

## Funerals Market Investigation

### Westerleigh Group's response to the CMA's working papers published on 30 January 2020

#### 1. Introduction and executive summary

1. Westerleigh is surprised and disappointed by the evidence and analysis set out in CMA's initial batch of working papers, published on 30 January 2020 (the "**Working Papers**"), and in particular the CMA's competitive assessment of the crematoria sector.<sup>1</sup> Despite investigating the sector for almost two years, the CMA's evidence base, from which it appears to be drawing conclusions with potentially significant and costly repercussions for the bereaved and the industry, is extremely thin. With such a poorly informed view of the sector, the CMA risks imposing reforms that, while good intentioned, are likely to result in worse outcomes for consumers, undermining the progress that has been made in recent decades through much needed new investment and improvements in quality, provision and choice.
2. Westerleigh's concerns with the CMA's analysis are explained in detail in this response, but in summary:
  - (a) The CMA demonstrates a limited understanding of how the market functions, suggesting wholly unrealistically that in order to be satisfied that there is "sufficient" competition it would need to see four crematoria within each relevant local area.
  - (b) The CMA assesses the extent of local competition in the provision of crematoria services on the basis of an unduly narrow and misconceived 30 minute cortege drive time analysis, from which it appears to draw the broad conclusion that crematoria face weak competitive constraints. However, this does not reflect the distances which customers are willing to travel, the importance of marginal customers to competition between crematoria, or a wealth of evidence showing that Westerleigh competes with rival crematoria across wider geographic areas.
  - (c) Moreover, the CMA inexplicably fails to consider the extent to which crematoria catchment areas overlap, despite acknowledging the importance of such an analysis.<sup>2</sup> In fact, an analysis of Westerleigh's sites shows that the vast majority of Westerleigh's customers are able to exercise an effective choice between at least two competing crematoria.

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<sup>1</sup> As with Westerleigh's previous submissions during the Market Investigation, our comments in this response are focused on the aspects of the Working Papers which relate to the supply of crematoria services, primarily the "*Crematoria: background and market structure*" working paper ("**Background and Market Structure WP**"); the "*Crematoria: evidence on competition between crematoria*" working paper ("**Competition between Crematoria WP**"); and the "*Crematoria: outcomes*" working paper ("**Outcomes WP**"). Westerleigh will respond separately to the working papers published on 20 February 2020.

<sup>2</sup> For example, at paragraph 32 of the Background and Market Structure WP.

- (d) The CMA's analysis fails to reflect the factors which are important to customers when choosing a crematorium and, therefore, which drive competition. This is largely due to its continued reliance on a very limited consumer survey which is poorly designed, unrepresentative, and the results of which the CMA in any event misrepresents. Westerleigh is particularly concerned that the CMA has maintained its position that quality is not important to customer decision-making, despite clear evidence to the contrary, including the significant investments made by Westerleigh (and others) in order to ensure that it can grow volumes by attracting customers on the basis of its overall value proposition, taking account of its higher quality facilities and service.
  - (e) Linked to the above point, the CMA also refuses to acknowledge the significant variation in the quality of crematoria provision across the UK, instead taking the perverse position that crematoria services are "*relatively homogenous*".<sup>3</sup> This is simply not supported by the evidence, with the CMA's own analysis in the Outcomes WP showing that private crematoria offer, on average, higher quality than local authority facilities on a number of measures. Moreover, the CMA's consideration of other quality-related aspects of competition between crematoria is extremely limited, highly selective and, at times, subjective. This includes the CMA's reliance on its impressions from visits to just four local authority crematoria (i.e. 2% of all local authority facilities) to claim that there is no material difference in quality between the public and private sector. As a result, it appears that the CMA has gained a limited understanding of key qualitative aspects of the sector, including the old stock of local authority crematoria (the median age of which is over 60 years) and failed to commission any independent reports on these (and other) local authority facilities.
  - (f) While the CMA acknowledges that private sector investment has delivered increased capacity and helped to meet growing demand for cremations, it fails to recognise that it is critical for the sector – and for consumer outcomes – that investment in new and upgraded facilities, innovation and improvement in service levels continues, given the expected continued increase in demand and the fact that many local authority facilities built in the 1950s and 1960s will (without significant investment) increasingly become obsolete. This investment is, most likely to come, as it has in recent decades, from the private sector (subject to the outcome of the CMA's review).
3. Westerleigh has also been left disappointed by the CMA's procedural approach to the investigation and its lack of transparency with Westerleigh. The CMA appears to be trying to avoid scrutiny of its analysis and evidence, and precluding Westerleigh from having a fair chance to respond.<sup>4</sup> In particular:

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<sup>3</sup> "*Remedy options for regulating the price of crematoria services*" working paper ("**Price Regulation WP**"), paragraphs 3 and 49.

<sup>4</sup> A more transparent approach only following Provisional Findings is not adequate given the limited time parties have to respond and that, in practice, the CMA rarely moves away from its Provisional Findings meaning that they effectively represent draft final conclusions.

- (a) The CMA has continued to focus its analysis disproportionately on private sector providers, despite the fact that local authority crematoria account for c.70% of cremations
  - (b) The CMA has refused access to survey data to enable parties to analyse the data collected, without any clear justification.<sup>5</sup> This has prevented Westerleigh from properly scrutinising the results around quality, from which the CMA has drawn surprising conclusions. This followed the CMA's refusal to share a final version of its survey prior to publishing the results.<sup>6</sup>
  - (c) The Working Papers reveal that the CMA's proposed tender to employ an expert on land value failed twice.<sup>7</sup> In such circumstances, one would have expected the CMA to have approached parties to the investigation to obtain views on how best to obtain an objective valuation of the land. Instead, the CMA chose not to do so and, with very limited knowledge, experience or expertise of the sector or of land valuation, attempted to undertake a land valuation itself.
4. It is in this context that Westerleigh believes that the evidence presented in the Working Papers is insufficient to sustain a finding that any feature or combination of features of the relevant market(s) give rise to an adverse effect on competition ("AEC") in relation to the provision of crematoria services in the UK.
5. Moreover, Westerleigh is concerned that, if the CMA did decide to impose remedies, the quality and extent of its analysis at this advanced state of the Market Investigation produces a significant risk that any remedies would be poorly informed, badly-designed, and risk worse outcomes for consumers in the form of, for example, increased capacity issues (and therefore reduced availability and longer waiting times), poorer quality, less choice and convenience, and lower standards of care. In particular, Westerleigh strongly believes that the evidence presented in the Working Papers does not support the imposition of price regulation remedies, and will respond separately to the CMA's working paper in that regard. However, Westerleigh accepts that there are aspects of the market that could function better, increasing competition and improving outcomes for consumers, and therefore is generally supportive of the CMA's consideration of information and transparency remedies.<sup>8</sup>
6. The rest of this response is structured as follows:
- (a) **Section 2** explains that the analysis and evidence presented in the Working Papers would not justify a finding that any feature or combination of features of the relevant crematoria market(s) give rise to an AEC;

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<sup>5</sup> [REDACTED].

<sup>6</sup> [REDACTED].

<sup>7</sup> "Crematoria: profitability analysis working paper" ("**Profitability WP**"), paragraphs 62 – 69.

<sup>8</sup> See Westerleigh's separate response to the Information and transparency remedies working paper, dated 27 February 2020.

- (b) **Section 3** provides an overview of Westerleigh's concerns with the evidence base which the CMA has used as the basis for its analysis in the Working Papers;
- (c) **Section 4** explains the flaws in the CMA's approach to assessing local concentration in the provision of crematoria services, as set out in the Background and Market Structure WP, and provides further evidence regarding the extent of local competition faced by Westerleigh's crematoria;
- (d) **Section 5** explains the errors in the CMA's assessment of the importance of quality-related factors to customer choice and competition between crematoria, as set out in the Competition between Crematoria WP and Outcomes WP, including its failure to recognise clear evidence that both private sector operators and local authorities compete on the basis of quality;
- (e) **Section 6** explains the CMA's flawed approach to assessing pricing evidence; and
- (f) **Section 7** explains that the CMA has failed to provide any evidence which indicates a clear correlation between the extent of local competition and price, crematoria and/or margins, providing a further indication that its local competitive assessment is far too narrow and therefore fails to properly assess competition between crematoria.

**2. The CMA's analysis does not provide evidence of an AEC in relation to the provision of crematoria services**

7. As set out in the remainder of this response, Westerleigh has significant concerns regarding the evidence basis presented by the CMA in its Working Papers, as well as the nature of its analysis, which is flawed in several respects. However, those concerns notwithstanding, it is important to emphasise that, while the CMA has avoided (at least explicitly) drawing any clear conclusions itself at this stage, the Working papers do not set out any evidence that would justify a finding that any feature or combination of features of the relevant market(s) give rise to an AEC in relation to the provision of crematoria services in the UK.

8. In particular, Westerleigh notes that:

(a) While the CMA's assessment appears to be that crematoria in some local areas face weak competitive constraints from local rivals, this is based on an erroneous and overly narrow catchment area analysis. In particular, as explained in greater detail in section 4 below, by simply assessing the number of rivals which each crematorium faces within a 30 minute cortege drive time catchment area (which in itself is too narrow, particularly as regards private sector crematoria), the CMA inexplicably fails to assess the extent to which crematoria have overlapping catchment areas, or the extent to which customers have an effective choice of crematoria in local areas. Crematoria are generally located around population areas rather than within them (especially more recent openings) and therefore compete over common population centres, which the CMA fails to recognise in its analysis.

(b) Indeed, an analysis of overlapping catchment areas for Westerleigh's crematoria shows that the vast majority of Westerleigh's customers are able to choose between Westerleigh and at least one other crematoria.<sup>9</sup> This is strong evidence that Westerleigh's crematoria are subject to significant competitive constraints, and far more so than suggested by the CMA's analysis. This is further demonstrated by the large number of Westerleigh customers who travel further than they need to, in order to attend a Westerleigh crematorium. This cohort represents on average [X]% of Westerleigh's business (and at some sites up to [X]%). These customers are essential to Westerleigh's performance and individual sites' economic viability and so Westerleigh actively competes to attract this business. As outlined in detail below, the CMA's dismissal of this evidence is mistaken and fails to appreciate how competition works in the sector (i.e. for the marginal customers). The importance of these customers is supported by internal business documents that feed directly into Westerleigh's commercial decisions.

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<sup>9</sup> In a market where customers are not well-informed about the options available to them, the extent to which customers have a choice should be a factual question based on the location of crematoria relative to the customer's location, not responses from a survey that only captures the (poorly informed) perception of whether the customer had a choice.

- (c) The evidence available to the CMA indicates high levels of customer satisfaction regarding the quality of provision of crematoria services and the CMA accepts that it has not identified any material issues relating to the quality of crematoria services.<sup>10</sup> The CMA also downplays a significant element of competition on quality of service, being the time available for the service. Having sufficient time to hold a dignified service, allowing friends and family to celebrate, remember and mourn their loved one in a way that is uniquely personal to them and without feeling rushed or intruded upon by other funeral services is fundamental to the quality of service. Westerleigh has continually sought to offer a better quality experience with longer slot times and this has been changing the market, with some local authorities also now increasing service lengths in response to competition and customer demand.
- (d) Similarly, while the CMA appears to have avoided obtaining direct evidence on whether customers are satisfied with cremation fees, the evidence that it does have available suggests that, on the whole, they are. For example, while the reliance that can be placed on the CMA's consumer survey is extremely limited (see below) it shows that only one respondent said that they would not recommend the crematorium they had used to others because it was "too expensive". More generally, it is unlikely that customer satisfaction scores would be as high as reported if customers did not consider they were receiving 'value for money'. In fact, the only evidence that the CMA presents in the Working Papers of dissatisfaction with cremation fees relates to certain Dignity sites, taking account of their respective quality.<sup>11</sup> While the CMA repeatedly cites the level of price increases by crematoria operators since 2008, it fails to acknowledge that price increases have stabilised and reduced in recent years and that the increasing uptake of reduced fee services and provision of direct cremations have provided additional pricing options for consumers at significantly lower cost. Furthermore, it ignores the fact that large numbers of families are actively choosing to pay more for a better quality service at Westerleigh's crematoria.
- (e) In any event, the CMA has not found any clear correlation between the extent of local concentration and prices, crematoria margins and/or quality (see section 7 below). The CMA has therefore not clearly identified any feature of the relevant markets which has given rise to higher prices charged to consumers or allegedly "high" profit margins.<sup>12</sup> In Westerleigh's view this is a clear indicator of the flawed nature of the CMA's local competitive assessment.
- (f) More generally, the CMA has failed to acknowledge or address a clear tension in the analysis presented in its Working Papers. Specifically, it has failed to explain why crematoria which face allegedly low levels of local competition, as well as consumers which allegedly fail to exercise choice between competing sites, continue to (i) offer and invest in high quality services, and (ii) have cremation fees which are not

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<sup>10</sup> Outcomes WP, paragraph 104.

<sup>11</sup> Outcomes WP, paragraphs 98 – 99.

<sup>12</sup> Westerleigh will respond separately to the findings set out in the Profitability WP in due course.

significantly higher than crematoria with closer competitors. This is, again, indicative of the overly narrow approach of the CMA's local analysis which demonstrates a concerning lack of appreciation of competitive dynamics in the sector.

(g) The CMA's analysis also fails to take account of the significant investments made by private sector operators such as Westerleigh in developing, upgrading and maintaining high quality facilities in recent years. While private sector operators typically (but not always) have higher cremation fees than local authorities, this reflects the higher quality of their sites and the risky nature of the investments made in developing new sites. In any markets dominated by public sector provision, private sector operators cannot and do not compete solely on the basis of price. While the CMA accepts that development by the private sector has allowed the sector to meet growing demand for cremations<sup>13</sup>, it fails properly to acknowledge the positive impact this has had on delivering increased capacity, competition, quality and customer choice.

9. For these reasons, the evidence presented in the Working Papers is not such as to justify intervention by the CMA in relation to the provision of crematoria services. Nevertheless, as with any market, steps could be taken to further increase competition and improve consumer outcomes. To this end, as noted above, Westerleigh would be supportive of further transparency measures in relation to the provision of funeral director services, including measures that would make consumers better informed about the crematoria alternatives they have available.

### **3. The CMA's evidence base and analysis is flawed and insufficient to reach any conclusions on the nature of competition between crematoria**

10. In addition to the points set out above, Westerleigh has a number of concerns regarding the evidence base presented by the CMA in the Working Papers, which is deficient and remarkably limited in relation to a number of key issues. These issues are highlighted where relevant in this response, but the points set out below warrant particular emphasis.

#### **3.1 The CMA's evidence base is disproportionately skewed towards the private sector**

11. As set out in the Working Papers, a significant majority of crematoria are operated by local authorities, which deliver c. 70% of cremations.<sup>14</sup> It is therefore surprising that, despite the concerns previously expressed by Westerleigh, the CMA's evidence gathering has remained focused predominantly on private sector operators. In particular, while the CMA has gathered

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<sup>13</sup> Background and Market Structure WP, paragraph 7.

<sup>14</sup> Background and Market Structure WP, pages 7 – 9.



extensive information from all of the main private sector operators, it has by contrast adopted a very limited "sampling" approach towards local authorities. For example:

- (a) In relation to the site visits conducted by the CMA, the Working Papers reveal that the CMA has visited only four local authority sites, representing 2% of all local authority facilities.<sup>15</sup> Limited information is provided on which local authority sites the CMA visited, or on what basis those sites were chosen, however it is obvious that such a limited sample cannot provide any true insight into the nature of public sector provisioning.<sup>16</sup> It is inevitably the case that there is a wide variation in the state of local authority facilities<sup>17</sup>, the approaches adopted by local councils to operating those sites, the budget constraints faced, and the quality of service offered to customers. Nevertheless, the CMA seeks to draw the broad conclusion, on the basis of those site visits alone, that *"regardless of the operator, the crematoria we have visited all appeared to be relatively similar when considering aspects of quality that are harder to measure"*. Given the number of sites visited, this reveals nothing about the differential in quality between the public and private sector across the UK. In Westerleigh's opinion, the CMA's assessment is not reflective of the market, which is characterised by a vast difference in the quality of crematoria.<sup>18</sup> Recent examples of local authorities announcing plans to re-provide or overhaul their facilities highlight that many existing crematoria are obsolete and do not meet the needs of families (e.g. Cheltenham, Plymouth, Bradford, Southend, Birtley, Darlington, Dewsbury). The CMA fails to recognise that these examples are indicative of the poor state of local authority crematoria more widely.
- (b) In relation to the CMA's quantitative analysis, in general this has been based on data relating to only 22 local authority crematoria, representing just 11% of all local authority facilities.<sup>19</sup> While the CMA claims that this is a *"representative sample"*<sup>20</sup>, regardless of the sites chosen, Westerleigh does not consider that a sample of just 22 sites is sufficient to allow the CMA to properly assess or understand the competitive dynamics in play across the whole sector in the UK.

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<sup>15</sup> By contrast, the CMA has visited crematoria operated by private operators which cover 76% of the private sector. The importance of visiting a range of local authority sites was emphasised by Westerleigh at its hearing in July 2019 but the CMA has chosen not to undertake such visits.

<sup>16</sup> As set out in section 5.3.2 below, the Working Papers do reveal the identity of one site visited – Mortlake Crematorium – which it is clear is not representative of local authority facilities more widely.

<sup>17</sup> In particular, given that the median age of local authority crematoria is 60 years and 60% of all such crematoria opened more than 50 years ago.

<sup>18</sup> Westerleigh has previously provided the CMA with the output of its own assessment of the condition of UK crematoria from 2016, which highlighted 114 crematoria as being of a poor or very poor standard ([~~§~~]), as well as commentary from its site managers on the quality of nearby crematoria ([~~§~~]).

<sup>19</sup> This includes, for example, the CMA's consideration of crematoria catchment areas, which underpins much of the CMA's assessment of local concentration (Background and Market Structure WP, paragraphs 31 – 47).

<sup>20</sup> Background and Market Structure WP, paragraph 34.



(c) In other areas, the CMA relies on highly selective and often anecdotal evidence, including when assessing quality differentials between private sector and local authority crematoria, where the CMA bases its finding on selective quotes from a small number of local councils and funeral directors (as well as its limited site visits) (see section 5 below). This is clearly not a sufficient basis to draw the broad conclusion that crematoria services are "*relatively homogenous*". Furthermore, the CMA appears to ignore anecdotal evidence where it contradicts its case, including quotes from funeral directors about the poor state of many local authority crematoria.<sup>21</sup> In addition, the CMA should be cautious of taking on board commentary from local authorities about their own provision, as many local authorities are not fully appreciative of the comparative quality of their facilities, the changing market and needs of families, and are content to maintain the status quo.

12. As well as failing to obtain adequate evidence to understand fully local authority provisioning, given that local authority crematoria are quite different from the majority of private sector crematoria<sup>22</sup>, there is also a significant risk that the CMA's skewed evidence will show incorrect data for the sector as a whole.

### **3.2 The CMA's overly simplistic 'averaging' approach fails to reflect competitive dynamics in local areas**

13. The CMA's sampling approach towards local authorities also means that in a number of areas its analysis is based on averages drawn from that limited dataset. While this may be inevitable in certain areas, given the approach to evidence gathering taken, the CMA has not distinguished between different providers and the approach limits the weight which can be placed on the results found by the CMA.

14. Of even greater concern is the fact that the CMA extends this 'averaging' approach even to areas where it *does* have provider-specific data available. This simplistic averaging approach is liable to fail to properly reflect local competitive dynamics and to understate the extent of local competition in a number of areas.

### **3.3 The CMA adopts a highly selective approach to the evidence available to it**

15. The CMA also adopts a highly selective approach to the evidence available to it, having ignored large amounts of the evidence put forward by Westerleigh in relation to issues such as the quality differential between its crematoria and those operated by many local councils. Such an approach is clearly inconsistent with a fair and transparent process, and suggests that the CMA has adopted a position that remedies are required and has then reasoned backwards in

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<sup>21</sup> Outcomes WP, paragraph 83. See further section 5 below.

<sup>22</sup> For example, in terms of location, with local authority crematoria more likely to be located close to cities and therefore larger populations than private operators which entered local markets at a later stage.

order to attempt (unsuccessfully, in Westerleigh's view) to present evidence that would lay the ground for finding one or more AECs that would justify it doing so.

16. For example, while the CMA cites evidence from Westerleigh<sup>23</sup> in an attempt to show that customers travel to a crematorium which is not their closest for reasons other than quality, it fails to recognise that the document in question is in fact supportive of Westerleigh's submissions (see section 5.2.1 below). Moreover, it ignores or otherwise seeks to rebut the evidence put forward by Westerleigh in relation to the "qualitative pull" of its sites and submissions that Westerleigh's crematoria have an incentive to compete on quality as its sites would not be profitable without competing for, and gaining, customers who have closer alternatives.
17. The CMA also appears to have been highly selective in its use of evidence obtained from local authorities and independent funeral directors, although Westerleigh is not in a position to confirm what evidence the CMA may have excluded from its analysis in the Working Papers.

### 3.4 The CMA's consumer survey is flawed and unreliable

18. In Westerleigh's response to the Market Study Interim Report it highlighted the inappropriate level of reliance placed in the CMA's analysis on the consumer survey commissioned by the CMA in June 2018 ("**Market Study Survey**"), which involved interviewing just 248 people who had organised a funeral involving a cremation.<sup>24</sup> The CMA appeared to accept these limitations, as it decided to conduct a new survey for the purposes of the Market Investigation ("**MI Survey**"). Unfortunately, however, despite initially consulting with Westerleigh and other parties on the design of the MI Survey, many of the same criticisms still apply. In summary<sup>25</sup>:

- (a) The MI Survey has a sample of only 376 individuals involved in the arrangement of a funeral involving a cremation in the last two years, in the context of 480,000 cremations each year.<sup>26</sup> The CMA has therefore captured the views of just 0.04% of customers/cremations over the two year period used for its analysis. For many questions, the sample is significantly below this. Under no circumstances, can such a limited "sample" provide any meaningful information on consumer behaviour. It does not come close to meeting basic standards for survey design and the results should not be given any weight. They certainly should not be used to inform, never mind

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<sup>23</sup> Competition between Crematoria WP, paragraph 50.

<sup>24</sup> Westerleigh's response to the Interim Report, 4 January 2019, section 3.1.

<sup>25</sup> As noted above, the CMA has refused to disclose the detailed MI Survey results to Westerleigh, significantly limiting its ability to respond.

<sup>26</sup> Background and Market Structure WP, paragraph 6.

form the primary basis for, conclusions that could have hugely costly repercussions for the sector, and could risk misguided remedies that would harm consumers.<sup>27</sup>

- (b) Most frustratingly, despite numerous submissions from Westerleigh, the MI Survey makes limited attempts to capture the importance to consumers of quality. Given it is common ground that consumers are often poorly informed, for the CMA to ask consumers to provide any factors they consider to be important, completely unprompted, is bad survey design and will systematically understate the importance of quality. A better approach would have been to provide some context for the attributes that vary between facilities and how they vary. Despite being poorly designed to capture quality, almost half of respondents indicated a parameter related to quality as the most important factor, which is inexplicably overlooked by the CMA.<sup>28</sup>
- (c) The MI Survey has failed to capture the willingness to travel of customers, or the trade-off between quality attributes and distance, and so fails to provide any insights into how customers actually make decisions. This omission is particularly disappointing given that Westerleigh has made numerous submissions noting that competition is most significant at the edge of a crematorium's catchment area, and, for Westerleigh at least, involves building a reputation for high quality and drawing customers to travel further on this basis.
- (d) The MI Survey makes no attempt to distinguish the provider of the crematorium that the consumer used, let alone the individual site. This is critical as the CMA is drawing conclusions on consumer perceptions and behaviour driven predominantly on a survey of consumers that used local authority crematoria, which account for c.70% of all cremations. With a sample size (376) that it is not much larger than the total number of crematoria (303), drawing conclusions by site or provider would not have been possible, but to not even ask the question so that the representativeness of the sample could be tested suggests a concerning disregard for the requirement of objectivity. Indeed, given that 80% of respondents to the crematorium questions were classified as "urban" and the majority of urban populations are served by older local authority crematoria, it is likely that the survey over-represents the experiences

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<sup>27</sup> These figures cannot be translated to a response rate as the CMA used the equivalent of a panel of self-selected individuals (i.e. forced responses). The survey involved 10,144 individuals, for which 376 represents only 3.7%. On any reasonable basis, this "sample" does not come close to meeting the CMA's own 5% minimum response rate threshold required to give weight to survey results.

<sup>28</sup> The CMA has refused to disclose its survey results so responses from different questions cannot be matched to obtain an accurate estimate, limiting Westerleigh's ability to respond meaningfully on this point. Of 339 responses: personal experience of using/attending the crematorium before (24%), availability and choice of dates/times, reflecting waiting times (5%), recommendation by funeral director (4%) or family/friend, etc. (3%), good reviews/ratings or reputation (4%), size/capacity (1%), value for money (1%), attractive setting, well-maintained buildings/grounds (4%), along with staffing and it being 'better', together representing 47% of the unweighted base. The CMA has clarified that recommendations often relate to location but without access to the survey data, Westerleigh has not been able to reduce the proportion to take this into account.

of local authority crematoria. To then draw conclusions, for example, that customers do not believe quality is important, and to use it as a basis to impose remedies on Westerleigh and other providers is clearly an unreasonable and unacceptable approach.

19. Each of these criticisms was made known to the CMA in advance of undertaking the survey<sup>29</sup> but the CMA has ignored each point and instead placed significant weight on a poorly designed and flawed survey. Furthermore, as noted above, the CMA refused to provide a copy of its final survey at any point since it consulted on the first draft over nine months ago, despite requests to do so, thereby giving Westerleigh limited opportunity to attempt its own evidence gathering to rebut the points in the MI Survey. There is no apparent justification for the CMA not to have been transparent in this respect, other than to avoid necessary scrutiny, nor has the CMA provided one.

### 3.5 The CMA has failed to adequately take account of recent developments in the market

20. Westerleigh is also concerned that the CMA appears to be basing its conclusions on data which, in most cases, dates from 2018 or before, without taking account of relevant developments in the intervening period and their impact on competition and outcomes for customers. This is unacceptable given that the CMA's final decision will not be published until late 2020. While Westerleigh understands that it is, to a certain extent, necessary for the CMA to 'frontload' its evidence gathering process, this does not justify a failure to update that evidence as the Market Investigation progresses and to take account of emerging trends which are relevant to the CMA's analysis. This includes:

- (a) **Private sector development:** While the CMA recognises in the Working Papers the significant investment which has been made by private sector operators in recent decades in developing new crematoria, helping to meet the growth in demand over the same period, it suggests that there are limited opportunities for further development in light of barriers to entry raised by planning laws. This is incorrect. In fact, development of new crematoria continues at a pace, in line with recent trends. In particular, operators such as Westerleigh, Dignity, Memoria, Horizon Cremation, independent operators, as well as some local authorities, have many schemes recently opened or in the planning and development process. Any remedies imposed may run the risk of cutting off this new investment and provision, and indeed Westerleigh understands that Dignity have paused their development programme pending the outcome of the CMA's review. Continued investment in high quality facilities is required to guarantee good outcomes for consumers in the future, in particular given:

- (i) *The state of local authority provision* – many local authority crematoria were built in the 1950s to 1970s and, with the median age of local authority crematoria over 60 years, are now increasingly becoming obsolete. While a

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<sup>29</sup> See Westerleigh's comments of the CMA's proposed consumer survey, 28 May 2019, as well as its response to the Market Study Interim Report.

small number of local authorities have recently invested in upgrading their facilities (driven by the competition introduced by private sector operators and resultant falling volumes), given pressures on local government finances it appears unlikely that sufficient investment will come from the public sector to ensure that the state of provision is fit to meet consumers' expectations absent continued investment from the private sector.

- (ii) *The expected increases in demand for cremation services* in coming years, with estimates that there will be a 25% increase in the number of deaths by 2040 and an expectation that the trend towards consumers increasingly choosing cremation over burial (as acknowledged in the Working Papers) will continue in coming decades given the significantly lower costs and increasing quality of cremation services (driven by private sector investment).<sup>30</sup> In addition, the changing nature of funerals means that people will want more personalisation, which will lead to a greater demand for longer service times.
- (b) The increase in the number of cremations over the last ten years has primarily been met by private operators. While the development of new crematoria is reflective of changes in consumer behaviour, it is also quite possible that it has, in part, caused the increase in the cremation rate as these new facilities have created provision which was not previously available. The CMA's analysis<sup>31</sup> fails to acknowledge that private sector investment to date has also greatly alleviated the pressure on a number of the busiest local authority sites, which have seen significantly reduced average volumes as a result.

**Figure 1 – Cremations serviced at ten busiest crematoria in 2006**

Crematorium	Number of cremations		
	2006	2018	Δ %
Portchester	3,993	3,329	-17%
Eltham	3,949	3,606	-9%
Middlesborough	3,727	3,125	-16%
South Essex	3,600	3,012	-16%
Southampton	3,394	1,710	-50%
Leicester	3,382	1,976	-42%
Ruislip	3,363	3,048	-9%
Crawley (Surrey & Sussex)	3,161	3,027	-4%
Exeter	3,153	2,623	-17%
Glasgow (Daldowie)	3,133	2,844	-9%
<b>Total</b>	<b>34,855</b>	<b>28,300</b>	<b>-19%</b>
<i>% of UK total</i>	<i>8.4%</i>	<i>5.87%</i>	<i>-30%</i>
<b>Total cremations - UK</b>	<b>416,880</b>	<b>481,712</b>	<b>16%</b>

Source: 2006 - Cremation Society of GB - Directory of Crematoria; 2018 - Pharos Statistics issue, Summer 2019

<sup>30</sup> See Westerleigh's response to the Issues Statement, paragraph 3.15.

<sup>31</sup> Background and Market Structure WP, paragraph 8 – 10.

- (c) **Continued improvement in quality:** as well as the continued investment by private sector operators in developing new high quality sites and upgrading existing sites, there is ample evidence that local authorities have, in recent times, increasingly started to respond to the increased competition and higher standards delivered by the private sector, which has also increased customer expectations. For example:
- (i) *Improvement of existing local authority crematoria* – Westerleigh has previously submitted evidence to the CMA to show that a number of local authorities are now in the process of refurbishing or re-providing old and out of date facilities as they recognise that the quality of facilities is well below the standards offered by competing crematoria, or where dilapidated buildings and equipment become obsolescent (e.g. Cheltenham, Plymouth, Bradford, Grimsby, Southend, Birtley, Darlington etc).<sup>32</sup> Some local authorities have also invested to bring their facilities closer to the standards offered by new private sector development (e.g. in the provision of audio visual facilities).
  - (ii) *Increase in slot length* – as noted in the Working Papers, there has been a trend towards local authorities increasing their slot lengths in response to private sector competition (see further section 5.2 below).
  - (iii) *Reduction in waiting times* – as set out in Figure 1 above, volumes at busy local authority crematoria has fallen significantly, leading to increased availability and a reduction in waiting times for customers of those sites.
- (d) **Cremation fees and lower cost options:** as noted above, while the CMA emphasises historic increases in cremation fees, it fails to acknowledge that price increases have been more in line with inflation in recent years (and in the past were in line with cost inflation in the sector). In Westerleigh's case, at the majority of its sites, annual price increases in 2019 were below those adopted in previous years and in some cases were below inflation.<sup>33</sup> The average Westerleigh fee increased by [X] % in 2019 and by [X] % in 2020, during a period (2018 to 2019) where RPI has varied between 2.1% and 4% (see further section 6).
- (e) Reduced fee services and direct cremation are also now becoming increasingly popular and prevalent, expanding from a very low base at an exponential rate over recent years. Westerleigh believes that the CMA's analysis, which is based on 2018 data, fails to capture this uptake in lower cost options.<sup>34</sup> Westerleigh expects direct

<sup>32</sup> For further detail and the underlying evidence, please see Westerleigh's response to the CMA's information requested dated 10 October 2019.

<sup>33</sup> As shown in the Site Manager Reviews provided alongside this response.

<sup>34</sup> Background and Market Structure WP, paragraph 7. For example, Westerleigh understands that Pure Cremation has carried out c. 2,000 cremations in its first year of operation, and that CWC and Simplicity Cremation and Low Cost Funerals have also seen significant growth in numbers in a short period since they were established.

cremations to increase to nearly [X], or [X]% of its total cremations in 2020, compared with [X] ([X]%) in 2019, and [X] ([X]%) in 2018. Indeed, while direct cremation is not the focus of Westerleigh's business strategy, which is centred on providing high quality, attended, services for the bereaved, Westerleigh has reduced fee early morning services at all of its sites and the lower priced unattended or direct cremation option at all bar one of its sites in response to increasing demand and competitors drawing customers for this lower cost option, including an additional 20 sites in 2019/20 alone. Westerleigh has also reduced direct cremation prices at many sites, reflecting reducing market prices. Additional evidence of this competition is provided in section 6 below.

- (f) **Changes in market structure:** The funeral and crematorium sector is, more generally, undergoing significant change, which is likely to continue and is not reflected in the CMA's analysis:
- (i) The emergence of low cost funeral packages offered by the likes of Simplicity Cremation, Cremation without Ceremony, Low-cost Funerals and Pure Cremation is resulting in more options available to families and is changing consumer habits.
  - (ii) The emergence of low cost cremation packages and options is driving the uptake of lower priced direct cremation, driving down average fee per cremation and changing the economics of crematoria.
  - (iii) At the same time, the development of new, high quality crematoria is giving those who would like an attended service more and better options. The continued increase in "pre-need" funeral plans shows the extent to which people are considering their wishes for the funeral and the improvement in the information available to the public on choices is improving consumer awareness.

#### 4. The CMA has significantly understated the extent of local competition between crematoria

21. Westerleigh is concerned that the Working Papers suggest a lack of appreciation on the CMA's part of the competitive dynamics in the crematoria sector and its historical development, including its predominantly public sector nature and the basis on which private sector operators compete in order to grow volumes. Moreover, Westerleigh strongly disagrees with the CMA's finding that "*most crematoria face a limited number of rivals in their local areas*"<sup>35</sup>, at least as regards its own crematoria. In particular, as explained in detail in this section:

- (a) The CMA's suggestion that it would need to see four crematoria in each local area in order to be satisfied that there is "sufficient" competition indicates a failure to take account of the specific features of the market. This provides a further, concerning, indicator that the CMA has reasoned backwards from a predetermined view that

<sup>35</sup> Background and Market Structure WP, paragraph 77.



there is insufficient competition in the market and framed its analysis on that basis, instead of objectively assessing the evidence available to it (see section 4.2).

- (b) The 30 minute cortege drive time adopted by the CMA to conduct its catchment area analysis is unduly narrow and not reflective of the evidence available on customers' willingness to travel (see section 4.3.1). The CMA's reliance on the location of funeral directors is also inappropriate for determining the geographic area from which crematoria draw most of their customers and significantly understates the true catchment (see section 4.3.2).
  - (c) Despite acknowledging that competition between crematoria will be stronger the more their catchments overlap, the CMA remarkably fails to take into account overlapping catchments and population re-centring in its analysis, thereby significantly underweighting the competitive constraints exerted by rivals located outside its narrow catchment areas (see section 4.3.4).
  - (d) The CMA's analysis fails to reflect the geographic areas over which Westerleigh competes or the extent of local competition around each of its sites (see sections 4.3.3 and 4.4). An analysis of Westerleigh's sites shows that the vast majority of Westerleigh's customers are able to exercise an effective choice between at least two competing crematoria.
  - (e) The CMA's assessment of capacity constraints understates the extent to which 'busy' sites represent a competitive constraint on local rivals (see section 4.4.5).
22. The CMA also significantly understates the scope for development of new crematoria across the UK in future (see section 4.5).

#### **4.1 The CMA fails to understand how competition works in the crematoria sector**

23. The CMA should be cautious when applying tools used for assessing competition in private sector markets to the public sector, and interpreting the results in the same way. Unfortunately, the Working Papers show no sign of such caution. As a result, the starting presumptions of the CMA need to be changed and a more nuanced understanding of the specific characteristics of the sector shown.
24. In particular, the starting point for assessing competition in the provision of crematoria services should be to recognise that it remains predominantly a public sector market and that the quality and pricing of local authority facilities have an important impact on quality and pricing in the overall market.<sup>36</sup> In any public sector markets, where private sector providers enter, the private provider cannot compete by providing a lower price or lower quality service

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<sup>36</sup> Indeed, the CMA in assessing such a limited portion of the market – in some cases only 14 local authority crematoria – has not even recognised in its Working Papers aspects of the market that have the direct effect of discouraging competition, for example, by local authority crematoria charging higher prices for out-of-area customers or influencing the planning process for new entrants.

(the same is true, for example, in relation to private hospitals, private dentists, private education, leisure centres/gyms). However, despite the public sector nature of the market, the CMA continues to attempt to analyse public sector provision as if it is responsive to commercial objectives.<sup>37</sup>

25. The CMA's analysis must also consider the historical context for the sector and the significant progress that has been made in recent decades. In particular, as noted above, a sector historically severely underfunded with limited capital investment and innovation beyond the development of the initial tranche of local authority crematoria pre-the 1970s, has seen sustained recent investment by private sector operators that has led to increased capacity and choice, the option for customers of much reduced waiting times, longer slot lengths, significant improvements in facilities and increased levels of competition.<sup>38</sup> Furthermore, given the particular circumstances of the market, new provision is inevitably of a higher standard as a result of significant improvements in building design and facilities over the decades, and consequently comes at greater cost.
26. The CMA asserts in the Working Papers that this new capacity has simply met growing demand (i.e. as opposed to reducing average volumes at existing crematoria), implying there has been no increase in competition, and even suggests that because incumbent volumes continue to grow a few years after the entry of a competitor, ongoing competition between the incumbent and the entrant does not take place. However, this ignores the evidence before the CMA, including internal documents provided by Westerleigh used to inform its day-to-day commercial decisions<sup>39</sup>, the geographic areas from which Westerleigh is winning significant customers, the CMA's own entry analysis, and the evidence that volumes at many local authority sites have reduced significantly (see section 3 above). This impact is generally felt by poor quality local authority sites, which do not offer a comparable quality of service.
27. Incumbent crematoria benefit from entrenched familial and historical attachments to a local crematorium and low public awareness of alternative crematoria that new entrants need to overcome. To compete, Westerleigh must invest in higher quality facilities, a higher quality product and service levels, in more peaceful and accessible settings, and in doing so build a

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<sup>37</sup> This includes, for example by (i) analysing the "excess profitability" of providers which do not have an objective to maximise or generate profits - local authority crematoria are subject to different objective functions (Profitability WP, to which Westerleigh will respond separately in due course); (ii) analysing the price response of local authority providers to entry, expecting public sector providers to be reducing their price to retain lost volumes (Competition between Crematoria WP, paragraphs 82 – 118, plus Appendix); and (iii) observing that entrants typically price higher than incumbents (which simply describes private sector providers as the new entrants and local authority providers the incumbents) (Competition between Crematoria WP, paragraph 37).

<sup>38</sup> Indeed, even if it were the case, as the CMA appears to suggest, that consumers only value travel time and consider location to the most important factor in choosing a crematorium (which Westerleigh disputes, as set out in this response), then the CMA must recognise that the new facilities have increased consumer welfare through increased convenience and reducing the distances which a significant portion of consumers need to travel.

<sup>39</sup> [REDACTED].

strong reputation in the local area. While over time public awareness grows as individuals attend services, the investment and quality standards set relative to competing crematoria must be maintained and continually improved given the importance of reputation, word of mouth and personal experience. Moreover, in order to compete as it builds its reputation, it must offer lower prices initially.

28. The CMA must also recognise that competition takes place over the long-term and occurs for the marginal customers. [✂]. In particular:

(a) First, while many customers have a preference for a particular crematorium (due to a family connection or lack of awareness of alternatives), not all customers do. Those customers with a less entrenched preference can be influenced by the guidance of the funeral director or through being made aware of price and quality attributes of available alternatives. Importantly, customers do not necessarily compare alternatives at the point of need or purchase. Competition take place over the long-term: Westerleigh's efforts at a local level involve setting a level of quality that it maintains and improves in order to raise public and funeral director awareness of its offering. For example: [✂]

(b) Second, while many customers have a preference to use the closest crematorium, not all customers do. Customers make decisions by trading-off different attributes of competing crematoria, and are willing to travel further if their initial preference or closest crematorium is of significantly poorer quality. For example, if they have to wait too long for a service, the price is too high, the slot length too short, and/or the buildings dilapidated and poorly maintained, then customers will travel further. For example: [✂]

29. Westerleigh will return to these themes at various points in this response, given the CMA's repeated failure to acknowledge these key aspects of the market context and competitive dynamics in which Westerleigh operates.

#### **4.2 The CMA adopts an extreme and unrealistic view of the number of crematoria required for effective competition**

30. In the Working Papers the CMA asserts, without any further explanation, that it "*would typically expect that in a local market with four or more competitors, competition may be sufficient*".<sup>40</sup> This statement indicates a concerning failure on the CMA's part to take account of the market structure of the crematoria sector, its historical development, the limitations placed on crematoria development by the planning regime (which are acknowledged

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<sup>40</sup> Background and Market Structure WP, paragraphs 2 and 77.

elsewhere by the CMA)<sup>41</sup> or the volume of cremations (or price) that would be required to make a crematorium economically viable.

31. Indeed, if this benchmark were applied, there would theoretically need to be hundreds more crematoria built across the UK before the CMA would accept that there was "sufficient" competition. This would not only be impossible under current planning regulations, given the need to demonstrate a sufficient "need" for a new facility, but would also likely mean that no further crematoria would be developed as each crematorium would experience a level of activity which would no longer be economically viable (or would require significant increases in price).<sup>42</sup> This clearly is not a reasonable position to adopt.
32. The CMA's approach – which appears to amount to no more than lifting a standard often applied as an initial screening mechanism in retail mergers without any consideration as to whether it is appropriate in this context (which it is not) – would therefore suggest that the CMA has started from a position of wishing to prove that there is insufficient competition in the provision of crematoria, and then defining an entirely arbitrary benchmark in order to ensure that it can reach that conclusion. This is obviously not a fair and objective way in which to approach a Market Investigation.
33. Moreover, the CMA's approach is contradictory, and concerningly simplistic by comparison, to that which it has adopted in previous inquiries in relation to other markets displaying similar features to the crematoria sector. For example, in relation to private sector hospitals, where a similar "needs" requirement applies under the applicable planning regulations as to new crematoria development, the CMA proceeded on the basis of an initial filtering exercise to identify and exclude from further analysis those hospitals where it "*could, by a systematic method, form a view that they were unlikely to raise competition problems*".
34. As part of this exercise, which was adopted as a "conservative" approach<sup>43</sup>, only private hospitals with fewer than two rivals within their relevant catchment area were identified as being of potential concern. In other words, the CMA accepted that the presence of three rivals was sufficient, by itself, to conclude that there was no competition problem. Those hospitals captured by the initial filtering exercise were then subject to a more detailed, area-

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<sup>41</sup> For example, the restrictions of s5 of the 1902 Cremations Act, which require that new crematoria cannot be developed within 200 yards of a dwelling, or 50 yards of a highway, mean that following the initial tranche of crematoria development up to the 1970s, and the subsequent expansion of conurbations, it is very difficult for new crematoria to be developed within or near to centres of population, which is where many existing crematoria are located.

<sup>42</sup> Taking into account the CMA's very narrow drive time analysis, Westerleigh believes that only a few very large conurbations with significant populations would support the density of crematoria which the CMA appears to expect.

<sup>43</sup> I.e. which was "*more likely to filter in a hospital where there is no problem than filter out a hospital where there is a problem*". Private Hospitals Final Report, paragraph 6.147.

by-area, assessment to determine if there were in fact any concerns, taking account of local competitive conditions.<sup>44</sup>

35. For these reasons, it appears that the CMA has proceeded on the basis of a wholly unreasonable and unrealistic view of the extent of local competition required to secure good outcomes for customers. This simply cannot be maintained as the basis for the CMA's provisional conclusions.

**4.3 The CMA has adopted an overly simplistic and narrow approach to assessing the extent of local competition between crematoria**

36. In the Background and Market Structure WP, the CMA claims that "*most crematoria face a limited number of rivals in their local areas*" based on fascia counting exercises within (a) a 30-minute cortege drive time radius around each crematorium, and (b) average 80% catchment areas. This analysis, which then underlies much of the analysis in the CMA's other Working Papers fails to properly assess the extent of local competition faced by crematoria. In particular, as explained below:

- (a) **Use of cortege drive time** (30 minutes cortege drive time, equivalent to 18 minutes normal drive time, where at the equidistant point between crematoria a customer would need to travel just 9 minutes at normal drive time) is overly narrow for the purposes of assessing the distance which customers are willing to travel to crematoria, particularly in light of evidence available on customers' travel patterns.
- (b) **Relying on the location of funeral directors** is inappropriate for determining the geographic area from which crematoria draw most of their customers and significantly understates the true catchment.
- (c) **The CMA's entry analysis points to significantly larger catchments:** The CMA's entry analysis shows that competitors have a significant impact on the volumes of existing private sector operators, both when the crematorium entering is between 33 minutes and 50 minutes cortege drive time away and in some cases when the crematorium entering is more than 50 minutes cortege drive time away. As the CMA has only recently provided its analysis, Westerleigh will respond to this in greater detail at a later stage but notes the results of the CMA's own analysis incontrovertibly point to a significantly wider catchment and significant competition taking place between crematoria located very far outside the CMA's artificially narrow catchment areas.
- (d) In any event, the CMA's approach is overly simplistic. In particular:
  - (i) **The geographic area in which competition is assessed does not reflect the trade-offs made by customers:** While the catchment area around a crematorium reflects the area from which it draws the majority of its customers, it does not necessarily reflect customers' willingness to travel in

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<sup>44</sup> Private Hospitals Final Report, paragraphs 6.147 – 6.158.

response to price and quality differentials. In particular, Westerleigh believes that customers who face poor quality provision at the nearest crematorium are more likely to be willing to travel further to experience a better quality offering. The CMA's approach will understate the scope of the geographic market and the willingness of customers to travel, and fails to reflect the trade-off customers face between different characteristics of crematoria and travel time.

- (ii) The CMA fails to properly take account of the extent to which crematoria's **catchment areas overlap** and dismisses **competition over population centres**, both of which provide a much clearer indicator of whether customers have a choice of crematoria and, accordingly, whether a particular crematorium faces competitive constraints. As a result the CMA fails to take into account constraints from outside the catchment area when it is these constraints that are driving competition.

37. Each of these is considered in turn below.

**4.3.1 Assuming the 30 minute drive time is at cortege speeds gives an overly narrow basis for assessing the distance which customers are willing to travel**

38. The CMA justifies its use of cortege drive times for the purposes of assessing the extent of local concentration on the basis that the hearse "*is likely to travel at slower than normal speeds and as such, the area over which choice of crematoria is exercised may be smaller due to slower speeds*" as well as its use in "*numerous planning appeals*".<sup>45</sup>
39. While a 30 minute cortege drive time is used by the industry for the purposes of planning applications in relation to new crematoria, this does not mean that it is an appropriate basis for assessing the distance which customers are prepared to travel when arranging a funeral. In a planning context, the 30 minute cortege drive time measure is used as a broad 'rule of thumb' starting point to assess the number of people which would be served by the new facility as part of determining the quantitative and qualitative "need" for the proposed development, often a key planning consideration for sites in green belt areas. It is not used to assess the extent of local concentration or to identify the distance between competing crematoria. Applying such a broad brush approach to this issue without taking account of local factors significantly undermines the weight which can be placed on such an analysis.
40. In fact, it is common as part of the needs assessment in planning applications to not only look at the number of people within the 30 minute drive time area, but also to assess how many of those people are within the catchment area of an existing crematorium, i.e. the extent to which the proposed site's catchment area would overlap with another crematorium. As

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<sup>45</sup> Background and Market Structure WP, paragraphs 19 – 21.

explained below, the CMA's analysis inexplicably fails to take this highly relevant factor into account.

41. If the CMA's methodology is applied, competing sites would need to be just 18 minutes apart at normal drive time.<sup>46</sup> As the majority of the UK population is based in urban locations where travelling speeds are low, this would mean that crematoria would need to be situated extremely close together to be considered "rivals" in the CMA's analysis. If a proposed new crematorium were to have four existing competitors on entry within a 18 minute drive time, the extent of the consequent multiple catchment overlaps would mean that it would be highly unlikely that the proposed development would demonstrate the requisite "need" under the planning regime and therefore would not be granted planning. If it were the case that the planning regime determined the scope of supply, the CMA's assessment would provide no meaningful information on the extent of competition or how the market functions, it would merely describe the outcome of the planning process.
42. The CMA also presents no evidence that the distance the hearse needs to travel is the most important factor for customers when choosing the location of a funeral (despite having conducted a consumer survey). In Westerleigh's experience most customers are unaware of cortege speeds and it is far more likely that they will consider normal drive time speeds, since this will be the main consideration for those travelling to attend the funeral, the importance of which the CMA has failed to recognise or attempt to capture in its survey.<sup>47</sup> Many customers will also take into account the fact that they will wish to visit the crematorium after the funeral in order to visit memorials which will, again, be considered in terms of normal drive time.
43. Furthermore, acceptable drive times are likely to vary from region to region, reflecting typical journey times in both rural areas where people are more accustomed to longer journeys and urban areas, where traffic speeds are lower. In practice, there are a number of factors which affect cortege speeds, in particular:
  - (a) In more populated urban areas, where traffic speed is already low, cortege speeds are likely to be more in line with normal traffic speeds. Given that a high proportion of crematoria are located near to large population centres, the application of a 0.6 factor is likely to significantly skew the competition analysis.
  - (b) Average drive times will be weighted by traffic volume, which typically is highest (and speeds lowest) at peak times. As funerals typically take place outside peak "rush-

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<sup>46</sup> Furthermore, as the CMA is assessing the distance between crematoria, the average customer along that route (assuming customers are equally distributed within the catchment) would have a maximum of 15 minutes drive time at cortege speed to their nearest crematorium, or just 9 minutes at normal drive times.

<sup>47</sup> The CMA notes elsewhere in the Competition between Crematoria WP that "[l]ocations may also be chosen because they are convenient for the majority of mourners" (paragraph 26) but takes no account of this in determining the appropriate geography for assessing competition.



hour" traffic, when speeds are likely to be higher than average, average drive times used by the CMA may understate distances.

44. In the MI Survey 83% of respondents said that the crematorium they used was within 30 minutes of the deceased's address.<sup>48</sup> The MI Survey did not confirm whether this was at normal driving speeds or at cortege speeds, and so respondents could have meant either. Despite noting that cortege speed "*was [not] a concept that could easily be understood*" by respondents<sup>49</sup>, the CMA nevertheless unreasonably assumes consumers did in fact mean cortege speed for the purposes of its analysis.
45. The CMA does not even undertake any sensitivity analysis of the outcome under both approaches to test the impact of its assumption. If consumers did instead mean 30 minutes at normal driving speed, which Westerleigh believes is far more likely given the lack of awareness of cortege speed, this is equivalent to **50 minutes** cortege driving time, thereby significantly increasing the size of the catchment area and fundamentally changing the competitive assessment.
46. To illustrate the impact of this assumption, the tables below provide the distribution of Westerleigh and total UK crematoria by number of competitors under an assumption of 30 minutes cortege drive-time and an assumption of 30 minutes normal drive-time. For Westerleigh the number of crematoria with no competitors located inside its catchment area falls from 18 under the cortege assumption (53% of all Westerleigh crematoria) to only five under the normal drive time assumption (15% of all Westerleigh crematoria). Westerleigh considers the competition these five crematoria face further below.

**Figure 2: Distribution of Westerleigh crematoria by number of competitors under cortege and normal driving speed**

Drive-time assumption	Number of competitors					Total Westerleigh crematoria
	0	1	2	3	4+	
<b>30 minutes cortege</b>	18 53%	12 35%	3 9%	0 0%	1 3%	34 100%
<b>30 minutes normal</b>	5 15%	8 24%	6 18%	5 15%	10 29%	34 100%

47. A similar change in the distribution occurs for all UK crematoria: from 204 with no competitors inside its catchment under cortege drive time to 75 under normal drive-time.

<sup>48</sup> The CMA has refused access to its survey data for any additional analysis to be undertaken of these particular responses.

<sup>49</sup> Competition between Crematoria WP, footnote 2.

**Figure 3: Distribution of total UK crematoria by number of competitors under cortege and normal driving speed**

Drive-time assumption	Number of competitors					Total crematoria
	0	1	2	3	4+	
<b>30 minutes cortege</b>	204	69	26	8	4	311
	66%	22%	8%	3%	1%	100%
<b>30 minutes normal</b>	75	87	47	34	68	311
	24%	28%	15%	11%	22%	100%

48. Finally, Westerleigh notes that while the CMA seeks to suggest that Westerleigh declined the opportunity to comment on the CMA's use of cortege speeds for analysing local concentration<sup>50</sup>, this is a clear misrepresentation. The question posed to Westerleigh clearly did not ask for Westerleigh's views on the use of a 30 minute cortege speed for the purposes of assessing local concentration.<sup>51</sup> Moreover, in Westerleigh's response to the Issues Statement, Westerleigh presented evidence on the extent of local competition for Westerleigh's crematoria, based on normal drive times, explaining that this measure had been used rather than cortege time as customer decisions relating to location will primarily be based on proximity for friends and family of the deceased.<sup>52</sup> It appears that the CMA has ignored the evidence provided by Westerleigh in this regard in its entirety, without adequate justification. Westerleigh provides further information on the competition its crematoria faces below.

#### 4.3.2 Relying on funeral director revenue understates the catchment area

49. In contrast to typical catchment area analyses, which use customer postcode data, the CMA's catchment area analysis is based on funeral director revenue data and starts from the unpromising premise that the CMA considers "*that the location of funeral directors may be a good proxy for the location of the deceased*" (emphasis added).<sup>53</sup> The CMA provides no further reasoning or evidence to support this assertion.
50. In Westerleigh's experience it is unlikely that the location of a funeral director will be a good proxy for the location for the deceased and Westerleigh believes this measure is likely to underestimate the extent of a crematorium's catchment area. For example, in many cases, where the customer has chosen a crematorium *before* visiting a funeral director they may deliberately choose a funeral director in proximity to that crematorium. In the CMA's analysis, these customers would indicate a very narrow catchment area, when in fact the deceased's

<sup>50</sup> Background and Market Structure WP, paragraph 20.

<sup>51</sup> "Please also explain how much slower you consider a cortege drive time speed to be compared to a standard drive time (we note planning decisions where a factor of 0.6 is applied)".

<sup>52</sup> Westerleigh's response to the Issues Statement, 16 May 2019, section 5.

<sup>53</sup> Background and Market Structure WP, footnote 27.

home might be some distance away and attendees of the service may be driving from relatively far away. In addition, funeral director branches are clustered in settlements, whereas addresses of the deceased will be more widely dispersed, especially where crematoria serve broad geographic areas.

51. Indeed, the CMA's own consumer survey suggests that in only around 1 in 4 cases the deceased lived within a five-minute drive time, and in less than half of cases within a ten-minute drive time, of the premises of the funeral director used.<sup>54</sup> Westerleigh has also analysed its own customer data across all of its sites, which shows the average distance between where the deceased person lived and the crematorium is [redacted]% **further** than the average distance between the premises of the funeral director used and the crematorium. This evidence strongly suggests that the CMA's catchment areas are, by a significant margin, too narrowly defined as a result of this assumption.<sup>55</sup>
52. Without a sound evidential basis for this broad assumption underpinning the CMA's analysis in the Working Papers, the CMA cannot rely on that analysis to assess the extent of local concentration.

#### **4.3.3 The geographic area in which competition is assessed does not reflect the area over which Westerleigh competes**

53. Westerleigh further believes that an 80% catchment area is inappropriate in the present case for the purposes of determining the area within which crematoria face competitive constraints. As the CMA is aware, an 80% catchment area is only an approximation to which the hypothetical monopolist test can be applied and will understate the geographic market.<sup>56</sup> As outlined above, and throughout this investigation, and as can be seen from Westerleigh's internal documents, the 20% of a crematorium's customers outside the CMA's catchment area are those most likely to be the *marginal customers* that crematoria are competing strongly for and will therefore be the customers that determine investment, levels of quality and price.
54. Westerleigh has previously explained to the CMA that investment in a number of its recently opened sites would not have been made, and a number of existing sites would not be profitable, if they were unable to draw customers from outside of their immediate catchment areas.<sup>57</sup> On average [redacted]% of Westerleigh's customers fall within this category.<sup>58</sup> Given the

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<sup>54</sup> Market Investigation Consumer Survey results, paragraph 50.

<sup>55</sup> For example, an average [redacted] minute drive-time based on funeral director locations would, on this basis, be equivalent to an average [redacted] minute drive-time based on where the deceased person lived.

<sup>56</sup> While a formal market definition exercise may not be necessary in a market investigation, given that it is well-established that catchment areas, without any economic theoretical underpinning, can be arbitrary and not reflect the true willingness to travel of consumers, the CMA must assess competition over an area that reflects the specific context of the market being investigated.

<sup>57</sup> Westerleigh defines its own catchment as including all customers for which its site is the closest crematorium but the point applies regardless of which catchment is used.

<sup>58</sup> Based on 2019 data.

importance of these customers, which by definition are typically those located furthest *away* from Westerleigh's crematoria, Westerleigh assesses local competition over a wider area than the CMA's 80% catchment area analysis would suggest.<sup>59</sup>

**4.3.4 The CMA fails to take into account overlapping catchments and population re-centring, thereby significantly underweighting rivals located outside its narrow catchment areas**

55. Competing crematoria's catchment areas commonly overlap and the extent of this overlap will provide an indication of the extent to which those crematoria are alternatives for customers.<sup>60</sup> Overlapping catchments mean that, regardless of the precise boundaries drawn for catchment areas, the local competitive assessment must also consider the constraints provided by crematoria located outside each crematorium's catchment area. Indeed, it is obvious that considering only a 30 minute cortege drive time around each crematorium is insufficient to properly capture the extent to which that crematorium competes with other crematoria for customers<sup>61</sup>, since funeral attendees do not travel between crematoria and many will be located in between two or more crematoria.
56. This is particularly important in situations where there is a significant town/city in the geographic area between rival crematoria, as is often the case given the history and nature of crematorium development. In such circumstances, there may be several crematoria which are each more than 30 minute cortege drive time away from each other, but compete over a common population centre, indicating that each exerts a strong competitive constraint on the others. The CMA's catchment area methodology is not suitable to take account of the location of the population in this manner. This is shown in the illustrative examples below.
- (a) [✂]
- (b) [✂]
- (c) [✂]
- (d) [✂]
57. These are not isolated examples but reflect a large number of Westerleigh sites. The CMA's dismissal of catchment overlaps and population re-centring is poorly reasoned and factually incorrect and is discussed further below. Indeed, supporting this Westerleigh has calculated that **the proportion of its customers within a 30 minute normal drive time of another**

<sup>59</sup> [✂]. Further details are provided in Section 5.

<sup>60</sup> Private hospitals, Final Report, paragraphs 5.63 – 5.68.

<sup>61</sup> Even if one accepted that customers are only willing to travel 30 minutes at cortege speeds from the deceased's home, which is strongly denied for the reasons set out above.

**crematorium is** [X]%. Even on an artificially narrow 18 minute normal drive time catchment, this proportion is [X]%, suggesting a high proportion of potentially marginal customers.

58. In the Working Papers the CMA acknowledges that "*competition between suppliers is typically stronger the more their respective catchment areas overlap, as overlapping catchment areas may suggest that suppliers are alternatives for a significant proportion of their customers*" (emphasis added).<sup>62</sup> However, rather than actually assess the extent of overlap, the CMA has instead "*compared the drive-time to a crematorium's nearest rival to the size of the crematorium's catchment area*" as "*a measure of the degree of overlap*".<sup>63</sup>
59. This contrasts to the approach adopted, correctly, in previous market inquiries, where the CMA has placed greater emphasis on the degree of overlaps between competing facilities' catchment areas rather than a simple fascia counting exercise, which has only been used as an initial screening exercise.<sup>64</sup> For example, in the Private Hospitals Market Investigation, the CMA noted that:

*"When comparing the location of each hospital's patients, we identified their centres of patient activity, ie the postcodes where most of their patients lived. We then considered the extent to which these postcodes overlapped with those where other hospitals were drawing patients...In most cases we would expect the overlap between competing hospitals to be large, and the distances that patients would have to travel to be similar, for us to conclude that a rival hospital was an effective competitor. However, **it was not necessary for a rival hospital to compete for all patients for it to provide a relevant constraint.** We are concerned with the totality of the constraints faced by a hospital and **in some cases we found that a hospital faced several competitors, each competing for patients in different locations.** As long as there was not a significant group of patients that appeared to have little choice other than the focal hospital, we concluded that the hospital was sufficiently constrained."* (emphasis added)<sup>65</sup>

60. Given the central importance of this issue to assessing the extent of local competitive constraints, it is surprising that the CMA appears to have given it little attention to date, with the Working Papers presenting only a cursory analysis, which is in any event flawed, as explained below.

a) Assessment of extent to which rivals inside a catchment area are geographically close

61. First, the CMA considers, for 34 crematoria which have at least one rival fascia *within* their catchment, how near that rival is.<sup>66</sup> The CMA concludes that this analysis suggests that "*in those instances where there is at least one rival fascia located within a crematorium's*

<sup>62</sup> Background and Market Structure WP, paragraph 32.

<sup>63</sup> Background and Market Structure WP, paragraph 41.

<sup>64</sup> Private Hospitals, section 6.

<sup>65</sup> Private Hospitals, paragraph 6.176 – 6.177.

<sup>66</sup> Background and Market Structure WP, paragraphs 40 – 42.

*catchment area, the nearest rival fascia is, on average, located towards the boundary of the catchment area."*

62. This result is unsurprising and entirely uninformative: (i) this reflects the overly narrow catchment areas applied by the CMA and (ii) in any event, given planning requirements it is unlikely that an operator would obtain permission to build a site in very close proximity to an existing crematorium. This does not, however, mean that those crematoria do not compete for customers. Indeed, where a rival crematorium is *within* the catchment area, there will, by definition, be a significant overlap between the respective crematoria's catchment areas. Nevertheless the CMA appears to have undertaken no assessment of the extent of that overlap.

*b) Assessment of extent to which rivals outside of a catchment are geographically close*

63. Second, the CMA presents an analysis in relation to those areas where crematoria do not face a constraint from rival crematoria within their catchment area to assess how far outside the catchment area the closest rival is, concluding that, on average, *"the rival outside the catchment is on average half as far away again, ie not close to the catchment boundary"*.<sup>67</sup>

64. However, the CMA fails to acknowledge the important point from this analysis, which is that it shows that the vast majority of crematoria have a catchment area which overlaps with that of at least one other crematorium. In particular:

(a) Where the degree of closeness between the catchment area boundary and the nearest rival fascia is anywhere below 2, this means that there are customers within the relevant crematorium's catchment area for whom the rival fascia is the closest option. The CMA's analysis suggests this is the case for 87% (47 out of 54) of the crematoria analysed which do not have a rival within their catchment area.

(b) The CMA finds that, on average, the degree of closeness for these crematoria is 1.5. This implies that for most crematoria that do not have a rival within their catchment area, there is a significant overlap with the catchment area of at least one other rival, and that a significant proportion of their customer base have a closer alternative.

65. Furthermore, the CMA's analysis is limited to crematoria which do not have a rival fascia within their catchment area, meaning it has failed entirely to consider whether crematoria which do have one or more rivals within their catchment area also compete with additional rivals located outside the catchment area.

*c) Assessment of competition over common population centres*

66. Finally, while the CMA does acknowledge that crematoria that are not within each other's catchment area may still compete over a common population centre and thereby pose a constraint on one another, it proceeds to assess this fundamental issue in just two short paragraphs. Moreover, that assessment is based largely on anecdotal evidence from just two

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<sup>67</sup> Background and Market Structure WP, paragraphs 43 – 45.

local authorities (Leicester City Council and Derby City Council), as well as a vague observation that maps provided by Dignity and Westerleigh show generally "*that customers will gravitate towards the closest crematorium, even in areas where there may be multiple crematoria in the same population centre*".<sup>68</sup>

67. This analysis is inadequate to form any conclusions on the extent of local competition between crematoria. Regardless of whether customers may, in general, gravitate towards their closest crematorium, this does not mean that those crematoria are not constrained by local competition. Regrettably, the analysis conducted by the CMA to date simply does not put it in a position to reach any sound conclusions.
68. Moreover, in relation to the Leicester area, the CMA ignores the fact that before Westerleigh's site at Great Glen opened in 2017 and Memoria's site at South Leicestershire Crematorium opened in 2015, the relevant population would have been served by a single (larger) Leicestershire City Crematorium catchment area. Absent this investment, virtually all of Great Glen's customers would otherwise have been customers of the Leicester City Crematorium. The opening of these two new sites relatively recently is in fact an indication that competition is working in customers' interests, providing both city residents and rural populations with alternative, higher quality, choices.
69. In addition, the way this is presented by the CMA – "*Maps from Westerleigh show that their Great Glen crematorium, south of Leicester, draws most of its customers from the south and east of Leicester (some of whom are closer to Leicester crematorium than Great Glen), but fewer from the north and West (and the vicinity of Leicester crematorium)*" – significantly underplays the impact of the opening of Westerleigh's Great Glen site (as well as Memoria's South Leicestershire site) on the competitive landscape. As shown in Figures 9 and 10 below:
- (a) Since the opening of these sites, Leicester City Crematorium has lost significant volumes in four consecutive years (contrary to the CMA's analysis that three years after new entry, incumbent volumes restart growing year-on-year<sup>69</sup>) despite increases in the death rate and cremation rate over this time.
  - (b) [REDACTED].
  - (c) The fact that a majority of customers may be located to the south of Leicester does not preclude competition for the *marginal* customer. These marginal customers will be those for which the crematoria are most closely substitutable. Indeed, the CMA has failed to undertake even a basic assessment of competition in this area. Great Glen is winning and competing for business over a very wide area due to (among others) its investment in better facilities for Hindus that would previously have used – and some of which continue to use – competing sites.

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<sup>68</sup> Background and Market Structure WP, paragraphs 46 – 47.

<sup>69</sup> The fact that incumbent volumes start growing year-on-year after a period of time says nothing about ongoing diversion between the two sites. The CMA fallaciously confuses migration and diversion.



**Figure 9 – Cremation volumes for Great Glen, South Leicestershire and Leicester City Crematorium 2013-2018**

Cremations		2013	2014	2015	2016	2017	2018
South Leicestershire	Memoria	-	-	921	1,462	1,387	1,257
Great Glen	Westerleigh	-	-	-	-	505	982
Leicester	Leicester City Council	3,283	3,180	2,729	2,364	2,119	1,976
		3,283	3,180	3,650	3,826	4,011	4,215
<b>Market share - %</b>							
South Leicestershire	Memoria	0%	0%	25%	38%	35%	30%
Great Glen	Westerleigh	0%	0%	0%	0%	13%	23%
Leicester	Leicester City Council	100%	100%	75%	62%	53%	47%

Source: Westerleigh analysis of Cremation Society data

**Figure 10 – [REDACTED]**

70. [REDACTED].

71. In summary, the evidence from the [REDACTED] corroborates what is self-evident from the customer locations of the Great Glen crematoria and from an analysis of overlapping catchment areas (that does not limit itself to the CMA's overly narrow 30 minutes cortege drive time). The CMA also appears to have dismissed all of the other Westerleigh customer maps as not pointing to competition occurring with overlapping catchment areas or over populations centres. Additional examples relating to other sites have been provided above to show this is incorrect. Westerleigh provides further evidence on its other sites in the next section.

#### 4.4 Westerleigh's crematoria typically face local competition from multiple competing sites

72. The CMA's analysis in the Working Papers fails to consider the significant volume of evidence demonstrating that competition takes place between crematoria in local areas on a range of aspects of competition, including quality and price. This section outlines that evidence, considering in turn:

- (a) **Most Westerleigh sites have 2 or more competitors.** Using a reasonable catchment area shows that Westerleigh sites are typically subject to competition from at least one and often more rivals.
- (b) **Almost all of the catchment areas of Westerleigh overlap to a significant degree with the catchment areas of competing crematoria sites.** Using a more reasonable catchment area analysis based on a 30 minute normal drive time shows that the vast majority of Westerleigh's customers have a choice between at least two competing crematoria. Moreover, even using CMA's extremely narrow 30 minute cortege drive time catchment area, only [REDACTED] of Westerleigh sites have less than 20% of their catchment areas overlapping with at least one competitor.
- (c) **Westerleigh's qualitative gain analysis (customers using Westerleigh instead of their closest crematoria)** shows that around [REDACTED]% of Westerleigh's volumes are generated from outside the immediate catchment areas of its sites. These customers typically

come from the catchment areas of multiple crematoria, which Westerleigh competes with. Indeed, Westerleigh has significant numbers of customers that drive *past* their nearest site to choose a Westerleigh crematorium, choosing to travel across the width of both catchment areas. Westerleigh believes that these decisions are being made on the balance of quality and value offered by the available sites. Qualitative gain – and the CMA's unreasonable dismissal of this evidence – is discussed in greater detail in Section 5 below.

- (d) [REDACTED]
- (e) **Impact of entry:** The CMA's entry analysis shows that entry leads to significant volume losses for incumbent providers. Westerleigh will comment in full on that analysis separately, by 10 March 2020.
- (f) **Capacity constraints:** The CMA's approach of effectively discounting crematoria which it assesses as being "capacity constrained" entirely from its competitive analysis significantly overstates the effect of any such capacity constraints, and fails to understand the trade-off between wait time and travel time.

73. Further evidence of crematoria competing on quality and price, [REDACTED], is set out in sections 5 and 6 below.

#### 4.4.1 Most Westerleigh crematoria face more than 2 competitors

- 74. Westerleigh has analysed the number of competitors each of its sites faces, using a 30 minute normal drive time catchment as a reasonable starting point for the analysis. Westerleigh believes its sites will also typically be subject to competition from crematoria located outside that catchment, as evidenced above and in this section.
- 75. As outlined above, the CMA's suggestion that only those areas with four or more competitors are sufficiently competitive is detached from reality and shows a very poor understanding of the market and its historical development. Following the approach taken in private hospitals, Westerleigh has applied an initial filter that those crematoria with two or more competitors within their catchment face sufficient competition, and has focused below on those sites with less than two competitors. There are 21 Westerleigh sites facing sufficient competition on this basis<sup>70</sup> and 13 that require further analysis. Of the 13, five have no competitor<sup>71</sup> and eight have only one competitor in their catchment areas.<sup>72</sup> All of the five crematoria with no competitor within their catchment area are located in more rural areas with limited or sparsely distributed populations.

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<sup>70</sup> [REDACTED].

<sup>71</sup> [REDACTED].

<sup>72</sup> [REDACTED].

76. Of the 13 crematoria with less than two competitors, importantly four of these sites opened within the last three years, involving combined investment of [REDACTED].<sup>73</sup> In each case, the new crematorium has increased competition and choice in locations where people had no choice of convenient crematorium or where they faced long journey times to access a crematorium which may be of poor quality. [REDACTED]. Each site has a payback period of no less than [REDACTED] years and, in each case, the sites will have to win business from existing crematoria to become successful.

Figure 11 - [REDACTED]

#### 4.4.2 Significant overlapping catchments

77. As outlined in detail above, to undertake a proper competitive assessment, the CMA must analyse the extent to which crematoria catchment areas overlap. Where overlaps occur, customers located in the overlap have a clear choice of crematoria. This is particularly relevant in the context of crematoria as competing sites can often both be located outside of a city or town, or one inside the town and one just outside, both with the aim of serving customers located in the town and its surrounding areas. As noted above, this is a function of the historic development of crematoria, planning requirements and the scarcity of suitable sites close to centres of population.
78. Westerleigh has analysed the proportion of each Westerleigh site's catchment area that overlaps with the catchment areas of competing sites. Westerleigh has done this using both the CMA's narrow 30 minutes cortege drive time and the 30 minute normal drive time catchments. The results are shown below:
- (a) On a 30 minute normal drive time catchment, 26 of Westerleigh's 34 sites have catchment areas for which 75% or more of the catchment overlaps with catchment areas of competing crematoria (22 have 90% or more of their catchments overlapping with a competitor). The average catchment overlap across all sites is 84%. Of the nine remaining crematoria, only [REDACTED] have less than 20% of their catchment overlapping with competing catchment(s) overlapping catchment ([REDACTED]), each of which also have a limited number of competitors, reflecting their rural location and limited population from which to draw demand ([REDACTED]).

Figure 12: [REDACTED]

- (b) Even on the CMA's narrow 30 minute cortege drive time, the average catchment overlap is 54%, with only [REDACTED] crematoria having a catchment overlap of less than 20% ([REDACTED]), showing that most customers have a choice of alternative crematoria and there is significant competition taking place between these choices.

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<sup>73</sup> [REDACTED].

Figure 13: [REDACTED]

79. [REDACTED].

Figure 14: [REDACTED]

#### 4.4.3 [REDACTED]

80. The significant competition taking place, even for those crematoria that do not meet the initial filter applied above, is corroborated by [REDACTED]. Details of these documents are provided in detail elsewhere in this document to further support Westerleigh's submissions on:

- (a) How competition in the market works: see section 4.
- (b) The importance to customers of quality, and making trade-offs being willing to travel further for greater quality: see section 5.
- (c) The price responsiveness of Westerleigh crematoria: see section 6.

81. In addition, there have been a number of instances where [REDACTED].

82. [REDACTED].

83. [REDACTED].

#### 4.4.4 Flawed assessment of capacity constraints

84. The CMA seeks to further its attempt to demonstrate weak competitive constraints in local areas by suggesting that crematoria that are capacity constrained "*may pose a weaker constraint because they are unable to accommodate new customers*".<sup>74</sup> This analysis is, however, divorced from reality. The CMA's approach of effectively discounting crematoria which it assesses as being "capacity constrained" entirely from its competitive analysis significantly overstates the effect of any such constraints, and fails to understand the trade-off between wait time and travel time.

85. In practice, each service represents a "new customer" for a crematorium. While some crematoria may have limited availability at certain times, they will almost never be "*unable to accommodate new customers*". Customers may be offered earlier or later slots in the day, different days or have a longer waiting time, which may lead to some customers choosing an alternative crematorium, but other customers may be willing to accept those limitations in order to attend their preferred site.

86. The CMA's binary approach of effectively discounting crematoria which it believes are capacity constrained from its assessment of local competitive constraints therefore inappropriately biases its analysis towards a finding of weaker competitive constraints, especially given the

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<sup>74</sup> Background and Market Structure WP, paragraph 48.

relatively low bar adopted by the CMA for defining capacity constrained sites and the seasonal nature of deaths. For example, the CMA's analysis fails to take into account that:

- (a) Many of the UK's busiest local authority sites carry out between 2,500 to just under 4,000 cremations per annum. While in Westerleigh's opinion these sites are not likely to be offering the best quality of service (with short service times and a 'conveyor belt' feeling), these sites are not closed to new customers. In fact, by definition, these busy sites are taking on a large number of "new" customers every week.
- (b) Many of these busier local authority sites will have experienced reduced market share and volumes over recent years, as new crematoria have entered the markets (see Figure 1, showing reduction in volumes at 10 busiest sites). While they may still be busy, they are not likely to be capacity constrained having previously managed higher volumes.
- (c) Due to the seasonality of deaths, even the busiest of sites during peak periods, are likely to have substantial capacity at less busy periods. For example, deaths in England and Wales during the busiest month of 2018 were 173% of the lowest month and for many unitary areas more than twice as high.<sup>75</sup>

87. It is therefore clearly flawed for the CMA to proceed on the basis that, where a crematorium has one rival within its catchment area which is "capacity constrained" this means that crematorium is "*likely to face no effective constraints within 30 minutes*".<sup>76</sup> It is more likely that capacity issues will feed into poor quality of service, longer waiting times for an appropriate slot and ultimately a decline in volumes as alternative crematoria offer a better quality of service. Capacity is therefore another element of the qualitative and value trade off which customers consider and a key part of the competitive dynamics in the sector.
88. Indeed, in Westerleigh's experience, where its crematoria are located near to 'busy' sites, Westerleigh competes directly and strongly with those sites, by offering a better quality service (e.g. longer slot times, better facilities, service and customer experience) and, as a result, has been most successful in growing numbers. If the CMA's analysis were correct, there would be no need for Westerleigh to compete on quality in this manner – it could simply gain volumes due to the supposed capacity constraints faced by its rival. To discount these sites from the competitive analysis therefore misrepresents the way in which competition operates in the real world.

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<sup>75</sup> See <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/deaths/datasets/monthlyfiguresondeathsregisteredbyareaofusualresidence>.

<sup>76</sup> Background and Market Structure WP, paragraphs 55 – 56.

#### 4.5 Scope for new entry

89. The CMA's Background and Market Structure WP contains an overview of the evidence the CMA has considered in assessing barriers to entry in relation to developing new crematoria. Westerleigh accepts that the planning regime and investment required to develop a site both represent challenges for a new entrant. However, these issues are significantly overstated in the Working Papers.<sup>77</sup>
90. As set out in Westerleigh's response to the Issues Statement, the continued development of new facilities by Westerleigh and other private providers in recent decades and, more recently, some local authorities (which are unlikely to be experienced in developing crematoria), demonstrates that these barriers to entry emphasised in the CMA's Final Report are surmountable.<sup>78</sup> Indeed, there have been around 50 new crematoria opened in the last 10 years alone, an increase of around 20%. While, as for any major development project, there are risks of protracted planning processes, and ultimately aborted projects, the number of recent openings, as well as pipeline projects, provides convincing evidence that where local areas are under-provisioned entry can and will occur, delivering increasing capacity, competition and choice for customers.
91. Furthermore, while the CMA presents anecdotal evidence to the effect that there may be few viable opportunities for development remaining in the UK<sup>79</sup>, Westerleigh strongly disagrees with this assessment. Indeed, the CMA cites a comment from The Federation of Burial and Cremation Authorities made in response to the Government's review of Crematoria Provision and Facilities, but has selectively quoted that document, ignoring the evidence provided by the Association of Private Crematoria and Cemeteries that there is "*a need for new crematoria in several parts of the country because of the ageing population which will be realised over the next two decades*"<sup>80</sup>, as well as evidence of the significant pipeline of specific future developments and the wider expansion plans of operators. This is before taking account of the significant need for re-provision of existing facilities, noted above, with the median age of local authority crematoria in excess of 60 years.
92. Westerleigh considers that, while there may be limited opportunities to develop new crematoria in areas which have large populations not currently served by an existing crematorium, there are opportunities to develop high quality, purpose built crematoria in areas where customers only have the choice of a poor quality of offering. Westerleigh therefore has plans to continue to invest in new crematoria (subject to the outcome of the CMA's investigation), to address both the quantitative and qualitative gaps. [✂].

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<sup>77</sup> As the market currently stands; intervention by the CMA may change these dynamics and raise the barriers to entry for new development.

<sup>78</sup> Westerleigh's response to the Issues Statement, section 3(b).

<sup>79</sup> Background and Market Structure WP, paragraph 70.

<sup>80</sup> MHCLG Crematoria Provision and Facilities: Government Response to the Review, page 8.

93. [REDACTED].

#### 4.6 Response to entry

94. As agreed with the CMA, Westerleigh will provide comments on paragraphs 99 to 118 of the Competition between Crematoria and related Appendix separately, by 10 March 2020.

#### 5. The CMA has failed to understand the importance of quality to competition between crematoria and customer decision making

95. Westerleigh's submissions throughout the Market Investigation have emphasised the importance of quality both to customer decision-making and competition between crematoria. It is therefore surprising that the evidence presented on quality-related factors in the Working Papers is extremely limited.

96. In fact, besides its flawed consumer survey, the CMA puts forward almost no evidence to assess the extent to which quality plays a role in customer decision making, and in fact appears to have expended most effort on attempting, unsuccessfully, to rebut clear evidence put forward by Westerleigh and other operators that demonstrates that a significant portion of customers choose crematoria on the basis of their respective quality offering, while ignoring completely other evidence to that effect. It is extremely disappointing that at this advanced stage of the Market Investigation, the CMA's consideration of this central aspect of competition between crematoria boils down to an exercise of this nature, instead of the CMA objectively and fairly assessing all the evidence available to it which demonstrates the extent to which competition on quality takes place.

97. Moreover, the CMA appears to draw conclusions which the limited evidence and analysis presented in the Working Papers simply cannot sustain. This includes the CMA's wholly unrealistic and unproven assertion that crematoria services are "*relatively homogenous*", seemingly in order to support its proposal to impose price regulation on the sector.<sup>81</sup> This assessment is based on a superficial, highly selective and at times subjective evidence base which is simply inadequate at this stage of the Market Investigation and. Westerleigh alone has provided a significant volume of evidence to demonstrate the quality differential between private sector and local authority crematoria, beyond its arguments regarding the "qualitative pull" of its crematoria, which appears to have been ignored entirely by the CMA. [REDACTED].

98. As concerning, the CMA does not appear to have recognised (or in any event considered) the clear tension in its analysis, which suggests at the same time that:

- (a) Customers do not make choices on the basis of quality and crematoria do not compete on the basis of quality; and
- (b) Private sector operators which have entered the market, including Westerleigh, invest significant amounts in developing, maintaining and upgrading high quality facilities,

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<sup>81</sup> Price Regulation WP, paragraphs 3, 49 and 65. Westerleigh will provide comments on the Price Regulation WP separately.



increasing choice and convenience, and customers, on the whole, are highly satisfied with the quality of services offered.

99. These findings are simply irreconcilable. In fact, as Westerleigh has repeatedly emphasised, its business strategy as a new entrant in many local areas is to offer a higher quality offering in order to differentiate itself and gain volumes from incumbent facilities. If the CMA maintains its current position, it is therefore incumbent upon it to explain the basis on which it considers that it would be rational for private sector operators to invest in quality in this way if it made no difference to the volumes of customers that their facilities would attract.<sup>82</sup>

### **5.1 Failure to understand the importance of quality to customers**

100. In the Competition between Crematoria WP, the CMA's assessment of the importance of quality to customers is almost entirely based on its MI Survey.<sup>83</sup> For the reasons set out in section 3 above, Westerleigh does not consider that the CMA can place any reliance on the MI Survey (or the Market Study Survey) to draw conclusions as to how customers make decisions when choosing between crematoria.
101. Of particular relevance to the CMA's consideration of the importance of quality is the fact that it is unable to split the results between private and local authority crematoria. This is a significant failing given the amount of time the CMA has had to prepare and conduct the survey and, as a result, Westerleigh has significant concerns that the pool of respondents are likely to have largely been customers that used local authorities, who are therefore less likely to have chosen the crematorium they used based on qualitative factors.<sup>84</sup>
102. However, even taking the CMA's survey evidence at face value, the CMA has failed to acknowledge the extent to which the MI Survey indicates qualitative factors driving customer choice. Westerleigh does not dispute that factors such as convenience, logistics and family connections may play a part, and will be particularly important for a large number of customers. However, this does not preclude quality being a key driver of customer choice. In particular:
- (a) Almost half of respondents (49%) cited a quality-related factor as the most important in choosing the crematorium they used, including personal experience (24%), availability, waiting time, date and time of service (5%), reputation, customer reviews or ratings (4%), recommendations (7%), attractive, peaceful setting and well-maintained buildings and gardens (4%), staffing, value of better than alternative (1%), or liked the location (3%). These cannot be dismissed as not reflecting quality.<sup>85</sup> The

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<sup>82</sup> Background and Market Structure WP, paragraph 7.

<sup>83</sup> Competition between Crematoria WP, paragraphs 41 – 81.

<sup>84</sup> This is supported by the proportion of respondents from an urban location, (80% of respondents), which is likely to be over-representative of customers of larger local authority crematoria.

<sup>85</sup> The CMA has argued that some of these should be excluded as they may not actually reflect quality attributes. Aside from this suggesting a survey poorly designed to capture quality, this is incorrect and does

importance of these factors will also be understated due to responses being unprompted and the survey providing the respondents no context (see above).

- (b) In terms of those respondents which reported having compared crematoria, nearly half did so on the basis of the attractiveness of the grounds and building, 18% did so on the basis of availability of service (or waiting time), 16% did so on the basis of modern, well-maintained facilities, 6% on having facilities to accommodate specific faith requirements. This is a very strong indicator of quality driving customer choice, which the CMA unduly plays down in the Working Papers.
- (c) When addressing the reasons why customers did use their closest crematorium, the CMA asserts that "*quality-related reasons (i.e. unattractive buildings/grounds, quality of facilities, limited range of facilities) were reported by a small number of customers as reasons for not using the closest crematorium*".<sup>86</sup> This is clearly incorrect, as the CMA fails to recognise that several other reasons cited are in fact also quality-related. This includes, for example, "*Did not offer choice of dates/days*", "*Difficult for funeral guests to find*", "*Not big enough*", "*Funeral director did not recommend it*". Moreover, it is likely that in at least some instances where respondents stated "*Not the 'family crematorium'/the crematorium we always/traditionally use*", that choice would have been made on quality grounds. Similarly, where the choice of crematorium had been made by the deceased, the active choice of the deceased is likely to have been driven by qualitative factors.
103. Beyond its flawed consumer survey, the CMA presents only a very limited selection of evidence on the importance of quality to customers.<sup>87</sup> While the CMA suggests that this evidence is "*mixed*", it in fact points almost uniformly to quality being an important consideration. Indeed, Westerleigh (in common with other private crematoria operators<sup>88</sup>) has repeatedly and unequivocally stressed the importance of quality to both customers and

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not reflect how competition works (through building a reputation and raising awareness). For example, if personal experience had been bad, the customer may not have chosen the crematorium. Recommendations by family and friends will reflect the standards that Westerleigh maintains and improves, without which such a recommendation would not have been made. The funeral director recommendation reflects [§]. To the extent the recommendation reflects location then this ought to have been captured by the response option ('the distance/journey time/location was convenient'). By refusing access to the survey data, the CMA has prevented Westerleigh from combining the responses to Q7a/Q7b. The CMA also prevents Westerleigh from verifying the results. For example, the sample base for Q7a/7b is noted as all respondents where the deceased did not make their wishes known for choice of crematoria in advance but stated as 339 in the detailed survey tables (Tables 44 to 51) but noted as 242 in Table 25 of the CMA's Survey Working Paper. The verification process achieved through transparency leads to better outcomes but the CMA inexplicably appears to be avoiding scrutiny of its analysis.

<sup>86</sup> Competition between Crematoria WP, paragraph 47.

<sup>87</sup> Competition between Crematoria WP, paragraph 30.

<sup>88</sup> Apart from Westerleigh, Dignity, Memoria, and other small private crematoria, have all informed the CMA that customers choose their sites over others on the basis of the quality of their facilities.

competition between crematoria.<sup>89</sup> The CMA points to only one piece of anecdotal evidence from an independent funeral director suggesting that customers "*rarely ask about the facilities available at a crematorium*", which is very far from showing that even those customers did not consider other qualitative aspects (such as the quality of the building and grounds, or the slot length available).

104. As a result, the weight of the evidence presented in the Working Papers in fact supports a finding that quality is important to customers which, as explained further below, is entirely consistent with Westerleigh's experience of operating and competing in the market.

## 5.2 Flawed assessment of competition on quality

105. Apart from brief references to its flawed consumer survey, the CMA's assessment of competition on quality in the Competition between Crematoria WP comprises entirely of an attempt to rebut evidence put forward by Westerleigh and other operators that they compete on quality in order to attract customers from outside of their immediate catchment areas ("**out-of-area customers**"). As explained below however, this exercise is flawed in several respects and certainly does not show that customers are not travelling to Westerleigh's crematoria on account of their higher quality. Moreover, the CMA has ignored entirely other evidence available to it which points clearly to crematoria competing on the basis of quality.

### 5.2.1 Flawed assessment of evidence on qualitative pull of private sector crematoria

106. Westerleigh has submitted considerable evidence to the CMA on the existence of a "qualitative pull" for its sites. The CMA accepts that around a third of the customers of each of Westerleigh, Dignity and Memoria are out-of-area customers. As noted in previous submissions, as well as the CMA site visit and hearing, Westerleigh believes that the main reasons for customers travelling to Westerleigh's sites from outside the catchment area are in relation to the relative quality and value offered by Westerleigh, as compared with neighbouring sites. Typically Westerleigh will offer better facilities, longer slots and more availability, especially during peak periods.
107. In fact, Westerleigh has a large number of crematoria with significantly higher qualitative gains, where Westerleigh offers a significantly superior product and service to the competing crematoria in the local area, as shown in Figure 15 below.<sup>90</sup>

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<sup>89</sup> Any suggestions to the contrary (for example, paragraph 30(f)) appear to be selective quotes from the relevant party's submissions.

<sup>90</sup> [REDACTED].

Figure 15 – [✂]

108. Despite these submissions, the CMA speculates in the Working Papers that there may be many reasons, other than quality differentials, that result in customers travelling to a crematorium which is not their closest.<sup>91</sup> However, as set out below, it is unable to substantiate this proposition and fails to consider that this analysis [✂].

a) Evidence relating to why customers travel to a crematorium which is not their closest

109. First, the CMA seeks to rely on the MI Survey.<sup>92</sup> For the reasons set out in section 3 above, Westerleigh does not consider that any reliance can be placed on these results. Indeed, the fact that only 14% of customers reported having used a crematoria that was not their closest is a strong indicator that the survey is not representative, given that this is substantially less than the proportion (approximately one third) of private sector operators' customers which fall into that category. In any event, as noted above, the CMA has significantly understated the extent to which customers responding to the MI Survey reported quality-related reasons for travelling further than necessary to attend their chosen crematorium.

110. Similarly, at paragraphs 49-50 of the Competition between Crematoria WP, the CMA incorrectly claims that reasons that "*are not related to quality*" result in some customers choosing a crematorium that is not their closest. In particular, Westerleigh considers issues such as road links, convenience, traffic, and a sense of place/location as key qualitative elements when considering the development of new sites. These are all important features of Westerleigh's competitive strength and drivers of customer choice which increase Westerleigh's qualitative pull. Westerleigh's focus on identifying and developing convenient and quality locations comes at greater cost and risk, with more convenient sites being closer to population centres and therefore often being less available, more expensive to acquire and more challenging to obtain planning permission for than less convenient sites located further away from the population.

111. In addition, the availability of booking slots, which is highlighted, is clearly a quality factor. In investing in new sites, as well as expanding existing sites (which Westerleigh has undertaken in three locations in recent years at considerable investment), being able to offer the bereaved

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<sup>91</sup> Competition between Crematoria WP, paragraph 55. The CMA also notes the high degree of variation in the proportion of out-of-area customers across crematoria, suggesting this may point to the proportion being independent of quality. This is a misrepresentation of the available evidence. The proportion of out-of-area customers will of course vary between crematoria as different crematoria face a wide range of different competitive constraints. The fact that Westerleigh aims to provide a consistent level of quality across its portfolio is entirely irrelevant to interpreting the extent to which its high-quality standards draw customers located closer to alternative crematoria (inevitably to different degrees across areas). The CMA merely confirms that its rebuttal analysis of out-of-area pull suffers from omitted variable bias (i.e. competition faced) and should be dismissed.

<sup>92</sup> Competition between Crematoria WP, paragraphs 46 and 54.

a booking slot of their choice at relatively short notice improves the quality of experience.<sup>93</sup> This cannot simply be dismissed as not a qualitative factor – in such circumstances customers face a choice between using their nearest crematorium but accepting limited availability and/or long waiting times, or travelling further to a crematorium which can accommodate their preferred time and date.

b) Evidence relating to the extent to which crematoria are able to attract customers who have a closer alternative crematorium

112. As noted above, on average around a third of the customers of each of the main private operators are out-of-area customers. However, the CMA has failed to draw the appropriate conclusion from that evidence – that crematoria compete on quality. Instead, the CMA states that "*we consider the fact that crematoria attract some customers who have closer alternatives is not, in itself, evidence of competition, or of competition over quality*" and therefore asserts that the figures "*will overstate the proportions of customers who use a crematorium who use a crematorium that is not their closest for quality-related reasons*".<sup>94</sup> This reasoning displays a concerning lack of objectivity in the CMA's approach to the evidence.
113. Indeed, while the CMA again tries to rely on its flawed consumer survey to argue that customers will often travel further because the closest crematorium was not the "family crematorium", it fails to acknowledge that (as noted above) the choice of a "family crematorium" is often related to past experience. Moreover, this factor is less likely to apply in relation to private sector crematoria, many of which have only opened in the last 10-20 years. To the extent a customer has a strong preference that competing crematoria cannot overcome, then competition occurs for the marginal customers without a strong preference that can be persuaded to switch (on the basis of long-term sustained investment in quality standards and raising public and funeral director awareness).
114. The CMA also attempts to downplay the qualitative pull analysis on the basis that the "*degree of any competition matters, which a focus on "core catchment areas" may not capture*". Remarkably, it then goes on to state that "*we expect competition to be stronger the more rivals there are within the catchment area and/or the more rivals' catchment areas overlap (as significantly overlapping catchment areas may suggest that suppliers are alternatives for a significant a significant proportion of their customers)*".<sup>95</sup> As set out above, this is precisely the type of analysis which is entirely absent from the CMA's consideration of local concentration. It is therefore apparent that the CMA cannot rely on this line of reasoning to disregard the evidence put forward by Westerleigh and other operators.

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<sup>93</sup> For a detailed description of the marketing and awareness campaigns carried out by Westerleigh for a new crematorium, please refer to Westerleigh's response to Q3 of the descriptive questions dated 8 May 2019 and the underlying documents referenced therein.

<sup>94</sup> Competition between Crematoria WP, paragraphs 54 – 55.

<sup>95</sup> Competition between Crematoria WP, paragraph 55.

c) Evidence relating to the extent to which crematoria do not attract all the customers for whom they are the closest

115. While the CMA seems to suggest that the fact that private crematoria do not attract all of the customers for whom they are the closest crematorium is indicative of an absence of competition of quality, its analysis in fact shows that competition does occur in the areas assessed. In particular, while Westerleigh seeks to attract as many customers as possible from both within its catchment and outside on the basis of offering a good quality service at fair value, which may be at a premium to a poor quality offering, customers will balance up the alternative offerings and they are free to choose the alternative (which may be based on proximity, price, availability or other qualitative grounds).
116. Put simply, the fact that some customers within Westerleigh's catchment areas choose to travel further in order (for example) to take advantage of a lower cost option elsewhere, or because a crematorium is more established, does not allow the CMA to conclude that quality is not important to a significant portion of customers. Rather, this is evidence of customer choice and is indicative that competition takes place across a range of measures and that different customer groups will place greater importance on different aspects.
117. The CMA's example of Barham and Folkestone is, furthermore, misleading: Westerleigh does not suggest that no customers will have a preference for Folkestone crematorium over Barham. Customers have different preferences based on a range of attributes and crematoria compete on these attributes. It would be entirely unsurprising if Folkestone had some inframarginal customers, as do all crematoria, and this is consistent with Westerleigh's submissions to the CMA throughout the Market Investigation.

d) Evidence relating to why certain crematoria are better than others at attracting customers who have a closer alternative crematorium

118. The CMA proceeds to set out an analysis of the extent to which differences in the ability of larger private crematoria operators to attract out-of-area customers are associated with differences in their relative prices, slot lengths, customer satisfaction and capacity utilisation, selectively presented either compared to their closest alternative crematorium or an aggregate relationship across all UK crematoria.<sup>96</sup> This analysis is, however, uninformative as the CMA is analysing each factor in isolation: the qualitative pull of Westerleigh's sites cannot be boiled down to any one single factor. As Westerleigh has repeatedly emphasised, "quality" encompasses a wide range of attributes that customers value to very different degrees. This is even confirmed by the CMA's flawed MI Survey, which points to a disparate range of factors that respondents pointed to as relevant.<sup>97</sup> Moreover, the CMA has failed to take any account

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<sup>96</sup> Competition between Crematoria WP, paragraphs 64 – 74.

<sup>97</sup> [X].

of one of the most important aspects of competition on quality – the standard and attractiveness of the grounds and buildings.

119. A particular concern with this crude analysis is that the CMA has analysed the relationship between the proportion of out-of-catchment customers and price, capacity utilisation and slot length *only in comparison to the closest alternative*. This is flawed as crematoria are typically subject to competition from more than one alternative and so the CMA only serves to highlight the limits of its competitive assessment: by ignoring the importance of overlapping catchments and by applying artificially narrow catchment areas it ignores the true number of alternatives available to different customers. It is therefore unsurprising and uninformative that the CMA finds no relationship.
120. The CMA will in many cases will be analysing only a minimal proportion of the overall constraint on a given crematorium, either because the closest alternative is not the main competitor and/or because the crematorium is subject to a wide range of competitors. As an illustrative example of how the CMA's crude approach drives its results, maps of Westerleigh's West Lancashire crematorium are shown below. [✂].

Figure 16: [✂]

121. This is confirmed by examining the overlapping catchments of each of the crematoria in the local area, which show that, even using an artificially narrow 30 minute cortege drive time catchment, 100% of the West Lancashire catchment area overlaps with the catchments from competing sites.
122. [✂].
123. In any event, the CMA's limited analysis does provide evidence that qualitative factors lead to customers choosing to travel further than their closest crematorium. In particular:
- (a) *Price*: the CMA's analysis suggests that if a private crematoria is cheaper than the closest alternative, they attract slightly more out-of-area customers than crematoria that are more expensive than their closest crematorium. The analysis shows only a weak relationship and is in any event unsurprising – if anything it suggests that, contrary to the CMA's analysis elsewhere in the Working Papers, some customers are making active choices based on price differentials.
  - (b) *Slot length*: the CMA's analysis suggests that there is a positive relationship between a longer slot length and attracting out-of-area customers.
  - (c) *Customer satisfaction levels*: the CMA's analysis suggests a negative relationship between customer satisfaction scores and out-of-area customers, which is inconsistent with Westerleigh's experience. This may be for several reasons, including most notably the fact that the CMA's analysis fails to take any account of the relative customer satisfaction scores between the private sector crematoria and their nearest rivals.



e) Qualitative evidence

124. Finally, the CMA presents a highly selective and limited amount of "qualitative evidence" as to where out-of-area customers come from, including the way in which private crematoria model the number of such customers a new site may attract as well as maps showing the distribution of customers for two of Westerleigh's sites, Great Glen and West Lancashire.<sup>98</sup> However, all that this shows is that (as one would expect) there are more out-of-area customers close to the relevant catchment area boundary than further way. It is unclear what conclusions the CMA intends to draw from this analysis, but it certainly does not allow the CMA to ignore or downplay the weight of evidence showing that there are significant numbers of customers willing to travel further than necessary in order to attend higher quality facilities.

125. [REDACTED]. These show customers travelling further due to:

(a) [REDACTED].

(b) [REDACTED].

(c) [REDACTED].

126. The CMA's suggestion that this simply reflects the closeness of the neighbouring crematoria ("*these customers will only travel a small additional distance...to reach the alternative crematorium*"<sup>99</sup>) is speculative, based on no evidence, and shows no attempt to actually assess local competition in these or any other areas. As the examples from Great Glen above show, customers are in fact travelling very far ([REDACTED]) to use Great Glen, which is not unsurprising given its investment in facilities that give it a competitive advantage. It is precisely this sort of investment that the CMA should be seeking to encourage.

**5.2.2 Failure to take account of other evidence demonstrating competition on quality**

127. In addition to its flawed assessment of the evidence on the qualitative pull of higher quality Westerleigh crematoria, the Working Papers display a concerning ignorance of other evidence which demonstrates competition on quality. In particular, as explained below:

(a) Westerleigh's (and other private operators) continued investment in high quality facilities cannot be explained other than by a need to compete on qualitative grounds.

(b) [REDACTED].

(c) The CMA presents evidence of local authorities increasing their slot length, but fails to take this to its natural conclusion – that they are doing so in response to the increased competition introduced into the sector by private sector investment.

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<sup>98</sup> Competition between Crematoria WP, paragraphs 75 – 78.

<sup>99</sup> Competition between Crematoria WP, paragraph 78.

a) Investment in high quality facilities

128. As set out in previous submissions, Westerleigh's business is centred on developing, maintaining and continually improving high quality, purpose-built, crematoria facilities and offering the best possible care for the bereaved. Westerleigh continually invests in maintaining and improving the quality of its facilities, settings and services, as well as expanding existing sites (for example by building second chapels and hospitality facilities) to accommodate increasing demand. As set out above, Westerleigh has also invested in order to meet the needs of local communities and funeral directors, in order to drive volume growth.<sup>100</sup>
129. Westerleigh makes these investments as the profitability of its sites, most of which were opened in the last 20 years, is dependent on gaining sufficient volumes of customers, including from outside of their immediate catchment areas. Westerleigh's business model is driven by the fact that a significant portion of customers will make an active choice to attend a higher quality facility, in a peaceful setting, and with a reasonable service length and will be willing to travel further than necessary in order to do so, and the expectation that as Westerleigh increases awareness of its facilities amongst funeral directors and end customers, this proportion will increase over time (and some will develop a strong preference for Westerleigh's own facilities).
130. The CMA's analysis completely overlooks this clear evidence of competition on quality-based grounds. Indeed, if quality was not important to customer decision-making, then Westerleigh (as well as other private sector operators) would be acting against its own commercial interests by investing the significant amounts that it does in developing and improving its sites. It would clearly be unreasonable and unsound for the CMA to adopt a position that assumes irrational commercial behaviour by private sector operators in this way.

b) Supplementary evidence corroborating customers travelling further for increased quality and making trade-offs

131. As outlined previously, both in this submission and earlier submissions, customers make trade-offs. Where an alternative crematorium offers better quality, some customers (i.e. marginal customers driving competition) are more willing to travel further for that quality. [X].

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<sup>100</sup> For example, Westerleigh invested in the Pooja celebration building at its Great Glen Crematorium to provide the local Hindu community with a private room to observe religious ceremonies, and also invested in hospitality facilities at two sites in response to changing customer requirements. A survey commissioned by the MHCLG had found that 59% of respondents reported that they had experienced problems with accessing crematoria in their local area that met the needs of their faith or community (MHCLG, Crematoria Provision and Facilities: Government Response to the Review, paragraph 6).

Table 1 – [REDACTED]

132. One very clear indication of this in practice is Westerleigh's investment in Westerleigh Crematorium in 2016. This programme included the construction of (i) a second chapel, (ii) high quality hospitality facilities, (iii) additional car parking (iv) landscaping and (v) increasing service slot lengths from 30 to 45 minutes. These developments significantly improved the quality of the site and, as a consequence, the customer experience. This improvement of quality drove an increase in cremation volumes and qualitative gain at the site, with customers coming from outside the catchment area increasing by [REDACTED]% between 2015 and 2018, showing that more families were prepared to travel further to the Westerleigh sites due to an improvement in quality.
133. In summary, this evidence overwhelmingly points to customers making trade-offs between different quality attributes of alternative crematoria and being willing to travel further based on these attributes, which in turn drives Westerleigh's incentives to invest, maintain and improve the quality of its product and service to win these marginal customers. Westerleigh is regularly monitoring the competitive offering (and in particular the quality) of rivals, both within *and outside* of its catchment. This evidence consistently corroborates and provides further substantiation of Westerleigh's submissions.

Slot length

134. Westerleigh views an adequate slot length as being an important aspect of providing a high quality service. In particular, the length of slot needs to be sufficient to accommodate the entry into the chapel, the holding of an appropriate length of service, and then for mourners to exit the chapel at the end of the service in sufficient time to ensure that the chapel becomes available for the next service.<sup>101</sup> Indeed, if slot length were not an important criteria for customers, private operators would not generally offer longer slot lengths, which risks losing extra capacity and additional revenue. Westerleigh, in common with other private sector operators, seeks to offer reasonable length slots, typically of 45 or 60 minutes, taking account of demand and legacy slot length. It also offers the option of extended slots for families looking for a longer than typical service.
135. The CMA has suggested that longer slot lengths do not reflect quality differentials, but rather operators simply filling available capacity. However, this is inconsistent with the fact that Westerleigh does not shorten its service times during periods at crematoria which are operating at or close to full capacity. The CMA takes the position that 60-75% utilisation is capacity constrained – on this basis, Westerleigh operates at full capacity at [REDACTED] of its sites.<sup>102</sup> [REDACTED].
136. The Working Papers also present evidence that private sector investment has driven local authorities to respond by increasing the standard length of service at their own facilities,

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<sup>101</sup> [REDACTED].

<sup>102</sup> [REDACTED].

noting "*we have found evidence of local authority crematoria increasing the length of their slots to meet consumer demand*".<sup>103</sup> However, the CMA fails to acknowledge that this provides clear evidence of competition on quality grounds (as well as the importance of slot length to customers), with many local authorities responding to the quality differential introduced by private operators.

### **5.3 Failure to appreciate the quality differential between private crematoria and local authority facilities**

137. The CMA adopts the wholly unrealistic view in the Working Papers that there is no "*clear cut evidence that there are quality differentials between crematoria depending on whether the crematoria are operated by private providers or local authorities*".<sup>104</sup>

138. This overall assessment is, however, based on an extremely limited, selective and at times subjective evidence base, which is it would be unreasonable for the CMA to rely on in order to reach any conclusions. Westerleigh is concerned that the CMA appears to have effectively closed its mind to obtaining a proper appreciation of the variation in quality in the sector in order to make out a case for imposing price regulation on the basis that crematoria services are "*relatively homogenous*".<sup>105</sup> Indeed, the CMA appears to have failed to properly take into account its own finding that on several qualitative measures private crematoria are, on average, higher quality than local authority facilities<sup>106</sup>, and ignored the evidence put forward by Westerleigh regarding the quality differential, including the output of its own assessment of the condition of UK crematoria from 2016, which highlighted 114 crematoria as being of a poor or very poor standard.<sup>107</sup>

139. Westerleigh's concerns with the CMA's analysis in the Working Papers are set out below.

#### **5.3.1 The CMA's consideration of 'quality metrics' points to the higher quality of private sector crematoria**

140. On those aspects of quality that the CMA considers measurable (for example, slot lengths and availability of facilities such as visual tributes), private crematoria, are found, on average, higher quality compared with local authority crematoria. In addition, based on the same metrics, newer crematoria (which are mainly, private crematoria) are, on average, higher quality. However, other than in relation to slot length, where the CMA's analysis shows a clear differential between private sector crematoria and local authority facilities (in line with Westerleigh's submissions), Westerleigh notes that a focus on qualitative aspects such as the

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<sup>103</sup> Outcomes WP, paragraph 55.

<sup>104</sup> Outcomes WP, paragraph 7.

<sup>105</sup> Price Regulation WP, paragraphs 3, 49 and 65. Westerleigh will provide comments on the Price Regulation WP separately.

<sup>106</sup> Outcomes WP, paragraphs 6 and 106.

<sup>107</sup> [REDACTED].

availability of music systems, visual tributes and web streaming in isolation is largely uninformative of the quality differential.

141. It is, moreover, extremely worrying that while the CMA notes Westerleigh's previous submission that quality differentials may be greatest when comparing older and newer crematoria, it considers this *only* in relation to these metrics and then fails to consider this highly relevant consideration at all when it later assesses other qualitative measures of quality. In fact, it should be obvious that the greatest differences between older and newer crematoria will often relate to quality and upkeep of the grounds and building, which the CMA assesses based solely on site visits to four local authority sites – see further below.

### 5.3.2 The CMA's consideration of qualitative measures is wholly inadequate

142. Westerleigh has highlighted to the CMA throughout the Market Investigation the difficulties of capturing many relevant quality-related factors in readily measurable or comparable ways. This means that a detailed qualitative consideration is required in order to properly understand the variation in quality of crematoria provision across the country, and in particular between high quality, purpose-built, facilities operated by Westerleigh and older local authority sites. It is therefore disappointing that the CMA's consideration of these factors extends to just 6 pages and indicates a highly selective and subjective approach to the evidence available to it, as well as a more general failure to obtain a sufficiently robust evidence base. Indeed, it appears that the CMA appears to have taken the starting point of wishing to prove that there is no material quality difference, and then sought out a limited range of evidence which would support that finding.

#### a) Scottish Inspector of Crematoria

143. The CMA first presents evidence from the Scottish inspectorate regime. The CMA notes that it has looked at the individual reports for each crematorium and found that there was no "*clear-cut or systematic difference in reported quality between private and local authority crematoria in Scotland*" in relation to the "*quality of service offered, the quality of staff, and overall upkeep of sites*".<sup>108</sup>
144. However, the CMA fails to acknowledge that that regime is not designed to assess quality from a customer perspective and that the reports in question likely include limited observations on compliance with the Scottish inspection regime rather than being used to identify general qualitative differences between private and local authority crematoria. Indeed, as the Outcomes WP notes, these reports focus on the crematoria staff and back of house quality. It is therefore not appropriate for the CMA to rely on these reports to assess qualitative differences in relation to matters such as the quality of the grounds and building, and the overall quality of service offered to customers.

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<sup>108</sup> Outcomes WP, paragraphs 70 – 72.

b) ICCM Charter for the Bereaved

145. The CMA also considers evidence from the ICCM Charter for the Bereaved to assess quality differentials between crematoria, highlighting that "*many local authorities are able to achieve a high score*".<sup>109</sup>

146. However, as Westerleigh has previously explained to the CMA, the Charter ratings do not provide a suitable basis for assessing the quality of service that customers experience at crematoria. Moreover, the ratings are concerned primarily with changes in quality levels, and therefore do not represent absolute and comparative quality. For example, the ICCM notes that:

*"The process is not designed to be used as a means of competing with other service providers but to give clear evidence to service users and elected members that the particular service is continually moving forward"*<sup>110</sup>

147. The Charter and scoring methodology is also focussed on the way in which local authorities operate crematoria and cemeteries and, therefore, may not be appropriate as a general measure of quality. Indeed, as the Outcomes WP acknowledges, only five private crematoria were assessed. Even the ICCM recognises that this is mainly targeted at local authority facilities, noting:

*"Many members have found that the results from the Assessment Process and their scores are treated seriously by elected members and this can lead to increased resources and recognition from their authority. It ensures that elected members recognise that it is their responsibility, and not the individual managers, to fund improved chapels, cemetery and crematorium infrastructure, and services generally"*

148. Finally, the ICCM Charter is primarily focused on back of house quality, including the extent to which basic standards are met. Like the Scottish inspectorate regime it does not, therefore, provide a suitable basis to assess the overall quality of service experienced by customers or other relevant aspects of quality such as mourner comfort and the quality of the grounds and buildings.

149. For these reasons, the Charter ratings do not provide an appropriate basis on which to compare the quality of local authority and private crematoria.

c) Customer satisfaction surveys

150. The CMA's consideration of customer satisfaction surveys acknowledges that private crematoria achieve consistently high scores in customer feedback. However, the CMA notes that a "*number of local authorities provided results of customer satisfaction surveys*" which

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<sup>109</sup> Outcomes WP, paragraphs 73 – 74.

<sup>110</sup> See <http://www.iccm-uk.com/iccm/index.php?pagename=charterforbereaved>. Similarly, the Charter notes that "*A gold service that carries out no further improvements could drop back to either silver or bronze.*"

"are in line with private crematoria survey results".<sup>111</sup> In fact, the CMA presents evidence relating to just seven local authorities (i.e. less than 4%), a number of which actually indicate materially *lower* customer satisfaction levels than those reported for private crematoria.<sup>112</sup> The CMA can place no reliance on such a comparison when its evidence base in relation to local authorities is so limited.

d) Other aspects of quality

151. Finally, the CMA summarises evidence it has in relation to aspects of quality that "*are harder to measure objectively*", including the quality of staff and general upkeep and 'feel' of the crematorium, based on its site visits and anecdotal evidence from local authorities and independent funeral directors.<sup>113</sup>
152. In relation to the "*general feel and upkeep*" of facilities, the CMA reveals, however, that it has only visited four local authority sites throughout the course of the Market Investigation (i.e. 2% of all local authority facilities). This a further source of significant disappointment for Westerleigh, given that it has emphasised to the CMA throughout the process the importance of visiting as many sites as possible in person in order to obtain a proper appreciation of the range of facilities available to customers in different parts of the country.
153. Westerleigh does not consider that any conclusions on quality differentials can be based on such a limited sample and certainly the CMA's finding that "*regardless of the operator, the crematoria we have visited all appeared to be relatively similar*" does not reflect Westerleigh's experience in the areas in which it operates, nor the feedback it receives from funeral directors. Westerleigh has provided the CMA with the outputs of a previous exercise which it carried out highlighting the variation in quality of UK crematoria and identifying a large number offering poor quality, which the CMA appears to have ignored entirely, without any justification.<sup>114</sup> Westerleigh contends that a survey of facilities, sites and buildings carried by a suitably qualified expert would highlight the significant differences in this essential part of the service experienced by the bereaved.
154. Moreover, the local authority facilities visited are not identified in the Working Papers, making it impossible for Westerleigh to comment on how representative those sites are of public sector provision more generally. The sole exception to this is Mortlake, which it is clear is not representative of the quality of provision of local authority facilities more generally. In particular, Mortlake has been recognised as being one of the higher quality local authority facilities (a "*crematorium with a difference*"), having been "*garlanded with awards*" and "*recognised within the funeral industry as a beacon of best practice*" and providing among

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<sup>111</sup> Competition between Crematoria WP, paragraph 79.

<sup>112</sup> For example, Durham and Havering crematoriums reported customer satisfaction scores of 85%, which is materially lower than the 96-99% scores reported for private crematoria. In addition the evidence from Belfast crematorium indicates only that a "majority" (i.e. greater than 50%) rated good or excellent.

<sup>113</sup> Outcomes WP, paragraphs 79 to 86.

<sup>114</sup> [X].



"the most exceptional customer service in the UK".<sup>115</sup> It is considered to be "one of the best crematoria in the London area" and is praised for its setting "in beautiful gardens...situated on the banks of the River Thames".<sup>116</sup> Accordingly, the CMA cannot draw conclusions from its experience of Mortlake Crematorium to conclude that, across all 185 local authority crematoria, there is a high quality of service, comparable to that offered by Westerleigh.

155. Furthermore, while the CMA presents a very limited amount of anecdotal evidence from funeral directors in the relevant section of the Working Papers, the CMA fails to acknowledge that this points clearly to a significant variability in the quality of facilities. For example: "*all the local authority crematoria are very different. Some are terrible*" (emphasis added); "*God this looks a mess*"; "*Not nice*".<sup>117</sup> As such, the CMA's analysis indicates a concerning lack of objectivity in the way in which the CMA has approached the evidence available to it.

#### 5.4 CMA evidence on the extent to which higher fees are related to higher quality

156. The CMA attempts to assert that higher cremation fees are not consistently related to higher quality, based on a comparison of fees and the associated slot lengths and availability of certain facilities, ostensibly in order to refute private sector operators' submissions that quality differentials may account for differences in fees.<sup>118</sup> However, this basic analysis does not allow any meaningful conclusions to be drawn. In particular:

- (a) As noted above, focusing on qualitative aspects such as the availability of music systems, visual tributes and web streaming in isolation is largely uninformative of the overall quality differential. Similarly, while considering the cremation fee alongside the slot length offered allows for a better comparison, it does not take account of other aspects which are relevant to customer decision making, such as the quality of the grounds and building.
- (b) The CMA's analysis of capital expenditure is wholly inadequate as it fails to take account of the age of crematoria and distinguish between investments in quality (such as additional facilities) and investments in required maintenance which has no impact on quality, particularly relative to competing crematoria. [REDACTED].<sup>119</sup>
- (c) [REDACTED].

157. Accordingly, limited weight can be placed on the CMA's analysis, and it certainly cannot conclude on this basis that Westerleigh's cremation fees are not related to the quality of its crematoria services.

<sup>115</sup> See <https://www.lbhf.gov.uk/articles/news/2016/11/caring-approach-sees-mortlake-crematorium-win-top-awards> and <https://beyond.life/blog/behind-scenes-mortlake-crematorium/>.

<sup>116</sup> See <https://www.poetic-endings.com/mortlake-crematorium>.

<sup>117</sup> Outcomes WP, paragraph 83.

<sup>118</sup> Outcomes WP, paragraphs 87 – 100.

<sup>119</sup> [REDACTED].

## 6. Flawed analysis of pricing evidence

158. In Westerleigh's response to the Issues Statement it highlighted that it would be important for the CMA to ensure that it did not consider the pricing of crematoria services on a standalone basis, but rather considered evidence relating to pricing alongside the quality of services offered, as well as the investments made by private sector operators in delivering new crematoria, increased capacity and greater choice for customers.
159. However, the CMA has failed to do so in any meaningful way in the Working Papers, resulting in an analysis which fails to properly take into account competitive dynamics in the sector and therefore does not provide a sound basis for any conclusions to be drawn. In particular, as explained below:
- (a) The CMA adopts an overly simplistic approach to the importance of pricing to customer decision making, which fails to acknowledge that price is one of a number of considerations which will be relevant for customers in choosing between alternative options (the importance of which will vary depending on each customer's circumstances).
  - (b) The CMA's analysis of the extent to which crematoria providers compete on price fails to take account of quality differentials between crematoria and the levels of investment undertaken by private sector operators.
  - (c) The CMA incorrectly dismisses the relevance of the price-per-minute measure of cremation fees, which provides a clear, objective, method of taking account of one important aspect of the quality differential between private crematoria and local authority facilities. This evidence shows that, when cremation fees are examined on a more comparable basis (adjusting for slot length but before taking into account the other qualitative factors), Westerleigh's prices are lower than those offered by local authorities in spite of Westerleigh's investments in developing and upgrading higher quality facilities.<sup>120</sup>
  - (d) The CMA fails to acknowledge that pricing information in relation to direct cremations, which are largely uniform, provides clear evidence that attended services are not "homogenous" between different facilities and, therefore, that quality is an important aspect of competition between crematoria.
160. Moreover, it is important to note that the CMA has not presented any evidence that customers are dissatisfied with the prices they are being charged for crematoria services. Indeed, as set out above, the high customer satisfaction scores routinely received by Westerleigh's crematoria provides a strong indication that customers believe they are receiving value for money.

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<sup>120</sup> Outcomes WP, Figure 2.

## 6.1 Flawed assessment of the importance of price to customers

161. In the Competition between Crematoria WP, the CMA asserts that "*price is not an important factor in the choice of crematoria by customers*"<sup>121</sup>, before suggesting (albeit not explicitly) that while crematoria benchmark their prices against local rivals, this does not provide evidence of price competition since there is limited evidence that "*crematoria use benchmarking to try to undercut rivals on price*".<sup>122</sup> This assessment is flawed for several reasons, as explained below.
162. The CMA's assertion that price is not an important factor for customers when choosing a crematorium is clearly a significant overstatement, even if Westerleigh were to accept the CMA's assessment of the evidence in this regard (which it does not). Indeed, the CMA's logic seems to be that certain factors other than price are of particular importance to certain customers and, therefore, price is not important.
163. While price may not be the *most* important factor to customers, and may indeed often be secondary to factors such as quality and location, in Westerleigh's experience, price is a relevant consideration for many customers and will be weighed alongside other factors. The weight attached to price when making such an assessment will vary depending on each customers' individual situation and, for certain customers, price is of particular importance. For example, the importance of price to certain groups of customers is apparent from the growth in direct cremations and reduced fee services in recent years (see section 6.2 below).<sup>123</sup> This growth cannot be readily reconciled with the CMA's claim that "*price is not an important factor*".
164. The CMA cites certain statements and internal documents in support of its claim "*that price is not an important factor for customers*".<sup>124</sup> However, in relation to the two Westerleigh documents that the CMA cites, it is clear that these do not align with the CMA's claim. In particular:
- (a) As the CMA notes in a footnote<sup>125</sup>, the first document, which the CMA claims shows that "*crematoria face inelastic demand*", was a sales document prepared by a former shareholders and management. [X].
  - (b) The second Westerleigh document has, as already highlighted to the CMA<sup>126</sup>, been used completely out of context. In particular, as set out above, the relevant context for the passage quoted is that the relevant Westerleigh crematorium had undergone

<sup>121</sup> Competition between Crematoria WP, paragraph 33.

<sup>122</sup> Competition between Crematoria WP, paragraph 40.

<sup>123</sup> As shown in Figure 4 of the Background and Market Structure WP.

<sup>124</sup> Competition between Crematoria, paragraph 29.

<sup>125</sup> Competition between Crematoria WP, footnote 34.

<sup>126</sup> [X].

a major capital investment and improvement programme. This improvement of quality was followed by an increase in cremation volumes and qualitative gain at the site<sup>127</sup>, which is consistent with Westerleigh's submissions that customers value quality. Indeed, given the value placed on quality by customers, it is unsurprising that the price increase in question, which was directly related to this improvement in quality, did not lead to customers switching to less expensive crematoria. This certainly does not, however, mean "*that price is not an important factor for customers*" or that demand is inelastic.

165. Consistent with the second Westerleigh document the CMA cites, a number of the other statements and internal documents that the CMA cites in fact seem to show that, although not the primary factor, price is still a relevant factor. For example, the statement from Dignity that the CMA cites shows merely that "*price is not at the top*" of the list of factors (emphasis added).<sup>128</sup>
166. The only remaining piece of evidence that the CMA cites in this regard is its MI Survey.<sup>129</sup> However, as explained in section 3.4 above, no conclusions should be drawn from that evidence given the flawed nature of the survey design and extremely low response rate.

## 6.2 Failure to acknowledge evidence of price competition

167. Westerleigh prices its services taking account of its offering relative to other providers, to ensure that it is offering value for money when compared to competing and neighbouring crematoria. Given that Westerleigh's crematoria are, in general, of a superior quality to its local rivals, its fees are often (though not always) higher. However, Westerleigh seeks to ensure that its overall *value proposition*, i.e. taking account of the quality differential, is better than its local rivals in each area.
168. While the CMA recognises that Westerleigh (and other private operators) "*compare and benchmark their fees relative to other neighbouring rival crematoria when setting fees*"<sup>130</sup>, the CMA nonetheless considers that such comparisons and benchmarking is not evidence that price is an important factor, since it has "*not seen evidence that crematoria use benchmarking to try to undercut rivals on price.*"<sup>131</sup> The CMA's claim is not understood. Given the quality differential, the fact that Westerleigh does not regularly seek to undercut neighbouring crematoria is not evidence of an absence of price competition. Indeed, it would make no sense for Westerleigh (or other private operators) to compare and benchmark against local

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<sup>127</sup> [REDACTED].

<sup>128</sup> Competition between Crematoria WP, paragraph 29(a).

<sup>129</sup> Competition between Crematoria WP, footnote 28.

<sup>130</sup> Competition between Crematoria WP, paragraph 34.

<sup>131</sup> Competition between Crematoria WP, paragraph 40.

rivals to achieve prices that are "*in line*", "*level*" and "*competitive*" with such rivals if price were not an important factor in attracting customers to its facilities.<sup>132</sup> [REDACTED].

169. Westerleigh (as well as other private operators) has also explained to the CMA that competition on price takes place when a new entry occurs. In particular, [REDACTED]. The CMA seeks to downplay the importance of this evidence, claiming that new entrant crematoria are often priced higher than incumbent crematoria in the relevant local area.<sup>133</sup> However, the CMA is incorrect to suggest that this indicates a lack of price competition on entry. In particular:
- (a) First, it seems that the CMA has misunderstood Westerleigh's submissions, which are not that it (necessarily) prices lower than the incumbents even when those incumbents are of lower quality. Rather, [REDACTED].
  - (b) In any event, the CMA's analysis indicates that new entrants are priced lower than incumbents in 40% of cases, indicating clear price competition in many local areas. Moreover, the CMA's analysis does not assess the quality of the closest incumbent crematorium or whether it is a local authority facility or private crematorium, which is likely to have a bearing on the size of the relevant quality differential.
170. The CMA also appears to have obtained only limited information from local authority crematoria with regards to their fees-setting policies. Indeed, the CMA refers to only 17 councils (i.e. less than 10%), providing yet another example of the CMA drawing broad conclusions across the sector based on a highly selective and limited evidence base. Moreover, while the CMA notes that local authorities set their fee increases by either a fixed percentage or by benchmarking, it fails to acknowledge that it is unsurprising that public sector bodies do not price in the same way that private operators do. As such, any conclusions that the CMA may make regarding local authority crematoria in this regard should not be used to inform its conclusions regarding Westerleigh.
171. [REDACTED].

**Table 2 – [REDACTED]**

172. In summary, the evidence corroborates that Westerleigh is monitoring the price of competing crematoria and adjusting its own prices in response to that competition and the resulting loss

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<sup>132</sup> See Competition between Crematoria WP, paragraph 34, where the CMA recognises that this, in fact, occurs. Indeed, in this paragraph, the CMA recognises that any price increases would only have limited effect on volumes when rivals undertake similar price changes, thereby confirming the importance of price competition: "*If the other facilities follow the same pricing structure we should still be competitive and maintain our market share.*" (emphasis added).

<sup>133</sup> Competition between Crematoria WP, paragraph 37.

or gain in volume. Price is not considered in isolation but part of an overall value assessment, along with relative quality.

### 6.3 Properly examined on a consistent basis, and taking account of quality differentials, Westerleigh's prices are consistent with the quality of its crematoria services

173. In the Outcomes WP, the CMA undertakes an analysis of prices between crematoria and over time. Its summary of this analysis is that "[a]verage standard cremation fees have increased across all providers in the period 2008-2018. Standard cremation fees have also increased (over the period 2014-2018) on a per-minute basis."<sup>134</sup> As explained below, in reaching this conclusion, the CMA undertakes a flawed and simplistic analysis seemingly designed to omit quality-related factors and otherwise unreasonably excludes relevant considerations from its assessment.
174. First, when considering the inputs for its calculation, the CMA notes that although the information that it was provided by Dignity showed that, on average, fees are 5% higher than those provided by the Cremation Society, the CMA prefers to use the Cremation Society data.<sup>135</sup> Westerleigh is concerned that the CMA has, despite the better evidence available to it, chosen to use a metric that, in effect, biases its analysis to find material differences between the fees charged by local authority and private crematoria. In particular:
- (a) The CMA's reasoning as to why it prefers the Cremation Society data is genuinely unclear. Specifically, the CMA notes that it does so "*given the reasons set out in paragraphs 10 and 12*".<sup>136</sup> However, when Westerleigh reads those paragraphs, as well as paragraph 11, it is unable to find any reason as to why the Cremation Society data is a preferable data set. Indeed, paragraph 11 provides reasons as to why the Cremation Society data omits material costs, paragraph 12 notes that the data could include non-standard cremation fees and paragraph 13 readily admits that the Cremation Society data *under-estimates* local authority fees. The CMA provides no reasons as to why it is appropriate to use such data in such circumstances.
  - (b) The only remaining reason that the CMA provides is that the Cremation Society data is available for historic time periods.<sup>137</sup> Yet the CMA provides no reasons as to why it cannot use the Dignity Trajectory market research data for the static calculations it conducts (for example, Figures 3 to 5).
  - (c) Finally, and for completeness, Westerleigh notes that much of the difference between the Cremation Society data and the Dignity Trajectory market research data seems to derive from the fact that the fees for certain crematoria are not readily available to then compare. Westerleigh wishes to reiterate in this regard that its fees are

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<sup>134</sup> Outcomes WP, paragraph 26.

<sup>135</sup> Outcomes WP, paragraph 13.

<sup>136</sup> Outcomes WP, paragraph 13.

<sup>137</sup> Outcomes WP, paragraph 13.

transparent and include all the items which would be expected to be included as part of the cremation fee. Given the data discrepancies, the CMA should provide access to all underlying data so that the analysis can be verified.

175. Second, when considering the metric by which it analyses the data, the CMA claims that a price-per-minute metric is not informative, "*because customers do not have a choice of slot lengths at a given crematorium for a standard fee service*".<sup>138</sup> Westerleigh strongly disagrees with this reasoning. In particular:
- (a) First, the CMA's argument that "*[c]ustomers have to accept the length of time offered to them by the crematorium, and, if they want a longer service, they have to pay for extra time in the increments offered by the crematorium*"<sup>139</sup> is not understood. That customers are able to pay extra for more time shows that they do have a choice. Moreover, and as explained above, the CMA's analysis of the choices available to customers understates the choices that customers face in reality. Rather, as Westerleigh has explained, its customers typically have a choice between crematoria offering a variety of slot lengths (at different price levels).
  - (b) In addition, as explained above Westerleigh considers that the length of time a crematorium offers a customer is a particularly important aspect of quality and customer experience. Westerleigh therefore chooses to offer a high quality service, which includes a slot length sufficient to accommodate a meaningful service. Indeed, in Westerleigh's experience, the length of service is becoming increasingly important as the personalisation of funerals is becoming more popular. Westerleigh has invested significantly in recent years in additional capacity through the development of second chapels at three sites in order to offer longer slot lengths.<sup>140</sup> Westerleigh has also increased slot lengths at other sites, potentially at the cost of a loss of capacity and volume. This evidence contradicts the CMA's suggestion that slot length is a function of capacity – capacity is being provided through investment or sacrificed in order to offer longer slot lengths and meet the needs of the bereaved for a better quality service.<sup>141</sup>
176. In any event, the fact remains that customers receiving a longer time slot necessarily benefit from a more valuable service. The CMA's analysis seeks to simply ignore this fact. As outlined above, Westerleigh continues to offer a longer time slot, even when a crematorium is at capacity, in three cases investing significantly in second chapels to increase capacity, rather than reducing the time slot. It is therefore apparent that, far from private operators 'imposing' longer slots on customers as a way of imposing higher prices (as the CMA seems to suggest),

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<sup>138</sup> Outcomes WP, paragraph 19.

<sup>139</sup> Outcomes WP, paragraph 19.

<sup>140</sup> [X].

<sup>141</sup> The importance of longer time slots is, in fact, borne out by the responses received by the CMA set out at paragraph 20 of the Outcomes WP.



such longer slots are reflective of customer demand for higher quality and more personalised services. This has the following implications:

- (a) First, when considering average standard fees over time<sup>142</sup>, the CMA takes no account of the increase in the uptake of longer slots, which would naturally, and reasonably, lead to higher prices. The CMA's analysis therefore is to compare apples and oranges, meaning that no meaningful conclusions can be drawn.
  - (b) Second, it is apparent from the above that an average standard fee per minute comparison<sup>143</sup> is a more meaningful comparison than a simple comparison of standard cremation fees. The per minute comparison shows that local authority fees are actually higher on average than those charged by private crematoria, including Westerleigh, despite offering lower quality. This more accurate calculation stands in stark contrast to the CMA's uninformative headline claim.
177. Third, even when using the CMA's inputs (which, as noted above, Westerleigh does not accept are appropriate), when considering the average effective price for 45 minutes slots<sup>144</sup>, it is clear that Westerleigh's fees are only marginally higher than those offered by local authorities. This is despite the significant quality differential in areas other than slot length, including (among others) the superior quality of Westerleigh's purpose-built ground and facilities. This is even more so when considering the average effective price for 60 minute slots<sup>145</sup>, where the CMA admits that the "*differences in average fees are less pronounced*"<sup>146</sup>. Indeed, many private operators offer cheaper fees than local authorities and Westerleigh's fees are, on average, less than £50 more expensive than those offered by (lower quality) local authority crematoria.
178. Moreover, the CMA fails to acknowledge that there has been limited growth in Westerleigh's average price-per-minute in recent years, with a CAGR of just [~~3~~] % between 2014 and 2020. Indeed, as set out in Figure 17 below, Westerleigh's average price-per-minute actually decreased in its latest round of annual price reviews and is now below the 2018 level.

Figure 17 – [~~3~~]

#### 6.4 The CMA fails to acknowledge the relevance of evidence on the prices of direct cremations

179. Finally, while the CMA highlights the dynamic of direct cremation fees in its analysis, it draws the wrong conclusions. As an initial point, it is notable that the CMA misses the obvious point that the existence of direct cremation services (as well as lower priced early morning services) provides customers with a less expensive option, which stands alongside the standard funeral

<sup>142</sup> Outcomes WP, paragraphs 14 and 15 and Figure 1.

<sup>143</sup> Outcomes WP, paragraphs 17 and 18 and Figure 2.

<sup>144</sup> Outcomes WP, Figure 3.

<sup>145</sup> Outcomes WP, Figure 4.

<sup>146</sup> Outcomes WP, paragraph 22.

service. This stands in contrast to the CMA's repeated claim that customers have no choice but to pay higher fees. In fact, as noted above, the growth in such lower-cost direct cremation services forms an important dynamic in the market which the CMA has failed to reflect in its analysis.

180. Moreover, it is significant that direct cremation fees are largely uniform. The CMA asserts that that this could be explained by services being characterised by competition over wider geographic areas, but provides no explanation or evidence for this assertion.<sup>147</sup> In Westerleigh's experience, the CMA's assertion is wrong. While direct cremations may be able to be conducted further away from customers when compared to attended services, geography remains a factor, since coffins need to be transported to the crematorium by the funeral director, whether or not the service is attended. As such, geographical competition does not provide an appropriate explanation for such uniformity.
181. Rather, Westerleigh believes that the uniformity of these prices relates to the reduced qualitative aspects of the offering – the crematoria are, in relation to direct cremations, essentially offering a more homogenous service, in contrast to attended services. Since the families do not attend a service at the crematorium, the comparative qualitative aspects of the crematoria are less relevant and are not, therefore, a main driver of comparative pricing. Therefore, Westerleigh contends that the greater variation between fees for attended services is actually further evidence that the qualitative factors highlighted in Westerleigh's submissions are important to customer decision making in relation to attended services, and that the CMA is wrong to assert that such services are "*relatively homogenous*".

**7. The evidence available to the CMA does not indicate a clear correlation between the extent of local competition and price, crematoria margins and/or quality**

182. In the Outcomes WP, the CMA presents its analysis of the extent to which there is a correlation between local concentration and cremation fees, crematoria margins and quality. In relation to quality, the CMA does not find any evidence that "*quality varies depending on whether the crematorium faces a rival within 30 minutes or not*", while acknowledging that "*EBITDA margins are not clearly correlated with the drive-time to the closest rival*".<sup>148</sup>
183. The CMA therefore only finds a correlation between local concentration and cremation fees, claiming that, on average, "*fees at crematoria with alternatives within 30 minutes tend to be lower than fees at crematoria without alternatives*".<sup>149</sup> However, this is significantly overstated in the Working Papers. In fact, the evidence demonstrates a very weak link between the number of rivals in a crematorium's catchment area and the fees charged by that crematorium. In particular:

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<sup>147</sup> Outcomes WP, paragraph 25.

<sup>148</sup> Outcomes WP, paragraphs 5 and 8.

<sup>149</sup> Outcomes WP, paragraph 39.

- (a) **Limited difference in fees based on presence of a competitor within a 30-minute cortege drive time.** The CMA's analysis shows that fees are only slightly higher at sites with no rivals within a 30 minute cortege drive time – just 4% in the case of Westerleigh's sites and 5% at local authorities. In fact, it appears from the evidence presented in the Outcomes WP that only Dignity has materially higher fees, on average, where it does not have a rival within a 30 minute cortege drive time. This does not allow a conclusion to be drawn across the market that there is a clear correlation between local concentration and cremation fees.
- (b) **Limited difference in fees based on cortege drive time to the nearest competitor.** When assessing how cremation fees compare to the distance to the closest rival, the CMA's asserts that its analysis shows that for "*private crematoria with a rival within 30 minutes, average fees are materially lower when their closest rival is less than 10 minutes away compared with private crematoria that have a rival within 10-30 minutes*".<sup>150</sup> However, as the CMA acknowledges this is based on a very limited dataset as there are only three private crematoria that have a rival within 10 minutes. There are, therefore, various local factors which could be driving these results, and accordingly no clear conclusions can be drawn.
- (c) Indeed, the CMA ignores the fact that, in relation to local authority crematoria which have a rival within 10 minutes – of which there are also only three instances – average fees are *higher* than where the closest rival is 10-20 minutes away and almost identical to those for crematoria whose closest rival is 20-30 minutes away. Moreover, in relation to private sector operators, the CMA's analysis shows that average fees are *lower* for crematoria whose nearest rival is 20-30 minutes away, than for those whose nearest rival is closer, at 10-20 minutes. This is clearly inconsistent with a clear positive correlation between local concentration and cremation fees. In relation to Westerleigh the CMA's analysis also shows only a very weak relation between the distance to the nearest crematorium and Westerleigh's fees – with less than 1% difference in the average fees charged when comparing crematoria whose closest rival is 0-15 and 15-30 minutes away, and less than 5% even when comparing those in the 0-15 and 30+ categories.
- (d) **Number of competitors within a 30-minute cortege drive time.** The CMA's analysis again shows only a very weak correlation between the number of rivals within a 30 minute cortege drive time and cremation fees. Indeed, as the CMA accepts "*the addition of each additional rival does not reduce average fees significantly*".<sup>151</sup> This evidence further undermines the CMA's suggestion that four crematoria are required in each local area for "sufficient" competition (see section 4.2 above).

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<sup>150</sup> Outcomes WP, paragraph 33.

<sup>151</sup> Outcomes WP, paragraph 38.

184. This provides a strong indication that the CMA's local competitive assessment is flawed. As set out above, the CMA's approach to assessing local concentration is overly narrow and fails to reflect competitive constraints that crematoria face over a much wider area than a 30 minute cortege drive time.<sup>152</sup> As part of this response and through the evidence previously provided to the CMA, Westerleigh has shown that Westerleigh is subject to strong competitive constraints in each local area in which it is present. In particular:
- (a) The CMA has correctly identified that there is a group of customers that have a strong preference for an existing crematorium due to family or historical ties, a limited awareness of alternatives or a strong preference not to travel far, and these customers are less likely to consider using an alternative crematorium. Broadly speaking, the longer a crematorium has been active, the greater these ties and greater awareness there will be. These are 'inframarginal' customers that are not the main focus of competition – to compete for them is a long-term process to overcome any ties and to raise awareness of alternative facilities. These ties can be broken more easily in the context of ageing dilapidated and poor facilities, that characterise a large number of providers, and as customers become more aware of the alternatives (i.e. they are more willing to make trade-offs if they know such trade-offs can be made);
  - (b) However, there is a significant number of marginal customers: these are customers who have less ties to a crematorium, greater awareness or openness to recommendations (including from a funeral director), are more sensitive to price or quality, and who make trade-offs. They are willing to travel to an alternative crematorium for increased quality (over a wide range of potential attributes dependent on their requirements or preferences) or lower price. Competition for these marginal customers is very strong – particularly those that travel furthest (as these are the ones most likely to have had a choice).
  - (c) The catchment areas of Westerleigh crematoria significantly overlap with competitor catchment areas as rivals compete for customers located in towns closer to or between a competing crematorium. This competition is supported by evidence on where Westerleigh's customers actually come from, overlapping catchment areas and the extent to which its crematoria are drawing in customers from competitors' catchments. It is, furthermore, corroborated by [redacted].
185. Taking full account of competition shows that Westerleigh delivers – and is incentivised to do so through competitive markets – very good outcomes for consumers. This can be seen by comparing prices or some of the quality factors the CMA has analysed across Westerleigh crematoria. Specifically, there is no clear relationship between price and the initial filter of whether a site has two or less competitors within a 30 minute normal drive time catchment area. This is largely because even those sites with less than two competitors in their catchment are subject to significant competitive pressure. This is shown in Figure 18 below,

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<sup>152</sup> Moreover, as noted previously, the CMA's analysis simple comparisons of standard cremation fees take no account of the relative quality offering available at each crematoria, including slot length in this analysis, further limiting the weight which can be placed on the results set out in the Working Papers.

which shows Westerleigh's prices across all of its crematoria (those sites that have less than two competitors within their respective catchment areas are highlighted yellow).

Figure 18 – [✂]

186. Extending this to take account of the slot length by analysing the price per minute, there is also no clear relationship between price-per-minute and the initial filter of whether a site has two or less competitors within a 30 minute normal drive time catchment area, as shown in Figure 19.

Figure 19 – [✂]

## 8. Conclusion

187. For the reasons set out in this response, Westerleigh has significant concerns regarding the nature, quality and depth of analysis set out in the CMA's Working Papers regarding the supply of crematoria services, which fails to reflect the competitive dynamics of the market in several key respects. This includes, in particular:
- (a) The CMA's overly narrow approach to assessing the extent of local competition between crematoria, and its inexplicable failure to consider the extent to which crematoria compete in overlapping catchment areas and/or over common population centres.
  - (b) The CMA's continued failure to recognise the importance of quality to customer decision-making and competition between crematoria, largely as a result of an overreliance on an extremely limited, poorly designed and unrepresentative customer survey and a failure to understand the way in which crematoria compete for marginal customers.
  - (c) The CMA's erroneous finding that there are no material differences in quality between private and local authority crematoria, such that crematoria services can be considered "*relatively homogenous*".
  - (d) The CMA's failure to properly acknowledge and take into account the significant customer benefits which have been realised in recent years as a result of the investment undertaken by Westerleigh (and other private operators) in developing new crematoria, as well as expanding and improving the quality of its facilities, which has delivered increased capacity, competition, quality and customer choice.
188. Westerleigh hopes that the CMA rectifies these errors of analysis and assessment before reaching its provisional conclusions, taking due account of the evidence provided with this response and in Westerleigh's previous submissions and avoiding the confirmation bias which, unfortunately, appears to have characterised the CMA's approach to the Market Investigation to date.

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189. In any event, for the reasons set out in this response, Westerleigh is strongly of the view that the evidence and analysis presented in the Working Papers does is insufficient to sustain a finding that any feature or combination of features of the relevant market(s) give rise to an AEC in relation to the provision of crematoria services in the UK.