



消費者委員會 CONSUMER COUNCIL
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國際消費者聯會
執委會及理事會成員
EXECUTIVE AND
COUNCIL MEMBER OF
CONSUMERS
INTERNATIONAL

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本函檔號 OUR REF.

23 February 2015

Mr. Colin CHUI
Clerk to Bills Committee on Private Columbaria Bill
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear Mr. Chui,

Submission on Private Columbaria Bill

The Consumer Council is pleased to submit our views on the captioned bill for consideration by the Bills Committee.

Enclosed please find a copy of our submission. Should you have any queries, please feel free to contact Mr. Eddie Ng, Head, Legal Affairs Division at 2856 8525.

Yours sincerely,

Simon CHUI
Acting Chief Executive
Consumer Council

Encl.

Submission on Private Columbaria Bill

1. The Consumer Council (the Council) is pleased to provide views to the Legislative Council Bills Committee regarding the Private Columbaria Bill. First of all, the Council welcomes and supports the proposed establishment of a licensing regime to regulate private columbaria and introduction of detailed requirements on its operation, sale of interment rights and ash disposal procedure.

2. From the consumers' perspectives, the Council proposes to focus on how to further protect the interests of purchasers and final users of niches provided by private columbaria through modification of the Bill and administrative measures.

(I) Sales Stage

False or misleading representations

3. According to paragraph 2.4(e) of the "Public Consultation on Licensing Scheme for Private Columbaria", published by the Food and Health Bureau in December 2011, some private columbaria run by commercial entities relied on "agents" for referrals and payment of a commission as high as 30 - 40% was quoted.

4. There have been allegations that some of these agents made false or misleading representations about the private columbaria, e.g. prospect of obtaining approval, in order to boost sales. It appears that the Bill does not address malpractices transpiring in the course of sale transactions for private columbaria.

5. Although these agents may be regarded as traders and regulated under the Trade Descriptions Ordinance ("TDO"), criminal prosecution usually involves prolonged time and heavy evidentiary burden. An additional safeguard which is more cost-effective can be provided for under the Bill to the effect that the licensed columbaria operators are obligated to take reasonable care and diligence (including contractual and non-contractual means) to ensure that their agents comply with all applicable law and act in a fair and honest manner. More specifically, the Bill may require licence holders to

execute an agency agreement when engaging any sales agent. The agency agreement should include essential terms to impose contractual obligations upon the agents to comply with all applicable law and act in a fair and honest manner. On the other hand, failure to ensure propriety on the part of agents may constitute a ground for revocation or suspension of licence or lead to penalty upon the licence holder. It is believed that such proposed provisions would increase the incentive of the licensed columbaria operators to ensure proper conduct of engaged agents and avoid colluding with the unscrupulous ones. In the longer run, the Government should monitor the market and consider whether it is appropriate to extend the regulatory regime to govern the sales agents as well.

Services Bundle

6. Services bundling, sometimes with collaboration of different traders, is a common practice in funeral-related industry. In light of the serious shortage of niches, it is crucial to impose additional conditions on licensed columbaria to prevent anti-competition trade practices. For instance, the operators should be forbidden from bundling the sale of interment rights with other funeral services provided by either themselves or other traders and coercing consumers to purchase “one-stop” service. Such kind of practice would not only limit consumers’ choice but also make price comparison more difficult, if not impossible.

(II) Contract Stage

7. It is noted that the Bill has purported to protect consumer interest by requiring that a sale agreement must be in clear language and contain essential terms or information, such as information about the seller’s licence, financial risks involved with prepayment purchase and recommendation for careful consideration and legal advice, etc. There are also provisions to prohibit sale of interment rights for a term beyond the term of tenancy of the columbaria premises. Under the Bill, an agreement which fails to meet any one of the statutory requirements is unenforceable by the seller against the purchaser.

8. Although Clause 42 of the Bill provides that a purchaser may cancel the unenforceable agreement and the seller must make refund to the purchaser all money received within 30 days of receiving the notice of cancellation, the Bill

has not stipulated any legal consequence in case of default. Whilst the purchaser may pursue a civil claim against the seller to seek refund, an additional deterrent measure can be provided for under the Bill to criminalize default in providing refund.

Cooling-off Period

9. According to our market survey conducted in 2010, the price of a single niche ranged from just below HK\$10,000 to HK\$400,000 odd. Apparently, the prices have been rising in the past few years and would surge further up due to additional compliance cost after passing of the Bill. In view of the long-term commitment and high contract value usually involved in sale of interment rights, the Council takes the view that consumers should be entitled to a cooling-off period during which they may cancel the contract without penalty.

10. The Council proposes to add a cooling-off period clause to the essential terms of agreement for sale of interment right provided for under the Bill (Schedule 4 of the Bill). Under such a clause, a purchaser may cancel the agreement within 21 working days and receive a refund after deducting administrative expenses reasonably incurred for cancellation of the agreement and any other service provided during the cooling-off period.

11. As mentioned above, the Council noted that Clause 42 of the Bill provides a purchaser with a right to cancel an agreement that is not enforceable by the seller at any time after it is made by giving the seller a written notice of cancellation. Whilst this statutory right of cancellation can be exercised at any time, i.e. beyond the suggested cooling-off period, it can only be exercised in the event that the agreement is unenforceable upon specified grounds.

12. On the other hand, under contract law, purchasers may resort to civil actions to void the contract and seek damages on the grounds that the contract was procured by the seller based on vitiating factors such as duress, undue influence and misrepresentation, etc. However, to pursue a civil claim, the purchasers have to bear risk of litigation losses and incur prolonged time as well as legal costs. In some situations, a purchaser aggrieved by aggressive or other unscrupulous sales tactics may face difficulties in adducing sufficient evidence to prove his/her case in court.

13. Therefore, a cooling-off period giving consumers the right to cancel the contract for whatever reasons without civil litigation may serve to fill such a gap. Moreover, it would give consumers a chance to reconsider their decision to enter into this sort of contract that brings about substantial or long-term commitment. It would also effectively discourage columbaria operators or their salespersons from adopting aggressive or high pressure sale practices since contract procured by misconduct may be cancelled by the victimized consumer during the cooling-off period. Hence, these two protective measures should be adopted simultaneously under the Bill in order to complement each other and a mandatory 21-day cooling off period should be introduced.

(III) Post-contract Stage

Compensation Fund

14. In the event that a columbarium closed down without providing refund or compensation, the aggrieved consumers can pursue a contractual claim in civil court and there is provision in the Bill on the ash disposal procedure. However, in administering the Consumer Legal Action Fund, the Council noted that consumers encounter serious problem in enforcing the judgment after they succeeded in the civil action against columbaria which turn out to be shelf companies.

15. As the Government may be well aware of, there has been strong public demand for a compensation fund to protect consumers aggrieved by sudden closure of any columbaria. Whilst noting the funding problem, the Council suggests making reference to the Travel Industry Compensation Fund which sources funds by collecting levy from the sale proceeds in each transaction. Considering the substantial prepayment at stake, consumers should be willing to accept a levy being a certain percentage of the purchase price in return for a compensation fund offering protection, partial even if not in full, against windfall loss in the event of sudden closure of columbaria.

(IV) Proposed Regulatory Regime as a Whole

Exemption

16. The Council understands that the exemption policy purports to strike a

balance between industry regulation and market supply of niches. It is also noted that the Bill attempts to manage the exempted columbaria by various means, such as eligibility requirements, prohibition on sale of interment right and the Licensing Board's discretionary power to impose further conditions on an exemption on measures relating to safety and environmental nuisance.

17. However, it is noted that exempted columbaria are not required to submit a management plan for approval. It is unclear why an exempted columbarium should not be required to submit an approved management plan in the same manner as their licence-holding counterparts. Similar to licensed columbaria, exempted columbaria may also pose safety risk and environmental hazard to patrons and residents in the neighbourhood if they are not duly managed. Through a proper management plan and due compliance with such a plan, it is more likely that an exempted columbaria would address the safety, environmental and traffic issues and nuisance potentially caused to local residents. The Council, therefore, recommends that submission of a management plan approved by the Licensing Board should form one of the eligibility criteria in the application for exemption.

Operational Matters

18. Under the Bill, columbaria operators applying for exemption must freeze sale of interment rights since the Bill announcement time while those granted with temporary suspension of liability must also freeze sale during the interim. According to news and feedback from the public, some operators continue to sell interment rights after the Bill announcement time and it is unclear whether they would apply for licence or exemption after passing of the Bill. On the other hand, one cannot rule out the possibility that an operator, despite obtaining a temporary suspension of liability, may secretly continue to sell interment rights but subsequently close down due to failure to obtain a licence or exemption eventually. Therefore, surveillance during the transition period as well as during the period of temporary suspension of liability is of utmost importance in order to avoid abuse of the licensing regime and deter consumer traps.

19. Besides, up-to-date and reader-friendly information about all operators, their respective columbaria and application progress/outcome should be available for public inspection on a free-of-charge basis. It would provide consumers with reliable and accurate information about columbaria in the

market and make them less susceptible to misleading representations or unscrupulous sale tactics.

20. Despite repeated consumer alert made by the Government and the Council recently, confusion about legitimacy or prospect of existing columbaria still exists among the public, and unscrupulous operators may take advantage of this perplexity to seek exorbitant profit. Apart from continued effort in public education, the Council calls for expeditious passage and implementation of the proposed legislation so as to minimize the period of uncertainty and potential hazard.

(V) Market Shortage

21. Finally, going beyond the scope of the Bill, the Council takes this opportunity to reflect the problems of rocketing prices and speculative activities in the niches market. Due to taboo about alternative burial methods coupled with serious shortage of public niches, consumers often find themselves with no choice but to purchase private niches at all cost and even from columbaria which are likely to be illegal operation. Apart from regulating the private columbaria industry and promoting alternative burial methods, increasing the supply of public niches is an essential means to ensure a healthy and sustainable columbaria industry.

**Consumer Council
February 2015**