

For discussion
on 8 November 2016

Legislative Council
Panel on Food Safety and Environmental Hygiene

Private Columbaria Bill

Purpose

The Government is committed to re-introducing the Private Columbaria Bill (“the Bill”), the resumption of the second reading of which was derailed by filibustering in the Fifth Legislative Council (“LegCo”), into the Sixth LegCo as soon as possible. The community and the stakeholder organisations welcomed, and many in fact urged, the Government to do so in earnest. This paper briefs Members on the salient features of the Bill. We aim to introduce the Bill into LegCo in late November 2016.

The Bill

2. The Bills Committee under the Fifth LegCo discussed the Bill, in its earlier form, extensively and comprehensively, and had a meeting with deputations on 25 October 2014. After 35 meetings ending in June 2016, the Government and the Bills Committee of the Fifth LegCo reached agreement on a total of 547 Committee Stage Amendments (“CSAs”) that would, by refining the regulatory regime, make the Bill better suited for the purpose.

3. Whilst acknowledging that the Bill might not provide the panacea that would at one stroke put right the historical legacy, the Bills Committee of the Fifth LegCo accepted that the longer it took to enact the Bill, the higher the prospects that the transitional issues might become so unwieldy as to undermine our endeavours to freeze the legacy at the cut-off time (explained in paragraphs 9 to 11 below).

4. Based on extensive liaison with political parties represented in the Fifth LegCo, we are of the view that having the Bill enacted (in its earlier form and with the 547 CSAs moved) by summer of 2016 represented a cross-party consensus in the Fifth LegCo. In the event, the resumption of the second reading of the Bill was derailed by filibustering on the Medical Registration (Amendment) Bill 2016, which was placed on the Council agenda before the Bill.

Key Features of the Bill to be Re-introduced

(1) The Bill and its Policy Objectives

5. Following deliberation by the Bills Committee over a two-year period from July 2014 to June 2016, the final marked-up version of the Bill, with the CSAs proposed by the Government submitted to the Clerk to the Legislative Council on 25 June 2016 was issued to Members vide LC Paper No. CB(2) 1900/15-16(01). Nothing substantive has been changed since then, save for a few minor technical details and stylistic polishing.

6. The licensing scheme serves the following policy objectives –

- (a) ensuring compliance with statutory and Government requirements, with suitable grandfathering arrangements for pre-cut-off columbaria¹ in tightly-ringfenced circumstances;
- (b) ensuring a sustainable mode of operation; and
- (c) enhancing protection of consumer interests.

(2) Compliance with statutory and Government requirements

7. Under the Bill, a private columbarium has to obtain a specified instrument (in the form of a licence, an exemption or a temporary suspension of liability (“TSOL”)) in order to be able to operate. Of the three types of specified instruments, only a licence allows the operator to sell (or offer for sale) interment rights. A columbarium will be licensed only if it complies with specified requirements, including planning-related, land-related and building-related requirements. A columbarium’s

¹ A pre-cut-off columbarium means a columbarium that was in operation, and in which ashes were interred in niches, immediately before the cut-off time.

eligibility for a licence will also depend on meeting the following requirements —

- (a) the columbarium premises being held directly from the Government under a lease;
- (b) a management plan in respect of the columbarium having been approved by the Private Columbaria Licensing Board (“the Licensing Board”); and
- (c) if a deed of mutual covenant is in force in respect of the columbarium premises — a written legal advice of a legal practitioner confirming that there is no express restrictive covenant as prescribed in the Bill.

8. In determining an application for a specified instrument, the Licensing Board must have regard to public interest and may have regard to any other relevant considerations. We have incorporated into the Bill a CSA which empowers the Licensing Board, when deliberating an application for the issue of a licence or an exemption or an application for the extension of a TSOL, to take into account, among others, the steps that the applicant has taken towards meeting applicable planning-related, land-related and building-related requirements.

(3) Grandfathering arrangements for pre-cut-off columbaria

9. As set out in the Bill, the cut-off time for the grandfathering arrangements is **8 a.m. on 18 June 2014** (the announcement time of the earlier Bill introduced into the Fifth LegCo). We have, through a Notification Scheme and aerial photos, captured at around the cut-off time a snapshot of the columbaria in existence together with information collected on their niches and ancillary facilities as well as land and structures on which such niches and ancillary facilities are located.

10. The Bills Committee of the Fifth LegCo and the community have generally accepted the need for grandfathering arrangements for columbaria that do not meet all the statutory and Government requirements, having regard to the following –

- (a) failing sensitive handling, interred ashes in as many as 385 000 niches could be displaced and need to be handled, at a huge cost

to society; and

- (b) such grandfathering arrangements have been premised on tightly ring-fenced grounds.

11. A sensitive and pragmatic approach is endorsed for dealing with pre-cut-off columbaria –

- (a) adopting a pragmatic threshold that allows pre-cut-off columbaria with prospect for regularisation to qualify for TSOL². The validity period of a TSOL will be set at no more than three years for the first time, and may be extended for no more than three years if warranted. A TSOL may not be extended more than once, unless exceptional circumstances exist;
- (b) adopting commencement of operation before 1 January 1990 as the basis for pre-cut-off columbaria's eligibility to apply for an exemption. This is subject to such columbaria ceasing the sale of interment rights by the cut-off time and fulfilment of certain conditions. A columbarium is taken as commencing its operation at the earliest time when a set of ashes was interred in any of its niches or the earliest time when any of its niches was sold, whichever is the earlier;
- (c) adopting a risk-based approach to building-related requirements (as reflected by concepts of certifiable buildings and structures certifiable for a pre-cut-off columbarium). Subject to such buildings and structures being certified by Authorized Persons/Registered Structural Engineers ("qualified professionals") to be structurally safe and meeting other requirements imposed by the Licensing Board –

² The Licensing Board may refuse to grant TSOL status, if, inter alia, a columbarium unlawfully occupies unleased land and the applicant neither applies to the Director of Lands for lawful authority to occupy the unleased land nor provides a declaration to the Director of Lands that the applicant does not have a claim to the unleased land, whether based on possession before, on or after the date of the application or on any other ground; or if a columbarium does not have certification by a qualified professional as not posing any obvious or imminent danger in terms of building safety and fire safety.

- (i) certain buildings (“certifiable buildings”) may meet the building-related requirements for the purpose of an application for a licence or an exemption in respect of a columbarium;
 - (ii) certain non-compliant structures (“structures certifiable for a pre-cut-off columbarium”) may be tolerated for the purpose of an application for a licence or an exemption in respect of a pre-cut-off columbarium;
- (d) providing for the following in respect of a pre-cut-off columbarium that fulfils certain prescribed conditions –
- (i) if the columbarium is conferred with, or has a pending application for, the following status –
 - licence or exemption status: certain provisions under the Buildings Ordinance (Cap. 123) do not apply to structures certifiable for a pre-cut-off columbarium; or
 - TSOL status: certain provisions under Cap. 123 do not apply to non-compliant structures,in respect of the columbarium;
 - (ii) if the columbarium is conferred with, or has a pending application for, exemption or TSOL status: certain provisions under the Town Planning Ordinance (Cap. 131) do not apply to unauthorized development in respect of the columbarium; and
 - (iii) if the columbarium is conferred with, or has a pending application for, TSOL status: certain provisions under the Land (Miscellaneous Provisions) Ordinance (Cap. 28) do not apply to unlawfully-occupied unleased land in respect of the columbarium.

Administratively, lease enforcement actions also do not apply to breaches of relevant lease conditions (relating to leased land) by a pre-cut-off columbarium conferred with, or has a pending

application for, TSOL status.

For a pre-cut-off columbarium eligible for an exemption in all other respects, the Director of Lands might administratively, upon application, regularise the breach of lease condition(s) and/or unlawful occupation of unleased land insofar as the proposed exemption area shown in the relevant plan is concerned, by way of a waiver or a short term tenancy (“STT”) or both, as the case may be. Such waiver fees or STT rentals or both, as well as administrative fees, in respect of the interment rights sold before the cut-off time, might be waived in respect of the exemption period and a period before it, depending on the circumstances and merits of each application. If such interred ashes are removed subsequently (such as claimed back by descendants), such vacated niches will not be allowed to be “refilled” as a matter of policy.

CSAs have been incorporated to empower the Licensing Board to impose conditions on a specified instrument in respect of a pre-cut-off columbarium, disallowing the imposition of additional fees, charges or other sums beyond the amounts, or not in accordance with any mechanism for their future revision, as set out in the agreement for sale of an interment right entered into before the cut-off time.

With the safeguards in the preceding two paragraphs, waiving of relevant waiver fees, STT rentals or both, as well as administrative fees during the validity period of the relevant specified instrument would benefit the consumers rather than the operators; and

- (e) CSAs have been incorporated to govern the interment of ashes of religious practitioners, without any fees, charges or other sums imposed in respect of such interment, in a religious ash pagoda of a pre-cut-off columbarium that is a Chinese temple that has, among other requirements, obtained an exemption, and complied with the various requirements and conditions prescribed in the Bill and imposed by the Secretary for Home Affairs.

(4) Protecting consumers' interests

12. Upon commencement of the new legislation, a columbarium operator will have to obtain a licence, before he/she can sell (or offer for sale) interment rights. To tackle undesirable practices observed in some past cases, the Bill in its earlier form provides that an agreement for sale of interment rights ("agreement") to be entered into on or after the enactment date is unenforceable against the purchaser –

- (a) if the seller purports to sell under the agreement a right that the seller is not entitled to sell (an example being selling the interment right for a term extending beyond the term of the lease under which the columbarium premises are held directly from the Government); or
- (b) unless –
 - (i) the seller held a licence in respect of the columbarium at the time when the agreement was entered into and the licence is still in force at the time of enforcing the agreement;
 - (ii) the agreement is in writing and was signed by the seller and the purchaser; and
 - (iii) the agreement sets out the information, recommendations and essential terms as prescribed in the Bill; and
- (c) unless, inter alia –
 - (i) before the purchaser entered into the agreement, the seller has explained to the purchaser the information, recommendations and essential terms as set out in the agreement;
 - (ii) the seller obtained the purchaser's acknowledgement, in writing, that the explanation referred to in paragraph 12(c)(i) above was given to the purchaser; and
 - (iii) the seller delivered to the purchaser a copy of the

agreement as soon as possible after it was signed by all the parties, which delivery must be effected by the prescribed means in the Bill; and

- (iv) any other requirements specified by the Licensing Board are met.

If an agreement is not enforceable against the purchaser, the purchaser may cancel the agreement by giving the seller a written notice of cancellation and seek from the seller a refund of all money paid under the agreement.

13. CSAs have been incorporated to the following effect –

- (a) for an agreement that is unenforceable against the purchaser –
 - (i) referred to in paragraph 12(a) and (b), the purchaser may cancel the agreement at any time (same duration as provided for in the earlier Bill) after the agreement is entered into; and
 - (ii) referred to in paragraph 12(c), the purchaser may cancel the agreement within 6 months (reduced duration as compared with the earlier Bill) after the date of the agreement;
- (b) the Bill makes a transferee of a specified instrument liable for all debts and obligations in relation to each agreement entered into before the transfer by the transferor. In other words, each such agreement may, after the transfer of a specified instrument, be enforced by the purchaser of the instrument right against the transferee;
- (c) an operator or his/her agent is excluded from being the authorized representative under an agreement as a person who is authorized to claim for the return of ashes interred under the agreement (see definition of *authorized representative* in the Bill); and
- (d) the arrangements for authorising a person to enforce an agreement are specified as an essential term of the agreement. This could cater for the scenario where the purchaser

himself/herself is the dedicated person, in which case the person so authorized could enforce the agreement when the purchaser passes away.

(5) Proper disposal of ashes

14. Under the Bill in its earlier form, improper disposal of ashes interred in a columbarium was made an offence. This is further elaborated in the relevant clauses of the Bill incorporating the CSAs, as follows –

- (a) if a person operating a columbarium under a specified instrument disposes of ashes, the person must act in accordance with the requirements prescribed in the Bill or carry out the prescribed ash disposal procedures;
- (b) a person is required to carry out the prescribed ash disposal procedures under the following circumstances –
 - (i) the person operates a columbarium without a specified instrument after the grace period;
 - (ii) the person ceases to operate a columbarium; and
 - (iii) the person, as the following third party, has taken possession of the columbarium premises –
 - (A) an owner or mortgagee who acquired an interest in the premises subject to an obligation to carry out the prescribed ash disposal procedures; and
 - (B) third party other than those in (A) above³.

15. Details of the prescribed ash disposal procedures (including provisions governing the return of the ashes and/or related items to whom these should be returned) are prescribed in the Bill. Flexibility is allowed

³ Such persons have the option of inviting DFEH to carry out steps considered necessary for ash disposal in respect of the columbarium on-site and allow a specified officer to enter the columbarium premises for the purposes of carrying out those steps, for at least 12 months.

for an ash handler to submit an alternative ash disposal plan for approval by the Director of Food and Environmental Hygiene (“DFEH”), provided that it is as effective as the prescribed ash disposal procedures. The Bill provides that a specified officer may apply to a magistrate for an occupation order to occupy the columbarium premises for a period of time to facilitate, as far as possible, the ashes and related items to be claimed back by the persons to whom these should be returned. After the expiry of the applicable stipulated period, any ashes and related items not returned to any claimants would be delivered to DFEH. If the prescribed ash disposal procedures have duly been completed by the ash handler (or the steps considered necessary for disposal of ashes by a specified officer have been carried out) and the ashes or items are left unclaimed after a reasonable period, DFEH may, at his or her discretion, arrange for the final disposal of such ashes and/or items in any manner as he/she sees fit.

(6) Refining the regulatory measures

16. Building on the regulatory framework, CSAs have been incorporated to the following effect –

- (a) subject to certain pre-requisites being met, excluding premises used as workplaces for carrying out the transformation of cremated human ashes into synthetic materials from the application of the Bill. This arises from our decision to bring such synthetic materials within the definition of *ashes* in the Bill when blatant attempts to circumvent our regulatory regime came to light after the Bill had been laid before LegCo;
- (b) subject to certain pre-requisites being met, excluding, from the application of the Bill, premises used as exhibition venues for display of no more than 10 containers of ashes for no more than 14 days. This will cater for the temporary exhibition of ashes of the Buddha and/or other prestigious monks and nuns in Hong Kong; and
- (c) excluding, from the application of the Bill, the keeping of no more than 10 containers of ashes (as compared with 5 containers of ashes in the original Bill) in domestic premises.

Legislative Timetable

17. The legislative timetable will tentatively be –

Publication in the Gazette	11 November 2016
First reading and commencement of second reading debate in LegCo	23 November 2016
Resumption of second reading debate, committee stage and third reading in LegCo	To be notified

Background

18. The majority of existing private columbaria are in breach of statutory and Government requirements, including planning, land and building safety requirements. Members of the public, especially residents living near such columbaria are dissatisfied with their presence, and the traffic impact and environmental nuisance caused by them. Consumers also demand better protection.

19. The Food and Health Bureau conducted two rounds of public consultations in July 2010 and December 2011 respectively. The feedback received supported that the proposed licensing scheme should strike a balance amongst competing interests of various stakeholders, having regard to –

- (a) the wider community interest, including meeting society's needs for provision of columbaria;
- (b) the sentiment of the descendants, in particular their wish not to upset the resting place of the deceased as far as practicable;
- (c) the desire of communities neighbouring private columbaria to have the nuisance caused by such columbaria minimised; and
- (d) the merits of ensuring a sustainable mode of operation of the private columbarium sector in the long run.

A Business Impact Assessment study was carried out in 2013 to collect the views of existing and potential operators and assess the impact of the licensing scheme on the trade. The earlier Bill tabled in the Fifth LegCo on 25 June 2014 sought, for the first time, to put in place a regulatory regime for private columbaria.

20. An integrated, holistic and coordinated regulatory mechanism incorporating all relevant statutory requirements could only be put in place after enactment of the Bill. Before enactment of the Bill, departments with enforcement powers would continue to stay vigilant in their enforcement actions to contain the problem of private columbaria operating in blatant breach of existing statutory land, building, fire and planning requirements in order to help contain the proliferation of newly-emerged cases. Meanwhile, we would also continue to work closely with the Consumer Council to strengthen consumer education, highlighting the risk of patronising such columbaria, prior to their obtaining a licence.

Food and Health Bureau
November 2016