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Legislative Council

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**Paper for the House Committee Meeting
on 27 June 2014**

**Legal Service Division Report on
Private Columbaria Bill**

I. SUMMARY

- 1. The Bill** The Bill seeks to provide for the licensing of non-Government columbaria for keeping cremated human remains, the establishment of the Private Columbaria Licensing Board and for related and incidental matters.
- 2. Public Consultation** The Food and Health Bureau launched the first public consultation in July 2010 on a review of the columbarium policy. A second-round consultation was launched in December 2011 on the licensing scheme. A business impact assessment (BIA) 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. According to the Administration, the views collected indicated general support for taking forward the licensing scheme but different stakeholders have different views on the level of regulation and the approach for handling pre-Bill columbaria.
- 3. Consultation with LegCo Panel** As advised by the Clerk to the Panel on Food Safety and Environmental Hygiene (the Panel), the Panel was briefed on the progress of the drafting of the Private Columbaria Bill including the result of the BIA study and the key features of the Bill on 19 November 2013. Various concerns were expressed by the Panel members.
- 4. Conclusion** In view of the proposed policy change and the grandfathering arrangements, it is recommended that a Bills Committee be formed to study the Bill in detail. Meanwhile, the Legal Service Division is scrutinizing the legal and drafting aspects of the Bill.

II. REPORT

The date of First Reading of the Bill is 25 June 2014. Members may refer to the LegCo Brief (File Ref.: FH CR 2/3751/07) issued by the Food and Health Bureau (FHB) on 18 June 2014 for further information.

Object of the Bill

2. The Bill seeks to provide for the licensing of non-Government columbaria for keeping cremated human remains, the establishment of the Private Columbaria Licensing Board (Licensing Board) and for related and incidental matters.

Background

3. According to paragraph 3 of the LegCo Brief, the Administration proposes a licensing scheme to regulate private columbaria for –

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

4. The Administration had launched two rounds of public consultations first on the review of columbarium policy in July 2010, and then on the licensing scheme in December 2011 respectively. According to the Administration, there was public support for a licensing scheme to enhance the regulation of private columbaria, but there were divergent views on the scope and level of regulation under the licensing scheme and the arrangements for the pre-existing private columbaria.

Provisions of the Bill

5. The Bill is divided into eleven parts and seven Schedules. Its key provisions are summarized as follows –

Private Columbaria Licensing Board

6. A Licensing Board is established to determine applications for a licence, exemption or temporary suspension of liability (altogether referred to as

¹ A pre-Bill columbarium means a columbarium that was in operation, and in which ashes were interred in inches, immediately before the Bill announcement time (i.e. 8:00 a.m. on 18 June 2014).

specified instrument) in respect of a columbarium, to issue guidelines and codes of practice about the operation and management of columbaria, to conduct investigation into irregularities and discipline operators, and to exercise powers that are ancillary to its functions (clauses 6 and 7).

Control on operation of private columbaria

7. A person must have a licence to operate a private columbarium, including selling interment rights. However, operation of a private columbarium without selling interment rights is permitted under an exemption or temporary suspension of liability. Contravention of the prohibition is an offence punishable by a maximum fine of \$5,000,000 and imprisonment for seven years (clauses 8 and 9).

Instruments required for operating private columbaria

8. The Licensing Board is empowered to issue, renew or extend a specified instrument for operating a private columbarium, but a private columbarium subject to certain enforcement actions under the Town Planning Ordinance (Cap. 131) or the Buildings Ordinance (Cap. 123) may not be issued with a specified instrument (clauses 11 and 12). The matters that affect the grant or refusal of an application for a specified instrument (eligibility criteria) are set out in clause 13. They include non-compliance with the land/planning/building-related requirements, failure to submit a management plan to the Licensing Board, and the operator's interest in the premises. The modifications of clause 13 in relation to an application for the issue of a licence of a pre-Bill columbarium are provided for in clause 14.

9. Grandfathering arrangements for pre-Bill columbaria are provided in clause 15 and other provisions of the Bill. Pre-bill columbarium is a columbarium which was in operation before the cut-off time (i.e. 8:00 a.m. on 18 June 2014) with interred ashes in its niches. If it meets other requirements under the Bill, the person operating the columbarium is eligible to apply for exemption status under the proposed licensing scheme if the operation of the columbarium commenced before 1 January 1990. If the operator of a pre-Bill columbarium wishes to apply for an exemption status, he or she must freeze the operation and cease selling (including letting out) new or unoccupied niches from the cut-off time; failing which, the operator would lose their eligibility for seeking the exemption status and must obtain a licence for continuing the operation and selling (or letting out) niches. An operator of a pre-Bill columbarium seeking a licence or exemption may apply to the Licensing Board for temporary suspension of liability if he or she needs time to work towards meeting the relevant requirements. The temporary suspension of liability would enable the columbarium to continue operating and providing services before a licence or exemption is granted. During the validity period of the temporary suspension of liability, the columbarium concerned could not sell or let out any new or unoccupied niches.

10. The form of a specified instrument and the conditions that may be imposed on a specified instrument are provided for in clauses 23 to 31. The main conditions include those about ash interment and continued compliance with the statutory requirements. A temporary suspension of liability, if issued, will be subject to conditions requiring its holder to take steps, with reasonable expedition, towards meeting the statutory requirements for a licence or exemption and procuring the issue of a licence or exemption before the expiry of the temporary suspension of liability.

11. The circumstances in which a specified instrument may be transferred, and the circumstances under which the Licensing Board may revoke or suspend a specified instrument or vary its conditions, are specified in clauses 32 and 33 respectively. Clause 35 provides for the suspension of operation of the Licensing Board's decision if it is appealed against.

Operation of columbaria

12. Clause 41 imposes the requirements that an agreement for the sale of an interment right (the agreement) must meet in order for it to be enforceable by the seller. Among other things, the agreement must not purport to sell an interment right for a term beyond the term of the lease, licence or other instrument under which the columbarium is held from the Government. The agreement must contain essential information, recommendations and terms specified in Schedule 4. If the agreement is not enforceable by the seller, the purchaser may cancel the agreement by giving the seller written notice and obtain a refund of all money paid (clause 42). Clause 43 sets out the requirements for records to be kept by each holder of a specified instrument. Clauses 44 to 47 provide for the ongoing obligations on a holder of a specified instrument; failure to comply with any of the requirements constitutes an offence.

Enforcement

13. Clause 48 provides for appointment of an authorized officer by the Director of Food and Environmental Hygiene. The Director's and authorized officers' powers of entry, search and arrest are set out in clauses 49 to 51. Clause 52 provides for related offences. Clause 54 empowers the Director to issue an enforcement notice to require the holder of a specified instrument to end and remedy any contravention of a condition of the instrument; failure to comply with the enforcement notice is an offence.

Ash disposal and cessation of columbaria

14. Clauses 59 and 60 provide that a person who has operated a columbarium must not abandon the columbarium. Upon cessation of operation of a columbarium, the person who has operated, kept, managed or in any other way

control the columbarium must give a written undertaking to the Director or an authorized officer to carry out the prescribed ash disposal procedure. This applies whether the columbarium is issued with a specified instrument, is illegally operated, or the person operated the columbarium only before the enactment date. Such person must not improperly dispose of ashes (clause 58). Contravention of any of the obligations is an offence (clause 63).

Appeal

15. The right of appeal and for the establishment and composition of the Private Columbaria Appeal Board (Appeal Board) are provided for in clauses 71 to 73. Clauses 74 to 80 deal with the procedures for hearing an appeal, create related offences, and provide for immunity of members of an Appeal Board and witnesses appearing before it.

Implication on other Ordinances

16. The requirements of the Bill are in addition to and do not derogate from other legal requirements unless otherwise stated in the Bill. A specified instrument does not negate any liability under any other Ordinance (clause 96). Clauses 97 to 99 modify the Land (Miscellaneous Provisions) Ordinance (Cap. 28), the Town Planning Ordinance (Cap. 131) and the Buildings Ordinance (Cap. 123) –

- (a) The modifications apply to certain breaches of these Ordinances by a pre-Bill columbarium if –
 - (i) a specified instrument specified in the relevant provision is in force or is being applied for or refusal of the instrument is under appeal and is suspended from operation; and
 - (ii) the breach is limited to the extent that is necessary for, or ancillary to, the operation of the columbarium and does not exceed the extent as at the Bill announcement time².
- (b) The effects of the modifications are that certain provisions of these Ordinances do not apply during the period the conditions are met.

Commencement

17. The Bill, if passed, would come into operation on a day to be appointed by the Secretary for Food and Health by notice published in the Gazette.

² According to the proposed definition under the Bill, the "Bill announcement time" means 8:00 a.m. on 18 June 2014.

Public Consultation

18. FHB launched the first public consultation in July 2010 on a review of the columbarium policy. A second-round consultation was launched in December 2011 on the licensing scheme. A business impact assessment (BIA) 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. According to the Administration, the views collected indicated general support for taking forward the licensing scheme but different stakeholders have different views on the level of regulation and the approach for handling pre-Bill columbaria.

Consultation with LegCo Panel

19. As advised by the Clerk to the Panel on Food Safety and Environmental Hygiene (the Panel), the Panel was briefed on the progress of the drafting of the Bill including the result of the BIA study and the key features of the Bill on 19 November 2013. While members in general supported the Bill to introduce a licensing scheme for private columbaria, some members expressed concern that the Administration would provide a long transitional period for the unauthorized private columbaria to meet the proposed licensing requirements. Some members were concerned about the cut-off date for determining eligibility for private columbaria to apply for licences under the proposed licensing scheme and the proposed exemption for undertakers. Concerns were also raised about the arrangement for handling the interred niches deposited in unauthorized private columbaria upon commencement of the Bill and the "outcome-based approach" proposed by the BIA consultant to replace the originally proposed maintenance fund of 15% of the sales proceeds from niches during the consultation period.

Conclusion

20. The Bill introduces a new legislation for the licensing of non-Government columbaria. In view of the proposed policy change and the grandfathering arrangements, it is recommended that a Bills Committee be formed to study the Bill in detail. Meanwhile, the Legal Service Division is scrutinizing the legal and drafting aspects of the Bill.

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