Children England submission to the Competition and Markets Authority

April 14th 2021

Children's social care markets

Children England is the membership body for children's charities, first founded in 1942 as 'The Constituent Societies of the National Council of Associated Children's Homes'. For nearly 80 years we have had an overview and detailed understanding of the services, conditions and systems affecting care for children, and we have a body of significant work over the last decade in particular that we believe is essential reading for the CMA in its important new inquiry. We are listing and linking them all below as our substantive evidence, along with the open offer to engage more fully and directly with colleagues at CMA in any ways helpful to explore, explain or expand on anything within them.

1. *Correcting a history of market failure (2014)*
   Analysis of the care market by Kathy Evans, Children England CEO
   https://www.childrenengland.org.uk/correcting-a-history-of-market-failure
2. *Public service markets aren't working for the public good… Or as markets (2016)*
   Chapter by Kathy Evans originally published in *Kittens Are Evil: Little heresies in public policy*
   https://www.childrenengland.org.uk/blog/public-service-markets-arent-working-for-the-public-good-or-as-markets
3. *Apocalypse NAO* – Children England responds to analysis by the National Audit Office and others describing the crisis in children's social care
   First published in CYP Now, November 2016
   https://www.childrenengland.org.uk/blog/apocalypse-nao
4. Evidence to the Committee on Housing, Communities and Local Government (February 2019)
   https://twitter.com/Kathy_CEO_CE/status/1097112030899777536?s=20
5. *Children in Charge*: rethinking the systemic problems facing the funding and commissioning of children's care by Kathy Evans, 2016
   https://www.childrenengland.org.uk/Blog/children-in-charge-original-proposal
6. What care commissioners need to learn from the Public Administration and Constitutional Affairs Committee inquiry into the collapse of Carillion, May 2018 Lessons for commissioners from Carillion | Children England
7. *Commissioning: it's time for clarity about cost, price and the real effects of competition*
   Kathy Evans for CYP Now, May 2019
   https://www.childrenengland.org.uk/blog/commissioning-its-time-for-clarity-about-cost-price-and-the-real-effects-of-competition
8. *Reimagining residential children's homes Commissioning children's homes: Potential improvements and reforms* Kathy Evans for Research in Practice, May 2020 Reimagining residential children's homes - Commissioning children's homes: Potential improvements and reforms (2020) (researchinpractice.org.uk)

We appreciate that you have specific questions to address too, and while we do not have knowledge and expertise to answer the full scope of this subject underneath all of your questions, we have offered answers to several, especially on questions that are not directly addressed in the reading material above.

Theme one: Nature of supply

1. **How has the provision of children's homes, unregulated accommodation and foster care for looked after children developed over time, what has driven this development and how will the wider environment shape it in the future?**

Given that our organisation was founded in the 1940s as the collective body for charitable children's homes at the time, Children England has always remained deeply concerned with the state and quality of care provision for children, even though charitable provision has shrunk significantly over the decades, to account for only 2% of all children's homes today. We produced a historical analysis of how we ended up with the 'market' for children's homes that we see today, and the nature of that market, in 2014 – called 'Correcting a history of market failure'. Correcting a history of market failure (2014) | Children England. This includes examination of:

- the nature of care for children as a 'public good' (and therefore, already, a 'market failure');

- consideration of what type of inherently dysfunctional market has been created (at first we considered it an oligopsony, and later, in other documents we share in this submission, we were persuaded that it is a monopsony);

- the complete lack of market regulation, national planning or oversight (as opposed to service regulation, of which there is plenty)

- the reasons for widespread withdrawal of charities from their former dominance in children's home provision, and how private sector provision grew into the spaces left by that withdrawal

- the irreconcilable distortion created by the 'customer/consumer' split in market approaches to children's care

- the systemic forces, and negative views about children's homes, that mean reliance on a competitive market approach will *always* fail to deliver optimal outcomes

That paper also makes recommendations for a long-term national strategic approach to addressing the problems of the whole care sector needed for children in care, spanning kinship care, foster and residential care, as well as adoption. We worked on our own ideas about what that national approach (and a new national market reform/regulation body) could look like, in our 2016 discussion paper "Children in Charge: imagining systemic reform and redesign in children's care commissioning" https://www.childrenengland.org.uk/Blog/children-in-charge-original-proposal

Our CEO also wrote a book chapter charting the history of the development of 'public service markets', and analysis of their inherent market structure, in the book published in 2016 by Triarchy Press *Kittens are Evil: Little Heresies in Public Policy*. In it she describes why and how competitive approaches to the procurement of public service lead inevitably towards market collapse, or to the formation of new provider cartels and monopolies, which is what we believe we are now seeing today in the significant growth of a small number of the largest equity-financed care companies, which in turn creates ever-present market pressures towards mergers and acquisitions of smaller companies and other types of provider who struggle to 'compete' with the giants. Public Service Markets Aren't Working for the Public Good… or as markets | Children England

2. **Are there significant differences in how providers operate, depending for example on the type of provider they are, their size or the geographic region in which they are operating?**

As the membership body for children's charities we believe it's really important to stress the vital distinction between charities and private firms and private equity. No charity has any shareholders and by law all of their funds and assets must be devoted to the children and families they serve, rather than extracting profits, dividends or other private financial benefits from the work they do with councils to care for children.

Thirty years of the commissioning marketplace has rendered this important distinction almost invisible by suggesting it doesn't matter who provides care as long as they can compete in a 'level playing field'. But it *does* matter who provides, and how they make their money. The 'market' is not a level playing field for charities any more than it is for small local providers trying and struggling to compete with the most profitable giants.

3. To what extent is a lack of availability of suitable residential and fostering placements driving undesirable outcomes for local authorities and children?

Since care for children has been slowly and inappropriately morphed into operating as a competitive market over 30+ years (despite state care being a market failure, by definition), the scarcity of sufficient care is what now drives market value, and some of the understandable consternation among councils and commentators over examples of particularly high pricing of placements. We do not believe it is accidental, or simply coincidental that we see a shortage of sufficient care at the same time as we now see a rising demand for places – on the contrary, successful business operation in a competitive market places a high premium on being a scarce resource that many potential competing customers need to buy from. This is not to say that we believe any individuals working in councils or in any provider organisation have been *deliberately* creating insufficiency, but it is a systemic force and phenomenon at work in all markets, including care.

As the American economist, Edgar Cahn powerfully explained (in 2007):

> *"Markets driven by monetary exchanges cannot put supply and demand together to rebuild the Core Economy because of the way that market value defines value. If quantity is scarce compared to demand, then market value is high. The opposite applies: if supply is abundant, then value goes down. We say something is dirt cheap or worthless if it is abundant.*
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> *That definition of value devalues those very universal capacities that enabled our species to survive and evolve: our ability to care for each other, to come to each other's rescue, to learn from each other, to stand up for what's right and to oppose what is wrong. In market terms, those capacities, if abundant, are worthless. In terms of rebuilding the core economy, those values are literally price-less."*

No council could conceivably have been commissioning 'an abundance' of care, or more capacity than is needed, even if demand had theoretically been stable over the last decade (and in practice, it hasn't been). But more capacity than is actually demanded is precisely what would be necessary to ensure that each child's care placement was made as a meaningful choice between multiple options, based on the child's unique needs and circumstances. In reality, most councils have not been commissioning new provision to meet rising demand at all, nor have they been in any financial position to consider major new investments when their funding from central government has been slashed to the bone, year after year. Most councils have therefore been left largely having to 'shop retail' (ie spot purchase) from whatever care provision is available as and when it 'comes onto the market', and whenever new vacancies become free. Higher prices can be demanded for vacant placements for which there are multiple councils 'competing' at the same time, in the knowledge that all of them will have very limited alternatives if they can't secure it: hence scarcity drives up the 'market value' of every placement.

That systemic scarcity has a huge knock-on impact on both unavoidable out-of-authority placements, and on the growth in use of unregulated settings. The vast majority of social workers, placement officers and commissioners we know and confer with regularly are fully cognisant that both out-of-authority placements, and unregulated settings are usually undesirable, and too often high-risk options for children, but ones over which they feel they have little or no choice due to the scarcity of locally-situated, or properly regulated alternatives. We see the relatively sudden explosion in the use of unregulated settings in particular as a terrible symptom of both market failure and of national government failure to take responsible oversight over the nation's care provision. It will not be solved unless decisive national oversight and action is taken to move away from reliance on 'the market' and public procurement culture in order to meet the needs of children in care.

4. How have the following four types of children's care home and fostering agency provision developed over the last decade: a. Local authority b. Private – private-equity owned c. Private – non-private-equity owned d. Third sector private.

Without pretending to offer a comprehensive answer to this question, we think it is absolutely vital to challenge and correct the fourth listed category term 'Third Sector Private'. A registered charity is not a private organisation, it is public. A charity's funds and assets are, under established charity law dating back through several centuries (generally referred to as the *cy pres* legal principle), public funds and public assets. Trusteeship of a charity is a public role as a custodian of a publicly registered body, required by law to deliver public benefit, and to act responsibly as a custodian of that charity's public mission, assets and services.

The term 'third sector' can be broader than just registered charities, and is usually used to refer to a multitude of voluntary and other not-for-profit forms of organisation including, but not restricted to, charities. Community Interest Companies are one form of public benefit organisation that straddles both public and private status – as registered companies with Companies House they are essentially private companies in founding nature; but as a requirement of subsequent registration at the Office for Community Interest Companies they will have created company constitutions that designate (and 'lock') their assets as being for public (not private) purpose; limit shareholder dividend entitlements; and, assure a proportion of any profit made to a designated social benefit (which may, or may not, be invested back into their primary trading business). There are certainly registered Community Interest Companies involved in care provision, including fostering and children's homes, but it is unclear to us which of your 4 categories they would be counted in for your market analysis. We would argue that CiCs should be accounted for in their own right, given their unique legal status, as a 5th category. More importantly to us, the category of 'third sector private' is a legally and economically inaccurate header under which to account for charities and the distinctive nature of their legal status, operations and public obligations.

Theme two: Commissioning

Our Chief Executive, Kathy Evans, is the author of a major, comprehensive evidence review on care commissioning practice, and commissioning reform, for Research in Practice (RiP), and we are sending the whole paper as an attachment for colleagues at CMA along with this submission. We won't, therefore, address the CMA's questions separately in this section, but strongly encourage you to read the whole RiP paper. The following excerpt is from the introduction to the paper, and is copied in here to give an overview and flavour of how significant we believe commissioning and policy reform is for both understanding the problems, and potential solutions in the care market today:

"The most recent comprehensive gathering of evidence and expert opinion about the issues facing the children's homes marketplace (as it is commonly described) is to be found among the wealth of written and oral evidence submitted to a parliamentary inquiry into the funding of local authority children's services. Over the course of their five-month inquiry, MPs on the Housing, Communities and Local Government Committee (HCLGC) identified rare sector agreement – across statutory and voluntary organisation representatives, academics, the Children's Commissioner and Ofsted – that the care provider marketplace, including children's homes, is unsustainable in its current form and requires serious action.

> *" …many of the witnesses considered that the market for the provision of care for looked after children was not working well." (HCLGC, 2019, para. 102)*
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> *"By December 2019, the Government should take the lead in conducting a review of the whole commissioning and procurement system and assess the merits of the various improvements that have been suggested to us in the course of our inquiry" (HCLGC, 2019, para. 115)*

Such sector-wide (and cross-party) agreement that the market is not working might suggest there would be a degree of unanimity about what reforms are needed to improve the system. As yet there is no such consensus, however. Finding solutions to any problem requires agreement not only that there is a problem, but also a shared diagnosis of the nature of that problem. But while different stakeholders and care sector experts may all see the marketplace as dysfunctional, they differ significantly in their analyses of why there is a problem.

At the risk of glossing over important matters of detail and nuance, those different views can broadly be generalised into one of three 'diagnostic' positions about the fundamental nature of the problem.

> **1. The existing system is essentially sound, but reforms are needed**. Commissioning care from a mixed market of providers is a perfectly reasonable, indeed essential, way for councils to plan and cater for children's diverse care needs; however, distinct problems currently prevent care commissioning and procurement from being as effective as they could be. These problems include (but are not restricted to):
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> > (i) The significant reductions in local authority spending power over the past decade have constrained the capacity for strategic commissioning, and become a driving force for costly and chaotic individual placement chasing.
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> > (ii) Providers' rising fees have contributed to 'overspending' on children's services budgets.
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> > (iii) The total nationwide capacity and availability of care, particularly children's homes, is geographically incoherent and now insufficient to meet the rise in levels of demand over recent years.

2. Profit making is distorting the system and should be removed. The whole system is increasingly damaged and distorted by private equity investors' financial interests, and financially drained by private care companies' business imperative to extract shareholder profit; without the profit motive at play in the system, councils would be free to make better, less expensive and more child-focused choices.

3. There needs to be whole system reform. The concept and structure of a competitive marketplace is itself the problem, no matter what types of organisation provide the care; the serious dysfunctions (and more) cited in positions (1) and (2) above are all design features in competitive marketplace approaches, not minor flaws in their otherwise healthy functioning."

The full paper is written in a way that does not seek to endorse or contradict any of these three diagnostic positions, nor to suggest they are mutually exclusive. Rather, it sets out to consider what potential commissioning and policy reforms might follow from each position, and what those reforms might mean in practice for children's homes and the wider care system. This covers:

- Contracting ideas to move away from spot purchasing (including 'soft block contracting', and Alliance Contracts)
- The need to release and encourage investment in greater public sector provision;
- The need to consider the precedents and practicalities of regulatory profit-bans and in-housing strategies;
- More radical approaches to rethinking commissioning (including the Human Learning Systems approach, and our own Children in Charge proposals for a national Care Bank).

We would also want to emphasise to the CMA that in their report of their Inquiry in 2019, the Housing, Communities and Local Government Select Committee heard our evidence and ideas about Care Bank reforms and commended DfE to explicitly consider them as part of action to address the dysfunctional care marketplace.

Conclusion

We will readily make ourselves available in any ways that would be helpful to CMA in order to be part of such vital explorations of market structure, commissioning implications and systemic redesign. We know that however much work we have already produced in analysing the problems in the marketplace, and thinking about solutions, they are evolving pictures and ideas and always open to interrogation and development through dialogue. We cannot emphasise strongly enough how vital we believe it is that the CMA and Care Review connected inquiries grasp the nettle of the need for fundamental re-engineering of our systems for commissioning and funding care as urgently and radically as possible, and we stand ready to contribute in any ways we can, and in any dialogue that helps, to ensure that such appetite for change is galvanised through this review.