

**Bills Committee on Private Columbaria Bill**

**Government's Response to the Issues Raised by**  
**Members of the Bills Committee at Previous Meetings**  
**(Issued on 18 December 2015)**

This paper sets out the third batch of Government's responses to the issues raised by the members of the Bills Committee at previous meetings.

	<b>Information requested / follow-up action required</b>	<b>Response from the Government</b>
<b>(A) Matters arising from the meeting on 29 July 2014</b>		
1	Information on the location and number of public columbaria and number of unoccupied public niches.	<p>There are currently eight columbaria managed by Food and Environmental Hygiene Department (FEHD). The total number of niches and number of unallocated new niches by these eight public columbaria are set out at <b><u>Annex 1</u></b>.</p> <p>Under the district-based columbarium development scheme, 24 potential sites were identified in 18 districts for columbarium development. In previous statements on this subject, we had included the following estimate: subject to the outcome of the traffic impact assessment, engineering feasibility studies (if applicable) and technical feasibility studies as well as support of the DCs and LegCo for columbarium developments in the pipeline, and taking into account the supply of the Chinese Permanent Cemeteries, the supply of new niches is estimated to cumulatively increase to hundreds of thousands by 2031.</p> <p>We have obtained support from the relevant DCs on 8 projects (about 452 000 niches in total, which account for more than half of the aggregate number of niches in the 24 projects). The number of niches that may be made available in the 8 sites is set out at <b><u>Annex 2</u></b>. Tentatively, we plan to consult 5 District Councils on 6 projects in 2016-17.</p>
<b>(B) Matters arising from the meeting on 23 January 2015</b>		
2	Information on the implications of the Private Columbaria	Part 10 of the Private Columbaria Bill (the Bill) deals with the implications of the Private Columbaria

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	Ordinance on other ordinances.	<p>Ordinance (the Ordinance) on other ordinances.</p> <p>In general, the requirements under the Ordinance are in addition to and do not derogate from any requirement under any other ordinances or law. Clause 96 of the Bill provides, inter alia, that a specified instrument under the Ordinance (namely a licence, exemption or temporary suspension of liability (TSOL)) has effect solely for the purposes of the Ordinance and does not negate any liability under any other ordinances or law.</p> <p>Clauses 97, 98 and 99 of the Bill modify the Land (Miscellaneous Provisions) Ordinance (Cap. 28), the Town Planning Ordinance (Cap. 131) and the Buildings Ordinance (Cap. 123). The effects of the modifications are that the relevant provisions of these Ordinances as specified in Part 10 of the Bill do not apply to pre-Bill columbaria during the specified period of time, provided that the stipulated conditions set out in the Bill are met.</p> <p>This issue has in fact been dealt with in detail at the Bills Committee meeting on 26 May 2015. Members may refer to the presentation slides (paper reference: CB(2)1691/14-15(01)). Please see also our response to the ALA's letter dated 17 April 2015.</p> <p>Please see Part 11 of the Bill for consequential amendments to a number of other ordinances.</p>
<b>(C) Matters arising from the meeting on 16 February 2015</b>		
3	The number of sets of ashes being kept in the premises of the 81 undertakers of burials and their average storage period.	The requested information is set out at <b><u>Annex 3</u></b> .

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4	Examples of provisions in legislation in which “shall not” or “must not” was used.	<p>Please see paragraph 9.2 of the booklet on “Drafting Legislation in Hong Kong – A Guide to Styles and Practices” published in January 2012 (link: <a href="http://www.legislation.gov.hk/blis/eng/pdf/2012/Drafting_booklet.PDF">http://www.legislation.gov.hk/blis/eng/pdf/2012/Drafting_booklet.PDF</a>). The Law Drafting Division no longer uses “shall” to impose an obligation or its negative form (“shall not”) to impose a prohibition.</p> <p>The requested information is set out at <b>Annex 4</b>. “Shall” has been used in ordinances enacted in the old days, while “must” has been used in ordinances enacted in recent years.</p>
<b>(D) Matters arising from the meeting on 23 March 2015</b>		
5	How applications for specified instruments should be handled for columbarium premises in respect of which legal proceedings had been instituted.	<p>Even if legal proceedings have been instituted in respect of a columbarium, it does not necessarily follow that its application for a specified instrument under the Bill would be affected.</p> <p>Whether the relevant application would be affected depends on whether the legal proceedings would affect the applicant’s fulfilment of the eligibility requirements for the specified instrument concerned under the Bill. The Licensing Board must also have regard to the public interest and any other relevant considerations in determining the merits of an application for a specified instrument (clause 17 of the Bill).</p>
6	The meaning of the term “keeping ashes” in the definition of “columbarium” stipulated in clause 2, and whether the definition would cover premises in which ashes were placed for a short duration for ancestral worship.	<p>According to The Concise Oxford Dictionary, Tenth Edition, Revised, p. 773, “keep” means “have or retain possession of”, “retain or reserve for use in the future” and “put or store in a regular place”.</p> <p>It appears that the word “keep” should be construed in the context of the statute in which it appears. In <i>Grandi v Milburn</i> [1966] 2 Q.B. 263, the Court is to decide whether petrol is “kept” on premises within the meaning of section 1 of the Petroleum (Consolidation) Act 1928 (c. 32) when it is sold there in quantity during several hours from a stationary petrol-tanker. The Court cited the judgment of <i>J. C. Thompson v. Equity Fire Insurance Co</i>[1910] A.C. 592, which states that: “<i>The expression as used in the statutory</i></p>

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		<p><i>condition seems to point to the presence of a quantity not inconsiderable, or at any rate not trifling in amount, and to import a notion of warehousing or depositing for safe custody or keeping in stock for trading purposes. It is difficult, if not impossible, to give an accurate definition of the meaning, but if one takes a concrete case it is not very difficult to say whether a particular thing is 'stored or kept' within the meaning of the condition."</i> It was held in <i>Grandi v Milburn</i> that because of the existence of the elements of considerable quantity, duration and presence for the purpose of trade, the owner was the occupier of premises on which, on the occasion in question, petroleum spirit was being kept.</p> <p>It therefore appears that depending on the context of the statute, length of duration of the presence of a thing is a factor to consider in determining if the thing is being kept.</p>
7	Examples of other relevant considerations that were taken into account by some statutory licensing authorities in processing licence applications.	<p>The relevant considerations to be taken into account by the licensing authority of a licensing regime are dependent on the contextual nature and characteristics of individual licensing regimes. Examples of provisions requiring the licensing authority to take into account any other relevant considerations under other licensing regimes include section 8A of the Dutiable Commodities Ordinance (Cap. 109), section 27(3A) of the Firearms and Ammunition Ordinance (Cap. 238), and section 28 of the Road Traffic Ordinance (Cap. 374). As can be seen from the examples, it will not be possible to make an exhaustive list of the scenarios and circumstances which may be relevant to the licensing authority's considerations under the Bill, as they differ for individual cases and evolve over time. Such considerations will also apply to the private columbarium industry alike. Detailed manifestations may need to be adjusted in tandem with operators' response to the details of the regulatory framework. To facilitate operators' application for issue and renewal of a licence and to facilitate subsequent enforcement actions, we consider it necessary to have</p>

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		<p>such a provision in respect of the determination of an application for a specified instrument under the Bill.</p> <p>In any case, we wish to stress that there is no unfettered discretion conferred upon a licensing authority in the realm of public law. The following passage from Wade &amp; Forsyth's Administrative Law 8th Ed. (p. 357) clearly explains this principle –</p> <p>“The powers of public authorities are therefore essentially different from those of private persons. A man making his will may, subject to any rights of his dependants, dispose of his property just as he may wish ... This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interests. There is nothing paradoxical in the imposition of such legal limits ... Nor is it (the principle) confined to the sphere of administration; it operates wherever discretion is given for some public purpose.”</p> <p>Therefore, the future Private Columbaria Licensing Board (the Licensing Board) in exercising its discretionary power under clause 17(2) must act reasonably, in good faith and upon lawful and relevant grounds of public interest in accordance with the above principle. It shall only take into account relevant considerations. Irrelevant considerations being taken into account by the Licensing Board may be a ground for appeal or judicial review. Its discretion is thus subject to limitations imported by the above principle under the administrative law.</p>
<b>(E) Matters arising from the meeting on 17 April 2015</b>		
8	A list of documents required for an application for a specified instrument and the estimated time required for an applicant to provide the relevant documents.	<p>The documents and forms required to be submitted in respect of an application for a specified instrument are spelt out in clauses 18, 19 and 21 of the Bill. In gist, an application for a specified instrument should comprise the following for a pre-Bill columbarium (the information in blue may not be required for a columbarium that is not a pre-Bill columbarium) –</p> <p>(a) a completed application form;</p> <p>(b) for an application for a licence, a management</p>

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		<p>plan;</p> <p>(c) plans of the columbarium certified by a qualified professional, including a site plan, layout plan and floor plans;</p> <p>(d) documentary proofs showing that the applicant has the right to use the premises under application;</p> <p>(e) evidence of –</p> <p>(i) the ash interment layout as at the Bill announcement time;</p> <p>(ii) (for an application for the issue/renewal of a licence) the ash interment capacity as at the Bill announcement time;</p> <p>(iii) (for an application for the issue/renewal/extension of an exemption or a TSOL) the ash interment quantity as at the Bill announcement time;</p> <p>(iv) the extent of occupation of land as was necessary for or ancillary to, the operation of the columbarium as at the Bill announcement time;</p> <p>(v) the fact that any structures necessary for, or ancillary to, the operation of the columbarium existed as at the Bill announcement time; and</p> <p>(vi) (for an application for the issue of an exemption) the first date on which a set of ashes was interred in a niche in the columbarium or the first date on which an interment right in respect of a niche in the columbarium was sold;</p> <p>(f) if the columbarium premises that are under application for a TSOL involve unlawful occupation of unleased land, the applicant has to submit an application for lawful authority to occupy the unleased land and provide a written declaration that the applicant has no claim to the unleased land based on adverse possession or</p>

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		<p>any other ground;</p> <p>(g) if the columbarium premises are under application for a TSOL, it has to be certified by qualified professional(s) as not posing any obvious or imminent danger in terms of building safety and fire safety;</p> <p>(h) if the columbarium is a pre-Bill columbarium, the applicant has to submit copy of the statement of the notifiable particulars prepared, the photographs taken and other records (including sketches) made, under the Notification Scheme by the scheme officer as evidence of the notifiable particulars (or evidence of probative value comparable to the aforesaid evidence under the Notification Scheme, for those who have not participated in the Notification Scheme); and</p> <p>(i) any other information, certificates and documents specified in the application form or otherwise <b><i>reasonably</i></b><sup>1</sup> required by the Licensing Board, such as a report on the Traffic Impact Assessment (TIA) of the columbarium operation if the same has not been considered by the Town Planning Board, etc.</p> <p>The information provided will facilitate consideration of whether the relevant eligibility requirements for the relevant specified instruments are met.</p> <p>The time required for an applicant to prepare the relevant documents depends on the type of specified instrument being applied for, as well as the nature and complexity of each case (e.g. whether the applicant has already applied to the relevant departments for regularisation / rectification of its breaches, whether a TIA has to be conducted, etc.). As such, it would not be possible to provide a general estimation on the time required for preparing the documents for the application of a specified instrument.</p>

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<sup>1</sup> We will move a CSA to insert “reasonably” as suggested by the Office of the Privacy Commissioner for Personal Data, Hong Kong.

	<b>Information requested / follow-up action required</b>	<b>Response from the Government</b>
9	Time allowed for private columbarium operators to apply for specified instruments.	<p>According to clause 21(1) of the Bill, an application for the issue of a specified instrument in respect of a pre-Bill columbarium must be made to the Licensing Board after expiry of 3 months, but before expiry of 6 months, beginning on the day on which Part 4 of the Private Columbaria Ordinance comes into operation.</p> <p>Pursuant to clause 21(2) of the Bill, the Licensing Board may consider an application that is made out of time, if –</p> <ul style="list-style-type: none"> <li>(a) the applicant has a reasonable excuse for failing to make the application within time; and</li> <li>(b) in all circumstances of the case, the Licensing Board considers that it is just and equitable to consider the application.</li> </ul> <p>For those which are not pre-Bill columbaria, they must not operate, keep, manage or in any other way have control of a columbarium (including sale of an interment right in respect of the columbarium), otherwise than in accordance with a licence. Hence, they should submit an application and obtain a licence in good time, before starting operation of their columbaria.</p>
10	To consider deleting the term “關於” from clause 22(2)(a)(i).	We will consider deleting “有關” before “須通報詳情” in clause 22(2)(a)(i) and (ii) and (3) <sup>2</sup> .

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<sup>2</sup> We will consider making similar amendments to clause 22(4)(a) and (b), (6) and (9).



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11	To review clause 22(2) and clause 22(9).	<p>For clause 22(2), we have already made clear in clause 22(1)(f) that the Notification Scheme was an administrative scheme announced by Secretary for Food and Health at the Bill announcement time, and hence any reference to it should rightly be in past tense. We consider the current wording of clause 22(2) appropriate.</p> <p>We will consider deleting clause 22(9)(a) as suggested by a LegCo Member, so that the Private Columbaria Licensing Board may consider other evidence of notifiable particulars produced by an applicant (who has not participated in the Notification Scheme) for the purposes of an application for a specified instrument. In doing so, the Licensing Board need not be satisfied in the first place that the applicant was precluded from participating in the Notification Scheme by circumstances beyond the applicant's control.</p>
12	To consider revising clause 22(8).	<p>Clause 22(6) has already clearly stipulated the effect of the information gathered under the Notification Scheme (which is to serve as evidence of the notifiable particulars), while clause 22(8) provides that if an applicant for a specified instrument in respect of a pre-Bill columbarium fails to produce such evidence, the Licensing Board may treat the applicant as having failed to prove to its satisfaction any notifiable particulars in respect of the columbarium. We consider clause 22(8) has duly reflected the policy intent.</p>

**Food and Health Bureau**  
**18 December 2015**  
**[updated on 24 December 2015]**

**Eight Public Columbaria under the Management of FEHD**  
**(As at 30 November 2015)**

	<b>Name of Columbaria</b>	<b>Total No. of Niches</b>	<b>Unallocated New Niches</b>
1.	Cape Collinson Columbarium	61 615	0
2.	Diamond Hill Columbarium	63 351	0
3.	Fu Shan Columbarium	9 625	0
4.	Kwai Chung Columbarium	9 276	0
5.	Wo Hop Shek Columbarium	66 000	5 069
	Gallant Garden	120	107
	Tribute Garden	30	30
6.	Cheung Chau Columbarium	3 335	524
7.	Lamma Columbarium	490	405
8.	Peng Chau Columbarium	490	91
<b>Total</b>		<b>214 332</b>	<b>6 226</b>

**Eight Columbarium Projects under the District-based Columbarium Development Scheme for which Support from the Relevant District Councils has been Obtained**

	<b>District</b>	<b>Columbarium Project</b>	<b>Anticipated Supply of New Niches</b>
1.	Wong Tai Sin	Diamond Hill Columbarium Extension	1 540
2.	Islands	Cheung Chau Cemetery extension	1 000 <sup>(1)</sup>
3.	Wan Chai	The Hong Kong Cemeteries and Crematoria Office (part) of the Food and Environmental Hygiene Department at Wong Nai Chung Road	855
4.	Tuen Mun	Part of the Tsang Tsui ash lagoon next to Black Point Power Station	160 000
5.	North	Surplus coffin burial grounds and other land within the Wo Hop Shek Cemetery (Phase I Development)	44 000
6.	Kwai Tsing	A site on Tsing Tsuen Road near Tsuen Wan Chinese Permanent Cemetery	20 000
7.	Eastern	A site on Cape Collinson Road, opposite Chai Wan Chinese Permanent Cemetery Columbarium	25 000
8.	North	Surplus coffin burial grounds and other land within the Wo Hop Shek Cemetery	200 000
<b>Total</b>			<b>452 395</b>

Footnote (1): We plan to consult the Islands District Council in 2016 for providing another 1 000 niches in the Cheung Chau Cemetery extension.

**Annex 3**

**Survey Result on Ashes Storage Quantity inside Premises Provided by 81 Undertakers with No Licensing Restriction on Temporary Storage of Human Ashes inside the Premises**  
( as at 30 June 2015 )

No. of undertakers interviewed		81
No. of undertakers with provision of temporary storage service of ashes		74
No. of sets of ashes being kept in the premises	No. of ashes urns:	7,614
	No. of ashes bags:	13,624
	<b><u>Total ash storage quantity:</u></b>	<b><u>21 238</u></b>
Average ash storage time range	The shortest period	2 months
	The longest period	4 years
	<b><u>Average storage period :</u></b>	<b><u>1 year and 8 months</u></b>

**Information on the use of “Shall Not” and “Must Not” in Legislation**

**(A) Examples of provisions using “shall not”**

*(i) Section 6X(2), Betting Duty Ordinance (Cap. 108)*

- “The Secretary shall not issue the licence to a company unless the Secretary is satisfied that the company, and all the directors, principal officers and controllers of the company, are fit and proper persons for the purpose of this section.”
- “除非局長信納有關公司及其所有董事、主要人員及控制人均就本條而言屬適當人選，否則局長不得向該公司發出牌照。”

*[Added by s. 14 of the Betting Duty (Amendment) Ordinance 2003 (29 of 2003), gazetted on 11 July 2003.]*

*(ii) Section 4(2), Limitation Ordinance (Cap. 347)*

- “An action for an account shall not be brought in respect of any matter which arose more than 6 years before the commencement of the action.”
- “清算帳項的訴訟，不得就任何於訴訟展開時已發生超過 6 年的事項而提出。”

*[The Limitation Ordinance 1965 (31 of 1965) was gazetted on 11 June 1965; the Chinese authentic version (L.N. (C) 35 of 1996) was gazetted on 12 April 1996.]*

(iii) *Section 11(2), Trade Marks Ordinance (Cap. 559)*

- “A trade mark shall not be refused registration by virtue of subsection (1)(b), (c) or (d) if, before the date of application for registration, it has in fact acquired a distinctive character as a result of the use made of it.”
- “如任何商標在註冊申請日期前已因其付諸使用而實際上具有顯著特性，則不得憑藉第(1)(b)、(c)或(d)款而拒絕註冊該商標。”

*[The Trade Marks Ordinance (35 of 2000) was gazetted on 16 June 2000.]*

(B) **Examples of provisions using “must not”** –

(i) *Section 6(3), Minimum Wage Ordinance (Cap. 608)*

- “An advance or over-payment of wages made to an employee in any wage period must not be counted as part of the wages payable in respect of that period.”
- “於任何工資期內預支或超額支付予僱員的工資，不得算作為須就該工資期支付的工資的一部分。”

*[The Minimum Wage Ordinance (15 of 2010) was gazetted on 23 July 2010.]*

(ii) *Section 9(2), Lifts and Escalators Ordinance (Cap. 618)*

- “A person must not use or operate a lift if there is no use permit in force in respect of the lift.”
- “如某升降機沒有屬有效的准用證，任何人不得使用或操作該升降機。”

*[The Lifts and Escalators Ordinance (8 of 2012) was gazetted on 27 April 2012.]*

(iii) *Section 87(2), Companies Ordinance (Cap. 622)*

- “Except as provided in Division 8, a company must not alter in its articles any statement mentioned in section 83 or 84(1).”
- “除按第 8 分部規定外，公司不得在其章程細則中修改第 83 或 84(1)條所述的任何陳述。”

*[The Companies Ordinance (28 of 2012) was gazetted on 10 August 2012.]*