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11th November 2021

Dear CMA,

Response to Children's social care market study interim report

I have read your interim report with care and note that you are asking for a response for each section of your interim report.

Introduction

This response is focussed around a number of the key questions that you have asked respondents to address. In particular I have responded on a number of the factors you set out in section 4 of your report, as follows:

- Residential care in England is my primary focus, as that is where I have the most experience, although my response does also have relevance for foster care services and residential care procurement in Wales.
- Whether or not, the broken nature of the current market-place is a reflection of the relatively small number of places purchased by each local authority and would be addressed by a larger regional approach.

I have not considered registration issues because this is outside my skill set. I have set out my experience and background at the end of this response to show you my provenance and have also given examples of relevant projects.

I agree with your initial analysis of the market place and support the majority of your analysis and provisional views. Much of the market-place is broken and requires fresh and innovative thinking and delivery models to address this.

I do not agree with all of your initial recommendations to resolve the issues and put forward an alternative perspective based on my own direct work in this market-place, as well as published and anecdotal information. I have focussed specifically on some of the assertions in section 4 of your paper and possible remedies in section 5.

The problems with the current market-place and why this ought to be a healthy local market (see 4.20 of the report)

You suggested, for example in paragraph 4.5 that the fact that each local authority purchases a relatively small number of places is a potential weakness. However, I do not believe that it is proven that this is a key factor adding to the weakness of this market in general nor that larger

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national or regional approaches will address this, except potentially for the small number of children with high level specialist needs.

The essentially local nature of the market is the outcome of the statutory basis for the majority of these services, which are based on duties placed on each local authority. They are a continuing requirement.

In my view, the local nature of the market is is consistent with achieving a market where supply and demand are balanced and, more important, where local authorities can more effectively meet children's needs and their own statutory obligations. In most instances, it is in the interest of children and their families for them to be placed locally. Perforce, this requires the local authority to purchase local places. Whilst there may well be numerically limited need for some very specialist places to be purchased nationally, or out of area places for some children, this does not negate the primary requirement for each local authority to have a significant majority of locally based places for children to be near to their families, existing health and education and wider relationships.

You have identified the 'sufficiency duty' in your introduction and in a number of places in your report. The statutory duties of local authorities are focussed on meeting the needs of children in their area (see Children Act 1989) and one of the identified issues with the current provision is that an authority cannot do this if lack of places mean that placements are based on availability, which may be many miles from their families, rather than meeting their need to be placed locally and/or in the most appropriate provision. The requirement for local provision to better meet children's needs is currently being addressed by a pilot project which I have been working on and which I believe is unique (Seslip project):
see, https://www.seslip.co.uk/live-projects/dfe-project-phase-2.

Procuring local provision via small blocks are key objectives underpinning this pilot project. It is a collaborative co-produced DfE funded model, fully co-produced between the local authority partners (West Sussex, Portsmouth and Kent) and provider organisations (Independent Children' Homes Association and Nationwide Association of Fostering Providers) with each having an equal role and place at the project board. The identified outcome is for the authorities to be able to procure viable blocks of service from provider(s) for services for older hard to place children. The public consultation documents were able to identify that they needed to procure a large enough number of places for this group of children to engage market interest. Providers have responded positively to being given an opportunity to bid, encouraged by knowing that they are being listened to, that the procurement terms and conditions will be fair and the project has the support of their trade associations. If successful, this model can be rolled out to a wider range of services.

Will providers sign up to longer term contracts? You have identified in paragraph 4.46 that local authorities in England have identified that one challenge to market shaping is the unwillingness of providers to sign up to long-term contracting arrangements. This is not proven or necessarily wholly true, in my view. The Seslip project I have highlighted above together with a residential care project being procured by Somerset County Council (see below), suggest that if the model offered is attractive to providers, many of them will sign up to long-term contracting arrangements:

https://www.somersetlive.co.uk/news/somerset-news/ten-new-childrens-homes-could-5555232

I suggest that the reluctance is because the majority of local authorities are not offering long term commitment procurement with fair terms based on relationship commissioning where providers are consulted and treated as partners whose views matter.

You identify in your paragraph 2.11 that a majority of places are spot purchases and within frameworks most are also spots purchased. A market-place which is currently 98% based on spot purchases is one which by definition offer no mutual commitment either to buy or sell. Whilst the length of the contract which is offered may typically, be anything from 3 plus 2 years to 7 plus years it does not offer any guarantee of purchasing by the relevant local authority or authorities. Commitment-based purchases with blocks or a right of first refusal has not been tried by most local authorities.

It is neither necessary nor appropriate for only 2% of places to be purchased via blocks. Blocks are not inconsistent with a single local authority procuring or small consortia of one or even two or three sub-regional projects rather than the current model (see below). A small flexible or soft block for one or two children's homes of say, five places for 5 years will still be a contract with a substantial multi-million pound value and if only 3 local authorities partner and buy 10% of their combined 150 or so residential places a year via a block with two providers (see paragraph 4.5 of your report), the value of a 5 year contract for a residential contract is likely to be in the order of £15 - 20,000,000 and even a single authority procurement over a few years may be upwards of £5,000,000. In a mature market longer contracts of 10 years plus with investment are commonplace (see the local authority leisure sector market-place). So 'small' is relative especially in a diverse market-place which includes small, medium and larger providers and where the average size of a children's home is 3.5 places (see paragraph 2..24 of your report).

There is an opportunity for local authorities to offer relatively small blocks either alone or with one or two other authorities, even without the sophisticated demand forecasting, which I accept ought to be an objective. I do not accept that failure to achieve demand forecasting can be used as an excuse for the current state of the market. My suggested block modelling can include variations/modifications via annual review or at need (see also the work carried out by Andrew Rome of Revolution Consulting on 'soft' or variable blocks). I have delivered examples of this model in the adult sector, it can work. The blocks can be augmented with other more sophisticated purchasing models (e.g. right of first refusal on payment of a retainer or cost : volume to augment the basic block).

The experience of those authorities who have block residential care contracts is that these typically reduce cost, potentially by a significant amount (see cross regional project which Oxfordshire County Council and Buckinghamshire Council are part of, see: https://old.buckscc.gov.uk/news/2016/july/crossregionalproject/).

It is unclear why this lauded project is not being rolled out more extensively. Appropriate, 'soft' or 'variable' blocks are able to address more than one local authority problem - financial stringency and duties to children.

Whilst I broadly agree with paragraph 4.14 of your report, collaborative commissioning and

procurement can be based on a very different and more focussed model than at present. I am pleased you will be considering a variety of approaches.

I am not suggesting that the whole market-place should consist of block contracts. All I am suggesting is achieving a healthy balance between the different available purchasing options.

I would go further and suggest that, as you identify, one concern is the high and increasing debt carried by private equity-owned firms and it's impact on resilience (see paragraphs 13, 3.48 and 3.49). There is every advantage for local authorities to encourage and develop models of purchase which support a diverse and resilient market place by encouraging expansion by small and medium as well as larger providers. Offering a range of different sized blocks including smaller ones which may well attract local providers to bid is both consistent with more effectively meeting statutory duties and children's needs and prudent market management.

In a market-place with insufficient places, as you identify, the bargaining position of the provider is strong. This means that they do not need to spend many, many hours on bidding for a framework or dynamic purchasing system when they have no guarantee of placements and do not need to do so in order to get work. You identify that there may be a number of authorities bidding for each place that becomes available (see 4.4 onwards of your report). Even where the provider is a non-profit-distributing organisation, they are still running a business. Turning this argument round and considering the provider's interests, why should they bother to bid with no commitment and a significant investment in time and resource to do so?

Successive reports commissioned by Government have suggested that there is profit in the market-place which can be squeezed out by more effective commissioning and procurement based on large scale frameworks. See the two reports by *Sir Martin Narey* on residential and foster care for example:
https://www.gov.uk/government/publications/childrens-residential-care-in-england
https://www.gov.uk/government/news/independent-review-of-foster-care-published

Local authorities were encouraged to develop a commercial approach based on a limited number of multi-authority large-scale consortia. These exist throughout England and include the 4Cs in Wales. *Narey* recommended that the consortia should use these to negotiate substantially better terms and conditions via more sophisticated purchasing models. Typically, these do have price-focussed evaluation models (see examples of recent procurement) and, although most local authorities in England are part of a number of large overlapping multi-authority consortia often consisting of 20 plus local authorities as recommended by reviews such as *Narey*, these do not and have not provided solutions.

This model has have been in existence for some years and I know from my own knowledge that most are in their second or third iteration i.e. being or have been re-procured. Whilst *Narey* was suggesting that the spot nature of the market is an issue, as identified by the CMA, this remains the model for the vast majority of purchases. These multi-authority consortia have not been able to change the model and procure more cost effectively in the same manner that the smaller Cross Regional Project and other smaller projects have done and it is envisaged that Seslip will do.

There is no objective evidence or analysis of why this is so. My own work has suggested that

agreeing and managing an effective model for placements and risk share in large scale, geographically diverse loosely structured consortium is impossible. It is difficult enough with a small group of authorities. If these large consortia are the solution I suggest that they would have worked by now because these are large enough to address the problems of relatively small numbers of placements. They have not succeeded in achieving sufficient provision or better cost efficiency. I suggest that the flaws may be intrinsic in a model based on large regional procurement and an assumption that local authorities across a large region have enough commonality of interest or capacity to put in place a top down model of purchase and management which achieve what *Narey* is suggesting. Local government is structured on a local and small regional basis for a reason; essentially, it is about local services, need and models of delivery and purchase. Whilst the 4Cs in Wales commissions on a pan-Wales basis the actual individual service contracts are entered into by each local authority.

Whilst Narey also said in his fostering review, 'Generally, commissioning needs to vastly improve' and 'Bluntly, the quality of local authority commissioning is not good enough', if his suggested solutions were viable, they would have been delivered and worked by now especially in view of the financial pressures facing local government.

I have advised on and read many examples of procurement documents in this sector from all around the England and to a more limited extent in Wales. Typically they differ across different local authorities, though have a number of similar characteristics. They are very long, many hundreds of pages long, difficult to read (for example individual documents may have been drafted by different local authorities), include rigid pricing models with limited opportunity for guaranteed inflators and, once entered into, providers have to go through extensive negotiation to achieve a small increase in fee. They are often perceived as adversarial by providers. From a provider perspective, the difficulties intrinsic in the model and its delivery are at a time when their staffing costs, difficulties in recruitment and registration requirements are creating significant problems for providers. Where procurement documents are based on price : quality evaluation models which give price a greater prominence than quality but without any purchasing commitment, there is limited incentive to bid.

You consider the issue of national terms and conditions (see paragraphs 4.10 and 4.11). I was involved in the original drafting of these and have discussed their updating with local authority representatives and provider organisations. I acknowledge the difficulty of doing so in England at present. This is probably an unrealistic aspiration in the short term and, whilst it may be a sensible aspiration, the difficulty in achieving consensus and fair terms are considerable. A national contract which is unacceptable either to providers or local authorities would be a potential disaster and would not address difficulties with the procurement model itself. I suggest an alternative approach, using successful pilots to demonstrate the procurement models together with terms and conditions that are acceptable and use these as a way of developing some more widely accepted precedents.

I am not ascribing blame to anyone for the current state of the market-place, though in my opinion the assumptions by government that there is fat in the market-place and that large scale consortia are appropriate and feasible and will help drive this out is misplaced. The (albeit limited) evidence so far has suggested that fee reduction can only be achieved via commitment purchasing via small consortia or individual local authority models of purchase.

Should there be a ban on profits or something less extreme?

I wholly agree with your interim report which says that seeking to inhibit profit without addressing supply is not recommended (see paragraphs 34 and 35 and section 5). It may well make it much more difficult for local authorities to find the placements that they need by discouraging providers from accepting the more complex child, discourage new investment, new providers or even encouraging providers to leave the market as happened in adult residential care where the value of the land and property especially in the South East of England exceeded the return on investing in the sector.

Providers need to be able to satisfy their funders that an investment is viable over the medium to longer term. Inhibiting profit is inconsistent with this.

In any event, as identified, in a balanced competitive market excessive profit is not an issue (e.g. see the available evidence in the published accounts of the commercial providers who supply local authority leisure services). I am not suggesting that the two market-places are similar, I am simply suggesting that there are other efficient local authority market-places without the need for price control as suggested by some in relation to this market-place.

What is needed to improve supply and better address children's needs

One further difficulty for local government is that at a time of severe budget strain it is very difficult to find the money and staffing resources for innovative thinking and pilots even though the cost may be far less than one residential care placement for a year. This is where the DfE has an important role in supporting local government and could take a greater role.

Continuing the same old way is not going to fix this broken market by increasing supply. I suggest, that radical and innovative pilot models are the way forward, trialing different approaches whilst limiting the cost and resource required and reducing the risk of failure in rolling out something too innovative which may be thought experimental and may not succeed.

It is also essential that local authorities appreciate that because the current market is very risky for them they must seek to achieve alternatives as a matter of urgency. It is very risky because in a market of insufficient supply, spots are commercially risky.

It is essential that in seeking to move away from this, the aspiration ought to be a lower risk approach of a diverse market where they purchase from many providers via committed blocks of all sizes augmented by spots via an open access DPS rather than purchasing from a small number of providers. This is safer for all, far safer than a model where local authorities block purchase from only a small number of providers with most of the market-place being spot purchases.

Examples from adult home care where some local authorities chose to offer blocks to a small number of larger providers reduced overall supply in their area as smaller providers without contracts withdrew from the market or failed. The market-place became less resilient (see also below).

The impact of the public contracts regulations

You do not mention the Public Contracts Regulations 2015 (PCR) in your report. As a procurement expert I have been aware since the PCR came into force in February 2015 that it is likely that a significant number of current placement contracts are in breach of the PCR. You identify that 51% of placements are spot purchased (see paragraph 2.11). You do not differentiate in this paragraph between residential and foster care, where the placement costs are lower.

Whilst it may not be seen as being in anyone's interests to challenge these placements, as the PCR applies to all social care placements with a value above around £650,000 in total (as calculated under the anti-avoidance provisions of the PCR), any individual spot purchase or additional placements of a child with a particular provider or may be above the threshold. If a spot purchase is made or the terms of a framework varied it may well be a breach of the PCR. It is reported that some specialist placements cost up to £1m pa (see Municipal Journal of 7th October2021 page 10 in the Article, *Putting it right*) so if not made via the procured terms of a framework or DPS it would be above the threshold and arguably, in breach the law within say 7 months. In addition to this, whilst some providers have a structure with multiple companies, others do not so that any placements throughout England and Wales between a particular local authority with a single provider will have an aggregated value. In practice, not only will this apply to larger providers but also to smaller providers with multiple placements from one local authority.

You also identify from the same market survey in paragraph 2.11 that 47% of all placements are via a local authority purchase '*...using framework agreements, which set out the terms (such as the service offered and the price) under which the provider will supply the relevant service in the specified period*' (see paragraph 2.11). The inference from this is that the use of these frameworks is under precise terms. However, the 2020 Revolution Consulting report does not go that far and I suggest you may wish to check with Andrew Rome, the author of the quoted report, whether you have quoted him accurately as I do not believe you have. In practice my experience is that not all of these 'framework' purchases are fully compliant with the terms of the framework. They ought to be, but in my experience are sometimes not, as upwards price negotiation outside the framework's parameters happens. It is impossible to know how frequent this is because the data is not collected but, if so, it may well be that the purchases are outside key provisions such as price and not compliant with the PCR.

For completeness I acknowledge that regulation 32 of the PCR includes limited exceptions to the PCR (e.g. for urgency). This is a very limited exception (see *Good Law Project v Minister for the Cabinet Office [2021] EWHC 1569)TCC)*). It cannot be used to justify faulty behaviour by a contracting authority such as a local authority failing to procure (See *Salt International Ltd v The Scottish Ministers* [2015] CSIH 85)).

This situation is very unsatisfactory. It is risky for all and is a further reason why local authorities ought to seek to resolve the market-place problems. I have heard representatives of local authorities and others say that the obligations under the Children Act come first. Compliance with the PCR is a statutory obligation and no other legislation can justify failure to comply.

Unintended consequence

There could be an unintended consequence in creating a larger national or regional framework/DPS. As identified above, it may result in the loss of smaller providers who cannot or do not want to spend the time and resource getting onto this and sell out or cease their service provision, causing a greater concentration of places in larger providers, whom as you have identified may be burdened by considerable debt. This may further weaken the market-place.

The second unintended consequence is that if it is an ineffective framework/DPS for any reason (e.g. it is poorly put together, has unsatisfactory terms and conditions or worse) as with many current frameworks/DPSs whose focus on spot purchases does not encourage investment in new provision, it will be ignored and the current inadequate and arguably illegal commissioning and procurement will continue.

Therefore, a suggested national or large regional approach could make matters worse!

Conclusion

I suggest that the locality-based nature of this market place ought to underpin authorities' decisions as this is both the statutory requirement and reflects the needs of most children to be placed near their families. Therefore, your suggestions in section 5 of regional or national based bodies is, in my opinion, flawed. A national or large-scale multi-authority approach as the core model is not appropriate and in any event, has been tried and failed.

Focussing on residential care in the first instance will deliver the most immediate benefit to children and cost benefits of more effective procurement (see above). This is seen (though erroneously in my view and that of many market experts) as the placement of last resort. The cost of a placement especially for children with complex needs is up to £10,000 per week in exceptional cases and there is considerable market-place shortage.

Pilots such as the Seslip example based on longer term relationship or collaborative procurement with fair terms and conditions developed by single or a small group of nearby authorities, could if progressed with speed and rolled out nationally be of significant and relatively speedy benefit.

If you would like to speak to me about any aspects of this response, please do not hesitate to get in touch.

Yours sincerely

[redacted]

Léonie Cowen

About Léonie: she is principal of Léonie Cowen & Associates. She is a leading local government lawyer and procurement specialist with extensive expertise advising on in all

aspects of public procurement and concession contracts.

Recently engaged to provide legal and procurement advice on the Seslip project, Léonie has acted for numerous local authorities in all aspects of social care commissioning and procurement and is nationally recognised as an expert in procurement of social care (children and adults) and delivery models for leisure and cultural services. Since leaving local government in 1989 at director level in a London authority, she has delivered numerous multi-million pound procurements across 'light touch' service contracts in particular. She has advised the Independent Children's Homes Association, NASS, the voice of the non-maintained special school sector and has worked with the Nationwide Association of Fostering Providers. She was a visiting lecturer at the University of Birmingham's post graduate Institute of Local Government Studies, lecturing to social care commissioners throughout the United Kingdom and is a published author and has lectured and provided national guidance for the National Commissioning Board Wales on achieving successful procurement of modern outcome based collaborative procurement for 'light touch'. Léonie's breadth of commissioning and procurement expertise across the public sector gives a breadth of understanding of what works and what does not work.

Léonie is responding on her own account and her views are her own personal views.