

## Executive Summary

### Direct Investigation on Management of Permitted Burial Grounds

#### Background

The custom of hillside burial of indigenous villagers of the New Territories has a long history. In 1983, the Government introduced the “hillside burial policy” (“the Policy”) and designated about 520 Permitted Burial Grounds (“PBGs”) on various pieces of Government land for burial of deceased indigenous villagers of the New Territories. The land totals some 4,000 hectares (about half the size of Hong Kong Island). The Policy aims to uphold the traditional rights and interests of indigenous villagers and to curb the problem of hillside burial of non-indigenous residents.

2. The Policy is jointly implemented by several Government departments in accordance with their respective jurisdictions. These departments include the Home Affairs Department (“HAD”), the Lands Department (“Lands D”), the Food and Environmental Hygiene Department (“FEHD”), the Agriculture, Fisheries and Conservation Department (“AFCD”) and the Water Supplies Department (“WSD”).

3. With the implementation of the Policy, an array of management problems associated with PBGs have emerged over the years such as unauthorised grave construction and suspected illegal burials of non-indigenous residents in PBGs. The Ombudsman, therefore, initiated this direct investigation to examine the current management system and procedures, with a view to identifying any inadequacies.

#### Burial Certificates and Responsibilities of Relevant Departments

4. Under the current system, District Officers and Assistant District Officers of HAD are delegated the statutory authority by FEHD and AFCD respectively to permit burials of deceased villagers in places other than public cemeteries and in country parks. Nevertheless, such authority does not cover enforcement against illegal burials.

5. According to the Operational Guidelines promulgated in 1983 by the former City and New Territories Administration (“CNTA”), the predecessor of HAD, when an indigenous villager passes away, his/her family member must first obtain confirmation of the indigenous status of the deceased from the Indigenous Inhabitant Representative or Rural Committee and make an oath in order to be eligible to apply for a Burial Certificate (“the Certificate”). Upon verification of the eligibility of the deceased, the District Office (“DO”) concerned will issue a Certificate and ask the family member to mark on a map of the PBG produced by Lands D to roughly indicate the proposed location of the proposed grave.

6. The Certificate sets out the conditions that Certificate holder must observe. Those conditions include:

- The remains of the deceased must be buried within the boundaries of the PBG as indicated on the map attached to the Certificate. The serial number of the Certificate must be inscribed on the gravestone.
- The Certificate holder must follow the rules on land use and public hygiene set by Lands D and FEHD respectively in the Attachment to the Certificate. If the grave is located within a country park or a water catchment area, the Certificate holder must also comply with the rules laid down by AFCD and WSD respectively.

7. DOs would refer cases of non-compliance with the above conditions to the relevant departments for follow-up in accordance with their jurisdictions and the relevant legislation. DOs have the power to revoke the Certificate in such cases, and refer the cases to Lands D and FEHD for enforcement action, i.e. removal of the grave and the remains.

8. Between 1983 and 2014, a total of 31,282 Certificates were issued by DOs in the New Territories.

## **Our Findings**

9. From the information that we have gathered, our case studies and site observations, we have identified the following inadequacies in the management of PBGs by the departments concerned.

### ***(1) Unclear Responsibilities and Divided Authority***

10. At present, the responsibilities of managing PBGs are shared by several Government departments in accordance with their jurisdictions and statutory authorities. Such divided authority and the lack of one single department for overall management have made it very difficult for PBGs to be effectively managed.

11. While HAD is responsible for processing applications for the Certificate and has been vested with the statutory authority to grant permission for deceased indigenous villagers to be buried on hillsides, the Department does not have the statutory authority and the expertise to supervise the burial process and take enforcement action against suspected illegal activities. The Department needs the assistance of other departments which have such statutory authority and expertise in handling issues relating to PBGs, e.g. to confirm whether a burial site falls within the PBG boundaries, to conduct inspections on PBGs, to follow up on cases of illegal burials and to deal with problems of environmental hygiene and illegal tree felling. However, such other departments

have failed to render HAD full support. As a result, various problems persist and remain difficult to resolve. Such a situation has already lasted for over 30 years.

12. One of the causes of the above-mentioned problem is the Government's failure to assign responsibilities properly for enforcing the Policy when it was first introduced. Prior to the establishment of Lands D in 1982, the former CNTA was responsible for administering Government land as well as handling indigenous villager affairs. Upon its establishment, Lands D took over the land administration function from CNTA, while indigenous villager affairs remain a CNTA responsibility. Since then, the two departments have continued to hold divergent views on the management responsibilities for PBGs. Consequently, the departments concerned cannot efficiently deal with the problems associated with PBGs and the related public complaints/enquiries.

13. Furthermore, under the Policy, deceased indigenous villagers can be permanently buried in PBGs, and yet PBGs remain unallocated Government land. The Government has never officially allocated PBG sites to any single department for management, nor clearly specified by way of a contract (such as a lease or land licence) the relationship between the Government and Certificate holders and their respective rights and obligations. When management problems relating to those sites emerge, there are bound to be disputes as to which party as allocatee/grantee of the land should handle the problems.

14. In one case, a District Lands Office ("DLO") was in dispute with the DO concerned on which department should be responsible for dealing with an illegal trail within a PBG. In another case that involved a dispute among different departments, AFCD argued that illegal tree felling within a burial site that was subject to the regulation of the Certificate should be handled by the DO and DLO.

15. Regarding the aforesaid systemic problems, HAD thinks that the management of PBGs can be improved by setting up inter-departmental management committees chaired by a District Officer or a Rural Representative. However, we believe that a more effective approach is to have one single department or organisation responsible for the overall management of PBGs, modelling on the case of FEHD operating public cemeteries on land allocated to the Department. In this connection, legally binding terms should also be imposed on the Certificate holders. By doing so, the issue of management responsibility can be resolved once and for all.

## ***(2) Loose Conditions of the Certificate***

16. Our investigation also reveals that the Government's regulation of PBGs is based mainly on the conditions of the Certificate issued by HAD, but such conditions are very loose and the departments concerned do not have any effective mechanisms to monitor compliance by the applicants. This is manifested in the following loopholes in the existing system of burial of indigenous villagers.

### ***No verification of burial locations***

17. According to the Operational Guidelines, neither DOs nor DLOs will conduct site visits to check the burial locations of indigenous villagers. In the absence of boundary markers for PBGs, the actual burial locations may not be the same as those indicated in the applications and may even be outside the PBGs. Although Lands D and FEHD can take enforcement actions and remove the graves and human remains in question, that is actually very difficult to do. Such actions would often be seen as disrespect for the tradition of letting the deceased rest in peace and would meet with strong resistance from the surviving descendants.

18. In one case, as many as about 60 graves/urns were found outside a hillside PBG. Eventually, the DLO and DO reluctantly had to make the case an exception and allowed those graves/urns to stay there. Another case reveals that burial sites could even infringe upon private land and that the land owner concerned eventually had to resort to a civil lawsuit at his/her own costs.

19. HAD has repeatedly proposed that Lands D verify on site the burial locations of indigenous villagers since Lands D has the expertise. Yet, Lands D refused the proposal on grounds of inadequate manpower. We are of the view that since illegal burials outside PBGs do happen, Lands D and HAD should not shy away from their responsibilities. Resource constraints are not a good excuse for inaction.

### ***No restriction on size of burial site***

20. HAD puts no restriction on the size of burial site when approving applications for burial of deceased indigenous villagers in PBGs. Nor is there any such restriction in the conditions of the Certificate. Consequently, the areas of land occupied by burial sites of indigenous villagers range from a few dozen to several hundred square feet. According to media reports, some burial sites may occupy more than 1,000 square feet of land.

21. Given the scarcity of land resources in Hong Kong, the public will find it unfair that the Government has set no restriction on the size of burial site for indigenous villagers. Indeed, the granting of free permanent use of Government land for burial of ancestors is already a very generous provision to indigenous villagers. It is, therefore, not unreasonable that the size of burial site should be suitably controlled.

### ***Futility of some conditions of the Certificate***

22. The departments concerned have set out conditions in the Certificate that holders must comply with. Nevertheless, we discover that some departments have no procedures or mechanisms to enforce those conditions. They do not even check whether the Certificate holders comply with the conditions of the Certificate, making

those conditions practically useless. For instance, it is stipulated, *inter alia*, that applicants must not remove any trees without prior permission from the DLO concerned. However, DLOs admit that they have never received any applications for tree removal within PBGs, even though it is common knowledge that grave construction at PBGs located in rural areas will normally entail certain extent of tree removal. Throughout these years, the DLOs have turned a blind eye to this problem.

23. Except for AFCD and WSD, the other departments, namely, Lands D, HAD and FEHD at present do not conduct regular inspections on PBGs. They just passively rely on reports of irregularities from the public. The absence of a mechanism to check the holders' compliance with the conditions of the Certificate amounts to conniving at or even encouraging non-compliance.

24. In October 2013, HAD held an inter-departmental meeting and proposed that a pilot scheme be introduced to certain PBGs, including the setting up of some management committees and the implementation of a number of improvement measures to strengthen the regulation of the locations and size of burial sites. That would have been a positive move, but it was halted for lack of support from the other departments concerned.

### ***(3) Lax Enforcement against Illegal Burials***

25. Burials of indigenous villagers outside PBGs and hillside burials of non-indigenous villagers (regardless whether they are within PBGs or not) are all illegal burials subject to enforcement actions by Lands D and FEHD. HAD can revoke the Certificates if the burial sites of indigenous villagers are outside PBGs.

26. We notice that illegal burials are in fact not rare. In a case cited above, as many as 60 graves/urns were found outside a hillside PBG. However, as HAD and Lands D would often suspend or even discontinue their enforcement actions when opposed by the indigenous villagers or the villages, the deterrent effect of their actions is very weak. Moreover, the departments concerned have never made any effort to assess the magnitude of the problem of burials outside PBGs.

27. FEHD's information shows that between 2009 and 2014, only three requests were received from DOs for removal of human remains involved in illegal burials. It can be seen that the departments concerned have rarely taken enforcement action in dealing with such cases. Furthermore, while HAD is empowered to revoke the Certificate in case of non-compliance, the DOs have never exercised that power since the introduction of the Policy in 1983.

### ***(4) Ecological Impact of PBGs on Conservation Areas***

28. According to the records of the Survey and Mapping Office under Lands D, there are some areas where PBGs overlap with the land of Conservation Areas or Sites of Special Scientific Interest ("SSSIs"). The overlapping areas add up to some 800

hectares. The Planning Department has indicated that those PBGs in existence before publication of the relevant statutory plans are considered as “existing use” under the Town Planning Ordinance, and so construction of new graves within those PBGs by indigenous villagers does not constitute unauthorised developments.

29. Nevertheless, the burials within the PBGs are largely incompatible with the stated purposes of Conservation Areas or SSSIs. To build a new grave, indigenous villagers would usually remove the trees, shrubs and turf in the vicinity before cementing the burial site. Apparently, such activities can damage the ecological habitat with conservation value, contrary to the Government’s original intent of designating the Conservation Areas. Given that the authorities do not verify the locations of burial site, nor is there any restriction on the size of burial sites, extensive construction works may be carried out within the conservation zones, thereby causing damage to the natural ecological environment.

30. In one case, some people were alleged to have removed the turf and vegetation within a Conservation Area to make way for building graves and an access road. A hillside slope covering 8,000 square metres had also been scorched by fire.

#### ***(5) Lack of Long-term Planning for PBGs***

31. The land available in rural areas for hillside burials is limited. Since indigenous villagers are entitled to permanent burial within PBGs, in the long run, the available space within the PBGs will gradually shrink and be less able to cope with villagers’ demand. Upon our enquiries, HAD has merely replied that it is unable to estimate the usable life span of the PBGs because when PBGs will become saturated depends on a number of uncertain and unforeseeable factors, such as the usable areas of the PBGs, the death rates among indigenous villagers, and their preference to be buried in PBGs.

32. We consider that the Government should have long-term planning. After all, the Policy has been implemented for more than 30 years. It should not be too difficult to collate the relevant data for analysis and forecast purposes. With limited land resources, the Government should give serious thoughts to the matter and contemplate how to uphold the rights and interests of indigenous villagers in hillside burials on the one hand and balance the interests of the general public on the other.

#### **Recommendations**

33. In the light of the above findings, The Ombudsman urges:

##### ***HAD, Lands D, FEHD, AFCD and WSD***

- (1) to launch the pilot scheme proposed by HAD as soon as possible, with the departments concerned actively participating according to their

respective expertise and statutory powers, to ascertain whether the improvement measures are feasible and effective, with a view to gradually extending them to cover more PBGs; such measures to include boundary markers for the PBGs and restriction on the size of burial sites;

- (2) to review and strengthen the conditions of the Certificate as soon as possible, and establish a mechanism for the departments concerned to monitor the compliance of those conditions stipulated by them and to take enforcement actions where necessary;

### ***HAD and Lands D***

- (3) to explore ways for their mutual support and set up an effective mechanism to ensure that all the graves are located within the PBGs, so as to avoid any future disputes over their enforcement actions;
- (4) to assess the magnitude of the problem of illegal burials and formulate effective enforcement strategies, including regular patrols of the PBGs and black spots of illegal burials, and step up their efforts in combating illegal burials;
- (5) to conduct a comprehensive review of the Policy jointly with the relevant departments and policy bureaux, aiming at incrementally systematising and enhancing the management of PBGs (if the management committee approach proposed by HAD proves to be unsatisfactory, deliberations should commence quickly about designating a single department/organisation to take up the overall management of PBGs); and to scrutinise the land use and the impact on natural environment in relation to the Policy, with a view to formulating a sustainable long-term strategy, including a study on the feasibility of gradually adopting the public cemetery approach for managing PBGs; and

### ***Lands D***

- (6) to avoid designating or extending PBGs within conservation zones, so as to avoid causing further damage to the ecological habitat with conservation value.