

Tel No. : 3919 3204
Fax No. : 2509 9055

M E M O

To : Clerk to the Panel on Food Safety and Environmental Hygiene

From : CCS(2)4

Our Ref : CB2/BC/1/16

Date : 2 June 2017

Bills Committee on Private Columbaria Bill

Referral to Panel on Food Safety and Environmental Hygiene

The Bills Committee on Private Columbaria Bill completed scrutiny of the Bill and reported its deliberations to the House Committee at its meeting on 24 March 2017 and to the Council at its meeting on 12 and 13 April 2017. The Bill passed through the Council on 25 May 2017. The Private Columbaria Ordinance will come into effect on 30 June 2017 upon gazettal.

2. Arising from members' suggestions in the course of deliberating the Bill, the Administration has undertaken to:

- (a) keep in view the implementation of the Ordinance and propose amendments to the Ordinance as and when necessary. A review of the Ordinance will in any event be conducted around three years after enactment; and
- (b) relay to the Private Columbaria Licensing Board of the members' suggestion of uploading information on applications for specified instruments onto the Licensing Board's website.

3. Furthermore, some provisions of the Bill stipulate that the concerned parties must act according to the requirements specified by the Licensing Board or the Director of Food and Environmental Hygiene ("DFEH") and failure to do so constitutes a criminal offence. Relevant examples include:

- (a) pre-cut-off columbaria¹ granted with exemption should, in connection with changes of dedicated persons of niches, update their registers containing the particulars specified by the Licensing Board in a timely manner;
- (b) if there is a material change in the information provided for the application for a specified instrument, the holder of a specified instrument must notify the Licensing Board of such a change within the time specified in the Ordinance;
- (c) a person holding a licence in respect of a columbarium must enter the particulars of each of the agreement for sale of an interment right into a register within a period of time as specified by the Licensing Board;
- (d) an ash handler is required to, on the expiry of the claim period for returning ashes, deliver unclaimed ashes to DFEH in a manner specified by DFEH; and
- (e) records kept by an ash handler must contain information required by DFEH.

Given that such requirements are not provided for in subsidiary legislation and therefore would not be subject to amendment by the Legislative Council, the Bills Committee is concerned about the serious consequence (i.e. criminal sanction) for non-compliance but is also aware that criminal sanction is necessary in order to have sufficient deterrent effect. It considers that as non-compliance cases would be handled by the court, it could play the role of "gatekeeper" in deciding the penalty to be imposed on the offenders concerned. Taking into account the above factors, the Bills Committee accepts the relevant provisions.

¹ Private columbaria that were in operation, and in which ashes were interred in niches, immediately before the cut-off time which is 8 am on 18 June 2014.

4. The Administration has also undertaken to brief the relevant Panel in a timely manner should there be further development or any difficulties encountered in the implementation of the arrangements mentioned in paragraphs 2 and 3 above.

5. Extracts from the report of the Bills Committee to the Council and the Hansard are attached for your reference and follow-up.



(Colin CHUI)
CCS(2)4

Encl.

**Extract from the speech of the Secretary for Food and Health
set out in the Official Record of Proceedings of
Council meeting on 13 April 2017
(Pages 6433 – 6435)**

X X X X X X X X

However, as we cannot fully foresee the adjustments to be made by the existing columbaria at the initial stage after the passage of the Bill, we have to provide flexibility in certain provisions of the Bill. It is impractical to expect that the Bill can resolve in one go all the regulatory problems that may arise. I appreciate the Bills Committee's understanding of this point and its consent to the present arrangement, on the premise that I have to respond to their concerns in my speech. I will now respond accordingly.

First, timely review. The provisions of the Bill are very complicated, and the scope and extent covered are deep and extensive. We will probably only have a more concrete and clearer understanding of the numerous problems and possible scenarios after the Private Columbaria Ordinance ("the Ordinance") is implemented. In this connection, we will closely monitor the implementation of the Ordinance and introduce an Amendment Bill when necessary. In fact, while we have pledged to conduct a review of the Ordinance around three years after implementation, we may have to initiate discussions with the Legislative Council at an earlier date if there is an urgent need.

Second, some members of the Bills Committee have suggested that the Licensing Board should consider uploading information on applications for specified instruments onto its website. We noted this suggestion and will relay it to the Licensing Board. At present, we propose to make the following information available online for public information:

- (a) the status of applications for specified instruments received by the Licensing Board (pending determination, approved or rejected); and
- (b) the corresponding validity period of specified instruments issued.

(THE PRESIDENT resumed the Chair)

This can facilitate consumers' access to data to better protect themselves from untrue claims made by operators that they have been duly authorized to sell niches under a licence.

Furthermore, some provisions of the Bill stipulate that the concerned parties must act according to the requirements specified by the Licensing Board or the Director of Food and Environmental Hygiene ("DFEH") and failure to do so constitutes a criminal offence. Relevant examples include:

- (a) pre-cut-off columbaria granted with exemption should, in connection with changes of dedicated persons of niches, update their registers containing the particulars specified by the Licensing Board in a timely manner;
- (b) if there is a material change in the information provided for the application for a specified instrument, the holder of a specified instrument must notify the Licensing Board of such a change within the time specified in the Ordinance;
- (c) a person holding a licence in respect of a columbarium must enter the particulars of each of the agreement for sale of an interment right into a register within a period of time as specified by the Licensing Board;
- (d) an ash handler is required to, on the expiry of the claim period for returning ashes, deliver unclaimed ashes to DFEH in a manner specified by DFEH; and
- (e) records kept by an ash handler must contain information required by DFEH.

Some members are concerned that the relevant requirements will not be explicitly provided in the legislation; yet non-compliance with such requirements will entail criminal consequences, which is serious. Nevertheless, they also agree that the provisions have to provide certain deterrent. I appreciate the Bills Committee's understanding of the Administration's dilemma: on the one hand, stipulating the relevant requirements in detail in the legislation can make such requirements more concrete and explicit; yet on the other hand, there might be omissions to render the Licensing Board unable to deal with the scenarios that we cannot project today. Having taken into account the relevant considerations, the Bills Committee finally does not object to retaining the original provisions, so as to allow the Licensing Board to set out requirements based on the specific facts and actual situations of different cases, and refine the

arrangements in due course after drawing experience from practice. The Bills Committee also agrees that there is a need to introduce criminal liabilities against non-compliance for deterrent effect. Since the courts will handle the adjudication of criminal liability, they can play the role of gatekeeper in deciding whether the merits of prosecution are justified, as well as whether the penalty and punishment are administered appropriately.

Should there be further development or any difficulty encountered in the implementation of the above arrangements, we will brief the Panels concerned in a timely manner.

X X X X X X X X

節錄自食物及衛生局局長載於
2017年4月13日立法會會議過程正式紀錄的發言
(第4605至4607頁)

X X X X X X X X

然而，我們不可能百分百預見這些現存骨灰安置所在《條例草案》落實的初期會作出的調整，所以《條例草案》的一些條文需要留有彈性。期望《條例草案》能一次過解決所有可能出現的規管問題，是不切實際的。我感激法案委員會對此表示理解，並同意現時《條例草案》的安排，唯前提是我需要今天這篇演辭中作出若干回應。我現在逐一闡述有關回應。

第一，適時的檢討。《條例草案》的條文十分複雜，涉及的層面及範圍既深且廣。有不少問題和可能出現的情況，或者在實踐後才能更具體和明確地掌握。為此，我們會密切監察《私營骨灰安置所條例》("《條例》")的實施情況，並在有需要時就《條例》提出修訂建議。我們承諾會在《條例》實施約3年後對其進行檢討。事實上，若有緊急需要，我們可能需要更早與立法會磋商解決方法。

第二，法案委員會部分委員建議，發牌委員會應考慮將指明文書申請的資料上載至發牌委員會的網站。我們備悉此建議，並會轉達給發牌委員會。我們在現階段建議，以下資料將會在網上公布，以供公眾備悉：

- (a) 發牌委員會收到的指明文書申請的狀況(例如"待決"、"已獲審批"、"已遭拒絕")；及
- (b) 已發出的指明文書的相應有效期。

(主席恢復主持會議)

這做法有助消費者獲取資訊以更好保障自己，免被營辦人指已獲批准可合法出售龕位的不實聲稱所誤導。

另外，在《條例草案》中，部分條文要求相關人士須根據發牌委員會或食物環境衛生署("食環署")署長指明的規定行事，否則會觸犯刑事罪行。有關的例子包括：

- (a) 獲發豁免書的截算前骨灰安置所，須因應龕位的受供奉者的更改，適時更新載有發牌委員會指明詳情的登記冊；
- (b) 如有關指明文書申請所提交的資料有關鍵性的改變，指明文書持有人須在《條例》指明的時間內，將該改變通知發牌委員會；
- (c) 就骨灰安置所持有牌照的人須就每份出售安放權協議，在發牌委員會指明的期間內，把委員會指明的詳情記入登記冊；
- (d) 骨灰處理者須在交還骨灰申索期間屆滿後，將未有交還的骨灰，以食環署署長指明的方式交付署長；及
- (e) 骨灰處理者所備存的紀錄，須載有署長所要求的資料。

部分委員關注到，有關的規定不會在法例明文列出；然而，有關違規後果屬刑事違法，是嚴重的，但亦認同條文需具一定阻嚇力。我感謝法案委員會理解政府當局所面對的兩難的局面：一方面，把有關規定詳列在法例內，能具體化、明確化相關的規定；但另一方面，或許會掛一漏萬，令發牌委員會無法處理我們今天未能預測到的情況。在顧及有關考慮後，法案委員會最終對保留原有條文不持異議，以容許發牌委員會根據不同個案的具體事實及實際情況作出規定，並在汲取經驗後適時優化有關安排。法案委員會亦同意，有需要為有關違規行為引入刑事法律責任，以收阻嚇作用。由於有關刑事責任的判決會由法庭處理，法庭可擔當把關角色，決定檢控理據是否充分及相關罰則懲處是否適當和相稱。

若將來就上述安排有進一步發展，或遇到任何執行上的困難，我們會適時向相關事務委員會簡報有關情況。

X X X X X X X X

**Extract from the report of the
Bills Committee on Private Columbaria Bill to the Council**

X X X X X X X X

10. As requested by the Bills Committee, the Administration has undertaken to keep in view the implementation of the Ordinance, propose amendments to the Ordinance as and when necessary, and conduct a review of the Ordinance in any event around three years after its enactment. The Administration has also agreed that the Secretary for Food and Health will give the undertakings in his speech for resumption of the Second Reading debate on the Bill ("SFH's speech").

X X X X X X X X

Updating of registers of pre-cut-off columbaria

23. Clause 54(2)(a) of the Bill requires the holder of an exemption in respect of a pre-cut-off columbarium to update the register as endorsed by the Licensing Board ("the endorsed register") of the columbarium as soon as practicable after effecting the changes of a dedicated person. The Legal Adviser to the Bills Committee ("the Legal Adviser") has pointed out that for such purpose, the particulars required to be contained in the endorsed register have to be updated under clause 54(2)(a). Under clause 23(2)(b), these particulars would be specified by the Licensing Board. They would not be provided for in subsidiary legislation and therefore would not be subject to amendment by LegCo. Non-compliance with clause 54(2) would be an offence punishable with a fine and imprisonment under clause 54(4) of the Bill.

24. The Legal Adviser has further pointed out that given that the requirements so imposed were not subject to amendment by LegCo, the Former BC was concerned about the serious consequence (i.e. criminal sanction) for non-compliance. The Former BC was, however, also aware that criminal sanction was necessary in order to have sufficient deterrent effect. It considered that as non-compliance cases would be handled by the court, it could play the role of "gatekeeper" in deciding the penalty to be imposed on the offenders concerned. Taking into account the above factors, the Former BC accepted the relevant provisions and suggested that its concerns, factors for consideration and acceptance of the arrangements should be covered in the SFH's speech.

X X X X X X X X

Information on applications for specified instruments

Notification of changes of information on applications for specified instruments

27. Clause 42(3)(b) of the Bill requires the holder of a specified instrument (i.e. a licence, an exemption or a TSOL) to provide information required by the Licensing Board within the time specified by it when a change occurs that materially affects the accuracy of the information provided by the holder in connection with the application for the specified instrument on the basis of which the specified instrument has been issued, renewed or extended. Clause 42(3)(b)(ii) empowers the Licensing Board to specify the information to be provided by the holder and the time frame for such provision. Members note that such requirements imposed by the Licensing Board are not provided for in subsidiary legislation and therefore would not be subject to amendment by LegCo. Non-compliance with the Licensing Board's requirements would constitute an offence punishable with a fine and imprisonment under clause 42(6) of the Bill. Members also note the Former BC's concerns and its acceptance of the relevant provisions as well as its suggestion which are the same as those mentioned in paragraph 24 above.

X X X X X X X X

Uploading information on applications for specified instruments onto Licensing Board's website

29. Under section 4(1)(a) of Schedule 3 to the Bill, the Licensing Board may publish a notice of an application for the issue of a licence in respect of a private columbarium through the Internet or a similar electronic network or in any other manner that the Licensing Board considers appropriate. Some members including Ms Tanya CHAN and Mr LEUNG Kwok-hung have suggested that in addition to the notice of a licence application, other information on the application should also be uploaded onto the Licensing Board's website. Such online publication should also cover information on applications for the other two types of specified instruments (i.e. exemption and TSOL). The Administration has advised that the suggestion would be relayed to the Licensing Board.

X X X X X X X X

Imposing requirements not in subsidiary legislation but entail criminal sanction for non-compliance

49. Apart from empowering the Licensing Board to impose requirements mentioned in paragraphs 23 and 27 above, the Bill also confers power on the Licensing Board or other authorities (e.g. DFEH) to impose requirements which are not provided for in subsidiary legislation but entail criminal sanction imposed in the event of non-compliance. They include, for example:

- (a) the particulars specified by the Licensing Board of each of the agreement to be entered into the relevant register within the period specified by the Licensing Board under clause 49(2)(b) of the Bill;
- (b) delivery of the ashes that are not returned to an eligible claimant to DFEH in a manner specified by DFEH mentioned in section 7(2)(b) of Schedule 5 to the Bill; and
- (c) information about ashes and claims handled in carrying out the prescribed ash disposal procedures required by DFEH to be contained in the record of the steps that an ash handler has taken to carry out the procedures under section 10(1)(b) of Schedule 5 to the Bill as revised by the Administration's proposed CSAs to that provision.

As the concerns relating to these requirements are similar to those mentioned in paragraph 24 above, the Bills Committee accepts the relevant provisions based on the same rationale explained in that paragraph. Regarding the requirement set out in paragraph 49(c) above, the Bills Committee has also requested the Administration to reaffirm its undertaking given to the Former BC that it will brief the relevant Panel after the implementation of the Ordinance on the difficulties encountered, if any, in enforcing that provision and on the information referred to therein. The Administration is also requested to include such undertaking in the SFH's speech.

X X X X X X X X

節錄自《私營骨灰安置所條例草案》委員會
向立法會提交的報告

X X X X X X X X

10. 應法案委員會的要求，政府當局承諾會密切注視《條例》的實施情況、在有需要時就《條例》提出修訂建議，以及必定會在《條例》制定約3年後進行檢討。政府當局並同意，食物及衛生局局長會在條例草案恢復二讀辯論的演辭("局長演辭")中，作出這方面的承諾。

X X X X X X X X

更新截算前骨灰安置所登記冊

23. 條例草案第54(2)(a)條規定就截算前骨灰安置所持有豁免書的人，須在完成更改受供奉者後，在切實可行的範圍內，盡快更新經發牌委員會批註的骨灰安置所登記冊("經批註登記冊")。法案委員會的法律顧問("法律顧問")指出，為達致上述目的，經批註登記冊須載有的詳情，必須按照條例草案第54(2)(a)條更新。根據條例草案第23(2)(b)條，這些詳情將由發牌委員會指明，卻並非在附屬法例中訂明，因此不受立法會修訂。條例草案第54(4)條訂明，不遵從條例草案第54(2)條即屬犯罪，可處罰款及監禁。

24. 法律顧問進一步指出，鑒於立法會不可修訂發牌委員會施加的規定，前法案委員會關注違規的嚴重後果(即刑事制裁)。然而，前法案委員會亦明白有需要訂定刑事制裁，以產生足夠的阻嚇力。前法案委員會認為，由於違規個案將交予法院處理，法院可擔當"把關者"的角色，決定對有關違規者施加的罰則。考慮到上述因素，前法案委員會接納相關條文，並建議應在局長演辭中說明前法案委員會就有關安排提出的關注、其考慮因素及接納原因。

X X X X X X X X

指明文書申請的資料

指明文書申請的資料如有改變須予通知

27. 條例草案第42(3)(b)條規定，如指明文書(即牌照、豁免書或暫免法律責任書)的持有人已在與指明文書申請相關的情況下提供資料，且指明文書已應該申請而發出、續期或延展，則倘若有一項改變發生，而該改變對該資料的準確性，有關鍵性的影響，該持有人須在發牌委員會指明的時間內，提供該委員會所要求的資料。條例草案第42(3)(b)(ii)條賦權發牌委員會指明該持有人須提供的資料，以及提供資料的時限。委員察悉，發牌委員會施加的這些規定並非在附屬法例中訂明，因此不受立法會修訂。根據條例草案第42(6)條，不遵從發牌委員會的規定即構成罪行，可處罰款及監禁。委員並察悉前法案委員會對相關條文的關注，以及前法案委員會已接納該等條文，並提出建議(與上文第24段的內容相同)。

X X X X X X X X

將指明文書申請的資料上載至發牌委員會的網站

29. 條例草案附表3第4(1)(a)條訂明，凡有人提出申請，要求就某私營骨灰安置所發出牌照，發牌委員會可透過互聯網或類似的電子網絡，或以發牌委員會認為適當的任何其他方式，發布該申請的通告。部分委員(包括陳淑莊議員及梁國雄議員)建議，除了牌照申請的通告外，有關該項申請的其他資料，亦應上載至發牌委員會的網站。這類網上發布還應涵蓋另外兩類指明文書(即豁免書及暫免法律責任書)申請的資料。政府當局表示會把這項建議轉達發牌委員會。

X X X X X X X X

施加並非在附屬法例中訂明的規定但違規者將引致刑事制裁

49. 條例草案除賦權發牌委員會施加上文第23及27段提及的規定外，還授權發牌委員會或其他當局(例如署長)施加並非在附屬法例中訂明的規定，但違規者將引致刑事制裁。這些規定的例子包括：

- (a) 根據條例草案第 49(2)(b)條，發牌委員會就每份協議指明的詳情，須在發牌委員會指明的期間內，記入相關的登記冊；
- (b) 條例草案附表 5 第 7(2)(b)條提及，沒有交還予合資格申索人的骨灰，須以署長指明的方式，交付署長；及
- (c) 根據條例草案附表5第10(1)(b)條(經政府當局就該條文建議的修正案修訂)，骨灰處理者如已採取步驟，進行訂明骨灰處置程序，便須備存該等步驟的紀錄，而該紀錄須載有署長所要求的，進行該程序所處理的骨灰及申索的資料。

鑒於這些規定引起的關注與上文第24段所提的關注類似，法案委員會基於該段闡釋的相同理據，接納相關的條文。關於上文第49(c)段所載的規定，法案委員會亦要求政府當局再次確認其對前法案委員會作出的承諾，即在《條例》實施後，向相關事務委員會簡報在執行該條文時遇到的困難(如有的話)，以及該條文所提述的資料。法案委員會並要求政府當局把這項承諾加入局長演辭。

X X X X X X X X