

Justice Committee

Oral evidence: [Criminal legal aid](#), HC 1069

Tuesday 12 June 2018

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Members present: Robert Neill (Chair); Mrs Kemi Badenoch; Ruth Cadbury; Bambos Charalambous; David Hanson; Gavin Newlands; Victoria Prentis; Ellie Reeves; Ms Marie Rimmer.

Questions 110 - 180

Witnesses

[I](#): Andrew Walker QC, Chair, Bar Council; and Angela Rafferty QC, Chair, Criminal Bar Association.

Examination of witnesses

Witnesses: Andrew Walker QC and Angela Rafferty QC.

Chair: Good morning, Ms Rafferty and Mr Walker. Thank you very much for coming to give evidence to us. This is the second of the hearings that we are having on criminal legal aid.

Before we start the questions, we have to deal with declarations of interest. I am a non-practising barrister, a former member of the Criminal Bar Association and a consultant to a law firm.

Victoria Prentis: I am a non-practising barrister, married to another barrister.

Ellie Reeves: I am a non-practising barrister.

Bambos Charalambous: I am a non-practising solicitor.

Q110 **Chair:** There are some non-lawyers, as well.

We have been looking at the background to the advocates' graduated fee scheme and some of the history of it. We will ask a little bit about that in a moment. Would you introduce yourselves for the record, and the organisations that you represent?

Andrew Walker: I am Andrew Walker QC. I am chair of the Bar Council of England and Wales.



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Angela Rafferty: I am Angela Rafferty. I am chair of the Criminal Bar Association of England and Wales.

Q111 **Chair:** There is a long history to the AGFS, as it is called for short, going back to 2000, or to about 1997.

Andrew Walker: Indeed.

Q112 **Chair:** There have been various changes over the years. There has been a lot of publicity concerning the latest iteration, if I can put it that way, and the steps that the Bar, and the CBA in particular, have taken around that, given their concerns.

Just this morning, Ms Rafferty, we have the result of a ballot that the Criminal Bar Association took of its members. You have given us the result. Would you like to tell us about that, as it may very much influence the line of questioning that we take thereafter?

Angela Rafferty: Yes. In the ballot, the criminal Bar very narrowly voted to accept the Government's proposal in relation to the advocates' graduated fee scheme. It is by a very narrow majority. We had an unprecedented turnout: 3,038 barristers voted, which is massive. There were 1,566—sorry, I need to put my glasses on for this.

Chair: Please do. I will have to do so myself in a minute.

Angela Rafferty: That is 51.55% who voted to accept; and 1,472, which is 48.45%, voted to reject. While the majority wants to accept the proposal, it cannot be said that the problems have gone away.

Q113 **Chair:** I take it you would say that you cannot ignore the view of those on the losing side in a narrow result like that, in many ways.

Angela Rafferty: It is a familiar situation to the House, I understand. We are still very concerned about our position.

Q114 **Chair:** I understand. Can you help me on this? You said 3,038 was an unprecedented turnout. In terms of your membership, roughly what would that be?

Angela Rafferty: There are about 4,000 members of the Criminal Bar Association, but many of them do not practise. We think there are about 3,500 barristers who practise, so it is a major turnout.

Chair: I get you.

Andrew Walker: It depends on how you look at the numbers. Some members of the Bar do a small amount of crime; others do a considerable amount of crime. It is still a very high proportion.

Q115 **Chair:** I understand that, and they might be members of the CBA. I understand that you are saying that the problems have not gone away. This is the extra £15 million, I think, that the Government are putting on the table, after meetings with Ministers, to enable some tweaks to the



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scheme.

Angela Rafferty: Yes.

Q116 **Chair:** As far as you are concerned, where does that leave the situation?

Angela Rafferty: The ballot that was sent round made it clear that a vote to accept the proposal would involve immediate cessation of the criminal Bar's present action.

Q117 **Chair:** The no returns policy had already been suspended, and this is on the non-acceptance of briefs.

Angela Rafferty: And barristers had not been accepting any work under the scheme since 1 April.

Q118 **Chair:** They will now do so.

Angela Rafferty: That will be the effect of the vote. Of course, it is still very early days, and we would like at least to consult our executive committee in relation to that.

Q119 **Chair:** I understand. Before we get to your next steps, perhaps you could give us a bit of history as to how we got here. Would that be a constructive way forward? I would be grateful if you could set out for us a bit of the history of that scheme and how this scheme differs from what has gone before. We have seen the argument that there has been a reduction of the total levels over a period of time, going back to 2007, I suppose, as the first major cut.

Andrew Walker: In fact, it goes back even further than that. Can I give you a potted history of the headlines?

Chair: Yes, absolutely. That would be very helpful.

Andrew Walker: You were right to say that 1997 was the starting point. When you had evidence a couple of weeks ago on the litigators' graduated fee scheme, you heard an explanation of how it used to work, which was very much on the basis of an individual assessment in each case.

The first graduated fee scheme was brought in in 1997. It applied only to cases where the trial was going to be between one and 10 days—the less significant cases. Four years later, in 2001, it was extended to trials up to 25 days. When that change was made, there was a commitment to cost neutrality, which is a term that has become, and is currently, contentious. There was a commitment to that and to a review.

In 2004, the Government accepted that what had happened had actually led to an unintended cut back in 2001. The rates were amended at that point, but not to take account of inflation.

Q120 **Chair:** That was the phrase that the Government accepted—unintended.



Andrew Walker: They accepted that at the time it was unintended, but when they brought the rates back up to the original rates, without inflation, they also extended the scheme to apply to trials of up to 40 days. Gradually, more and more criminal defence work was brought within the scheme.

In November 2005, all rates for QCs were cut by 12.5%. In April 2007, following the review by Lord Carter, there was a restructuring of the graduated fee scheme. There were cuts to senior fees but increases to junior fees, and large increases to guilty pleas. At the same time, the overall increase to the fees under the scheme was 18%, but inflation since 1997 was 26%, so it did not deal with inflation up to 2007.

Q121 **Chair:** You were 8% worse off if you allow for inflation.

Andrew Walker: Still worse off at that point, despite the restructuring. The Committee will appreciate that the litigators' graduated fee scheme came in at that point, too. It is notable that, from that point, more HCAs started to do criminal defence work than had been seen previously. The two factors together may have brought that about.

In April 2010, post the crash, the Ministry announced that rates would be cut by 13.5% over three years. The first cut of 4.5% was applied at that stage. The scheme was extended again, this time to trials of up to 60 days, so almost all trials, other than the most serious, were now within the scheme, but those extended, longer trials were paid at a much lower refresher rate for the last 20 days. By the way, the Ministry of Justice assessment for 40 to 60-day cases was that the effect of bringing them into the scheme in the way it did would be a cut of 39.5% in the amount of money paid to advocates for those cases.

The second cut of 4.5% came into effect in April 2011, and the third in April 2012. In between, in October 2011, further cuts were applied, particularly for murder cases, high-value fraud cases, cracked trials and sentencing hearings. That brought us to 2013, when a further cut, which we assessed at around 13.5%, was proposed. It was at that point that the Bar took action. Some of those around the Committee table may recall that there was a period of no returns in relation to work under the scheme, and indeed under the scheme for the longer, more serious cases—the very high-cost case scheme—because cuts were threatened there, too. That led, in March 2014, to what you might call a truce between the Bar and solicitors and the Ministry of Justice, and it was that truce that kept action at bay until now; the truce was the backdrop to the new scheme being formulated and, in due course, brought into effect.

To get across the point about the effect of that long history, our assessment, statistically, in 2013 was that the cuts just from 2007 to 2013 had been 21% in cash terms and 37% in real terms based on the CPI. For some cases, it was even more. For the mid-range dishonesty cases there were cuts of 60% in real terms over that six-year period. The



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overall effect of 37% at that point is now down to 40% in real terms. That is also part of the background to where we are now.

I hope that provides a brief summary of where we have come. It has been cuts all the way.

Q122 **Chair:** That is very helpful. You mentioned the growth in HCA work. You have had that cut in the amount of fees that barristers would generally be taking for that type of work. At the same time, independently of that—it may or may not be linked—solicitors with higher-court advocacy rights have increasingly undertaken Crown court advocacy.

Andrew Walker: Yes.

Q123 **Chair:** And that has reduced the pool of work available for barristers doing that sort of work.

Andrew Walker: Indeed. The figures there are only on the defence side, and it is worth remembering that something similar happened on the prosecution side. We had a prosecution graduated fee scheme in 2001. There had been no adjustment to the rates since 2001—for 17 years—with the exception of 2012, when there was a cut.

Whether you are doing prosecution work or defence work, the position has been the same. There may now be fewer in-house advocates at the CPS doing prosecution work. There was also a time when there were in-house advocates in the CPS doing that work. Many of them are members of the Bar, as are many HCAs. There has perhaps been a swing, but one way and then back the other way, on the prosecution side.

Q124 **Chair:** I got the sense, Ms Rafferty, that some of the independent Bar went in-house to the CPS simply because they needed the security.

Angela Rafferty: It could be. I think that is right. We are very concerned; as you will see in our statement today, we are launching a campaign to improve the position for prosecuting counsel, too. On both sides, underfunding is becoming a real and critical problem, which we have said repeatedly for many years, as you have heard.

Q125 **Chair:** Yes. That growth in HCA solicitor advocates and in-house CPS work—for a period, and then it tailed off—are things that the Bar cannot itself control. They are extraneous factors.

Andrew Walker: That is certainly right. They are driven by a mixture of cost considerations and considerations of career progression within the CPS. From a Bar perspective, many of those CPS advocates are members of the Bar.

Chair: Indeed.

Andrew Walker: We are keen to look after them, too. There is definitely a real concern, which perhaps we will come back to, about what is happening at the most junior end of the Bar. It is not just the CPS that is



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a potential destination for individuals; the Serious Fraud Office and a number of other employers have an interest in the skills of junior barristers. Of course, that takes them away from the criminal Bar.

Q126 **Chair:** I understand. Perhaps we will come back to that. Are there any other factors outside the scheme that undermine its efficacy?

Andrew Walker: When it comes to the new scheme, undoubtedly. When the scheme was first put in place, we did not have the social media that we have today, and we did not have the amount of data that we have today. Undoubtedly, and I think the Ministry of Justice statistics would bear this out, there has been an exponential rise in the amount of evidence. That is both prosecution evidence, served as evidence, and, as the Committee is aware, a lot of undisclosed material. Most of the time it gets disclosed; it is sometimes better, sometimes worse. That is all relevant material, and all of it needs to be taken into account. It has been a major change, and the growth in sexual offences has been a significant change, too.

Q127 **Chair:** At the time when the consultation on the scheme was announced, with the initial proposals, there was a rather more favourable reaction from the Bar. I think it was hailed by your predecessor, Mr Walker, as heralding a new step in co-operation. Can you tell us what steps the Bar and the CBA were taking to co-operate in the development of that scheme?

Andrew Walker: Looking at it again, one needs to go back to the background and that truce or armistice in March 2014. Part of the arrangement was that the Ministry would look at an alternative scheme—an alternative to imposing the cuts. The cut at that stage was simply postponed. In one sense, it is still hanging out there. It is the same with the litigators' graduated fee scheme: there was a postponement of the cut.

The aim was to try to design a new scheme that the Ministry could be persuaded to put in place, which would persuade it that at the same time it needed to invest more money. The background being a cut, the idea was that there would be more money.

One of the difficulties we have encountered is that, even when we have put forward and costed a scheme, it would cost more than the existing scheme. The fundamental problem has been lack of money. The compromises that one has had to try to make, or that the Ministry in particular has had to try to make, as a result of an excessively constrained budget, have meant that the aims of the new scheme, as explained by the Ministry itself, simply have not been met.

Q128 **Chair:** Was there any particular difference in the approach of the Ministry in the January 2017 consultation from previous versions? There was talk about cost neutrality and other things. Was that a new feature, or had it always been there?



Andrew Walker: In one sense, there was a new feature in the background, which I think you touched on in the preceding question, regarding the attitude of the Ministry of Justice. Cautiously, I would assess that there has been a softening of what were at one time very combative attitudes. There has been greater appreciation—I put it no higher than that—of the impacts and implications of all the cuts that have been taking place.

As regards the Ministry's attitude in the consultation paper, it was very much a matter of them saying, "We were presented with an alternative." They owned, in the jargon, the scheme they published. They said, "This is our vision imposed." I think that is right. As was always inevitably going to have to happen, there was a consultation, and it was genuinely a consultation. It was a proposal to which the Bar responded. I am sure we will come on to the reaction to that in just a moment.

Angela Rafferty: It is important to point out that the Bar, and all representatives of the Bar, constantly made the point to the Ministry that, year on year, advocates' fees are falling, with 40% cuts in the last decades. It was always a requirement of the Bar for the Ministry to consider further investment because, year on year, our profession is becoming unsustainable. No other budget has been cut to this extent.

It would not be right to say that that was not repeatedly and strongly pointed out during the consultation process, because it was. That is why, to a degree, the 1% that is being offered in relation to the proposal we are dealing with today is something that we hope, next year, will become a future-proofing method, so that we do not face the effect of rising inflation, lowering fees, our youngsters leaving and our middle-ranking practitioners leaving day after day because the profession has become unviable.

Chair: That is very helpful.

Q129 **Ellie Reeves:** You have touched on this, but it would be useful if you could summarise your initial overall response to the consultation version of the graduated fee scheme. I know that the Bar Council was initially quite supportive of it, apart from a few technical details. It would be useful if you could set out what the response was, and why.

Andrew Walker: There was appreciation that lots of people had been involved in trying to produce something that was an improvement on the former scheme. The overall reaction was to recognise that there were many positive elements in the structure. The difficulty, inevitably, is when you get into the detail. It would be wrong to say that even the initial response from the Bar Council in 2017 was a full welcoming of the scheme.

A number of things have been made clear, and Angela has just touched on one of them. The rates payable were always too low. That has always been a marker, and cost neutrality was never something that was



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accepted. We had been pressing throughout for index linking, which was not there. There was a commitment to keep it as a possibility, which is a bit of a non-commitment. Nevertheless, saying nothing about it would have been worse than saying even something about it.

Our response raised the issue of calculations that had been done by individuals and by individual chambers, and said that that needed to be considered. It raised the issue of the fact that the budget year chosen was the lowest year for budgetary expenditure on AGFS. Indeed, it had gone up again by another £13 million or so between the initial year they were working on and the then current year.

There was a hope that it would support greater career development, which is one of the key concerns about it. We have been making that point since 2013, when we were first looking at the new scheme. I am not sure that the new scheme achieves that, although there was a hope that it would.

There were a number of other changes being promoted, particularly for the more serious cases, but they were not taken up. Inevitably, there is a focus on the junior Bar, and some changes dealt with that, but there were quite a lot of concerns that were not dealt with. Looking back from my perspective, one of the things about the consultation was that it was a missed opportunity to look more carefully at the impacts. The impact assessment was very high level. One could perhaps have delved into it in rather more detail. The consultation responses were an opportunity for that, which was perhaps missed.

Angela Rafferty: From our perspective, we were more cautious, but our concerns were the same. We made it clear, in the response and throughout, that funding was inadequate for the entire budget. We welcomed a couple of aspects of the consultation that put right iniquities that we considered we should not have faced in the first place. Our members have been working for free, effectively, on the second day of any Crown court trial. They have not been paid for that for many years. Similarly, if our members are in a long case that runs over 40 days, at 40 days their fee reduces arbitrarily to a third. We used to receive an uplift for that, because those are often the most serious cases.

We welcomed those aspects, because, we would say, they should not have occurred in the first place. They were iniquities that were causing real hardship. Our concerns are the same as those of the Bar Council on recruitment, retention, diversity and so on, and without more investment generally across the scheme, those concerns remain. In fact, they will become worse year on year. We said that in the consultation.

Q130 **Victoria Prentis:** Are you surprised by the result of today's vote?

Angela Rafferty: I have no emotion. One of my tutors used to say to me, "Lawyers don't feel things; they think things." I think it is a very



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indicative and illustrative result, which will show the depth of feeling and despair of the profession.

Q131 **Victoria Prentis:** Who wrote the statement?

Angela Rafferty: I and my committee did, as a collaborative effort. I am still concerned, although, to a degree, I am relieved that we have the result that we have. I would not say that I am surprised, no.

Q132 **Victoria Prentis:** Do you think that elements of the Bar have done better out of this settlement—the very junior Bar, for example, rather than those who are of, say, 10 years' call?

Angela Rafferty: The details of the proposal have yet to be worked out, but we were concentrating on three areas in relation to this investment: first, to plug a gap that we identified in relation to those who do very complex cases with high evidence turnover; a second tranche of money in relation to the junior Bar, which we are hoping will ameliorate the situation for them; and then the 1% in April.

We are hoping that everyone will benefit from this proposal, at least to a degree, albeit not to a degree that we are completely content with; our campaign continues. We do not want it just to benefit one level of the Bar, but it would be right for you to know that the level of the Bar that it does benefit, in the middle, were the real losers. Some people were losing 30% of their income almost overnight in the scheme.

Q133 **Victoria Prentis:** Do you feel that, as a profession, we have done enough to illustrate the effect on the 10 years' call people?

Angela Rafferty: I think we have, and I think we will continue to do so. We work very hard to get the message out that our profession is a vocational profession, and that we want to keep those in the middle ranks who have caring responsibilities, who are women. We will keep at it, but we hope that the message is getting across. You will all have read your copy of "The Secret Barrister" and you will have seen the difficulties that we face.

Chair: Indeed.

Q134 **Victoria Prentis:** Grippled. Are you completely speaking as one on this?

Andrew Walker: Absolutely.

Angela Rafferty: Yes.

Andrew Walker: For those who voted in favour or against, no one was voting on the basis of its being a permanent or long-term solution; it is a patch repair. There is unanimity across the Bar about all the factors that drove the action. The result of the vote is really just a decision about what to do at this point in time.



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Where I would differ is that there probably is more we can do to provide the Ministry in particular with a clear explanation of what is going on. The Bar Council has been surveying criminal chambers to try to get as clear a picture as we can of what has happened to their most junior tranche of criminal practitioners, and we are almost there on that.

More analysis can be done of the Ministry's own figures and information. We have a better picture of the make-up of the Bar, because barristers now have to tell the regulator, when they renew their practising certification, what area of work they do and what proportion of their work it is. That is a growing picture. We are building that picture up, and we will be pushing it harder than we may have been able to do at the moment. We will be looking to find a more carefully designed solution than time has allowed with the current situation.

Q135 Ruth Cadbury: The Ministry appears to have taken on board a lot of your criticisms of the consultation version of the scheme. What do you think still needs doing with it, notwithstanding the outcome of the vote? Should there be more or less graduation between fees for people with different experience? What about the proportionality between fees for different categories of cases? Is there more to be done?

Andrew Walker: There is no short answer to that, but let me give you a summary of what I think may be the answer. To a degree, it is conditional, because we are still looking at what we think the implications of the new scheme are. If work is taken under the new scheme, that itself will generate some information as to the impacts.

The aim behind the new scheme was to achieve more graduation, because we want a career path; we want something for the most junior to aspire to and, in due course, to go right the way up the ladder. To do that, the idea was to try to find proxies for complexity and the degree of skill required. We are talking about everything from the most straightforward assault cases to the most complex multi-complainant serious sexual offences cases, gang murders and so on. There is a very wide range of cases. In any fixed fee scheme, there will be compromises. The problem, we feel, is that there were certainly too many compromises with the previous scheme, and there are still too many compromises.

If there is a key factor missing in the current scheme, it is probably lack of appreciation and allowance for the amount of evidence in some of the very evidence-heavy cases, plus lack of allowance for the most serious cases. Those that can get through the escape valve, as it were, into the very high-cost case scheme are assessed on a more case-by-case basis. Everything else just gets the fixed fee. There is nothing in the scheme, other than relatively straightforward bands, to capture all of that. Those are the two key factors. That then plays through into all our concerns about the impact.

Angela Rafferty: A rape case with 50 pages can sometimes take a lot of barristers' work. It is very difficult on a fixed-fee scheme, which is not



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remunerating in relation to the time it takes to prepare the case and get it right. We are still trying to do that.

As Andrew said, the levels of work our members deal with can vary substantially. Usually it is the more seasoned practitioners who deal with the more serious matters, but the work they actually do is often not rewarded at all. As you all know, hours and hours of barristers' time on both sides of the case are spent considering unused material, for which there is absolutely no prospect of payment. That is something that, from the Criminal Bar Association's perspective, we really wish to change because, as we have heard, the evidence picture has changed so much over the last 10 years that we would like that to be reflected.

Q136 Ruth Cadbury: You have anticipated my next question. To what extent can it be anticipated? What payment would work, say, for reading unused prosecution material?

Angela Rafferty: We discussed that at some length. There are a number of ways it could be done, through some form of page threshold or an ex post facto hourly rate. There are various ways that it could be done, but it could be done. We would like to work on ensuring that it is done for members in future.

Q137 Ruth Cadbury: That is one of the next things to do. As you know, we are doing a disclosure of evidence inquiry.

You have already touched on whether the new scheme will be cost neutral or whether it will be a reduction under existing expenditure. Is there any more you want to say about where you think it will go in terms of the overall cost of the scheme? How easy is it to conduct accurate modelling of future expenditure on AGFS?

Andrew Walker: As in the adage, the past is no guide to the future. The difficulty, inevitably, is that the types of cases that determine next year and the year after are unpredictable. That inevitably means that you are modelling based on historical information. What perhaps may have been missed is looking at the trends and at what underlies those trends.

Going back to the amount of evidence and of undisclosed material, it is clear that the trend for both of those is up and up and up. From the Ministry's point of view, they will say, "That is going to cost us an awful lot of money." From the Bar's point of view, we are saying, "Hang on a moment. We are having to work with this material."

What is actually happening is that the number of cases getting through to the Crown court is falling, but they are becoming harder to do. There is more evidence, and they are more complicated. Some of the historical sexual offences cases, which are, sadly, a rather recent phenomenon—there were years when they were not being addressed—are really difficult to do because they can have a lot of material.



When you are designing a scheme, you need to be looking into the future. To do that, you need to recognise trends. The trend in the amount of material is difficult to capture. It certainly has not been captured properly at the moment, and we need to find a way of doing it if we can and, if the Ministry is prepared to do so, to put the money behind that. If it does not do that, barristers may still—despite the action coming to an end—look at the fee on offer for some of those cases and say that on no view is it a reasonable fee for that type of case. That may still happen under the new scheme.

Q138 Ruth Cadbury: Do you think it is possible to devise an AGFS model that will always provide an adequate and consistent income for members at different levels? Given that Crown court cases in particular are changing, as is the nature of evidence, is it possible to devise a scheme?

Andrew Walker: Perfection is impossible. As soon as you move to the concept of a fixed fee scheme, which inevitably has swings and roundabouts, you are moving to trying to capture all the variables in a very simplistic way. The simpler it is, the more difficult it will be to capture the variables.

It can be done. One of the proposals in the original scheme proposed back in 2015 was for a regular review every six months, or perhaps every three months, to adjust the scheme to capture the trends that were coming through in the information. If you do that, while you try to design the best you can at the outset, you are looking to adjust it as time goes forward. Given that we are not talking about a very large proportion—in fact, it is a very small proportion, certainly of Government expenditure and even of Ministry of Justice expenditure—if it moves a few million pounds either way by way of adjustments, it ought to be entirely feasible.

Q139 Ruth Cadbury: Yes, that is fine—not that I am in Government; but if it could move either way, I can see that the Government might be relaxed about regular reviews. If it was always pushing against the budget cap, there might be resistance to review if it was too regular.

Andrew Walker: With the trend in cases falling, you might say that you are looking to readjust to ensure that you are not underpaying the small, serious cases that are coming through. If we had had a review process over the past couple of years, it would have identified that there are some more serious cases, and they are only being remunerated in this way.

We are missing the type of case that Angela referred to, for example, where there is not a lot of evidence but there is quite a complicated case. We are missing out on that, and the scheme is not remunerating those cases. You can then look to make an adjustment to ensure that they are captured. It does not mean that the overall budget necessarily goes up—it might or it might not—but there are external drivers over which we have no control. It does not mean that we should be the servants of those external drivers and not look to find a solution.



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Angela Rafferty: That is right. There is a wider point, which might be outside our remit, of the general position of justice, and the justice budget, in society. We hope that there are some signs that it is being accepted that continual cuts to the Ministry's budget are causing real difficulty in the system as a whole. We need to start looking differently at the justice system and to fund it better, generally speaking. That is not just to do with fees; it is across the board. You have heard us on that ad nauseam, but the point stays good, even today.

Q140 **Ruth Cadbury:** Sorry, did I hear six months? What would be a reasonable review frequency?

Angela Rafferty: Six to 12 months.

Andrew Walker: Within-year reviews would be sensible. There ought to be a process of regular review. The timing of changes is not necessarily the same as the timing of the process of review.

Q141 **Chair:** A few people have said that we have perhaps taken out too much from the criminal justice system by now.

Ms Rafferty, you made a point about the lack of granularity being reflected in the scheme; both of you did. You mentioned that a rape case with 50 pages could be very onerous. I suppose a case might involve a vulnerable witness—a child or somebody who is mentally unwell. There might not be a very large page count, but an awful lot of specialist skill would be required in cross-examining such a person.

Angela Rafferty: At the moment, the criminal Bar as a whole is, effectively, training itself in how to deal with vulnerable witnesses—completely free, with no Government funding at all. It is being done at the weekend, using our experience and skill. That is something that has changed in the picture of evidence over the last 10 years. Far more cases are coming to court in relation to vulnerable witnesses. It takes a specialised approach, and it generates further hearings, such as ground rules hearings, which were not thought of when the initial scheme was inception. Section 28 may be rolled out. All of that has to fit a slightly unwieldy structure. Again, it is something we would wish to consider in any review of the scheme.

Q142 **Chair:** None of those things is currently reflected in the scheme.

Angela Rafferty: No.

Q143 **Chair:** Any more than changes to our approach and attitudes to evidence and other rules.

Angela Rafferty: There has been a sea change. Under the new scheme, hearings will be paid for now, but, in vulnerable witness cases, there is no uplift or anything like that, although it takes specialist skills to deal with those cases.

Q144 **Chair:** I wonder if you could clarify one other thing for me. We heard



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some evidence in a previous hearing, which I want to clarify. The example used was rape cases, in particular multi-handed rape cases, and whether there was any difference in the fee, depending on the number of defendants.

Andrew Walker: Not under the new scheme.

Angela Rafferty: No.

Q145 **Chair:** Not under the new scheme.

Andrew Walker: That is one of the particular issues that the new scheme does not deal with. It deals with not getting paid because there is no evidence; the idea now is that, under the new scheme, you would at least get a better fee as a starting point, but there is no extra category, which was one of the suggestions that we made that did not get anywhere—another one.

Q146 **Chair:** My experience was that even a single-defender case of serious sexual assault is demanding and, sometimes, stressful.

Angela Rafferty: There is a high diet in the Crown court, I think; it might be up to 40%.

Q147 **Chair:** Exactly. It is a very high percentage.

Angela Rafferty: That type of work is very wearing and detailed. You are dealing with vulnerability probably on both sides of the case. It would almost inevitably be a complex case just by its definition. Anything involving children—

Chair: Is always going to be difficult.

Angela Rafferty: It will always be difficult, complex and emotive, and will take extra work.

Q148 **Chair:** At the moment, if it was a single count and a single-complainant case, or perhaps one or two counts, you do not get any difference between that and if it was a grooming case, as we have seen publicised. The Rotherham cases and others were very substantial, long trials on immensely complex matters, yet the basic remuneration is the same.

Angela Rafferty: Yes. That's right.

Chair: I see. That is very helpful.

Q149 **Gavin Newlands:** Given the possible, or even likely, changes in the future profile of Crown court cases, is it possible to devise a model that will always provide a consistent and adequate income for members of the criminal Bar at all levels of seniority?

Andrew Walker: It is possible to do, in the sense that, if you are getting as close as you feasibly can to paying a fair fee for individual cases and designing a scheme with that firm focus in mind, and if you have the skill to make a successful practice and you are busy, you will secure a fair



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income for all of that work. Inevitably, that means there will be swings and roundabouts, but the difficulty in making sure that it is right is appreciating where those swings and roundabouts happen.

To take your question a little bit further, looking at the sort of practice at a particular level within the Bar, and at the type of cases people are doing, if you want to make sure that all those types of case are still being remunerated fairly on a swings and roundabouts basis, you would end up with a more successful scheme than one that, at the moment, simply says, "Let's take all sexual offences cases involving children." There are swings and roundabouts across the whole range of those. That ignores the fact that the more senior juniors are doing the more difficult cases, so you need to make sure that the swings and roundabouts work on those more difficult cases.

It is possible to do. It involves a lot more analysis. The Ministry has some analytical capacity, but inevitably, with all the cuts, it is itself in a position, I suspect, of struggling to get all the capacity it needs to deal with that sort of issue. Again, it comes back to the budgets. If you keep cutting the Ministry's budget, the knock-on effects are in every single area, including getting as right as possible everything it is trying to do.

Angela Rafferty: I agree with what Andrew said. My personal view is that some cases will have anomalies. I personally would like to see some sort of mechanism whereby those who do serious and intense work on such cases as we were discussing a minute ago could be paid on an hourly basis, or something like that. That would be fairer. That is a personal view.

Fixed fees have been with us since 1997. We are trying to work, not to perfection, but to be as fair as we possibly can to all our members.

Andrew Walker: But there is an existing scheme to deal with this: the very high-cost case scheme. If you were to build in an ability to take more cases into that scheme on a case-by-case basis, you capture the point that Angela made; there are some cases that you will just not be able to deal with. That is what that separate scheme is designed to try to capture. It is just that, over the years, it has been shrunk and shrunk.

Angela Rafferty: It does not really capture the cases that we have been discussing, for example, does it?

Andrew Walker: No.

Q150 **Chair:** Would you have to make applications to the Legal Aid Agency?

Andrew Walker: You would have identified criteria that are not just to do with the length of the case or whatever. Inevitably, you would not capture everything, but you could capture them, perhaps with a fall-out discretionary category if they are not caught by one of the other things. To take your example, where there is a case with X number of complainants and X number of defendants, a number of objective criteria



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could get you into a situation where you have to assess the case individually.

Q151 Gavin Newlands: Could the Government have handled the review a bit differently? In Scotland, the recent review of legal aid was published, and it was agreed beforehand that both the legal profession and the Government would abide by the outcome. That has been well received on all sides. Should the UK Government have taken a similar approach? When this scheme comes up for review in 12 to 18 months, do you think they should look at doing something similar?

Angela Rafferty: I will go first, because Andrew might want to say something different. I think the politics should be taken out of justice as much as possible. It should be a protected budget, and some sort of independent review body would be welcome, such as you mention in Scotland. I agree with the premise of your question, and I think that would be a good way forward for legal aid in this country, and might reset some of the problems that we have had in recent years.

Andrew Walker: I would agree with taking legal aid out of politics. Those who understand the importance of the rule of law understand the importance of the system. The problem we have had for years is that, too often, we have been a soft target for cutting budgets, without reference to the impact on the rule of law.

If you could take legal aid out of politics and have a cross-party understanding of where it should be, we would have a better hope of getting it right. That was one of the Bar commission suggestions, and I think it was broadly welcomed, because there is just too much politics involved.

Angela Rafferty: As I think you heard from the solicitors who gave evidence, the Scottish aim was to have the best legal aid system that it could have in that country, which is a laudable aim, rather than the usual narratives, or some of the narrative that we have had in recent years. Putting the rule of law at the centre of it would be a fantastic idea, and a good thing going into Brexit.

Gavin Newlands: You brought that up.

Andrew Walker: It is important not to forget that our international reputation is affected by how we deal with our legal aid system and by how we treat our criminal justice system. There are no two ways about that.

Angela Rafferty: Legal services are worth £25 billion.

Q152 Victoria Prentis: The whole system stands or falls as one, doesn't it?

Angela Rafferty: Absolutely.



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Andrew Walker: Absolutely. In many ways, the criminal justice system is probably the most high profile, in the sense that it is more visible than the family justice system, because so much has to be done in private in family justice, but both of them are driven by expenditure saving. All the problems are driven by expenditure savings on the part of the Ministry of Justice. The problems are very similar, and you cannot just deal with one and not with the others. They stand or fall together.

Angela Rafferty: As we have seen recently in cases where disclosure has gone wrong, I think, and have said, that it is mainly to do with funding, and people who are innocent could be going to prison for many, many years, directly referential to the issues that we are discussing today.

Andrew Walker: And the other way round, of course.

Angela Rafferty: And the other way round.

Andrew Walker: Those who should be convicted are potentially not being convicted, which is as much of a concern as anything.

Q153 **Ms Marie Rimmer:** Can we reflect on the period you have gone through, up to and from 1 April? Following the 90% majority vote of barristers, with 2,317 voting, they wanted "to secure proper investment in the Criminal Justice System." You requested that members consider not taking any work under a new legal aid representation order dated from 1 April.

Do you think the action taken by barristers from 1 April affected the conduct of trials? How do they feel about that, looking back now? Could you provide examples of the impact on cases so far?

Angela Rafferty: The action was carefully calibrated to try to minimise disruption. Given the way listing works in relation to cases, it takes a while for trials to come through the system. Listing is a whole other area, which we are not dealing with today, but, if the legal aid order is from 1 April, trials will mostly be listed at the end of the summer or into the autumn. From my knowledge, no trial has as yet been disrupted to the extent that it cannot go ahead, in relation to the action.

It is difficult for me to say how all barristers feel about it, but my body of members are highly committed professionals, and they are very concerned about the rule of law. As you will have seen from everything that we have written and published about this, no one wanted to take the action, and no one wanted it to escalate. We did not implement the no returns policy; we suspended it in order to consult with the Government. Our aim is not disruption; our aim is to secure proper investment. We think that we responsibly and carefully calibrated our action in relation to that.

Q154 **Ms Marie Rimmer:** Can you gauge anything about the public reaction to any impact?



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Angela Rafferty: I believe it is beginning to be seen by the public at large how important criminal justice is to our society. I know I am going on about it, but the disclosure failures that have been uncovered have highlighted what can go wrong. I am hoping that it is understood why we have got to this position, and that it goes much wider than barristers' fees.

You will have heard things about lights falling on people's heads in courtrooms, and juries being sent home because it is too cold to deliberate. All of that remains, and has to be fixed. That is quite a lot of the reason why our members are very angry. The experience of coming to a criminal court is not a pleasant one for anyone—witness, victim, juror or judge, as well as the Bar. As I have said, it is a bit of a dystopian landscape. If you ever wanted to go to one of the Crown courts in London, you could see for yourselves leaking rooms and things falling off the walls. All of that is still there. We hope that the public want a criminal justice system that is world-class, and we hope that the Government will fund it.

Q155 **Ms Marie Rimmer:** You mentioned earlier that you had not implemented the no returns policy. In fact, it was postponed until today.

Angela Rafferty: Yes.

Q156 **Ms Marie Rimmer:** As the negotiations were going further, you recommended suspending it until today. Can you tell us what the impact of a no returns policy would have been, or could have been, on criminal cases?

Angela Rafferty: There is a convention among barristers that they will cover each other's work, because we do not control listing. If a trial that we are instructed in comes in quite late in the day, sometimes at 4.30 the night before, and you are already doing something else, one of your colleagues will cover that trial for you, and it will become what is called a return. That actually keeps the system going. It is a good-will measure on behalf of the Bar in how we organise ourselves. Had no returns been implemented, in my view, significant disruption would have very quickly followed. We tried to avoid that, and we hope we have avoided it.

Again, it must be emphasised that the returns policy is one of convention and good will between barristers. People often do not get paid for things that they return, or work is wasted. It would have highlighted that, but it would have been disruptive, to answer your question. We are pleased that we avoided it.

Andrew Walker: It would also have highlighted the lack of capacity in the system. One of the reasons you have to have so much return work is that there is lack of capacity, which means that everything is working at 105%, and there is no leeway when things overrun or something goes wrong in a trial.

Q157 **Ms Marie Rimmer:** It is evident that there is so much commitment, with



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the work that goes on unpaid and your trying to delay any action, but you are feeling so frustrated. That is very evident. Now that the offer has been accepted—it is not unlike the Brexit vote, with 52% to 48%—

Angela Rafferty: We had noticed that.

Ms Marie Rimmer: I hope it goes much more peacefully than that. Now that the offer has been accepted, do you think the dispute is resolved?

Angela Rafferty: No. I do not think it is. It has not been a dispute just about pay. It is a dispute about many and much wider things. As you can read from my message today, I do not think it has been resolved, but there is now some time to resolve it. There are also some signs that we can work together, possibly cross-party, to resolve it. That is what we would like to do if we can.

Ms Marie Rimmer: It is clear to me. I understand the justice system a lot more, from following this through, and exactly what commitment and passion there is for a true, real justice system to operate. I think that will prevail. Thank you very much for those answers.

Q158 **David Hanson:** Angela, if you were a Government Minister and this landed on your desk this morning, you would not necessarily think that there was more mileage in the dispute, would you?

Angela Rafferty: I am so sorry—more mileage?

David Hanson: If you were a Government Minister and this result landed on your desk this morning, you would not think that there was more mileage in the dispute, having had a recommendation to accept.

Angela Rafferty: You mean more mileage in carrying on with action?

David Hanson: Yes. The associations agreed to the recommendations.

Angela Rafferty: Yes, but there is quite a large minority of people who are still very angry and very concerned.

Andrew Walker: It comes back—

Q159 **David Hanson:** But the point is, and I say this neutrally, that the Government have the whip hand, in that your members have accepted the recommendations that the Government made.

Angela Rafferty: They have, but our members had not moved to no returns. Our members are willing to work with the Government, and have said so repeatedly, and they will continue to do so in order to fix the wider problems in the system, but our members' patience is finite.

That is what I have been answering in relation to the other questions. We are glad that this step has been taken. It is a step. We accept that we must move on from it, or try to, but, if these issues are just brushed under the carpet, they will not go away; they will surface again across



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the wider system. That is why Government Ministers should continue to engage with us. We hope that they will.

Andrew Walker: As I said earlier, I see it as a patch repair. There is an opportunity for Ministers in the Ministry of Justice and those they can persuade in Government to address the concerns. I am cautious in thinking that they recognise the concerns. It is a question of sorting them out.

The willingness to take action has not gone away, except for now. If things do not move in the right direction, one thing that we can take from the very narrow majority is that it will happen again. The Bar is very frustrated about this.

Q160 **David Hanson:** It is just my assessment, but if I were a Minister in the Department I would think the heat is slightly less warm than it was yesterday.

Angela Rafferty: It is slightly less warm, but it can always have the temperature turned up again.

Q161 **Chair:** Your message is, "You have perhaps bought yourself some time with the £15 million, but you have not solved it."

Angela Rafferty: We need to resolve this properly over time.

Q162 **Chair:** And it will come back.

Angela Rafferty: It will come back.

Q163 **Bambos Charalambous:** I have some questions about the impact of the AGFS dispute on solicitors. Do you know to what extent solicitor advocates have supported the Bar's ban on new cases by declining new work themselves?

Angela Rafferty: Many solicitor advocates have been very supportive of the Bar's action. I think, and I have said, that quite a lot of the administrative consequences of the action have in fact fallen on solicitors. I think you have heard evidence on this, so I will not repeat it, but what solicitor advocates have faced in relation to the listing of cases, and the approach of some of the judiciary to them, has been a concern for us. We are grateful to those who supported us, and we hope that we can continue to work with solicitors in relation to the entire system.

Q164 **Bambos Charalambous:** Are you aware of pressure being put on solicitor advocates to accept cases that were not within their normal range of cases?

Angela Rafferty: That has been brought to my attention. I read the evidence that was given, which was perhaps more on point, but I had become aware of it. I think there was an occasion when a member of staff from a solicitor's office was given rights of audience, which was very concerning if that were the case. Other pressures were brought to bear



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on solicitors' staff by outside agencies. Yes, I think they have faced a difficult time.

Q165 **Bambos Charalambous:** Some solicitors have complained about being put under huge strain by the Bar's action, including instructing counsel outside their approved list, and even being pressured into conducting advocacy themselves. Do you have any comments on that?

Angela Rafferty: That is what I was saying. Some solicitors who would not undertake certain types of cases have perhaps felt that they had to, or have been made to. That is very unfortunate, because no lawyer should do a case that they do not feel ready for or competent for. That has been happening. We heard about it happening and we were very concerned. We put some messages out about it. Yes, the burden on solicitors has been quite high.

Q166 **Bambos Charalambous:** Do you see a co-ordinated approach between the Bar and the Law Society in pressurising the Government to review legal aid for solicitor advocates and for barristers under the AGFS?

Andrew Walker: The concerns about the justice system are cross-profession; this is not just a Bar concern. Solicitors are just as concerned about all the issues affecting the criminal justice system. For us, the focus is inevitably on the trial work that we are doing—the preparatory work for trial; the solicitors' focus, inevitably, is on all the preparatory work that falls within their remit, from the police station right the way through to getting the matter to trial. We all have the same interest in that.

The litigators' graduated fee scheme is inevitably a different scheme. We have complete commitment to our solicitor colleagues in saying that their fee scheme needs to be properly funded. Both schemes should reward the work that both sides of the profession do, and it should be rewarded fairly. There is no difference between us in that respect.

All of the other concerns are mutual: we are all concerned about the rule of law, about the impact on clients and on the victims of crime, and about making sure that we get proper buy-in from the public when they turn up to watch a trial or as a juror, so that they feel that the system is valued, and they know they are doing important work and feel that the system is working as it should.

Q167 **Bambos Charalambous:** This is a slightly flippant question, but do you know if any of the Ministers at the MOJ have read "The Secret Barrister"?

Angela Rafferty: I will ask them for you and get back to you. I think it is third on the best seller list this week.

Bambos Charalambous: Yes.

Angela Rafferty: We have copies here if anybody would like one. I felt I should say that.



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On the point about solicitors, their concerns are exactly the same as ours. They have a court case going on, so I will not say anything that could affect it, but it is really difficult for them, too, in the present climate. You have heard from them, and they have spoken for themselves, but this should not be seen as a them-and-us situation. It affects everyone, and, as Andrew said, the concerns are as high among our sister professions as they are with us.

Q168 **Chair:** Have many Members of Parliament come back and said that they have read "The Secret Barrister"?

Angela Rafferty: Some. I have not done a tally.

Chair: I hope they have. I think we have.

Q169 **Victoria Prentis:** I had to order a copy to go in the House of Commons Library. There wasn't one there.

Chair: But there will be now.

Victoria Prentis: There is now.

Andrew Walker: If you come across anyone who doesn't have a copy, we will be happy to fill the gap.

Angela Rafferty: So that it is clear, all proceeds from the book are going to the Bar pro bono unit, not to the secret barrister, which is a generous and principled position to take.

Chair: Indeed.

Q170 **Victoria Prentis:** You have been very collegiate about the solicitors' profession. Did you read the article in *The Law Society Gazette* about how the "magic money tree" had been shaken for the Bar, but not for the solicitors' profession?

Angela Rafferty: I think Andrew did. I heard about it.

Andrew Walker: It is an unfortunate use of language, because it is a rather flippant way of dealing with a very serious issue.

Victoria Prentis: Yes.

Andrew Walker: I make no apology if we have been successful in securing some—however small—additional money from the Ministry of Justice. I make no apology for that. More is needed than we have secured.

This is not a matter of shaking a magic money tree; it is a matter of making sure that there is proper investment across the system. We can only do so much at this point. There is much more yet to be done.

Victoria Prentis: Fair enough, and I did not mean it to be a flip question.



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Andrew Walker: I know.

Q171 **Victoria Prentis:** What I really meant is, can the barristers' profession resolve its dispute without the solicitors' profession also resolving its dispute?

Andrew Walker: In one sense we can, because our focus is on advocacy and the way advocates are rewarded. In theory, you can deal with that separately from how litigators are rewarded, but the reality is that the two need to work together. Otherwise, you will end up with conflicting incentives, having to do some things for one scheme and not for the other. Administratively, that would be unhelpful, to say the least.

The focus, as I said before, really has to be on rewarding advocacy and litigation properly for the work you actually have to do, so that you do not have to depend on windfalls here or there, but you actually get remunerated properly for the everyday work that you are putting into every case.

Q172 **Victoria Prentis:** What do we do next?

Andrew Walker: We have a plan of action. Some of it will inevitably remain internal to us. There are a number of things we have to do. First, we have to help and cajole the Ministry of Justice in the negotiations in relation to the next spending round.

Q173 **Victoria Prentis:** Do you feel there are any specific ways in which this Committee can help the Ministry of Justice?

Andrew Walker: If you don't mind my saying so, this Committee has done an awful lot to try to help the Ministry of Justice. It has not always been reciprocated. You can lead the proverbial horse to water. I sense, cautiously, as I said before, that the ministerial team in the Ministry of Justice understands the concerns. It understands this Committee's concerns.

Victoria Prentis: We sense that, too.

Andrew Walker: I am very keen to know what it needs to help in arguing the case for justice in Government, and the priority that needs to be given to justice in Government. We know that it is the poor relation when it comes to supporting citizens. Health and education are much more easily understood by the public; justice is not, but this Committee is well aware of the value of justice and has plugged away on that. We need to keep helping to arm the Ministry of Justice with the material it needs and can use if it is willing to do it.

Coming back to the action for a moment, one thing that has to be borne in mind is that those feelings are not going away; they are very real. They need resolving in some way, otherwise we will hit a point when not only will we see a crisis and want to do something about it, but the public will have to recognise that.



Q174 **Victoria Prentis:** Timescales?

Angela Rafferty: This Committee has shone a light on the various areas of the system that need work. I hope that the spotlight never moves away from them until there is resolution of the issues. You are doing massively important work to bring the issues to Government and to the public. That needs to continue to happen, because we cannot fall back again. At the end of our message, we said that we did not want to take any more backward steps. There has to be an ongoing, onward process to put it back where it belongs.

It isn't rocket science. The budget is quite small. One of the favourite statistics is that foreign aid is more. I know it is a cliché, but this is a pillar of democracy.

Ms Marie Rimmer: It is.

Angela Rafferty: We want to make sure that that is understood and that it goes back into its proper place for the future.

Andrew Walker: We cannot sell our rule of law to the world without getting it right at home, and we are not doing that.

Q175 **Chair:** It goes back to Lord Mance's speech in the UNISON case; it is not a commodity—it is a public good.

Andrew Walker: Absolutely.

Angela Rafferty: Absolutely.

Q176 **Chair:** Ms Rafferty, I have read the statement, and you end with this: "The Criminal Bar has faced degradation and despair." That is extraordinarily strong language.

Angela Rafferty: It is.

Q177 **Chair:** What prompts an experienced, calm, rational person, who thinks and does not feel, like yourself, to use those phrases?

Angela Rafferty: Thank you very much.

Chair: It is pretty stark.

Angela Rafferty: They are chosen carefully to reflect something very real. To a degree, they could be considered an understatement. I constantly receive communications from members about their conditions and about things that happen in the system that really concern me. Degradation is not too strong a word for where we are.

Q178 **Chair:** It is not just fees, is it?

Angela Rafferty: No. Absolutely not.

Q179 **Chair:** Fees are just part of it.



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Angela Rafferty: This Committee session is about that, but it is much wider than that.

Andrew Walker: I echo that. As vice-chair, I went out on circuit visits with last year's chair. We talk to the Bar. We hear what their concerns are and we hear where they think things are going, and there were very clear messages, stronger than I have heard before. I have been on the Bar Council for a while, and they are much stronger than I have heard before.

I echoed those right at the start of my tenure, and nothing has dissipated—none of it. There is recognition that things have now got to a point where people are no longer prepared to take it any more. They have been taken for granted for so long that they have been pushed to the point of saying, "We're not prepared to do that any more." That was behind the action as much as anything else, and acceptance of the proposal does not get rid of that.

Angela Rafferty: I promised Andrew that today I would make no classical allusions, like posh barristers do, but in the myth—I think it is a myth—Cassandra made prophecies that nobody ever listened to. I often wondered what happened to Cassandra afterwards. That is how we have felt: years and years of warnings, warnings, warnings. We now see that you, at least, are starting to listen, so we hope that we will not be the Cassandras going forward.

Q180 **Chair:** Sometimes posh Ministers make classical allusions, but yours is an apt one.

Angela Rafferty: Thank you.

Chair: I am very grateful, as are all the Committee, for your evidence, which raises a very serious issue. No doubt we shall keep in touch on the matter as it progresses.

Angela Rafferty: Thank you.

Andrew Walker: Thank you.

Chair: Thank you very much for your time and your evidence today.