

**Meeting of the Bills Committee
on Private Columbaria Bill**

**Issues Raised by Members (on 25 November 2014)
and Responses Made by the Administration**

Purpose

This paper provides the supplementary information on the Private Columbaria Bill (“the Bill”) sought by Members at the Bills Committee meeting held on 25 November 2014.

Validity period of licence

(A) Members’ Views

2. Some Members opine that given operators’ upfront investment in seeking compliance with licensing requirements and consumers’ preference for ash interment on a long term basis, the maximum validity period of 10 years for a licence is too short. They suggest setting it to be coterminous with the term of the land lease (“land tenure”) of the columbarium premises instead. Some float the idea of revoking the licence (if appropriate) upon mid-term review, under a longer licence duration.

(B) Administration’s Responses

3. By way of background, the following provisions in the Bill are relevant -

- (a) Among the requirements to be fulfilled for seeking a licence, an applicant must hold the columbarium premises directly from the Government (i.e. “self-owned premises”) (except where for a pre-Bill columbarium, this requirement is modified to the extent that if it is not run on self-owned premises, the applicant must prove that he or she has the right to continue to use the

premises for at least five years from the date on which the licence is to take effect);

- (b) Clause 11(2) provides that the Private Columbaria Licensing Board (“the Licensing Board”) may, in its discretion, determine the term for which a licence is issued, renewed or extended (“validity period”). Clause 11(3) further provides that the validity period of a licence must not exceed the shorter of the following –
 - (i) if the columbarium premises are occupied under a tenancy, lease or other instrument, the remainder of the term of the tenancy, lease or other instrument;
 - (ii) 10 years; and
- (c) Clause 11(8) provides that a licence may be subject to review within its validity period on the dates specified in the licence.

4. The features (including duration) of different types of licences vary as a function of the objects, activities and/or operations that may be regulated by a licensing system¹. In our case, we have proposed a licence period of up to 10 years, having regard to factors including the nature of columbarium operations and the need to ensure continuous compliance with the licensing requirements and licensing conditions in the course of time. In the latter respect, common to other licensing regimes, renewal avails an opportunity for the Licensing Board to review the performance of the licensee and to take necessary follow-up action at appropriate juncture (e.g. variation to licence conditions if appropriate).

5. We have conducted research on the land leases of the columbarium premises on the basis of the “Information on Private Columbaria” published by the Development Bureau on 30 September 2013, when drafting the Bill. Excluding private cemeteries in Part A, there are 111 columbaria. Of these 111 columbaria, 7 are not covered by

¹ In Hong Kong, normally, the duration of licences for municipal services (such as restaurants, undertakers) is one year while that for broadcasting (such as televisions, radios) is 12 years.

land leases. A breakdown of the remaining 104 columbaria² by land tenure is as follows –

Expiry Date of Land Lease	No. of Columbaria
2038	1
2043	1
2046	1
2047	82
2048	2
2049	1
2050	8
2051	4
2056	1
2059	1
2090	1
2886	1
Total	104

Note: There is a columbarium involving various lots with some expiring in 2047 and one expiring in 2050. To simplify presentation, it is only counted once in the category of year 2047, but not again in the category of year 2050.

We consider 10 years an appropriate interval as it would allow two breakpoints for nearly 80% of the cases (where the land tenure expires in 2047), and one breakpoint for the case with the shortest land tenure (that expires in 2038). Setting it to be coterminous with the land tenure could mean a licence duration as long as around 870 years in the case with the longest land tenure (that expires in 2886). Absence of a breakpoint for such a long licence duration is highly undesirable from the regulatory control perspective.

6. To protect consumers' interest, the following provisions in the Bill are relevant - –

² Included in the 104 columbaria are 5 columbaria with both land leases and other land instruments.

- (a) Clause 41(2)(c) provides that the agreement for the sale of an interment right (“contract”) for a term that extends beyond the term of the land lease is not enforceable by the seller against the purchaser³. Section 1(c) of Schedule 4 (Information and Recommendations) provides that a contract must set out the term of the land instrument (lease, licence or any other instrument). Section 2(b) of Schedule 4 (Essential Terms) provides that a contract must set out, inter alia, the particulars of the duration of the interment right and any right of the purchaser to renew the interment right for another term, on the expiry of the term under the contract etc.; and
- (b) Part 7 and Schedule 5 provide that an operator must not improperly dispose of the ashes interred in the columbarium (together with the detailed arrangements for complying with such requirements). Failure to do so constitutes an offence punishable by fine and imprisonment upon conviction.

In other words, the contract duration does not necessarily have to be limited by the validity period of the licence, and is a matter for agreement between the parties to the contract. Where the contract duration is longer than the validity period of the licence, consumers should pay attention to the detailed terms in the contract for protecting their interests (e.g. what arrangements would apply in case of cessation of columbarium operation for any reason, e.g. non-renewal of the licence, including whether and if so how a refund or compensation would be made to the consumers, how the interred ashes would be properly disposed of etc.).

7. Having considered Members’ views, we remain of the view that a licence duration of 10 years strikes a reasonable balance between the long-term nature of such transactions and public expectations favouring rigorous control of columbarium operations. We wish to stress that barring unforeseen circumstances, if no non-compliance with the requirements and conditions is observed throughout the licence term, such licences would normally be renewed upon application. As regards the suggestion of revoking the licence (if appropriate) upon mid-term

³ That is to say, the amount payable by the consumer ceases to be payable or the amount paid by the consumer is recoverable.

review⁴, this will also bring uncertainty for operators and consumers, thus defeating the original purpose of this proposal.

Building-related Requirements

(A) Member's Question

8. A Member asks about the types of buildings or building works that could be covered under a licence / an exemption, despite some being non-compliant structures.

(B) Administration's Responses

9. Having regard to the feedback received during the past two public consultation exercises, we are particularly conscious of the need to adopt a pragmatic approach in resolving the problems inherited from the past. In drawing up the arrangements for handling compliance or otherwise with the building-related requirements, we have borne in mind the pragmatic need to avoid massive displacement of interred ashes. Upsetting the resting place of the deceased could result in social tensions arising from descendants having to relocate their ancestors' ashes.

10. In the interest of upholding the prevailing standards of building safety under a risk-based approach, the eligibility requirements for a licence / an exemption are underpinned by a system of certification by Authorised Persons / Registered Structural Engineers (AP/RSE)⁵, where –

⁴ Experience in other policy areas shows that a mid-term review is undertaken for the purpose of making the licensee to make improvement.

⁵ AP/RSE have the meanings given by section 2(1) of Cap. 123.

“Certification by AP/RSE” is a short-hand expression for the following –

- (a) certification by AP/RSE to be structurally safe to the satisfaction of the Licensing Board; and
- (b) carrying out of works that may be required by the Licensing Board in accordance with the requirements imposed by it.

- (a) the Buildings Ordinance (Cap. 123) does not apply;
- (b) section 14 of Cap. 123 applies but has been contravened; or
- (c) the Licensing Board sees fit to specify under the Bill.

11. As defined in section 3(1) of Schedule 2 of the Bill, compliance with the building-related requirements means –

- (a) the columbarium complies with the requirements for approval and consent to the commencement of building works under section 14 of Cap. 123 and every other requirement specified by the Licensing Board⁶; or
- (b) the following requirements are met in respect of every building or building works in, on or at the columbarium –
 - (i) these form the whole or a part of a **certifiable building**⁷ ;
 - (ii) certification by AP/RSE (see footnote 5).

12. Under clauses 13 and 14 of the Bill, among the requirements to be fulfilled for **seeking a licence**, the columbarium must comply with

⁶ These may include certification by AP/RSE (see footnote 5).

⁷ A certifiable building means a building to which the requirements for approval and consent to the commencement of building works under section 14 of Cap. 123 do not apply because it is–

- (a) an NT small building that came into existence on or after 16 October 1987 with a certificate of exemption issued under the Buildings Ordinance (Application to the New Territories) Ordinance (Cap. 121);
- (b) an NT small building that came into existence on or after 1 January 1961 and before 16 October 1987 and complied with the repealed Buildings Ordinance (Application to the New Territories) Ordinance at the time of its erection; or
- (c) an NT building built before 1 January 1961, if there has been no alteration, addition or reconstruction of the building in contravention of Cap. 123 on or after that date.

statutory requirements, such as compliance with building-related requirements (see paragraph 11) (except where for a pre-Bill columbarium, this requirement is modified to the extent that if it does not comply with the building-related requirements, the non-compliant structures necessary for or ancillary to the operation of the columbarium are **structures certifiable for a pre-Bill columbarium**⁸ and the requirements of certification by AP/RSE are complied with (see footnote 5).

13. Under clause 15 of the Bill, among the requirements to be fulfilled for **seeking an exemption**, either the pre-Bill columbarium must comply with the building-related requirements (see paragraph 11) or the non-compliant structures necessary for or ancillary to the operation of the columbarium are **structures certifiable for a pre-Bill columbarium** (see footnote 8) and the requirements of certification by AP/RSE are complied with (see footnote 5).

14. Under clause 20 of the Bill, the Licensing Board may approve plans of a columbarium for the purposes of an application for a licence / an exemption etc. only if, inter alia, that it decides to grant the application and authorize or permit the particulars as shown in the plans. Such

⁸ By structures certifiable for a pre-Bill columbarium, we mean building or building works that do not meet the building-related requirements, but existed immediately before the Bill announcement time, meeting the control under paragraph 16(a) and falling within the following description –

- (a) on-grade outdoor structures with niches;
- (b) single-storey building;
- (c) ground storey of a multi-storey building; or
- (d) an NT small building that came into existence on or after 16 October 1987 without a certificate of exemption issued under Cap. 121.

In connection with (a) to (d) above, a building –

- (a) includes one situated on unleased land at the time of its erection without a land licence referred to in the Land (Miscellaneous Provisions) Ordinance (Cap. 28) or in breach of a land licence; but
- (b) excludes one situated in or on another building that complies with section 14 of Cap. 123.

particulars include **the structures necessary for, or ancillary to, the operation of the columbarium.**

15. For a licence / an exemption, if granted –

- (a) it is subject to the condition that (for the pre-Bill columbarium) **the non-compliant structures necessary for, or ancillary to, the operation of the columbarium must be limited to structures certifiable for a pre-Bill columbarium shown in the approved plans** (see, under the Bill, clause 24(b) in relation to a licence and clause 27(b) in relation to an exemption); and
- (b) it may be subject to the condition on measures relating to building safety, amongst others, including requiring certificates or reports by AP/RSE to be submitted to the Licensing Board at regular intervals (see, under the Bill, clause 25(c) in relation to a licence and clause 28(a) in relation to an exemption).

16. Against the above background, it should be noted that stringent controls are exercised by way of the following –

- (a) structures certifiable for a pre-Bill columbarium are confined to those existing immediately before the Bill announcement time that –
 - (i) contain niches used or intended to be used for the interment of ashes where at least a niche was so used immediately before the Bill announcement time;
 - (ii) form the whole or a part of any essential ancillary facilities supporting the operation of the columbarium;
- (b) with the non-compliant structures necessary for, or ancillary to, the operation of the columbarium being limited to structures certifiable for a pre-Bill columbarium shown in the approved plans (see paragraph 15(a)), there are safeguards against aggravation of such structures beyond what is indicated on the approved plans.

17. Guidelines on this subject area would be promulgated in due course for reference by the columbarium sector, professional bodies, consumers and members of the public.

Protection of consumers with contracts entered into prior to the commencement of the Ordinance

(A) Member's Views

18. Members point out that consumers with contracts entered into (as well as ancestors' ashes interred) in respect of niches in a private columbarium might be affected, if the columbarium eventually fails to obtain a licence or an exemption after the commencement of the Ordinance. They enquire what protection or assistance is available to such consumers.

(B) Administration's Responses

19. By way of background, the following provisions in the Bill are relevant -

- (a) Division 1 of Part 5 imposes requirements that a contract must meet in order for it to be enforceable by the seller against the purchaser (see footnote 3), and Schedule 4 provides for prescribed information, recommendations and essential terms to be contained in such a contract. Being prospective in nature, they could only govern the contracts that are entered into after the commencement of the Ordinance; and
- (b) Part 7 and Schedule 5 provide for obligations in disposing of ashes and set out the prescribed ash disposal procedures to be carried out, including occupation orders and arrangements for the return of ashes to the concerned parties. After the commencement of the Ordinance, the operators of private columbaria to which the Ordinance applies are required to dispose of interred ashes properly in accordance with the prescribed ash disposal procedures laid down in Part 7 and

Schedule 5, including in case of cessation of their columbarium operation. Failure to do so will render the operators criminally liable, punishable by a fine and imprisonment upon conviction.

20. We wish to first deal with a contract made before the announcement of the Bill. Depending on the facts and circumstances of each particular case, if a columbarium operator fails to obtain a licence / an exemption after the commencement of the Ordinance, it could be a breach of contract on the part of the columbarium operator (if there is fault on the part of the columbarium operator or the event rendering performance impossible is self-induced) OR frustration of contract (if there is no fault on the part of either party). Where there is a breach of contract, the remedies for breach of contract are available to the consumers affected, such as suing for damages. Where there is frustration of contract, section 16(2) of the Law Amendment and Reform (Consolidation) Ordinance (Cap. 23) gives a cause of action to the consumers. On frustration, the amount payable by the consumer before the time of discharge ceases to be payable, and the amount paid by him before frustration is recoverable provided that the court may allow the columbarium operator to recover or retain any expenses incurred for the purpose of the contract before the time of discharge if the court considers it just to do so. That said, where express provisions are provided in the contracts to deal with the frustrating events or events rendering performance impossible, the court shall give effects to such provisions. In this regard, consumers are advised to pay attention to the detailed terms in the contract for protecting their own interests.

21. We next come to deal with a contract made after the announcement of the Bill. Depending on the facts and circumstances of each particular case: (a) the doctrine of frustration may or may not arise; (b) it is also possible that circumstances may give rise to a breach of contract on the part of the columbarium operator.

22. The provisions referred to in paragraph 19(b) (i.e. ash disposal procedures, including in case of cessation of columbarium operation) apply to the interred ashes of any private columbarium to which the Ordinance applies, irrespective of when the contract is entered into (i.e. before or after the commencement of the Ordinance).

Summing Up

23. Members are invited to note the content of this paper.

**Food and Health Bureau
December 2014**