

Funeral directors and crematoria services market investigation

Dignity plc response to the CMA's Provisional Decision Report

1. Executive summary

1.1 Dignity plc (“**Dignity**”) welcomes the opportunity to make this submission in response to the CMA's Provisional Decision Report (“**PDR**”).

1.2 Dignity supports the CMA's proposed ‘sunlight’ remedies, including its proposed recommendation to the Government for an inspection and registration regime for funeral directors to improve the quality of funeral director back of house standards. Dignity considers that these initiatives will help to improve consumer engagement through easier access to pricing information online, as well as providing reassurance that there are systems in place to ensure that an appropriate quality of service is provided, especially where this is not visible to consumers. Dignity looks forward to working with the CMA to ensure these remedies are designed and implemented in the most effective and proportionate manner possible to improve consumer outcomes.

1.3 However, Dignity has significant concerns about the consumer detriment findings for funeral directors and crematoria in the PDR. It is clear that they are incorrect. The CMA makes several crucial assumptions that inflate these detriment estimates, and which do not align with market experience or the CMA's own approach in previous market investigations. This leads to estimates that are unrealistic when scaled up to the whole market. The estimates are also out-of-date. In arriving at its conclusions:

(i) For both funeral directors and crematoria: the CMA has failed to take into account the financial data for 2019 (pre-Covid crisis) which puts the industry pricing trend and profitability into context. The CMA's current profitability analysis captures the five years from 2014 to 2018. However, the CMA analysed only one firm in 2019 and found that: “[Firm A] *demonstrates a fall in profitability that brings ROCE in line with the cost of capital for the first time*”.¹ Dignity's profits also fell in 2019. The detriment estimates are, therefore, out of date. Dignity supplied the CMA with its data for 2019 as part of its response to the working papers. However, the CMA did not analyse (or even attempt to open) the 2019 data that Dignity submitted.

(ii) For funeral directors:

(a) On profitability, the CMA did not conduct any return on capital employed (“**ROCE**”) economic profitability analysis for smaller funeral directors, which account for over 60% of the market. For the larger funeral directors, the CMA conducted a ROCE analysis but did not make the appropriate adjustments to capital employed through owned property

¹ Appendix S, paragraph 179 (Firm A is a firm other than Dignity).

values, capitalising leases, or including an appropriately valued reputation asset. This leads to ROCE estimates being overstated; and

(b) On pricing levels, the CMA compared the actual trends of funeral director professional fees collected by SunLife for a small, churning sample of 100 branches across the UK against the trends of such fees had they increased in line with inflation (i.e. RPI and CPI). However, the SunLife data is not a reliable source and little evidentiary weight should be placed on the results of analyses based on this data. The CMA's finding on the basis of the SunLife data that Co-op and Dignity "*are often significantly more expensive (which we estimate to be by approximately £800 and £1,400 respectively) than many of the small, typically family-owned, businesses that operate the majority of branches in the UK*"² is therefore unreliable, and should not be carried forward into the CMA's final report.

(iii) For crematoria:

(a) On profitability, the CMA severely undervalued crematoria land costs by disregarding feedback from independent valuation specialists³ and instead relying on an unrepresentative sample. Further, the CMA has assumed away higher value assets,⁴ and concerns arise in the treatment of leased properties in the analyses. Even on this basis the CMA's sensitivity analysis shows that a large number of crematoria are not making excess economic profits; it is therefore not proven that prices are too high at a market-wide level; and

(b) On crematoria entry, the CMA's analyses underestimate the effect of entry on incumbents' volumes. The latest data from The Cremation Society (which is more recent than that used in the PDR) shows that entry has more significant and sustained effects than reported by the CMA – an incumbent crematorium's volumes do not return to growth after three years. The competitive discipline posed by entry is, therefore, even stronger than reported in the PDR. This is important because, if remedies in the crematoria market were necessary, remedies to facilitate entry should be preferred to those that might frustrate entry (e.g. price control).

1.4 **The consumer detriment figure is considerably lower** for both funeral directors and crematoria once these issues have been corrected, even using the CMA's methodology. There are also a number of other findings and observations in the PDR that need to be

² Paragraph 11 of the PDR.

³ Dignity considers it unsatisfactory that – in the context of a lengthy inquiry that is meant to provide time for this type of detailed analysis - no appropriately qualified and experienced valuation specialists have even been instructed by the CMA.

⁴ By simply assuming away sites that are 'uneconomic to replace in their current locations', the CMA is clearly biasing the excess profits test. It is removing those assets that would likely not be able to achieve reasonable returns.

revisited in light of the evidence provided by Dignity (see **Section 2** below and **Annex 1** to this submission).

1.5 Dignity welcomes the CMA's provisional decision that, due to the Covid-19 crisis, it is no longer reasonable and practicable to specify and implement price control remedies in the short to medium term.⁵ However, Dignity strongly disagrees with the CMA's provisional conclusions that price controls for funeral directors and crematoria services would have been an effective and proportionate solution to the AECs and the customer detriment identified by the CMA.⁶ See Dignity's comments in this regard at **Section 3**. In particular:

- (i) Other less onerous remedies are sufficient to increase effective competition; the latest data on prices and profitability shows that price control is not necessary; price control would be unworkable, distortionary and disproportionate; and price control could ultimately lead to customer detriment; and
- (ii) There is no legal basis for the CMA to take a decision now on the likely appropriateness of price control remedies at the end of a future investigation: the CMA has a duty under the Enterprise Act 2002 (the "**Act**") at the end of a market investigation to remedy, mitigate or prevent the AEC(s) identified and must have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the AECs identified and the resulting customer detriment. Given that the CMA has decided that it is not reasonable or practicable to implement price control remedies at this time, it cannot purport to decide that price control will be necessary, reasonable or proportionate at the end of a possible future market investigation reference ("**MIR**").⁷ Dignity is concerned that Covid-19 may also have materially changed the dynamics of the market and the CMA should not pre-judge any future remedies or bias a future investigation.

1.6 As regards the CMA's proposed remedies package:

- (i) Dignity fully supports the introduction of 'sunlight' remedies, and in this submission has made some suggestions as to how those remedies could be strengthened further to maximise their impact on consumer engagement and mitigate the AECs identified by the CMA. It will be important for the CMA to ensure that all market participants, large or small, are required to comply with these remedies (with compliance monitored as appropriate in a risk-based manner) in order to drive real change in the sector. See Dignity's comments at **Section 4**.

⁵ For example, PDR, paragraph 9.230.

⁶ PDR, paragraph 9.227.

⁷ See also Dignity's comments at Section 6. Dignity notes that the CMA has used the term "supplementary market investigation" in the PDR. There is no such term existing in the Act or in any of the CMA's guidance that is relevant for market investigations (e.g. CC3, CMA3 or OFT51). As explained in Section 6, any future MIR would need to comply in full with the procedural requirements in the Act, i.e. the CMA Board would need to have reasonable grounds for suspecting at that time, on the basis of contemporaneous evidence, that there were features of the funeral director or crematoria services markets that could prevent, restrict or distort competition.

- (ii) The recommendations to the Government to establish an inspection and registration regime for funeral directors are a positive step towards establishing minimum standards for back of house services. However, in its recommendation the CMA should also lay out a clear path to full quality regulation of back of house standards in the near future.⁸ Absent a strong recommendation from the CMA, there is every likelihood that the quality regulation regime will not be implemented for a number of years with the risk of continuing customer detriment. The CMA has correctly identified in the PDR a need for quality regulation of back of house standards in the sector on a standalone basis.⁹ There is therefore no reason to delay this. See Dignity's comments at **Section 5**.
- (iii) Paragraph 4.3 to 4.8 set out a number of factors that the CMA will need to consider when designing the proposed ongoing monitoring of funeral directors and crematoria operators. In particular, the collection of data should be representative of the whole sector, covering the breadth of the market from the smallest to the largest operators, as opposed to focussing only on players with a minimum of ten branches. The current data collection proposal would not provide the CMA board with sufficient information on which to base a decision on whether or not to make a future MIR.
- (iv) There are serious risks in relation to the proposed recommendation for the CMA to consider a future MIR to contemplate price control for funeral directors and crematoria operators once the industry has stabilised after the Covid-19 crisis (see Dignity's comments at **Section 6**), notably:
 - (a) Dignity considers that the 'sunlight' and quality regulation remedies can remedy or mitigate the AECs identified by the CMA in its PDR and therefore a conclusion now that a future MIR is likely to be required is premature, unlawful, disproportionate and unnecessary. The CMA should give its proposed current remedies package the chance to resolve its concerns.
 - (b) The recommendation would impose unnecessary and disproportionate uncertainty on the industry for a protracted period, as well as implying significant further costs should there be a future MIR.
 - (c) If the CMA were to consider later that a future MIR may be appropriate, it would need to comply in full with the procedural requirements in the Act. In particular, the CMA Board would need to have reasonable grounds for suspecting at that time that there were features of the funeral director or crematoria services markets that could prevent, restrict or distort competition.¹⁰ It would also need to consult publicly on any

⁸ On the lines of the quality regulation proposal set out in Appendix W, paragraphs 114-136.

⁹ PDR, paragraph 9.136.

¹⁰ Section 131(1) of the Act.

proposal to make a MIR.¹¹ If a future MIR were to be made, the appointed CMA Panel would need to collect updated market data to assess whether or not there were AECs and, if so, what remedies would be reasonable and practicable to address them.

- 1.7 Finally, Dignity notes that it has not been granted full access to the underlying economic evidence on which the CMA has based its findings in the PDR. At the PDR stage, the CMA has given Dignity access only to Dignity's own profitability data, which clearly comprises only part of the CMA's market-wide findings. This is despite Dignity's repeated requests that this data (and the unredacted PDR) be disclosed to its external advisors through a confidentiality ring, in line with the CMA's guidance on transparency and disclosure.¹² The Competition Appeals Tribunal has recognised that "*Competition cases are redolent with technical and complex issues, which can only be understood, and so challenged or responded to, when the detail is revealed*" and that the use of confidentiality rings facilitates that process of fair consultation.¹³
- 1.8 Dignity considers that this lack of access to the evidence is a serious barrier to its ability to respond properly and meaningfully to the CMA's provisional conclusions, and that disclosure of this evidence is essential to ensure due process. In particular, without access to the CMA's underlying economic analysis of market-wide detriment, Dignity cannot respond fully to the CMA's findings on customer detriment and profitability, which lead directly to the CMA's provisional conclusions on the appropriate remedies package. For example, the CMA estimated a Sensitivity scenario in the crematoria profitability analysis in which two private operators and nine Local Authorities were not making excess profits, and so detriment would be much lower. But as the CMA does not report this lower detriment in the PDR, parties are prevented from commenting on this or similar scenarios.
- 1.9 Moreover, Dignity's advisors have previously identified errors in the CMA's analysis of Dignity's data, and the Dignity data that the CMA has now disclosed continues to contain computational errors. This raises significant concerns about the accuracy of the CMA's analyses for other parties, and Dignity is concerned that the CMA's quality control procedures have not been robust. The CMA's customer detriment findings in the PDR are not supported by the economic evidence that Dignity has submitted – indeed, as described above, the CMA has not even analysed the full economic evidence that Dignity has submitted. Given this serious omission in the CMA's review of the evidence and in its quality control processes, Dignity repeats its request for the CMA to provide it with access to the rest of the relevant data at the earliest opportunity.

¹¹ Section 169 of the Act, paragraph 1.12 of *CMA3 Market Studies and Market Investigations: Supplemental guidance on the CMA's approach*.

¹² The CMA's guidance on transparency and disclosure (CMA6) states that confidentiality rings may be used "*when it is necessary to make the disclosure for the purpose of facilitating the CMA's functions by ensuring due process*" (paragraph 4.29), and that the CMA is likely to permit the use of a confidentiality ring "*where it is proportionate, there are clear benefits in doing so, and potential legal and practical difficulties can be resolved swiftly in agreement with the parties concerned*" (paragraph 4.34).

¹³ *BMI v. CC* (No. 1), [2013] CAT 24, paragraph 39(7).

2. Issues with the CMA's findings and analyses in the PDR

2.1 A number of observations and findings in the PDR do not factor in the evidence provided by Dignity (and potentially by other industry participants). Such findings therefore need to be revisited in the CMA's final report.

(i) Findings on consumer detriment

2.2 Dignity submits that **the CMA's customer detriment estimates for the funeral and crematoria markets are incorrect**. The CMA makes several crucial assumptions that inflate these detriment estimates, which do not align with market experience or the CMA's own approach in previous market investigations. This leads to estimates that are unrealistic when scaled up to the whole market.

2.3 The estimates are also out-of-date – based on the period 2014 to 2018 – and so provide a poor reflection of the detriment, if any, that future remedies would need to address. As discussed above, they do not reflect the 2019 data submitted by Dignity to the CMA, which the CMA has erroneously ignored.

2.4 Dignity's concerns with the customer detriment findings are set out in further detail in **Annex 1** to this submission.

(ii) Changes in funeral mix and the impact on revenues and profitability

2.5 The CMA at paragraph 2.27 of the PDR has acknowledged that direct cremations have seen rapid recent growth. In its working paper on 'International Comparisons' the CMA observed that direct cremation has become a low-cost option in most countries and it is likely to grow further, as a proportion of all funerals.¹⁴ The CMA has also noted more intense competition at this 'lower cost end' of the sector, which indicates that this is an area that funeral directors consider to be growing and important.¹⁵ Dignity itself has provided evidence of the significant increase in the take-up of direct cremation and simple funerals in recent years.¹⁶ Despite these observations and data, the CMA concludes at paragraph 5.185 of the PDR that "*simple funerals and direct cremations remain somewhat peripheral offerings*". The CMA does not seem to have engaged with the impact of this trend on funeral director profitability, which was expected to continue to decline in the near future even before the Covid-19 crisis. The CMA's analysis should be updated to take into account this growth in lower cost funerals, the changing funeral mix of providers and its impact on prices and profitability as a whole in the pre-Covid-19 period (i.e. up to March 2020) and post Covid-19, before arriving at the conclusion that price control

¹⁴ Published in January 2020, at paragraph 55.

¹⁵ At paragraph 5.184 of the PDR.

¹⁶ See Dignity's final submission before the CMA's PDR, submitted on 19 June 2020. Dignity submits that the growth of direct cremations and simple funerals has been even starker during the Covid-19 crisis but even if that spike in demand is discounted, the pre-Covid-19 trend also suggests that these are becoming increasingly popular funeral options. As a result, they do impose a direct constraint on the pricing of standard funerals and impact profitability of funeral directors that need to maintain much of the same capital infrastructure to provide these lower cost funerals.

remedies would be necessary, reasonable and practicable were it not for the Covid-19 crisis (as suggested by the CMA in Appendix W).

(iii) Provisional conclusion that funeral prices have increased above inflation

2.6 The CMA has drawn important conclusions on customer detriment in the funerals market and on price levels of standard funerals using data from the SunLife survey. Based on that survey, the CMA concluded that “[h]ad funeral director prices increased in line with inflation since 2006, the average price within this dataset in 2019 would have been £480 or £630 lower depending on the measure of inflation used”.¹⁷

2.7 The SunLife data is an unaudited source in which the CMA had already identified “a number of biases” in the methodology and therefore in SunLife’s published results.¹⁸ The CMA itself shows that SunLife’s results were very sensitive to small changes in methodology. The SunLife data is therefore not reliable, and cannot be used as the basis for the CMA’s conclusions. Dignity’s concerns with the use of this data are set out in detail in **Annex 1** to this submission.

(iv) Transparency in commercial dealings – disclosure of ownership

2.8 The CMA states that large funeral directors retain local funeral director brand names and do not adequately disclose the ownership of the branches concerned.¹⁹ This is not supported by the facts, at least in respect of Dignity.

2.9 Dignity has undertaken a conscious effort over a number of years to make it clear across its sites that the local funeral director is part of Dignity’s portfolio, by placing appropriate signage on the location and using the ‘Dignity’ branding on all information and service material, both physical and digital. This was evident during the site visit conducted by the CMA Panel in June 2019 and is also borne out by the Dignity internal document quoted by the CMA at footnote 526.²⁰ Dignity has also provided at **Annex 2** to this submission pictures of the signage from one of its acquired sites for the CMA’s ease of reference.

2.10 Dignity therefore requests the CMA to re-visit these observations and more accurately reflect Dignity’s commitment to be transparent and clear to customers in this regard.²¹

¹⁷ PDR, paragraph 8.36.

¹⁸ *Funeral Directors pricing levels and trends working paper*, paragraph 2. To the best of our understanding, no party has been given an opportunity to examine SunLife’s underlying data for robustness.

¹⁹ The PDR, at paragraph 5.61 notes, “[t]his is demonstrated through the strategies of Funeral Partners and Dignity (and historically Co-op) of expanding by buying established firms and retaining the existing name, rather than focusing on their own national brand”, and at paragraph 5.180 notes, “...largely by acquisition of local funeral directors, the names of which were retained and marketed more prominently than their national umbrella brand”.

²⁰ “When we acquire businesses what we are really buying is the local goodwill built up over many years. 66% of people who use our businesses have used them previously or come to us through recommendation. So the traditional business name is important. **However we also do not want to hide the fact that the business is part of Dignity, hence the clear signage**” [emphasis added].

²¹ Dignity however supports the remedy recommendation made by the CMA at paragraph 9.249 of the PDR, as there may be other market participants that do not adhere to the same standards of transparency as Dignity.

Any references to the contrary in the final report could be used by its detractors as a matter of “fact” to discredit Dignity, despite being incorrect.

(v) Effect of crematoria entry on incumbents

2.11 The CMA has provisionally concluded that, on average, incumbent crematoria lose volumes upon the entry of a new crematorium operator in their local area, but this decline stops soon afterwards and, three years after entry, volumes start growing again year on year at rates similar to those before entry.²² This conclusion is incorrect and not supported by the data, including more recent data published by The Cremation Society after the CMA's working paper on the subject. See further detail in **Annex 1** to this submission.

3. Price controls are not necessary, reasonable or proportionate

3.1 Dignity welcomes the CMA's provisional decision that it is no longer reasonable and practicable to specify and implement price control remedies in the short to medium term.²³ However, Dignity strongly disagrees with the CMA's provisional decision that price controls for funeral directors and crematoria services would have been an effective and proportionate solution to the AECs and the customer detriment identified by the CMA were it not for the difficulties caused by the Covid-19 crisis, as discussed at paragraphs 77 to 113 of Appendix W (Remedies). In particular:

- (i) Dignity strongly disagrees with the CMA's provisional conclusion that price control is likely to be necessary and that it would be feasible to develop an effective and proportionate methodology for controlling the pricing outcomes the CMA has found in relation to both funeral director services and crematoria services;²⁴ and
- (ii) There is no legal basis for the CMA to take a decision now on the likely appropriateness of price control remedies at the end of a possible future investigation.²⁵

Price control remedies are unnecessary, disproportionate and not practicable

3.2 Dignity does not consider that the case has been made for price control remedies in either funeral director or crematoria services, and that their introduction could in fact lead to significant customer detriment. In particular:

- (i) **The CMA's recommendation is not based on recent and reliable evidence:** the CMA's calculations of the consumer detriment and market profitability, which have led it to recommend price controls as a future remedy, suffer from major data issues (described in **Section 2** and **Annex 1** to this submission) and, as a

²² PDR, paragraph 6.156.

²³ For example, PDR, paragraph 9.230.

²⁴ PDR, paragraph 9.227.

²⁵ See also Dignity's comments at Section 6.

result, significantly overstate the consumer harm (if any). The PDR expressly states that the CMA's price control recommendation is based on its finding of high customer detriment: "*our provisional view is that given the nature of the features we have provisionally identified, as well as the scale and persistence of the customer detriment we have provisionally found, measures that control pricing outcomes are also likely to be necessary*".²⁶ However, the CMA recognises that it has not assessed recent pricing data, and nor has it updated its profitability analysis to consider suppliers' most recent data (including the financial performance for operators and the market in the aftermath of Covid-19).²⁷ As explained in detail in **Annex 1** to this submission, the CMA has not updated its profitability analysis for Dignity despite Dignity having provided its recent financial information with which the CMA could have done so (in fact, it has recently come to Dignity's attention that the CMA did not even attempt to open the 2019 data that Dignity submitted). Had the CMA done so, it would have found that its assessment of excess profitability was not supported by the latest evidence.

- (ii) **There are other less onerous and less costly remedies that more directly address the AECs:** the 'sunlight' remedies and quality regulation will effectively address the AECs identified by the CMA (see **Section 4** of this submission), and as a result price control remedies would be disproportionate. The CMA's 'CC3: Guidelines for market investigations: Their role, procedures, assessment and remedies' ("**CMA Guidelines**") recognise that the CMA "*will not generally use remedies that control outcomes (such as price controls) unless other, more effective, remedies are not feasible or appropriate*".²⁸
- (iii) As set out in detail in Dignity's submissions of 12 June 2020 on the CMA's working papers on remedies,²⁹ **price control would be unnecessary, unworkable, distortionary and disproportionate in both the funeral director and crematoria sectors.** In particular:
 - (a) The funeral director sector is a highly fragmented market with a significant number of competitors, varying price levels across providers and high price dispersion across the UK. Moreover, funeral services themselves are highly heterogeneous, as the products and services purchased reflect the wishes of the deceased and the bereaved – meaning that any price control remedy in funeral director services is highly likely to suffer from specification risks.³⁰ There are therefore

²⁶ PDR, paragraph 9.227.

²⁷ See paragraphs 81 and 100 of Appendix W to the PDR: "*we were unable to collect recent pricing data, nor update our profitability analysis*".

²⁸ Paragraph 89 of Annex B to the CMA Guidelines.

²⁹ Dignity response to the CMA working papers on remedy options for funeral director services, dated 20 February 2020 (see Section 2), and Dignity response to the CMA's working paper on remedy options for regulating the price of crematoria services, dated 20 February 2020 (see paragraphs 8 to 13).

³⁰ The CMA Guidelines recognise that defining appropriate parameters for the level of a price cap may be impractical particularly where products or services are differentiated rather than homogeneous, which increases the complexity of

serious feasibility challenges in implementing a price control given the range of services and quality provided by a highly fragmented supplier group. The CMA has dismissed these concerns in the PDR, but has not set out any reasoning for doing so;³¹

- (b) Price controls would be complicated and costly to enforce due to the large number of players in the funeral director services market. This was highlighted by the practical difficulties encountered by the CMA in its data gathering for the market investigation, even when using its formal powers to request data: of over 3,500 small independents operating in the market, only 46 provided data in a form that the CMA could use in its analysis;³² and
 - (c) In the crematoria market, there would also be considerable practical challenges in setting the level of any price cap in a manner that would not result in reduced competition, in particular by deterring further market entry or expansion (a particular concern in a sector in which market entry is already costly).
- (iv) Price controls are likely to lead to **unintended negative effects on customers**, by:
- (a) Stifling innovation such as, for example, the emergence of more sustainable business practices and “green” funerals and cremations, and investment in the quality of services and (for crematoria) grounds;
 - (b) Disincentivising the development of alternative, lower-cost options;
 - (c) Reducing the take-up of pre-paid funeral plans and/or reducing advance planning by customers. As explained in **Section 4** of this submission, the CMA should be encouraging funeral planning prior to the point of need and seeking to improve consumer engagement, whereas a price control could have the opposite effect;
 - (d) Becoming a focal point for all providers’ prices, reducing price competition; and/or
 - (e) Potentially creating a stigma around price-controlled packages, leading customers to pay for more additional elements than they might otherwise have done.

any control in order to capture adequately the diversity of products on offer (paragraph 88(a) of Annex B of the CMA Guidelines).

³¹ Appendix W (Remedies), paragraph 84.

³² Dignity notes that of those 46, at least seven funeral directors’ data show inaccuracies affecting Average Total Revenue (ATR) and EBITDARS estimates (e.g. see notes to Table 15 in the PDR).

Again, the CMA has dismissed these concerns, which Dignity has previously raised, but has not set out any reasoning in the PDR for doing so.³³

There is no legal basis for the CMA to take a decision now on the appropriateness of price controls in the future

- 3.3 In circumstances in which the CMA has identified an AEC and has decided, under Section 134(4) of the Act, that action should be taken by it to remedy, mitigate or prevent that AEC or any detrimental effect on customers arising from it, it is subject to a duty under Section 138(2) of the Act to take that action, having “*regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the adverse effect on competition concerned and any detrimental effects on customers so far as resulting from the adverse effect on competition*” (Section 138(4)).
- 3.4 In the PDR the CMA has provisionally decided that price control remedies are “*no longer reasonable and practicable*” due to the impact of the Covid-19 pandemic.³⁴ Its provisional decision under Sections 134(4) and 138(4) of the Act is therefore not to implement price control remedies in this investigation.
- 3.5 The CMA cannot purport to decide now that price controls will be necessary, reasonable or proportionate at the end of a possible future MIR.³⁵ This carries a serious risk of confirmation bias; as explained in **Section 6** of this submission the CMA must not prejudge the outcome of any future MIR to assume that the AECs it has identified would still exist or that price controls would be an appropriate remedy at that future time. That future assessment would need to be made on the basis of contemporaneous data and market circumstances. The CMA in the PDR has expressly linked its recommendation that price control is revisited in the future to perceived high prices in both the funerals and crematoria services markets.³⁶ It is self-evident that such an assessment cannot be forward-looking: whether price control is an appropriate remedy in a future MIR can only be assessed on the basis of pricing data at that time. The CMA’s recommendation, if carried forward into the final report, could be highly persuasive for a future CMA Panel, and therefore seriously risks prejudicing the outcome of a future MIR.
- 3.6 Dignity therefore urges the CMA to remove from its final report its recommendation that price controls are revisited in a future MIR. Such a recommendation is not supported by

³³ Appendix W (Remedies), paragraph 85.

³⁴ PDR, paragraph 9.230 and Appendix W (Remedies), paragraph 1.

³⁵ PDR, paragraph 9.227 and Appendix W (Remedies), paragraphs 77-113.

³⁶ See paragraph 80 of Appendix W (Remedies): “*Our preliminary view is that price control regulation is likely to be both necessary and appropriate in order to directly and comprehensively address the harm associated with high funeral prices. The aim of price control regulation would be to reset high prices closer to competitive levels and provide an ongoing restriction on future price increases*”, and paragraph 98: “*our preliminary view is that price control regulation is likely to be both necessary and appropriate, in order to comprehensively address the harm associated with high prices for crematoria services. The aim of price control regulation would be to reset high prices of more expensive operators closer to competitive levels and provide an ongoing restriction on future, above inflation, price increases*”.

the evidence and is likely to lead to negative effects for customers, and moreover would ignore the CMA's duties under the Act.

4. 'Sunlight' remedies should be strengthened to make them more effective and drive change in consumer behaviour

4.1 In this Section, Dignity provides some suggestions as to how the 'sunlight' remedies should be further strengthened by making it easier for customers to compare offerings from different funeral directors; by ensuring compliance in the industry; by making greater use of intermediaries to disseminate information to consumers and to encourage advance planning of funerals; and by providing greater transparency on switching costs.

Suggested clarifications to make pricing information easier to compare

4.2 Dignity believes that there is a clear increase in consumer engagement in the purchase of funeral services, particularly with the increasing use of the internet.³⁷ However, it considers that the 'sunlight' remedies set out at paragraphs 9.241 to 9.250 of the PDR can further accelerate such engagement. To maximise the effectiveness of the remedy over time³⁸ and make it even easier for customers to compare competing offers, Dignity suggests that the CMA consider clarifying the following points:

- (i) How frequently funeral directors should review which product is their most commonly sold package (e.g. on an annual basis), as this may change over time.³⁹ For funeral directors that do not define any set 'packages' in their offering, and in cases where the most common sale is a product in which customers add services on top of a basic package, the funeral director should provide information on that configured package. This will ensure that customers get accurate information about the amount of spend they could generally expect with a funeral director.
- (ii) Whether the 'simple funeral' package (referred to in paragraph 9.241(c) of the PDR) could be a 'direct cremation' package sold by the funeral director.
- (iii) Whether "*a description of what is included in and excluded from the package*"⁴⁰ includes a description of the quality of the services to be provided (both "seen" and "unseen"), for example the type of fleet used, and whether back of house comprises specialist mortuary and respectful resting facilities, clinical refrigeration facilities, and embalming facilities. Dignity suggests that a description of the quality of services is included to allow customers to compare

³⁷ The CMA acknowledges at paragraph 3.181(c), "*there is evidence that use of the internet in this market is growing and will become more prevalent, especially as younger consumers (who have an existing propensity to transact online compared with their older peers) mature.*"

³⁸ As noted by the CMA at paragraph 9.80 "*we can envisage its impact increasing over time, as the benefits of greater transparency in enabling customers and others to hold suppliers to account are realised*".

³⁹ The pricing information that funeral directors will be required to publish includes the price of their most commonly sold funeral package. PDR, paragraph 9.241(a).

⁴⁰ PDR, paragraph 9.242(a).

like with like, although this will need to be balanced against the risk of overburdening customers with information. The standardised format for the pricing information should include an explanation of the level of detail required in respect of some key quality parameters; this should also ultimately be linked to, and be in line with, the minimum quality standards set as part of the proposed quality regulation regime.⁴¹

- (iv) That the standardised format for the pricing information will need to include a standard list of all disbursement categories. This is important so that customers are able to compare information easily and are not confused by funeral directors using different terminology or a different order in providing this information. It would also help funeral directors to comply with the requirements in paragraphs 9.242(a), 9.242(c) and 9.243 of the PDR. The same applies in respect of crematoria services at paragraph 9.247(a) of the PDR.
- (v) That all statements regarding price will need to be expressed as inclusive of taxes or, where it is not possible to do this, funeral directors should expressly state in a prominent place that taxes are excluded.
- (vi) Crematoria should also be asked to provide, in addition to total price and slot length,⁴² the price per minute for the use of chapel and crematoria services for the standard fee attended service (i.e. for the Core service as defined by the CMA), overrun fees, late arrival fees, and any resident vs. non-resident fees. Without these metrics, customers will still not be able to compare like for like as they may not in the first instance appreciate that what might otherwise appear to be a more expensive choice, provides better value for money and could be more economical as they may not need to book additional slots.

Focus on compliance and effective enforcement of these remedies is key

- 4.3 The CMA Guidelines are unequivocal that a remedy option pursued by the CMA “*should be capable of effective implementation, monitoring and enforcement*”.⁴³ The CMA has itself noted the significant issues it has faced during this investigation in getting engagement from smaller independent providers.⁴⁴ Dignity is therefore concerned that the monitoring and enforcement mechanism provisionally selected by the CMA, i.e. of asking funeral directors with more than ten branches and crematorium operators to submit annual compliance reports,⁴⁵ would be insufficient.
- 4.4 In particular, it would mean that monitoring of the remedies would not be carried out in line with risk, as is required under Principle 3 of the Regulators’ Code (with which the

⁴¹ PDR, paragraph 9.48.

⁴² PDR, paragraph 9.247(c).

⁴³ CMA Guidelines, at paragraph 336.

⁴⁴ Even when using its formal powers to request data: of over 3,500 small independents operating in the market, only 46 provided data in a form that the CMA could use in its analysis.

⁴⁵ PDR, paragraph 9.65.

CMA must comply). Principle 3 requires that “Regulators should consider risk at every stage of their decision-making processes, including [...] targeting checks on compliance” and that “Regulators, in making their assessment of risk, should recognise the compliance record of those they regulate, including using earned recognition approaches and should consider all available and relevant data on compliance, including evidence of relevant external verification”.⁴⁶

- 4.5 Requiring only large funeral directors to submit annual compliance reports would create a clear risk that the remedies would be implemented by only a subset of providers, depriving large sections of the market of the benefits that they are intended to provide. It is important that the CMA dedicates resources to ensuring that all funeral directors, regardless of their size, comply with the remedies. Further, Dignity also disagrees with a simplified compliance reporting for some funeral directors as the same rules should apply to all market participants. A simplified reporting regime will be unlikely to capture the level of heterogeneity (e.g. in cost structures) across funeral directors.
- 4.6 Dignity would therefore expect the CMA to provide in its final report a more robust implementation plan, with dates and key milestones to ensure sector-wide compliance through publicity campaigns and the provision of detailed guidance to all funeral directors and crematoria operators on what is required. The CMA should also work with the trade associations to publicise the CMA’s remedies and what funeral directors need to do to comply with them.⁴⁷ Dignity suggests that all funeral directors are required to send an annual compliance statement to the CMA to prompt them to take action to comply. The CMA could also consider carrying out ‘mystery shopping’ exercises.
- 4.7 As a minimum, the CMA website should include a well-publicised formal complaints mechanism for customers and industry players to raise complaints with the CMA directly and the CMA should publicise that, in accordance with its duty under Section 162 of the Act, it will act on complaints (once they have been substantiated) and take enforcement action against businesses that are not complying with the remedy. Dignity suggests that in addition to enforcement action being taken in terms of the Act, the CMA should actively monitor the sector and publicly ‘name and shame’ non-compliant service providers on its website.⁴⁸

Making greater use of intermediaries to disseminate information to consumers closer to time of need

- 4.8 In order to enhance the successful roll out of the sunlight remedies, Dignity suggests that the CMA defines an enhanced role for third-party intermediaries such as will writers, GPs, care homes, hospices and hospitals in encouraging consumers to consider options. For example, intermediaries could be encouraged to inform the bereaved that there is a choice of local funeral directors, that the funeral directors are required to provide price

⁴⁶ Regulators’ Code, Principles 3.2 and 3.4.

⁴⁷ Dignity notes that this would be in line with Principle 5 of the Regulators’ Code, which requires that “Regulators should ensure clear information, guidance and advice is available to help those they regulate meet their responsibilities to comply”.

⁴⁸ This should be a consequence detailed in the Order in line with Section 164(3)(c) of the Act.

information on their websites and at their branches and perhaps suggest questions to ask so that consumers can better understand and evaluate their options.⁴⁹ Dignity notes that the CMA's analysis of the role of intermediaries in Appendix D appears to focus mainly on the negative impact they could hypothetically have on the market but not on the positive role that they can play (particularly where no financial payment is involved) in improving consumer engagement and behaviour.⁵⁰ The CMA should in its final report therefore reflect further on this potential role for intermediaries and also factor this into its proposed package of remedies.⁵¹ There is also clearly a role for the Government in guiding customers to compare options and raise relevant questions at the time of need.

Greater transparency in switching costs

4.9 Dignity also suggests that as part of the final remedy package the CMA should require funeral directors to include information on switching costs (e.g. any mandatory charges for conveyance or storage of the deceased) in the pricing information that they provide to consumers on their websites and at their branches (discussed at paragraph 56 of Appendix W). This measure will not add to the costs of implementation and can easily be added to the other commercial disclosures expected of funeral directors. Requiring that this information be expressly provided would educate customers about their option to switch and put this front of mind at a time when customers may be under the impression that switching is not a possibility.

5. Recommendation to improve funeral director back of house standards should be stronger and pursued swiftly

5.1 Dignity welcomes the CMA's provisional decision to make a recommendation to the Government that all funeral directors in England, Wales and Northern Ireland should be subject to an independent quality inspection and registration regime that focuses on back of house standards. As detailed in its previous submissions to the CMA, Dignity is supportive of an outcomes-based quality regulation applicable to all funeral directors and overseen by an independent body.

5.2 However, Dignity notes that the CMA's provisional decision is to recommend an inspection and registration regime as a "*first step towards the establishment of [a] broader [quality] regulatory regime*".⁵² This recommendation does not go far enough to address effectively the AEC that has been identified by the CMA in relation to funeral director back of house quality standards. Dignity considers that the CMA should make a stronger recommendation to Government to gradually, but surely, implement the "*fully-fledged quality regulatory regime*" that it identifies at paragraph 9.101 and in Appendix W of its

⁴⁹ Dignity notes that intermediaries should be required to provide the information to consumers in a neutral fashion, pointing to all available local options.

⁵⁰ Dignity agrees with the CMA that allowing financial inducements for recommendations could distort the market but this concern can be tackled as proposed by the CMA through strict sanctions against such tie-ups.

⁵¹ The CMA Guidelines at paragraph 341 note that, "*measures which have a shared aim of introducing, or strengthening competition within a market will tend to be mutually reinforcing*".

⁵² PDR, paragraph 9.102.

PDR.⁵³ Further, it should be unequivocal that the regime would apply to all funeral directors and not just certain segments; therefore, the rules around certification, licensing and inspections should be applicable equally to all irrespective of size of operations.

- 5.3 Dignity strongly believes that the breadth of data gathered by the CMA in its current market investigation, together with the ongoing work of industry bodies such as the FSCSR – which is a live ‘sector wide’ initiative that proposes a practical and realistic framework for funeral director operations (small or large), should provide the Government with sufficiently detailed evidence with which to assess suitable minimum standards and implement an appropriate quality regulation regime at the earliest opportunity. Dignity considers that the inspection and registration regime is inextricably linked to the identified ‘additional’ features and the recommendation to Government should therefore be to develop the fully-fledged quality regime soon even though its implementation may be phased initially – this could be structured as a registration requirement, along with a requirement to submit evidence of certain minimum operational standards leading to a licence to operate which could be terminated if there is non-compliance; and the set-up would need to be supported by an adequate and effective inspection mechanism.
- 5.4 Under Section 141(4) of the Act, where the CMA makes a recommendation for the purpose of remedying, mitigating or preventing the AEC identified, it should have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the AEC concerned. To ensure the comprehensiveness and effectiveness of the proposed remedy, the final report should therefore make a stronger case in its recommendations to Government that a fully-fledged quality regulatory regime should be implemented at the earliest opportunity.
- 5.5 The recommendation to Government should also focus on addressing back of house quality as a priority and irrespective of any potential future price control regulation. By including in its recommendation that the inspection and registration regime could be designed with the flexibility to accommodate future unknown economic remedies, or be postponed altogether (following the conclusion of a future MIR),⁵⁴ the CMA risks undermining its findings in this market investigation of the necessity of quality regulation and delaying its implementation, to the detriment of customers and the industry as a whole.
- 5.6 The CMA suggests that the CQC would be ill-equipped to deal with a regulatory regime that “*could possibly include economic regulation in the future (following a future MIR)*”.⁵⁵ Dignity considers however that the consideration of the CQC or another independent body should not be ruled out on the basis of its ability to deal with hypothetical economic features of a possible future economic regime. This comment also pre-judges the outcome of a later CMA decision on whether or not to make a future MIR and, if a future

⁵³ This includes the following features: (i) clear requirements for funeral directors in the form of statutory minimum standards; (ii) effective monitoring and enforcement of standards through a statutory licensing and inspection regime; (iii) an appropriate body to monitor and enforce standards; and (iv) the collection and dissemination of information to customers on the quality of services provided by funeral directors.

⁵⁴ PDR, paragraph 9.95.

⁵⁵ PDR, paragraph 9.121(c).

MIR is made, the outcome of such an investigation. As detailed in **Sections 3 and 6**, Dignity in any event does not consider that recommending a future MIR or price controls is appropriate in this case. A piecemeal approach to the design and implementation of a quality regulation regime would also likely incur additional and unjustifiable costs.

6. Recommendation for a future MIR raises serious legal and practical challenges

- 6.1 There are serious risks of confirmation bias in relation to the proposed recommendation for the CMA to consider a future MIR to consider price control for funeral directors and crematoria operators once the industry has stabilised after the Covid-19 crisis, as well as legal and practical challenges. A purported conclusion now that a future MIR to consider price control remedies is likely to be required once the industry has stabilised is premature, unlawful, disproportionate and unnecessary.
- 6.2 There is no justification for the CMA making a recommendation to itself that it should consider consulting on a future MIR at the earliest opportunity when the sector is more stable.⁵⁶ Instead the CMA should give its proposed current remedies package the chance to resolve the concerns.
- 6.3 The recommendation is also likely to impose unnecessary uncertainty on the industry for a protracted period of time, as well as further costs in the event of a future MIR. The CMA's final report should emphasise that a future MIR will only be considered where this is justified due to ongoing concerns about the level of consumer detriment resulting from ongoing AECs in the sector and that the standard MIR procedures will be followed (see paragraph 6.5 below).
- 6.4 The CMA studied the market for around two years prior to the Covid-19 crisis and continues to have engagement from stakeholders, including Dignity, on the evolving nature of the market and services. Based on the information available to the CMA, particularly 2019 data, Dignity strongly believes that price controls would be unnecessary, distortionary and ineffective at addressing issues in the market (see **Section 3**). Exposing the sector to lingering uncertainty in this regard, coupled with potentially a second time-consuming and resource-intensive future MIR phase, would therefore be completely disproportionate, and would be of no benefit to customers.
- 6.5 If the CMA were to consider later that a future MIR may be appropriate, it will need to comply in full with the procedural requirements in the Act. In particular:
- (i) The CMA Board would need to have reasonable grounds for suspecting at that time that there were features of the funeral director or crematoria services markets that could prevent, restrict or distort competition;⁵⁷

⁵⁶ Section 134(4) of the Act specifies that the CMA should consider whether to '*recommend the taking of action by others for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers*'. It does not specify that the CMA may make a recommendation to itself.

⁵⁷ Section 131(1) of the Act.

- (ii) The CMA would need to consult publicly on any proposal to make a MIR;⁵⁸ and
- (iii) If a future MIR were to be made, the appointed CMA Panel would need to collect updated market data to assess: (a) market developments since the current market investigation (reflecting market changes that were already in train before the Covid-19 crisis, changes resulting from the Covid-19 crisis and the impact of the remedy package put in place at the end of the current investigation) to establish whether or not any AECs identified in the current investigation remained and, if so, (b) what remedies would be reasonable and practicable to address these. There is no lawful short-cut to move straight to a review of remedies, as implied by the references in the PDR to a future MIR considering price control remedies. The future CMA Panel's investigation should not be pre-judged to assume that the AECs would still exist or that price regulation would be the most appropriate, effective and proportionate remedy at that time.

6.6 In summary, any decision to re-visit price controls or other remedies in the future would need to take into account the pre-Covid-19 trends from 2019 and early 2020, the subsequent evolution of the industry in response to the Covid-19 crisis and impact of the CMA's sunlight remedies to determine whether there is still an AEC that merits an intervention.

6.7 In light of this, the current approach in the PDR of strongly recommending a future MIR, along with statements that prejudge the outcome of such an MIR, such as "*the UK government and devolved administrations in Northern Ireland and Wales may choose to introduce quality regulation and price control regulation together following the conclusion of any future MIR*",⁵⁹ and "*in the absence of the challenges presented by Coronavirus (COVID-19), it would be possible to implement price control regulation of funeral director services / crematoria services which would be both effective and proportionate*",⁶⁰ are completely unacceptable and should be removed from the final report.

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⁵⁸ Section 169 of the Act, and paragraph 1.12 of *CMA3 Market Studies and Market Investigations: Supplemental guidance on the CMA's approach*.

⁵⁹ PDR, paragraph 9.95.

⁶⁰ Appendix W (Remedies), paragraphs 93 and 113.

ANNEX 1

Critical observations on the CMA's profitability analyses and customer detriment figures

1. Overview

- 1.1 Dignity welcomes the opportunity to comment on the PDR and its accompanying Appendices. This Annex should be read alongside Dignity's response to the PDR.
- 1.2 Dignity's advisors have not been given access to the underlying market data through which the CMA estimates its market-wide detriment estimates, meaning that Dignity's ability to critically evaluate the CMA's figures has been substantially constrained. The published PDR also contains many redactions which prevent a full assessment of the CMA's provisional findings.¹
- 1.3 The CMA, on 8 September 2020 (26 days after the PDR was published), disclosed spreadsheets related to the CMA's calculations of Dignity's funerals and crematoria profitability. Computation issues have been identified in these underlying spreadsheets (see below). It was also found that the CMA had not used Dignity's revised financial data submitted in June 2020, and had apparently not attempted to open at least some of the files that Dignity submitted. This omission raises serious concerns about the robustness of the CMA's analyses for other parties, and therefore the market-wide findings themselves.
- 1.4 Even based on the redacted PDR, it is clear that the CMA's customer detriment estimates for the funeral and crematoria markets are incorrect. The CMA makes several crucial assumptions that inflate these detriment estimates, which do not align with market experience or the CMA's approach in previous market investigations. This leads to estimates that are unrealistic when scaled up to the whole market. The estimates are also out-of-date – based on the period 2014 to 2018 – and so provide a poor reflection of the detriment, if any, that future remedies would need to address.
- 1.5 This Annex explains the issues in four of the CMA's key analyses:
 - (i) The economic profitability analysis for funeral directors;
 - (ii) The economic profitability analysis for crematoria;
 - (iii) The price benchmarking based on SunLife data; and,
 - (iv) The effects of crematoria entry.

¹ As an example, **Appendix S** on *Profitability of Funeral Directors* redacts Tables 1 to 14 on large funeral director profitability and Table 17 on EBITDARS per funeral of large firms; Chart 2; and parts of many paragraphs preventing a full understanding of that paragraph e.g. paragraphs 26, 150, 168, 176, 177, 179, 180, 185, 187, 190, 192, 193, 196, 199, 201, 203, 205, 209, 229, 240, 253, 266, 281(b), 289, 291, 292 and 331).

2. The economic profitability of Funeral Directors

2.1 The CMA estimates customer detriment of at least £402 per funeral.² This relies on three key steps:

- (i) Estimates of ROCE for the 13 largest funeral directors over the period 2014 to 2018;
- (ii) An estimated WACC of 8% over this period; and,
- (iii) An assumption that these results can be generalised to the smaller independents that in fact account for over 60% of the market.³ The CMA was not able to conduct economic profitability analysis for the smaller funeral directors. Instead the CMA looked at a metric called EBITDARS for less than 2% of the smaller FD population.

2.2 These steps are each examined in turn explaining why flaws in the assumptions lead to incorrect detriment results.

Are the ROCEs for the 13 Largest FD measured correctly?

2.3 The ROCEs for the 13 Largest FDs are overstated and do not reflect the current or future market circumstances. Issues arise in the CMA's assumptions on valuing capital employed. It is also clear that the recent trends in the market, now accelerated by the Covid-19 pandemic, indicate that profits have been falling.

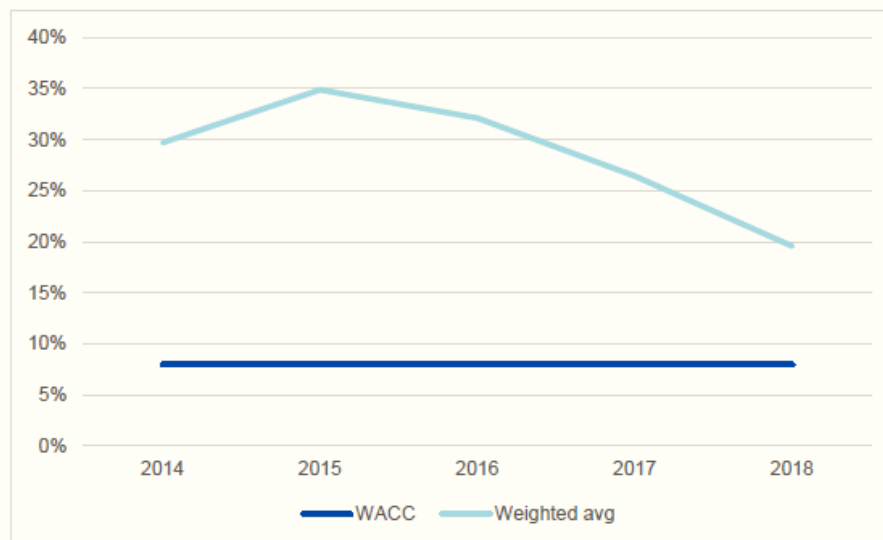
2.4 First, the CMA's detriment estimate relies on average ROCE across the five years from 2014 to 2018. But profits have been falling. The CMA's own evidence – assuming no further adjustments to ROCE – shows the marked decline for the largest firms (**Chart 1** below from page S44 of Appendix S).⁴

² Paragraphs 5 and 8 of Appendix V.

³ Appendix V, paragraph 6 explains: “Our profitability analysis indicates that a number of Smaller firms are likely to be earning economic profits similar to those of The Large firms, based on a comparison of EBITDARS” (emphasis added). In 2018, the 13 Largest Funeral Directors accounted for 37% of funeral volumes.

⁴ There are many other references in the PDR to declining profits for funeral directors. For example: “Eight of the 13 firms have seen an overall decline in ROCE from 2014 to 2018, with two firms experiencing an increase in ROCE over the same period and three remaining largely consistent.” (paragraph 232) and “Considering other metrics of profitability, the trend in economic profit as a percentage of cost-plus of [Firm C] follows a pattern which slightly differs from [Firm A] and [Firm B] in that it increases to 2016 (where [Firm A] and [Firm B] decline from 2015) however falls in line with [Firm A] and [Firm B] from 2016, following a downwards trend” (paragraph 185).

Chart 1: [Weighted average] ROCE of the Large funeral directors from 2014 to 2018, including WACC benchmark (%)



Source: CMA analysis

- 2.5 The declining profits trend would have continued in 2019 had the CMA collected and analysed the data:
- (i) The CMA conducted analysis on only one firm in 2019 and found “*In 2019, [Firm A] demonstrates a fall in profitability that brings ROCE in line with the cost of capital for the first time*”.⁵
 - (ii) The CMA did not update its profitability analysis for Dignity to reflect 2019 and 2020 data submitted in June 2020. Dignity’s own evidence in response to the working paper showed that its 2019 profits had fallen substantially, with economic profits per funeral having halved since 2016.
- 2.6 Therefore, the CMA’s average detriment estimate is clearly skewed upwards by the higher figures in 2014 to 2016. Focussing on the more recent three years (2017 to 2019), even prior to the pandemic or further adjustments, would likely have reduced the CMA’s estimated annual detriment figure by over a third.
- 2.7 Second, the CMA acknowledges that revaluing the owned funeral properties is important to measuring the capital employed accurately. In the working paper, the CMA used the House Price Index (HPI) but noted that a commercial or retail price index would be preferred (but had not been identified). Following the approach set out by the CMA in the working paper, Dignity provided analysis of regional HPI trends to show how Dignity’s branch portfolio was more exposed to higher inflation areas (in particular, London).⁶

⁵ Paragraph 179 of Appendix S.

⁶ Using HPI’s regional indices would have increased Dignity’s capital employed by [§] in each year.

- 2.8 In the PDR, however, the CMA shifts to the Consumer Price Index (CPI) instead of HPI, which lowers the capital employed and takes no account of regional variation. The CMA does not provide a detailed analysis of why CPI performs better than HPI (or indeed any other available indices). The shift in index increases detriment.
- 2.9 Third, IFRS 16 is factually a part of the market now and going forward. The CMA acknowledges that capitalising leases would affect the estimated ROCEs. Capitalising leases would, more likely than not, reduce the estimated ROCEs, potentially materially for those firms with a large proportion of leasing (e.g. Funeral Partners and Dignity). Yet the CMA has chosen not to collect this data systematically across the 13 Largest FDs, thereby leaving the ROCE incorrectly estimated and a poor reflection of forward-looking levels.
- 2.10 Fourth, Dignity provided evidence of start-up losses across a cohort of over 65 greenfield entries. The CMA dismissed start-up losses by citing anecdotal evidence from two small FDs, one of which appears to be an independent choosing the barest minimum business model, rather than a model built on quality.⁷ Dignity does not consider two anecdotal experiences to be a robust basis on which to exclude start-up losses. Indeed, if entry is so easy and low cost, as the CMA implies through rejecting start-up losses, then there should be no long-term concerns for the CMA as entry will discipline any higher prices.
- 2.11 There are, therefore, several reasons why ROCE for the 13 Largest FDs is overstated.

Is the CMA's WACC threshold of 8% fair?

- 2.12 Clearly, the lower the CMA sets the WACC threshold the higher the detriment it will find.
- 2.13 The CMA uses a WACC of 8% for funeral directors, chosen from a range estimated between 5.3% and 8.7%.⁸ The estimate was based on six large listed companies, of which Dignity was the only one operating in the UK.
- 2.14 First, as explained in response to the working paper, the CMA's own data shows that the upper bound of the Dignity WACC range was 10.0%.⁹ As this was the only firm active in the UK, and there are evident differences between countries, it should be given weight.
- 2.15 Second, the upper bound of the WACC range cannot be excluded as a reasonable level of cost of capital in a well-functioning market. The upper bound is based on actual market evidence. Selecting a threshold below this upper bound simply acts to inflate the

⁷ Paragraph 139 of Appendix S.

⁸ Dignity noted that the upper bound of the range in the CMA's working paper was 8.8%.

⁹ The CMA received evidence from Dignity that it made investment decisions using WACC estimates around 10%.

detriment. The CMA is, in effect, seeking to hold the industry to an idealised threshold of competition and performance.¹⁰

- 2.16 Third, using a higher WACC estimate is reasonable given that the majority of funeral directors are micro-businesses, these micro-businesses account for more than half the market, and the WACC threshold is supposed to reflect the market.¹¹
- 2.17 The CMA rejects the inclusion of this ‘small company premium’.¹² The CMA explains this by noting that: “... while in practice very small firms may incur higher costs of obtaining capital, and/or the investors in such firms may have a reduced ability to diversify their risks, allowing a higher cost of capital for smaller firms in our analysis would imply that, in a well-functioning market, customers should pay more in order to be served by a smaller firm than by a larger one. We do not agree that this is appropriate in a market where both larger and smaller firms offer the same product or service.”
- 2.18 The CMA acknowledges that the smaller firms may in fact face higher cost of capital but sets the market threshold as if this reality should not exist. This sets an idealised benchmark for the market.
- 2.19 Therefore, in assuming a WACC of 8%, the CMA chooses to set a more difficult test for the industry, and so estimates a higher detriment, than could reasonably have been chosen on the basis of market evidence. Had a WACC of 10% been used, estimated customer detriment would fall by tens of millions of pounds.

Can the detriment be scaled across the market?

- 2.20 The 13 Largest FDs accounted for only 37% of funerals (by volume) in 2018. The CMA was not able to conduct any return on capital employed economic profitability analysis for the rest (over 60%) of the market.
- 2.21 Further, the CMA says that it found that only 10 of the 13 Largest FDs made excess profits. This does not suggest a substantial share of the market has been found to earn excess profits.¹³ **Dignity is not aware of any other market investigation in which the CMA (or its predecessors) has reached a market-wide finding of excess profitability**

¹⁰ The Market Investigation Guidelines (2013, paragraph 30): “In its market investigation reports the CC uses the term ‘a well-functioning market’ in the sense, generally, of a market without the features causing the AEC, rather than to denote an idealized, perfectly competitive market.”

¹¹ These tiny companies have a different risk profile to the six listed companies in the CMA’s analysis. As examples, an investor in a small funeral provider may face additional risks because: (i) smaller provider revenues would be less diversified in terms of the products and geographic markets served, and so more volatile; (ii) smaller providers would face greater key-person risk; and (iii) an interest in a privately-held company may be less easy to trade than an interest in a publicly-traded company.

¹² This is remarkable also as a precedent being set by the CMA that suggesting that a small company premium should never be applied in any market in the UK.

¹³ In an excessive pricing case (Chapter 2 of the Competition Act), the CMA would first need to establish dominance of the entity/entities involved, before considering whether prices were too high. A market share in excess of 40% would typically be needed. In this market investigation, the CMA is considering a fragmented market in which, even combined, the analysed firms would not satisfy the typical starting point of an excessive pricing case.

based on analysing a smaller share of the market or indeed a more fragmented market (with an HHI in the region of 500).

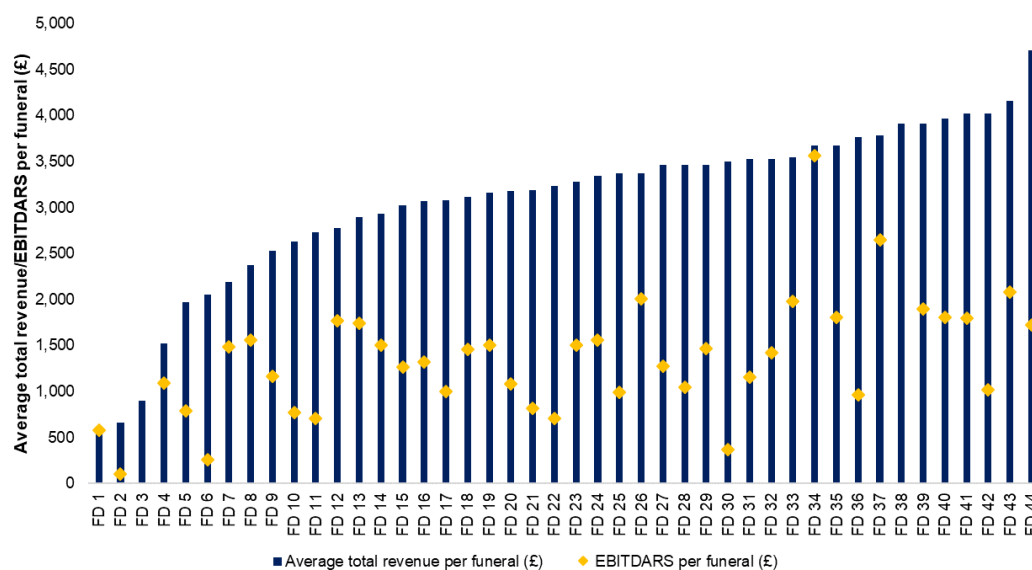
- 2.22 The CMA used its formal powers to request financial data from smaller FDs but received very little robust information in return. P&L information was provided by only a small number of FDs (and even these do not appear reliable¹⁴), and no reliable balance sheet information is presented.
- 2.23 Factually, therefore, the CMA does not have proof of excessive profits across the majority of the funeral director market. The economic profitability of the majority of operators in the market is unknown.
- 2.24 Instead, the CMA makes assumptions to gross up the estimated economic profits for the 13 Largest FDs across the rest of the market.
- 2.25 The CMA assumes that smaller FDs share a similar level of profitability to the 13 Larger FDs. This assumption relies on its analysis of 46 smaller FDs for which it had any P&L data and the analysis of a variable, EBITDARS, that has again not been used previously by the CMA (or its predecessors) in a market investigation.
- 2.26 First, Dignity notes the very significant concerns about the reliability of the data from the 46 smaller FDs:
- (i) The CMA acknowledges data inaccuracies affecting Average Total Revenue (ATR) estimates of at least seven FDs in the sample (see notes to Table 15 in the PDR). For example, FD30 had precisely the same ATR per funeral in each year from 2014 to 2018, which is clearly not possible. If even the most basic top-line revenue figures could not be recorded correctly, then even greater concerns arise about any more detailed margin analysis.
 - (ii) The CMA acknowledges the “*very broad range*” of ATRs across the 46 firms, averaging between £2,000 and £4,700. But there is also extreme variation ‘within’ individual smaller FDs over the period 2014 to 2018 – as examples:
 - (a) FD19 starts at £2,240 in 2014, rises to £3,532 in 2015, falls in 2016 to £2,948, then increases in 2017 to £3,744 and falls again in 2018 to £3,539.
 - (b) FD31 starts at £3,005 in 2014, increases to £4,136 in 2015, goes down to £2,981 in 2016, increases to £3,342 in 2017, and rises again to £4,165 in 2018.

Volatility of this magnitude needs to be examined in detail before the data can be considered reliable or used to draw conclusions across the market.

¹⁴ The notes below Table 15 of Appendix S identify firms where, for example: “*These firms demonstrate ATR figures which we believe to be too low to be credible ...*”, “*...This suggests data inaccuracy...*”, “*The results of these two firms appear particularly high. We believe this to likely be a result of data inaccuracies*”.

- 2.27 Data integrity issues in this small sample of FDs raise concerns about whether any results based on this data could be reliable or representative.¹⁵
- 2.28 Second, the CMA conducts EBITDARS analysis based on this data, but does not examine the robustness of this metric or its results. Figure 1 below shows that there is no apparent relationship, on average, between a firm's ATR and its EBITDARS. Given that EBITDARS is stated before deducting both rental and staff costs, what types of expenses being removed explain the huge variation and scale of the difference between ATR and EBITDARS? The CMA does not assess this in Appendix S but it is fundamental to confidence in the EBITDARS metric.

Figure 1: Comparing smaller funeral director ATR and EBITDARS per funeral (£)

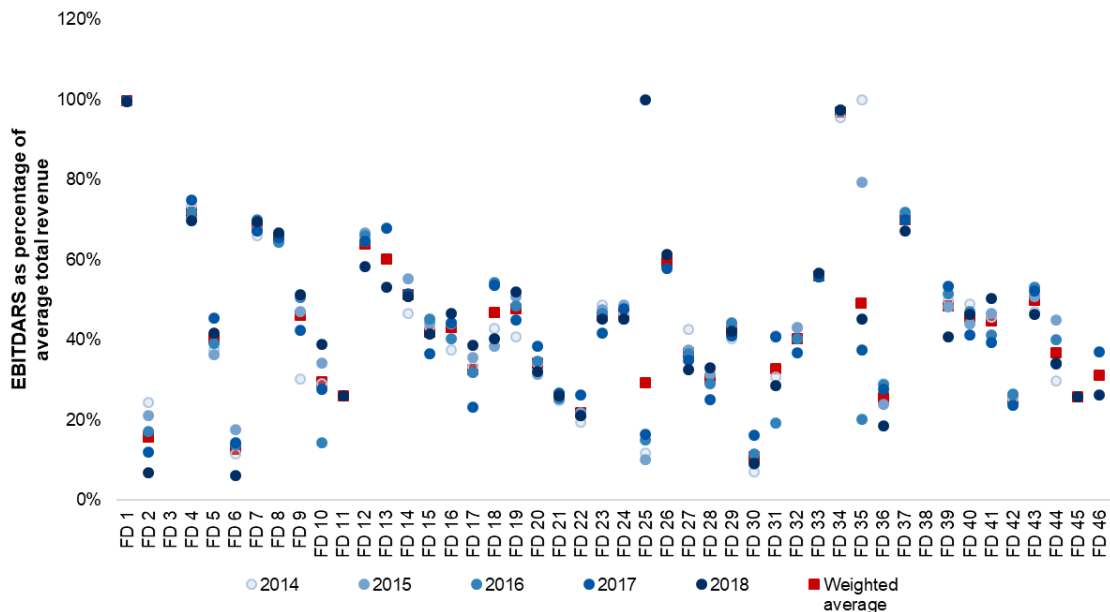


Notes: The figure combines data from Tables 15 and Table 16 of *Appendix S: Profitability of funeral directors*. Dignity notes that the chart also shows FDs whose data are considered unreliable by the CMA (i.e. FDs 1, 2, 3, 30, and 35). FD 45 and FD46 are not shown because the CMA considered their data unreliable and they distort the y-axis too much. The figure only shows positive values, meaning that the EBITDARS of FD 3 does not appear on the graph. EBITDARS per funeral is not displayed for FD38 as it is reported to be 'n/a' in Table 16.

- 2.29 Further, even within the same FD, there is no reliable relationship between EBITDARS and ATR over time. Figure 2 shows EBITDARS as a percentage of ATR changing materially and unpredictably year-on-year. This volatility again should be assessed to have any confidence in the reliability of the underlying data or the metric itself.

¹⁵ Dignity has also raised concerns about survivorship bias affecting the reliability of the sample and submitted evidence of churn. The CMA's view in paragraph 311 - 313 of Appendix S reject the risk of survivorship bias, but without further data, research or evidence presented.

Figure 2: EBITDARS per funeral as a percentage of ATR per funeral (%), 2014 – 2018 and weighted average



Note: Dignity calculations using data from Table 15 and Table 16 of PDR *Appendix S: Profitability of funeral directors*. Dignity notes that the chart also shows FDs whose data are considered unreliable by the CMA (i.e. FDs 1, 2, 3, 30, 35, 45 and 46). The figure only shows positive values, meaning that values for FD 3 do not appear on the graph. The chart does not show EBITDARS as a % of ATR for those FDs with missing information on EBITDARS and/or ATR (i.e. FDs 8, 11, 13, 26, 32, 38, 42, 45 and 46).

2.30 Conclusions could be drawn on the basis of EBITDARS only if the metric itself appeared robust. There is clearly significant volatility in this metric across and within firms, and across time. The CMA has not investigated this volatility or controlled for it in its comparisons with the larger firms.

2.31 Third, if the CMA were correct and prices could fall by £402 per funeral, would this be viable for smaller FDs? The CMA's data suggests it is unrealistic:

- (i) Table 16 of Appendix S shows that over half (26 of 45¹⁶) of the smaller FDs assessed by the CMA had EBITDARS below £1,500 per funeral on average. Across the smaller FDs the simple average EBITDARS is £1,343 per funeral.
- (ii) The CMA says that “*our analysis of Large funeral director firms demonstrated that staff costs per funeral are largely within the range of £900 to £1,200 per funeral (based on 2018 data)*”. Therefore, simply accounting for staff costs in a comparable way to the larger firms would likely lower these smaller FDs' profits by £900 to £1,200 on average.

¹⁶ One of the 46 in the table has a weighted average of 'n/a'. Looking at 2018 data only (rather than the average), 43 firms have EBITDARS and 22 have values below £1,500.

- (iii) This is before accounting for any rental or capital costs, which would reduce the EBIT even further, or for a reasonable cost of capital return.
- (iv) So, on the CMA's own figures, most of the smaller FDs in its sample would unlikely even break-even with funeral prices falling by a further £400. This suggests this is not a reliable detriment estimate at a market-wide level.

Conclusions on market-wide profitability / detriment for FDs

- 2.32 The CMA's detriment estimate for funeral directors is unrealistically high. Further, Dignity is concerned that the CMA has repeatedly made assumptions that increase its estimated detriment.
- 2.33 The estimate does not reflect the current market circumstances – economic profits have been falling. The only data point the CMA shows in the PDR for 2019 indicates returns in line with WACC.
- 2.34 The failure to collect reliable data from smaller FDs underlines that a price control would be unworkable. Further, given that the CMA – in fact – has not proven excessive economic profitability of the majority of operators in the market, implementing a price control could have substantial negative impacts on firms, potentially putting a large number of FDs out of business.

Further comments on Dignity spreadsheets

- 2.35 On 8th September 2020, the CMA disclosed four spreadsheets related to the profitability analysis for Dignity's Funeral division. Through access to the underlying data, the following issues in the CMA's calculations have been identified:
 - (i) The spreadsheets **do not use the revised financial data submitted by Dignity in response to the profitability working papers on 12th June 2020.**
 - (ii) Errors are made in how the CMA adjusts for depreciation in its revaluation of properties:
 - First, at paragraph 80 of Appendix S, the CMA explains that when revaluing properties: "*[f]or the results [...] to be economically meaningful, all changes in the value of capital employed over the period must be recognised in EBIT, including holding gains and losses. Therefore, we have removed the depreciation that the firms charged against their property portfolios over the relevant period and replaced this with a total holding gain or loss, which reflects both changes in the CPI and the depreciation of property assets as they age*". The CMA makes this adjustment on the 'Property Adjustments' tab, shown in Figure 3. Row 28 should remove the depreciation Dignity applied to its property assets so that the CMA can then include its own – adjusted – depreciation (which is included in 'Net gain/(loss) from holding' at Row 29). This should be done using the depreciation calculated by Dignity; not, as the

CMA has done, using one re-calculated using the CMA's chosen UEL for the assets.¹⁷

Figure 3: Property Adjustments tab

[✂]

Source: *Dignity (Funeral Services) CPI - All property related capex.xlsx*

Figure 4: CMA calculation of annual depreciation of Dignity's property assets

[✂]

Source: *Dignity (Funeral Services) CPI - All property related capex.xlsx*

- Second, the CMA does not implement the depreciation adjustment correctly for Dignity's Head Office properties in the 'Dignity - head office property reval and split.xlsx' spreadsheet. In the '2014', '2015', '2016', '2017' and '2018' tabs, the 'Annual depreciation (pre-revaluation)' column is actually calculating the total asset depreciation, not the annual depreciation. Figure 5 below shows a different formula is being used to that used in Figure 4 above.

Figure 5: Incorrect formula used to calculate annual depreciation of Dignity's head office properties

[✂]

Source: *Dignity - head office property reval and split.xlsx*

- (iii) The EBITDARS calculations for Dignity appear distorted by the CMA including its own adjusted levels of depreciation ('DepnFAR' in the formula in Row 15 of the 'Margins' tab), at the same time as Dignity's actual depreciation in each year.
- (iv) Since the working paper stage, the CMA has removed 'Other (deferred commissions)' from the capital employed, decreasing Dignity's capital employed by £[✂] depending on the year. This methodology change is not explained in the PDR or spreadsheet.
- (v) Dignity provided the CMA an allocation of its head office properties across the different areas of its operations: [✂]% funerals; [✂]% crematoria; and, [✂]% pre-need. The CMA has not used this allocation. It instead uses the relative size of the building portfolios between funeral directors vs crematoria, which produces volatile percentages over time (ranging from [✂]% to [✂]%). This methodology change is not explained in the PDR or spreadsheet. Further, Dignity notes that

¹⁷ Dignity notes that the CMA had previously done this step correctly at the working paper stage.

in the crematoria profitability spreadsheet the CMA applies a different approach to allocating head office properties and costs.

3. The economic profitability of Crematoria Operators

3.1 In Appendix V on detriment, the CMA says that its profitability analysis found that:

- (i) the Local Authority (LA) crematoria in its sample earned economic profits of around £5.6 million per annum across 2014 to 2018, leading to a detriment of approximately £175 per cremation; and,
- (ii) the four private crematoria (Dignity, Westerleigh, Memoria and LCC) earned economic profits of £23 million per year, or £215 per cremation.¹⁸

3.2 As noted for Funeral Directors above, Dignity is concerned that these estimates are out-of-date and do not reflect 2019 or 2020 trends. Dignity is also concerned that relevant leases have not been capitalised under IFRS 16.

3.3 Dignity also has significant concerns that the cost bases for Local Authorities will not have been measured correctly; for example, understating the allocation of central costs. Without access to the underlying data, however, Dignity is prevented from testing these concerns and there is little detail presented in the PDR that the CMA has done so.

3.4 However, the fundamental flaws with the CMA analysis for crematoria are:

- (i) The CMA failed to instruct a specialist valuation firm to value the capital employed at crematoria. Instead, the CMA used its own analysis of an unrepresentative sample, leading to a value for crematoria land that is unrealistically low. Dignity submitted evidence from a specialist valuation firm (Cushman & Wakefield) and directed the CMA to evidence from the UK's Valuation Office Agency (VOA) that both showed much higher values were appropriate. Using these higher values means that the majority of crematoria in the CMA's sample do not make excess profits.
- (ii) The CMA makes a crucial assumption to exclude London land values from its Sensitivity analysis that biases the economic profit test. This assumption, which was not made at the working paper stage, is unrealistic and biased.

3.5 On 8th September 2020, the CMA also disclosed the spreadsheets for Dignity's crematoria profitability analyses. The impacts of these changes are discussed below. These flaws cause the capital employed to be substantially underestimated and so ROCE and detriment to be overestimated.

¹⁸ It is noteworthy that even on the CMA's unrealistically low Base Case, two of the private operators do not make excess economic profits.

The approach to valuing crematoria land

- 3.6 It is clear that properly measuring the capital employed (land and buildings) is crucial to the accuracy of the ROCE assessment. Dignity called for detailed valuations to be conducted in its response to the first profitability approach paper dated 9 August 2019.
- 3.7 Dignity provided the CMA with a valuation report by a specialist valuation firm, Cushman & Wakefield (a firm previously instructed by the Competition Commission to conduct land and property valuations¹⁹) that considered available land and planning issues in detail. This used an approach consistent with the approach applied by the Competition Commission in the Private Healthcare market investigation.
- 3.8 Dignity also directed the CMA to valuation estimates from the UK's Valuation Office Agency which showed values of land in residential, commercial and industrial areas that might be used.
- 3.9 Dignity welcomed the CMA's acknowledgement of the importance of finding an independent valuation expert.²⁰ However, the CMA's efforts to find an independent valuer were unsuccessful, in part due to the timing of the CMA's tenders in December 2019.²¹ There was plenty of time in 2020 to re-run these tenders. Dignity considers it unsatisfactory that – in the context of a lengthy inquiry that is meant to provide time for this type of detailed analysis - no appropriately qualified and experienced valuation specialists have even been instructed by the CMA.
- 3.10 The CMA, instead, based its valuation estimates on a sample of 18 recent crematoria land transactions. The CMA said that *'these transactions reflect the actual sites that firms have chosen in terms of size, location and layout, and the actual costs they have incurred to secure those in the open market'*.²² The CMA accepts that a large proportion of these transactions were located in rural areas but still considered this sample to be representative of all UK crematoria.
- 3.11 Dignity contends that the sample **is plainly not representative of crematoria in the UK:**
- (i) Figure 6(a) below shows that over two-thirds of crematoria in the UK are in 'Urban' areas.
 - (ii) Figure 6(b) shows that, in contrast, the CMA's sample of 18 is biased to 'Rural' areas. No sites in the CMA sample were in Greater London.

¹⁹ DTZ (now Cushman & Wakefield) was commissioned by the Competition Commission (CC) to undertake the valuation of the portfolio of private hospitals during the CC's Private Healthcare market investigation. See full report at: https://assets.publishing.service.gov.uk/media/533aed46e5274a56600001f/Appendix_6.15.pdf.

²⁰ Paragraph 63 notes that *"In our view, the ideal approach to valuation of land for older sites would have been to conduct an external valuation exercise of land values for all crematoria within our sample. However, it has not proven possible within the constraints of this investigation to conduct such an exercise"*.

²¹ Footnote 8 of the working paper.

²² Appendix U, paragraph 69.

- (iii) The CMA's sample is at odds with the overall market split or the split for Local Authorities. It is clearly not appropriate for urban areas such as Greater London. Indeed, when the CMA estimates the profitability for 22 Local Authorities, 18 of the 22 (over 80%) are in Urban areas, with some in Greater London.
- (iv) The Cushman & Wakefield (C&W) sample is more similar to the market position and includes some London sites.

Figure 6(a): Rural-Urban split across crematoria operating in 2019

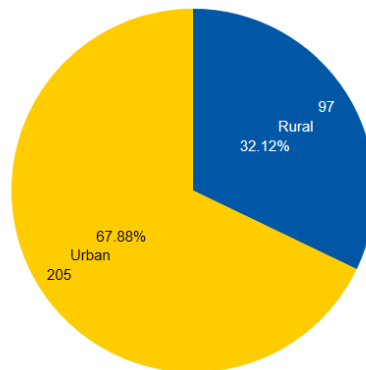


Figure 6(b): Rural-Urban split across CMA's sample [1]

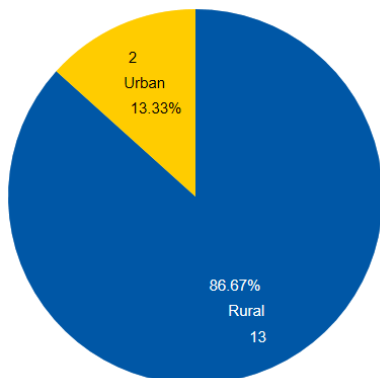


Figure 6(c): Rural-Urban split across Cushman & Wakefield sample [2]

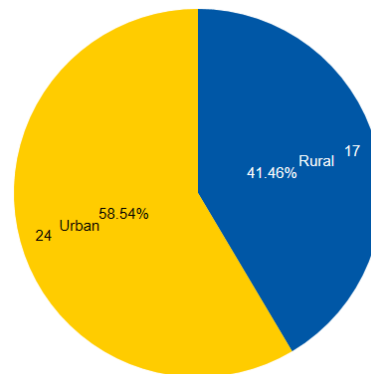


Figure 6(d): Rural-Urban split across Local Authority crematoria

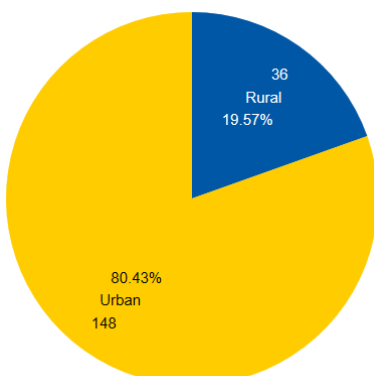
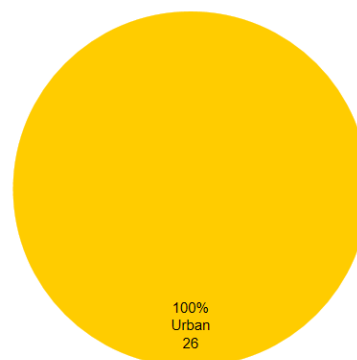


Figure 6(e): Rural-urban split across inner and outer London



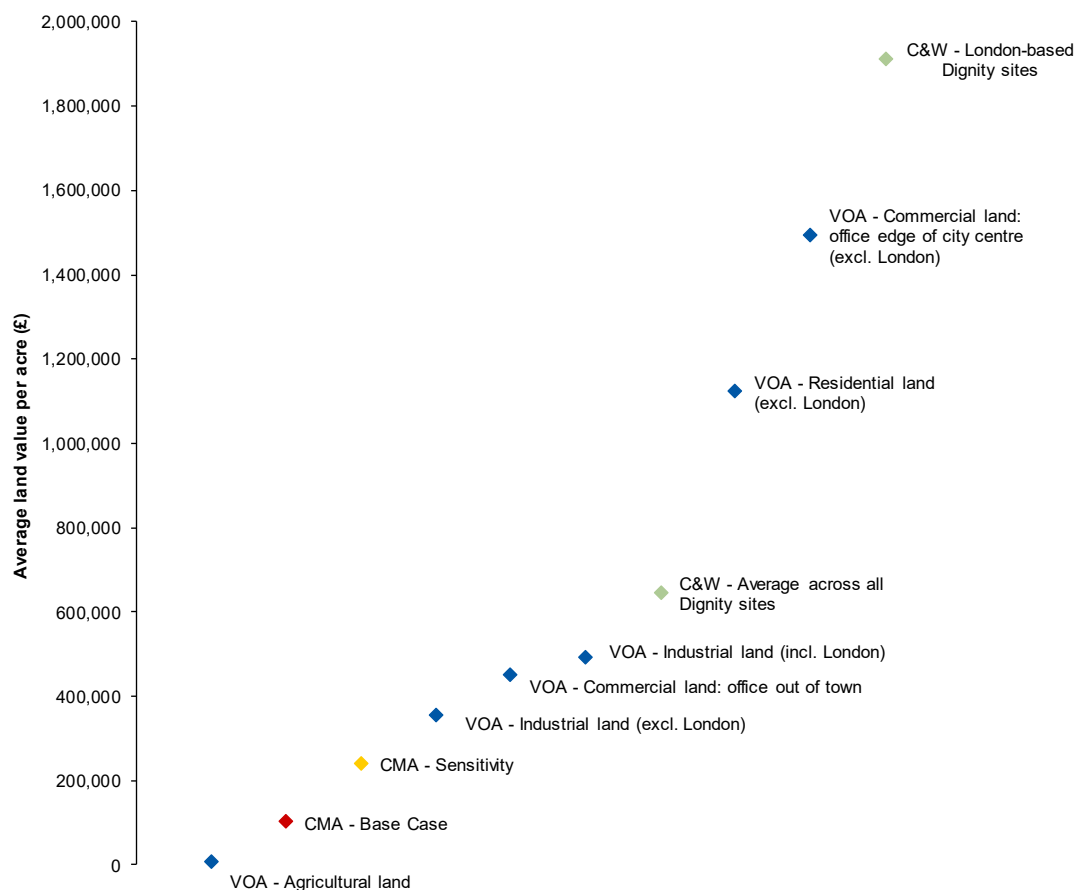
Notes: See End Note of this Annex for a detailed explanation of segmentation into Urban and Rural using ONS data.

[1] Dignity reconstructed the CMA's sample on the basis of Figure 1 presented in the PDR Appendix U. Dignity could not accurately identify all crematoria except for one. Dignity believes that this crematorium might be Westerleigh's Essington crematorium, which has not opened yet. According to Dignity, this crematorium is located in Broad Ln, South Staffordshire while the CMA maps locate it in Broad Ln, Birmingham, which does not appear correct. South Staffordshire corresponds to a rural site while Birmingham corresponds to an urban site. Figure 6(b) includes Essington crematorium and treats it as a rural site (i.e. located in Broad Ln, South Staffordshire). Were Birmingham (urban area) to be the correct location for Essington crematorium, the sample split would not materially change – i.e. 17% urban vs. 83% rural.

[2] The Cushman & Wakefield sample consists of all crematoria operated by Dignity, except those operated by Dignity on behalf of a local authority. Crematoria are defined as being in inner or outer London if they have a postcode that falls within the 'Inner London' and 'Outer London' regions defined by the ONS.

3.12 The CMA's biased sample leads to its unrealistically low land value estimate of £103,000 per acre. As shown in Figure 7, the CMA's values are far below the estimates provided by specialist valuers such as Cushman & Wakefield or VOA. The CMA's approach is simply unrealistic as a value to replace a crematorium in a commercial, industrial or residential area. Even the CMA's Sensitivity estimate is below values from the valuation specialists.

Figure 7: Land values across the UK



Notes: The CMA's Base Case and Sensitivity are as shown in the PDR. The Cushman & Wakefield (C&W) estimates are based on replacement of Dignity's owned sites as set out in their report. The Valuation Office Agency (VOA) values can be found in Table 7 of Dignity's response to the CMA working paper on crematoria profitability.

Assuming away higher value assets

- 3.13 The CMA's working paper from February 2020 had presented three scenarios (a Base Case; a Sensitivity One; and, a Sensitivity Two) under an assumption that crematoria sites should be capped at 10 acres.
- 3.14 Dignity's response to the working paper explained why Sensitivity Two was the most appropriate scenario. Under this Sensitivity Two (even with the 10-acre cap), two of the four private operators made economic losses. Dignity also challenged the capping of the site to 10-acres.
- 3.15 Dignity continues to consider any site size cap unnecessary, but Dignity is pleased that the CMA, in the PDR, decided to change its site size cap to 20 acres. In the PDR, however, the CMA now simply drops Sensitivity Two.
- 3.16 Instead, the CMA shows a different "Sensitivity". Paragraph 7.252 says that "*Sensitivity: in the sensitivity we drew exclusively on the valuations in the Cushman & Wakefield report to calculate an average price per acre ... In coming to this per acre estimated, we excluded the Cushman & Wakefield valuations for sites in greater London [as] these sites would be uneconomic to replace in their current locations.*"
- 3.17 By simply assuming away sites that are 'uneconomic to replace in their current locations', the CMA is clearly biasing the excess profits test. It is removing those assets that would likely not achieve an economic return, skewing the sample to higher profitability.
- 3.18 This assumption is out of line with reality. 26 crematoria operate in Greater London (and many more in highly urban areas in Birmingham, Manchester, etc.), but the CMA's assumption in effect assumes that these could never be replaced locally and so should, instead, be benchmarked against an unrealistically low land value outside the urban area.
- 3.19 This assumption is unrealistic and biased. The Sensitivity shown should simply be the Sensitivity Two from the working paper, now with a 20-acre cap (if a cap is applied at all).

Even under the CMA's biased Sensitivity there are no market-wide concerns

- 3.20 Figure 7 above shows that the Sensitivity land value is still substantially lower than the appropriate values based on Cushman & Wakefield and VOA. But even if this Sensitivity were accurate:
- (i) Paragraph 7.270 of the PDR says "*under the sensitivity applied to local authority crematoria, 13 earned returns above the cost of capital (of 8%) on average across the historic period; two earned returns equal to the cost capital; and seven earned returns below the cost of capital.*"²³ This suggests that almost half of the LA sample are not making excessive profits under the Sensitivity.

²³ This is in fact incorrect as the footnote to Table 11 says that LA11 and LA17 should not be included as their data appear unreliable.

- (ii) Table 42 of the PDR shows that even under the Base case, only two of the four private operators made excessive profits, and “[t]he remaining two firms made economic losses each year” (paragraph 7.261). Table 43 of the PDR shows that under the Sensitivity the economic profits were lower still.

3.21 Therefore, a large proportion of crematoria in the CMA’s sample are not making economic profits under the CMA’s Sensitivity.

Comments on Dignity’s spreadsheets

3.22 On 8th September 2020, the CMA disclosed a spreadsheet of its analysis of Dignity’s profitability in its Crematoria division. Dignity raised with the CMA that this analysis did not include Dignity’s revised financial data submitted in June 2020.

3.23 A review of the underlying spreadsheets indicates that the CMA made some material changes to its analysis. It also did not report in the PDR some scenarios it had considered at the working paper stage. For example, the CMA had removed from Dignity’s capital employed the five crematoria Dignity operates in long-term agreements for Local Authorities. Dignity had challenged this at the working paper stage. Now the CMA has excluded the land for a further five crematoria ([~~§~~]²⁴) which Dignity operates under long-term leases (and owns the buildings). These should have been capitalised or the values from Cushman & Wakefield should have been used.

Conclusions

3.24 The CMA’s analysis covers less than 40% of the crematoria market (on the basis of either revenues or volumes) and the CMA itself identifies that “[t]he provision of crematoria services in the UK is highly fragmented...”²⁵ This makes generalised conclusions on the overall market challenging. It also means that the CMA cannot conclude that a ‘substantial’ portion of the market is earning excessive profits.

3.25 Currently the CMA’s analysis shows that a large number of crematoria are not making excess economic profits. **Therefore, it is not proven that prices are too high at a market-wide level.**

4. The price benchmarking using SunLife data

4.1 The CMA has drawn important conclusions on customer detriment of the funerals market and on price levels of standard funerals using data from the SunLife survey. The CMA says that:

- (i) “[t]he two largest suppliers, Co-op and Dignity, account for 30% of branches and are often significantly more expensive (which we estimate to be by approximately

²⁴ [~~§~~].

²⁵ Paragraph 21 of the Working Paper.

£800 and £1,400 respectively) than many of the small, typically family-owned, businesses that operate the majority of branches in the UK.”²⁶

- (ii) *“funeral director professional fees for a standard funeral have increased at a rate above general inflation from at least 2006 until 2016, albeit this has slowed more recently. Had funeral director prices increased in line with inflation since 2006, the average price within this dataset in 2019 would have been £480 or £630 lower depending on the measure of inflation used. This comparison gives an indication of the amount that customers could have saved per funeral on average in 2019 if prices had increased in line with inflation since 2006”.²⁷*

4.2 The SunLife data is an unaudited source in which the CMA had already identified “a number of biases” in the methodology and therefore in SunLife’s published results.²⁸ The CMA itself shows that SunLife’s results were very sensitive to small changes in methodology.

4.3 Dignity expressed several concerns about the SunLife data in its response to the Funeral Directors working papers from February 2020:

- (i) The SunLife annual samples are very small – 100 surveys (10 in each region) – giving a coverage of under 2% of funeral branches in the UK each year. This risks huge measurement error. The very high levels of churn in the underlying sample shown by the CMA in Annex 2 of its pricing working paper would magnify the risks of measurement error in small sample sizes. Given the challenges with the reliability of the small samples, Dignity considers it highly unlikely that the CMA would have accepted a survey in this form in other market investigations. Therefore, any evidentiary weight attached to this data should be very low.
- (ii) This source suffers from various issues such as selection biases and high churn rates.²⁹ The CMA attempted to adjust its results by share of supply and regional death-rate, but Dignity still believes that the adjusted figures do not sufficiently control for variation in funeral directors (i.e. quality and cost), customer needs, and regional differences. Conclusions cannot be drawn on national averages that do not control for these sources of variation.
- (iii) The SunLife definition of “professional fees” includes “*collection and care of the deceased, hearse and attendants and director, one limo, use of chapel of rest, attending to all essential documentation, oak veneer coffin.*”³⁰ The definition risks

²⁶ Paragraph 11 of the PDR.

²⁷ Paragraph 8.36 of the PDR.

²⁸ *Funeral Directors pricing levels and trends* working paper, paragraph 2. No party has been given an opportunity to examine SunLife’s underlying data for robustness.

²⁹ As shown in Table 4 of the Appendix N, SunLife’s sample is unbalanced over time. For instance, in 2018 the Co-op branches surveyed were only 6 compared to 13 in 2019. In 2018, Dignity branches were 23, much higher than the 11 in the period 2010 – 2012.

³⁰ Footnote 62 of the PDR.

confusion. As the CMA acknowledges,³¹ this is closer to the definition of a standard funeral but excludes other additional services such as personalised funeral procession or embalming, which are commonly chosen by customers and included in fee estimates. There is no auditing of whether the surveyed branches actually provided fees including only the elements of SunLife's definition.

- 4.4 **The SunLife data is not reliable.** The CMA should instead use the pricing data it collected from funeral directors which showed a lower level of inflation over the period 2014 to 2018 than found by SunLife.

5. The impact of crematoria entry

- 5.1 Dignity agrees with the CMA's findings that entry has a significant negative impact on the volumes at incumbent crematoria. However, Dignity finds that the CMA's analyses underestimate the effect of entry on incumbent volumes. In fact, entry has more significant and sustained effects than reported by the CMA.
- 5.2 The competitive discipline posed by entry is, therefore, even stronger than reported in the PDR. This is important because, if remedies in the crematoria market were necessary, **remedies to facilitate entry should be preferred to those that might frustrate entry** (e.g. price control).

The impacts on cremation volumes

- 5.3 In Section 6 of the PDR, the CMA "*assessed the extent to which incumbent crematoria lose volumes over a sustained period of time*".³² The CMA concluded that "*[a]fter entry, average volumes at incumbent crematoria have declined, but three years after entry, average volumes restarted growing year on year at rates similar to those that prevailed before entry...*".³³
- 5.4 This conclusion is fragile and not supported by the data.
- 5.5 At the working paper stage, Dignity extended the CMA's analysis presented in Figure 18 of the PDR showing that when Year 5 or Year 6 are shown on the same chart, the CMA's claimed return to growth after three years was incorrect.³⁴
- 5.6 The CMA responded in the PDR.
- 5.7 First, the CMA says that "*this pattern of volume changes looks counterintuitive (given that in years three and four we have seen volumes grow again) and Dignity has not provided*

³¹ At paragraph 54 of Appendix N, the CMA states that: "*[the Beyond dataset] includes, for each branch, the price of its professional fees and optional extras including coffins or hearses. To estimate the price of a standard funeral, we have added together each funeral director's professional fee, the cost of a traditional wooden coffin, a classic hearse, and one limo. This reflects the definition of professional services fee used by SunLife*".

³² Paragraph 6.156 of the PDR.

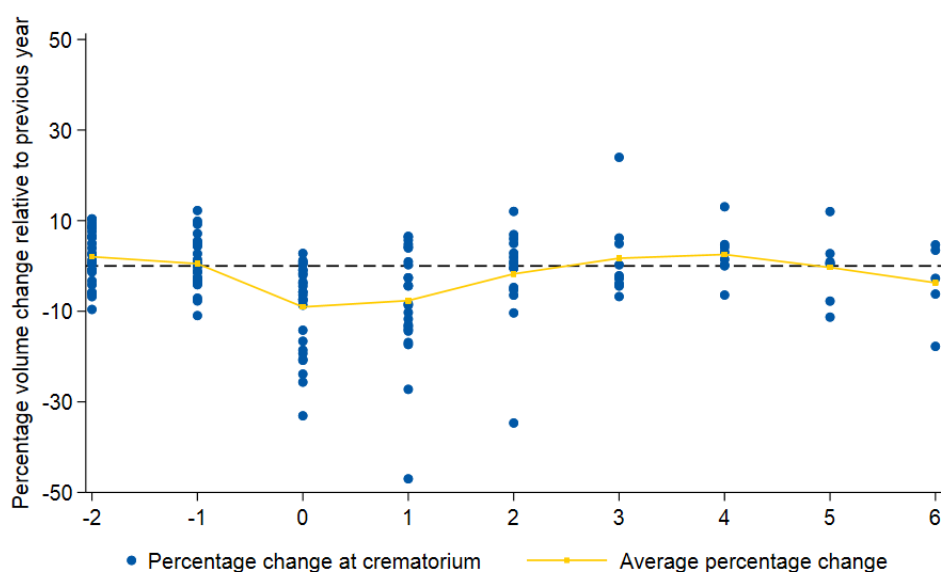
³³ Emphasis added, Paragraph 6.181 of the PDR.

³⁴ Dignity's response to the *Crematoria: evidence on competition between crematoria working paper*.

any explanation of these results.” Dignity’s extension of the analysis was submitted in order to argue that the CMA’s finding was fragile and unreliable. Dignity simply reported the facts in The Cremation Society data, which the CMA had truncated. Given that overall cremation volumes in the UK are growing, the result is even more striking.

- 5.8 Second, the CMA says that “Dignity’s analysis of volume changes five and six years after entry is based on a very limited number of observations (seven and five crematoria respectively). [...] given the small number of observations, two relatively large anomalous volume losses have resulted in negative average volume changes.”³⁵
- 5.9 Dignity noted that there was greater measurement error risk from the smaller samples in Year 5 and Year 6; Year 5 = 7 and Year 6 = 5, and that the Year 3 and Year 4 samples were also relatively small (Year 3 = 9 and Year 4 = 8). Fortunately, as discussed below, new data from The Cremation Society increase sample sizes and shows the CMA’s conclusion to be incorrect.
- 5.10 Third, the CMA was concerned that the patterns may be driven by outliers. Figure 8 shows the percentage volume change for each incumbent crematorium relative to the previous year as well as the average percentage volume change per crematorium up to Year 6. Year 5 and Year 6 do not show higher dispersions than earlier years.

Figure 8: Distribution of percentage changes in volumes on the previous year at incumbent crematoria experiencing entry (in year 0)



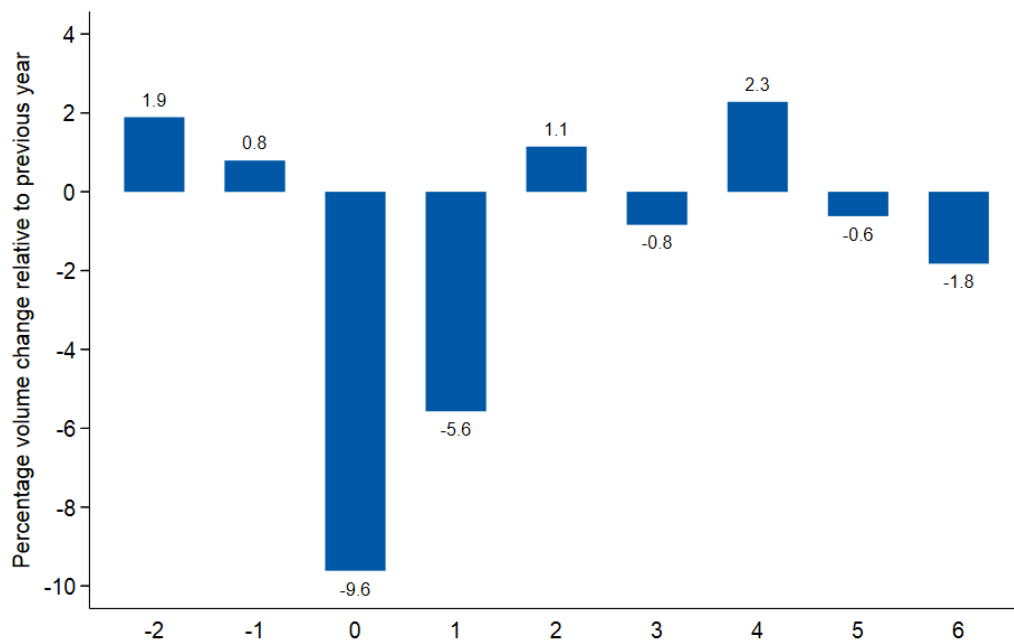
Note: The figure is based on 27 crematoria in Year -2, 28 crematoria in Years -1 and 0, 24 crematoria in Year 1, 15 crematoria in Year 2, 9 crematoria in Year 3, 8 crematoria in Year 4, 7 crematoria in Year 5 and 5 crematoria in Year 6.

- 5.11 At Footnote 816 of the PDR, the CMA states that “[y]ear five’s volume growth on the year before is skewed negative due to a 11% loss in volume at Stourbridge crematorium and

³⁵ Paragraph 6.157 of the PDR.

year six's volume growth on the year before is skewed negative due to a 18% volume loss at Ipswich crematorium" suggesting that the CMA considered these two crematoria as outliers. Assuming that these two crematoria are outliers, excluding them from the sample would even more clearly show that the CMA's findings are fragile. Figure 9 below excludes Stourbridge and Ipswich crematoria, and now the growth rate is negative even at Year 3.

Figure 9: Average changes in volumes on the previous year at incumbent crematoria experiencing entry (in year 0) excluding Stourbridge and Ipswich crematoria



Note: The figure is based on 25 crematoria in Year -2, 26 crematoria in Years -1 and 0, 22 crematoria in Year 1, 13 crematoria in Year 2, 7 crematoria in Year 3, 6 crematoria in Year 4, 5 crematoria in Year 5 and 3 crematoria in Year 6.

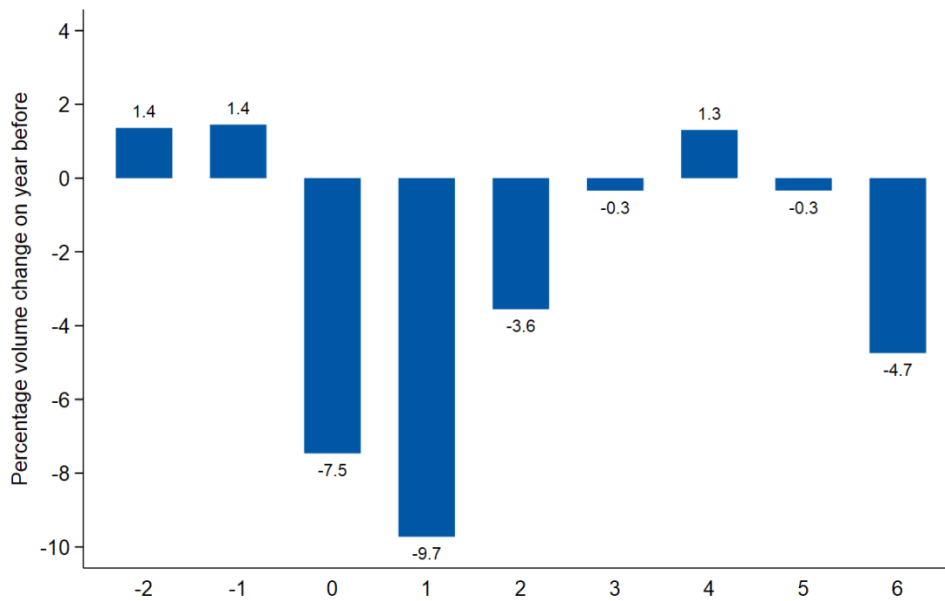
- 5.12 Dignity now submits a further extension of the CMA's initial analysis which reflects data on 2019 volumes from The Cremation Society which has come out since the CMA's working paper (but the CMA has not used in the PDR).³⁶
- 5.13 The extra year of data means that there are larger sample sizes every year including Year 5 and Year 6. In contrast to the CMA's initial analysis, Figure 10 shows that incumbent crematoria do not see their volumes grow again at Year 3. This further year of data therefore underlines that the CMA's PDR conclusion above is incorrect.

³⁶

Accessible at:

<https://www.cremation.org.uk/content/files/2019%20Table%20of%20Cremations%20carried%20out%20in%20the%20British%20Islands%281%29.pdf>.

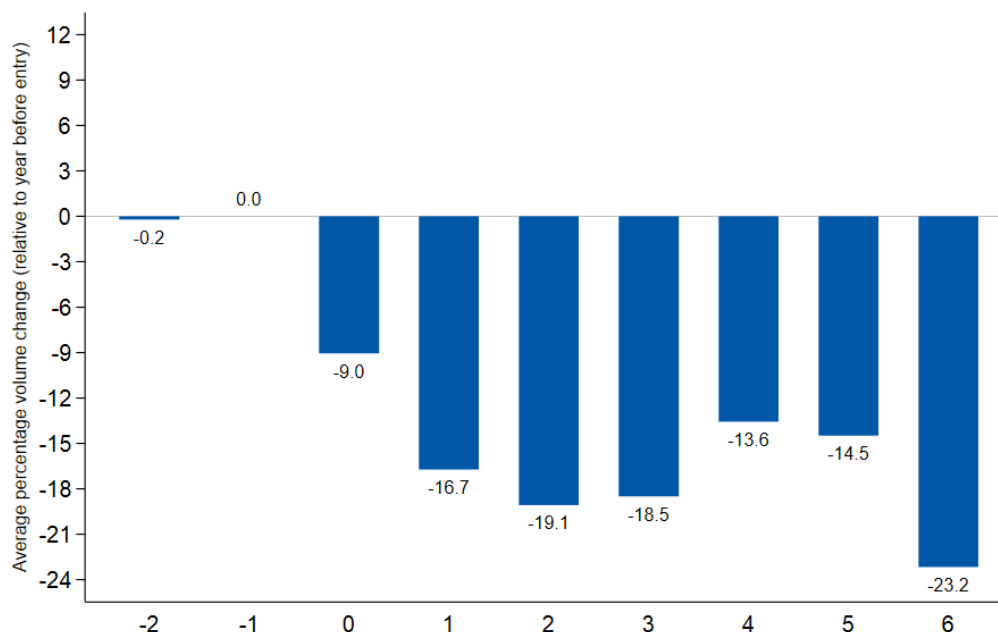
Figure 10: Average changes in volumes on the previous year at incumbent crematoria experiencing entry (in year 0) including 2019 data



Note: Analysis of incumbent crematoria that experienced entry within a 20-minute normal drive time (33 minutes at cortege speeds) between 2008 and 2018. The figure is based on 29 crematoria in Year -2, 30 crematoria in Year -1, 30 crematoria in Year 0, 27 crematoria in Year 1, 23 crematoria in Year 2, 14 crematoria in Year 3, 8 crematoria in Year 4; 7 crematoria in Year 5 and 7 crematoria in Year 6.

- 5.14 Dignity notes that the CMA did not engage with another Dignity extension of the initial CMA analysis submitted during the working paper stage, in which Dignity examined the CMA's data using a different 'base' year for the average incumbent's volumes (see Figure 11 below, which shows the sustained negative effects of entry on the incumbent).

Figure 11: Average changes in volumes at incumbent crematoria experiencing entry (relative to the year before entry)



Note: The figure is based on 28 crematoria in Years -2, -1 and 0, 24 crematoria in Year 1, 15 crematoria in Year 2, 9 crematoria in Year 3, 8 crematoria in Year 4, 7 crematoria in Year 5, and 5 crematoria in Year 6.

5.15 Therefore, the evidence does not show a return to growth after three years. The competitive impact of entry is more sustained. Further, Dignity notes that the fixed-effects econometric analysis of the effects of entry also suggested more significant effects on volumes and price.

6. Endnote on methodology of Figure 6

6.1 In constructing the Urban vs Rural segmentation in Figure 6(a) of this Annex:

- (i) The crematoria operating in 2019 are based on the dataset received from the CMA for its entry analysis.
- (ii) Using the postcodes in this dataset and the National Statistics Postcode Lookup (NSPL) published by the ONS³⁷, crematoria are defined as being in either rural or urban locations according to the 2011 Census Rural-Urban Classification.
- (iii) For England and Wales:
 - The following codes have been classified as 'Urban': A1 urban major conurbation, B1 urban minor conurbation, C1 urban city and town, C2 urban city and town in a sparse setting.

³⁷ Accessible at the following link: <https://geoportal.statistics.gov.uk/datasets/national-statistics-postcode-lookup-august-2020>.

- The following codes have been classified as 'Rural': D1 rural town and fringe, D2 rural town and fringe in sparse setting, E1 rural village, E2 rural village, F1 rural hamlet and isolated dwellings, F2 rural hamlet and isolated dwellings in a sparse setting.
- The following categories did not end up having any crematoria associated with them: C2, D2.

(iv) For Scotland:

- According to the ONS, "the rural-urban classification in Scotland is consistent with the Scottish Executive's core definition of rurality that defines settlements of 3,000 or less people to be rural".
- Accordingly, the following codes have been classified as 'Urban': 1 large urban area: settlement of over 125,000 people, 2 other urban area: settlement of 10,000 to 125,000 people, 3 accessible small town: settlement of 3,000 to 10,000 people, within 30 minutes' drive of a settlement of 10,000 or more, 4 remote small town: settlement of 3,000 to 10,000 people, with a drive time of 30 to 60 minutes to a settlement of 10,000 or more, 5 very remote small town: settlement of 3,000 to 10,000 people, with a drive time of over 60 minutes to a settlement of 10,000 or more.
- The following codes have been classified as 'Rural': 6 accessible rural: settlement of less than 3,000 people, within 30 minutes' drive of a settlement of 10,000 or more, 7 remote rural: settlement of less than 3,000 people, with a drive time of 30-60 minutes to a settlement of 10,000 or more, 8 very remote rural: settlement of less than 3,000 people, with a drive time of over 60 minutes to a settlement of 10,000 or more.
- The following categories did not end up having any crematoria associated with them: 3, 4, 5, 7, 8.

As there are no crematoria associated with the 'less' urban classifications (i.e. C2 in England and Wales and 3, 4 and 5 in Scotland), Dignity is confident of the rural-urban classification used to define the locations of crematoria.

ANNEX 2

Before and after pictures of the signage at an acquired Dignity site

Before acquisition



After acquisition

