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Response to CMA Provisional Decision Report

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Introduction

The National Association of Funeral Directors (“NAFD”) is the largest and most inclusive trade association for the UK funeral profession. We represent the interests of the entire spectrum of funeral directing businesses – including independent and family owned firms, co-operatives and major funeral groups – and have more than 4,100 UK funeral homes in membership. Between them, NAFD member firms conduct the vast majority of UK funerals each year.

Overview of our response

NAFD welcomes the opportunity to give its views on the Competition and Markets Authority’s (“CMA’s”) Provisional Decision Report (“PDR”) but regrets that the PDR does not recognise the significant contribution that is being made by funeral directors, as key workers, during the COVID-19 pandemic, in ensuring that the UK is able to manage tens of thousands of excess deaths and give all those who have died, from whatever cause, a dignified funeral despite the restrictions. .

We particularly regret the very short times for the sector to respond to a complex 1076-page report, which sets out several entirely new proposals. Our view is that the CMA has not taken sufficient account of the sector’s limited resources and the highly challenging circumstances it continues to face.

We also believe the much-publicised estimated average consumer detriment of “at least” £400 per funeral, which the CMA sets out in the PDR is an overestimation, and seriously misrepresents the current market – and has already caused reputational damage for thousands of funeral firms across the UK.

Turning to the CMA’s key proposals,

- We welcome the proposals on price transparency, which reflect steps the sector is already taking to improve information for consumers. However, it is important to get the details right and, as we have set out in more detail below, we believe the CMA needs to reflect further on its proposals, to ensure the best outcome for consumers can be achieved.
- We welcome the proposals for registration and quality regulation, but believe the right way forward is to build on the efforts the sector is already making to introduce independent and risk-based regulation. We look forward to discussing these proposals further at our upcoming hearing with the CMA.
- We have strong concerns that insufficient justification has been provided for a number of proposals and that there is a lack of detail on what they will entail. In particular we think the CMA should make more effort to properly assess costs of compliance in a sector dominated by small independent providers.
- Finally, we believe the proposal to require the provision of monitoring information for an indefinite period with a view to conducting a supplementary market investigation would be counterproductive, costly and we are concerned that this potentially exceeds the CMA’s powers.

Comments on the deadline for responding and changes made to the administrative timetable and procedural matters

NAFD has serious concerns about the CMA’s surprise decision to shorten the consultation window for its Provisional Decision Report (PDR) from more than three months to just 17 working days, without notice and to bring forward the target date for publishing its final report by a similar timeframe.

The result of this was that many funeral directors, already overstretched by the demands of a global coronavirus pandemic, will not have been able to respond meaningfully to the 1,076 pages of technical economic arguments and proposals set out in the PDR. Given that the PDR makes a number of completely new proposals, this failure to adequately consult will significantly increase the risk of unintended consequences.

This is not the first time NAFD has raised procedural concerns with the CMA. Throughout the course of this market investigation, we have repeatedly highlighted that the funeral sector, unlike many of the markets the CMA is perhaps more accustomed to investigating, is dominated by small and medium sized businesses. These firms lack the capacity and resources necessary to enable them to meaningfully respond to the large volumes of complex information published by the CMA within the very tight timeframes it has permitted.

We are disappointed that the CMA has repeatedly failed to acknowledge this fact by persistently treating the funerals market as if it were dominated by large businesses, with access to specialist economic and legal advice. This has served to mute the voices of the majority of funeral businesses and has disproportionately focussed the CMA's attention on a minority of larger firms that have been better able to engage with the CMA's preferred way of working. This approach may well have skewed the CMA's overall view and understanding of the sector.

We have set out a list of our concerns about the way the CMA has approached consultation during this market investigation, along with some suggestions on how the CMA can improve its approach in future, at Appendix B. We hope the CMA will reflect on these points with a view to learning lessons, not only to improve its approach to carrying out the final part of this investigation, but also when seeking to engage with other markets in future. A failure to do so will risk allowing the process to fall at the final hurdle, wasting this important opportunity to review and improve the market for the benefit of consumers.

Comments on the CMA's estimation of consumer detriment in the market

The CMA has estimated that the average consumer detriment across the market is at least £400 per funeral. If this were true, this would clearly be cause for concern.

However, we consider there to be a number of reasons why this figure is a significant overestimation and provides an inaccurate representation of the market. These reasons are set out in detail in a supplementary submission to this paper but, in summary:

1. There are serious issues with the CMA's estimation of economic profits for the Large firms and the conclusions it has drawn around the profitability / consumer detriment for these Large firms.
2. There are plausible reasons why the profitability of the Large firms would be higher than that of Small firms (and clear reasons why it is implausible to expect these to be the same), such that it is unreasonable to apply the detriment figure calculated for the Large firms to the remaining 58 per cent of the market.
3. Applying this figure across the whole of the market takes no account of the distribution of funerals across different providers, such that a median detriment figure may be significantly lower than the average figure.

The effect of the CMA repeatedly making such a bold and worrying statement in its PDR was, quite predictably, to generate significant public and media interest. Indeed, the figure has now been published by several newspapers and is likely to feature on an upcoming ITV documentary. All of this

has been to the detriment of the good reputation of the funeral directing profession, who, while putting themselves at risk in order to support communities throughout an unprecedented pandemic, are increasingly portrayed in the media as being willing to take advantage of bereaved consumers.

We are concerned at how little evidence of consumer detriment the CMA has been able to find after closely scrutinising the funerals market for in excess of two years. In our view, the CMA acted irresponsibly by publishing this provocative estimated figure, several days before revealing how it was calculated, offering no opportunity for the sector to scrutinise the evidence base upon which it has been arrived at.

NAFD comments on the proposed remedies

Proposal to require funeral directors to disclose price and particular commercial information to customers

NAFD broadly supports this proposal in principle but has concerns about the lack of detail set out in the report.

Funeral director services price transparency

The CMA has provisionally decided to require all funeral directors to provide customers with information on the price of their:

- a) most commonly sold funeral package;
- b) standard funeral package (if different); and
- c) the simplest funeral package they offer.¹

This pricing information would need to be made available to customers in a prominent place at the funeral director's premises and on their website (where applicable).²

NAFD welcomes the CMA's proposed intervention to improve transparency of pricing in the funerals market but has reservations about the lack of detail and apparent emphasis placed on funeral packages, which not all businesses provide.

By way of illustration, it is not clear how a funeral business that only provides bespoke funerals could comply with this requirement. Such a business could probably provide customers with the price of the simplest funeral they were willing to offer, but they would not be able to meet the other two requirements. They could provide the average price of a funeral sold by them within a set period, but this is not the same and is arguably of limited use to a prospective customer.

If it is the CMA's intention to require all businesses to sell defined packages that will enable them to report in this way, this would have implications on both consumer choice and the business models of a large number of funeral firms. We note that no consideration of the potential impact of such requirements has been set out in the PDR, so we assume that this is not the case.

The difficulties in identifying a suitable standardised format in which funeral price information can be usefully presented to consumers is something the Funeral Service Consumer Standards Review (FSCSR)³ has been grappling with for some time. In February 2020, the FSCSR published a consultation paper seeking views on its proposed solution to this problem, which took the form of a Key Information Form (KIF).

¹ CMA Funerals Market Study PDR, para 9.24

² CMA Funerals Market Study PDR, para 9.28(a)

³ The FSCSR is an independently-chaired project that brings together the skills and knowledge of industry experts and key stakeholders with a view to improving quality, standards and outcomes for funeral service consumers (see www.fscsr.co.uk).

The KIF overcomes the ‘bespoke service vs package funeral’ difficulty by setting out clearly defined core service criteria and requiring the funeral business to provide the price of the lowest cost service package or bundle of bespoke services that meet these criteria. Regardless of how the funeral business chooses to market their services, this provides consumers with a clear point of reference for comparing the business’s core pricing with those of their competitors.

One problem with the price transparency proposal set out in the PDR is that the terms have not been adequately defined. For example, it is unclear from what is meant by the “simplest” funeral package offered by a business, which, in a market that offers a growing variety of simple funeral and direct cremation options, is likely to be a highly contested issue.

Another shortfall, when compared with the FSCSR KIF recommendation, is that the subjective pricing reference points offered by the model proposed in the PDR will not facilitate an easy like for like comparison. The simplest funeral package offered by one business may vary widely from that offered by another, with some important elements (e.g. a hearse) not being provided. Motivated consumers would of course be able to compare the itemised breakdown to make better informed decisions but many are unlikely to do so, particularly in view of the CMA’s provisional view about general consumer behaviour in the funerals market. The FSCSR KIF overcomes this by setting objective criteria, better enabling consumers to make a quick and easy like for like comparison.

If modified slightly, this proposal from the CMA would represent a significant step towards greater transparency in the funerals market. We would like to support our members, who together make up the majority of the market, in complying with this requirement by updating our online platform, www.funeral-directory.co.uk, so that this information can be displayed next to their business details. This will help ensure that even those businesses that do not have a website will be able to make this information available to consumers online.

However, for the reasons set out above, NAFD recommends that the CMA should consider adopting an approach that is consistent with the recommendations set out in the FSCSR Transparency Consultation Paper, which can be accessed via the FSCSR website.⁴

Local crematorium operator pricing information

The CMA has provisionally decided to require all funeral directors to provide customers with information on the price information of crematorium operators within a 30-minute cortege drive time from their business premises.⁵

The CMA assesses that businesses will not incur significant costs in seeking to comply with this requirement.⁶ It is not clear how it has made this assessment and we are concerned that, unless supported to do this, smaller businesses are likely to be disproportionately affected by this requirement and may well suffer financially as a result.

For example, it is not clear from the PDR how crematorium operators would be required to make pricing information available to funeral directors (e.g. via post, email, or just published on their website) or where responsibility for identifying which crematoria fall within a 30 minute-cortege drive will rest. A small business with a limited workforce would likely find it difficult to monitor local crematoria pricing information and ensure their records are kept up to date.

We also note that, according to paragraph 9.28 of the PDR, it appears that funeral directors would be required to provide this information even if it had not been provided to them by their local crematorium operators. We hope this is an oversight and that the final report will make clear that funeral directors will only be expected to make available to information that has been given to them.

⁴ This can be accessed here: www.fscsr.co.uk/wp-content/uploads/2020/02/FSCSR-Consultation-paper-2-transparency-for-website.pdf

⁵ CMA Funerals Market Study PDR, para 9.28

⁶ CMA Funerals Market Study PDR, Para. 9.66

Notwithstanding our comments above, NAFD is supportive of this proposal in principle and thinks it is important that consumers are able to access crematorium operator pricing information at the point of purchase. Indeed, we would support a strengthening of this proposal, requiring funeral directors to make this information available online, where they have an online presence.

NAFD intends to support its members in complying with this requirement by updating our online platform, www.funeral-directory.co.uk, so that this information is automatically displayed next to their business details. We would be grateful if the CMA could provide further details as soon as possible so that we can be in a position to do this before the requirement comes into effect.

Funeral directors' terms of business

The CMA has provisionally decided to require all funeral directors to provide customers with details of their terms of business, specifically:

- a) the size of upfront deposit required;
- b) when the deposit and final balance must be paid;
- c) any available payment options for paying the deposit balance; and
- d) any charges for late payment.⁷

This information would need to be made available to customers in a prominent place at the funeral director's premises and on their website (where applicable).⁸

NAFD supports this proposal and believes it would represent a significant step towards greater transparency in the funerals market. We intend to support our members in complying with this requirement by updating our online platform, www.funeral-directory.co.uk, so that this information can be displayed next to their business details. This will help ensure that even those businesses that do not have a website will be able to make this information available to consumers online.

Further consultation on price transparency requirements

We note that the CMA is proposing to implement this requirement by way of an Order, which would be made within six months of the publication of the final report.⁹ We also note that the intention is to formally consult with the public and relevant parties before doing so.¹⁰

We strongly urge the CMA to use this time to consider the proposals set out in the FSCSR Transparency Consultation document and to understand how the major trade associations can help facilitate compliance with any requirements imposed on the sector.

Proposal to require funeral directors to disclose information about charitable donations made

The CMA has provisionally decided to require funeral directors to make available to customers, both at their premises and online, clear and prominent information about any charitable or gratuitous payments made by the business.¹¹

We are aware that many of our members make donations to charities, including hospices. The reason we are aware of this is because they tend to make these donations in a very public way, often promoting their charitable activity on social media.

As our members tend to be very happy to make this information publicly available, we do not have major concerns about the impact of this proposal might have on their businesses. However, clear

⁷ CMA Funerals Market Study PDR, para 9.27

⁸ CMA Funerals Market Study PDR, para 9.28(a)

⁹ CMA Funerals Market Study PDR, para 9.89(a)

¹⁰ CMA Funerals Market Study PDR, para 9.78(a)

¹¹ CMA Funerals Market Study PDR, paras 9.32-9.33

guidelines would need to be provided on exactly what the type of activity is intended to be captured by this requirement, how the details should be displayed and for how long.

Our main observation about this proposal is that it could lead to unintended consequences, such as deterring some businesses from making much needed charitable donations, without leading to any competition or consumer outcome benefits. We note that the CMA has not found any evidence that there is a widespread problem of charities and hospices giving preferential treatment to donor funeral businesses. In the absence of any reliable evidence that this is occurring, it could be viewed as disproportionate to impose a remedy that could have such a negative impact on the organisations that rely on charitable donations.

We also feel that the PDR falls short of adequately explaining how this requirement will address any adverse effect on competition. As the Market Investigation has highlighted, funeral consumers tend not to engage with the purchasing process, in terms of comparing price and service options, to the same extent that they might when purchasing other services. It therefore seems highly unlikely that consumers who might otherwise have relied solely on the recommendation of a hospice will take note of this additional information and alter their behaviour accordingly.

Proposal to prohibit funeral directors from engaging in particular activities

Prohibition on arrangements with hospices, care homes and other similar institutions

The CMA has provisionally decided to prohibit funeral directors from making payments to, or engaging in arrangements with, hospices, care homes and other similar institutions, which encourage or incentivise those institutions to refer customers to the funeral director.¹²

NAFD does not think that this proposal will address any adverse effect on competition nor have any significant benefit for consumers. However, we are concerned that this recommendation could lead to unintended negative consequences for the reputation of the funeral sector and, unless very carefully implemented, for hospices, care homes and similar institutions too.

We completely agree that funeral directors should not engage in activity of this nature but have not seen any evidence to suggest that this is a widespread problem and also note that the CMA has not found any evidence that arrangements of this nature exist. It could also be argued that existing Bribery laws cover the kind of inducement payments which lie at the heart of the CMA's concern.

If the CMA imposes this prohibition, it is likely to lead to a perception that there was a widespread problem to begin with. This risks unfairly damaging consumer trust and confidence in both the funeral and the charitable sectors.

There is also a risk that this prohibition could deter funeral directors from continuing to make well-intentioned donations with hospices and other similar institutions. The PDR does not set out what test would be applied in order to determine whether a donation or arrangement falls foul of the prohibition. If the rules are not carefully thought through and clearly set out, the likely effect will be a reduction in income for organisations that rely on charitable donations.

In the absence of any reliable evidence that a significant problem exists, we would recommend abandoning this proposed remedy.

¹² CMA Funerals Market Study PDR, para 9.34(a)

Prohibition on solicitation through coroner and police contracts

The CMA has provisionally decided to prohibit funeral directors from soliciting for business through coroner and police contracts.¹³ NAFD does not object to this proposal in principle, but notes the lack of detail set out in the PDR on the vitally important questions of exactly what activity this prohibition would cover and how compliance might be monitored and enforced.

We also question whether this would be either effective or proportionate as a standalone remedy. However, we do think that the CMA should consider recommending that this prohibition should be included in any future statutory code of practice and monitored by a designated sector regulator.

As the CMA is aware, coroner and police contracts often include non-solicitation clauses. These seek to prevent funeral directors from gaining unfair access to customers by seeking to directly market their services while servicing the public contract.

These clauses are notoriously difficult to interpret and enforce. There is little doubt that most non-solicitation clauses prohibit funeral directors from actively promoting their services to families or passing them promotional leaflets when working under a public contract. However, they do not, and should not, prevent family members from independently choosing to use the services of the funeral director who took their deceased loved one into their care under such a contract. Indeed, many families do this, either because they have been impressed by the funeral director's performance or because they don't want to go to the trouble of finding another provider.

The mere fact that a family subsequently opts to use the services of the contracted funeral director is not good evidence that a non-solicitation clause was breached. The only way a non-solicitation breach can be detected is through the use of undercover mystery shoppers or by complaints being received from individuals who have witnessed offending behaviour. Given that the majority of people are unlikely to be aware of the prohibition, let alone where to direct their complaint, it is unsurprising that very few breaches are ever identified.

If the CMA's intention is for this general prohibition to mirror a typical non-solicitation clause (as paragraph 9.35 of the PDR suggests), other than to imply inserting a non-solicitation clause into all relevant contracts, we would not view this as introducing any new rules or requirements, although we accept that it would open up the possibility of additional sanctions for breaching existing requirements.

If the CMA wants to reduce the risk of funeral directors soliciting for business through coroner and police contracts, it would need to do two additional things:

- 1) The CMA would need to clearly set out exactly what conduct is not permitted under the order. If funeral directors are completely clear on this, they are much more likely to comply.
- 2) The CMA would need to set out plans for monitoring and enforcing compliance with this order in much greater detail than is set out in the PDR.

To be clear, our recommendation is not that the CMA should do these things now. Given the lack of evidence that there is a widespread problem with funeral directors soliciting for business through public contracts, it would seem disproportionate to set up a special regulatory function, as significant taxpayer expense, to deal with this specific issue.

We instead suggest a more proportionate approach would be to recommend that any future regulator(s), set up or recognised by the UK government or devolved administrations in accordance

¹³ CMA Funerals Market Study PDR, para 9.34(b)

with the CMA's separate provisional recommendation regarding the regulation of standards in the sector,¹⁴ should also have responsibility for designing and enforcing the terms of a prohibition on funeral directors soliciting for business through coroner and police contracts.

Proposal to recommend the establishment of an inspection and registration regime to monitor the quality of funeral director services

The CMA has provisionally decided to recommend to the UK Government and devolved administrations in Wales and Northern Ireland, that they should establish an inspection and registration regime to monitor the quality of funeral director services, as a first step in the direction of a broader regulatory regime for funeral services in England, Wales and Northern Ireland.¹⁵

NAFD, for the most part supports this proposal, which is consistent with our [Position Statement on Regulation of the Funeral profession](#),¹⁶ published in December 2018. We are also pleased to see that the CMA has drawn provisional conclusions that are broadly in line with the recently published [headline findings from the FSCSR Standards Consultation](#),¹⁷ to which NAFD contributed.

NAFD has long believed that the introduction of a system of proportionate and tailored statutory regulation of standards and quality in the funeral sector would be in the best interests of our members and the families they serve. As the largest standards body for the UK funeral profession, NAFD has always advocated for the effective scrutiny of all funeral directors. At present we are only able to scrutinise and provide an independent complaints service to customers of those 4,100+ funeral homes that are in NAFD membership. In our view, it is unacceptable that some firms are currently able to escape scrutiny by refusing to join a trade association which offers an inspections and standards regime.

However, we are also aware of a perception that the regulatory function of the major trade associations is incompatible with our separate role as advocates for our members. In spite of the many safeguards we have put in place to ensure the independence of our complaints, disciplinary and quality assurance procedures, we recognise that more needs to be done to ensure public confidence in the sector and its major regulators' ability to enforce standards is maintained.

For this reason, we have supported Government-led regulation in Scotland and worked closely with the Scottish Government throughout the introduction and implementation of the Burial and Cremation Act, helping to ensure that regulation in Scotland will be proportionate, based on firm foundations and will work in the best interests of both the consumer and the funeral profession.

Notwithstanding the fact that the Scottish model is yet to be finalised or tested, we believe a similar statutory model could work well for England, Wales and Northern Ireland. It is however important that we learn all that we can from the Scottish experience with a view to achieving the best outcome for bereaved consumers in all nations of the UK.

The CMA has said that its reason for not proposing to extend its recommendation to the Scottish Government is because "there is an existing regulatory regime for funeral services in Scotland".¹⁸ We disagree with this statement, which might give the reader the incorrect impression that funeral directors in Scotland are currently subject to statutory regulation.

A more accurate description would be to say that, since April 2016, legislation has been in place to enable the Scottish Government to implement a regulatory regime for funeral directors at some point in the future. Over the past three years, the Scottish Government has taken significant steps towards

¹⁴ CMA Funerals Market Study PDR, para 9.21(iv)

¹⁵ CMA Funerals Market Study PDR, para 9.21(iv)

¹⁶ <https://nafd.org.uk/?download=54008>

¹⁷ <http://www.fscsr.co.uk/wp-content/uploads/2020/08/FSCSR-Standards-consultation-headline-document-redacted.pdf>

¹⁸ CMA Funerals Market Study PDR, para 9.93

understanding what a regulatory regime might look like and has consulted on certain proposals¹⁹ but is yet to take any firm steps towards putting a regulatory regime in place.

The primary reason that a Scottish statutory regime is not yet in place, more than four years after the enabling legislation received Royal Assent, is that it is a very complicated task that has required a dedicated team of civil servants and an independent appointee (the Inspector of Funeral Directors) to engage with stakeholders and think carefully about how to overcome complex issues and sector specific challenges.

In view of this, it seems likely that any statutory inspection and registration regime for any or all of the other UK nations will take many years to develop and implement. This is particularly likely to be the case in the current climate, with much Parliamentary time being devoted contending with issues posed by the COVID-19 pandemic and the UK's departure from the European Union.

Cost considerations

We are surprised to see that the CMA has made no attempt to quantify the cost of establishing and running a statutory inspection and registration regime in accordance with this provisional recommendation to government.

The CMA reports having received representations from funeral directors stating that the cost of complying with the requirements of such a regime would not be prohibitive. However, the cost of establishing and running such a regime appears not to have been considered in any detail by the CMA. The CMA's comments only go so far as to say that it believes that the regime should be funded by funeral directors via a levy or registration fee and not by the public through general taxation.²⁰

The lack of any attempt to quantify costs is particularly surprising, given that the CMA Panel expressed concern at the likely cost of establishing a quality regulator at the hearing it held with NAFD in June 2019, and invited NAFD to bring forward ideas about how regulation could be introduced which did not involve the cost of establishing a new regulator.²¹

The running costs of a new regulator are likely to be significant. The table below sets out the annual expenditure of statutory regulators in the health sector which have similar numbers of registrants to those which would fall under any new funeral regulator:

Name of regulator	Number of registrants	Annual expenditure from latest Annual Report (£)	Annual staff costs (£)	Cost of regulation per registrant (£)
General Chiropractic Council (GCC)	3297	2,951,965	1,056,708	895
General Osteopathic Council (GOsC)	5334	2,989,271	1,336,485	560

¹⁹ For example, the consultation on a statutory code of practice for funeral directors, which closed on 20 September 2019.

²⁰ CMA Funerals Market Study PDR, para 9.133

²¹ [Summary of CMA Panel hearing with the NAFD on 26 June 2019](#), para 18

While the above regulators register individuals, and not businesses, their functions are broadly the same as those envisaged for the inspection and registration body in the CMA's PDR, particularly if this develops into a fully-fledged quality regulator over time.

GCC and GOsC set standards for their registrants to follow, set and monitor education and CPD requirements, and deal with alleged breaches of the required standards. Therefore, it is not unreasonable to suppose that annual expenditure of a funeral regulator might be similar to GCC and GOsC, given the similarities in function and size. Indeed, it is arguable that any funeral regulator may incur additional expenditure to these bodies, insofar as the GCC and GOsC do not inspect premises or facilities, which would be a key (and costly) function of a funeral regulator. Therefore, annual expenditure of £3M is a conservative estimate on the likely cost of a funeral regulator.

If, as per the report cited in the PDR,²² there are a total of 6995 funeral branches in the UK, all of which will need to be registered in any statutory regulatory regime, and the annual expenditure of the funeral regulator is in-line with GCC and GOsC above (approximately £3M), the annual cost of regulation could amount to approximately £430 per branch. If registration fees are levied on a per branch basis, this would mean the annual cost to NAFD's largest members could be in the region of £[REDACTED] (Co-op), £[REDACTED] (Dignity) and £[REDACTED] (Funeral Partners). This is significantly higher than these members currently pay NAFD for their membership subscription, which places them under our regulatory remit.

If the CMA decides to make this very bold recommendation to the UK Government and devolved administrations, it is important that it sets out its assessment of the costs that are likely to be involved. It is not a responsible approach to recommend that government should take action without properly considering the costs of it doing so.

If the CMA feels it would be more appropriate for government to make this assessment, the recommendation should be amended accordingly. Our suggestion would be as follows:

The CMA recommends that the UK government and devolved administrations in Wales and Northern Ireland should consider the potential costs and benefits of establishing an inspection and registration regime to monitor the quality of funeral director services, as a first step in the direction of a broader regulatory regime for funeral services in England, Wales and Northern Ireland.

Implications for economic regulation

We note that the CMA envisages that price regulation may be imposed on the market following a supplementary market investigation.²³ As set out in our previous response to the CMA,²⁴ this type of interventionist regulation would carry significant risks to consumers, such as incentivising firms to compromise quality in order to save costs and retain a profit.

The CMA rightly acknowledges that there are currently limited incentives for funeral directors to address any issues with back of house standards that are not typically observed by customers.²⁵ However, the PDR fails to acknowledge that the risk of a 'race to the bottom' in terms of quality and standards would become particularly acute if the CMA sought to impose price regulation prior to a robust quality and standards regulatory regime being established.

Given that the PDR provisionally recommends that the CMA Board should consult on a supplementary market investigation reference at the "earliest opportunity",²⁶ it seems highly unlikely that any new

²² CMA Funerals Market Study PDR, para 2.71

²³ CMA Funerals Market Study PDR, para 9.200

²⁴ <https://nafd.org.uk/wp-content/uploads/2020/07/NAFD-response-to-working-papers-released-on-200420-FINAL.pdf>

²⁵ CMA Funerals Market Study PDR, para 9.99(a)

²⁶ CMA Funerals Market Study PDR, para 9.257

regulatory regime, in any of the four nations of the UK, including Scotland, will be in place at the time that the CMA envisages it may be appropriate to impose price regulation on the funerals market.

It is our strong view that this would be a mistake and that imposing price regulation on an otherwise unregulated market risks harming consumer interests and causing irreparable damage to the reputation of the sector.

The role of NAFD in the interim period

NAFD agrees with the CMA's observation that the current situation, regarding standards and quality regulation in the funerals sector, is out of step with consumer expectations. We also agree that this should be addressed as soon as possible.

As stated above, we believe a statutory model, such as that being developed in Scotland, could provide a long-term solution to this problem. However, this will require primary legislation and a lengthy development and consultation process, which will take years to complete. Given the concerns identified by the CMA and others, we do not believe it would be in the interests of consumers for the sector to sit on its hands and accept the status quo in the meantime.

It is for this reason that NAFD intends to support the CMA's recommendation by establishing an independent regulatory body, open to all funeral directors (including non-NAFD members), to drive up standards and help prepare the sector for statutory regulation in the future. This new regulator will be operational in only a fraction of the time required to pass new primary legislation, which will avoid harmful delays and help ensure the drive towards the improvement of standards, which has been propelled by the CMA's intervention in the sector, does not lose momentum over time while the government grapples with other pressing issues of national importance.

Although the new body will be strictly independent of NAFD in terms of its governance, we will recommend that it:

- a) uses the recommendations of the Funeral Service Consumer Standards Review²⁷ as a starting point for establishing a set of codified minimum standards for funeral directors who fall within its regulatory remit; and
- b) seeks to have any code of practice and monitoring processes it adopts independently approved and monitored by the designated UK competent authority, the Chartered Trading Standards Institute under its Consumer Codes Approval Scheme (CCAS).

The new body will not initially have a mandatory remit, which is arguably a major weakness of the current system of regulation in the sector. However, we are confident that an independent regulatory scheme, overseen by the designated UK competent authority, will ensure consumer confidence and attract a much larger, broader and more inclusive membership than the current trade association-led system of regulation.

If the new body is successful as we hope, a straightforward option for Government could be to grant it the statutory powers necessary to ensure all consumers in the funeral market are adequately protected.

Alternatively, if the government feels the desired outcome would be better achieved by establishing a new statutory body, the first challenge for such an organisation will be to identify a suitable regulatory model and set of minimum standards for the sector. This challenge will be much easier if the sector has had the opportunity to adjust, and a robust - albeit voluntary - system of regulation is already in place.

²⁷ In particular, we believe the [FSCSR Code](http://www.fscsr.co.uk/fscsr-code-of-practice-guidance/) will provide a useful template for the new body (see <http://www.fscsr.co.uk/fscsr-code-of-practice-guidance/>)

Whatever form statutory regulation takes, such a significant change will have implications for not only thousands of businesses across the UK, but also the bereaved families they care for and so it's vitally important to get it right. NAFD stands ready to play its part in finding a solution that is robust, proportionate and fit for purpose.

A more detailed overview of our plans to establish an independent regulatory body, including provisional timescales, is presented at Appendix A.

NAFD comments on the proposed continuing review of the funerals sector by the CMA

In determining any remedy to be imposed, the CMA is required to take into account its likely speed and impact; the proportionality of the remedy to the Adverse Effect on Competition (AEC) and the detriment that is to be addressed; the desirability of minimising compliance costs; and the likely effectiveness of the remedy selected.

Paragraphs 9.153-9.191 of the PDR set out a number of proposals under the umbrella heading of 'continuing review of the funerals sector by the CMA'. The approach the CMA has adopted, when assessing the costs, benefits and proportionality of some of these proposals, is to treat them as if they were a single proposed remedy.

It is not clear to us why the CMA has done this, nor do we think this approach is sensible. It is far from clear that each element of the proposed package is complementary to the others and the envisaged effects of each component part range widely, from encouraging compliance with Orders made by the CMA to paving the way for a further Market Investigation.

These proposals have never before been consulted on by the CMA. They are distinct, wide ranging and are liable to have very different consequences for the funerals market. Our view is that the effectiveness and proportionality of each should be addressed individually. We have therefore set out our response to them in this way.

Proposal to recommend that the CMA Board should track funeral volumes and revenue

The CMA has provisionally recommended that its Board should track funeral volumes and revenue in the funerals market for the purposes of monitoring consumer outcomes in the funerals sector.²⁸

The effectiveness of this proposal

Paragraphs 9.157-9.158 of the PDR purport to set out the CMA's explanation for how this measure would address any Adverse Effects on Competition (AECs). However, perhaps due to the fact that the CMA attempts to consider this proposal as a part of a larger group of proposals, it appears to have neglected to do so.

At no point in the PDR does the CMA set out how it believes that its continued monitoring of funeral director's revenues and sales volumes will serve to address any provisionally found AEC. For NAFD's part, we cannot see how it possibly could.

In the absence of an alternative explanation, it seems to us that the CMA's aim in recommending this measure can only be to pave the way for a supplementary MIR. This is not the same as seeking to address an AEC and so, if this is the case, we would question whether the CMA is justified in this use of its powers.

²⁸ CMA Funerals Market Study PDR, para 9.257(a)

Furthermore, even if the CMA were able to demonstrate that monitoring consumer outcomes is likely to address a provisionally found AEC, it is our view that tracking revenue and funeral volume data would not be an effective way of monitoring consumer outcomes.

Our reasons for saying this are:

- The data the CMA will collect will be limited to revenue and volume information. Whilst this will provide the CMA with a view of trends in average funeral prices, it will not enable the estimation of other metrics such as profitability and cost efficiency. Simply tracking funeral prices will give a very limited view of consumer outcomes, as this will not take into account other phenomena which could be driving revenues, such as consumer preferences and the tailoring of funerals.
- Elsewhere in NAFD's response we have also detailed the difficulties in requiring firms to report revenues and volumes for funeral 'packages'. Many businesses do not provide packages and funerals can differ in many aspects. For firms with 10 or more branches, the requirement to split the reporting across the CMA's package types may not provide the CMA with useful information, as there may be too much variation across firms for reasonable comparisons.
- Price information is already intended to be required through the first remedy on price information transparency and therefore there is a risk of duplicating reporting effort on the part of firms.

In order to usefully monitor consumer outcomes, the CMA would need to continue to track much more information, as it has been for the past 27 months. However, it is far from clear that such action would be proportionate in the circumstances.

The proportionality of this proposal

The CMA is required to seek to ensure that its remedies are no more onerous than is necessary to remedy the AEC it has identified.

As set out above, we do not believe that the CMA has adequately explained what effects it expects to result from this proposal in terms of addressing any provisionally identified AECs. It is therefore not possible to properly assess the proportionality of this proposal.

Nevertheless, it is surprising that the CMA has not considered the costs of this monitoring remedy for the taxpayer. Such costs would include costs to the CMA of collating, checking/auditing and analysing the data received. This could be onerous, particularly if the data are in different formats or compare very different types of funerals (e.g. if one firm's "simple" funeral is the same as another firm's "standard" funeral this could make comparison and analysis meaningless, unless adjusted for).

In summary, we consider the CMA's monitoring remedy to be of limited value and effectiveness in addressing any provisionally found AEC or monitoring consumer outcomes. We consider that further efforts should be made by the CMA to assess the potential costs of the such a remedy and to clearly weigh these against the benefits.

Proposal to require certain categories of funeral directors to provide detailed commercial information to the CMA at regular intervals for an indefinite period

The CMA has provisionally decided to require funeral directors with five or more branches to provide the CMA with the total number of funerals provided each quarter, and the total revenue (excluding disbursements) during that quarter.

For funeral directors with ten or more branches, this information would need to be provided both in aggregate form and split by simple, standard and other funerals (based on the funeral director's definition of these types of funerals).

The effectiveness of this proposal

As set out above:

- a) we do not believe collecting this data will enable the CMA to effectively monitor consumer outcomes; and
- b) the CMA has not explained what AEC or consumer detriment it hopes to address by monitoring consumer outcomes in the funerals market.

For these reasons, we cannot currently see how this is an effective proposal.

Having said that, we would highlight that the number of branches a funeral business has is not a good measure of its size. The operating model of funeral businesses can vary significantly depending on multiple factors, such as the geographical location of the business and the demographics of the communities they serve. For example, a funeral director operating in rural Scotland might need multiple branches to cover a community the same size as can be covered by another funeral director's single large city centre branch. The NAFD is also aware that some funeral businesses outsource their mortuary facilities, meaning that they can service a great many funerals without any branches at all.

The NAFD uses a different metric – the number of funerals sold in a year – to rank its members in order of size, for the purposes of charging different rates of membership subscription fee. Admittedly, this metric has its own shortfalls, but the fact that a significant number of our members rank considerably higher on this scale than other members with many more branches reinforces our concerns about the CMA's proposed approach.

The proportionality of this proposal

The CMA is required to seek to ensure that its remedies are no more onerous than is necessary to remedy the AEC it has identified.

As set out above, we do not believe that the CMA has adequately explained what effects it expects to result from this proposal in terms of addressing any provisionally identified AECs. It is therefore not possible to properly assess the proportionality of this proposal.

We note that the CMA does not expect this remedy to impose significant costs on businesses²⁹ but would expect a fuller explanation of what costs the CMA would consider to be significant and why it does not expect such costs to be incurred.

The assertion that costs will not be significant because the information to be provided should already be readily available fails to take into consideration the costs of reporting, including making any necessary format changes. Unless the CMA intends for funeral businesses to be able to submit data in whatever format they choose, these costs, which will disproportionately affect smaller businesses, will need to be estimated and taken into account.

We would expect there to be a better assessment of the costs and associated benefits to consumers of this remedy in order to allow for a meaningful assessment of its proportionality.

²⁹ CMA Funerals Market Study PDR, para 9.170

Proposal to recommend that the CMA Board should consider consulting on a supplementary MIR at the earliest opportunity

The CMA has provisionally decided to recommend that the CMA Board should consider consulting on a supplementary market investigation reference (MIR) at the earliest opportunity once the impact and consequences of COVID-19 on the funerals sector are sufficiently understood and the sector is more stable.

The effectiveness of this proposal

The CMA has made it clear that this measure is not intended to immediately address any AECs or resulting customer detriment provisionally found.³⁰ Rather, it is a mechanism to allow time for the impact of COVID-19 on the funerals sector to subside. Therefore, in terms of addressing any provisionally identified AEC, this proposal is completely ineffective.

As the CMA has acknowledged,³¹ the funerals market is not the same market that it was several months ago, let alone in March 2019, when the CMA initiated its investigation. Seeking to understand this new market in the future through the lens of an investigation which is already outdated is likely to cause confusion and harm effective analysis.

There is nothing to prevent the CMA Board from independently deciding to conduct a Market Study of this new funerals market at some point in the future, should it feel this is appropriate. Such a Market Study would be able to take into account the CMA's previous findings, just as the current Market Investigation took into account the findings of the Office for Fair Trading investigation that preceded it. However, it should not be unduly influenced by any previous assessment of the market. The suggestion that a future MIR should be "supplementary" to the current investigation implies dependence on the work that has already been carried out, which is no longer current.

It is not in our view helpful or appropriate to invent the concept of a supplementary MIR with a view to extending the reach of the current investigation beyond the statutory timeframe.

The proportionality of this proposal

The strict statutory rules governing the timeframes for Market Investigations are in place for good reason. Above all, they protect sectors from suffering excessive economic harm due an investigation being permitted to continue for a disproportionate period of time.

This proposal, combined with the monitoring of funeral revenues and volumes, could be considered as an attempt by the CMA to extend the statutory deadlines for a market investigation or retain the opportunity to reopen the investigation once more information has been gathered.

Certainty is a very important consideration for investors and players in markets. It is therefore important that the CMA applies the rules to this market investigation in the same way as it would any other. If it imposes remedies, it should do so based on its assessment of what measures are likely to be effective and proportionate in remedying any AEC it identifies at the conclusion of its investigation. It is not fair or appropriate to impose remedies based on a supposition that the situation may change in future.

We appreciate the CMA's frustration at its work being disrupted by a global pandemic but would urge it to think very carefully before using this as a basis for seeking to circumvent statutory rules. To do so

³⁰ CMA Funerals Market Study PDR, para 9.202

³¹ CMA Funerals Market Study PDR, para 21

would set a worrying precedent with serious implications, not only for the funeral sector, but for every market investigated by the CMA in future.

The continuing threat of a supplementary market investigation is almost certain to have adverse impacts on the sector, in particular increasing regulatory risk. This could lead investors to demand a higher return to protect themselves from such risk, leading to an increase in the cost of capital and potentially a corresponding increase in costs for customers.

Appendices

Appendix A - THE INDEPENDENT FUNERAL STANDARDS ORGANISATION (IFSO): A NEW REGULATOR FOR FUNERAL DIRECTORS

1. Introduction: The case for IFSO

1.1 In its Provisional Decision Report (PDR) to the Funeral Market Investigation, the Competition and Markets Authority (CMA) has provisionally decided to recommend to the UK Government, and the devolved administrations in Wales and Northern Ireland that an inspection and registration scheme for funeral directors be established, with a focus to quality assure the standards of back-of-house services and facilities.

1.2 The CMA set out their thoughts on such a regime in the PDR in the following paragraphs:

We have provisionally decided to recommend to the UK government and the devolved administrations in Northern Ireland and Wales to establish in England, Northern Ireland and Wales an inspection and registration regime to monitor the quality of funeral director services and as a first step in the establishment of a broader regulatory regime for funeral services in England, Wales and Northern Ireland. (9.92)

We propose that the regime should be supported by legislation to enable the UK government and the relevant devolved administrations to act upon the inspection findings – this may include the establishment of a broader regulatory regime, which could encompass minimum standards, a licensing regime and the publication of service quality metrics. (9.94)

Over time, a fully-fledged quality regulatory regime for funeral directors could include the following elements:

- (a) Clear requirements for funeral directors in the form of statutory minimum standards;*
- (b) effective monitoring and enforcement of standards through a statutory licensing and inspection regime;*
- (c) an appropriate body to monitor and enforce standards; and*
- (d) the collection and dissemination of information to customers on the quality of services provided by funeral directors. (9.101)*

Given the nature of our concerns, we consider it especially important that the following back of house services provided by funeral directors fall under the scope of a registration and inspection regime:

- (a) Collection and transport of the deceased.*
- (b) Care, storage and preparation of the deceased. (9.115)*

In order to provide these services to an acceptable minimum level of quality, funeral directors will need to be able to demonstrate that they have:

- (a) Suitable premises, facilities and equipment, including facilities for the storage and preparation of the deceased, having (or having access to) sufficient and appropriate refrigeration facilities, and (if embalming is to be carried out at the funeral directors' premises) access to embalming facilities;*

(b) appropriate education and training, including continued professional development (CPD), the necessary accredited technical education and/or training for relevant staff and management training for those with management responsibility;

(c) appropriate governance processes and procedures to monitor quality standards, including suitable procedures to monitor premises, facilities and equipment and for the identification of the deceased; and

(d) an appropriate complaints and consumer redress process to ensure that any incidences of funeral directors failing to meet the required standards can be effectively resolved and the customer appropriately recompensed. (9.116)

1.3 NAFD is supportive of an inspection and registration regime being established, focused on back-of-house standards, provided that this achieved in a proportionate and cost-effective way.

1.4 In the PDR, the CMA made no attempt to quantify the cost of establishing and running such a regime. While CMA reports that it had received representations from funeral directors stating that the cost of complying with the requirements of such a regime would not be prohibitive, the cost of establishing and running such a regime appears not to have been considered in any detail by the CMA. The CMA's comments only go so far as to say that it believes that the regime should be funded by funeral directors via a levy or registration fee and not by the public through general taxation (9.133). The lack of any attempt to quantify costs is surprising, given that the CMA Panel expressed concern at the cost of establishing a quality regulator at the hearing it held with NAFD in June 2019, and invited NAFD to bring forward ideas about how regulation could be introduced which did not involve the cost of establishing a new regulator.

1.5 The running costs of a new regulator could be significant. The table below sets out the annual expenditure of statutory regulators in the health sector which have similar numbers of registrants to those which would fall under any new funeral regulator:

Name of regulator	Number of registrants	Annual expenditure from latest Annual Report (£)	Annual staff costs (£)	Cost of regulation per registrant (£)
General Chiropractic Council (GCC)	3297	2,951,965	1,056,708	895
General Osteopathic Council (GOsC)	5334	2,989,271	1,336,485	560

1.6 While the above regulators register individuals, and not businesses, their functions are broadly the same as those envisaged for the inspection and registration body in the CMA's PDR, particularly if this develops into a fully-fledged quality regulator over time. GCC and GOsC set standards for their registrants to follow, set and monitor education and CPD requirements, and deal with alleged breaches of the required standards. Therefore, it is reasonable to suppose that annual expenditure of a funeral regulator might

be similar to GCC and GOSC, given the similarities in function and size. Indeed, it is arguable that any funeral regulator may incur additional expenditure to these bodies, insofar as the GCC and GOSC do not inspect premises or facilities, which would be a key (and costly) function of a funeral regulator. Therefore, annual expenditure of £3M is a conservative estimate on the likely cost of a funeral regulator.

- 1.7 If there are a total of 6995 funeral branches in the UK (see 2.71 of PDR), all of which will need to be registered in any statutory regulatory regime, and the annual expenditure of the funeral regulator is in-line with GCC and GOSC above (approximately £3M), the annual cost of regulation could amount to approximately £430 per branch. If registration fees are levied on a per branch basis, this would mean the annual cost to NAFD's largest members could be in the region of £[REDACTED] (Co-op), £[REDACTED] (Dignity) and £[REDACTED] (Funeral Partners), significantly higher than these members currently pay to NAFD for membership.
- 1.8 This cost of regulation could be greatly reduced if the regulator shared certain back-office administrative functions and physical resources with NAFD, e.g. finance, human resources, IT, accommodation etc. As can be seen from the tables above, staff costs make up a sufficient proportion of a regulator's annual spend, and any sharing of such costs could help reduce the overall financial burden. Section 8 outlines how this could be achieved.
- 1.9 There would be further efficiencies if the regulator built on the existing expertise that NAFD has in regulatory activities. NAFD already sets a Code of Practice for its members, inspects its members' premises, runs conciliation and adjudication services to deal with consumer complaints, and has processes for disciplining members (including the sanction of expulsion from membership) if they persistently fail to meet acceptable standards.
- 1.10 To achieve the cost savings and efficiencies above, it is recommended that the CMA's objectives are best met through NAFD establishing the Independent Funeral Standards Organisation (IFSO). While IFSO would be initially set up by NAFD, and share accommodation and back-office functions with NAFD, once established it would have governance arrangements which would ensure its independence to act as a public interest regulator (see section 2 below). An approach would be made to government to invest it with the statutory powers to ensure that non-NAFD members were required to register with it.
- 1.11 This paper sets out the structure and functions of IFSO, and a plan for its establishment.

2. Governance

- 2.1 There are two main shortcomings to trade body-led regulation, as currently administered by NAFD and SAIF.
- 2.2 Firstly, the lack of statutory powers means that trade bodies have no jurisdiction over those who chose not to become trade body members. This can mean that service providers are able to avoid scrutiny and operate in an entirely unregulated space, and arguably some of these are the very service providers who pose the biggest risk to consumers. It can also mean that, where it is difficult for the trade body to publicise its

regulatory activities to the general public, consumers are vulnerable to unwittingly choosing a service provider outside of the scope of a regulator. This is a particular problem in a sector such as funerals where the public falsely assume there exists a statutory regulator.

2.3 Secondly, trade bodies are vulnerable to the charge that they have the interests of their members as their *raison d'être*, and not the interests of members of the public or consumers. This can affect consumer confidence in trade body-led regulation.

2.4 These issues seem to be the basis for the CMA's reluctance to give trade bodies a role in quality regulation (although the CMA concedes this is a matter for government):

a number of parties told us that the regulation of funeral directors should be independent of the trade associations or any other industry body or group. We agree with these parties that the various organisations currently supporting some funeral directors, including NAFD, SAIF and the Good Funeral Guide, would not be best placed to monitor and enforce compliance with quality standards. Membership of these various organisations is voluntary, does not cover the entire sector, and such a model (in the case of NAFD and SAIF) would create conflicts of interest where representative bodies would also be responsible for regulating their members. Further, the trade associations have previously had difficulty in addressing transparency concerns identified by the CMA's predecessor body, the OFT (see Section 2). However, we think that these organisations could play an important role in assisting their members in complying with any regulatory regime. (9.121 (b))

2.5 The CMA appears not to have considered other regulatory models which have worked well in other sectors. For example, successive governments have been reluctant to establish new regulatory bodies for areas of health and care not currently subject to statutory regulation, but have encouraged the setting up of 'voluntary accredited' registers by existing professional bodies, which have external oversight from the Professional Standards Authority (PSA). The CMA appears not have considered the option of trade bodies setting up a register along these lines, which then have appropriate external oversight (e.g. from PSA or a government department). Alternatively, in other sectors professional bodies have set up separate companies to act as regulatory bodies which are given by government a statutory underpinning. For example, the Chartered Institute of Legal Executives (CILEX) set up CILEX Regulation which has oversight from the Legal Services Board (LSB) and has appropriate statutory powers.

2.6 NAFD favours the latter approach, which is the basis of the proposal outlined in this paper. Investing such companies with a statutory underpinning means that registering with them becomes obligatory, rather than voluntary. Furthermore, provided that certain safeguards are put in place regarding the governance of these companies, the conflict between the representational interests of a professional/trade body with the need to regulate in the public interest can be avoided. For example, in the legal sector, the Legal Services Board (LSB) has set out a number Internal Governance Rules for Approved Regulators (ARs). The purpose of the rules is to ensure that ARs separate their regulatory and representational functions, so that consumers can be confident that regulatory functions are being exercised in the public interest. These rules include the following:

Each AR must determine and implement arrangements which are as effective as reasonably practicable for separation of its regulatory functions

Representative and regulatory functions shall be discharged by separate bodies

The AR and regulatory body shall cooperate with one another to provide and accept assurance

The regulatory body shall decide how to regulate free from inappropriate influence by the AR

No person may be involved in both regulatory decisions and representative functions, unless that person's role is within a shared service...

Regulation should be predominantly governed by lay persons

The regulatory body shall independently appoint, appraise, remunerate and terminate the members of its board

It is for the regulatory body to determine and allocate the resources required for regulatory functions...

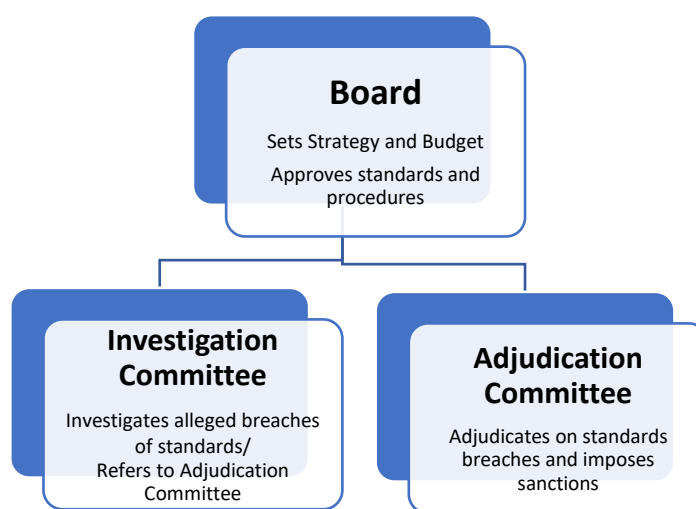
2.7 It is proposed that NAFD uses these rules, as far as is proportionate and practical, to determine the governance of the regulation of funeral directors.

2.8 As such, NAFD should set up a separate company to discharge regulatory activities, the Independent Funeral Standards Organisation (IFSO). This will be a Community Interest Company (CIC) to make it clear that the activities of the company are for the benefit of the wider community, and not funeral directors. The objects of IFSO will be to promote and uphold the highest professional standards of funeral directing. The functions of IFSO will be to:

- Maintain a register of funeral directors
- Set standards for entry onto the register
- Set standards of education and continuing professional development for those working for funeral directors
- Set a Code of Practice which all those on the register are expected to abide by
- Inspect and 'quality assure' funeral directors' premises
- Investigates alleged breaches of the Code of the Practice
- Adjudicates on alleged serious breaches of the Code where a case to answer has been established, and imposes sanctions

2.9 It is proposed that IFSO will have its own Board of five members to govern regulatory activities, the majority of which will not have had any current or prior connection with the funeral sector (i.e. they will be 'lay members' of the Board). No Board members will be involved in NAFD's representational or advocacy functions, or hold office at any other funeral-related trade body or professional body. This will ensure that the governance of IFSO complies with the LSB's rule that 'regulation should be predominantly governed by lay persons'.

- 2.10 The role of the Board will be to set the strategy and budget for IPSO, and approve its key policies and procedures. In particular, it will be the role of the Board to set standards, approve the Code of Practice, approve the framework for inspections, and approve disciplinary procedures. It will not be involved in making decisions about individual breaches of these standards, but will establish an Investigation Committee to investigate alleged breaches and determine whether the matter needs further adjudication, and an Adjudication Committee to determine the veracity of any allegations and impose sanctions where cases are found proven. These Committees will also have a lay majority, and no member of the IFSO Board will be member of either committee. This will ensure there is complete separation between the rule-making, investigatory, and adjudicatory functions of IFSO, in line with best regulatory practice.



- 2.11 The Board may decide to establish other committees to advise it on areas such as education, ethics etc.

3. Registration

- 3.1 IFSO will maintain a comprehensive register of funeral directors' businesses, including business and trading names, addresses of head offices and all branches.
- 3.2 It is proposed that the register follows a similar structure to pharmacy registration in that for each business there will be a named 'Superintendent Funeral Director' who has overall responsibility for compliance with IFSO standards across the business. For each branch there will be a named 'Responsible Funeral Director' responsible for the application of those standards in the particular branch. This will enable IFSO to set particular training and CPD requirements for persons holding these roles.
- 3.3 All NAFD members will be required to register with IFSO, and we are hopeful that SAIF will impose a similar requirement. To simplify administration, the registration fee for IFSO will be collected with the NAFD membership fee.
- 3.4 Funeral directors who are not members of NAFD or SAIF will be able to register directly with IFSO. While registration for non-NAFD and non-SAIF members will initially be voluntary, the ambition is for IFSO to receive statutory powers from government so that all

businesses carrying out the activities of a funeral director and/or using the titles 'funeral director', 'undertaker' or other similar titles, will be legally required to register with IFSO.

4. Standards

- 4.1 All IFSO registrants will be expected to adhere to a set of standards. It will be the role of the IFSO Board to set those standards, but it is expected that initially IFSO will adopt the Code of Practice which was a key outcome of the Funeral Services Consumer Standards Review (FSCSR). This Code of Practice was consulted on extensively, is outcome focused, and contains key clauses around many of the CMA's concerns identified in the PDR. For example:

O(1.4). you give your clients and prospective clients sufficient information to allow them to make informed decisions about the services they need and the options available to them;

O(1.5). Your full pricing information (including an explanation of third- party costs) is made available clearly both at your funeral home(s) and, where you have a website, online;

O(1.6). your clients receive full and clear information, both at the time of engagement and when appropriate as their matter progresses, about the likely overall cost of their matter;

O(5.1). your publicity in relation to your business is accurate and not misleading, and is not likely to diminish public trust in the funeral directing profession and/or related services;

O(5.2). your publicity relating to charges is clearly expressed and identifies whether disbursements are included;

O(5.3). you do not make unsolicited approaches in person, by telephone or through a third-party agent to members of the public in order to publicise your business (e.g. through selling funeral plans) or another business;

O(5.4). clients are informed of any financial or other interest which an introducer has in referring the client to you;

- 4.2 In addition, IFSO will set standards which the Superintendent Funeral Director and Responsible Funeral are expected to meet. These standards are not yet developed and will be a key priority for the IFSO Board once it is established. Criminal Records checks, and annual declarations, may also apply to these individuals.

5. Quality Assurance

- 5.1 IFSO will inspect funeral businesses to ensure they are meeting the standards set by the Board. Standards and Quality Managers, currently employed by NAFD, will have their employment transferred over to IFSO under TUPE regulations to carry out this work (see section 8 below).
- 5.2 The approach taken on inspections will be a matter for the IFSO Board, but it is envisaged that initially IFSO will adopt the approach taken by NAFD following its review of the quality

assurance framework, which is being led by former Inspector of Funeral Directors in Scotland, Natalie McKail. This review has been commissioned to ensure that the comments of the CMA in the PDR around inspections being more 'back of house' focused are addressed, and that a more risk-based approach to inspections are adopted. The terms of reference of the review are appended (see Appendix A1).

6. Education and Continuing Professional Development (CPD)

- 6.1 The IFSO Board will set education and CPD requirements for registrants, but will not itself be a provider of education or CPD. It is likely that education and CPD requirements will apply across the funeral workforce, and clearly it is an expectation of CMA that any quality regulation regime will have this as a key feature. In the PDR, the CMA states:

In order to provide these services to an acceptable minimum level of quality, funeral directors will need to be able to demonstrate that they have:...

(b) appropriate education and training, including continued professional development (CPD), the necessary accredited technical education and/or training for relevant staff and management training for those with management responsibility (para 9.116)

- 6.2 It is likely that IFSO will set particular requirements for Superintendent and Responsible Funeral Directors.
- 6.3 In addition to setting requirements, the IFSO Board may decide to set up an accreditation system for education programmes and CPD courses. This will mean that only IFSO accredited programmes will be recognised for the purposes of registrants meeting the education and CPD requirements. IFSO may also decide to monitor compliance with CPD requirements, with certain employees of registrants having to keep CPD logs, and IFSO taking random samples of these each year to check compliance.
- 6.4 NAFD's education strategy is designed to enable NAFD to become a key education and CPD provider under a regulatory system, with programmes and qualifications covering the funeral workforce, and the provision of appropriate CPD materials. NAFD anticipates a surge in demand of its educational offerings as a result of regulation, and has reviewed delivery mechanisms to ensure it can cope with additional demand.

7. Discipline

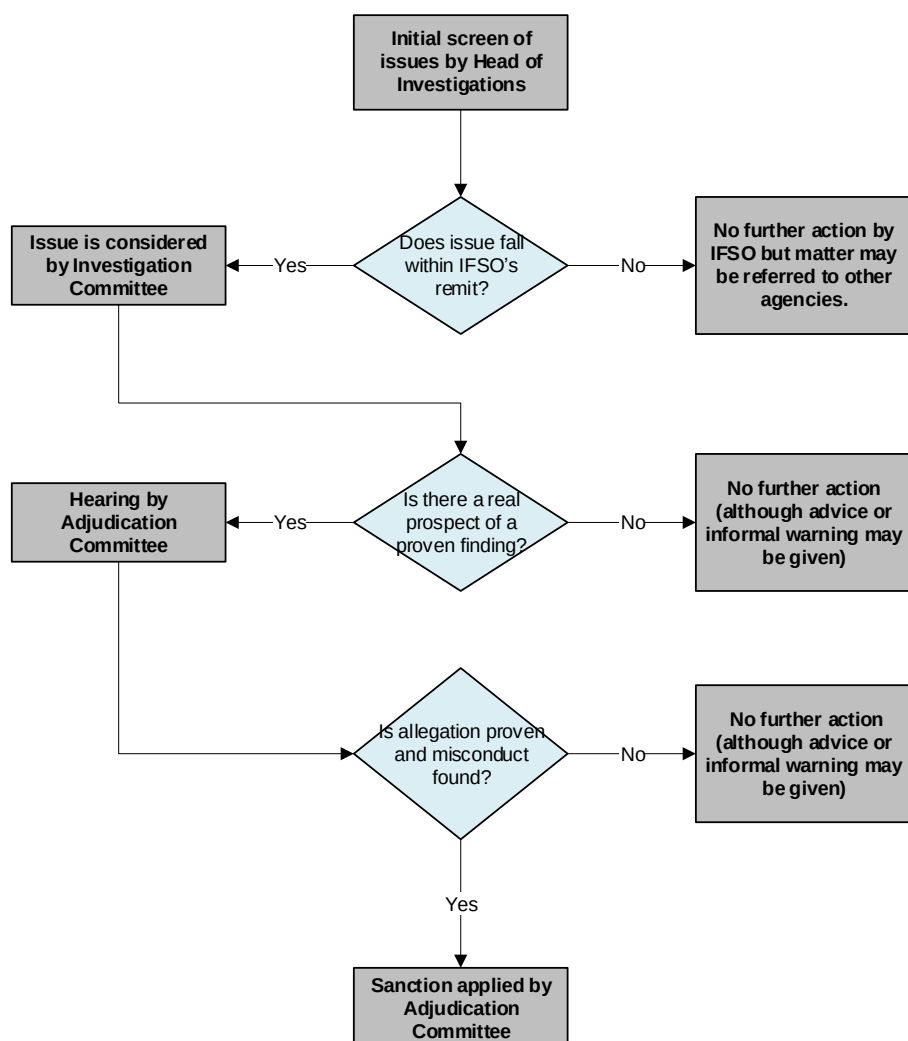
- 7.1 IFSO will have powers to discipline registrants when there is evidence of serious non-compliance with the standards its set. As set out in 2.10 above, it will have two committees to deal with alleged breaches of standards, who will work under procedures set by the Board. The Investigations Committee will investigate alleged breaches, consider the evidence and the seriousness of alleged breaches, and determine whether there is a realistic prospect of an adverse finding being made by the Adjudication Committee. If there is a realistic prospect, the matter will be referred to the Adjudication Committee who will hold a hearing to consider the case. The Adjudication Committee will have powers to sanction registrants, and ultimately remove businesses from the register.
- 7.2 IFSO will receive evidence of alleged breaches from three main sources:

- Complaints made by members of the public/other funeral directors
- Matters referred to them by NAFD and/or SAIF
- Evidence from IFSO's own inspections

7.3 While the main focus of the disciplinary process will be breaches made by funeral businesses, as standards will also be set for individual Superintendent Funeral Directors and Responsible Funeral Directors, it may be the case that sanctions are also applied to individuals. For example, if serious matters are discovered to have happened at a branch, due to the negligence of the Responsible Funeral Director for that branch, the Adjudication Committee may decide that the individual concerned should not hold the position of Responsible Funeral Director for that company, or in any other funeral business for a designated period.

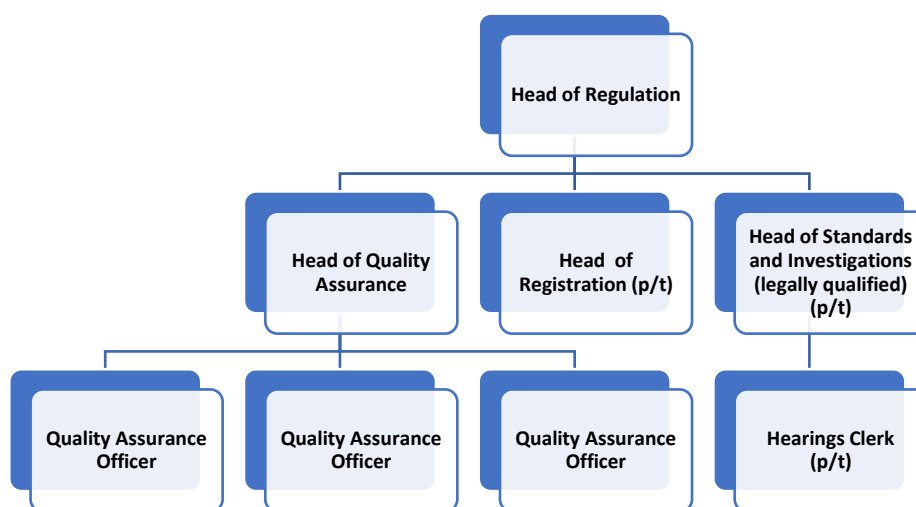
7.4 It is not proposed that NAFD Resolve come under IFSO's remit. This will remain a benefit of NAFD membership. However, NAFD may refer matters to IFSO if the Resolve process uncovers matters requiring disciplinary resolution, in addition to consumer redress issues.

IFSO Complaint/Conduct Issue Process



8. Staffing and Facilities

- 8.1 It is envisaged that IFSO would share staff with NAFD in the following areas: Finance, Human Resources, IT and Facilities. IFSO could also use NAFD's events staff should it wish to hold consultation events or conferences. NAFD would levy a management charge to IFSO to cover these staff and accommodation costs.
- 8.2 IFSO would have its own dedicated staff to support its Board (Head of Regulation), conduct inspections (Quality Assurance), maintain the register (Head of Registration), support the Investigations Committee (Head of Standards and Investigations) and support the Adjudication Committee (Hearings Clerk).



- 8.3 It is envisaged that the Head of Registration and Head of Standards and Investigations roles would be part-time, as the volume of work for these roles would not currently justify full time positions. This may change over time, particularly for the Head of Standards and Investigations role if the number of complaints increases, as has been the trajectory for most regulators for a number of years. The Hearings Clerk post, because of the very occasional occurrence of matters progressing to hearing, would be no more than one day per week (on average), but again may increase over time.

9. Finance

- 9.1 Set-up costs for IFSO are projected to be as follows:

Activity	Cost	Notes
Legal advice	£15,000	Drafting of Articles of Association etc
Board member recruitment	£10,000	Advertisements to attract high calibre Board members, possible agency involvement
IT Infrastructure	£50,000	Putting in place segregated CRM, complaints management system etc
Staff recruitment	£15,000	Advertisements to attract high calibre staff, possible agency involvement

Running organisation in shadow form for 6 months prior to first registrations	£190,000	Board member costs and staff costs
TOTAL	£280,000	

9.2 These set up costs would be funded by NAFD Ltd, but recouped over a period of time (to be agreed with the IFSO Board) through the annual management charge.

9.3 Annual recurrent expenditure is projected to be as follows:

Area of activity	Annual cost (£)	Note
Employee costs	£320,000	Based on staffing details above
Inspection costs	£80,000	Based on NAFD's existing costs of inspections, allowing for additional number of inspections.
Legal costs	£50,000	Legal advice for investigations, hearings etc.
Non-legal adjudication costs	£20,000	Hearing costs
Governance costs	£75,000	Payments to Board and Committee members. Assuming Board members are salaried £12K per year. Day rate for other committee members
Management charge	£200,000	NAFD Ltd charge for finance, admin staff, and overheads. Estimated at this stage.
TOTAL	£745,000	

9.4 IFSO activities would be funded via annual registration fees. Allowing for a £65,000 contribution towards reserves each year, the cost of regulation would be £114 per branch, if all funeral homes are required to register by statute. If only NAFD members register during the pre-statutory (voluntary) period, the cost of regulation would be £190 per branch, with a proportionate reduction to NAFD membership fee being made for those services which are transferred from NAFD Ltd to IFSO (inspections etc.).

10. Timetable for implementation 2020

10.1 It is intended that IFSO will become operational from 1 January 2021, existing in shadow form for six months to put in place the key policies and procedures for it to become operational during this period. The table below sets out the intended timeframes for establishing IFSO.

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Draft Articles												
Recruit Chair												
Recruit other Board members												

Recruit Regulation Manager												
Recruit other staff												
Approve key policies and procedures												
Set budget and registration fee												

APPENDIX A1 - DEVELOPING A RISK-BASED STANDARDS AND QUALITY ASSESSMENT FRAMEWORK FOR FUNERAL HOMES: TERMS OF REFERENCE

Purpose

To devise a standards and quality assessment framework for funeral homes which ensures that NAFD's oversight of its members is targeted on remedying those issues which present the highest risk of detriment to the dignity of deceased persons and to the users of funeral director services. The framework should be devised to give assurance to NAFD and the public that funeral homes are **safe, effective**, are **responsive to users' needs**, and are **well led**. The framework should support NAFD members in achieving compliance with requirements, rather than being punitive in its purpose.

Scope

The review will need to consider the following questions:

What are those areas of funeral director practice which pose the highest risk of detriment to the dignity of deceased persons and the users of funeral director services, based on available evidence (e.g. complaints data, CMA publications, research)?

How are such risks typically managed in the funeral home environment, and the effectiveness of such methods?

How evidence of the safe and effective management of risks can be gathered and assessed in a way that is cost effective to NAFD and limits added bureaucracy for the funeral home?

The review will consider:

How the frequency of inspections can be made proportionate to risk (e.g. should a funeral home with a good track record in managing risk be inspected less frequently than others?)

How the intensity of inspections can be made proportionate to risk (e.g. should a funeral home with a good track record in managing risk have a less fulsome inspection than others?)

How the FSCSR Code of Practice will be applied as the standards against which funeral homes will be assessed, and the extent to which other relevant standards will need to be considered (e.g. recent guidance from public health bodies on care of the deceased and managing a funeral because of COVID-19)

How the framework, while being primarily supportive in helping compliance being achieved, will deal with serious non-compliance and interface with NAFD's disciplinary process

The circumstances in which it would be most beneficial to carry out announced and unannounced physical inspections of NAFD member firms' premises

How an element of self-assessment might facilitate a more risk-based approach to inspections

How the remote consideration of internal quality assurance material and other information (e.g. NAFD complaint data, other external quality assurance material such

as statutory inspection reports in Scotland) might facilitate a more focused physical inspection

How assessment outcomes will be reported (grading systems etc) and publicised in order to promote and maintain public confidence in NAFD member firms

How inspection/compliance assessment regimes in other sectors have adopted risk-based approaches, and what good practice can be adopted from these sectors

What training and support will the Standards and Quality Managers (SQMs) need to effectively implement the framework?

Outcome

The review team, led by an independent consultant, will prepare a report with recommendations to the Chief Executive, to be submitted no later than 31 December. Interim progress reports may be requested, with due notice provided to the consultant in requesting these interim reports.

Appendix B – Feedback on the CMAs approach to consultation

Throughout the course of this market investigation, NAFD has repeatedly highlighted that the funeral sector, unlike many of the markets the CMA investigates, is largely made up of small and medium sized businesses. These firms lack the capacity and resources necessary to enable them to meaningfully respond to the large volumes of complex information published by the CMA within the very tight timeframes it has permitted.

We are disappointed that the CMA has repeatedly refused to acknowledge this fact by persistently treating the funerals market as if it were dominated by large businesses with access to specialist economic and legal advice. This has served to mute the voices of the majority and has disproportionately focussed the CMA's attention on a minority of larger firms that have been better able to engage with the CMA's preferred way of working. This approach has almost certainly skewed the CMA's overall view of the sector.

The CMA should take greater care not to set deadlines that prevents those it is seeking to investigate from engaging with the process

The CMA has set several unreasonably short deadlines for responding to working papers and reports. The result of this has been to prevent funeral businesses from feeding into the investigation, which has limited the CMA's ability to understand the market it is investigating.

For example, on 30 January 2020, the CMA published and sought views on 12 working papers, totalling well in excess of 700 pages of information, analysis and proposals. Among other things, these papers set out, for the very first time, the CMA's detailed thoughts on whether an independent body should be set up to regulate the back of house standards and sales practices of funeral directors. The sector was given only 27 days to respond to these papers, during which the CMA published a further nine papers, setting out equally significant proposals within a similarly tight time frame for response.

Similarly, in August 2020 the CMA surprised the sector with its sudden decision to shorten the consultation window for its Provisional Decision Report (PDR) from more than three months to just 17 working days, without notice and to bring forward the target date for publishing its final report by a similar timeframe. The PDR itself is 472 pages long and the appendices run to an additional 604 pages. Given that the appendices only became available during Monday 17th August, the sector had only 17 working days in which to read and analyse 1,076 pages of technical economic arguments and proposals, seek professional advice and then report back to the CMA.

Making such a sudden, drastic and unexplained change to the process was particularly damaging in the context of a global pandemic that has seen, and continues to see, the vast majority of organisations and individuals with an interest responding to the PDR working flat out for months on end.

Even with support from external experts, NAFD and some of our largest members, struggled to meet these timescales and would certainly have been able to provide fuller and more valuable responses if more time had been made available. For the majority of funeral directing businesses, these timescales will have been completely prohibitive. As the PDR made a number of completely new (not previously consulted on) proposals, failing to properly consult will have significantly increased the risk of unintended consequences.

In future, we recommend that the CMA should publish its rationale for setting consultation response deadlines and should actively encourage those who might struggle to meet them to apply for an extension.

The CMA should better tailor consultation documents to the needs of the parties with whom it wishes to consult

At almost every consultative stage in the investigation process, the CMA has chosen to frame its provisional findings, arguments and proposals in language that is impossible for the majority of funeral directing businesses to understand and engage with.

It is essential that the CMA equips itself with the best possible understanding of all relevant factors. The only way to do this is to consult properly with all stakeholders, ensuring that they each have fair opportunity to reflect on the proposed approach and provide comments. We are concerned that, on multiple occasions, the CMA's approach to consultation has fallen significantly short of this.

For example, on 24 July 2019, the CMA published a working paper setting out its proposed approach to assessing the profitability within the funerals market. Such exercises are inevitably contentious, since accounting measures of profit do not correspond to the concept of profit that is of interest to the CMA.

The CMA's 40-page working paper was difficult to read and understand. It was very technical and would be confusing to anyone who does not at least have a foundational understanding of economic theory. It contained a great deal of economic terminology that would be completely alien to the majority of working funeral directors. This will have served to deter funeral directors from engaging with the consultation process.

In our response to this working paper, we urged the CMA to publish a follow-up consultation paper before reaching a decision about its approach to assessing profitability. We suggested that this document should set out some targeted questions and explain, in plain English, why each question is being asked.

The CMA responded with the following:

"We appreciate that the paper covers technical subject matter and it is, in fact, aimed at specialists. However, before we reach any decisions about an appropriate approach to measuring profitability, we intend to publish a follow up paper. That paper will include an explanation written in non-technical language so the majority of funeral directors are able to engage with the consultation process and feed into our proposals whilst they are still at a formative stage."

It is regrettable that that no such follow up paper was produced or published. The result of this was that the CMA only ever received meaningful feedback on its profitability and financial analysis from those who were able to obtain the advice of the specialists at whom the CMA aimed its working paper. This would not have included the vast majority of UK funeral directing businesses.

In future, we recommend that the CMA should set out the intended audience for each of its working papers, particularly if they are aimed at specialists rather than individuals and business owners. This will help ensure businesses can allocate resources appropriately and will give a clearer picture of exactly which parties the CMA has engaged with on particular questions.

The CMA should adopt a transparent and even-handed approach to granting time extensions

On 14 August NAFD wrote to the CMA, seeking a four-week extension to the deadline for all parties responding to the PDR. This request was refused but we were invited to make an individual request for a time extension. The CMA explained that it would only consider requests for extensions on a case by case basis, based on the individual circumstances of any party.

On 28 August 2020, we were therefore surprised to learn that all 967 members of the National Society of Allied and Independent Funeral Directors (“SAIF”) had been granted a blanket time extension, following a similar request from SAIF.

We wrote again to the CMA, asking it to extend the benefit of this time extension to all NAFD members and funeral directing businesses that are not affiliated with any trade association. This request was refused, without satisfactory reasons being provided.

It was clearly unfair for the CMA to give preferential treatment to a class of individuals/businesses purely on the basis that they subscribe to a particular trade association. Doing so, particularly in a sector that has two major trade associations, gave an unfair advantage to the trade association whose members have been selected for this preferential treatment, over the other.

NAFD and SAIF have many joint members but we also compete for those members who choose only to be members of a single trade association. As a result of the CMA’s actions, SAIF members were given a distinct advantage over NAFD members. Given that many funeral directors were at maximum capacity while trying to respond to the PDR, with significant numbers of staff on leave and fatigued after the first pandemic wave, the time extension from the CMA will have been greatly valued by those who got it and greatly envied by those who do not. This served to place the SAIF at a competitive advantage over the NAFD in terms of its member benefits.

The justification the CMA provided for its decision is set out below:

“With regard to our consideration of extension requests, the CMA’s normal practice is to consider any request for extension to a deadline on a case-by-case basis, having given careful consideration to the individual circumstances of the company making the request. There should therefore not be any presumption that every party that is the subject of our investigation would be treated in exactly the same way. The decision we have made in relation to SAIF and its members was based on their circumstances and is therefore not a relevant consideration when it comes to matters relating to the NAFD or its members. Similarly, we have no reason to believe that the circumstances that have led us to grant an exemption to the NAFD would apply to its members individually. In addition, there are clearly some material differences between the circumstances of your members, with some of them having considerable resources and/or legal representation. This means that the engagement of your members with the CMA has varied considerably, as reflected by the submissions, hearing summaries and other evidence that we have published on our website. We would therefore expect their ability to engage with us in relation to our PDR to vary considerably across your membership.

In particular, we have already received some responses to the PDR from some of your members and some companies have approached us asking for extensions. We note that the requested extensions were not all of the same duration, as they reflected the specific circumstances of the relevant businesses. We have carefully considered such requests and responded to the relevant businesses, and it would therefore be very confusing for them if we were to take the approach you have requested, in addition to being very disruptive to the running of our investigation. As previously stated, it is open to any of your member to ask for an extension that reflects their specific circumstances.”

This explanation is, in our view, entirely unsatisfactory and impossible to reconcile with the CMA’s claim that it only considers requests for extensions on a case by case basis, based on the individual circumstances of any party.

The CMA could not possibly have considered the individual circumstances of each SAIF member and so must have granted this blanket extension based on SAIF's membership criteria. The only significant difference between the NAFD and SAIF membership is that NAFD members include businesses that SAIF would not deem to be 'independent' (where the line should be drawn is a topic of significant debate – e.g. some SAIF members are far larger organisations than some regional Co-operatives, who can only be members of NAFD).

We believe that fairness required that all funeral directors should have been given the same period of time to respond to this crucial report but, if the CMA felt that larger businesses should not require the same time to respond as their smaller competitors, it should have applied an objective set of criteria for determining which firms should be granted an extension.

We would highlight the fact that the vast majority of NAFD members are SMEs, exactly the same as SAIF members. Indeed, we represent a larger section of the independent funerals market than SAIF. It was unfair and counterproductive to the CMA's stated aims to place these businesses at a disadvantage simply because they had not paid a membership subscription to SAIF.

In future, we recommend that the CMA should publish a list of all extensions it grants and its reasons for doing so. This will help ensure respondents and other interested parties have confidence that they have been treated fairly.

The CMA should be careful not to publish misleading information, particularly when it has the potential to damage the reputation or commercial interests of another party

On 30 January 2020 the CMA published its working paper on the quality of 'back of house' funeral director services. We raised concerns at the time that a significant number of misleading and unsubstantiated comments from third-parties with a clear interest in damaging the reputation of the National Association of Funeral Directors ("NAFD"), were published in this paper without any attempt by the CMA to provide clarification or balance.

For example, an organisation that seeks to compete with the NAFD on the monitoring of standards in the sector was quoted criticising the NAFD for having never taken disciplinary action against any of its members. At the time the CMA published this statement it was well aware that this was not the case, having been provided with details of all disciplinary matters dealt with by the NAFD in recent years.

Although we do not dispute that the third party made this statement, it was clearly irresponsible for the CMA to publish it in these circumstances, particularly without giving NAFD the opportunity to respond before doing so. Its inclusion added no value whatsoever but gave readers the incorrect impression that the NAFD does not taken action against member firms when they breach our Code of Practice.

Had the CMA taken reasonable steps to clarify that it was aware that the NAFD has taken disciplinary action against its members, this would have mitigated the risk that:

- a) the NAFD's reputation would be unfairly damaged by the quote; and
- b) respondents to the consultation would be unduly influenced by the comment when responding to the questions relating to future NAFD involvement in monitoring and enforcing standards.

In future, we recommend that the CMA offers a right of reply to any party whose reputation or interests are likely to be harmed by the publication of any third-party quotes or statements before publishing them.

