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30 September 2014

BY EMAIL & BY POST

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Dear Mr. Chui,

Bills Committee on Private Columbaria Bill

We are pleased to attach the Law Society's submissions on the Private Columbaria Bill for consideration by the Bills Committee.

Yours sincerely,

Kenneth Fok
Director of Practitioners Affairs

Encl.

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PRIVATE COLUMBARIA BILL

Submissions

General

1. The Law Society has reviewed the Private Columbaria Bill (“the Bill”) which was introduced to the Legislative Council on 25 June 2014. The Law Society considers that the scheme envisaged in the Bill is practical, simple and humane. Subject to the following queries and comments, the Law Society in principle is in support of the Bill.

Comments on individual clauses

2. The comments of the Law Society on the Bill, by reference to the page number of the Gazette, are tabulated below.

Page Nos on Gazette	Clause No.	Comments
C3413	Clause 10 – interpretation	Should the number of niches be a part of the definition of “ ash interment quantity ”? In some cases in the past, the Lands Department has limited the capacity of a private columbarium, e.g. for waiver, Government Short Term Tenancy (“STT”) purposes, by the number of niches.
C3415	Clause 11(3)(b) – Licence, exemption	Is 10 years for the validity of the licence issued in respect of a columbarium too short?

Page Nos on Gazette	Clause No.	Comments
	and temporary suspension of liability	
C3417	Clause 11(6) - ditto	The term of Government STTs is often for a fixed period of, say, one, two or three years and thereafter quarterly. Should the term of STTs for private columbaria be for a longer fixed period, e.g. 10 years, rather than the validity period set out in Clauses 11(3) and (7)?
C3417	Clause 11(9) - ditto	What sorts of exceptional circumstances would justify an extension of temporary suspension of liability more than once?
C3421 – C3429	Clauses 14(1), 15 & 16 – pre-bill columbaria	“Bill Announcement time” is 18 th June 2014. How will an applicant prove ash capacity at this date?
C3425	Clause 15(1)(d) – exemption	Is this intended to be the date of the publication date of the first IDPA Plan in the New Territories? If so, should not the date vary according to the publication of the first IDPA plan for the district in which the pre-Bill Columbarium is situated? What about these columbaria where there was an OZP in place before that date, whether rural or urban, and whether in the New Territories or the urban area? The 1990 date would imply that there are no existing columbaria in the urban area. Is this correct?
C3429	Clause 16(2)(b)(ii) – temporary suspension of	There may be cases where writs have been issued against the Government for adverse possession, or, more likely, the Government has taken action in the

Page Nos on Gazette	Clause No.	Comments
	liability	possession and the claimant is defending on adverse possession grounds.
C3431	Clause 17(2)(a) – determination of applications	Is “the public interest” too wide and does it give the Board too much discretion without guidelines? Should a Transport Impact Assessment, Environmental Impact Assessment (and possibly other reports) be required in each case?
C3431 & C3437	Clause 18 & 21 – applications	Should it be mandatory that public notice be given of an application? Schedule 3, S.4 says only that the Board may require notice if it “considers it appropriate”. Should objections be invited?
C3437	Clause 21(1) – application be made to licensing board	Is the three months period given here too short?
C3459	Clause 32(3) – transfer of instruments	Must applicant for transfer show that the proposed transferee has the necessary competence to run a columbarium? Should a new management plan be required or confirmation that the transferee intends to adopt the existing plan? Would this apply also to a successor as in 33(g)(i).
C3473 – C3485; C3607- C3613	Part 5 & Schedule 4 – agreement for sale of interment right	These requirements seem overly complicated. Can they not be simplified? Can an agreement (or a niche) be sold or transferred? There is no reference to this in Parts 1 and 2 of Schedule 4.
C3491	Clause 51 – power of arrest	Is power to arrest without warrant excessive power?
C3509	Clause 64 – power of landlord etc	It is not clear whether a mortgagee can exercise power of sale or can only carry out the disposal

Page Nos on Gazette	Clause No.	Comments
		procedures as in subsection (2).
Various	Clauses 65(3), etc. – which involves courts	Is the definition of “court” in Cap.1 sufficient and what court will have jurisdiction? The Magistrates Court is mentioned in Part 9, Clause 89 and elsewhere.
C3523	Clause 72 - appeals	Assuming there has been public notice given is an objector included under “person aggrieved”?
C3523	Clause 72(2) – notice of appeals	Is it clear at law on what date a notice is “given”?
C3587	Schedule 2, Part 1, S.2 – compliance with planning requirement	“Requirement” would include the terms of a Section 16 approval?
C3587 – C3589	Schedule 2, Part 1, S.3(1) – compliance with building requirement	Would an Occupation Permit be sufficient evidence here?
C3597	Schedule 2, Part 3 – interpretive provision	Will not “small building” cause confusion when the term “New Territories Exempt House” covers “small building” and “small house” is in common use in regard to the Small House Policy?
C3605	Schedule 3, Section 4 – publication of licence applications	See previous suggestion that public notice should be mandatory for all applications.
C3623	Schedule 5, Part 2 Section 5(2)(b) – ash disposal	Can human ashes be owned, i.e. be property? There is no property in a human corpse. There can be property in a niche but not in the ashes.

Other Comments

3. In cases of Pre-Bill columbaria where land has been occupied under a Government STT or Government lease in breach of the tenancy/lease and without waiver, and Lands Department agrees to issue a waiver for future columbaria use, does the Government intend that waiver fees will be charged for the past period of use in breach of the tenancy/lease?
4. A similar question arises in connection with unauthorized use of Government land by a Pre-Bill columbarium being regularized by a grant of Government STT/Government lease.
5. Does the Bill need to specify how ash capacity and set of ashes or a niche are to be valued? It is understood that prices for niches may be calculated on a fixed sum together with pre-payment of management fees for the period of use of the niche and that, depending on circumstances the fixed sum may be only a small proportion of the total fee.
6. The issue whether storage of cremated ashes is storage of “human remains” under the GN conditions for sale of land in the New Territories has not been resolved. How does the Government intend to deal with this?
7. If the Government is genuine in encouraging private columbaria and stamping out unlicensed ones, the imposition of premiums for removal of this prohibition will not assist in that aim. Is the Government prepared either to issue a general waiver of that prohibition or to agree to remove it in each case for a nominal sum?
8. Further consideration needs to be given to enhance the measures to promote Green Burials, etc. as envisaged by the Government (see Annex B to the Legco Paper dated 18 June 2014 (File Reference: FH CR 2/3751/07)). For instance:
 - (a) Further measures to educate the public. Surveys to find out where the resistance to scattering of ashes at sea, etc. is coming from the older section of the community or the younger and devising educational means targeted at each identified group;

- (b) Greater flexibility in the quota of members each family is allowed in the vessels. Larger quotas could be offered at a fee.
- (c) Encouragement of building private crematoria in the form of multi-storey buildings.
- (d) Encouraging people to visit crematoria in the month before and the month after Ching Ming and Chung Yeung providing necessary traffic arrangements, i.e. creating a wider time zone of opportunity.

THE LAW SOCIETY OF HONG KONG

30 SEPTEMBER 2014