members, different stakeholder groups and the Legal Adviser. The Administration has proposed further revisions to a small number

of CSAs subsequent to the last Bills Committee meeting on 16 March 2017 (see LC Paper No. CB(2)1072/16-17(01)) and a few minor textual amendments on top of the CSAs proposed therein, including:

- (a) for clauses 19(2)(a), 20(4)(a) and 52(2A)(a)(i) and (2C)(a), to simplify the formulation "between the cut-off time and the enactment date" to "before the enactment date", because it has already been spelt out in the clauses that the ashes concerned are those interred "since the cut-off time"; and
- (b) for section 4(1)(a) of Schedule 3 to the Bill, to replace "internet" with "Internet" as a proper noun.

The Administration has provided members of the Bills Committee on 29 March 2017 with the CSAs mentioned in paragraph 33 and this paragraph for their comments. No comments are received from members on these CSAs.

Committee stage amendment proposed by individual Member

54. The Bills Committee takes note that Dr Fernando CHEUNG has indicated his intention to move a CSA as detailed in paragraph 36 above.

Follow-up actions by the Administration

55. The Administration has undertaken:

- (a) to keep in view the implementation of the Ordinance and propose amendments to the Ordinance as and when necessary. A review of the Ordinance will in any event be conducted around three years after enactment (paragraph 10);
- (b) to relay to the Licensing Board members' suggestion of uploading information on applications for specified instruments onto the Licensing Board's website (paragraph 29);
- (c) to brief the relevant Panel on the difficulties encountered, if any, in enforcing section 10(1)(b) of Schedule 5 to the Bill and on the information referred to therein after the implementation of the Ordinance (paragraph 49); and
- (d) to include the following in the SFH's speech:
 - (i) the Administration's undertaking mentioned in items (a) to (c) above; and

- (ii) the Bills Committee's concerns about the Administration's proposals of imposing requirements (which are not provided for in subsidiary legislation and therefore would not be subject to amendment by LegCo) and the consequence that non-compliance with such requirements would entail criminal sanction, as well as the rationale of the Bills Committee's acceptance of these proposals (paragraphs 23, 24, 27 and 49).

Resumption of Second Reading debate

56. The Bills Committee supports the resumption of the Second Reading debate on the Bill at the Council meeting on 12 and 13 April 2017.

Consultation with the House Committee

57. The Bills Committee reported its deliberations to the House Committee on 24 March 2017.

Council Business Division 2
Legislative Council Secretariat
6 April 2017

Bills Committee on Private Columbaria Bill

Membership list

Chairman	Hon CHAN Hak-kan, BBS, JP
Deputy Chairman	Hon Tanya CHAN
Members	<p> Hon LEUNG Yiu-chung Hon Tommy CHEUNG Yu-yan, GBS, JP Hon WONG Ting-kwong, SBS, JP Hon Starry LEE Wai-king, SBS, JP Dr Hon Priscilla LEUNG Mei-fun, SBS, JP Hon Paul TSE Wai-chun, JP Hon LEUNG Kwok-hung Hon Steven HO Chun-yin, BBS Hon MA Fung-kwok, SBS, JP Hon CHAN Chi-chuen Hon LEUNG Che-cheung, BBS, MH, JP Hon Alice MAK Mei-kuen, BBS, JP Dr Hon KWOK Ka-ki Dr Hon Fernando CHEUNG Chiu-hung Dr Hon Helena WONG Pik-wan Dr Hon Elizabeth QUAT, JP Hon Martin LIAO Cheung-kong, SBS, JP Hon POON Siu-ping, BBS, MH Ir Dr Hon LO Wai-kwok, SBS, MH, JP Hon CHU Hoi-dick Hon Jimmy NG Wing-ka, JP (Up to 9 December 2016) Dr Hon Junius HO Kwan-yiu, JP Hon HO Kai-ming Hon Holden CHOW Ho-ding Hon SHIU Ka-chun (Since 9 December 2016) Hon Wilson OR Chong-shing, MH Hon YUNG Hoi-yan Hon CHEUNG Kwok-kwan, JP Hon LUK Chung-hung Hon LAU Kwok-fan, MH Hon Nathan LAW Kwun-chung Dr Hon LAU Siu-lai </p> <p>(Total : 33 members)</p>
Clerk	Mr Colin CHUI
Legal Adviser	Ms Wendy KAN
Date	6 April 2017

Bills Committee on Private Columbaria Bill

Organizations and individuals which/who have provided written views to the Bills Committee

1. Civic Party
2. Clients and worshippers of Memorial Park Hong Kong
3. DAB Kowloon City Branch
4. Hong Kong Columbarium Merchants Association Limited
5. Liberal Party
6. Memorial Park Hong Kong
7. Pink Alliance
8. Sexualities Research Programme, The Chinese University of Hong Kong
9. The Covenant of Rainbow
10. The Hong Kong Buddhist Association
11. The Hong Kong Sex Culture Society Limited
12. The Incorporated Owners of Parkland Villas
13. The Society for Truth and Light
14. 朱先生
15. 性小眾團體
16. 林生
17. 馮小姐

**Requirements imposed for regularization of
unlawful occupation of unleased land and/or
lease breach by pre-cut-off columbaria**

1. According to the Administration, requirements will be imposed for regularization of unlawful occupation of unleased land and/or lease breach by pre-cut-off columbaria, details of which are set out below.
2. Clause 17(1) provides that the Private Columbaria Licensing Board ("the Licensing Board") may refuse an application for the issue of a licence in respect of a columbarium, if:
 - (a) the applicant fails to prove to its satisfaction that the columbarium complies with all of the following:
 - (i) the land-related requirements;
 - (ii) the planning-related requirements;
 - (iii) the building-related requirements; or
 - (b) the applicant fails to prove to the satisfaction of the Licensing Board that the applicant holds the columbarium premises directly from the Government under a lease (the on-leased-premises requirements).
3. For a columbarium that is a pre-cut-off columbarium, if the applicant fails to satisfy clause 17(1)(a)(i) and (b), it may:
 - (a) apply for the issue of a licence under clause 17 as modified by clause 18; or
 - (b) apply for the issue of an exemption under clause 19.
4. However, the following stringent requirements, among other requirements, are applicable to those cases referred to in paragraph 3:
 - (a) those seeking a licence must prove to the satisfaction of the Licensing Board that:
 - (i) the pre-cut-off columbarium (i.e. a columbarium that was in operation, and in which ashes were interred in

niches, immediately before the cut-off time which is 8 am on 18 June 2014) complies with the land-related requirements (as clause 17(1)(a)(i) is applicable). In other words, it has to seek regularization of unlawful occupation of unleased land and/or lease breach, if any, as ring-fenced in paragraph 4(a)(ii) below (which is subject to payment of premium, waiver fee or short term tenancy ("STT") rental at full market value/rental ("FMV") as well as administrative fee for regularization), in order to be eligible for the issue of a licence;

- (ii) the extent of "occupation of land as is necessary for, or ancillary to, the operation of the columbarium"¹ is limited to that as was necessary for, or ancillary to, its operation as at the cut-off time (see clause 18(1)(c)); and
- (b) those seeking an exemption must prove to the satisfaction of the Licensing Board that:
- (i) the pre-cut-off columbarium commenced operation before 1 January 1990 (clause 19(1)(d));
 - (ii) no interment right in respect of the pre-cut-off columbarium has been sold since the cut-off time (clause 19(1)(e)); and
 - (iii) the pre-cut-off columbarium complies with the land-related requirements (clause 19(1)(f)). In other words, it has to seek regularization of unlawful occupation of unleased land and/or lease breach, if any, as ring-fenced by the limit to the extent of occupation of land mentioned in paragraph 4(a)(ii) above (see clause 19(1)(c)) (where waiving payment for

¹ As provided for in clause 2(5) of the Bill, a reference to occupation of land as is necessary for, or ancillary to, the operation of a columbarium is a reference to the occupation of land by:

- (a) any building or building works containing niches used or intended to be used for the interment of ashes; or
- (b) furnaces for burning offerings and any other essential ancillary facilities supporting the building or building works referred to in paragraph (a) to be used as referred to in that paragraph.

Unlawful occupation of unleased land as is necessary for, or ancillary to, the operation of a columbarium is to be construed accordingly.

regularization may be considered on a case-by-case basis)² in order to be eligible for the issue of an exemption;

5. Irrespective of whether it is:
 - (a) a columbarium (which may, or may not, be a pre-cut-off columbarium) seeking a licence; or
 - (b) a pre-cut-off columbarium seeking an exemption,

it has to comply with the land-related requirements, in order to meet the relevant eligibility requirements.

6. Under section 1 of Schedule 2, a columbarium complies with the land-related requirements only if:
 - (a) the operation of the columbarium does not involve unlawful occupation of unleased land; and
 - (b) the requirements in respect of the columbarium under the lease, STT or other instrument, under which the columbarium premises are held directly from the Administration, are complied with.

² For pre-cut-off columbaria confirmed to be eligible for exemption status in all other respects, the Director of Lands might, upon application, consider administratively regularizing the breach of lease conditions and / or unlawful occupation of unleased land for the proposed exempted area before and during the exemption period, by way of a waiver and/or a short term tenancy ("STT"), with the relevant waiver fees, STT rentals and administrative fees waived, depending on the circumstances and merits of each application.

**Examples of appeal boards which have adopted arrangements
similar to those set out in clause 84(6) to (8) of
Private Columbaria Bill**

1. Section 8 of the Medical Registration (Miscellaneous Provisions) Regulation (Cap. 161 sub. leg. D), which provides that:

"(1) When the Legal Adviser to the Council advises the Council on any question of law as to evidence, procedure or any other matter, in any inquiry under section 21 of the Ordinance, an appeal hearing from a decision of a committee or a meeting of the Council pursuant to an election petition under the Medical Practitioners (Electoral Provisions) (Procedure) Regulation (Cap. 161 sub. leg. B), he shall do so in the presence of every party to the proceedings or the person representing each party or, if the advice is tendered after the Council has commenced to deliberate as to its findings, every such party or person as aforesaid shall be informed of the advice that the Legal Adviser has tendered.

(2) In any case where the Council does not accept the advice of the Legal Adviser to the Council on any such question mentioned in subsection (1), every such party or person shall be informed of this fact."

2. Section 7 of the Midwives Registration (Miscellaneous Provisions) Regulation (Cap. 162 sub. leg. D), which provides that:

"(1) If, during an inquiry held under section 8 or 10 of the Ordinance, the legal adviser to the Council advises the Council on any question of law as to evidence, procedure or any other matter, the legal adviser shall give the advice in the presence of every party to the proceedings or in the presence of the person representing each of the parties.

(2) If, after the Council has commenced to deliberate as to its findings, the legal adviser gives any advice on any question of law as to evidence, procedure or any other matter in respect of an inquiry under section 8 or 10 of the Ordinance, the legal adviser shall inform all parties to the proceedings or their representatives of his advice.

(3) If the Council does not accept any of the advice given by the legal adviser under subsection (1) or (2), the legal adviser shall inform the parties to the proceedings or their representatives accordingly."

3. Section 40 of the Chiropractors (Registration and Disciplinary Procedure) Rules (Cap. 428 sub. leg. B), which provides that:

- "(1) Where during the hearing of an inquiry under section 17 of the Ordinance, the Legal Adviser advises the Inquiry Committee on any question of law as to evidence, procedure or any other matter in respect of the inquiry, the Legal Adviser shall, as far as practicable, do so in the presence of the parties to the inquiry or their legal representatives. Where it is impracticable to do so, the chairman of the Inquiry Committee shall cause the parties to the inquiry or their legal representatives to be informed of the advice.*
- (2) If an advice of the Legal Adviser is tendered after the Inquiry Committee has commenced to deliberate as to its findings, the chairman of the Inquiry Committee shall cause the parties to the inquiry or their legal representatives to be informed of the advice.*
- (3) In the case of the Inquiry Committee not accepting the Legal Adviser's advice mentioned in subsection (1) or (2), the chairman of the Inquiry Committee shall cause all parties to the inquiry or their legal representatives to be informed of this fact."*



中華人民共和國香港特別行政區政府總部食物及衛生局
Food and Health Bureau, Government Secretariat
The Government of the Hong Kong Special Administrative Region
The People's Republic of China

By Fax and Email

30 March 2017

Mr Colin CHUI
Clerk to Bills Committee on Private Columbaria Bill
Legislative Council
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear Mr Chui,

**Bills Committee on Private Columbaria Bill
Letter from Hon Alice MAK –
supply of niches and related matters
after passage of the Private Columbaria Bill**

Thank you for your letter of 30 March 2017.

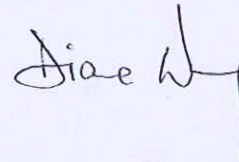
After we have issued our letter dated 13 March 2017, we have liaised with the Chairman of the Panel on Food Safety and Environmental Hygiene (“the Panel Chair”), who has kindly agreed to include an item on the captioned matter in the agenda of the Panel meeting on 11 April 2017.

However, it has subsequently transpired that the Panel meeting scheduled for 11 April 2017 already has a full agenda, comprising three time-critical items. The Panel Chair has then suggested to hold a special meeting on 24 April 2017; however, some official attendees are not available on that time slot and hence this option is not pursued further.

Notwithstanding the above, we will issue a paper on the captioned matter before 31 March 2017 and, subject to the agreement of the Panel, arrange for it to be discussed at the Panel meeting on 9 May 2017.

We should be grateful if you could help inform the BC Chair of the latest progress. Many thanks.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Diane W", with a long vertical stroke extending downwards from the end of the signature.

(Miss Diane WONG)
for Secretary for Food and Health

- c.c. Hon CHAN Hak-kan, the Chairman of the Bills Committee on Private Columbaria Bill
- Dr Hon. Helena WONG, the Chairman of the Panel on Food Safety and Environmental Hygiene
- Clerk to the Panel on Food Safety and Environmental Hygiene
- Director of Food and Environmental Hygiene