



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

3 January 2016

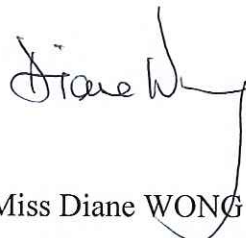
Ms Wendy KAN
Assistant Legal Adviser
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear Ms Kan,

Private Columbaria Bill

Thank you for your letter of 20 November 2015 which seeks the Government's responses to your observations on Part 6 the Private Columbaria Bill. Our responses to your observations and our other suggestion are set out at **Annex**.

Yours sincerely,



(Miss Diane WONG)

for Secretary for Food and Health

The Government's Response to ALA's Observation
on Part 6 of the Private Columbaria Bill (the Bill)

Item	Response from the Government
1	<p>Issue: Re: clause 48 –</p> <ul style="list-style-type: none"> • 署長可為施行本條例，委任公職人員為獲授權人員。 • The Director may appoint a public officer as an authorized officer for the purposes of this Ordinance. <p>Should the appointment of an authorized officer be made in writing? Further, should an authorized officer be imposed with an obligation to produce written evidence of his or her identity and appointment upon request when exercising his or her powers conferred by the Bill? Please provide such requirements in the Bill.</p> <p>Response:</p> <p>Reference is made to section 3A of the Fisheries Protection Ordinance (Cap. 171), section 14 of the Fire Safety (Commercial Premises) Ordinance (Cap. 502) and section 15 of the Fire Safety (Buildings) Ordinance (Cap. 572).</p> <p>We will consider amending clause 48 to the effect that –</p> <p>(1) The Director may appoint <u>in writing</u> a public officer as an authorized officer for the purposes of this Ordinance.</p> <p>(2) An authorized officer –</p> <ul style="list-style-type: none"> (a) may be assisted by such persons as the officer reasonably requires; and (b) must produce his or her written appointment under subsection (1) for inspection by any person who reasonably requires to see it.

Item	Response from the Government
2	<p>Issue: Re: clause 49(1)(c) –</p> <ul style="list-style-type: none"> • “為進行檢查而查閱、移走和扣押任何上述簿冊、文件或物品，為期按署長或獲授權人員認為必需而定，並予以檢查和抄錄或複印；” • “to inspect, remove and impound for the purpose of examination for so long as the Director or authorized officer may consider necessary, and to examine and copy, any such book, document or article;” <p>It seems that “any such book, document or article” in clause 49(1)(c) means the book, document or article that relates to the operation or management of the columbarium or to any other activity in respect of the columbarium in the possession of a person taking part in the operation or management of the columbarium as referred to in clause 49(1)(b). Please clarify. Please also clarify whether the power of inspection under clause 49(1)(c) also covers items required to be kept in clause 43.</p> <p>Response:</p> <p>The phrase “any such book, document or article” in clause 49(1)(c) refers to the book, document or article as referred to in clause 49(1)(b), i.e. the book, document or article relating to the operation or management of the columbarium or any other activity of the columbarium. As the records kept under clause 43 relate to the operation, management and activities of a columbarium, such records should be covered by clause 49(1)(c).</p> <p>We will take the opportunity to amend “remove and impound” in clause 49(1)(c) to “remove or impound”.</p>

Item	Response from the Government
3	<p>Issue: Re: clause 49(1)(c) – Please explain the reason(s) for requiring to vest the Director or an authorized officer with a power to remove and impound under clause 49(1)(c) in view of the powers given under clause 50(3).</p> <p>Response:</p> <p>There is a difference in nature between the powers in clause 49 and clause 50 –</p> <p>(a) clause 49(1)(c) is related to a columbarium in respect of which a specified instrument is in force. The inspection, removal or impoundment is related to the discharge of the regulatory function.</p> <p>(b) clause 50(3) (read together with clause 50(2) is related to any columbarium (be this with specified instrument or not). The inspection, removal or impoundment is invoked in the circumstances that there are reasonable grounds for suspecting that there is anything containing evidence of an offence under this Ordinance.</p> <p>The powers referred to in clause 50(2) may be exercised under clause 50(3) without a search warrant only in the circumstances where any delay could result in the loss or destruction of such evidence. By comparison, the powers under clause 49(1)(c) may be exercised to inspect, remove or impound any books, documents or other articles referred to in clause 49(1)(b)(i), where –</p> <p>(a) an offence may not be in contemplation; and</p> <p>(b) such books, documents or other articles may or may not contain evidence of an offence.</p>
4	<p>Issue: Re: clause 49(1)(c) – Please provide expressly in the Bill a duty on the Director or an authorized officer to return the book, document or article impounded after completing the examination.</p> <p>Response:</p> <p>Reference is made to section 4 of the Electricity Ordinance (Cap. 406). We will consider adding new subclauses in clause 49 to provide for the return of any book, document or article removed or impounded under clause 49(1)(c).</p>
5	<p>Issue: Re: clause 49(1)(e) –</p> <ul style="list-style-type: none"> • “行使施行本條例條文所需的任何其他權力。” • “to exercise any other powers that may be necessary for giving effect to the provisions of this Ordinance.” <p>The Director or an authorized officer has been given wide powers under clause 49(1)(e). Please give the justification.</p> <p>Response: Clause 49(1)(e) is a catch-all provision which enables the Director or an authorized officer to exercise necessary powers, which have not been set out</p>

Item	Response from the Government
	specifically in the preceding paragraphs (a) to (d) in clause 49(1), to give effect to the Bill. Similar provisions may be found in other legislation, e.g. section 11(1)(e) of the Dutiable Commodities Ordinance (Cap. 109) and section 17(1)(h) of the Prevention of Copyright Piracy Ordinance (Cap. 544).
6	<p>Issue: Re: clause 49(2) –</p> <ul style="list-style-type: none"> “凡署長或獲授權人員要求得到協助及資料，以行使在本條之下的權力，指明文書的持有人及該人的僱員、傭工或代理人，須提供該項協助及資料。” “A person holding a specified instrument and the employees, servants or agents of the person must provide the assistance and information required by the Director or an authorized officer for exercising the powers under this section.” <p>Please clarify the legal consequence(s) for contravening clause 49(2).</p> <p>Response: A person who without reasonable excuse fails to provide the information required by the Director or an authorized officer under clause 49 or wilfully obstructs the exercise of a power under section 49 may be liable to be prosecuted for an offence under clause 52(1) of the Bill. Also, under clause 51(1), a person may be arrested without a warrant if the Director or an authorized officer reasonably suspects that the person has committed or is committing an offence under the Bill.</p>
7	<p>Issue: Re: clause 50(4) –</p> <ul style="list-style-type: none"> “如署長或獲授權人員根據第(2)(b)款檢取、移走或扣押任何物品 —” “If the Director or an authorized officer seizes, removes or impounds any thing under subsection (2)(b)—” <p>Clause 50(4) applies if the Director or an authorized officer seizes, removes or impounds any thing under clause 50(2)(b). What if the Director or authorized officer does so pursuant to clause 50(3)?</p> <p>Response:</p> <p>Clause 50(3) provides that the Director or an authorized officer may exercise any of the powers referred to in clause 50(2) without a search warrant in the circumstances where any delay could result in the loss or destruction of such evidence. The Director or an authorized officer is exercising the power under clause 50(2) by virtue of clause 50(3). As our intention is that clause 50(4) applies to the scenario under clause 50(3), we will consider amending clause 50(4) as follows: If the Director or an authorized officer seizes, removes or impounds any thing under subclause (2)(b) (or by the exercise of the powers referred to in subclause (2)(b) under subclause (3)) [...].</p>
8	<p>Issue: Re: clause 50(4)(a) –</p> <ul style="list-style-type: none"> “署長或該人員須將一份宣布該檢取、移走或扣押的中文通告，張貼於有關處所的顯眼位置；及” “the Director or authorized officer must post at a conspicuous place outside the

Item	Response from the Government
	<p>premises a notice, written in the Chinese language, declaring the seizure, removal or impoundment; and”</p> <p>Clause 50(4)(a) provides that the notice required to be posted at a conspicuous place outside the premises be written in the Chinese language only. Please explain the reason(s) for providing so.</p> <p>Response: We will consider removing the requirement that the notice should be written in the Chinese language.</p>
9	<p>Issue: Re: clause 50(4)(a) – In the Chinese text, should “張貼於有關處所的顯眼位置” rather be “張貼於有關處所外的顯眼位置”, as the Chinese rendition of “post at a conspicuous place <u>outside</u> the premises” in the English text?</p> <p>Response: We will consider adding “外” after “有關處所” in the Chinese text of clause 50(4)(a).</p>
10	<p>Issue: Re: clause 53 –</p> <ul style="list-style-type: none"> • “如根據第 50(2)(b)條檢取、移走或扣押的任何物品 [...]” • “If any thing seized, removed or impounded under section 50(2)(b) is required [...].” <p>Please note Question 7 above regarding any thing seized, removed or impounded under clause 50(3).</p> <p>Response: Please see our response to item 7 above.</p> <p>As our intention is that clause 53(1) applies to the scenario under clause 50(3), we will consider amending clause 53(1) as follows: If any thing seized, removed or impounded under clause 50(2)(b) (or by the exercise of the powers referred to in clause 50(2)(b) under clause 50(3)) is required, or likely to be required, [...].</p>
11	<p>Issue: Re: clause 53(3) –</p> <ul style="list-style-type: none"> • “如有關物品的擁有人沒有根據第(2)款所訂而行事，該物品 — (a) 成為政府財產，而不受任何留置權、申索權或產權負擔所約束；及 (b) 可被售賣或以署長認為合適的方式處置。” • “If the owner of the thing has not acted as provided under subsection (2), the thing— (a) is to become the property of the Government, free from all liens, claims or encumbrances; and (b) may be sold or otherwise disposed of in a manner that the Director thinks fit.” <p>Please provide the justification for clause 53(3).</p> <p>Response: If the owner of the thing seized, removed or impounded never applies to the</p>

Item	Response from the Government
	<p>Director for the thing to be returned to the owner, it would impose an indefinite burden on the Government to hold onto the thing which would be an unreasonable requirement. It would hence be necessary to include a provision to allow the Director to dispose of the thing in a manner that the Director thinks fit. Similar provisions could also found in other legislation, including sections 106 and 107 of the Road Traffic Ordinance (Cap. 374), section 22 of the Public Health and Municipal Services Ordinance (Cap. 132) and section 12 of the Land (Miscellaneous Provisions) Ordinance (Cap. 28).</p>
12	<p>Issue: Re: clause 53(3)(b) –</p> <ul style="list-style-type: none"> • “可被售賣或以署長認為合適的方式處置。” • “may be sold or otherwise disposed of in a manner that the Director thinks fit.” <p>In the Chinese text, “以署長認為合適的方式處置” should be “以署長認為合適的其他方式處置” instead, as the relevant English text is “<u>otherwise</u> disposed of in a manner that the Director thinks fit”.</p> <p>Response: We will consider adding “其他” before “方式” in the Chinese text of clause 53(3)(b).</p>
13	<p>Issue: Re: enforcement notice under clause 54 –</p> <ul style="list-style-type: none"> • “(1) 署長可藉通知(執法通知)，要求就骨灰安置所持有指明文書的人(通知對象)作出以下一項或多於一項事情 —” • “(1) The Director may, by notice (<i>enforcement notice</i>), require the holder of a specified instrument in respect of a columbarium (<i>recipient</i>) to do one or more of the following—” <p>Please consider to change the Chinese rendition of “enforcement notice” in the English text from “執法通知” to “執行通知”, as in other legislation, “enforcement notice” in the English text is usually rendered as “執行通知” in the Chinese text.</p> <p>Response: We consider that the expression “執法通知” is appropriate and no amendment is necessary.</p>
14	<p>Issue: Re: clause 54(2)(a) –</p> <ul style="list-style-type: none"> • “有關違反行為的詳情，以及停止該項違反行為的時限；” • “the particulars of the contravention concerned and the time within which the contravention must end;” <p>In clause 54(2)(a), “must” in the English text has not been rendered in the Chinese text.</p> <p>Response: We consider that the expression “停止該項違反行為的時限” has duly reflected the meaning of “the time within which the contravention must end”.</p>
15	<p>Issue: Re: clause 54(2)(b) and (c) –</p>

Item	Response from the Government
	<ul style="list-style-type: none"> • “(b) (如適用的話)通知對象為對該項違反行為的後果作出補救而須採取的行動，以及採取該行動的時限； (c) 通知對象為防止該項違反行為再次發生而須採取的行動，以及採取該行動的時限；” • “(b) if applicable, the action that the recipient must take to remedy the consequences of the contravention and the time within which the action must be taken; (c) any action that the recipient must take to prevent the recurrence of the contravention and the time within which the action must be taken;” <p>In clause 54(2)(b) and (c), should “以及採取該行動的時限” in the Chinese text be “以及須採取該行動的時限” instead, as the Chinese rendition of “and the time within which the action <u>must</u> be taken” in the English text?</p> <p>Response: We consider that the expression “採取該行動的時限” has duly reflected the meaning of “the time within which the action must be taken”. It is not necessary to add the word “須” before “採取”.</p>
16	<p>Issue: Re: clause 54(2)(c) – For consistency with the wording of clause 54(2)(b), please consider to replace “any action” in clause 54(2)(c) with “if applicable, the action”.</p> <p>Response: We will consider amending the following to bring them in line with clause 54(2)(b) –</p> <ul style="list-style-type: none"> (a) clause 54(2)(a): by inserting “if applicable, ” before “the time within which the contravention must end”. For example, if the enforcement notice relates to contravention of a licensing condition on minimising the nuisance caused by burning of offering at Ching Ming Festival, the acts might have ceased already by the time the enforcement notice is issued. (b) clause 54(2)(c) by replacing “any action” with “if applicable, the action”.
17	<p>Issue: Re: clause 54(2) – It appears that even if an appeal is lodged under clause 72(1)(f) on the Director's decision to serve an enforcement notice under clause 54, the recipient of the notice is still required to end the contravention or take the action within the stated time in accordance with the notice. Should an express provision, in such event, be made in the Bill to provide for a suspension of the operation of the notice pending the determination of the appeal or to specify the time when the stated time in the notice starts to run?</p> <p>Response: We will consider including an express provision that the operation of the enforcement notice will not be suspended pending determination of an appeal against the notice. There are provisions in other ordinances which provide that an order or decision will not be suspended pending an appeal against the order or decision (see, for example, section 35(4) of the Food Safety Ordinance (Cap 612) or section 22(2) of the</p>

Item	Response from the Government
	District Cooling Services Ordinance (Cap 624)).
18	<p>Issue: Re: clause 54(4) –</p> <ul style="list-style-type: none"> • “如執法通知的通知對象沒有採取該通知所述的行動，以對該通知所述的違反行為的後果作出補救，或防止該項違反行為再次發生，則署長可安排採取任何其認為屬必要或可取的行動，以對該後果作出補救，或防止該行為再次發生。” • “If the recipient of an enforcement notice fails to take the action stated in the notice for remedying the consequences of a contravention stated in the notice or preventing the recurrence of the contravention, the Director may arrange for any action to be taken that the Director considers necessary or desirable to remedy the consequences or prevent the recurrence.” <p>In clause 54(4), please add “within the stated time” after “preventing the recurrence of the contravention” in the English text and make corresponding amendment to the Chinese text.</p> <p>Response: We will consider amending clause 54(4) by adding “within the stated time” after “failed to take the action stated in the notice”.</p>