



Law Society
of Scotland

Consultation response

CP21/4: Funeral plans: proposed approach to
regulation

April 2021



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Consumer Law Sub-committee welcomes the opportunity to respond to the consultation on *CP21/4: Funeral plans: proposed approach to regulation*.¹ We have the following comments to put forward for consideration.

Response to questions

Q1: Do you agree that our proposed rules will not have a material impact on groups with protected characteristics?

The cohort of consumers who engage in this market will probably be older and/or may have vulnerabilities. There is unlikely to be a negative differential impact on people with most protected characteristics.

To an extent, the answer to this question will depend on how the market participants respond to the regulatory proposal and the impact that has on consumers' ability to engage with it. The regulations assume that the typical regulatory approach to the provision of finance at a point in time will meet the structure and operation of this market. At present we can think of no parallel to the funding of a service, which includes the provision of goods, at an uncertain point in the future where the consumer funding the plan does not know the outcome of their investment.

Q2: Do you agree with our proposal for applying high-level standards to funeral plan firms?

Yes, if anything intervention in this sector is overdue.

Q3: Do you agree with our proposal to require firms to back funeral plan contracts with a trust or insurance arrangement going forward?

¹ <https://www.fca.org.uk/publications/consultation-papers/cp21-4-funeral-plans-proposed-approach-regulation>

Yes, we agree with this for the reasons set out in the consultation. These are the two types of arrangements that are currently used. We are not aware of others and consider that alternative capital arrangements are likely to be more expensive and opaque.

While this may be outside the scope of the current consultation, we also note that it could be helpful to consider creation of a statutory Register of Funeral Plans, funded by the Providers. This would be readily accessible to Executors and families and would help to restrict further the possibility of “orphan plans” as described in the FCA Paper.

Q4: Do you agree with our proposed rules on trust arrangements?

The trust proposals broadly seem to reflect the existing FPA regulations and principles. We support these but consider it would be helpful to see the draft FPCOB rules/handbook to gain a greater understanding of how these rules will operate

We agree with the proposal for the fees to be paid directly to the trust/insurer and understand this already happens with some existing arrangements.

We also agree that the drafting of the trust deeds could be clearer. It would be extremely helpful if the FCA/FPA could publish a model deed, as it can be difficult to translate regulations and principles into draft clauses in a trust deed. For example, they say at 4.23 that trust backed plans must make it clear that the assets are held on trust for the benefit of the plan holders, but they do not say how specifically that is meant to work. It is not clear whether these are bare trusts or trusts to apply the assets for specific purposes (and in that regard note that non-charitable purpose trusts are not possible in England). A model deed could also help bring greater clarity in terms of tax treatment of such trusts.

4.23 also says that trust assets must be segregated from the providers' assets and consider that this will provide a certain degree of protection for consumers' assets. However if, for example, there were losses exceeding the providers' funds, it would not be possible to ring fence the other assets from those losses.

Q5: Do you agree with our proposals for trust solvency and how trust solvency should be assessed?

We support the need for some form of solvency assessment. Existing FPA rules already require this for FPA approved providers, so it makes sense for it to be applied as a requirement for all providers. We have no comment on the methodology.

Q6: Do you agree with our proposed prudential requirements on funeral plan providers and intermediaries?

Yes.

Q7: Do you agree with the way we propose to apply our FPCOB rules?

Yes, there should be an expressly requirement to remind the consumer of the right to request a Solvency Assessment Report.

Q8: Do you agree with our proposed general conduct of business standards for funeral plans?

Yes.

Q9: Do you agree with our proposed ban on intermediaries receiving remuneration other than advice or arrangement fees from the customer?

Yes.

Q10: Do you agree with our assessment that commissions are leading to mis-matched incentives and conflicts of interests between firms and customers in the funeral plan market?

Commission creates incentives for intermediaries to promote the plans that pay the biggest commission, rather than plans which best suits the consumers' needs and can generate opacity accordingly. While consumer law would require transparency, this is not necessarily a remedy, because the consumer is likely to place trust in the intermediary when choosing a complex product, which is difficult to compare with others.

If you disagree, it would be helpful to explain why by reference to current commission structures and practices you are aware of in the market and, in particular, why you do not consider these to risk creating mis-matched incentives and conflicts of interests.

No further comment.

Q11: Do you agree with our assessment that commissions are leading to customers paying prices which are too high relative to the benefits the funeral plan provides?

Yes.

Q12: Do you agree with our assessment that intermediaries receiving commission are providing little or no benefit to customers?

Yes.

If you disagree, it would be helpful to explain why by reference to current commission structures and intermediary services you are aware of in the market and, in particular, how you think they provide benefit to customers.

No comment.

Q13: Do you have any comments on the alternative approaches to tackling the harms caused by commission?

Yes – see below.

In particular, do you have any comments on the alternative option we would be minded to follow if we conclude that a ban is not required?

We have no comment on this question.

Q14: Do you agree that with our proposals for remuneration of plan providers?

Yes, as CFV is critical to the activities. However, that coupled with product governance rules will result in very significant changes in current activities. That will impact time to organise and implement, including recruiting expertise to support the change – with resultant costs. These costs will be very significant.

It would be helpful to know whether the FCA anticipates or will be seeking some level of vertical integration in these activities from Insurers or Trusts already engaged in the activities.

Q15: Do you agree with our proposals for pre-contract disclosures?

Yes.

Q16: Do you agree with our proposals for plans sold through instalments?

Yes. The approach for instalment plans already entered into will require some further careful consideration to manage potential, adverse, impacts on consumers including additional costs and termination of arrangements by providers. How /who does the FCA anticipate will manage that impact?

Q17: Do you agree with our proposed standards sales standards?

Yes.

Q18: Do you agree with our proposed approach to cancellation rights and other fees?

Yes.

This raises wider questions of practical implementation of these regulations and how the FCA proposes to address these in detail given the very significant change the regulations will drive across pre-existing arrangements and businesses not currently so closely inter - dependant /connected. There is scope for significant complexity and misalignment of regulatory expectations and consumer outcomes.

Q19: Do you have any comments on whether our proposals are likely to impact the relationship between funeral plan contracts and underlying insurance contracts?

See above.

Q20: Do you agree with our proposal to require plan providers to nominate a funeral director within 30 days of the plan being purchased?

Yes, provision of a personal service the purchaser will not assess but, very likely, have clear views on.

Q21: Do you agree with our proposal to require plan providers to send a letter to the customer's representative once a plan has been purchased?

Yes.

Q22: Do you agree with our proposal to require plan providers to send an annual letter to consumers?

Yes.

Q23: Do you agree with our proposed rules for plan redemption?

Broadly yes. However, as plans may last in excess of 10 years there will inevitably be change; perhaps significant changes simply in costs. The consumer may change their mind – humanist; cremation; a pandemic may cause problems; cedar / oak may not be environmentally friendly. All these issues will drive variability in costs.

How does the regulator envisage the firms will manage “change” in the context of what is a very small investment and the considerable impact of regulations?

Q24: Do you agree with our proposals for rules to apply to plans entered into before 29 July 2022?

Yes.

Q25: Do you agree with our proposed product oversight and governance requirements for funeral plan manufacturers?

Yes.

Q26: Do you agree with our proposed product oversight and governance requirements for funeral plan distributors?

Yes. However, we expect these regulations with associated costs will be a burden unless applied to volume standardised activity. That will affect market arrangements and consumer choice/costs.

Q27: Do you agree with our proposed rules on fair value for funeral plans?

Yes, see above. To the extent that fair value may also include the provision of services and goods directly associated with death and burial at an uncertain point in time it is difficult to understand, at this stage, how this will be measured or compared. Or if any such services/items will, after regulation is implemented, simply be excluded from the service. This may result in more cost applying to the funeral arrangements, which the consumer is seeking to avoid by entering into the contract.

Q28: Do you agree with our proposed resolution rules?

No comment.

Q29: Do you have any views on reimbursement and what amount should be considered adequate noting option 1 (to reimburse an amount equal to the retail cost of an equivalent replacement plan), option 2 (an amount linked to monies paid by the consumer), and other options that sit between these

eg sums paid by the consumer that have been paid into a trust plus a pro-rated share of the remainder of the trust assets?

No comment.

Q30: Do you have any views on how these reimbursement options could be funded? In particular, how could funeral plan arrangements be structured in such a way as to ensure that the funeral plan provider's obligations could be met at all times?

No comment.

Q31: Do you have any views and evidence on the costs and benefits of these options, including relating to consumer protection and commercial impact on firms? We also welcome any evidence on the likely differential between the amounts relating to options 1 and 2, and between these amounts and the amount available from trust and insurance arrangements.

No comment.

Q32: Do you agree with the proposal to introduce FSCS protection for certain funeral plan activities in relation to firms that are declared "in default" by FSCS, and for acts or omission arising, from the date FCA takes on regulation of the funeral plan activity?

Yes. However, there are likely to be time imperatives and whether FSCS can address these, or that a payment will fulfil the need remains to be seen as will whether the market will provide options or contingencies to meet the immediate need of a funeral in such circumstances.

Q33: Do you agree with the scope of proposed FSCS coverage?

Yes.

Q34: Do you agree with the proposed approach to FSCS quantification, the payment of compensation and the compensation limit?

Yes.

Q35: Do you agree with the proposal to introduce a new funeral plan activity FSCS funding class as set out above? If not, please set out an alternative funding approach with justification.

Yes. However, see above.

Q36: Do you agree that an initial class limit of £5 million for the new funeral plan activity FSCS funding class would be appropriate, on the basis that this limit will be reviewed at least one year after regulation commences?

Yes.

Q37: Do you have any other comments on the proposals in relation to FSCS?

No.

Q38: Do you agree with our proposal to apply the SM&CR to funeral plan providers?

Yes.

Q39: Do you agree with our proposals to treat funeral plan firms (that have no other regulatory permissions) as Core firms, except for intermediaries whose primary business is not funeral plan intermediation and who only have permission to carry on funeral plan mediation activity, which we propose would be Limited Scope?

Yes.

Q40: Do you agree with our proposed fit and proper requirements, including criminal record checks and regulatory references?

Yes.

Q41: Do you agree with our proposed approach to applying the Conduct Rules to funeral plan firms?

Yes.

Q42: Do you agree with our proposal above to extend the rules and guidance for ARs to funeral plan firms?

Yes.

Q43: Do you agree with our proposal above to apply the existing Approved Persons Regime to funeral plan firms?

Yes.

Q44: Do you agree with our proposal to require funeral plan principal firms to notify us of changes in relation to their ARs as detailed above?

Yes.

Q45: Do you agree with our approach to apply our complaint handling rules and guidance in DISP, including the compulsory jurisdiction of the ombudsman service, to all authorised funeral plan providers and which will also apply to intermediaries (e.g. appointed representatives)?

Yes. However, again there is a time imperative here where resolution of a complaint needs addressed well within usual timescales or an alternative resolution mechanism deployed in the interim.

Q46: Do you think there are any gaps in ombudsman service coverage in the scenarios discussed above or are there any other issues you have identified? If so, please provide details.

A category of consumers who purchased funeral plans from suppliers who are not or were not members of FPA and cease to do business after 29th July may not be able to have a complaint heard or adjudicated. That needs to be addressed – perhaps reference to an existing body could be made mandatory?

Q47: Do you agree with our assessment that it is not necessary to make any changes to the rules on eligible complainants?

After death it is less clear how the ombudsman will establish “locus” to complain unless the FPC mandates such a person; that change to that mandate is managed (eg the nominee(s) pre-decease) and that any difference between such a mandated person and one authorised by law (intestacy) is established by the regulations. There will also be a time imperative in some circumstances.

Q48: Do you agree that this covers all likely forms of redress? If you consider further categories are needed please provide details in your response.

We have no comments.

Q49: Do you agree with the ombudsman service’s proposal to expand the scope of the voluntary jurisdiction in this manner?

Yes. See response to Q46. Such circumstances will remain challenging at a difficult time.

Q50: Do you have any comments on the proposals in Table 1 on the application of our FEES rules and guidance to Funeral plan providers and intermediaries, in particular the proposal to create a new Funeral plan provider and Intermediary industry block with the tariff base based on annual income subject to a minimum fee?

We have no comments.

Q51: Do you agree with our proposed application of the existing SUP rules to funeral plan firms?

Yes.

Q52: Do you agree with the notification requirements and guidance we are introducing into SUP 15?

Yes.

Q53: Do you have any comments on the reporting requirements set out in this CP?

No.

Q54: Do you agree with the proposal for the FCA to impose an administration fee on funeral plan firms for late submission?

Yes.

Q55: Do you have any comments on our proposal to apply the same approach to enforcement investigations and actions to funeral Plan firms as we do to other regulated firms, as set out in EG?

We have no comments.

Q56: Do you have any comments on our proposal to follow the same procedures for decision-making and imposing penalties in relation to funeral plan firms and individuals set out in DEPP?

We have no comments.

Q57: Do you have any comments on our cost benefit analysis?

We have no comments.

For further information, please contact:

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