

Public Consultation on NSW Draft Funeral Funds Regulation 2016

Legal Aid NSW Submission
to NSW Fair Trading

July 2016

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 35 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW welcomes the opportunity to respond to the public consultation of the proposed *Funeral Fund Regulation 2016*.

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Funeral Funds Regulation 2016

Legal Aid NSW supports the elements of the proposed *Funeral Funds Regulation 2016* (draft Regulation) that ensure consumers are appropriately protected in their transactions relating to pre-paid funeral funds and funeral contribution funds.

Proposed changes in the draft regulation

Legal Aid NSW supports the proposed changes in the draft Regulation. In particular, Legal Aid NSW supports:

- removal of clause 17(2) requiring a consumer to pay \$50 to exercise their cooling off rights
- removal of clause 19 to ensure that directors and managers are not excluded from liability under the *Corporations Act 2001*, and
- removal of clause 15(2) meaning that suppliers will be required to provide the consumer with contract documentation once, at a time prior to entering the contract.

Legal Aid NSW is of the view that these proposed changes deliver necessary consumer protections consistent with transaction transparency, allow access to important consumer rights and provide accountability for failure to comply with those protections.

Use of un-utilised regulation-making powers

Power to cancel registration

Legal Aid NSW is of the view that the powers in section 16(1)(g) and section 39(1)(d) *Funeral Funds Act 1979* (the Act) could be used to prescribe grounds upon which the Commissioner for Fair Trading (the Secretary) could cancel the registration of a funeral contribution fund or pre-paid funeral fund.

Legal Aid NSW recommends that the powers of sections 16 and 39 of the Act be used to include a clause in the draft Regulation allowing for the cancellation of any funeral contribution fund or pre-paid funeral fund, on the ground that the fund no longer meets the requirements of section 13.

Through its casework practice, Legal Aid NSW has assisted consumers in disputes with a particular contributory funeral fund that does not maintain the requisite company rules concerning the payment of the paid-up value of the person's contributions (clause 5 *Funeral Funds Regulation 2011* (FFR)). Nevertheless, the fund was registered under the Act. Our clients paid into that fund for more than 10 years, ceased their contributions but lost any right to claim a benefit from the fund. They have been unable to claim the payments made to the fund using any other consumer protection provisions.

If the funeral fund does not maintain company rules concerning the right to a benefit after 10 years, consumers are left without any remedy for their loss. Unfortunately, the Act does not require that funds comply with clause 5 FFR, other than for registration purposes. Given the importance of these company rules and the impact on consumers, Legal Aid NSW is of the view that the draft Regulation should allow cancellation of registration where the required rules are not maintained.

Information that should be provided to consumers

Clause 15 of the draft Regulation sets out information that a funeral director should provide to a consumer when entering a pre-paid contract.

Legal Aid NSW recommends including a similar regulation that prescribes the information that a fund should provide to a consumer. Contribution funds are various types of organisations only some of which are regulated by the *Corporations Act 2001*. Legal Aid NSW submits that it would be useful for the draft Regulation to prescribe information that must be provided to consumers at the time of contract formation. This should include information similar to that required by the product disclosure regulations in the *Corporations Act 2001*.

We recommend that Fair Trading NSW use section 92 of the Act to create such a regulation.

Further Changes

Annual reports to contributors

Legal Aid NSW recommends that additional items be added to the list of particulars that must be contained in reports given to contributors (clause 8 FFR). We recommend that the funeral contribution fund be required to include:

- the value of any benefit payable on the death of the contributor or other person, as at the date of the annual statement
- the total amount the contributor has paid to the fund since commencement of the contract, and
- information about the consequences of ceasing payments.

This will inform consumers about the value of their contributions, the benefit they are entitled to and what happens if they fail to make payments. The current list of particulars includes information about the contributions consumers have made in the previous year, but lacks information about the totality of their contract, the value of the benefit where this differs from the account balance, or the consequences of failing to pay.

At present, the draft Regulation envisages that the account balance would be equal to any benefit payable on death and/or equal to the total amount the contributor has paid. In our experience, this is not always the case with a funeral contribution fund.

Legal Aid NSW has assisted approximately 170 clients in disputes with a particular contributory funeral fund. The fund does not provide consumers with the annual statements required by the Act and at present there is no remedy available to consumers for the fund's failure to comply. Annual statements provide consumers with important information about their contract and helps consumers make informed financial decisions about future planning. Where statements are not provided, consumers do not know the value of their contributions and the benefits the fund would owe to their family upon their passing.

Need for review of the *Funeral Funds Act 1979*

The Act plays an important role in the regulation of funeral funds and provides consumer protections to those entering contracts with funeral directors and funeral funds.

Legal Aid NSW believes there is significant evidence that the Act should include remedies for consumers who experience loss as a result of a provider's breaches of the Act. At present, the Act provides limited penalties and gives the Secretary power to investigate companies but it lacks critical remedies for consumers.

If such remedies were available consumers would be able to resolve issues concerning a provider's failure to provide information, failure to make payments of the paid-up value of a person's contributions and failure to provide annual statements.

Given the growth in the funeral insurance industry and the need for vulnerable consumers to find ways to pay for funerals, we believe the Act should provide sufficient protections and avenues to remedy loss when providers breach those protections.

Case study: The impact of a failure to provide statements and maintain appropriate rules

Mary lives in a remote Aboriginal community. Finding a way to pay for funerals can be difficult in circumstances where there is limited income and where there may often multiple deaths in one year. To alleviate this strain, Mary entered into a contract with a contributory funeral fund in 2005 to get cover for the costs of her funeral and the funeral of her partner. Mary attended an outreach day held by Legal Aid NSW and spoke to a lawyer about her funeral fund. Mary had never received annual statements from the funeral fund and as a result didn't know how much she had paid, or what benefit she would get if her or her partner passed away.

Legal Aid NSW assisted the client to obtain this information. Mary had made payments totaling over \$15000. She and her family would only be entitled to \$6000 upon the death of her or her husband. Mary felt deceived and said that if the fund had provided her with annual statements she might have avoided overpaying, or she would have been able to ask for help about the issue earlier. Either way, she would have been more informed. Instead, Mary feels like she can't stop paying because she will lose the value of the money she has put in. The contributory fund does not maintain the company rules required by section 13 of the Act and regulation 5 FFR

which would mean if Mary stopped paying, her family would still be able to access the paid up value of her fund. As it stands, Mary would lose everything if she stops paying. The current laws are insufficient to provide any remedy for Mary's situation.