

## Funerals Market Investigation

### Westerleigh Group's response to the CMA's working paper on price regulation for crematoria services

#### 1. Introduction

1. This response sets out Westerleigh's comments on the CMA's working paper on remedy options for regulating the price of crematoria services ("**Price Regulation WP**"). This response should be read alongside Westerleigh's responses to the CMA's other working papers, and refers to those responses where relevant.<sup>1</sup>
2. Given the Advisory Steer given to the Inquiry Group by the CMA Board at the outset of the Market Investigation, Westerleigh understands the detailed consideration which the CMA has given to remedial options which directly intervene in outcomes in the supply of funerals services.<sup>2</sup> However, Westerleigh is strongly of the view that the evidence available to the CMA demonstrates that, even if the CMA were to find one or more adverse effects on competition ("**AECs**") in relation to the supply of crematoria services (which Westerleigh does not accept is the case<sup>3</sup>), a price regulation remedy would not be appropriate and would give rise to significant risks of unintended consequences, in particular by disincentivising further investment in the sector at a time when it is sorely needed.
3. Westerleigh trusts that, in moving towards its provisional findings, the CMA will approach this with an open mind and objectively consider whether the imposition of a highly interventionist remedy in the form of price regulation at a time when the sector is already facing great uncertainty in both the short and longer term, is likely to result in the best outcomes for customers. For the reasons set out in this response, Westerleigh believes it would not and that other, more appropriately targeted, remedial options are available to the CMA to enhance competition and consumer welfare in the event it determines intervention is required.
4. Alongside this response, Westerleigh provides a summary of the results of a survey of Westerleigh's customers conducted following publication of the working papers ("**Westerleigh's Survey**") (which obtained a significantly higher number of responses than

---

<sup>1</sup> Westerleigh's response to the information and transparency measures working paper, dated 27 February 2020 ("**Information Remedies Response**"); Westerleigh's response to the working papers setting out the CMA's competitive assessment of crematoria services in the UK, dated 2 March 2020 ("**Main WP Response**"); Westerleigh's response to the CMA's entry analysis, dated 10 March 2020 ("**Entry Analysis Response**"); and Westerleigh's response to the Crematoria Profitability Analysis working paper ("**Profitability WP**") ("**Profitability Response**").

<sup>2</sup> CMA Board Advisory Steer, 28 March 2019, paragraphs 10-11.

<sup>3</sup> The representations made in this response are made without prejudice to Westerleigh's position, explained in responding to the other working papers published by the CMA, that the CMA has not identified an AEC in relation to the provision of crematoria services in the UK.

either of the CMA's own surveys). The survey results are referenced where relevant below and also provide further, objective, evidence to support a number of key aspects of Westerleigh's previous submissions on the CMA's competitive assessment.<sup>4</sup>

## 2. Executive summary

5. The CMA's remedy-making powers are subject to an established rule of "*double proportionality*". That is, the more intrusive, uncertain in its effect, or wide-reaching a proposed remedy is likely to be, the more detailed or deeper the investigation of the justification for that remedy must be.<sup>5</sup> As set out in Westerleigh's previous submissions, Westerleigh does not believe that the CMA has established any AECs in relation to the supply of crematoria services.<sup>6</sup> Even if the CMA ultimately determines otherwise, however, the evidence and analysis presented by the CMA to date falls a long way short of the standard required to demonstrate that the imposition of a highly restrictive pricing remedy of the form contemplated in the Price Regulation WP would be an appropriate or proportionate response.
6. As recognised in the CMA's guidance, pricing remedies should only be used as a measure of last resort, where remedies to address any underlying AEC are not available or feasible.<sup>7</sup> In the present case, as the CMA has identified, information and transparency measures are key to ensuring that customers have sufficient information available to them at the point of need to make informed choices when arranging a funeral. This would make it easier for customers to compare the prices, quality and range of services offered by different crematoria in their local area. In doing so, it would further stimulate competition between crematoria, specifically in the areas which matter most to the bereaved when choosing the venue for a funeral.
7. Westerleigh's Survey demonstrates that customers have significant choice of crematoria, but are often not aware of the options available to them. The results also show that customers consider overall quality to be by far the most important factor when choosing a crematorium (far more so than price), and that they are willing to travel considerably further than the CMA currently assumes in order to access the quality they desire. This evidence shows the importance of enhancing information availability: properly informed customers will make active choices, taking account of the different aspects of crematoria offerings (including quality, distance and price). Given the central role which funeral directors have in informing families of the options available to them, the CMA should seek to ensure that funeral directors are able to help customers fully understand the choice of crematoria that they have. These measures should be implemented as a priority.

---

<sup>4</sup> Westerleigh intends to provide a more detailed explanation of its customer survey and the results in a separate submission shortly.

<sup>5</sup> Competition Appeal Tribunal (CAT) judgments: in *Barclays Bank plc v Competition Commission* (2009), CAT 27 (paragraph 21); citing *Tesco v Competition Commission* (2009), CAT 6 (paragraph 139).

<sup>6</sup> See, in particular, Westerleigh's Main WP Response, section 2.

<sup>7</sup> CC3, paragraph 89.

8. By contrast, Westerleigh strongly believes that the imposition of pricing regulation would be misguided and carry with it very significant risks of unintended long term consequences for future competition, and ultimately end up reducing (rather than promoting) consumer welfare. In particular:
- (a) **The crematoria sector is ill-suited for price regulation:** In the first instance, there are several features of the crematoria sector that make it inherently unsuitable for the application of price regulation. This includes:
- (i) **The highly fragmented nature of the sector:** With a large number (184) of providers, operating under a diverse range of business models, designing a pricing remedy which appropriately takes into account the different circumstances of different operators (which the CMA's current proposals do not) would be extremely complex, costly, burdensome and prone to errors of assessment.
- (ii) **The significant quality differentials between crematoria:** As Westerleigh has emphasised throughout the market investigation, there is a vast difference between the quality of service offered by crematoria across the UK.<sup>8</sup> Westerleigh's customer survey confirms that the CMA's assertion that crematoria services are "*relatively homogenous*" is simply incorrect. Very few respondents considered this to be the case. As a result, price regulation would carry a significant risk of distorting operators' incentives to offer high quality services and disproportionately affect those operators which have invested in higher quality facilities.
- (iii) **The need for continued investment in the sector:** Whereas price regulation is typically reserved for sectors which are characterised by high barriers to entry in which, consequently, 'high' prices cannot act as an effective signal for competitive market entry, this is demonstrably not the case in relation to the crematoria sector, which has seen significant entry and expansion in recent years. The recent COVID-19 outbreak has proven how vital this investment is, and over the next 20 years sustained investment in the sector is required to meet the continued growth in demand for cremation and to replace/upgrade the existing stock of local authority facilities as it becomes increasingly obsolete. In these circumstances, and as explained further below, price regulation would give rise to significant risks of unintended consequences by distorting market signals to entry and expansion.
- (b) **Profitability concerns relating to local authorities do not justify price regulation:** The CMA's primary rationale for considering price regulation appears to be its position that the "*characteristics of the sector...have allowed crematoria operators to set prices*

---

<sup>8</sup> See, for example, section 5.3 of Westerleigh's Main WP Response.

*at above the competitive level*".<sup>9</sup> However, the CMA's profitability concerns relate predominantly to public sector providers (albeit based on a very small sample), for which profitability analysis is particularly ill-suited given that their objective function is not to make a profit and they are subject to different capital funding.<sup>10</sup> It would be unsound for the CMA to use such concerns as the justification for imposing restrictive price regulation on an industry-wide basis, which would disproportionately affect those private sector operators which have been investing most heavily in the sector in recent years, to the benefit of customers. This is particularly so in circumstances where local authorities are subject to existing legal obligations, requiring them to price on a cost recovery basis.

- (c) **Price regulation risks deterring much-needed investment:** As noted above, it is critical for the sector and ultimately for consumer welfare that any remedies do not deter private sector investment in new and upgraded crematoria facilities. As with any other industry, private sector development in the crematoria sector requires a return on capital sufficient to stimulate investment in new and upgraded facilities. Westerleigh therefore believes that any form of price regulation would carry a very significant risk of reducing investment incentives at precisely the time when it is needed most and/or drive operators to build new sites that are developed to a lower quality standard (e.g. smaller, in less desirable locations, lower specification) and therefore less suited to the needs of the bereaved. If further investment does not occur, consumers in many local areas will face longer waiting times, less choice and in many cases be forced to hold funerals at inadequate and less convenient sites and facilities. These risks are only exacerbated by the CMA's proposal to implement a simplistic, uniform price cap, as well as the uncertainty created by the COVID-19 outbreak regarding the longer term outlook for the sector.<sup>11</sup>

9. The risks associated with price regulation are particularly significant given that, although not fully reflected in the CMA's analysis to date, the market is currently working and evolving in customers' interests in many important respects. Private sector investment in new and improved crematoria has resulted in a significant increase in competition and customer choice in recent years. As a result, more people have a convenient local facility than ever before and have a choice between two or more local facilities, which span a range of price points and relative quality levels. Customer satisfaction levels are also extremely high and, while the CMA has understandably focused on price increases over the period to 2018, in more recent years prices have been increasing in line with (and often below) inflation. Changes in customer demand and choices have also driven an increase in the availability and uptake of

---

<sup>9</sup> Price Regulation WP, paragraphs 44 to 46.

<sup>10</sup> As set out in [redacted].

<sup>11</sup> Given the period of time provided for Westerleigh to finalise its response to the Price Regulation WP, Westerleigh has not had time to make detailed submissions regarding the potential impact of the COVID-19 outbreak on the sector and its relevance for the CMA's proposals in this response.

lower cost funeral options, including direct cremation. Increased levels of competition have, therefore, also resulted in improved outcomes for customers in terms of fees.

10. The imposition of pricing regulation would risk impeding the continuation of these trends and, more generally, preventing the normal operation of market forces from delivering competition and the related benefits to consumers. In these circumstances, and given the significant risks that misguided remedies would result in long term harm to consumer welfare, the CMA requires a particularly compelling evidence base that the application of price regulation is required to avoid significant customer detriment. However, given the availability of other, less-intrusive, remedial options designed to improve the competitive process, there would only be limited (if any) incremental benefits from the imposition of price regulation by the CMA. Given that any CMA-implemented remedy would only be 'interim' in nature, they would also be (by definition) short term in nature.
11. For these reasons, the CMA is unable to establish to the requisite legal standard that the imposition of price regulation would be appropriate and proportionate. Rather, Westerleigh believes that, to the extent the CMA identifies one or more AEC(s), the proportionate response would be to:
  - (a) Prioritise designing and implementing comprehensive and effective information and transparency measures. As noted above, as well as facilitating customers in comparing crematoria, such measures should ensure that funeral directors are able to help customers fully understand the choice of crematoria that they have.
  - (b) Consider the need for local authorities to be provided with additional guidance on compliance with their cost orientation obligations, and make appropriate recommendations accordingly.
  - (c) To the extent that the CMA could establish that further measures may be required to address pricing conduct (which is not accepted), recommend to government that a new sector regulator be established with the requisite powers to consider the need for appropriately targeted pricing regulation at a later date, i.e. taking account of market developments in the period following the CMA's Final Report and if other measures prove to be ineffective.<sup>12</sup>
12. Finally, and strictly in the alternative, if the CMA ultimately does proceed to propose a form of 'interim' price regulation, any such regulation must be designed taking into account the following key considerations:
  - (a) **Price regulation should be limited in geographic scope:** To ensure that price regulation is appropriately targeted, price caps should only be applied in local areas where customers do not have an effective choice of crematoria, where there is

---

<sup>12</sup> Enabling a new sector regulator to consider price regulation would also have the important benefit (among others) of allowing sufficient time for the longer term impacts of the COVID-19 outbreak on the sector to be evaluated in assessing the need for, and design of, any price regulation regime, as well enabling the regulator to take full account of qualitative factors as part of its wider remit.

compelling evidence that the lack of competition has led to poorer outcomes for customers, and other, less intrusive, remedies are less likely to improve those outcomes.

- (b) **A uniform price cap is inappropriate as it does not account for variances in costs and quality:** While a uniform price cap may be superficially attractive given its relative simplicity, such an approach is manifestly inappropriate given the significant differences in service offerings, cost bases, objective functions and risk profiles between crematoria operators. Westerleigh therefore believes that the CMA should only seriously consider a cap on price increases (subject to exceptions where appropriate) for any interim price regulation, rather than a cap on prices, and this should reflect demand and cost conditions faced specifically by crematoria operators.
- (c) **If a uniform price cap is adopted it must allow for a premium for higher quality facilities:** To the extent that the CMA does proceed with a uniform price cap, it must be set at a level which continues to allow operators offering higher quality facilities and services to charge an appropriate premium, to avoid significant customer detriments arising from a reduction in the quality of services available and reduced investments in new crematoria.

13. The remainder of this response is structured as follows:

- (a) Section 3 explains why, even if the CMA were ultimately to identify one or more AECs in relation to the supply of crematoria services, the imposition of price regulation would not represent an appropriate or proportionate response.
- (b) Section 4 provides, without prejudice to Westerleigh's view that price regulation is not warranted, Westerleigh's views on the considerations which must be taken into account in the design of any interim price regulation by the CMA.

**3. Price regulation is not a proportionate response to any AECs the CMA may identify**

14. This section sets out a number of important considerations which, in Westerleigh's view, mean that the imposition of price regulation in the crematoria sector would be neither appropriate or proportionate, even if the CMA ultimately finds one or more AECs in relation to the provision of crematoria services. In particular:

(a) While the CMA's consideration of price regulation appears to be driven by a desire to address its concerns that crematoria operators have "*set prices at above the competitive level*", those concerns are overstated and relate predominantly to public sector providers. It would be unsound and unreasonable for the CMA to use concerns relating to the public sector to justify imposing highly interventionist and restrictive price regulation on private sector operators such as Westerleigh.

(b) In any event, the specific features of the crematoria sector make it inherently unsuitable for the application of price regulation. In particular, the market is highly fragmented, comprised of providers operating diverse business models and offering heterogeneous and evolving services, with widely different cost structures, funding models and objective functions, and is subject to significant and sustained entry and expansion. These features make the application of price regulation highly complex and liable to create significant distortions of competition, and the CMA's proposal for a uniform price cap which makes no distinction between operators with different circumstances, service offerings, cost bases and risk profiles is entirely inappropriate.

(c) It is, furthermore, critical for the sector and ultimately for consumer welfare that any remedies do not deter private sector (or local authority) investment. The CMA appears to accept this, but has failed to give any real consideration to the issue. Westerleigh believes that any form of price regulation would carry very significant risks of reducing investment incentives at precisely a time when investment is needed most. As a result, the risks of intervention in the manner proposed in the Price Regulation WP would far outweigh any potential benefits.

15. In Westerleigh's view, information and transparency measures, which would facilitate customer choice and thereby increase competition between crematoria without directly intervening in outcomes in a potentially harmful manner, represent a more appropriate and proportionate response to the concerns the CMA has identified. The CMA has also recognised that pricing concerns regarding the public sector can, in principle, be addressed by issuing guidance to local authorities on the application of existing cost orientation conditions. In such circumstances, the introduction of price regulation is not warranted, in particular where the CMA has the option of recommending that a new sectoral regulator be established with powers to introduce price regulation at a later date, if deemed necessary taking account of market developments in the intervening period.



### 3.1 The CMA cannot impose sector-wide price regulation based on concerns which predominantly relate to public sector operators

16. The CMA must ensure that any remedial measures it proposes are appropriately targeted and the least onerous necessary to address the issues it identifies in its competitive assessment. As set out above, the CMA's proposal to introduce price regulation appears to be based on its concern that *"the characteristics of the sector...have allowed crematoria operators to set prices at above the competitive level"*, based on its profitability analysis.<sup>13</sup>
17. However, while the CMA states that the concerns that *"its analysis to date is pointing to mean that our current thinking is that any price control remedy would apply to all crematoria operators"*<sup>14</sup>, it fails to explain on what basis it considers it necessary to apply price regulation on an industry-wide basis. In fact, CMA's concerns regarding the profitability of crematoria operators relate predominantly to (a small sample of) local authority facilities which, incidentally, have also undertaken significantly less recent investment than private sector operators such as Westerleigh.
18. As set out in [redacted]. The CMA's analysis also ignores the fact that [redacted], which is reflective of increased competition and indicative of a functioning market. [redacted]. By contrast, the CMA finds that the large majority of local authority crematoria in its sample earned returns that were in excess of their cost of capital.<sup>15</sup> Furthermore, the CMA's findings highlight that:
- "local authority crematoria are making higher returns on average than the large crematoria and that their profitability has increased by around 5 percentage points, on average, over the relevant period"*.<sup>16</sup>
19. It is, therefore, entirely unclear on what basis the CMA concludes from this analysis that it is appropriate to impose price regulation on all crematoria across the UK. In fact, its analysis points clearly to any 'excess' profits in the crematoria sector being predominantly earned within the public sector which, as the CMA acknowledges, generally owns older assets where the capital expenditure has often been fully depreciated.<sup>17</sup> Private operators have newer facilities, many of which have opened in recent years as the result of risky investments, and will not have fully depreciated such costs. The CMA must take this into account in considering which remedial options are appropriate and whether they should apply to all operators in the same way.

---

<sup>13</sup> Price Regulation WP, paragraphs 44 to 46.

<sup>14</sup> Price Regulation WP, paragraph 45.

<sup>15</sup> Although, as noted in Westerleigh's Profitability Response, Westerleigh is concerned that the errors which identified in the CMA's assessment of Westerleigh's costs may be replicated within the CMA's analysis of the sample of local authorities. Moreover, the CMA's sample only represents around 10% of local authority crematoria, limiting the extent to which the CMA can read across its results to all local authorities.

<sup>16</sup> Profitability WP, paragraph 181.

<sup>17</sup> Profitability WP.



20. Put simply, it is not rational or reasonable for the CMA to impose highly intrusive remedies on private sector operators based on profitability concerns which do not, on the whole, apply to them. Nor can the CMA impose price regulation upon all private operators on the basis of excess profits earned by one operator alone. This is even more so given that, as set out below, the most significant risks of unintended consequences arising from a remedy of this nature relate to the impact on the incentives of private sector operators to continue investing in new and improved crematoria in coming years.
21. In the Profitability WP, the CMA states that it intends to "*consider the differences in profitability between the private and local authority crematoria in more detail as we develop our analysis further*".<sup>18</sup> In doing so, it must equally consider how that analysis impacts on the justification for imposing price regulation and, in particular, the proportionality of imposing such regulation on the private sector. Alongside this, in interpreting its profitability analysis, the CMA must consider the fundamental question of whether such analysis is well suited to organisations whose objective function is not to make a profit (including analysis of the budgetary implications for any "surplus" earned), which are subject to wider objective functions, and are able to access capital through very different sources on different terms.
22. Furthermore, while the CMA acknowledges that local authorities are subject to obligations to charge for crematoria services on a cost recovery basis, it fails to take this to its natural conclusion. The CMA has not alleged that those legal obligations are not fit for purpose; indeed, the CMA notes that it expects that the rules would continue to apply and that it would "*expect local authorities to follow them*".<sup>19</sup> The CMA also does not allege that (or even consider whether) local authorities are failing to comply with their legal obligations (which would be a serious allegation), but does note that it is "*mindful that local authorities may benefit from additional guidance on how their cost recovery obligations should be interpreted and implemented*".<sup>20</sup>
23. This approach is inadequate. In circumstances where the CMA has identified profitability concerns that relate predominantly to the public sector which can, *prima facie*, be addressed by existing legal obligations, a proportionate and sensible starting point would be to focus on considering whether local authorities require appropriate guidance on the application of those obligations, and then to make appropriate recommendations accordingly. Only if authorities fail to comply with their existing obligations, or private operators price significantly and persistently in excess of this level in a manner which cannot be justified by differences in costs and relative quality (taking account of their individual circumstances), would there be any case for price regulation.<sup>21</sup> This is a particularly inadequate policy analysis for a sector in which demand is primarily serviced by public sector providers (that still account for over 70%

---

<sup>18</sup> Profitability WP, paragraph 181.

<sup>19</sup> Price Regulation WP, paragraph 46.

<sup>20</sup> Price Regulation WP, paragraph 46.

<sup>21</sup> As set out in Westerleigh's Main WP Response, the pricing evidence shows that considered on a price-per-minute basis, Westerleigh's fees are not materially higher than those charged by local authorities.

of all cremations), and whose "commercial" (or uncommercial) decisions create significant risks and inevitable consequences for private sector providers.

### 3.2 The features of the crematoria sector make it inherently unsuitable for the application of price regulation

24. The CMA must also take account of the fact that there are several features of the crematoria sector which make it inherently unsuitable for regulation which directly controls pricing, and which distinguish it from other price-regulated industries. Indeed, it is unsurprising given these features that the CMA has not identified any price regulation regime for crematoria services in other jurisdictions.<sup>22</sup> As explained below, the crematoria sector is characterised by:

- (a) A highly fragmented base of providers, including both public and private sector, which operate under a range of different business models, meaning that designing an appropriate price regulation regime would be hugely complex, costly and prone to significant risks of errors of assessment and resultant unintended consequences.
- (b) Significant differentials in quality, meaning that far from supporting a uniform price cap on the basis that crematoria are "*relatively homogenous*", the evidence demonstrates that a proportionate pricing remedy would need to be designed taking account of relative quality, adding even greater complexity (and risk of unintended consequences).
- (c) Significant and sustained investment in entry and expansion by private sector operators, which has improved customer outcomes in a number of areas in recent years and which evidence shows is critical to ensure that there is sufficient capacity and quality in the sector to meet future demand and changing customer expectations, meaning that intervention in pricing carries particularly significant risks of unintended, detrimental, consequences for consumer welfare.
- (d) A need for flexibility in pricing to take account of quickly evolving market conditions, including changes to costs, demand (as a result of rivals' entry), a changing product mix, and significant uncertainty associated with new investments (each of which has characterised the sector in recent years), meaning that any price regulation would need to be subject to regular updating and applications for amendments/exceptions, adding further to the costs and regulatory burden of any remedy.

25. Westerleigh notes that many of its concerns regarding the application of price regulation in the crematoria sector, explained more fully below, were explicitly recognised by the CMA in the context of the Private Healthcare market investigation, and relied upon by the CMA as justification for not taking forward such a remedy. In Westerleigh's view similar considerations should lead to the same conclusion in the present case.

---

<sup>22</sup> CMA, International comparisons working paper, 30 January 2020, paragraph 8.

**Competition Commission, Private Healthcare Market  
Investigation, Final Report (2 April 2014)**

*"12.67 We were concerned that, given the large number of different treatments and procedures in existence, **a price control regime would be very difficult and costly to set up in this market** (whether in the form of a reference tariff or by comparison to charges levied by similar hospitals) **and to update**, to take account of both the introduction of new treatments and procedures, and movements in costs over time. **We were also concerned that price controls may be vulnerable to circumvention, in that hospitals subject to such a cap would be incentivized to reduce the quality of the service they provide.** Further, we thought that the **existence of price caps may generate distortion risks over time by discouraging innovation** and the introduction of new and better treatments and procedures. **They would also discourage new entry into an area subject to a capping regime, unless the potential new entrant could be certain that the fact of its entry would result in the removal of price caps in that area.** There is at present no private healthcare industry regulator and the imposition of this remedy would require one to be created to administer and update the price-capping regime and adjudicate on disputes.*

*12.68 We considered that, while price caps might appear to address the immediate customer detriment in single hospital areas, the **cost of setting up and administering such a regime would be considerable and, over time, would result in customer detriment through distortions creating lower quality of service and reduced innovation.** We therefore decided that a **price-capping regime would not be effective in the long term, and would not be proportionate**" (emphasis added)*

**3.2.1 Price regulation is costly and complex to apply in a fragmented sector comprised of operators with a diverse range of business models**

26. The crematoria sector is highly fragmented and made up of a large number (184) of operators. The largest operator, Dignity, accounts for just 15% of all crematoria, while the largest three providers account for less than 30%, with the large majority of the market served by independent local authority or charity operated crematoria. This contrasts to other price-regulated sectors, which are typically comprised of a small number of operators each of which has significant market power (typically associated with some form of economic bottleneck) in a particular area.
27. The crematoria sector is also characterised by a diverse range of business models. This includes:
- (a) 160 local authorities (accounting for 184 crematoria), most of which operate a single crematorium, whose assets are typically fully depreciated, with limited ongoing

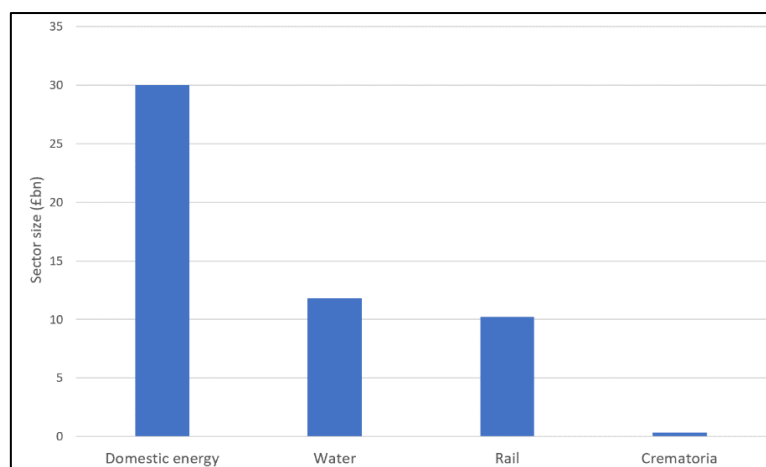
investment other than for routine site maintenance, and with varying degrees of other services and operations such as cemetery management and maintenance.

- (b) Small private sector operators, typically operating a single crematorium (accounting for 22 crematoria).
  - (c) Larger private sector operators, including Westerleigh, which operate multiple sites of varying ages (many recently opened), have additional head office costs which are not relevant for the smaller providers, and in some (but not all) cases are actively investing significant amounts in developing new crematoria, as well as upgrading existing sites to deliver additional capacity and improved quality.
28. These features mean that to design an appropriate pricing regime in the crematoria sector, which properly takes account of the range of business models under which crematoria are operated, would be hugely complex, costly and prone to significant risks of errors of assessment. It would also be likely to involve placing a disproportionate regulatory burden on many operators.<sup>23</sup>
29. Instead of recognising and accounting for these issues, the CMA avoids addressing the significant complexities of assessing the various ways in which the differences in crematoria business models interact with the appropriate level of any price cap(s) by proposing a blunt form of price regulation, in the form of a simplistic price cap which applies uniformly to all crematoria. However, it is not open to the CMA to treat operators with different cost bases and risk profiles in the same way in this manner. Indeed, as explained further below, the CMA's current proposals would disproportionately affect those operators, such as Westerleigh, which have been investing most heavily in the sector in recent years, to the benefit of customers.
30. Finally, it is also important to note that the size of the crematoria sector, with revenues of approximately £350 million per annum, is significantly smaller than other sectors in which price regulation has been deemed appropriate, as shown in Figure 1 below. This must be factored in when considering the proportionality of the regulatory burden which any price regulation regime would introduce.

---

<sup>23</sup> Indeed, the CMA does not propose to adopt a rate of return approach in applying any price regulation on account of the complexity of gathering cost data for all crematoria. Price Regulation WP, paragraphs 67-70.

**Figure 1 – Relative size of price regulated sectors in the UK**



### 3.2.2 Price regulation is inappropriate given the significant quality differentials in the provision of crematoria services

31. The CMA's own guidance recognises that in markets characterised by differentiated products or services, defining appropriate parameters for remedies designed to control outcomes, including price control, is likely to be "*complex and, in some cases impractical*" since it is necessary to "*capture adequately the diversity of products [on] offer*" and, as a result, remedies of this nature will be "*vulnerable to specification risks*".<sup>24</sup>
32. This is precisely the situation the CMA is faced with in the crematoria sector, which is characterised by significant differentials in the quality of facilities and services offered by different providers, which cannot be readily captured in a form that lends itself to the application of price regulation. Indeed, the CMA has recognised that "*a comprehensive comparison of all aspects of quality between crematoria is not possible. There are many aspects of quality, not all of which are measurable, quantifiable or objective*".<sup>25</sup>
33. It is surprising, then, that the CMA's proposals in the Price Regulation WP are premised on the assertion that "*cremation services are a relatively homogenous 'product'*" and that the CMA can therefore simply "*identify a commonly purchased combination of cremation services and set a maximum price for this benchmark package, which all providers who are subject to the price control regulation would be required to offer*".<sup>26</sup> This is entirely inconsistent with the CMA's reasoning in other working papers and the evidence base available to it. In fact, even the Price Regulation WP itself is internally inconsistent, with the CMA's acceptance that there are "*demands for customisation*" and a need to ensure that operators "*retain incentives to*

<sup>24</sup> CC3, paragraph 88.

<sup>25</sup> Outcomes WP, paragraph 53.

<sup>26</sup> Price Regulation WP, paragraph 49.

*innovate [and] differentiate*<sup>27</sup> clearly contradicting its suggestion that all crematoria offer a homogenous service.

34. Westerleigh has explained in its previous responses its concerns at the CMA's failure to gather adequate evidence to accurately capture these quality differentials<sup>28</sup>: a central flaw in the CMA's work and evidence gathering thus far is its failure to recognise the heterogeneity of customer preferences, and the benefits of diverse providers to meet these. However, even the CMA's limited analysis in the Outcomes WP shows that there is a range of quality available and that private crematoria offer, on average, higher quality than local authority facilities on a number of measures.<sup>29</sup>
35. Crematoria services are offered in buildings and grounds of vastly differing quality, in different settings, with a different range of facilities and services available at each, and with services of varying lengths. Even in terms of the basic cremation services there are vast differences in the quality of the facilities used and amenities provided. In the same way that consumers in many markets desire (and are willing to pay more for) a higher quality service, some people want to say farewell to their loved ones in a crematoria with state of the art facilities and well maintained grounds, offering exceptional care and service.<sup>30</sup> All of these qualitative aspects are important to the bereaved and impact on how they experience a funeral.
36. These features are confirmed by Westerleigh's Survey, the results of which show that customers place significant value on quality attributes. Almost no respondents believed that "*crematoria are much the same*". Indeed, quality attributes were considered significantly more important than price, suggesting that a focus on pricing intervention would be misplaced if the ultimate goal is to protect and promote consumer welfare.
37. In Westerleigh's view, these features make the crematoria sector inherently unsuitable for price regulation, and certainly to a 'one-size-fits-all' approach as proposed by the CMA, which implies that the quality of a crematorium and the service offered to customers should have no bearing on the cremation fees it charges. It is not open to the CMA to circumvent a proper consideration of the issues raised by the quality differentials between crematoria by falsely claiming that crematoria services are somehow 'homogenous'.
38. A price remedy which reflected quality differentials would be likely to require a highly complex design, involving significant costs, and would be prone to significant uncertainty and risks of errors of assessment. On the other hand, while a price cap which applies equally to all crematoria regardless of quality may be attractive to the CMA on account of its relative

---

<sup>27</sup> Price Regulation WP, paragraph 59.

<sup>28</sup> See in particular Westerleigh's Main WP Response, section 5.

<sup>29</sup> Furthermore, as set out in Westerleigh's Main WP Response, the CMA's assessment that there is no material difference in quality between the public and private sector in relation to other quality-related aspects is based on a limited, highly selective and often subjective evidence base which cannot sustain the conclusions it draws

<sup>30</sup> Westerleigh has set out at length in its previous submissions the factors which drive the qualitative aspects of customer experience, which are corroborated by the results of Westerleigh's Survey.

simplicity, such an approach raises significant risks of distorting operators' incentives to invest in providing quality services to customers and therefore dampening competition on this key element. Indeed, the CMA's proposed cap on "benchmark" services would do nothing to allow private operators to earn an appropriate return from offering higher quality grounds, facilities and customer service.

39. These risks could manifest in a number of ways, including reduced incentives to invest in maintaining and upgrading existing crematoria, removing incentives to develop new facilities (see further below), anti-competitive effects and/or, to the extent that development of new crematoria continued, changing operators' incentives in such a way that they would seek to do so at the lowest cost, since there would be no certainty that investment in higher quality facilities would be appropriately rewarded through being able to charge an appropriate price premium compared to incumbent facilities.
40. The CMA acknowledges some of these risks, at least to an extent, in the working papers as it notes that it *"will need to consider that there may be risks with regards to the quality of depending on the price control regulation"*.<sup>31</sup> However, it proceeds to suggest that the disincentive effect on investments in improving quality could be addressed by a new regulator by considering *"the need for minimum quality standards in crematoria"*. This, again, displays a lack of understanding on the CMA's part of the role which quality plays in the market. Minimum quality standards are inherently incapable of replicating the competition on quality which currently takes place, and which has driven innovation and delivered significantly improved consumer outcomes in recent decades in terms of the quality and range of facilities available, slot lengths, waiting times and other aspects of customer service.
41. It is, moreover, concerning that the CMA appears to suggest that any negative impact of a price control remedy on quality could be addressed by a new regulator at some (unspecified) point in future.<sup>32</sup> Given that the CMA is proposing to implement an interim price cap for five to seven years, this approach is self-evidently insufficient to ensure that consumers do not face worse outcomes as a result of any intervention by the CMA. The CMA cannot defer consideration of the impact of any remedy on the incentives of suppliers to lower quality for several years. Rather, it must form a central part of the CMA's consideration of whether such a remedy is reasonable and proportionate.<sup>33</sup>

### **3.2.3 The risks of intervention are greater in a sector characterised by significant and sustained market entry**

42. As noted above, the crematoria sector has seen significant new entry in recent years, delivering improved outcomes for consumers. Alongside developing 18 new crematoria in the space of just 10 years, Westerleigh has also undertaken significant investment in recent years

---

<sup>31</sup> Price Regulation WP, paragraph 83(a).

<sup>32</sup> It is also unclear how minimum quality standards could be met and funded by local authority crematoria.

<sup>33</sup> Indeed, as the CMA accepted in the Issues Statement (paragraph 130), *"any assessment of a price control remedy would need to take account of its impact on the incentives of suppliers to lower quality"*.



in expanding the capacity of its existing sites, including by building second chapels at three sites, to accommodate increasing customer demand while maintaining a high quality service.<sup>34</sup> Other operators such as Memoria have also continued to open multiple new facilities while new providers, including Horizon, have entered.

43. There is a significant body of evidence showing that, as a result of this investment, the market is operating in a manner which is producing significant customer benefits, which must be taken into consideration in evaluating the proportionality of, and risks associated with, any potential remedial options. This includes, among others:
- (a) **Increased competition, choice, capacity and quality:** Private sector investment has resulted in a significant increase in competition and customer choice in recent years, including a significant number of new crematoria with modern designs, superior quality facilities and grounds, increased service options and longer service lengths which results in crematoria which are incomparable with the old stock of local authority crematoria. As a result, more people have a convenient local facility than ever before and have a choice between two or more local facilities, which span a range of price points and relative quality levels. In addition, customers now have more choice of service length and a greater range of facilities offered at many crematoria.
  - (b) **Reducing profitability and price increases:** While the CMA has understandably considered price increases over the period 2018, price increases have reduced significantly in more recent years and Westerleigh's recent price increases have been close to inflation. Indeed, Westerleigh's average price-per-minute has increased below inflation in recent years (with a CAGR of just [X]%) between 2014 and 2020) and actually decreased in its latest round of annual price reviews.<sup>35</sup> Westerleigh has frozen prices at some sites, and has also reduced its direct cremation prices.<sup>36</sup> As noted above, [X], which is reflective of increasing levels of competition and indicative of a market functioning in customers' interests.
  - (c) **Increasing availability and uptake of low cost options:** There is currently greater availability of lower cost options for customers than ever before, with direct cremation, reduced cost early morning slots and low cost funeral options (offered by Cremation without Ceremony, Simplicity Cremations and Pure Cremation among others) increasingly being taken up by price sensitive customers. These changes have emerged relatively recently, but are accelerating rapidly.

---

<sup>34</sup> [X].

<sup>35</sup> As the main component of the service offering is time in the chapel, Westerleigh considers the price-per-minute metric is a far more relevant metric than the cremation fee in itself, especially when making comparisons with other operators and over time, where service lengths can vary.

<sup>36</sup> This trend is also not specific to Westerleigh. For example, Dignity has frozen prices at most of its crematoria for a protracted period.

- (d) **High levels of customer satisfaction:** The evidence available to the CMA also indicates very high levels of customer satisfaction regarding the quality of crematoria services (and only limited, isolated, examples of dissatisfaction with cremation fees specific to certain providers).<sup>37</sup>
44. The investment which has been seen in recent years is expected to continue in coming years (setting aside the potential adverse implications of intervention by the CMA), and is fundamental to ensuring that there continues to be sufficient capacity to serve growing demand, which is being driven by two trends:
- (a) The continuing trend towards consumers choosing cremation over burial: as noted in the Background and Market Structure WP the proportion of funerals involving a cremation increased from 35% to 78% between 1960 and 2018.<sup>38</sup> As it stands, Westerleigh expects this trend to continue given, among others, the increasing quality of crematoria (driven by private sector investment), the significantly lower costs of cremations as compared to burials and the trend towards consumers choosing more secular funerals.
- (b) The expected growth in deaths in coming years: while the mortality rate has generally been in decline in recent decades until 2016, it has been estimated that with an increasing and ageing population there could be a 25% increase in the number of deaths by 2040 (from 2014 levels).
- (c) The increasing ability for new, high quality facilities to win business from increasingly dilapidated, under-funded incumbent local authority crematoria.
45. While the working papers seek to downplay the likelihood and need for significant development of new crematoria in future<sup>39</sup>, in fact operators including Westerleigh, Dignity, Memoria and Horizon Cremation, as well as independent operators, have many schemes recently opened or in the planning and development process, at least prior to the uncertainty caused by (i) the possibility of interventionist remedies resulting from the CMA's market investigation and (ii) the COVID-19 pandemic.<sup>40</sup> The development activity is taking place alongside the need to re-provide obsolete stock of local authority crematoria, which no longer meet the needs of the bereaved (which has been highlighted in recent years given the gulf in quality with modern, high quality facilities).<sup>41</sup>

---

<sup>37</sup> See for example Westerleigh's Main WP Response, paragraph 8, and Outcomes WP, paragraph 104.

<sup>38</sup> Background and Market Structure WP, paragraph 4.

<sup>39</sup> Background and Market Structure WP, paragraph 70.

<sup>40</sup> See Westerleigh's Main WP Response, paragraph 20(a).

<sup>41</sup> While ideally investment in the sector would include investment from local authorities in upgrading and replacing their existing facilities, alongside private sector investment in maintaining their current crematoria and developing new facilities, given the current state of local government finances and the widespread impact of COVID-19 this appears unlikely to happen, although Westerleigh is aware that some local authorities have schemes currently in the planning and development process.

46. In these circumstances, the CMA should be particularly cautious in considering the case for, and potential costs of, imposing price regulation. Such regulation is typically reserved for markets characterised by high barriers to entry which make competitive entry unlikely. This is evidently not the case in the crematoria sector, which has seen significant and sustained entry/expansion in response to market signals, delivering improved outcomes for customers. As explained further in section 3.3 below, this feature of the market means that price regulation carries very significant risks of unintended consequences and long term customer detriment.

#### **3.2.4 The nature of crematoria services means that flexibility is required in pricing**

47. As acknowledged by the CMA, any price cap would need to be adjusted on an ongoing basis, and there would have to be the ability for crematoria operators to make interim applications for updates, variations and exemptions (see further section 4 below).<sup>42</sup> Indeed, as has been shown by the recent crisis, there is a need for flexibility in how operators rapidly adapt to evolving market circumstances. This is not simply a matter of reconsidering the appropriate level of any price cap on an annual basis. Rather, operators need to have access to a clear, predictable and sufficiently quick process to obtain such exceptions and adjustments where necessary. This would represent a significant burden, which must also be taken into account in assessing the costs involved in the implementation and monitoring of any remedy, as well as ongoing compliance costs.

#### **3.3 Price regulation risks deterring much needed investment in the crematoria sector**

48. Westerleigh has highlighted throughout the Market Investigation the importance of ensuring that any remedial action the CMA takes does not deter private sector investment in the crematoria sector. Given the current state of development of the market – which as set out above requires sustained investment in new facilities to ensure that there is sufficient capacity to meet future demand – there is a significant risk that poorly designed interventions will produce unintended long term consequences for future competition and consumer welfare.
49. The risk of deterring such investment is, inevitably, greatest in relation to price regulation which would directly limit the returns which could be achieved on what are risky investments. As with any other industry, private sector development in the crematoria sector requires a return on capital sufficient to stimulate the investment in new and upgraded facilities. Westerleigh therefore believes that any form of price regulation would carry a very significant risk of reducing investment incentives at precisely a time when these are already dampened and investment is needed most, by damaging the business case for investing in new sites and upgrading inadequate existing sites. Equally, it is likely to mean that, even where new sites are developed, they will be built to a lower quality standard (e.g. smaller, in less desirable locations, lower specification, etc).
50. As a result, there is a real risk that if the CMA proceeds with its current proposals some areas of the country that could have benefitted from competitive entry/expansion will not. As set

---

<sup>42</sup> Westerleigh has provided the CMA with details of the significant year to year variation in its cost increases.

out above, operators have plans to develop more crematoria, delivering increased choice, capacity and quality to customers in local areas around the UK, but in many cases these plans are on hold pending the outcome of the CMA's review of the sector. If this investment does not occur, customers in many local areas will face longer waiting times, less choice, have lower quality facilities available to them, have to travel further, and more generally will not benefit from the customer benefits related with enhanced competition between crematoria.

51. Westerleigh's concerns regarding the CMA's proposed intervention stand regardless of the current situation. However, given the unprecedented pressures the sector is currently facing and the significant uncertainty regarding the longer-term implications of the COVID-19 outbreak, now would be a particularly dangerous time to impose additional, restrictive, regulatory burdens on the sector. Indeed, the uncertainty which the pandemic has given rise to only increases the risks of interventions being poorly designed and carrying unintended consequences that will reduce customer welfare in the long term.
52. While the CMA acknowledges the importance of ensuring that any price regulation remedy does not unduly impact investment incentives<sup>43</sup>, it does not take account of this highly relevant factor at all when it comes to assessing the design of its proposed remedy. For example, while the CMA asserts that "*[market] distortion risks, for example that operators are unable to earn a normal rate of profit...can be addressed by assessing the level of a price cap in consideration to costs and/or profitability*", the CMA then proposes a uniform price cap based on pricing information from the sector without any regard to relative quality or the level of profitability required to ensure that incentives to invest in new and improved crematoria facilities are not distorted. This approach only exacerbates the risks set out above.
53. Moreover, the CMA fails to recognise that the introduction of 'interim' price regulation for a period of five to seven years before a new regime is implemented by a new regulator would in itself introduce significant uncertainty in relation to the potential returns on investment which, in itself, is likely to deter investment (see further section 3.5 below). Indeed, this can already be seen from the fact that Dignity has suspended its development activity pending the outcome of the CMA's review.
54. In these circumstances, the CMA requires a particularly compelling evidence base that the application of price regulation is required to avoid significant customer detriment. However, given the other remedial options available to the CMA (discussed further below) and the fact that any 'interim' price regulation imposed by the CMA would (by definition) only be short term in nature, any incremental benefits from the imposition of price regulation by the CMA will only be limited. Westerleigh therefore strongly believes that the potential costs of intervention as proposed in the Price Regulation WP far outweigh the potential benefits.

---

<sup>43</sup> For example, Price Regulation WP, paragraphs 42 and 83-84.

**3.4 Information and transparency measures represent a more proportionate response to any AECs the CMA may identify, while pricing concerns regarding local authorities can be addressed through existing legal obligations**

55. As noted above, the CMA's guidance recognises that the imposition of remedies that control prices (or other market outcomes) directly should be used as a last resort where remedies to address any underlying AEC are not available or feasible.<sup>44</sup> In the present case, there are alternative remedies available to the CMA to address any AEC(s) it may identify by further stimulating competition between crematoria in local areas. As a result, the imposition of further measures to directly regulate prices would be neither necessary or proportionate, in particular given the significant risks to consumer welfare that this would carry.
56. In particular, as the CMA has identified, information and transparency measures would improve customer awareness of the choices available to them and make it easier for them to compare the prices and services offered by different crematoria in their local area. Funeral directors should be at the centre of any such measures, given the key role which they play in informing families of the options for choice of crematorium, and advising on the comparative quality of facilities. Appropriately designed remedies of this nature would directly address the CMA's concern regarding the challenges which the bereaved in exercising choice at the point of need, and in doing so lead to enhanced competition between crematoria in order to attract customers to their facilities.
57. Moreover, Westerleigh believes that such measures would also encourage many customers to travel further for a funeral than is currently the case by increasing awareness of the range of crematoria available in their local area. In Westerleigh's experience, which is supported by the evidence on the 'qualitative pull' of its crematoria and Westerleigh's Survey, customers are willing to travel for a one-off event. Thus, greater awareness of the availability of higher quality services and facilities is likely to encourage customers to shop around and make more informed choices about the distance they are prepared to travel.<sup>45</sup> This, in turn, would promote enhanced competition between crematoria as the number of 'marginal' customers would increase.
58. Westerleigh therefore believes that the CMA's focus as it proceeds to making its provisional findings should be on designing comprehensive and effective information and transparency remedies. Westerleigh recognises that the CMA's predecessors have previously attempted to enhance the availability of information for consumers in this area. However, Westerleigh believes that there is potential for the CMA to go much further than the "*lighter touch*" self-regulatory model adopted by the OFT in 2001<sup>46</sup>, with much greater certainty of producing a positive impact customer's ability to effectively exercise choice, including as a result of

---

<sup>44</sup> CC3, paragraph 89.

<sup>45</sup> See Westerleigh's Information Remedies Response, paragraph 2.11.

<sup>46</sup> OFT, A report of the OFT inquiry into the funerals industry, July 2001, paragraph 7.2.

changes in consumer behaviour and technology over the intervening period, in particular the growth in the use of the internet for purchasing decisions, including in relation to funerals.<sup>47</sup>

59. Furthermore, as noted in section 3.2, the CMA has also acknowledged that any pricing concerns regarding the public sector should, in principle, be capable of being addressed through existing legal obligations. An appropriately targeted response to the profitability concerns raised by the CMA (which relate predominantly to the public sector) would therefore be for it to consider the need for local authorities to be provided with additional guidance on the application of their cost orientation obligations, and to make appropriate recommendations accordingly.<sup>48</sup>
60. While the CMA notes the need *"to achieve a timely solution to address any AECs and/or detrimental effects on customers"*<sup>49</sup>, this does not justify price regulation being introduced alongside other measures which, if effective, would address any detrimental effects identified by the CMA in terms of pricing outcomes. Given the risks of price regulation, it should only be imposed if it is clear that alternative measures are insufficient to address the concerns identified by the CMA. That is not the case on the basis of the evidence presented in the working papers. In any event, as set out above, any incremental benefits from imposing 'interim' price regulation would be limited and short term in nature, but carry significantly greater risks of long term harm to consumer welfare.
61. Furthermore, while the CMA asserts that information and transparency remedies *"may only be effective in areas where customers have a choice of crematoria"* and that *"about half of crematoria in the UK have no alternative within a 30 minutes' drive, and as such, encouraging shopping around in these circumstances will not help a large number of customers"*<sup>50</sup>, Westerleigh strongly disagrees. In particular, as explained in Westerleigh's Main WP Response, the CMA has adopted an overly narrow approach to assessing the degree of local concentration in the provision of crematoria services. This is further confirmed by the results of Westerleigh's Survey, which show that customers are willing to travel significantly further than the CMA's analysis assumes.
62. In fact, the vast majority of Westerleigh's customers have an effective choice between at least two (and often more) crematoria<sup>51</sup>, meaning that appropriate information and transparency measures would represent an effective remedy to address the concerns raised by the CMA. In any event, even if the CMA continues to maintain this position, the logical conclusion would be that this could only possibly justify further, outcomes-based, regulation in those local areas where customers do not have an effective choice (see further section 4 below).

---

<sup>47</sup> See further Westerleigh's Information Remedies Response.

<sup>48</sup> Indeed, local and central government would need to give consideration to how local authorities might fund essential bereavement services if the current model faces restrictions.

<sup>49</sup> Price Regulation WP, paragraph 93.

<sup>50</sup> Information and Transparency WP, paragraph 24.

<sup>51</sup> See further Westerleigh's Main WP Response, section 4.

### **3.5 Price regulation could, if deemed necessary, be introduced at a later date by a sector regulator**

63. Even to the extent that the CMA considers price regulation may be necessary alongside other measures (which Westerleigh does not accept), it would be open to the CMA to recommend to Government that it establish a new sector regulator with powers to regulate prices in certain circumstances. This option is recognised in the Price Regulation WP, but does not form the basis for the CMA's proposals.
64. Importantly, however, this approach would allow time for information and transparency measures to 'bed in' and for a new regulator to assess their effectiveness and impact on customer-decision making and outcomes, as well as the impact of any intervention in relation to local authority crematoria budget setting, before taking a decision on whether further action was required to protect consumers at an appropriate point. A 'staged' approach of this nature would represent a more proportionate approach and ensure that price regulation is only used as a 'last-resort' where other measures have failed. This would also have a number of additional important advantages, as compared to the imposition of an interim price control by the CMA, as explained below.
65. First, by providing for a new sector regulator to consider the issue of price regulation after an appropriate period in which information and transparency measures had been implemented, this would also allow other developments in the market in the intervening period to be taken into account in assessing the case for (and design of) price regulation. This is particularly important at the present time given the uncertainty surrounding the potential longer-term impacts of the COVID-19 outbreak on the sector in coming years.
66. Second, Westerleigh believes that a sector regulator with a remit to oversee the funerals sector more generally would be better placed to design a price regulation remedy which took appropriate account of qualitative considerations. As set out above, Westerleigh believes this would be a hugely complex task and difficult to achieve. This makes the time-pressured nature of the CMA's market investigation process particularly ill-suited to enabling a full and proper consideration of the various aspects of quality and how they should be taking into account in designing a pricing remedy.
67. Third, as noted above, any price cap would need to be adjusted on an ongoing basis, and there would have to be the ability to make interim applications for updates, variations and exemptions (see further section 4 below). A new regulator could be established with clear processes for dealing with such issues in a way which gives operators, in advance of the imposition of price regulation, confidence that appropriate adjustments/exceptions would be available in a sufficiently timely manner, much more so than if an application had to be made to the CMA on each and every occasion. While the CMA contemplates the possibility of establishing a new external body to support an interim price cap, this would add additional cost and complexity and there would be significant uncertainty around issues such as whether it would be effective within a sufficiently quick timeframe to meet the challenges such a regime would pose, how it would interact with the CMA and whether it would be able to



provide clear answers, address questions and deal with the practicalities required to deal with a price control.<sup>52</sup>

68. Fourth, a guiding principle for price regulation is that it should be predictable, so that operators are able to make investments with a reasonable degree of certainty regarding the expected outcomes from the regulatory regime. The CMA's current proposal to have an interim price cap, followed by a different and as yet unspecified regime implemented by a new sector regulator, would introduce significant uncertainty regarding how the current arrangements would be transitioned to a new regime, including whether the new regulator would adopt a similar 'pricing information' approach (as currently proposed by the CMA), move to a cost-based price control regime or adopt some other methodology. This compares to other price control regimes in the UK, where operators have the surety of a high degree of continuity from one price regulation period to the next.
69. Given that the pay-back period for new crematoria from the point of initiating planning and development is considerably longer than five to seven years (and the CMA makes the assumption that crematoria have a useful economic life of 100 years), there would be a significant risk that the uncertainty created by an interim price control regime would undermine investment incentives until such time as the new regime had been fully established, resulting in significant customer detriment for the reasons set out in section 3.3 above. This would be avoided by providing that – to the extent required – any price regulation would be introduced by the same regulator that would oversee its application in future years.
70. Fifth, introducing any price regulation once transparency and information measures are implemented would mean that there would be an established means for ensuring effective communication of the regulated offering to consumers.<sup>53</sup>
71. Finally, Westerleigh has repeatedly highlighted the issue that the CMA's powers under the Enterprise Act 2002 ("**Act**") to remedy any adverse features of the market, in so far as they relate to local authority crematoria, are limited to making recommendations to Government as a result of the legal doctrine of Crown immunity.<sup>54</sup> The CMA has adopted a different

---

<sup>52</sup> For example, while the CMA likens this proposal to the appointment of a Monitoring Trustee, previous cases have highlighted the limitations on extent to which operators can rely on the guidance provided by such an entity (Case 1285/10/12/18 *Electro Rent v CMA* [2019] CAT 4).

<sup>53</sup> As noted above, Westerleigh believes that funeral directors play a key role in informing families of the options for choice of crematorium, and advising on the comparative quality of facilities. Therefore it is essential that any communication strategy includes ensuring that funeral directors have access to sufficient information.

<sup>54</sup> As highlighted in Westerleigh's previous submissions, the legal doctrine of crown immunity as it is applied in England and Wales holds that unless Parliament intends otherwise, onerous legislation does not apply to the Crown. Consequently, the Crown is not bound by statute unless the contrary is expressly stated, or unless there is a necessary implication to be drawn from the provisions of the relevant legislation that the Crown was intended to be bound, or there can otherwise be gathered from the terms of the legislation an intention to that effect (Halsbury's Laws of England, Constitutional Law and Human Rights, Volume 8(2)). Part 4 of the Enterprise Act 2002 (the "**Act**") does not contain any provisions which (expressly or implicitly) bind Crown bodies, including in relation to the CMA's order-making powers. This contrasts to section 236

position, but has failed to provide a clear explanation of the legal basis on which it has done so, simply asserting (again) that it "*can make an Order under the Enterprise Act 2002 on any person, including a local authority where it is appropriate to do so*" (emphasis added).<sup>55</sup>

72. However, the CMA appears to have accepted the limitation on its powers as regards local authorities as, throughout the market investigation, it appears to have sought information from local authorities on a voluntary basis. This contrasts to the approach the CMA has taken towards Westerleigh (and presumably other private operators), where the CMA has requested a large volume of information using its formal powers under section 174 of the Act. There is no objective justification for the CMA to have adopted a different procedural approach to operators subject to the market investigation, unless it believed that its formal powers did not extend to local authorities. To the extent that there is any ambiguity as regards the enforceability of the CMA's order-making powers to local authorities, which represent the large majority of crematoria operators, this further militates against the CMA using those powers to impose interim price regulation.
73. Westerleigh therefore urges the CMA, as it proceeds towards its provisional findings, to give due consideration to the option of recommending to Government to establish a sector regulator with the requisite powers to introduce price regulation, rather than proceeding with proposals for potentially extremely damaging 'interim' price regulation. There should, however, be no assumption that price control would need to be introduced by a new regulator. Rather that should be subject to an evidence-based assessment by the regulator at the appropriate time. Indeed, the prospect of a new regulator introducing price regulation in future would be likely to have an important disciplining effect on firms' pricing behaviour in the period between the conclusion of the CMA's review and the establishment of the new regulator, which the CMA should also take into account in its evaluation.<sup>56</sup>

---

of the Act, which states that the Crown is bound by Part 8 of the Enterprise Act relating to the enforcement of certain consumer legislation. Similarly, section 73 of the Competition Act 1998 provides that the Crown is bound by the Competition Act, although the Crown cannot be criminally liable or liable for any penalty as a result. The fact that no such provision is made in relation to Part 4 of the Act therefore creates the clear implication that the Crown is not bound by that part. It is therefore not the case, as the CMA asserts, that its order-making powers apply to "*any person*".

<sup>55</sup> Price Regulation WP, paragraph 94. In the Market Study final report, the CMA the position that its order-making powers "*provide a clear legal basis*" for imposing price regulation for *all* crematoria, whether operated by local authorities or private operators (paragraph 8.87). Westerleigh therefore requested that the CMA provide further clarity on its legal position in this respect (Westerleigh's response to the Issues Statement, paragraph 7.9).

<sup>56</sup> Moreover, any consideration of price regulation by such an regulator would need to take account of the various issues set out in this response which in Westerleigh's view make the crematoria sector inherently unsuitable for regulation of this nature.

#### **4. Comments on key design considerations for any interim price regulation regime**

74. Without prejudice to Westerleigh's position set out above, in this section Westerleigh provides its initial views on how any interim price regulation remedy, if ultimately imposed by the CMA, should be designed.
75. At the outset, it is important to note that the CMA has provided very limited details regarding its current thinking as to how any such price regulation might be implemented. This has limited Westerleigh's ability to comment in an informed manner. While Westerleigh has therefore provided comments at a high level, inevitably the potential impacts of any price control remedy will depend upon the specific details of its design. This includes (among others) the level of any price cap which the CMA proposes to impose. Westerleigh's comments in this response must be read in this light and Westerleigh reserves the right to develop its representations to take account of further details of the CMA's proposed approach, once available (to the extent that the CMA proceeds to propose a price control remedy at the provisional findings stage).
76. In designing any price control remedy, the CMA must be cognisant of the fact that, as noted above, price regulation must be seen as a measure of 'last resort' and, if introduced, should be part of a wider package of measures including, in particular, appropriate information and transparency measures. It must therefore be designed in a manner that it recognises that it is a short term measure to limit (alleged) customer detriment in the short term while other measures take effect, and before a new regulator evaluates the continued need for price regulation, and what shape any such regulation should take in the longer term. The CMA should also place a significant emphasis on ensuring that the inevitable risk of disincentivising crematoria operators from investing in developing new crematoria, and in improving the quality and capacity of existing crematoria, is mitigated as far as possible.
77. These considerations mean that, in order to ensure that the regulatory burden imposed on crematoria operators is proportionate, any pricing remedy should be appropriately targeted so as to impose the minimum burden necessary, straightforward for crematoria operators to apply and monitor compliance with, and that, where appropriate, exceptions to the application of the price control can be readily obtained through a clear and predictable process. Moreover, the remedy should ensure that crematoria operators retain both the ability and incentive to differentiate and innovate in the provision of crematoria services.
78. As explained below, Westerleigh therefore considers that any price control remedy should be designed taking account of the following key considerations:
- (a) Price regulation should only be applied in local areas where customers do not have an effective choice of crematoria, i.e. where information and transparency measures are less likely to improve outcomes for consumers.
  - (b) A uniform price cap is inadequate to take account of differences in quality and cost. Westerleigh therefore believes that the CMA should only seriously consider a cap on

price increases (subject to exceptions where appropriate) for any interim price regulation, rather than a cap on prices.

- (c) To the extent that the CMA proceeds with a uniform price cap, it must be set at a level which continues to allow operators offering higher quality facilities and services to charge an appropriate premium, to avoid significant customer detriment arising from a reduction in the quality of services available and reduced investment in new crematoria.
- (d) Westerleigh agrees that any price regulation should apply to a benchmark package of 'essential' services. However, operators must retain freedom to innovate and meet the needs of the bereaved for an enhanced service (including longer service times, out-of-hours services and additional products) and consumers should not be tied or unduly influenced towards a basic service which does not give them the level of experience they desire.
- (e) Provision must be made for any price regulation to be updated on an ongoing basis to take account of innovation, evolving market conditions, cost increases, and investment in new and upgraded crematoria, including recent investments undertaken prior to the regulation being implemented.

#### 4.1 Geographic scope of application

- 79. Any interim price regulation should be limited to those local areas where the CMA determines, based on a reasonable assessment of local concentration, that customers do not have an effective choice of crematoria and there is compelling evidence that the lack of competition has resulted in worse customer outcomes. In particular, it would be disproportionate for the CMA to impose such regulation in local areas where customers have an effective choice between crematoria, in which any concerns can be addressed through other measures designed to directly address the relevant AEC(s) identified by the CMA. Similarly, there is no justification for imposing price regulation in areas which are *prospectively* competitive, i.e. where operators have existing plans to enter in the near future which, once materialised, will provide customers with an effective choice.
- 80. For example, as explained in section 3.4, any concerns regarding customers' ability to make informed choices in such areas could be addressed through effective information and transparency measures.<sup>57</sup> Indeed, as noted above Westerleigh envisages that an important advantage of ensuring greater availability of information for customers is that it will likely encourage customers to travel further for a funeral than is currently the case, in order to experience a better quality of service. This is a further reason for the CMA to be cautious in considering the geographic scope of application of any interim price-controls, which may

---

<sup>57</sup> On the same basis, Westerleigh considers that any recommendation given to Government to establish a new regulator with price regulation powers should require the regulator to have due regard to the extent of local competition in determining whether it is necessary to impose price regulation in relation to any particular crematorium.

dampen price competition which would otherwise be encouraged by other, more proportionate and appropriately targeted, remedies.

81. Targeting interventions to those areas where the risk of market failure is greatest in this manner would be consistent with the approach taking by regulators in other sectors. For example, under the Civil Aviation Act 2012, the CAA is only able to impose economic regulation in relation to an airport where it can establish that the airport operator has, or is likely to acquire, substantial market power in a relevant market.<sup>58</sup> Although, even in that case, it is important to note that the revenue of those individual operators which are regulated are many multiples of total revenues in the crematoria sector as a whole.<sup>59</sup>

#### 4.2 Form of price regulation

82. In the Price Regulation WP, the CMA proposes to adopt a uniform cap, applicable to all crematoria, based on pricing information. As explained in section 3.2 above, such an approach is not reasonable given the significant variation in business models operated by different crematoria operators. The CMA cannot treat operators with different costs bases and risk profiles in the same way when applying a price cap, in particular where this would disproportionately affect private sector operators which have been investing most heavily in the sector.
83. A uniform price cap would also mean that investment in new crematoria in areas where land prices are increasing – i.e. exactly in the areas where investment is required – would be disincentivised. The price cap would, therefore, significantly restrict new investment (and/or could potentially result in development in areas which deliver less customer benefits). Moreover, while the CMA recognises the potential for differences in land and operational costs (for example, wages) in the Price Regulation WP, it then fails to take this into account in the section on geographic scope. The idea of separate caps for different nations or even regions is over-simplistic. Land values and operating costs are not the same throughout Scotland or England or Wales, and vary significantly within regions (see further Westerleigh's Profitability Response). There is, therefore, a serious risk of unintended consequences, which the CMA has not recognised or sought to engage with.
84. The CMA's proposed uniform approach also takes no account of the significant quality differentials which can be observed between different crematoria, despite the CMA earlier recognising that it would be necessary to do so.<sup>60</sup> The CMA's current approach implies that a crematorium located in a busy urban centre which was built in the 1940s, with minimal investment in the intervening period, offering a poor quality, "conveyor-belt", experience,

---

<sup>58</sup> And where the CAA determines that (a) for users of air transport services, the benefits of regulating the airport operator by means of a licence are likely to outweigh the adverse effects; and (b) competition law does not provide sufficient protection against the risk that the airport operator may engage in conduct that results in an abuse of the substantial market power.

<sup>59</sup> For example, Heathrow Airport had revenue of close to £3 billion in 2018.

<sup>60</sup> Issues Statement, paragraph 130.

would be able to charge the same price as a recently opened, modern, purpose-built, facility located in a peaceful setting and well-maintained grounds and with staff offering exceptional customer service. A simplistic price cap of the type proposed by the CMA would, as a result, significantly distort incentives to invest in quality and would be liable to drive down overall quality in the sector over time.<sup>61</sup> For the reasons set out in section 3.3 above, this is not something that can be addressed in seven years by a new regulator. Rather, it must be fully taken into account in designing any remedy, even if interim in nature, in order to avoid significant customer detriment.

85. Westerleigh believes that designing a price control remedy which takes due account of the significant quality differentials between crematoria would require a highly complex design, would involve significant costs, and would be prone to significant uncertainty and risks of errors of assessment. Moreover, as noted above, this is not simply a matter of considering minimum quality standards. Rather the CMA would need to consider the need for variations in any price cap according to the relative quality of crematoria. Given the high risk of errors, it would necessarily need to be open to adjustment in the initial years of operation to ensure that market outcomes were not distorted.
86. As explained in section 3.2 above, Westerleigh believes the crematoria sector is inherently unsuitable to price regulation for these reasons. But in any event, if the CMA is to pursue such an approach it must address these issues head on and it cannot avoid it by asserting, erroneously, that crematoria are homogenous and proposing a uniform price cap. Indeed, the CMA's proposals can be contrasted with the more nuanced approach taken by other sector regulators, which have, for example:
- (a) Adopted greater pricing flexibility to promote investment and entry. For example, in its current proposals for broadband regulatory framework for 2021 to 2026, Ofcom will allow greater pricing flexibility in prospectively competitive areas to provide incentives for competitive entry and investment.<sup>62</sup>
  - (b) Adopted a greater focus on a broader definition of consumer outcomes, rather than focusing solely on price. For example, Ofwat takes a much more holistic view of consumer outcomes when setting price controls for water companies.
87. The CMA also contemplates a full rate of return approach. However, as the CMA acknowledges, this would require the CMA to evaluate the cost base of over three hundred crematoria across the UK, including their respective land values and local authority crematoria, which may have varying budgetary structures (e.g. whether they bear the costs of closed cemeteries and other bereavement services). Not only would this be hugely complex and costly, but given the flawed way in which the CMA has assessed land values for the

---

<sup>61</sup> It is, moreover, inconsistent with the approach taken towards funeral director services where the CMA proposes to introduce quality regulation alongside price regulation.

<sup>62</sup> Ofcom, Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021-26.

purposes of the Profitability WP<sup>63</sup>, would be liable to give rise to significantly distorted outcomes as a result of errors of assessment.

88. Moreover, since local authorities are not subject to commercial objectives in the same way as private operators, it is likely that a number of authorities are not operating in a fully efficient manner. Such an approach would therefore risk rewarding inefficient practices, or alternatively require a very detailed scrutiny of operators' costs in order to determine which costs should be allowable, which would be impractical given the number of operators in the market. In addition, there would be additional complexities around local authority finances, including the recognition of local authority pension costs and deficits in the results of the local authority crematoria.
89. A rate of return approach would also not take due account of quality differentials between crematoria and would, again, therefore be liable to distort outcomes for the same reasons as set out above. For these reasons, Westerleigh does not believe that a rate of return approach would be proportionate or practical, in particular given the relatively small size of the crematoria sector and the temporary nature of any price regulation which would be imposed by the CMA.
90. Given the above considerations, Westerleigh believes that – should the CMA ultimately proceed with proposals for interim price regulation – it should give serious consideration to moving away from its current proposal to cap prices and instead consider capping price increases, to avoid above-inflation rises (i.e. RPI-0). Even having a safeguard cap on price increases would not fully address the issues above, but would be significantly less prone to unintended consequences than the CMA's current proposals. As with a price cap, it would also need to be subject to exceptions where operators could show above-inflation cost increases and/or recent investments justifying greater price increases (see further below).

#### **4.3 Level of price cap**

91. As set out above, Westerleigh believes that a uniform price cap is inappropriate and liable to give rise to significant distortions of competition given that it is incapable of reflecting the significant cost and quality differentials between different operators. To the extent that the CMA does proceed with its proposal for a uniform price cap, however, this must be set at a sufficiently high level to allow operators which offer higher quality facilities and services to charge an appropriate premium as compared to lower quality competitors. Otherwise, the CMA risks a 'race to the bottom' in terms of quality, which would result in significant customer detriment for the reasons set out above.
92. For this reason, Westerleigh is extremely concerned at references to using "*median*" prices in the Price Regulation WP.<sup>64</sup> Such an approach would inevitably disproportionately affect operators such as Westerleigh, which is the operator which has been most active in driving new investment in the sector in recent years (and charges a limited premium accordingly),

---

<sup>63</sup> As explained more fully in Westerleigh's Profitability Response.

<sup>64</sup> Price Regulation WP, paragraph 72.



and which has plans to continue doing so in coming years, subject to the outcome of the CMA's review. The detrimental effects of such an approach would not be outweighed by any marginal benefits to be gained from reducing prices for a portion of Westerleigh's customers, many of whom will have actively chosen to use a Westerleigh crematorium due to its relative quality and overall value compared to nearby, and typically lower-cost, alternative choices.

93. Westerleigh therefore urges caution on the CMA's behalf in considering the level of any price cap. This is particularly so at a time when the COVID-19 outbreak has decimated many local authority budgets and is likely to result in tightening public sector budgets in future, meaning that the private sector will, perhaps to an even greater extent than in recent decades, be required to meet the ongoing need for re-provision of fit-for-purpose facilities.

#### **4.4 Scope of services covered**

94. Westerleigh agrees with the CMA that it would be more practical, and proportionate, for any interim price regulation to apply to a benchmark 'package' of services, rather than seeking to apply separate price controls to each element of the cremation.<sup>65</sup> If adopted, this must provide the option for customers to take advantage of a lower cost funeral option comprising a benchmark package of the 'essential services' required for a funeral service, with customers retaining the freedom to choose additional elements offered by operators, including extra time, to ensure that the clear trend for customers wanting to choose and experience a higher quality service is not impeded.
95. As the CMA has accepted, customisation of funeral services is becoming increasingly popular<sup>66</sup> and crematoria operators compete for marginal customers through a number of qualitative factors, including (among others) the range and quality of facilities and slot length offered. The CMA's intervention should not curtail this trend. It is equally important that crematoria operators retain the incentive (and ability) to innovate and differentiate in their service offering – while there will inevitably be a risk that these incentives would be diminished by any form of price regulation, that risk would increase if the CMA took an overly prescriptive approach to the elements included within the benchmark package.
96. Westerleigh agrees that the elements set out at paragraph 54 of the Price Regulation WP would form an appropriate basis for such a benchmark package. Westerleigh considers that medical referee fees and applicable environmental surcharges could be included in the benchmark package (though the costs associated may vary between crematoria), but the CMA should ensure that customers are able to compare the total costs they would need to pay at each crematoria to avoid the risk that customers are 'surprised' by unexpected costs at a later stage. Westerleigh also agrees with the CMA that the cost of the benchmark package should be passed through to customer by funeral directors at cost in line with current practice.<sup>67</sup>

---

<sup>65</sup> Price Regulation WP, paragraphs 48-49.

<sup>66</sup> Price Regulation WP, paragraphs 59-60.

<sup>67</sup> Price Regulation WP, paragraph 81.

#### 4.5 Adjustments and exceptions to take account of investment and increased costs

97. The Price Regulation WP accepts that any price regulation remedy would need to be updated over its duration and be subject to exceptions to suspend or amend its application in appropriate circumstances.<sup>68</sup> In this regard, it is critical that the CMA's processes for considering these matters are made clear in advance and give operators certainty that necessary adjustments and exceptions can be obtained in a sufficiently timely manner (as set out in section 3.5 above, for this reason Westerleigh believes that any price regulation would be best implemented by a new sectoral regulator). Any ambiguity in this regard is likely to have a chilling effect on investment. However, while the CMA notes that the "*operation and implications of the remedy need to be clear to the persons to whom it is directed*"<sup>69</sup>, it has provided no detail in this regard.
98. Furthermore, while the CMA has recognised (correctly) the need for the price cap to be updated to adjust for inflation and for exceptions to be made in cases of new entry, it will also be important for provision to be made for adjustments/exceptions in the following circumstances:
- (a) First, in the event that operators' face material increases in costs, above inflation, or unforeseen capital expenditure (e.g. in relation to changing legal obligations) this would need to be met by a corresponding increase in the level of any price cap.
  - (b) Second, while the CMA accepts that exceptions to the application of the price cap should be made in the event of the opening of new crematoria, this should equally apply in relation to crematoria which have been opened in recent years. A failure to take account of significant, recent, investment of this nature would have a deterrent effect on future investment in the sector.
  - (c) Third, for the same reason, exceptions from the application of the price cap should be available in the event that operators undertake material investments in upgrading the quality of their crematoria, to avoid disincentivising operators from undertaking investments of this nature.

---

<sup>68</sup> Price Regulation WP, paragraphs 36 and 73.

<sup>69</sup> Price Regulation WP, paragraph 104.