

Thursday, 18 January 2024

1
2 (10.00 am)
3 **LADY HALLETT:** Mr Dawson.
4 **MR DAWSON:** Good morning, my Lady. The next witness this
5 morning is Professor Paul Cairney.
6 **PROFESSOR PAUL CAIRNEY (affirmed)**
7 **Questions from LEAD COUNSEL TO THE INQUIRY for MODULE 2A**
8 **MR DAWSON:** Good morning, Professor Cairney.
9 If I could ask you, when speaking, to try to speak
10 into the microphone, it should pick up your voice, but
11 you're here for a couple of hours at least, I think, so
12 if you could try to do that so we can hear everything
13 you're saying, I'd be very grateful.
14 Professor, you have produced an expert report for
15 the Inquiry, I think, which is dated 9 January of this
16 year. Is that right?
17 **A.** That's right.
18 **Q.** And that is under Inquiry reference INQ000274154. You
19 are familiar with the content of this report?
20 **A.** Yes.
21 **Q.** It is your report?
22 **A.** Yes.
23 **Q.** And your position is that this represents your opinion
24 in connection with matters upon which you were asked to
25 provide it?

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1 **A.** That's correct.
2 **Q.** You have also published reports, articles and papers
3 about the Scottish Government and/or the UK Government's
4 response to the pandemic, all of which I think are
5 listed in your expert report; is that correct?
6 **A.** That's correct.
7 **Q.** I'd like to ask you a few broad questions about the
8 scope of your instruction in preparing your expert
9 report for us.
10 Broadly speaking is it correct to say that you were
11 asked to prepare a report which focused on Scottish
12 Government decision-making during the pandemic?
13 **A.** Yes, very much so.
14 **Q.** When you prepared your report, you separated the topics
15 that you separated the issues that you were asked to
16 address into a number of different topics, I think?
17 **A.** Yes.
18 **Q.** Broadly, you were asked, first of all, to look at
19 Scottish Government decision-making structures which
20 existed up to and at the time the pandemic started?
21 **A.** Yeah.
22 **Q.** And you were asked to look at some of the issues that
23 arose as regards preparation for an emergency such as
24 the pandemic in Scotland?
25 **A.** Yes.

3

1 **A.** It does.
2 **Q.** Thank you.
3 I'd just like to ask you some questions about your
4 professional background. You're a professor of politics
5 and public policy in the division of history, heritage
6 and politics at the University of Stirling?
7 **A.** Yes.
8 **Q.** And you specialise in research on UK and Scottish
9 Government policy processes, including their public
10 health policies and impact on inequalities; is that
11 correct?
12 **A.** That's correct.
13 **Q.** You have written or co-written 14 books, 97 articles in
14 international peer reviewed journals and 31 chapters in
15 edited books; is that correct?
16 **A.** Yes.
17 **Q.** You were a special adviser to the Scottish Parliament's
18 commission on parliamentary reform in 2017, I believe?
19 **A.** Yes.
20 **Q.** And in 2023 you were a special adviser to the Scottish
21 Parliament's Finance and Public Administration
22 Committee, where your role included producing a report
23 and giving oral evidence to inform the committee's
24 thinking about effective Scottish Government
25 decision-making; is that correct?

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1 **Q.** Broadly speaking, that ended up covering your topics 1
2 and 2?
3 **A.** Yes.
4 **Q.** You were then also asked to look at the challenges that
5 were posed by the Covid-19 pandemic; is that right?
6 **A.** That's right.
7 **Q.** And you were asked to look at a number of areas relating
8 to processes that go into Scottish Government
9 decision-making during the pandemic, broadly?
10 **A.** Yes.
11 **Q.** And those included the role that devolution had played?
12 **A.** Yes.
13 **Q.** It included looking at key individuals and bodies that
14 made decisions?
15 **A.** Yes.
16 **Q.** It included looking at key both administrative and
17 medical advisory bodies, in broad terms?
18 **A.** Yes.
19 **Q.** It included looking at the challenges posed by the scale
20 of the pandemic in Scotland?
21 **A.** Yes.
22 **Q.** It included looking at decision-making structures?
23 **A.** Yes.
24 **Q.** And ultimately all of those many topics you brought
25 together in your topics 3 and 4?

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- 1 A. Yes.
- 2 Q. You were also asked to look at the Scottish Government's
3 systems for communications, in particular its public
4 communications strategy?
- 5 A. Yes.
- 6 Q. And that became your topic 5, I think?
- 7 A. Yes.
- 8 Q. You were asked to look at parliamentary processes by
9 which primary and secondary legislation were enacted
10 during the pandemic in Scotland?
- 11 A. Yes.
- 12 Q. And that became your topic 6?
- 13 A. Yes.
- 14 Q. You were asked also to look at the issue of, broadly
15 speaking, how public life and public services are funded
16 in Scotland?
- 17 A. Yes.
- 18 Q. And you were asked specifically to look at how funding
19 worked for Scotland during the pandemic?
- 20 A. Yes.
- 21 Q. And those matters were brought together under your
22 topic 7?
- 23 A. Yes.
- 24 Q. You were also asked to look at, drawing all of these
25 things together, whether you were to provide an opinion

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- 1 Q. And you also received copies of the individual witness
2 statements of key decision-makers, former First Minister
3 Nicola Sturgeon, and former Deputy First Minister
4 John Swinney; is that correct?
- 5 A. Yes.
- 6 Q. In your expert report at page 4, if we could just have
7 a look at that, you list 25 such witness statements from
8 the Scottish Government and these two key individuals,
9 and you took these reports into account in the
10 preparation of your report?
- 11 A. I did.
- 12 Q. I think it's also fair to say that, as one goes through
13 your report, one can see that you had regard to certain
14 other materials; is that correct?
- 15 A. That's correct.
- 16 Q. And those materials included materials relating to key
17 strategies within the Scottish Government's
18 decision-making process; is that right?
- 19 A. Yes.
- 20 Q. And that included things like the four harms framework
21 from April 2020?
- 22 A. Yes.
- 23 Q. It also included other things like the statement of the
24 route map from May 2020?
- 25 A. Yes.

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- 1 on successes and failures, with a view to providing
2 suggested recommendations for the future?
- 3 A. Yes.
- 4 Q. And that became your topic 8, as I understand it?
- 5 A. Indeed.
- 6 Q. I'd like to ask you some questions about the methodology
7 that you adopted in compiling your very long and
8 detailed report. We won't, this morning, I should say,
9 cover the report in huge detail. We will try and focus
10 on some of the key areas, but I am keen to try to
11 understand, broadly, the methodology that you adopted in
12 its preparation.
- 13 The Inquiry, as I understand it, provided you with
14 copies of a number of witness statements which were
15 received from the Scottish Government's directorates, in
16 the first instance.
- 17 A. Yes.
- 18 Q. And subsequently you received additional directorate
19 statements which were by way of addenda to the original
20 statements.
- 21 A. Yes.
- 22 Q. You also received some additional directorate statements
23 on subjects that hadn't been covered in the first
24 bundle.
- 25 A. Yes.

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- 1 Q. And it included another key document that we have
2 referred to already in the Inquiry, which was the levels
3 system, broadly speaking, which was set out in
4 October 2020?
- 5 A. Yes.
- 6 Q. I understand from your report that you also had regard
7 to places where people have provided commentaries on
8 those key documents?
- 9 A. Yes.
- 10 Q. Which you also drew on to try to understand the Scottish
11 Government's strategy during the pandemic?
- 12 A. Yes.
- 13 Q. And you discovered, I think, when preparing your report,
14 in connection with these areas and on the basis of these
15 materials, that there were in existence a broad range of
16 other reports or literature connected to a number of
17 aspects of the Covid-19 pandemic in Scotland?
- 18 A. Yes.
- 19 Q. These came from a number of different areas, including,
20 for example, epidemiology, care, vaccination strategy,
21 and the like?
- 22 A. Yes.
- 23 Q. And you, as I understand it, looked at these reports in
24 order to inform yourself as to what other commentators
25 in their specialist areas had identified as potential

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1 issues with the way in which the pandemic had been
 2 handled in Scotland?
 3 **A.** Yes. I was very academic about it.
 4 **Q.** Right, and you make frequent reference to these and, in
 5 academic fashion, you reference all of these as you go
 6 through?
 7 **A.** I do.
 8 **Q.** And they include, for example, the wide range of reports
 9 commissioned by the UNCOVER group for the
 10 Scottish Inquiry?
 11 **A.** Yes.
 12 **Q.** Setting out a number of proposed issues and questions
 13 for that Inquiry to examine?
 14 **A.** Yes.
 15 **Q.** Some of those reports relate to questions that are
 16 relevant to this module.
 17 **A.** Yes.
 18 **Q.** In particular, reports relating to preparedness and
 19 Scottish decision-making?
 20 **A.** Indeed.
 21 **Q.** And when you had analysed these reports and other
 22 sources, you developed a knowledge about issues which
 23 may exist and then addressed, within your own specialist
 24 expertise, yourself to the question as to whether
 25 political decision-making or structures may have played

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1 **A.** Yes.
 2 **Q.** -- which you are effectively telling us you may have
 3 taken into account for the purpose of this report as
 4 well?
 5 **A.** Yes.
 6 **Q.** Thank you.
 7 You have not had access to the Scottish Government's
 8 Cabinet papers, have you?
 9 **A.** No.
 10 **Q.** And you have not had access to its internal documents
 11 relating to decision-making processes, have you?
 12 **A.** No.
 13 **Q.** But you explained to us earlier, I think, that you had
 14 had access to a number of key strategic documents which
 15 you have taken into account?
 16 **A.** Yes.
 17 **Q.** Taking into account your areas of expertise, your own
 18 writings, the volume of material you have been provided
 19 to consider in the preparation of your report and the
 20 type of material you have not had access to, do you
 21 consider that you have sufficient knowledge of the facts
 22 to provide your professional opinions on the matters you
 23 were asked to address by this Inquiry?
 24 **A.** I do.
 25 **Q.** Thank you very much.

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1 a part in these perceived issues with the pandemic?
 2 **A.** Yes.
 3 **Q.** Could we go to page 122, please. This is annex 1 to
 4 your report where you list from page 122, going on for,
 5 I think, 17 pages, of -- reports, papers, articles and
 6 books which you have considered as part of this
 7 instruction. Is that right?
 8 **A.** Yes.
 9 **Q.** Are the materials listed here the basis upon which you
 10 completed your report, along with the documents I've
 11 already mentioned that you were provided with by
 12 the Inquiry?
 13 **A.** They are.
 14 **Q.** Are there any other important sources of information
 15 which you have used which are not listed in the report?
 16 **A.** Only indirectly. Some of the sources I use as a proxy
 17 for a wide range of other sources. So, I mean,
 18 for example you will see quite some self-citation, and
 19 that is an efficient way to refer to a whole other body
 20 of other sources that I didn't get into in detail.
 21 **Q.** I see, so you're referring to publications that you have
 22 authored yourself?
 23 **A.** Yes.
 24 **Q.** But within them are included a lot of other sources that
 25 you looked at for that purpose --

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1 If I could then move on to some of the substance --
 2 as I say, I don't think we'll touch on every area that's
 3 costs order in your extremely extensive report,
 4 Professor, but we would like to focus on the ones that
 5 appear to us to be of most significance to the types of
 6 decisions that the Chair will ultimately have to face
 7 and make in this module.
 8 Am I correct in saying, Professor, that one of the
 9 areas in which you have expertise and have an interest
 10 is generally the area of government policy?
 11 **A.** Yes.
 12 **Q.** You define in your report in the context of the pandemic
 13 various policy problems which might be defined as the
 14 issue with which government is presented, to which it
 15 requires to come up with a broad strategy as to how to
 16 deal; is that right?
 17 **A.** Yes. I would say an issue is only a problem when
 18 a government pays attention to it and makes sense of it.
 19 So there's quite a technical definition of problem
 20 definition in this field. It is how they pay attention,
 21 how they interpret what's going and therefore what they
 22 think is feasible to do as a result.
 23 **Q.** Right. As far as policy is concerned, as far as the
 24 area we are looking at, it really is predominantly to do
 25 with the strategy that was -- the overall strategy that

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1 was adopted by the Scottish Government in the pandemic;
 2 would that be fair?
 3 **A.** Yes.
 4 **Q.** And once one has developed a strategy, one has to work
 5 out a way as to how one implements that strategy --
 6 **A.** Yes.
 7 **Q.** -- to deal with what you have defined as the policy
 8 problems.
 9 **A.** Yes.
 10 **Q.** In order to implement the policy, the government
 11 requires to take decisions about matters on a more
 12 granular level?
 13 **A.** Yes.
 14 **Q.** It is normally thought to be good governance policy, is
 15 it not, Professor, that the policy, the strategy, will
 16 guide how those decisions are taken?
 17 **A.** Yes.
 18 **Q.** The systems in place aim, broadly, to try to maximise
 19 the quality of the decisions when faced with problems in
 20 order to meet the aim of the policy?
 21 **A.** Yes.
 22 **Q.** Would that be fair?
 23 **A.** Yes.
 24 **Q.** So in order to assess whether there is good governance,
 25 would it be fair to say that you need to assess broadly,

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1 quality of the decision-making?
 2 **A.** Yes.
 3 **Q.** And your expertise helps us in that process?
 4 **A.** Good.
 5 **Q.** Well, that's a question.
 6 **A.** Yes, it should do.
 7 **Q.** You say a number of things in your report. Very
 8 helpfully, you set out a very long section dealing with
 9 what you've defined as topics 1 and 2, the background,
 10 and we've already had Module 1 which -- as you know,
 11 because you draw on some of the evidence that was heard
 12 in that module, which has looked in detail at UK-level
 13 preparedness, but has also looked at Scottish-level
 14 preparedness. So I don't want to dwell too much other
 15 than as necessary to inform the key elements, topic 3
 16 and onwards in your report, on that.
 17 **A.** Yes.
 18 **Q.** However, we will come to that in due course as
 19 necessary.
 20 You tell us something in your report about -- at
 21 paragraph 1, if we could go to that. A number of bullet
 22 points which I think summarise aspects, I think, of your
 23 assessment of Scottish Government decision-making
 24 culture, I think it would be fair to say?
 25 **A.** Yes.

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1 perhaps, three things: first of all, do you need to
 2 assess the quality of the policy which aims to provide
 3 better lives for the people of Scotland?
 4 **A.** Yes.
 5 **Q.** You need to assess the quality of the more granular
 6 decisions which seek to put that policy into practice?
 7 **A.** Yes.
 8 **Q.** And you need to analyse and address the quality of the
 9 systems which lead to the making of the decisions?
 10 **A.** Yes.
 11 **Q.** I think, broadly speaking, if I've summarised it
 12 correctly, that's what you've sought to do in your
 13 report, analyse all of these areas?
 14 **A.** Yes.
 15 **Q.** You've looked at the quality of the policies?
 16 **A.** Yes.
 17 **Q.** You've looked at the quality of the systems?
 18 **A.** I have.
 19 **Q.** And you've looked at the quality of the decisions?
 20 **A.** Yes.
 21 **Q.** Perhaps not at a granular level, but broadly?
 22 **A.** Yes.
 23 **Q.** And you've tried to do so in order to assist the Inquiry
 24 with reaching its conclusions about whether any of these
 25 things played a role in affecting the outcome and

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1 **Q.** And you say in paragraph 1 that:
 2 "Devolution promised 'new Scottish politics' but
 3 delivered a Westminster-style system."
 4 If I could just also take you to paragraph 10 --
 5 thank you very much -- and in that paragraph you talk
 6 about the Scottish Government using "aspirational 'new
 7 politics' language" to describe its culture of
 8 decision-making.
 9 What are the characteristics of this story of a new
 10 Scottish policy style from the Scottish Government?
 11 **A.** So, I won't dwell on this too much, but if I take you
 12 back to the 1990s, the push for Scottish devolution took
 13 place during a time of low faith in political
 14 institutions, so the language was very much that
 15 Scottish politics would be a very strong improvement on
 16 old Westminster politics, you know, which was too
 17 adversarial, too centralised, too "winner takes all" and
 18 suchlike. So the Scottish Government built on this idea
 19 that the Scottish Parliament would be more important,
 20 the culture of politics would be more consensual, and
 21 the Scottish Government would operate in that context.
 22 So it used to tell a story from 1999 that compared
 23 to the UK Government it was more likely to consult with
 24 stakeholders and collaborate with a wide range of
 25 bodies, and it was less likely to try to subvert other

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1 forms of policy delivery, you know, like traditional
 2 local government. It was more likely to put faith in
 3 public bodies such as local government, and more likely
 4 to put faith in the traditional public sector
 5 professionals to deliver policy.
 6 **Q.** Thank you, Professor. So just to set it in a broad
 7 context, the position before 1999, when devolution came
 8 into operation as a result of the Scotland Act 1998, was
 9 that there had been a certain amount of, I think, what
 10 used to be called administrative devolution --
 11 **A.** Yes.
 12 **Q.** -- in Scotland, and that a number of the areas that were
 13 subsequently devolved to the new Scottish Parliament
 14 after the 1998 Act had been administratively devolved
 15 within the Westminster government to the
 16 Secretary of State for Scotland; is that right?
 17 **A.** Yeah, essentially the Scottish Government from 1999
 18 inherited the responsibilities of the Scottish Office
 19 before then.
 20 **Q.** Yes, but the way that things had been dealt with up to
 21 that point led to, as you've already described,
 22 a certain degree of dissatisfaction with that
 23 arrangement --
 24 **A.** Yes.
 25 **Q.** -- for some of the particular reasons that you've

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1 identify feasible solutions."
 2 So the reference to the policy problems we discussed
 3 a moment ago.
 4 **A.** Yes.
 5 **Q.** You say at (b) that one of the other aspects of this was
 6 that there was "more faith in public bodies and public
 7 sector professions to deliver policy", which you explain
 8 as meaning that:
 9 "Ministers would place high trust in traditional
 10 ways to make and deliver policy -- such as through
 11 collaboration with local government -- and rely less on
 12 the top-down and remote performance management measures
 13 associated with the UK Government?
 14 **A.** Yes.
 15 **Q.** So there are a number of aspects here that were part of
 16 this style which included greater commitment to
 17 collaboration; yes?
 18 **A.** Yes.
 19 **Q.** With stakeholders in the first instance?
 20 **A.** Yes.
 21 **Q.** But also by professionals and organisations that
 22 delivered government at an even further devolved level?
 23 **A.** Yes.
 24 **Q.** And that there was a commitment not only to consultation
 25 with those types of groups and individuals and

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1 pointed out?
 2 **A.** Yes, and they were -- they were always accentuated in
 3 Scotland. So, for example, you know, people in
 4 Scotland, they have a very long memory in terms of the
 5 Thatcher government onwards, and would -- so if you see
 6 opposition to a Thatcher government in the UK, it has
 7 always been much more accentuated in devolved
 8 government, particularly in Scotland. And so a lot of
 9 the language was essentially to say "We need a Scottish
 10 political system that would protect us from the worst
 11 excesses of UK Government control and interference and
 12 suchlike".
 13 **Q.** Okay. You set out in paragraph 10 there on the screen
 14 some of the key characteristics of this Scottish policy
 15 style, which was put forward as characterising the
 16 Scottish Government's approach to matters in the period
 17 after devolution; is that right?
 18 **A.** Yes.
 19 **Q.** And you focus there in particular at paragraphs (a) and
 20 (b) on the style being characterised by "more
 21 consultation and collaboration". You say that:
 22 "Ministers and civil servants would meet routinely
 23 and frequently with stakeholders -- including interest
 24 groups, professions and other public sector
 25 organisations -- to help define policy problems and

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1 organisations, but to their genuine involvement in
 2 policymaking?
 3 **A.** Yes.
 4 **Q.** And as we've said, policymaking would then underpin
 5 decision-making if it's delivered correctly?
 6 **A.** Yes.
 7 **Q.** Is it correct to say that this policy style has
 8 continued in different guises, at least at
 9 an aspirational level, to be the aim of the Scottish
 10 Government since that time?
 11 **A.** Yes. They changed the terminology a little bit. So
 12 "Scottish policy style" I think would be a phrase used
 13 by academics. You know, successive
 14 permanent secretaries to the Scottish Government have
 15 described a "Scottish model" or a "Scottish approach".
 16 **Q.** If we could go to paragraph 22, please, and we see in
 17 this paragraph that you've set out, I think, a number of
 18 principles, and the Scottish policy style, I think, over
 19 time, has crystallised itself in these principles, being
 20 the way in which the Scottish Government would report,
 21 to go about its business.
 22 **A.** Yes. This is slightly tricky to explain, this one. So
 23 the Parliament committee was examining effective
 24 Scottish Government decision-making -- in fact,
 25 you know, not long ago, so it's, you know, good timing.

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1 And they provided a list of things that they associated
 2 with effective Scottish Government decision-making from
 3 their perspective and that of the government, and turned
 4 that into seven common principles that you would
 5 associate with being effective.

6 **Q.** So these would be the sorts of things that the committee
 7 thought would be laudable principles and aims in trying
 8 to achieve good governance?

9 **A.** Yes.

10 **Q.** And of course every government is trying to achieve good
 11 governance, or at least that's what the people expect
 12 them to do?

13 **A.** Yes.

14 **Q.** If I could just run through these, these include
 15 responsible and accountable government, and you mention
 16 there -- it's mentioned there that:
 17 "There should be a direct link between the choices
 18 of elected governments and the citizens they serve."

19 **A.** Yes.

20 **Q.** You mention the fact that it's important to have
 21 anticipatory or preventative policymaking?

22 **A.** Yes.

23 **Q.** Might that include the need to try to predict when
 24 things will happen that will require decisions to be
 25 taken in the interests of the people?

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1 policy-relevant knowledge or producing policy.

2 **Q.** That was, yes, that was relevant to the point we
 3 discussed earlier, which was that it's not simply
 4 a matter of speaking to stakeholders but actually
 5 involving them in the creation of policy?

6 **A.** Yes.

7 **Q.** And the next is policy coherence and policymaking
 8 integration. Could you just explain to us briefly what
 9 that is.

10 **A.** So this is -- I would describe this as a -- just a very
 11 broad aspiration that if you produce -- a mix of policy
 12 should be coherent in that governments produce lots of
 13 different instruments, they tax and spend, they
 14 regulate, they provide information, they add resources;
 15 they should all come together to produce something that
 16 makes sense. And a problem of government in general is
 17 that they produce lots of different policies that don't
 18 match up, so policy coherence would be dealing with that
 19 problem.

20 **Q.** Right, thank you.

21 The others include evidence-informed policymaking,
 22 fostering equity, fairness -- it says "or" justice but
 23 I assume it's "and" justice"?

24 **A.** Well, these terms tend to be used interchangeably or
 25 differently. So, yes, all of those, but often people

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1 **A.** Yes, and also to deal with things that are -- that can't
 2 be dealt with immediately, such as, you know, long-term
 3 plans and outcomes. So that would come up with things
 4 like health inequalities.

5 **Q.** Yes. Indeed. We'll probably return to health
 6 inequalities at some point, Professor. But this, just
 7 to understand the role of policy in this, what's being
 8 suggested by that principle is that it's important to
 9 have policies in place as a broad structure within which
 10 particular decisions might need to be taken in any given
 11 circumstance?

12 **A.** Yes, yes, rather than dealing with crises when they
 13 happen.

14 **Q.** Thank you.

15 The third is power sharing and co-operation (sic),
 16 and we've seen -- as well as (a), responsible and
 17 accountable government, we've seen power sharing and
 18 co-operation (sic) appear in the Scottish policy style
 19 definition you've already given, so those are repeated
 20 here; is that right?

21 **A.** Yes, but they use this -- again, a technical term --
 22 "co-production", which is quite a vague term, but it's
 23 supposed to give this idea that the government is not
 24 simply consulting with other people, it is producing
 25 something with them, and so that can either be producing

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1 use them as an alternative to each other when they
 2 describe them.

3 **Q.** Thank you, and the final one is delivering services
 4 well, so the operational side of the delivery of the
 5 policy?

6 **A.** Yes.

7 **Q.** The broad proposition that you put forward, I think, at
 8 the top of paragraph 1, if we go back to that, please,
 9 the very first bullet point, was that "Devolution
 10 promised 'new Scottish politics' but delivered
 11 a Westminster-style system". That's a conclusion which
 12 I think you have come to or a proposition you are
 13 making. Is it correct to say that your summary here or
 14 your analysis here leads us to think that although at
 15 the start of devolution and since there is an aspiration
 16 that all of these various important principles should
 17 form part of the way that decisions are made, that many
 18 of the problems associated with the previous system, the
 19 Westminster system, have started to manifest themselves
 20 in Scottish decision-making?

21 **A.** Yes. Could I expand on that a little bit.

22 **Q.** Of course, yes.

23 **A.** So I think there are two aspects to that. So one is
 24 culture and one is structure. So if you look at what
 25 the -- well, what we'd call the architects of

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1 devolution, what they actually produced, it was many of
 2 the same organisations and relationships that
 3 Westminster had. So, for example, there was not like
 4 a US-style division of powers between the executive and
 5 the legislature. You had the same expectation that
 6 the executive would be in a parliament, would likely
 7 have very strong influence over the parliamentary
 8 arithmetic, would be expected to govern, and the main
 9 form of accountability would be ministers to their
 10 citizens through national elections. So the same
 11 sort of sense of high stakes politics that would produce
 12 competition between parties rather than, you know,
 13 a much more proportional system where they were expected
 14 to co-operate more routinely.

15 **Q.** What were the sorts of things that had been contemplated
 16 as might -- as possibly forming a more powerful part of
 17 the Scottish system that might have gravitated against
 18 that outcome, structurally speaking?

19 **A.** Yeah. Well, the -- one of the principles of the
 20 Scottish Parliament was to be this idea of power sharing
 21 between Parliament and government, but I think that was
 22 never really fully defined, and essentially it was the
 23 same relationship that you associate with Westminster:
 24 the government produces most legislation, the parliament
 25 scrutinises. So it's a very traditional Westminster

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1 to play that role, has it continued since that time to
 2 play that role, is it updated and adapted?

3 **A.** I think it does. I mean, it's not something that many
 4 people know about outside of government, but my
 5 impression is that if you're in the Scottish Government,
 6 you're very aware of it and you're very aware of the
 7 need to pay reference to it.

8 **Q.** I think it is referred to in some of the high-level
 9 strategic documents that you've looked at,
 10 Professor Cairney, is that right, including things like
 11 the four harms type documents which informed the
 12 approach to the pandemic?

13 **A.** Yes.

14 **Q.** So it seems that it did continue to play a role, as in
 15 guiding policy and then into decision-making, within the
 16 Scottish Government?

17 **A.** Yes.

18 **Q.** You say at paragraph 31 that:
 19 "... the NPF does not feature strongly in civil
 20 contingencies or pandemic preparation. It represents
 21 Scottish Government agendas and aspirations, not
 22 a specific decision-making tool."

23 **A.** Yes.

24 **Q.** Could you explain what you mean by that?

25 **A.** My impression is that civil servants are expected to

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1 approach, and I think that was always the plan.

2 **Q.** Okay. You go on in your report to tell us, at
 3 paragraph 31 -- if you could go there, please -- about
 4 something called the National Performance Framework.
 5 Could we just go to paragraph 31, please. If we
 6 could just have the page up on its own.

7 You're telling us here broadly at this passage about
 8 what you call the NPF, which is the National Performance
 9 Framework. Could you just tell us broadly what that is
 10 and how that fits into the way in which decisions are
 11 made in the Scottish Government?

12 **A.** Yes, so that really began in 2007, but it was supposed
 13 to be the manifestation of all these things we talked
 14 about, about, you know, more consultative, more coherent
 15 government. So the National Performance Framework had
 16 a single core purpose, and I couldn't tell you the exact
 17 wording but it was -- it was, you know, sustainable
 18 economic growth, and then it had a series of other
 19 ancillary purposes associated with that, you know, to do
 20 with health, education and suchlike, and the idea was
 21 that instead of individual ministers or departments
 22 being responsible for each part, all of the government
 23 and the public sector would be responsible for turning
 24 this vision into reality.

25 **Q.** Right. Does the National Performance Framework continue

26

1 know about the NPF, they're expected to use the language
 2 of the NPF when they produced other strategy documents,
 3 in a general sense, you know, it's -- you know, key
 4 reference points that they all use, but it is not
 5 something that is detailed enough to inform detailed
 6 decision-making. It doesn't -- it's not a blueprint
 7 that tells you what to do. It's a set of principles
 8 that you would use to inform your work.

9 **Q.** So your impression of government decision-making is that
 10 the NPF has a laudable set of principles contained
 11 within it --

12 **A.** Yes.

13 **Q.** -- but that when it comes to the application of those
 14 principles to actual on the ground real decisions,
 15 because it lacks a mechanism to transport, to transfer
 16 those principles into results --

17 **A.** Yes.

18 **Q.** -- that is, perhaps, a problem with the system?

19 **A.** Well, I would say it's a problem with any system in that
 20 a lot of the aspirations they have are in practice
 21 contradictory, so even the phrase that they used to use,
 22 "sustainable economic development", there's
 23 a contradiction there in terms of the things they have
 24 to pursue. For some that would mean prioritise economic
 25 development, often at the expense of the environment.

28

- 1 For some people, the word "sustainable" would suggest
2 that we need to change the way we pursue economic
3 growth. But the NPF itself does not resolve those
4 matters. It presents the phraseology to use.
- 5 **Q.** Thank you.
- 6 Another aspect I think of what you say at
7 paragraph 31 is that the NPF is not something which
8 features strongly in civil contingencies or pandemic
9 preparation; is that the impression you've gained from
10 the materials you've looked at?
- 11 **A.** Yes, to me, when I looked at -- I looked at a lot of
12 preparation documents, I don't remember seeing the NPF
13 language. I think the closest thing you could get is
14 the same sense of collectivism in the language of the
15 documents, but they do not refer to each other in any
16 meaningful way.
- 17 **Q.** One might say that if the NPF is part of an attempt --
18 a laudable attempt, I think we've said -- to try to
19 define principles that will assist with good
20 decision-making ultimately --
- 21 **A.** Yeah.
- 22 **Q.** -- that in situations of emergency, one might wish to
23 have a means by which those principles can be
24 operationalised quickly and effectively --
- 25 **A.** Yes.

29

- 1 directorates.
- 2 **A.** Indeed.
- 3 **Q.** Can we go to paragraph 163, please.
- 4 Here is it correct that you tell us that because of
5 the high uncertainty about how to deal with the pandemic
6 and the likely impact of various decisions, this meant
7 that the four harms framework was, much like the
8 National Performance Framework, an important reference
9 point to general principles rather than a detailed guide
10 to decision-making during the pandemic?
- 11 **A.** Yes.
- 12 **Q.** You explain again, as you had with the National
13 Performance Framework, I think, that the four harms was
14 not itself a decision-making tool in the pandemic or
15 specific decision-making tool; is that right?
- 16 **A.** Yes, my impression is that it is mostly a statement of
17 the problem, it's not a statement of the solution.
- 18 So it essentially says there are four main harms
19 that we need to take into account, and there will always
20 be trade-offs between trying to reduce one harm in
21 relation to the other. So the classic was a lockdown
22 would reduce Covid-19 harm, but it would also have
23 a knock-on effect for the other three. There would be
24 less access to the NHS, there would be more social
25 isolation, there would be a problem of, you know,

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- 1 **Q.** -- is that right?
- 2 **A.** Yes.
- 3 **Q.** One of the strategies that you looked at, and we've
4 mentioned already, which is we've heard a lot about
5 already in the first few days of hearings, which was
6 actually implemented, which was put in place by the
7 Scottish Government, was the Scottish four harms
8 framework, which I know you've looked at.
- 9 **A.** Yes.
- 10 **Q.** Just by way of reminder, this was a framework which was
11 published originally in April 2020; is that right?
- 12 **A.** Yes.
- 13 **Q.** And it set out a framework which required explicit
14 comparison and balancing between four different areas
15 where harm was perceived to be caused by the pandemic?
- 16 **A.** Yes.
- 17 **Q.** And that those harms were: the direct harm of Covid-19
18 itself, other health harm caused by the pandemic,
19 societal harm, and economic harm; is that right?
- 20 **A.** Yes.
- 21 **Q.** There are repeated references to the four harms
22 framework in the witness statements of the Scottish
23 Government; is that not right?
- 24 **A.** Yes.
- 25 **Q.** The ones that we provided you with from the

30

- 1 economic activity. So it was essentially a way to
2 describe the four key harms that they wanted to pay
3 attention to at any one time.
- 4 **Q.** Does this mean that it's perhaps, again, a laudable
5 statement of intent or approach, but it doesn't set out
6 any means by which ultimate decisions should be made in
7 a scientific or evidence-based way?
- 8 **A.** That's right. I think it's just a very general way of
9 focusing the mind on, you know, four key objectives.
- 10 **Q.** And it would mean that, I think you say here, it would
11 require still a significant degree of judgement, perhaps
12 subjective judgement, to be applied when it comes to
13 actually making decisions?
- 14 **A.** I would say profoundly so. You know, I think there's no
15 framework like this that could tell a minister when to
16 lock down or not, who to favour -- you know, to favour
17 economic growth or Covid-19 reduction in harm. It does
18 not -- I don't think it was ever really designed to
19 guide decision-making in that way, apart from just to,
20 you know, give people the things that they -- you know,
21 remind them of the trade-offs, remind them of the
22 principles that they signed up to.
- 23 **Q.** So I think, if I heard you correctly, your position was
24 that it helped define the problem but didn't help with
25 the solution?

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1 **A.** Yes.

2 **Q.** Thank you.

3 You give some attention to this in your report, very

4 helpfully, I won't go through every aspect of it, but

5 I think that you suggest that it is -- it was perhaps,

6 on your assessment, not a strong feature of decisions as

7 regards certainly the first lockdown, because it didn't

8 exist at that time --

9 **A.** Yes.

10 **Q.** -- but subsequent decision-making including,

11 for example, the decision to have the second lockdown?

12 **A.** Yes. I think the only thing that stood out was one

13 document said that -- so, I mean, in Scotland everything

14 is compared with the UK Government and the one document

15 stated "we used this framework more purposefully than

16 the UK Government". So what I took that to mean is all

17 ministers, UK and devolved, are trying to make this

18 judgement between reducing Covid-19 and dealing with

19 social and economic harm, and I think their statement is

20 they have a document and a way of working that makes

21 that -- that focuses the mind on that trade-off. But

22 that doesn't mean that other governments are not engaged

23 with the same trade-offs and decisions.

24 **Q.** Okay, thank you.

25 We've talked about a number of things which might be

33

1 say that something is better does not make it good, and

2 to say that it's less top-down does not make it not

3 top-down.

4 So I think that the reference point is useful, but

5 it can also distract us from what, you know, governments

6 actually do.

7 **Q.** One of the things you refer to from a structural

8 perspective in your report, very helpfully, and about

9 which there is an enormous amount of very complex

10 information, which I think I have to try to present in

11 due course, is the directorate structure of the Scottish

12 Government.

13 Is this a structure which has come in, broadly

14 speaking, since the governments have become

15 SNP-dominated or either exclusively SNP-led

16 administrations since 2007?

17 **A.** Yes, I should say that the way the former

18 permanent secretary at the time described this meeting

19 of minds between the Scottish Government and the SNP

20 government, they had the same idea about what to do, and

21 the idea was you would have fewer ministers and you

22 would have a departmental system that became

23 a directorate system, that was designed to be much more

24 joined-up -- relating to the NPF -- and much less

25 subject to the problems associated with Westminster,

35

1 described as setting the scene or aspirational; would

2 that be right, characteristic of the various things

3 we've looked at so far?

4 **A.** Yes.

5 **Q.** And you've also drawn us to your -- the first bullet

6 point conclusion in paragraph 1 that there has been

7 a characteristic of Scottish Government decision-making

8 over years that it aspires to be different from the

9 Westminster system but often fails in that aspiration;

10 is that correct?

11 **A.** Yes.

12 **Q.** Is it your evidence that the decision-making structures

13 within the Scottish Government, as far as you could

14 glean -- relating to the pandemic -- in the paperwork

15 with which you were provided, which emanated

16 predominantly from the Scottish Government, shared some

17 of the features that were criticised, I suppose, in the

18 UK Government decision-making structures, such as it

19 being centralised and top-down?

20 **A.** Yes. I hesitated there. I would say there's -- given

21 the system they have, there's an almost in-built

22 tendency towards top-down policymaking. It's a Scottish

23 version, and it may be less top-down, more consensual,

24 but the thing that I always had in mind is the

25 comparison with the UK is often unhelpful, because to

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1 which were that departments were much more built based

2 on sectors and they existed in silos without talking to

3 each other.

4 So they both had this idea that they could have

5 a coherent group of ministers and a coherent collection

6 of directorates that could then talk to each other in

7 a much more meaningful way.

8 **Q.** So you said there -- I think that you described

9 a meeting of minds between the Scottish Government and

10 the SNP government?

11 **A.** Ah, sorry. Okay, so I should say --

12 **Q.** Did you mean the Scottish civil service or did you mean

13 the UK Government being the first one?

14 **A.** Ah, okay. So I should -- okay, there's -- I've taken

15 for granted things.

16 In my mind, the Scottish Government describes the

17 organisation that contains ministers and civil servants,

18 so then I was describing the Scottish Government as

19 largely the civil servants, so that would be

20 John Elvidge and colleagues.

21 **Q.** Yes.

22 **A.** And --

23 **Q.** Hence you were discussing the prominent civil servant

24 having given some commentary on what had happened over

25 that period, I think?

36

1 A. Yes, yes.

2 Q. And you go into more detail about this in the report,
3 and that there had been, I think -- please correct me if
4 I'm wrong about this -- an impetus or a desire on the
5 part of the new SNP administration to try to achieve
6 this directorate structure, broadly for the reasons that
7 you've outlined, that it was thought that it would work
8 better than the rigid departmental structure which had
9 been and is characteristic perhaps of the UK Government
10 and had been characteristic of the Scottish Government
11 up till that point?

12 A. Yes, and I think it needed that meeting of minds between
13 ministers and civil servants because it was
14 a substantial reform, you know, essentially abolishing
15 what they called departments, introducing a far larger
16 number of directorates. It required support from both
17 sides.

18 Q. So there was -- I suppose, the policy, if you like, was
19 to try to introduce a new system, but there needed to be
20 buy-in from those who would be part of that system, and
21 that was the position at 2007?

22 A. Yes.

23 Q. The directorate system had these goals, and in
24 particular you referred to the fact that it seeks to
25 minimise rigidity and departments working in silos; is

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1 system. So you would expect this kind of testimony
2 where there was very much an emphasis on doing things in
3 a Scottish way, a Scottish Government way, with
4 reference to a wider culture and set of expectations,
5 and you'd normally expect there to be a story that this
6 works well.

7 Q. And as far as you are concerned, did you see in the
8 materials with which you were provided evidence of this
9 aspirational approach to the directorate structure
10 achieving the aims which it set out to achieve?

11 A. Yeah, I would say that on paper, or if you were to
12 listen to someone describing what they do, it would look
13 like it made sense. It's very difficult to relate that
14 to what actually happens.

15 Q. Okay, and that would apply -- obviously the paperwork
16 I'm referring to is paperwork related to the way that
17 decisions were made in the pandemic?

18 A. Yes.

19 Q. So is your position, is your evidence that this is
20 an example, again, I think, of a structure which seeks
21 to try to have a positive aim, but of which there is
22 little evidence that it actually has a positive effect?

23 A. Yes. I mean, I'm keen to stress -- you know this phrase
24 "evidence of absence is not absence of evidence", or --
25 either/or. So what I'm struck by is, when I read

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1 that correct?

2 A. Yes.

3 Q. And one sees sometimes a phrase which we rather use in
4 the Inquiry as well, I'm afraid, a degree of trying to
5 minimise cross-cutting problems that would arise in
6 different areas and try to work together to solve them;
7 is that right?

8 A. Yes, and I would say almost every problem is
9 cross-cutting in some way. So this is an approach that
10 makes sense.

11 Q. In your evidence at paragraph 89.2 -- if we could go to
12 that -- this is in the section where you are still
13 talking about some of the Module 1 evidence and the
14 background structures which existed to try to deal with
15 emergency situations in the Scottish system, you
16 referred in particular to some evidence on this subject
17 that was given by Gillian Russell.

18 Could you explain the role that she played and why
19 it was that you thought that the description that she
20 gave of the system was of interest as far as whether
21 this directorate system functioned well or not?

22 A. Yeah, so this is a little bit simplistic, but, as
23 I understand it, all serving Scottish Government civil
24 servants make reference to this kind of language, about
25 being joined-up and about having a good directorate

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1 Scottish Government documents or accounts, they very
2 much emphasise their aspirations, their structures,
3 their strategies, and they do not really emphasise the
4 more fine grain decisions or their impacts. It's very
5 much a kind of genel story about how this is supposed to
6 work.

7 Q. Just to be clear, in case there is any doubt about it,
8 the documents that I'm referring to upon which you have
9 undertaken this analysis, these are the corporate
10 statements and a couple of individual statements which
11 have emanated from the Inquiry's investigation into how
12 decisions were taken?

13 A. Yes.

14 Q. So it would be fair to say that if there were examples
15 which you have suggested are absent of the way in which
16 this directorate structure did achieve the aim which it
17 set out to achieve, one might expect them to appear
18 within that very large corporate body of evidence?

19 A. Yeah. I wouldn't expect the Scottish Government to be
20 sitting on, you know, a secret stash of documents
21 exhibiting their success.

22 Q. You refer in your report also to a number of
23 organisational changes which took place during the
24 course of the pandemic.

25 If we go to paragraph 141 -- yes, in paragraph 142,

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1 under the heading "The reorganisation of Directorates to
2 co-ordinate a Scottish Government response to Covid-19",
3 we've touched on some of this in the opening statement
4 and we'll address some of the detail with some other
5 witnesses in due course, but you set out there that,
6 broadly speaking, there was a reorganisation based on
7 the materials that you were given where, within the
8 directorate structure, a number of new directorate
9 bodies were created to deal with the pandemic at various
10 different times and in various different places?

11 **A.** Yes.

12 **Q.** Just to be clear, and in the hope that I understand
13 this, there are, I think, what are called "directorates
14 general", which are overarching bodies that within them
15 contain a number of sub-directorates that are called
16 "directorates"?

17 **A.** Yeah. It is a confusing language, and I think that the
18 Scottish Government uses the language of "families of
19 directorates". So I think a family -- I mean,
20 a well-working family, I think, that was what they're
21 trying to project, and that this is a collection of
22 directorates which interact with each other. They are
23 separate organisationally, but they interact with each
24 other in -- as part of a wider directorate general, led
25 by a director general.

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1 Health and Social Care Directorate General, there
2 appeared to be a number of new bodies, new advisory
3 structures created; is that broadly your understanding?

4 **A.** Yes, and I think in some other cases the role is much
5 clearer because the directorate is new and the topic is
6 new, so I think, for example, a directorate for,
7 you know -- well, I should remember them all, but say
8 a directorate for testing and tracing or something like
9 that, it's clearly been established to do something new.

10 **Q.** Yes.

11 **A.** Where some of them have been re-branded to repurpose
12 what they do.

13 **Q.** Yes.

14 Can we look at paragraph 141, please. Again, your
15 position was, I think, there, around about halfway
16 through, you say:

17 "However, the Scottish Government provides limited
18 evidence that this system of decision-making was more
19 effective during its response to Covid-19 (partly
20 because the Inquiry did not ask it to do so
21 explicitly)."

22 As far as that is concerned, where does that second
23 comment emanate from, the one in brackets?

24 **A.** Yeah, I'm smiling a bit here. So I -- I produced four
25 drafts of my report, the final draft was the fourth

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1 **Q.** We see there at 142.1, for example, the "Directorate
2 General for Constitution and External Affairs", that
3 would be one of the family definitions, and within that
4 there would be a number of members in the family that
5 would be directorates underneath that?

6 **A.** Yes.

7 **Q.** And I think you point in particular to the fact that
8 within that directorate general, which I think it fair
9 to say was certainly one of, if not the lead directorate
10 general in relation to the pandemic, there were a number
11 of new bodies and directorates and structures created
12 while the pandemic was actually happening?

13 **A.** Yes. I should say that I would express uncertainty.
14 It's very difficult to know the extent of the
15 reorganisation. My sense is the documents that I read
16 that we referred to provide a lot of detail on various
17 name changes to directorates, and they list the director
18 in each case. It's very difficult to know if the name
19 change represents or symbolises a functional change or
20 if they're simply re-branding what they do with
21 different names.

22 **Q.** We can explore that factual matter, and no doubt we will
23 have to with other witnesses in due course,
24 Professor Cairney, but within that particular
25 directorate general and also another one, which was the

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1 draft. The second draft was in response to the Inquiry
2 team comments -- very constructive and helpful. The
3 final draft was produced after detailed comment from
4 core participants, primarily from Scottish Government
5 participants. I sort of -- I joked to the team that it
6 was like they were marking my homework, and that was
7 often very good, because they pointed out some
8 inaccuracies. But this one, I think, summed up for me
9 the problem the Inquiry has in getting information from
10 the Scottish Government, because my impression is: it is
11 only providing answers to the questions posed and it's
12 never going any further than that. And so I think that
13 was a -- that was feedback from one person in response
14 to a comment that I'd made in a previous draft, which
15 was "The Scottish Government doesn't provide much
16 evidence on X, Y and Z", the response from them was
17 "Well, you didn't ask us to give that evidence".

18 **Q.** So that comment, to be clear, came from the Scottish
19 Government; is that right?

20 **A.** Yes.

21 **Q.** And the Scottish Government's comment was that the
22 reason why the Scottish Government documentation had
23 provided limited evidence that this system of
24 decision-making was more effective during its response
25 to Covid-19 was because the Inquiry hadn't asked it to

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1 do so?

2 **A.** Yes.

3 **Q.** As far as the second part is concerned, based on what
4 you have seen, and putting aside for the moment the
5 question of whether they had been asked that or not,
6 your assessment was, I think:

7 "... most of its relevant written evidence (to which
8 I have had access) describes organisational changes
9 rather than their effectiveness."

10 **A.** Yes.

11 **Q.** So your impression was that, although there was a lot
12 about how things had been moved around and re-branded,
13 there wasn't an awful lot of discussion about how that
14 had helped the people of Scotland ultimately?

15 **A.** Indeed.

16 **Q.** Broadly speaking, based on your experience of the way in
17 which governments are structured, policies formulated
18 and implemented to try to maximise the effectiveness of
19 decisions, would you -- and bearing in mind, of course,
20 that you have conducted a very extensive analysis of the
21 pre-pandemic situation in Scotland in that regard --
22 would you generally think it is a good idea to reinvent
23 systems so much in the heat of the fire, rather than
24 before the fire starts?

25 **A.** That's a good question. I certainly think -- it's
45

1 each directorate, because the documents focus on the
2 formalisation of their roles.

3 **Q.** My question I think was a little bit more specific than
4 that. You go on at various stages in your report to
5 discuss, for example, in the context of advisory
6 structures --

7 **A.** Yeah.

8 **Q.** -- but also decision-making structures -- this is in the
9 context of the devolution and intergovernmental section
10 of your report -- you refer to the fact that there were
11 systems for achieving medical advice from experts via,
12 for example, SAGE --

13 **A.** Yes.

14 **Q.** -- and its various subgroups?

15 **A.** Yes.

16 **Q.** And there were existing decision-making bodies such as
17 COBR, for example?

18 **A.** Yes.

19 **Q.** And that you question, I think -- you pose the question,
20 at least, as to whether more effort could have been made
21 to try to use those existing structures developed for
22 the purpose of an emergency?

23 **A.** Yes.

24 **Q.** And your question, therefore, by extension, as
25 I understand it, whether the development of these new
47

1 well known in government and the study of government
2 that major formal reorganisations are expensive in terms
3 of the time it takes to do, the time it takes for civil
4 servants to become proficient in their new role, and the
5 time it takes for people to understand what their roles
6 are in relation to other people. So I think any
7 government would pause before having a major formal
8 reorganisation.

9 So I think what I would say is the reorganisation
10 in 2007 was the profound one. This one I think it's
11 more difficult to say how big it was. So I think a good
12 example is when some of the Scottish Government
13 documents essentially say "We had a directorate working
14 on Brexit, and we re-purposed that directorate to deal
15 with Covid-19", so in some senses that seems -- I think
16 that would seem odd to people that they would do that,
17 but it makes sense in that what that directorate was
18 trying to do was to co-ordinate a response across
19 government on a complex issue. So it made sense for
20 people experienced in that very broad task of
21 co-ordination to be involved in the directorate.

22 So I think some things do make sense. I wouldn't
23 want to give the impression that I think this is a lot
24 of sort of needless moving the deck chairs around. It's
25 just difficult to know in detail what the purpose was of
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1 more Scottish-based systems, I think broadly one can
2 say, was necessarily a good idea in the circumstances?

3 **A.** To be honest, I'm not sure. It's difficult to tell from
4 the evidence available. I can say in general terms some
5 of these things make sense. So it makes sense to have
6 a family of directorates that try to co-ordinate policy
7 across government. I think maybe it makes sense to give
8 them names that relate to the tasks, and maybe that's
9 the advantage of the directorate system.

10 It's difficult -- the thing that I would be less
11 sure about would be, for example, the -- I mean, a lot
12 of directorate functionality comes down to the people
13 who lead them and their experience and suchlike.
14 I don't have enough detail on their experience in,
15 you know, relevant things or if they were put into new
16 roles or this was an extension of their old role. So
17 it's difficult to tell. I think it would be difficult
18 for anyone on the outside to tell how these things work,
19 and presumably very difficult for the Scottish
20 Government to explain how they work to, you know,
21 a typical citizen.

22 **Q.** I wonder if I could give a comparison about which you've
23 already heard some evidence. Although it's not the area
24 you have been asked to look at, you'll be aware of the
25 fact that there was a body called Public Health Scotland
48

1 that played a predominant role in the pandemic response?

2 **A.** Yes.

3 **Q.** It was the case that the Scottish Government, as I think
4 you note in your report, was keen to try to develop
5 a new and better system for dealing with Scotland's
6 considerable health inequalities.

7 **A.** Yes.

8 **Q.** And part of that plan was the development of a body to
9 co-ordinate the public health response, which was Public
10 Health Scotland.

11 **A.** Yes.

12 **Q.** And it became operational in April of 2020.

13 **A.** Yes.

14 **Q.** And although that had been pre-planned, that was
15 a difficult -- we've heard some evidence that that was
16 a difficult time, obviously --

17 **A.** Yeah.

18 **Q.** -- for that to happen.

19 It's been accepted on their behalf that when one
20 creates new structures like that, it's inevitable that
21 there will be a degree of practical and cultural and
22 organisational change and reorganisation that will be
23 necessary.

24 **A.** Yes.

25 **Q.** I understand it to be their position that they would

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1 a difference in terms of the work that goes in. So
2 I think Public Health Scotland would be the example of
3 long-term planning organisation, whereas the
4 directorates would be this short-term crisis response.

5 **Q.** Thank you very much.

6 Could we go to paragraph 125, please. This is,
7 I think, where you're expressing your opinion in
8 relation to topic 1, which is technically the
9 preparedness topic, although I think you, quite
10 helpfully, use these opinion sections to try to tell us
11 a bit about how this feeds into our core function here,
12 which is to look at the actual decision-making.

13 I think in this paragraph you say that:

14 "[The] focus on ... being better prepared over time
15 to make effective decisions, based on a commitment to
16 continuous policy learning and ... being increasingly
17 better prepared for an unfolding pandemic, is a strong
18 feature of Scottish Government oral testimony for
19 Module 1 and written testimony for Module 2A, as
20 follows. First, a general focus on the Scottish
21 Government being a learning organisation is a key
22 feature of the Scottish Government's 'Scottish approach'
23 narrative on decision-making ... Second, multiple
24 witness statements describe continuous learning to
25 respond to an emerging problem more effectively:

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1 accept that that was not ideal in the middle of
2 a pandemic, but there was no choice, because that had
3 been pre-planned.

4 **A.** Yeah, so I know --

5 **Q.** My ultimate goal here is not to get into that, sorry,
6 Professor.

7 **A.** Okay.

8 **Q.** I just wanted to draw a comparison to say: do these same
9 concerns apply in your area of expertise in regard to
10 organisational change within government in -- as I've
11 said, in the heat of the fire?

12 **A.** I think those -- they're comparable, but different.

13 I would say that the introduction of Public Health
14 Scotland was much more like the introduction of
15 directorates in 2007, in that that had been years in the
16 planning, and that had been a long-term attempt to
17 co-ordinate health and other issues between, you know,
18 Scottish Government public health bodies and local
19 government.

20 So that -- I mean, in some senses I would describe
21 what they had done, say, from the mid-2010s onwards as
22 good practice in long-term planning. So that is
23 different from the reorganisation of directorates, which
24 took place much more quickly. My impression is some of
25 this was much more overnight. You know, so there is

50

1 preparedness for future phases of Covid-19 would be
2 improved because the Scottish Government had far more
3 information about the nature and spread of the virus,
4 and its ability to respond. Third, this preparedness
5 would be bolstered by new arrangements, including (a)
6 the establishment of a Scottish Government advisory
7 system, based on the Scottish Government's realisation
8 that it should be less reliant on UK science advice
9 mechanisms ... and (b) new specialist Directorates
10 better able to respond to the immediate Covid-19 threat
11 then prepare properly for another ..."

12 So I think there what you're helpfully doing,
13 Professor, is you're bringing together the importance,
14 which we learned from Module 1, of being well prepared
15 and learning lessons, and you're applying that also to
16 the fact that we're not dealing here with a single
17 incident that happened on one day, but something that
18 went on for a period of years, and I think your
19 assertion is that it is -- well, the assertion in the
20 documents, the Scottish Government's assertion is that
21 they learned lessons as things went on, and therefore,
22 I assume, assert that they improved their response; is
23 that correct?

24 **A.** Yes. Could I expand on that?

25 **Q.** Of course. I'd very much like you to.

52

1 A. So I would say that if you were to distill down all of
2 the evidence from the Scottish Government, you could
3 turn it into a very simple convincing story, which
4 is: we are a well co-ordinated learning organisation, we
5 may not have been prepared for this new pandemic in
6 spring 2020 but we are an effective organisation to the
7 extent that we can learn and respond to subsequent
8 pandemics much more effectively.

9 I think that is the Scottish position, the Scottish
10 Government position.

11 I think also there is witness statements from the
12 former First Minister and Deputy First Minister that
13 encapsulate that assertion of learning. So the
14 First Minister says "I told the Scottish Cabinet in
15 December 2020 that essentially we have learned that you
16 cannot wait for this problem to become a crisis, you
17 have to act quickly. We learned that from the first
18 lockdown". The Deputy First Minister says "We've
19 learned that in key cases sometimes only a major
20 lockdown will do, you know, these other measures are not
21 going to work and we need to do it".

22 So they both talk about learning from the previous
23 experience in the sense that it would inform their
24 future decisions, and, you know, that is a good learning
25 organisation.

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1 PHS statistician, about there being significantly high
2 levels of cases, higher than other places in the
3 United Kingdom, later in the pandemic, but still in the
4 period we're interested in, in particular from around
5 August 2021. We have heard that those high rates
6 obviously went up and down but they continued and there
7 continued to be a high mortality rate resulting from
8 what were known as the Delta and Omicron variants from
9 that point into 2022. We have heard evidence that there
10 were significant issues with hospitals becoming
11 overwhelmed in 2021, which required the military to be
12 drafted in to assist. We've heard evidence of this
13 situation being described as a perfect storm.

14 A. Mm.

15 Q. We've heard evidence from particular impacted
16 organisations that their voice continued not to be heard
17 during the pandemic, and that members of their
18 communities continued to suffer, including oral
19 testimony to that effect yesterday.

20 Are these features of the evidence -- and of course
21 we keep our mind open to what the evidence may be -- are
22 these features of the evidence consistent with your --
23 what I understand to be your general proposition that
24 the evidence doesn't seem to suggest, that you've seen,
25 that lessons were learned during the pandemic such as to

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1 But what I can't then do is reconcile that with the
2 fact that they appear to have made exactly the same
3 mistakes twice. The first one was understandable
4 because the virus was novel. Lockdown in March was
5 something that was profoundly different from what anyone
6 had been used to. They clearly were not sure what would
7 happen, how much people would adhere to the guidelines
8 and suchlike. But they state time and time again in the
9 documents, "We learned a lot from what happened during
10 that lockdown and we have learned a lot about what this
11 virus is", and yet they appear to have produced the same
12 delays in response for the second lockdown as the first.

13 So in my mind that does not exhibit pandemic
14 preparedness in relation to continuously learning.

15 So I've been reflect -- this is slightly
16 speculative, but what I would like clarity on from the
17 Scottish Government is, in a nutshell, do they think
18 that the virus in 2020, by the end, was so different
19 that they could not prepare for it and therefore it's
20 very difficult to prepare ever for a novel virus? Or is
21 there some other explanation for the fact that they
22 learned so much and yet acted, you know, so late?

23 Q. You, I think, have confined your comments there to what
24 happened during 2020, but the Inquiry has heard evidence
25 from statisticians, the government statistician and the

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1 combat further waves and further devastation?

2 A. Yes, I think that the Scottish Government documents talk
3 much more about learning than they demonstrate learning
4 feeding into action.

5 I should say I made this point more strongly in the
6 third draft of my report. I did get a response from the
7 Scottish Government which was essentially a list of the
8 ways in which they were learning, and I put that list in
9 my fourth report. But my sense is that essentially
10 that's what it is, it's a list of activity in different
11 parts of the Scottish Government. It is not a coherent
12 narrative of how they learn effectively during a crisis.
13 And I think that's one of the sort of unresolved issues
14 here about the extent to which there's a rhetoric of
15 learning that does not match reality.

16 I suppose the other thing I should note is, in my
17 mind the Scottish Government, much like
18 the UK Government, have described Inquiries as the place
19 to learn. In fact, when the now Deputy First Minister
20 gave evidence to the committee -- or was it -- the
21 inquiry that was involved in effective government
22 decision-making, I believe she said that "We will learn
23 lessons during the inquiries". And that struck me as
24 quite odd, given that the focus so much in these
25 documents is about continuous learning.

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1 Now, maybe they're talking about two different
 2 kinds. Maybe there's a difference between trial and
 3 error, learning on a daily basis, and there is evidence
 4 of that, for example, when the former Health Secretary
 5 talks about learning how to deal with, you know, PPE
 6 problems. Maybe that's what they meant. But I don't
 7 see evidence of this longer-term learning that will then
 8 produce something that will inform the next pandemic.
 9 I think, you know, there was a -- one of the
 10 committees they have talks about Disease X, you know,
 11 this disease -- we don't know anything about it, but we
 12 know it's coming. I don't see anything from Scottish
 13 Government documents that says "This is what we have
 14 learned that will inform how we deal with Disease X".
 15 **LADY HALLETT:** So are you saying it's translating the words
 16 into actions?
 17 **A.** Yes. I think the -- I'll be careful in how I say this,
 18 but the Scottish Government produces beautiful strategy
 19 documents, it has a wonderful language to describe how
 20 it wants to be. It does not have the same effective
 21 language for describing how it is.
 22 **MR DAWSON:** My Lady, if that's a convenient point?
 23 **LADY HALLETT:** It is, certainly, thank you. I shall return
 24 at 11.30.
 25 **(11.15 am)**

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1 **Q.** And in paragraph 14, you refer to:
 2 "From 2015, the Scottish Government used its
 3 revision of the NPF ten year plan to: ..."
 4 Amongst other things, at bullet point 2:
 5 "identify priorities in relation to addressing
 6 poverty and reducing inequalities (then First Minister
 7 Nicola Sturgeon made strong commitments to reduce
 8 education and health inequalities)."
 9 **A.** Yes.
 10 **Q.** Could we look at paragraph 113, please. Again, this is
 11 in the section where you were looking at some of the
 12 evidence that was available in relation to the Scottish
 13 Government from Module 1, and in that paragraph, as part
 14 of your analysis of the context of the pandemic, you say
 15 that:
 16 "... health outcomes do not reflect the successful
 17 application of [these] new policies."
 18 Citing, amongst other materials, the Bambra and
 19 Marmot report commissioned by this Inquiry. Is that
 20 right?
 21 **A.** Yes.
 22 **Q.** Could we look at paragraph 115, please. Do you say in
 23 this paragraph that in the field of health inequalities
 24 you state this is an example of where there were
 25 aspirations not put into practice?

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1 **(A short break)**
 2 **(11.30 am)**
 3 **LADY HALLETT:** Mr Dawson.
 4 **MR DAWSON:** Thank you, my Lady.
 5 Professor Cairney, I'd just like to move on to
 6 a slightly different though connected area, which is the
 7 Scottish Government's commitment to human rights and
 8 equality, which is something we're interested in in this
 9 module.
 10 If you could have page 5 up, paragraph 1 again, you
 11 say in the fifth paragraph there that:
 12 "The aspirational ... 'model' [this is of the
 13 Scottish approach] involves establishing a 'national
 14 performance framework' (NPF) with a 'core purpose'
 15 replacing sectoral government departments with
 16 cross-sectoral directorates, co-producing public sector
 17 commitments to deliver the NPF and focusing on long-term
 18 aims -- such as to reduce inequalities -- rather than
 19 short-term targets based on a fixation with national
 20 elections."
 21 So the commitment to the reduction of inequalities
 22 is something that is part of this aspirational
 23 principles to be applied to the way that decisions are
 24 made?
 25 **A.** Yes.

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1 **A.** Yes.
 2 **Q.** Again, I think it's fair to say that commitments to
 3 inequalities, including health inequalities, and human
 4 rights in a more general sense, feature aspirationally,
 5 if you like, in some of the key structural documents,
 6 including the four harms approach?
 7 **A.** Yes, and -- so other scholars know much more about human
 8 rights approaches than I, but my impression is the
 9 reference to a human rights approach is now the Scottish
 10 Government's thing, it's -- I mean, I don't mean that in
 11 a negative sense. It is very committed to adopting that
 12 kind of language throughout government. And I think my
 13 impression is it's the same kind of aspiration -- it's
 14 a very general term, it's very difficult to -- you know,
 15 very difficult to oppose, who wouldn't want a human
 16 rights approach? But the detail of how they make sense
 17 of it and the choices they make, I think that's the
 18 thing that is less visible.
 19 **Q.** So when you say "the choices they make", ultimately what
 20 that means is whether the decisions they make actually
 21 put that aspiration into practice?
 22 **A.** Yes, and how they define human rights and whose human
 23 rights, and the balance between human rights and --
 24 I mean, so lockdown was really about removing human
 25 rights, so if they were to talk about a human rights

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1 approach to something like that, it would be very
 2 difficult to make sense of without more detail.

3 **Q.** Your report as regards the period before the pandemic,
 4 drawing, as I say, amongst other things, on the Bamber
 5 and Marmot report but other sources, suggests that
 6 although this approach to inequalities, in particular
 7 health inequalities, had been an aspirational part of
 8 Scottish Government decision-making for some time,
 9 updated and reinforced in 2015, as we saw --

10 **A.** Yeah.

11 **Q.** -- that health inequalities and inequalities in general
 12 remained a significant problem with Scottish society at
 13 the time the pandemic started; is that correct?

14 **A.** Yes.

15 **Q.** And this Inquiry has heard significant evidence relating
 16 to this module that those inequalities and health
 17 inequalities were exacerbated by the way the pandemic
 18 was managed. Would it surprise you to hear that it has
 19 heard that evidence?

20 **A.** No. I think that the experience of Covid-19 policy
 21 symbolises a lot of the problems with inequalities that
 22 we saw before 2020.

23 **Q.** Thank you.

24 I'd now like to move to a different area which you
 25 have also very helpfully covered in some detail in your

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1 pandemic. There was blurriness about the lines of
 2 responsibility. Broadly speaking, is that right?

3 **A.** I would say there's always a blurry boundary in this
 4 kind of system.

5 **Q.** Yes. And would it be fair to say that when a disaster
 6 comes along like the pandemic, which affects all areas
 7 of society and life, and therefore all policy areas,
 8 that this blurriness starts to become a bit of
 9 a problem?

10 **A.** Yes.

11 **Q.** Because in response to a pandemic, one needs clarity,
 12 not blurriness?

13 **A.** Yes.

14 **Q.** Clarity as to whose responsibility each element of
 15 society it is?

16 **A.** Yes.

17 **Q.** The Inquiry has heard evidence that there were systems
 18 in place, I think as far back as the Scotland Act but
 19 certainly from more recent years, including a memorandum
 20 of understanding and supplementary agreements last
 21 updated in 2013, that were designed, amongst other
 22 things, to encourage activity within, amongst other
 23 bodies, a Joint Ministerial Committee, to try to deal
 24 with this very issue of what you've described as the
 25 blurriness.

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1 report. The area is devolution and the interplay
 2 between the UK Government and the Scottish Government.

3 We have heard in the Inquiry a substantial body of
 4 evidence, generally speaking, about the devolution
 5 settlements across the UK, not least in the expert
 6 opinion from Professor Ailsa Henderson, which I know
 7 that you have been able to look at.

8 **A.** Yes.

9 **Q.** So it may be that the ground that we cover here can be
 10 a bit more focused, because we have some general
 11 context, but I would like to ask you some questions
 12 about that.

13 I think you say in your report that because of the
 14 devolution settlement which attributes certain policy
 15 areas to the Scottish Government but reserves certain
 16 other policy areas to the UK Government, that both the
 17 UK Government and the Scottish Government share overall
 18 responsibility for policy decisions that impact
 19 Scotland?

20 **A.** Yes.

21 **Q.** You say in your report at paragraph 56 -- we'll go to
 22 that -- that in this context the -- I think you use the
 23 word "blurry" to describe the boundary between UK and
 24 Scottish Government responsibilities. I think at this
 25 stage you're referring to the period before the

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1 **A.** Yeah.

2 **Q.** Would that be fair?

3 **A.** Yes.

4 **Q.** It is Professor Henderson's evidence that there had been
 5 relatively little activity in that regard in the years
 6 preceding the pandemic; is that your understanding?

7 **A.** Yes.

8 **Q.** And that in fact the Joint Ministerial Committee had met
 9 only 11 times in relation to Scotland between 2007 and
 10 2019?

11 **A.** Yes.

12 **Q.** And it hadn't met after 2019 and before the pandemic, so
 13 during 2019?

14 **A.** Yes.

15 **Q.** And in 2007, the 2007 date is the time that the SNP
 16 became the controlling party of the Scottish Government?

17 **A.** Yes.

18 **Q.** Do you think that it is the case that our constitutional
 19 settlement required that there ought to be fora in which
 20 these boundaries should have been rendered less blurry,
 21 such as to make a pandemic response involving both
 22 policymaking agencies more effective?

23 **A.** Yes.

24 **Q.** Another aspect which you touch upon in this regard in
 25 your report is the suggestion that the existence of

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1 these blurry lines may also make it easier for
2 decision-makers in the Scottish Government to attribute
3 blame for bad policy outcomes to the UK Government and
4 vice versa, thereby potentially creating
5 an accountability deficit in Scotland?

6 **A.** Yes.

7 **Q.** Could you explain a little bit more about what you mean
8 by that concept?

9 **A.** Well ... this would take us back to the topic that we
10 began with about, you know, new Scottish politics or old
11 Westminster. I think a characteristic of a Westminster
12 system is high stakes accountability for problems. It
13 is -- parties contest elections based on who should take
14 the credit, who should take the blame for decisions, and
15 that is reflected in relationships between UK and
16 devolved governments, particularly when they're of
17 a different party. So I would say that the way that the
18 parties narrate the relationships relates profoundly
19 strongly to the way that they campaign. So I would say
20 that, on both sides, the UK Government leadership and
21 the SNP government, to criticise each other in key cases
22 is a key part of the way in which they present
23 themselves to the electorate.

24 **Q.** To turn, then, to the outcomes of this as far as the
25 pandemic was concerned, you explain very helpfully in

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1 **A.** -- but that's my understanding.

2 **Q.** Yes, I understand, you're not a legal expert,
3 Professor Cairney, it's very important to point that
4 out, but in your report you have summarised evidence
5 available from other sources --

6 **A.** Yes.

7 **Q.** -- which lead you to believe that that is the case, and
8 certainly my understanding is that's consistent with the
9 evidence the Inquiry has already heard in that regard.

10 In the end of the day what happened was there was
11 the Coronavirus Act 2020 which, amongst its schedules,
12 accorded certain powers to the Scottish Government to do
13 things like impose legal restrictions on members of
14 Scottish society. Is that your understanding?

15 **A.** Yes.

16 **Q.** That operated within the devolution arrangements,
17 subject to any extra powers that were included in the
18 2020 Act?

19 **A.** Yes.

20 **Q.** Would it be fair to say at an overall level, without
21 getting into any legal detail, that that resulted in
22 a situation whereby the blurry lines became something of
23 an issue, because the pandemic strategy in Scotland
24 required input in certain areas from the UK Government,
25 but accorded overall control to the Scottish Government?

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1 your report -- which hopefully I can summarise, but
2 please correct me if I'm going wrong -- that there would
3 in these circumstances have been two ways in which, from
4 a legal and constitutional perspective, the pandemic
5 could have been managed.

6 I think you highlight, about which evidence has been
7 heard in Module 2 as well, that the pandemic could have
8 been governed by the Civil Contingencies Act route or it
9 could have been governed the way it was, via what
10 I think you describe as the public health route.

11 **A.** Yes.

12 **Q.** And that these two routes have different legal and
13 constitutional outcomes in terms of responsibility for
14 the management of the pandemic; is that right?

15 **A.** I think so.

16 **Q.** Yes, and I think that the evidence we've heard in
17 Module 2 already, and please tell me if you disagree
18 with this, is that had the Civil Contingencies Act route
19 been used, that would have resulted in a greater degree
20 of responsibility being vested in the UK Government for
21 matters pertaining to Scotland than actually happened;
22 is that correct?

23 **A.** That is what I -- I'm relying on more expert people than
24 I --

25 **Q.** Yes.

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1 **A.** Yes.

2 **Q.** For example, you highlight in your report at least one
3 major area, but possibly other areas, that would
4 technically fall within the reserved powers of
5 the UK Government. The major one is funding --

6 **A.** Yes.

7 **Q.** -- to which we will return. The UK Treasury remains
8 a reserved matter. There are other, there are perhaps
9 multiple matters, but another one which is of some
10 significance to this module is the question of borders.

11 **A.** Yes.

12 **Q.** Because border control generally is a reserved matter.

13 **A.** Yes.

14 **Q.** Therefore, is it fair to say that your assessment is
15 that there required, given that that route was selected,
16 to be a significant degree of co-ordination and
17 co-operation between the governments, given the all
18 encompassing nature of the pandemic and its effects?

19 **A.** Very much so.

20 **Q.** And given that requirement, the blurry lines caused
21 a significant problem?

22 **A.** I think so, yes.

23 **Q.** You also, in your report, in the very helpful lengthy
24 section about pandemic preparedness, talk about a lot of
25 systems which existed and about which the Inquiry has

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1 heard in detail in Module 1 to do with resilience
 2 partnerships and that sort of thing. Given that -- is
 3 it your understanding that the systems which existed
 4 pre-pandemic as far as Scotland's preparedness was
 5 concerned were based on a civil contingencies type
 6 outcome in terms of the way a pandemic or any other
 7 emergency might be managed?

8 **A.** My impression is that they had -- they had two different
 9 systems running on parallel tracks, so one of them was
 10 civil contingencies and the legislation that required
 11 the Scottish Government to prepare for an emergency.

12 **Q.** Yes. But the systems that we were talking about were
 13 systems that would be employed in a civil contingencies
 14 type scenario, the scenario that wasn't actually
 15 followed through; is that right?

16 **A.** Yes. I mean, my impression -- to be honest, I found the
 17 documents very confusing, but my impression was they
 18 were anticipating either -- "emergency" is defined very
 19 generally, so they very rarely refer to a pandemic, or
 20 they're anticipating -- my impression is that they're
 21 anticipating emergencies a bit like natural disasters,
 22 where there's this very quick responses by emergency
 23 services to an incident. I don't think that many of the
 24 documents talk about, you know, the scale of this kind
 25 of pandemic.

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1 of being challenged, but that it made a decision not to
 2 legislate in the Scottish Parliament in favour of
 3 a four nations approach built on legislation in
 4 Westminster.

5 **Q.** So your understanding from the Scottish Government
 6 materials is that the Scottish Government had the power
 7 to impose a lockdown before it was imposed?

8 **A.** If it legislated to do so.

9 **Q.** Yes.

10 **A.** Yes.

11 **Q.** Indeed. But that it chose not to in favour of the
 12 four nations approach, which culminated in
 13 a co-ordinated commencement to the lockdown in
 14 March 2020?

15 **A.** Yes.

16 **Q.** Is it fair to say -- one might say, I think, that -- or
 17 is it fair to say that in this area there may be
 18 a significant degree of confusion as to where the power
 19 lies in this regard?

20 **A.** Yes.

21 **Q.** And that perhaps is why you have struggled, as others
 22 have, to work out what the position is?

23 **A.** Yes.

24 **Q.** But your understanding of the evidence is that the
 25 Scottish Government's position is that it felt it could

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1 **Q.** Could we look at, please, paragraph 59. Under
 2 subparagraph (e), please.

3 You talk there, I think, and tell us that the
 4 materials which you've looked at suggest that -- in
 5 written testimony in particular, that from a legal
 6 perspective, and with the caveat that you're not
 7 a lawyer and you're relying on this material, the
 8 Scottish Government's position, or at least certain
 9 individuals who were prominent in the Scottish
 10 Government at the time, suggest that the Scottish
 11 Government could have acted so as to impose lockdown,
 12 for example, before the Coronavirus Act 2020?

13 **A.** Yes, and this is one of -- an example where I think
 14 I got far more clarity from the Scottish Government in
 15 comparison to other issues, because in the draft of my
 16 report I had said -- I had said that I'm honestly not
 17 sure if the Scottish Parliament could have legislated in
 18 this field, and I'm not sure what the legal position was
 19 before that.

20 **Q.** Mm.

21 **A.** And I got very clear -- which I quoted here -- very
 22 clear feedback from the Scottish Government that the
 23 Scottish Government could have initiated the legislation
 24 in the Scottish Parliament, because this was clearly
 25 a public health responsibility, so there were no issues

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1 legislate for a lockdown in the period before 23 March?

2 **A.** Yes.

3 **Q.** And we know, of course, that the Scottish Government did
 4 not legislate and have a lockdown before that period,
 5 but it did issue a number of recommended courses of
 6 action in early March to curb social interaction and the
 7 like?

8 **A.** Yes.

9 **Q.** Given that there is a lack of clarity in this area, it
 10 would appear, and it is your evidence that that is the
 11 case, is this the sort of thing that would have
 12 benefitted from clarification of the blurry lines,
 13 perhaps in a Joint Ministerial Committee, so that if
 14 an emergency like this struck, everyone would know what
 15 their powers were?

16 **A.** Yes.

17 **Q.** Does it appear to be the case that the lack of clarity
 18 contributed to issues around a delay in the lockdown at
 19 that time based on your assessment of the materials?

20 **A.** That's tricky for me to answer. What I can say for sure
 21 is that the feedback from the Scottish Government is
 22 that they thought this was the quickest way to do it.
 23 So I think from their perspective this reduced delay.
 24 I think the counterfactual is: what if Scottish
 25 Government ministers had much earlier on recognised this

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1 as a problem, thought that the UK Government was not
2 doing enough about it, and therefore legislated much
3 more quickly? From the documents they have given, they
4 do not give the impression that they were operating on
5 a much more accelerated timetable than
6 the UK Government, and therefore, they were quite close
7 together, it made sense for them to do this quickly.

8 I think that sometimes things that aren't left said
9 is, although the UK Government does not challenge
10 Scottish Government legislation much, the UK Government
11 and citizens can challenge Scottish Parliament
12 legislation if deemed out of competence.

13 So I think it would be reasonable for the Scottish
14 Government to say that during a crisis, when there's not
15 100% clarity on who's responsible, it makes sense for
16 Westminster to legislate because then it won't receive
17 that challenge over competence in a way that the
18 Scottish Government could.

19 **Q.** But as I think you accepted earlier, one might, in
20 a counterfactual situation, had there been greater
21 clarification over these matters between the governments
22 to deal with the pandemic --

23 **A.** Yes.

24 **Q.** -- that we might have been operating in a counterfactual
25 situation where there wasn't that lack of clarity?

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1 **A.** Okay.

2 **Q.** -- about the financial issue that meant that they had
3 the responsibility but not the financial means to act,
4 which it seems played some part in the decision-making.

5 **A.** I --

6 **Q.** We'll get on to the more difficult stuff in a moment,
7 I assure you.

8 **A.** Okay.

9 So I think the Scottish Government position is that
10 an act such as lockdown would be profoundly expensive,
11 and that has been borne out, and it did not have the
12 means to borrow the money to finance that activity. It
13 had a budget, but that budget was already allocated, and
14 we're talking about a scale that it wouldn't be able to
15 fund, for example -- I think the biggest example is the
16 employment furlough, it didn't feel able financially to
17 fund its own furlough.

18 **Q.** So to be fair, I think it's important to point out that
19 the evidence that you've seen is pointing out that that
20 was an important factor in the decision-making as
21 well --

22 **A.** Yes.

23 **Q.** -- it wasn't simply a matter of "We can just go off and
24 have a lockdown because we can", there were other
25 considerations, including these financial

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1 **A.** Yes, I think if they had their time again they would
2 have clarified this and the Scottish Parliament would
3 have legislated.

4 **Q.** Okay.

5 One of the other things that you mention there that
6 we'll come on to in a moment is you interpret the
7 evidence that you've seen as being that the Scottish
8 Government had the formal responsibility but not the
9 financial means to act, before saying this was
10 an example of the blurry boundaries.

11 What is your understanding of the concern about the
12 financial means that would have been necessary for the
13 Scottish Government to act?

14 **A.** Okay, so this is a remarkably concise answer based on
15 the detail.

16 **Q.** Thank you.

17 **A.** The -- essentially, the history of Scottish Government
18 finance has been that the Treasury essentially provides
19 the budget, the size; the Scottish Government decides
20 how to spend it. So --

21 **Q.** Professor, I want to get into a little bit of the detail
22 about how funding works in a moment -- sorry to cut
23 across you -- but I'm just trying to clarify what your
24 understanding of the evidence that emanates from the
25 Scottish Government as to what it was specifically --

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1 considerations, to take into account?

2 **A.** Yes, because I think the key question, when they're
3 considering solutions, is: is this solution feasible?

4 So at the time they were wrestling with two
5 feasibility issues. One was the political one: will
6 people accept a lockdown? The other was the technical
7 feasibility: can we do it and can we afford it? And
8 I think, yeah, that informed all decision-making at that
9 time.

10 **Q.** Thank you.

11 Before we move on to look at this area of funding in
12 a bit more detail, I just wanted to clarify with you,
13 which is an important although I think sometimes perhaps
14 misunderstood element, of the way that the devolution
15 settlement played out in the pandemic. It is important
16 to understand, is it not, that the UK Government
17 continued to have a direct role in controlling Scottish
18 matters during the course of the pandemic?

19 **A.** Yes.

20 **Q.** Not all Scottish matters, but certain Scottish matters
21 that were reserved to their competence?

22 **A.** Yes.

23 **Q.** So, for example, as we will see in a moment, the funding
24 arrangements were still generally controlled by the
25 Treasury?

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1 A. Yes.

2 Q. I say generally because there are some tax raising
3 powers of the Scottish Government that we'll touch on.

4 A. Yes.

5 Q. Other areas, for example, that we've seen, we've heard
6 something about already, defence is a reserved matter?

7 A. Yes.

8 Q. So that during the course of the pandemic, when the
9 military required to be brought in to assist with
10 hospitals, that was a matter over which the
11 Secretary of State for Scotland took control?

12 (Pause)

13 A. Yes.

14 Q. If you don't know that particular --

15 A. I --

16 Q. In general terms --

17 A. In general terms --

18 Q. -- defence matters would be for the UK Government --

19 A. UK government.

20 Q. -- and if you take it from me on the hypothesis that
21 there required to be defence intervention, you would
22 expect that to be a matter for the UK Government.

23 A. Yes.

24 Q. So although operational control of the pandemic lay with
25 the Scottish Government, the UK Government had exclusive

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1 be?

2 A. Yes.

3 Q. Broadly speaking, the way that the amount is arrived at
4 is by the application of something called the Barnett
5 formula; is that right?

6 A. Yes.

7 Q. And the Barnett formula is an agreed, though not
8 uncontroversial, means by which a budget is set,
9 effectively, for England, and Scotland is given
10 a percentage of that, and that's its block grant; is
11 that correct?

12 A. Yes. The only way I would qualify it is that the term
13 "Barnett formula" has taken on this wider meaning, it
14 means all sorts of things to different people. So it
15 can be defined in the way you suggest, but I would not
16 assume that that is a widely understood description of
17 how it works.

18 Q. Right. Effectively the way I've suggested is that it
19 involves the application of a fixed percentage of the
20 amount allocated to the budget for England, and the
21 application of that to the English budget gives you what
22 the Scottish budget is. Is that broadly correct?

23 A. Yes, and I think, you know, the brief context is that it
24 was treated by the Treasury as a means to make changes
25 to the Scottish budget as automatic as possible.

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1 control in certain areas and therefore an important part
2 to play in Scotland's pandemic response?

3 A. Yes.

4 Q. Thank you.

5 So then to turn to the question of funding, we go to
6 paragraph 255, please.

7 This is what we described earlier as topic 7. You
8 were asked a specific question about this, and you say,
9 I think, at paragraph 258 -- if we could just go over
10 the page -- I think as you've already said in passing
11 that the general rule as far as funding in Scotland is
12 concerned is that the Treasury heavily influences the
13 size of the Scottish Government's budget but it does not
14 control how the Scottish Government spends its budget?

15 A. Yes.

16 Q. Is that correct? Again, if I could try and put this to
17 you, and if you disagree please tell me. My
18 understanding of the very helpful evidence you've given
19 in this regard is that funding is normally allocated to
20 Scotland by the UK Treasury as part of a block grant; is
21 that correct?

22 A. Yes.

23 Q. And that when the grant is being fixed by the
24 UK Treasury, there will be some level of negotiation
25 with the Scottish Government about how big that should

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1 Q. Yes.

2 A. They didn't want to have these annual disputes about how
3 much the budget should be, and this was the formula
4 to --

5 Q. Yes, indeed, indeed. So that's why, although one might
6 do it a different way, many people may, there is a fixed
7 formula which tries to simplify the process?

8 A. Yes.

9 Q. And that presumably gives a certain degree of
10 predictability about what the funding might be for
11 future planning purposes and many other factors?

12 A. Yes.

13 Q. At paragraph 261, this is in the section where you are
14 talking about the Scottish Government's pandemic
15 response, you note that the Scottish Government's budget
16 available to deal with the pandemic was largely
17 influenced by spending on comparable services in
18 England. Is that because where large amounts of
19 effectively emergency funding were allocated for England
20 by the UK Treasury, generally speaking, the amount for
21 Scotland was calculated by the application of the
22 Barnett formula?

23 A. Yes, particularly if -- the expectation would be a lot
24 of the funding would be on the National Health Service,
25 so that would be treated as a devolved matter, highly

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1 comparable, so it would be relatively straightforward to
 2 apply.
 3 **Q.** Yes. In circumstances where the Barnett formula is
 4 applied as the tool -- you described it as being to
 5 a block grant -- it may well be the case that the
 6 Scottish Government may apply a greater proportion to
 7 one area and a smaller proportion to another; is that
 8 right?
 9 **A.** Yes.
 10 **Q.** And that the Scottish Government has the power to
 11 decide, once it's got its grant, what it uses it for?
 12 **A.** Yes.
 13 **Q.** And over a block grant, which applies to all services,
 14 although the Scottish Government may disagree, the
 15 amounts that are required may balance out because there
 16 might be greater spending in one area as a result of
 17 Scottish Government policy but there may be a lesser
 18 requirement to spend in another area; is that right?
 19 **A.** Well, certainly they have to balance their budget.
 20 **Q.** Yes.
 21 **A.** So any additional spending in one area has to be met by
 22 a reduction somewhere else.
 23 **Q.** Yes, but the theory at least is that they require to do
 24 that and therefore if the Scottish Government decides to
 25 spend more on health, for example, it would have to find

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1 situation, is this the sort of matter which could have
 2 formed part of discussions in a Joint Ministerial
 3 Committee to work out how such eventualities may be
 4 dealt with in an emergency?
 5 **A.** Yes. I would say given the level of crisis and,
 6 you know, the sort of unprecedented nature of the
 7 crisis, the kind of negotiations between civil servants
 8 in the UK and Scottish Government would require a level
 9 of co-operation between ministers to give them the cover
 10 to talk those things through.
 11 **Q.** I think you have drawn upon perhaps other sources but
 12 certainly John Swinney's evidence to Module 1 where he
 13 said that -- not just at ministerial level but more
 14 broadly his evidence was that relations between the two
 15 governments at the time the pandemic struck were
 16 particularly poor?
 17 **A.** Yes, I think -- and it might be important to stress,
 18 you know, poorer than what?
 19 So I would say from 1999 to 2007 you had Labour
 20 leading both governments, and all of these issues you
 21 talk about would be dealt with quite informally. If
 22 there were crises at ministerial level it would be dealt
 23 with informally between parties. From 2007 that was not
 24 possible, and the devolved administrations pushed for
 25 more formal arrangements. But I think these meetings

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1 that proportionate deficit elsewhere?
 2 **A.** Yes.
 3 **Q.** Is it correct to say, as I think we've confirmed
 4 already, that the way in which funding for the Covid-19
 5 pandemic generally worked would be that money would be
 6 allocated by the UK Treasury as an emergency budget, and
 7 that the Barnett formula would be applied in order to
 8 reach the amount that Scotland would get?
 9 **A.** Yeah, so I think eventually, instead of working it out
 10 after the spending had taken place, they estimated what
 11 the spending would be.
 12 **Q.** In advance?
 13 **A.** Yes.
 14 **Q.** Is it your view that such an approach to working out the
 15 Scottish share for specific matters in an emergency
 16 situation, which although generally certainly adopted if
 17 not necessarily entirely agreed with, is the approach to
 18 overall block grant is an appropriate way of allocating
 19 funding to Scotland for its specific needs in a specific
 20 emergency?
 21 **A.** No. I would say that what became known as the "Barnett
 22 formula" -- that's me being academic -- was a political
 23 solution, was not a coherent financial solution.
 24 **Q.** Again, given your evidence that this was not
 25 an appropriate thing to deal with this sort of

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1 are largely in the control of the UK Government. The
 2 devolved governments can't successfully demand that they
 3 happen, so they're sort of subordinate partners there.
 4 So their relationship was already bad.
 5 The -- over the years there have been -- so it's
 6 been both sides. So the SNP has been highly
 7 dissatisfied with the UK Government. The UK Government
 8 has portrayed the SNP government as not to be trusted.
 9 So this was a key feature before, that their position
 10 was: it was very difficult to share information with the
 11 Scottish Government, because we do not trust their
 12 ministers to keep it quiet.
 13 So there was a lack of trust between ministers.
 14 It was exacerbated, I think, by key personalities,
 15 and exacerbated by the -- you know, the -- you know,
 16 Brexit, which was, you know, famously, you know,
 17 rejected by most people in Scotland.
 18 **Q.** Yes.
 19 **A.** So I would say that up to, roughly, the point of Brexit,
 20 it's hard to imagine a worse relationship between the
 21 UK Government and devolved government.
 22 **Q.** Thank you very much for that context. We'll obviously
 23 explore these matters with appropriate witnesses in due
 24 course, my Lady.
 25 Just a few final things on funding. One of the

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1 points that you mentioned earlier was that there was
 2 concern, and there's documentary evidence to suggest
 3 that this was the case during the course of the
 4 pandemic, that Scotland's policy control over the
 5 management of the pandemic may be limited by its lack of
 6 access to financial levers. In particular you gave the
 7 most prominent example of their ability to fund the
 8 furlough scheme were they to exercise their power to
 9 impose a further lockdown, for example, at a different
 10 time, perhaps, from England.

11 You, in your report, talk about this issue. It was,
 12 I think, a part of the narrative from the Scottish
 13 Government during the course of the pandemic that this
 14 was a problem, and you, I think, in your report, comment
 15 on this where you talk about the extent to which
 16 financial levers may influence policy decisions in
 17 Scotland.

18 **A.** Yes.

19 **Q.** Is that your understanding of the Scottish Government's
 20 position, broadly, from the papers that you've looked
 21 at?

22 **A.** Yes, that they needed the UK Government to allocate
 23 additional funds, that the Scottish Government did not
 24 have the means to provide those funds themselves,
 25 because, you know, almost all of this additional funding

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1 **Q.** There was something of a political issue. The document
 2 that you're talking about is -- there are two news
 3 articles. Just for the record I'll leave their numbers:
 4 INQ000360049; and the one relating to the
 5 Prime Ministerial response is INQ000360145.

6 Because would it not seem, from a political
 7 perspective, odd if the position were that, in terms of
 8 the Coronavirus Act, the political power had been
 9 accorded to the Scottish Government to do just that,
 10 create a lockdown if they felt it appropriate in the
 11 interests of Scotland, for the government,
 12 the UK Government, then to say "Well, if you feel you
 13 need to do that at a different time from us, we won't
 14 fund it"? Would that not be a politically unusual
 15 situation to be in?

16 **A.** I think so. I think the context you describe is
 17 important here, because if you had a situation before
 18 2020 when the two governments were working really well
 19 together, they knew each other and trusted each other,
 20 then if the Prime Minister had said "We will provide
 21 this funding in a flexible manner" the Scottish
 22 Government would have been assured and would have acted
 23 accordingly. I think the problem here is that -- in
 24 fact I'm sure this will come up in their testimony --
 25 Scottish Government ministers do not trust UK Government

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1 came from borrowing and the Scottish Government does not
 2 have those powers. It needed the certainty of how much
 3 it would receive so that it could allocate that funding
 4 quickly. And I think its position is it not only relied
 5 on the UK Government to give it this funding, but it
 6 also did not get a clear enough steer about what that
 7 funding would be.

8 **Q.** That's its position. There is evidence which
 9 the Inquiry has before it that this was a matter of some
 10 concern to the Scottish Government in around
 11 November 2020. You'll remember at that time that
 12 contemplation was being given to the possibility of what
 13 were called "firebreak" lockdowns to break chains of
 14 transmission, and there were concerns expressed not only
 15 on the part of the Scottish Government but indeed other
 16 politicians in Scotland that to do so would perhaps run
 17 the risk of a measure being taken that could not be
 18 supported financially.

19 Is it your understanding that a clarification was
 20 made at that stage to the effect that -- by the then
 21 Prime Minister -- that the furlough scheme would be
 22 available for future lockdowns in Scotland?

23 **A.** I think from a document I took that the former
 24 Prime Minister had given a verbal assurance that that
 25 would be true.

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1 ministers, and would not take a verbal assurance as
 2 something that they could plan on. And I think it's
 3 that lack of trust, you know, communication,
 4 co-operation, that would undermine the delivery of that
 5 kind of flexibility.

6 **Q.** Before I move on from that, just to point out, of
 7 course, the other devolved nations did have firebreak
 8 lockdowns around that time and, as I understand it, the
 9 Welsh firebreak lockdown had started before those
 10 exchanges on 1 November.

11 **A.** Mm.

12 **Q.** And it may be subject to subsequent evidence, but
 13 obviously those devolved nations have similar financial
 14 arrangements --

15 **A.** Yes.

16 **Q.** -- and therefore it would seem that some sort of plan
 17 had been laid out for the Welsh firebreak lockdown,
 18 which no doubt we will address in due course.

19 **A.** Yes. And I should say there's a long history of that
 20 kind of allocation. I think, again, the -- not everyone
 21 would use this term, but the -- academically you would
 22 say that is called "formula bypass". So the
 23 UK Government would ostensibly use the Barnett formula
 24 to make these decisions, but would always reserve the
 25 right to make any ad hoc financial decision it wanted to

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1 in relation to devolved governments. So there is a long
2 history of essentially saying "Here's your budget" but
3 then on an ad hoc basis giving different allocations.

4 **Q.** Okay, thank you.

5 One matter I just wanted to raise with you at
6 paragraph 289, please.

7 This is in your conclusions section relating to
8 topic 7. You earlier on have done an analysis of some
9 reports and materials available from, amongst others,
10 Audit Scotland, relating to the question of how the
11 money was spent --

12 **A.** Yes.

13 **Q.** -- and was the conclusion that came from that analysis
14 that it's difficult to know exactly what the money was
15 actually spent on?

16 **A.** Yes. I think that Audit Scotland's quite clear on that,
17 that it's -- they're very dissatisfied with the lack of
18 clarity and how the money was spent.

19 **Q.** When we talk about "the money", the money that was
20 allocated in support of the pandemic response?

21 **A.** Yes. And I think the added complication is that
22 Audit Scotland can only audit resource allocation by the
23 Scottish Government and the Scottish public sector, and,
24 you know, this response was characterised by spending
25 from the UK to the Scottish Government or the UK

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1 could possibly contribute collectively to joint
2 decision-making. I don't think that's what it exists
3 for. And if ministers want to perform that kind of
4 work, they do that in far smaller Cabinet committees, or
5 subcommittees.

6 So I think -- for as long as I've studied UK
7 politics, Cabinet has not been seen as a decision-making
8 body, it's rather been seen as a decision-ratifying
9 body.

10 **Q.** Right.

11 **A.** Whereas the -- at least the Scottish Government's
12 description of its Cabinet is that because it's smaller,
13 because they have cross-cutting responsibilities,
14 because directorates can respond to different ministers,
15 and because the Deputy First Minister has this
16 overarching role, it can perform that function that,
17 you know, would be -- you know, that most people would
18 think Cabinets perform.

19 **Q.** But consistently with some other themes from your
20 evidence, you say in paragraph 45 that this potential is
21 not necessarily or always realised.

22 **A.** Yeah. It's difficult. I would say the story that "We
23 make all decisions through the Scottish Cabinet" I think
24 is the official story. It was -- if I was doing
25 academic work, it would be my starting point for

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1 directly, and so not only did it not know what Scottish
2 Government spending was in sufficient detail, it was
3 unable to audit the UK Government spending.

4 **Q.** Okay. Thank you.

5 I'd like to move on to a separate topic, please,
6 which is to do with the structures for decision-making
7 within the Scottish Government, in particular
8 paragraph 42 of your report, please.

9 You say that:

10 "The Scottish Cabinet performs equivalent functions
11 to the UK Cabinet."

12 And I think you say there that in the constitutional
13 or the decision-making structures of the Scottish
14 Government, similar to the UK Government, the Cabinet is
15 the ultimate decision-maker; is that correct?

16 **A.** Yes.

17 **Q.** At paragraph 45, you note that compared to the
18 UK Cabinet, the Scottish Cabinet is smaller, which
19 creates a greater potential to "perform a more
20 meaningful collective function"; is that right?

21 **A.** Yes.

22 **Q.** What do you mean by that?

23 **A.** My impression of the UK Cabinet is that if -- in fact
24 you can see it visually: it's people sitting around
25 a huge table, and there are far more people there than

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1 criticise analysis to look at what actually happened.
2 I would just assume that there was always this gap
3 between the official picture and how things are really
4 done.

5 **Q.** When you mentioned earlier the concept of a -- the
6 UK Cabinet you were describing as potentially
7 a decision-ratifying body, what exactly do you mean by
8 it? Does that mean the decisions are taken elsewhere
9 and simply put before the Cabinet to rubber stamp them;
10 is that roughly what you're saying?

11 **A.** I mean, "rubber stamping" has a real --

12 **Q.** Yes, please use your own words to describe it.

13 **A.** I would say that given the amount of time and
14 deliberation and knowledge that it would take to make
15 a meaningful collective decision, and the time given to
16 a UK Cabinet and the amount of time for deliberation,
17 those two things don't match up. You could not make
18 decisions in that manner. And they don't.

19 I don't think even the UK Cabinet puts up much of
20 a pretence that that's how it works.

21 **Q.** The theory, however, of Cabinet being the
22 decision-making body is, I think, that various different
23 aspects of government decision-making and, by extension,
24 Scottish life, or UK life, are represented by different
25 people, such that different views can be brought to bear

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1 in a decision-making body that then leads to
 2 a collective decision; is that the theory at least?
 3 **A.** Yes. And I think those discussions do happen.
 4 Ministers, civil servants and others do debate those
 5 issues, but I think the UK style, if you like, is to do
 6 those things before Cabinet and behind closed doors, and
 7 then use Cabinet as a way of ratifying the decisions and
 8 discussions already had.
 9 **Q.** Yes.
 10 **A.** The portrayal of the Scottish Cabinet here is different,
 11 at least from the Scottish Government. It is that the
 12 Scottish Cabinet is the place where people have these
 13 debates and make these choices.
 14 **Q.** Okay.
 15 You mentioned there the complexity and volume of
 16 material that was inconsistent with the idea that
 17 UK Cabinet was actually making the decisions. Obviously
 18 within the pandemic, as we've seen, the volume and
 19 complexity of the material was at the extreme end.
 20 **A.** Yeah.
 21 **Q.** Do you think, therefore, that Cabinet, proper Cabinet
 22 decision-making, as the Scottish Government purports
 23 happens within its decision-making structures, would
 24 have the advantage of spreading the burden of that
 25 information and allowing its totality and complexity to

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1 **LADY HALLETT:** They were Cabinet committees, they were
 2 comprised of people, so they -- it wasn't as if they
 3 were just a couple of people in the corridor making
 4 a decision on their own.
 5 **A.** No, indeed not, no. But I think that would be --
 6 I think the Scottish Cabinet could be considered to be
 7 the equivalent of that Cabinet committee in terms of the
 8 size and scale. I think they had a Cabinet committee so
 9 they thought: let's have the most important people in
 10 the room, let's make it a manageable process.
 11 Particularly during an emergency.
 12 And I think the idea here is, because the Scottish
 13 Cabinet is already smaller, they could do that without
 14 relying as much on Cabinet committees.
 15 **LADY HALLETT:** Yes.
 16 **MR DAWSON:** Could I just go to paragraph 43, one final
 17 matter on this. In this paragraph you are talking about
 18 decisions which would normally be taken at the Cabinet
 19 level. Is there a clear guidance about decisions
 20 requiring to be discussed and made at Cabinet level and
 21 circumstances in which they can be delegated,
 22 for example, to an individual minister? I think here
 23 you suggest perhaps not?
 24 **A.** I think, well, the language matters here. I think ...
 25 I think from their perspective they're as clear as they

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1 be taken more into account in an ultimate decision than,
 2 say, for example, if you had just an individual
 3 decision-maker?
 4 **A.** Yes. I think it performed a profoundly important
 5 function, because on the one hand the -- you know,
 6 minute-by-minute day-to-day decisions of ministers could
 7 not be process -- you know, could not all be processed
 8 by a Cabinet, but they were able to process key matters
 9 of principle that would guide all activity. So --
 10 **Q.** Your evidence there is on the assumption, I think, that
 11 their purported model is the model that actually played
 12 out?
 13 **A.** Yes.
 14 **Q.** But we will explore that in the evidence. Your position
 15 is that during the course of the pandemic, that
 16 purported model of Cabinet decision-making would have
 17 been a good one for the reasons that we've discussed?
 18 **A.** Yes. If working well --
 19 **Q.** Yes.
 20 **A.** -- and as described, it would be an excellent way to
 21 make decisions.
 22 **LADY HALLETT:** With the UK Cabinet, what happened during
 23 Covid was we ended up with the Cabinet committees, like
 24 Covid-O and Covid-S.
 25 **A.** Yes.

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1 need to be, because I think the thing that is either
 2 stated elsewhere or is implicit throughout is that
 3 ministers have to make judgements to interpret these
 4 rules, and individual ministers are responsible for
 5 their own behaviour, Cabinet is responsible for the
 6 collective behaviour. So this is very much about the
 7 judgement of individuals within a broad context.
 8 **Q.** So that does that mean where responsibility is
 9 delegated, the Cabinet needs to decide -- understand
 10 it's giving away its collective responsibility to
 11 a particular individual, which may have -- it may,
 12 theoretically -- some adverse consequences, because
 13 that's the reason why Cabinet exists, to have
 14 a collective view?
 15 **A.** Yes. And it's interesting to me, the witness statements
 16 do provide examples of how this works, and I think they
 17 have provided the least controversial -- you know,
 18 I think if you look at the example they give, you
 19 think: okay, that's reasonable. So the example they
 20 give is: in principle we'll agree to remove the
 21 obligation to wear a face mask once these conditions are
 22 met, and then that is delegated to the First Minister.
 23 So I think that's -- you know, if you think these
 24 are the examples, then it's straightforward because the
 25 principle's been established, the measures of change

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1 have been established, so this is just a case of making
2 a decision.

3 **Q.** Yes.

4 **A.** It's -- I don't have access to, like, a full allocation
5 of the choices made by the First Minister.

6 **Q.** Yes, yes, I'm really trying to address this for the
7 purpose of looking at those sorts of decisions in the
8 abstract with you, to try to work out what would be the
9 advantages and disadvantages, which I think we've
10 covered.

11 **A.** Yeah.

12 **Q.** I would just like to go to paragraph 48, please.

13 In this section, you're telling us something about
14 the way in which the civil service works in Scotland.
15 The civil service is a reserved matter, is that correct?

16 **A.** Yes.

17 **Q.** Is it correct to say that the civil service at the time
18 of devolution was an important part of the devolution
19 settlement, in that in reserving the civil service to
20 the UK Government's ambit, that was one of the
21 mechanisms by which the primacy of the Westminster
22 Parliament would be thought to be maintained; is that
23 broadly correct?

24 **A.** Certainly the way I would describe it is this is the way
25 to solve most of those problems of intergovernmental

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1 was it changed the ability, the power -- it accorded
2 power to the Scottish Government to be able to appoint
3 its own civil servants?

4 **A.** Yes. I mean, I will admit to being confused by the fine
5 details of this. But my impression has always been that
6 the Scottish Government has delegated responsibility for
7 recruitment, so it essentially operates as -- you know,
8 a -- to some extent autonomous organisation recruiting
9 civil servants according to these rules, and so it's
10 a kind of operational rule within these rules.

11 So I think the only time this becomes a problem or
12 a contentious issue is the appointment of the most
13 senior civil servants. So essentially these are
14 supposed to be non-partisan, non-political roles, but
15 I think the most senior civil servant is performing,
16 you know, a very delicate political task, you know, that
17 would have to be managed well.

18 **Q.** But to be clear, from 2010, as you set out there, there
19 is a Scottish Government Civil Service Code; is that
20 right?

21 **A.** Yes.

22 **Q.** And the fundamental rule of that is, as a civil servant,
23 you're accountable to Scottish ministers, who are in
24 turn accountable to the Scottish Parliament?

25 **A.** Yes.

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1 relations we talked about. Regardless of relationships
2 between ministers, there would always be this excellent
3 relationship between civil servants.

4 **Q.** Right, but in terms of the constitutional settlement,
5 one of the things that -- one of the important things
6 that civil servants do is to advise ministers, that's
7 broadly their function?

8 **A.** Yes.

9 **Q.** And sometimes that might involve telling a minister that
10 they're not doing the right thing or making a bad
11 decision or they should think about it, or something
12 like that?

13 **A.** Yes.

14 **Q.** And one of the things in the settlement, the devolution
15 settlement, which related to that was the possibility
16 that civil servants might sometimes have to tell
17 Scottish Government ministers that what they were
18 wishing to do exceeded their legislative competence?

19 **A.** Yes.

20 **Q.** And that was a means by which that was meant to be
21 regulated?

22 **A.** Yes.

23 **Q.** You mention there the Constitutional Reform and
24 Governance Act 2010, was that an Act which -- it did
25 a number of things, but one of the things that it did

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1 **Q.** There's an accountability there to the Scottish
2 Ministers, as opposed to the UK Government in some way?

3 **A.** Yes. And that did become an issue in relation to
4 Scottish independence, because the permanent secretary
5 at one time was expressing that language, to say "I am
6 here to support an SNP-led Scottish Government, it is
7 their commitment to foster independence, therefore it is
8 my duty to, you know, foster that". So I think that
9 was -- really symbolised there, in terms of the balance
10 they struck -- very much the way they articulated their
11 role was in relation to the Scottish Government, and
12 they would often downplay their, you know, wider UK
13 role.

14 **Q.** Have these sorts of things given rise generally to
15 concerns, at least about whether the Scottish civil
16 service is too committed to the cause of independence?

17 **A.** I mean, there would be lots of expressed concerns by
18 certain people. So it's hard for me to give, you know,
19 like, a balanced account of that. That's essentially
20 a --

21 **Q.** All I'm asking is: is that a matter which is an issue in
22 public discourse, about there are concerns in that
23 regard? I am not asking you to say whether they are
24 well-founded or not, but merely that this is a matter on
25 which political commentators, political experts like

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1 yourself, that you're aware this is an issue which you
2 are sometimes called upon to discuss and think about?

3 **A.** Yeah, certainly it would not be difficult to find
4 critics of the Scottish Government civil service saying
5 that they were too committed to the SNP government.

6 **Q.** Thank you.

7 Could I go to paragraph 206, please. This is the
8 last topic that I intend to take you to, Professor.

9 This is the section which, if I recall, is topic 5,
10 where you're talking about public communications.

11 **A.** Okay.

12 **Q.** You give again a very useful commentary on this. At
13 paragraph 206 you refer to other literature which notes
14 that at times of crisis leaders can be led into a more
15 presidential style of decision-making and communication,
16 where the elected leaders seek to personalise their
17 power.

18 Do you think that a presidential style of leadership
19 was a feature of the Scottish Government's
20 communications strategy, in particular Nicola Sturgeon
21 fronting much of the communication operation?

22 **A.** Yes.

23 **Q.** In your report, you also note at paragraph 229 that
24 there is -- you've helpfully told us about some polling
25 which exists which tends to suggest that Nicola Sturgeon

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1 them as part of your duty. So if you simply
2 unconditionally trust a government, you're failing in
3 your duty to hold them to account.

4 So -- and I think the satisfaction in trust is quite
5 a weak proxy of how things are going, because people may
6 put their trust in governments without any evidence,
7 you know, to give them the reason to do it. Or there
8 are clear differences in terms of trust in governments
9 according to the extent to which you share their beliefs
10 or you support the party that they're from.

11 Okay, so you separate that out, there's still this
12 difference in trust, but they are also looking for
13 measures of understanding and compliance with the
14 measures they take and measures over time. So they want
15 to know: do people understand what we were asking of
16 them? Do they agree with what we're asking them to do,
17 or at least are they willing to do it, and are they
18 doing it?

19 So those are very different polling data. One is
20 very general and one is specific on behaviour.

21 **Q.** I think you say that at least there's limited evidence
22 of the second type, the ability of the public to
23 understand the information, whereas there is
24 a proliferation of evidence from various different
25 places for public satisfaction, which may be a less

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1 in her public role certainly compared favourably to
2 Boris Johnson in terms of public approval, but you make
3 a distinction there between public satisfaction with
4 government communication and the ability of the public
5 to understand the information conveyed by governments.

6 Could you just explain briefly the difference and
7 the significance of that?

8 **A.** Yeah, so the -- so governments commission essentially
9 proxies -- proxy information of how well their campaigns
10 are going. One of them is a question about, you know:
11 "Do you trust this government and this government to act
12 in your best interests?" Or something like that.

13 So the Scottish Government scored consistently
14 higher in terms of that general trust that this
15 government was acting in your best interests. So
16 I think that's -- that's not only work commissioned by
17 the Scottish Government, but also in independent
18 polling. I think you might struggle to find someone who
19 didn't come up with that same kind of picture.

20 They also commissioned work to try to understand --
21 because, you know, the issue with trust is -- it is not
22 all a good thing. So in work that I have reviewed, the
23 authors prefer this idea of watchful trust, which is you
24 put enough trust in people that you think they're
25 competent and sincere, but you always keep an eye on

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1 reliable and less helpful indicator; is that correct?

2 **A.** I think if you truly want to understand if people
3 understand information, you have to ask them to describe
4 it. You have to say to them: tell me what this means.
5 You don't ask them "Do you understand what this means?"
6 Because lots of people will say they understand but will
7 not be able to describe it.

8 So they're working on these proxies, and there are
9 some examples -- so I think this is an interesting one
10 that I would probe. The Scottish Government
11 representatives have been asked about this already in
12 Scottish Parliament committees, and a committee has put
13 to key people that there are campaigns that we have done
14 that people clearly don't understand or even remember.
15 So the famous one is FACTS, which I could perform not
16 knowing what the five things stand for, but I simply
17 could not -- I don't know what they stand for, and
18 I studied it and in my report they're listed. I think
19 it's striking that a minister giving evidence to
20 a Parliament committee was given a round of applause for
21 recounting those five, and I think to me that summed up
22 the issue.

23 So I think the response from key people has been:
24 well, even if people could not tell you what FACTS
25 means, it has raised awareness and the kind of -- they

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1 kind of know what it means. They know, okay, wear
2 a face mask, distance yourself, seek a test and so on.
3 So there's a lot of that focus from Scottish
4 Government submissions on: this is generally going okay,
5 look at the weight of communication that we're doing,
6 and -- I would say that's a key theme. Whenever probed
7 to say "How effective is your campaigning?" the answer
8 will be, "Oh, look at the amount", and I think that's
9 an issue for me.

10 **MR DAWSON:** My last question was going to be whether you
11 could recount FACTS, but as you inform me you don't want
12 to do that, that is my last question. Thank you very
13 much, Professor.

14 There are no core participant questions, my Lady.

15 **LADY HALLETT:** Thank you very much indeed, Professor. We've
16 hardly touched the surface. You've obviously done
17 a huge amount of work, for which I'm extremely grateful,
18 but don't worry about the rest of your written material,
19 we take into account all the evidence, not just the
20 oral, the written as well.

21 **THE WITNESS:** Thank you.

22 **LADY HALLETT:** I'm just sorry I won't have the time to pop
23 along to Stirling and listen to a seminar or lecture, if
24 you still give them. So thank you very much for your
25 help.

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1 If we turn to page 35, there will be a signature
2 which is beneath the personal data. Is this your
3 statement?

4 **A.** It is.

5 **Q.** Are the contents of this statement true to the best of
6 your knowledge and belief?

7 **A.** They are.

8 **Q.** I understand, Dr Macaskill, that you wanted to say
9 something before we get into the substance of your
10 evidence. Here is an opportunity to do so.

11 **A.** Thank you, Mr Tariq.

12 And I think it's very important, on behalf of
13 Scottish Care's care home, home care and housing support
14 members, that I would state at the beginning my own
15 personal but also our organisation's condolences to the
16 thousands of individuals who lost their lives as
17 a direct result of Covid, but also to the tens of
18 thousands of others who had lost the opportunity to
19 spend their last few months, weeks of their lives
20 because of the measures which were undertaken during the
21 pandemic. So we express our condolences to them.

22 But I would also want at the same time to recognise
23 and to underline the amazing dedication of frontline
24 women and men who went out to care in our care homes and
25 in other community settings and in individual homes.

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1 **THE WITNESS:** Thank you.

2 **(The witness withdrew)**

3 **LADY HALLETT:** Right, I shall return at 1.35.

4 **(12.35 pm)**

5 **(The short adjournment)**

6 **(1.35 pm)**

7 **LADY HALLETT:** Mr Tariq.

8 **MR TARIQ:** Good afternoon, my Lady. May I please call
9 Dr Donald Macaskill.

10 **DR DONALD MACASKILL (sworn)**

11 **Questions from COUNSEL TO THE INQUIRY**

12 **LADY HALLETT:** Sorry you have been kept waiting for some
13 time, Dr Macaskill.

14 **MR TARIQ:** Dr Macaskill, thank you for your assistance to
15 the Inquiry to date.

16 There are a few preliminary matters that I wanted to
17 raise with you. Can you please keep your voice up and
18 speak slowly, because we have a stenographer who is
19 taking a note for the transcript. If any of my
20 questions are unclear, please say so, and I will
21 rephrase.

22 Scottish Care has provided a witness statement to
23 the Inquiry that's dated 11 July 2023. The statement is
24 at INQ000224524, and you will see that the statement is
25 on the screen in front of you.

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1 They are the best of us. At a time of real fear, when
2 the novel coronavirus was presenting itself, they left
3 the comfort of their own homes to care for and support
4 some of our most valuable citizens. Thank you.

5 **Q.** Thank you, Dr Macaskill.

6 I want to now start with the substance of your
7 evidence and I want to begin by asking you questions
8 about Scottish Care.

9 Scottish Care is a membership organisation
10 representing the independent care sector in Scotland; is
11 that right?

12 **A.** That's right. So we represent charitable, not for
13 profit, employee-owned and private providers of older
14 people's care in care homes, and in the community in
15 care home and housing support.

16 **Q.** As I understand it, Scottish Care has around
17 350 members; is that correct?

18 **A.** Correct.

19 **Q.** During the course of the pandemic, your interest lay in
20 the field of care homes but also those that were being
21 cared for at home, as your members delivered both of
22 those services; is that correct?

23 **A.** That's correct, yes.

24 **Q.** These services were delivered to a wide range of people,
25 it could be older people, people with long-term health

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1 conditions, people with disabilities, people with
 2 learning disabilities and people with physical
 3 disabilities; is that correct?
 4 **A.** Correct.
 5 **Q.** The organisations that Scottish Care represents, they
 6 vary in size; is that correct?
 7 **A.** Absolutely, they vary from single operators, often
 8 family-run operators, charitable organisations of
 9 various size, all the way up to national and larger
 10 corporate bodies.
 11 **Q.** Over the course of the pandemic, your members were at
 12 the forefront of caring for some of the most vulnerable
 13 people in our society, both in residential care settings
 14 but also in individuals' homes; is that right?
 15 **A.** Yes, and the frontline staff employed by our members
 16 were very much at the forefront of addressing the
 17 challenge of the pandemic.
 18 **Q.** I now want to turn to the role of Scottish Care in the
 19 pandemic.
 20 It said in the statement of Scottish Care that
 21 Scottish Care was at the heart of the debate and
 22 discussion around the social care sector, that it
 23 provided a detailed and vocal response to the issues
 24 faced by the care sector in Scotland. Your statement
 25 explains that Scottish Care attended meetings and

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1 questions about this period.
 2 Can we turn to the report from Public Health
 3 Scotland which is titled "Discharges from NHSScotland
 4 Hospitals to Care Homes between 1 March and
 5 31 May 2020". This report is at INQ000101020, and you
 6 will see that the report is on the screen in front of
 7 you.
 8 Can we turn to page 6 of the report.
 9 You will see that there is figure 1 on page 6 of the
 10 report, and you'll see that on 13 March it says:
 11 "First Clinical Guidance for Care Homes."
 12 And this is stated as being: social distancing,
 13 essential visits only, accept admissions to the
 14 care home if safe, close the home if resident tests
 15 positive.
 16 So if we can explore some of these further, what was
 17 understood within the care home sector to have been
 18 meant by "accept admissions to the care home if safe"?
 19 **A.** So before that development of that guidance, we had made
 20 representations -- and you have evidence of my
 21 communications with Scottish Government -- that, based
 22 on a long period of distrust between particularly
 23 residential but also nursing care home providers, we
 24 needed a degree of assurance that what was meant by
 25 clinical assessment was sufficiently robust. Indeed, in

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1 working groups convened by the Scottish Government, it
 2 contributed to guidance that was produced by the
 3 Scottish Government and Public Health Scotland, which
 4 impacted the sector, and it maintained direct and
 5 regular communications with the Scottish Government on
 6 the key issues affecting the sector. Is that correct?
 7 **A.** Correct.
 8 **Q.** I want to turn to the period leading up to
 9 21 April 2020, and in particular look at some of the
 10 Scottish Government's decision-making in that critical
 11 period of March 2020 and up to 21 April 2020.
 12 We know that a large number of patients were
 13 transferred from hospital to care homes without being
 14 tested for the virus in the early stages of the
 15 pandemic, and it was not until 21 April 2020 when it
 16 became mandatory for hospital patients to have two
 17 negative Covid-19 tests before being discharged and for
 18 all new care home admissions to be isolated for a period
 19 of 14 days.
 20 There is data which shows that between 1 March and
 21 21 April 2020, 82% of the 3,595 patients discharged from
 22 hospital to care homes were not tested, and 752 care
 23 homes took in untested patients between 1 March and
 24 21 April 2020.
 25 So I hope that that summary contextualises my

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1 our early meetings with our members online, we had
 2 stipulated that at this stage our guidance was, and this
 3 remained the case, that providers should not admit new
 4 residents unless they were assured about the robustness
 5 of the clinical assessment.
 6 We challenged that that should include the testing
 7 of those being admitted, both from the community and
 8 from discharge from any setting, but particularly
 9 an acute and secondary care setting. There were reasons
 10 given to us as to why that was not possible, and instead
 11 the argument that was made by clinicians was that
 12 a robust clinical assessment should be sufficient to
 13 enable somebody to be admitted.
 14 On the one hand, hearing all that we were hearing
 15 about how important it was to keep flow happening and
 16 not to have our NHS hospitals collapse, we were cautious
 17 about being the sector which stopped that flow, but on
 18 the other hand we were also extremely well aware, not
 19 least myself through my international connections and
 20 contacts, of what was happening in Italy and Spain and
 21 also in France, that the population most at risk was
 22 a population over the age of 80, with multiple
 23 comorbidities, and that tended to be a population that
 24 lived in Scotland's care homes.
 25 So we were balancing our knowledge that the

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1 population most at risk from this novel coronavirus was
2 our population, whilst at the same time seeking robust
3 assurance that if somebody was discharged from hospital,
4 that we could be as assured as we could be that that
5 person was safe and was not coronavirus positive.

6 **Q.** Before we go through the guidance in a bit more detail,
7 I'm interested to find out what your experience and
8 understandings were at the time based on what you were
9 seeing internationally. Are you able to explain that in
10 more detail?

11 **A.** I was a member and still am a member of the Global
12 Ageing Network and also the Commonwealth ageing network,
13 and we were in regular contact, in February and into
14 March, exchanging what was happening in different parts
15 of Europe and more widely internationally, and it was
16 known to anybody in the care sector that the population
17 most at risk was our older population.

18 And we were already, even in late February and
19 certainly in early March, beginning to identify that the
20 classic symptoms demonstrated as being Covid symptoms
21 were not manifesting in the same way in a population
22 which was particularly old and with multiple
23 comorbidities. So added to the usual characteristics of
24 fever and cough and flu-like symptoms, we were
25 evidencing a loss of mobility, confusion, delirium,

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1 professional respect from Public Health Scotland and its
2 understanding of the social care sector and its unique
3 situation, particularly in relation to infection
4 prevention and control in care homes, to be wholly
5 regrettable.

6 **Q.** You've touched upon what you describe, I think, as
7 limited engagement in respect of the guidance that came
8 on 13 March. Is it correct that I think you were only
9 consulted, is it, on 12 March, about the draft guidance?

10 **A.** Yes, and given a quite tight timeframe of a matter of
11 hours to make comments. And not just in terms of
12 admission, we made comment about the reality of how
13 difficult it was to transfer a system of
14 essentially infection prevention and control methodology
15 developed for an acute sector such as a hospital into
16 an environment such as a care home, particularly
17 a residential but including a nursing home, which was
18 first and foremost somebody's home.

19 And whilst in words clinicians may have accepted,
20 "Yes, we recognise this isn't a hospital, it's
21 a care home and somebody's home", what that actually
22 meant in terms of the freedom of movement, in terms of
23 managing and supporting somebody living with later stage
24 dementia, in terms of the importance of mobility and
25 routine and ritual in living in your own home was

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1 issues to do with continence, diarrhoea and vomiting,
2 which were more frequently being manifested as symptoms
3 of the new coronavirus.

4 So the international social care community was very
5 aware, as we were in Scotland, that this was of
6 significance to our sector, which is why Scottish Care
7 became the first body in the UK, and indeed, as far as
8 I'm aware, in Europe, to issue our own guidance at the
9 end of February for our members.

10 **Q.** Looking at the guidance that was issued on 13 March, the
11 guidance on 13 March refers to "accept admission to the
12 home if safe". Is the qualifier, "if safe", is that
13 a clinical assessment that's being made?

14 **A.** So what is meant there is clinical assessment.

15 I should say that we were disappointed with the
16 process of the development of the guidance on 13 March,
17 and we've presented evidence and papers to the Inquiry
18 to that end.

19 We found that there was a minimum level of
20 engagement with Public Health Scotland, or HPS at this
21 time, in the development of this guidance, and as was
22 seen both here in the necessity to repeat that guidance.
23 Mainly as a result of our remonstrations later in the
24 month, we found, both here but also throughout the main
25 stage of the pandemic, the lack of engagement and

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1 singularly failed to be understood, certainly at this
2 juncture but I have, unfortunately, to say at several
3 points during the pandemic.

4 **Q.** We will come back to other points in the pandemic, but
5 just so I'm clear, that Scottish Care had issued its own
6 guidance as early as, is it late February?

7 **A.** I think from memory 24 February.

8 **Q.** And when it comes to the guidance that comes from the
9 Scottish Government and HPS, Scottish Care have
10 an opportunity of mere hours to be able to comment on
11 the guidance before it's published?

12 **A.** Yes.

13 **Q.** If we're looking at the guidance again, there's
14 a reference to social distancing. How easy is it to
15 maintain social distancing in a care home?

16 **A.** I think only somebody or a group of people who had no
17 experience of the reality of life in a care home would
18 have under -- would have put that there, to be honest.

19 Care homes are busy, interactive environments where
20 people are constantly moving around, gossiping,
21 laughing, engaged in the lives of each other, moving
22 into each other's space, and the idea that, particularly
23 when you're supporting somebody with latter stage
24 dementia, that you discourage contact, especially touch,
25 from that person, who may not understand, is really

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1 far-fetched.

2 So it became hugely problematic for care homes to
3 keep social distancing, particularly in the lives of
4 people with dementia, and it became really traumatic for
5 residents in particular who were used to social
6 interaction, who were used to spending time in communal
7 space, whether that be, you know, watching telly,
8 engaging in an activity or just simply being with
9 people.

10 It became a massive challenge for most operators and
11 providers to adhere to guidance which was not fit for
12 purpose.

13 **Q.** Looking at social distancing, and you've touched upon
14 people with dementia, is it correct that many residents
15 within care homes suffer from dementia?

16 **A.** So one of the challenges then and now, sadly, is that we
17 don't have sufficient data to properly give
18 an understanding of the number of people living with
19 dementia in our care homes, but practitioners would
20 argue that we're talking between 80% to 85%. The nature
21 of care homes today, whether residential or nursing, is
22 vastly different from what it was ten years ago. Life
23 expectancy is down at about 14 months compared to about
24 five years ago where life expectancy was three to
25 four years. Very few people move into a care home

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1 hospitals, and to make sure that people who were fit for
2 discharge were able to be admitted into a care home.

3 The other related pressure was the constant barrage
4 in the popular media, from politicians and others, about
5 how important it was that the social care sector came up
6 to the plate, and that was -- the sector was able to
7 keep the flow going and prepare us for what many
8 considered to be a huge increase in cases.

9 So there were multiple points of pressure, and many
10 found it very difficult to resist that. That's the
11 reason that we were arguing for robust testing and
12 clinical assessment.

13 **Q.** You've touched upon the pressure being felt by
14 care homes. Jane Morrison, of Scottish Covid Bereaved,
15 yesterday had said that many of the group's members had
16 experience of family members feeling, in hospitals,
17 pressured into being moved from hospitals into the care
18 environment. Were you aware of similar concerns or
19 pressures faced by patients and their family members?

20 **A.** Yeah, we were.

21 And moving into a care home is a major decision for
22 anyone. It's in many senses a sense of bereavement and
23 loss, a loss of a relationship, a home, a dynamic that
24 an individual may have had. It's a process that has to
25 be managed carefully. And care homes are really good at

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1 unless they have underlying significant health
2 conditions, and the majority of those have
3 a neurological condition, in the majority of those it is
4 dementia.

5 **Q.** Did care homes feel pressure -- you've touched upon,
6 I think, the pressures that care homes were feeling in
7 terms of trying to help the NHS create capacity -- to
8 accept patients being transferred from hospitals, and if
9 they did, why?

10 **A.** The answer is undeniable pressure, which was a pressure
11 which some even against their best judgements felt that
12 they could not but address.

13 And that pressure came for many reasons. In
14 Scotland we have got something called the National
15 Care Home Contract, which is a contract nationally
16 between local government, through COSLA, and care
17 providers. It has very clear terms and conditions, 70%
18 of those in a care home fall under the contract, it's
19 paid for by the state, and one of those conditions is
20 that a registered care home as part of the contract
21 should not ordinarily refuse admission unless there were
22 very clear clinical reasons not to do so.

23 So there was that pressure from health and social
24 care partnerships, who were themselves being pressured
25 by the NHS secondary and acute sector to clear the

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1 that, they are sensitive to the fact that the importance
2 of choice of the person having as much voice and control
3 as is possible within their capacity, ability.

4 So this is a process that has to be managed, and
5 critical to that is that family and informal carers are
6 closely involved in the transition from their own home
7 or indeed from a hospital setting into a care home. All
8 of that was cast aside in many instance, and individual
9 care home managers and staff frequently in our contact
10 spoke about the fact that people were being
11 "railroaded", to use the term that one person used with
12 me, to make a choice, which was a very limited choice,
13 of: that care home or no care home.

14 **Q.** At this stage, on 13 March 2020, there was no need for
15 a negative test before a patient was transferred from
16 a hospital into a care home. In Scottish Care's
17 statement, it is said that Scottish Care advocated from
18 early March 2020 that there needed to be a robust
19 clinical assessment -- which you've touched upon -- and
20 testing of residents entering into a care home from both
21 the community setting and also the acute NHS setting.

22 Do you recall when in March 2020 Scottish Care had
23 come to the view that there needed to be testing of
24 admissions coming into care homes?

25 **A.** Very early, and indeed probably in late February.

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1 Again, because of what we were aware of internationally.
 2 And I have to place this into some sort of context.
 3 I talked earlier about a breakdown and a lack of
 4 a relationship of trust. And there were many reasons
 5 for that and, you know, I appeared before the Scottish
 6 Parliament and its Health Committee a few weeks before
 7 and spoke about one of the major issues affecting
 8 social care provision was the feeling from social care
 9 providers that the priority in all instances -- and this
 10 is before the pandemic -- was being given to the NHS and
 11 not least the issue of delayed discharge and the
 12 importance of what was called at the time "bed
 13 blocking", and making sure that the flow continued,
 14 particularly during winter. So there had always been
 15 a pressure to make sure that hospitals were not
 16 "blocked".

17 In that context, many of our members reported to us
 18 a lack of trust in the hospital discharge process in
 19 normal times, and I've lost count of the instances of
 20 hearing from our members of people -- what used to be
 21 called the "Friday night discharge", and that was to
 22 clear hospitals for the weekend. People were discharged
 23 late on a Friday afternoon, often without information
 24 being communicated to family, typically and not
 25 infrequently without appropriate medication or at least

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1 **Q.** You've spoken about the context pre-pandemic and the
 2 tensions between the NHS and trying to have more rapid
 3 discharge of patients and the issues around
 4 prioritisation of the NHS over the social care sector.
 5 Did the pandemic exacerbate all of those issues?
 6 **A.** Absolutely. I'm on record as saying that the problems
 7 facing social care in January 2020 were still there but
 8 accentuated by July 2020.

9 And one of those was the almost myopic political and
 10 media and public attention and focus on the NHS at all
 11 costs. And that really hit hard to many frontline
 12 social care staff, because even when the pandemic
 13 started and we had supermarkets giving priority to NHS
 14 staff and to key workers, many of our frontline staff
 15 were turned away, particularly by one supermarket who
 16 I won't name, because they weren't considered to be
 17 key workers.

18 When we started to clap people on a Thursday night,
 19 that didn't include social care staff for the first
 20 two weeks. It was only afterwards that they were
 21 considered to be of value. The emphasis on "Protect the
 22 NHS" everywhere you saw made social care staff feel --
 23 and certainly providers of care home and home care feel
 24 as if "Here we go again, we're of less significance and
 25 of less value".

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1 scripts that were able to be taken to a pharmacy out of
 2 emergency hours, and in many instances with a lack of or
 3 insufficient case notes to enable that transfer to
 4 happen positively, both to the community and into
 5 care homes. That was the context.

6 Now, in some parts of the country discharge worked
 7 brilliantly, professionally, with a degree of mutual
 8 regard and professionalism. In other parts of the
 9 country there was simply a lack of trust.

10 Against that backdrop, we then had the new
 11 coronavirus being introduced, and we were very clear as
 12 an organisation, listening to our clinical colleagues
 13 out in the field, that they needed additional
 14 reassurance, and simply saying "We leave this to the
 15 professionalism of clinical assessment", I'm sorry, it
 16 didn't wash at the time, I communicated that to the
 17 Cabinet Secretary, and I indicated that what we wanted
 18 and needed was testing, to evidence a negative test.
 19 Which with nothing else could mean -- and we appreciate
 20 that testing was for in the moment, but it would mean
 21 a reduction in the potential period of isolation for
 22 an individual in a care home.

23 **Q.** You referred to the Cabinet Secretary, that's
 24 a reference to Jeane Freeman; is that correct?

25 **A.** That's correct.

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1 **Q.** You've spoken about Scottish Care's position formed in
 2 late February, into March around testing. When did
 3 Scottish Care start to push that position on the
 4 Scottish Government? Do you recall when?

5 **A.** Early March.

6 **Q.** And social care was and is a devolved matter, as is
 7 public health.

8 **A.** Yeah.

9 **Q.** So as far as you were concerned, did the responsibility
 10 for these important matters fall on the Scottish
 11 Government?

12 **A.** We recognise that there were some issues over which
 13 Scottish Government had a limited degree of control,
 14 such as PPE, such as finance, but we certainly perceived
 15 that decisions around discharge and testing as far as
 16 capacity enabled were matters for Scottish Government.

17 **Q.** From your interactions with the Scottish Government
 18 around this time, was the guidance that just we've
 19 spoken about on 13 March from -- it was Health
 20 Protection Scotland at the time, that later on became
 21 Public Health Scotland -- was that endorsed by the
 22 Scottish Government?

23 **A.** The 13 March guidance --

24 **Q.** Yes.

25 **A.** -- and all subsequent were endorsed by Scottish

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1 Government, yes.

2 **Q.** It is also said in Scottish Care's statements that

3 Scottish Care advocated that all individuals entering

4 a care home should be treated as Covid positive and

5 therefore barrier nursed for a period of 14 days. What

6 is meant by treating all residents as Covid positive

7 when entering a care home?

8 **A.** So on the basis of what we've talked about, our lack of

9 trust in the nature of a clinical assessment at point of

10 discharge and in the absence of an agreement to

11 undertake a test, we were encouraging our members to

12 engage in barrier nursing, which is high intensive

13 infection control nursing. But bearing in mind that is

14 only possible in care homes which are nursing care homes

15 rather than care homes which are residential care homes,

16 who would neither have access to the relevant PPE or the

17 skills to engage in barrier nursing.

18 And even those care homes which were nursing

19 care homes would have and did have a limited amount of

20 supply to enable them to barrier nurse. It's not that

21 care homes, particularly nursing care homes, were not

22 used to infectious disease, very experienced with

23 norovirus, very experienced with flu, but the nature of

24 this novel -- new -- virus meant (a) that there was

25 a lack of understanding within the sector, as there was

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1 a restricted number of tests available, that instead

2 of -- sorry, in addition to a focus on the NHS we should

3 also be focusing on social care settings. First of all,

4 on the residents in those settings; secondly, on staff,

5 especially in homes where there had been cases, because

6 for a considerable period it was only after five

7 positive cases had been detected that additional

8 measures were introduced. So we wanted to get ahead of

9 the game by using the limited number of tests that we

10 had available to engage in preventative testing so that

11 we could monitor not just after an outbreak but before

12 an outbreak happened. And we argued with those who

13 would listen that as well as utilising tests in

14 a clinical acute NHS setting, where practice around

15 infection prevention and control should have been more

16 regular and advanced, though admittedly the range of

17 nosocomial infections might question that, that priority

18 needed to be given to social care. But in

19 an environment where the whole concentration was on

20 secondary and acute NHS, that aspiration came to

21 nothing.

22 **Q.** In the context of testing for staff, Scottish Care say

23 in its statement that staff working in care homes were

24 likely to pose the greatest risks to those being

25 supported in care settings. Why would you say that?

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1 across the health and social care sector, about what was

2 needed in terms of nursing somebody, but certainly the

3 principles of barrier nursing are about isolation, high

4 levels infection and -- control management, but they are

5 again to reiterate extremely difficult to undertake in

6 an environment where you are working with people with

7 dementia and where you, as became very clear in the

8 pandemic, have real constraints upon staffing.

9 **Q.** So in practical terms, many of your members would not

10 have been able to barrier nurse residents; is that

11 correct?

12 **A.** They wouldn't have been able to barrier nurse the

13 majority of residents, no.

14 **Q.** In Scottish Care's statement, it is also said that from

15 March 2020 Scottish Care advocated that priority be

16 given for testing to care home staff and those providing

17 care at home, even in the context at that time of the

18 very limited testing capacity that existed. Why did

19 Scottish Care think that this group should be

20 prioritised for testing in the early weeks of the

21 pandemic?

22 **A.** Our overarching concern, and again I articulated this at

23 the time, was that we recognised that our population

24 were the most at risk from this novel coronavirus, and

25 that even accepting an environment where there was

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1 **A.** Because the majority of residents in the care home

2 weren't going anywhere. They were a static population.

3 The population which was moving was staff coming from

4 their own homes, living in communities. And, you know,

5 we very clearly and quickly mapped that in communities

6 where there were high levels of incidence of the virus,

7 then not surprisingly there was greater risk and

8 occurrence of outbreaks within care home communities,

9 because people live in communities. And whilst there

10 were some care homes where staff literally left their

11 families for a month or six weeks to move into the

12 care home, to literally pull up the drawbridge, those

13 were the exception, and what was happening was

14 an ingress of staff from community into an environment

15 where individuals were at greatest risk.

16 So that's one of the reasons why we said it's really

17 important that we start to test staff in a preventative

18 manner, and fortunately in many instances what happened

19 was that we started to use tests after an outbreak

20 occurred.

21 **LADY HALLETT:** Could you speak a little more slowly,

22 Dr Macaskill?

23 **A.** Sorry.

24 **LADY HALLETT:** I have the same failing, so we're in the same

25 club.

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1 **MR TARIQ:** We have spoken a little about staff who were
2 working in care homes. What about staff who were
3 providing services for those in their own homes? Would
4 these types of employees be moving around multiple homes
5 over the course of a day?

6 **A.** Absolutely. And whilst there was a challenge and we've
7 already -- the Inquiry has already heard of the virtual
8 overnight withdrawal of support for individuals in their
9 own home, services which did continue meant that staff
10 were, you know, on a typical day, visiting 12, up to
11 20 individuals. So that was different households
12 engaging in different levels of care and support. But
13 at this stage, almost certainly, a -- personal care and
14 intimate care and support.

15 The care at home workforce, I remember using the
16 phrase "they are the forgotten frontline" in late April,
17 early May, because all the focus had been placed on
18 care homes, both in terms of testing and other
19 intervention including PPE. And this workforce, who are
20 significantly larger than the workforce in care homes,
21 had largely been forgotten.

22 **Q.** So in terms of your perception of prioritisation, you've
23 got the NHS that was being prioritised, then you've got
24 care homes, but then below that is those that are people
25 that are being cared for at home?

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1 **Q.** In the absence of that workforce being prioritised for
2 tests, did that lead to staff having to self-isolate and
3 taking longer absences from work if they came into
4 contact with somebody that was Covid positive, and if so
5 what impact did that have on the care home being able to
6 deliver the services to its residents?

7 **A.** One of our arguments for extending testing and for that
8 to include staff was also for it to include staff who
9 had to self-isolate because a family member or they had
10 been in contact with an individual. In early April in
11 particular, we were at a point at which we were facing
12 a very real risk of collapse of our workforce with more
13 and more individuals having to isolate as the virus
14 became more prominent and prevalent in the community.
15 And introducing testing, which eventually did occur, to
16 enable staff to return to work earlier, safe in the
17 knowledge that they weren't at that time positive, would
18 have made an immense difference at a time of real
19 criticality.

20 **Q.** At this time of real criticality where there is reduced
21 workforce because people are having to self-isolate,
22 what impact did that have on the residents in
23 care homes?

24 **A.** It had a profound impact. We were -- we advised our
25 members to lock down on 12 March, so that was the day

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1 **A.** Absolutely.

2 **Q.** Now, what was the impact on the workforce in the
3 care sector of staff not being prioritised for testing?

4 **A.** I think -- you know, and I've been looking at some of
5 our early video webinars, I think it's really difficult
6 for those of us for whom this has been our world for the
7 last two or three years to forget the sheer terror and
8 fear felt by frontline staff in care homes and going out
9 to visit people in their own home.

10 Nobody had the depth of knowledge that was needed to
11 give assurance to people about how you contracted this
12 disease, what the risks were to yourself, and the
13 palpable fear that individuals felt in working for
14 care -- in care was extremely high. And it's to their
15 credit that individuals continued to get up in the
16 morning, leave their families, and go out to care homes
17 and to other people's homes. In that context, I think
18 the -- there was a sense of despair and there was
19 a degree of resignation, "Well, of course they're going
20 to prioritise the NHS", because that's what they were
21 experiencing, but there was also a growing sense of
22 anger, that: why should we be putting ourselves at risk
23 without the level of protection which we, as experienced
24 professional clinical staff in care homes and in
25 communities know, even if we're not employed by the NHS?

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1 before the guidance came out, and it was a couple
2 of weeks before national lockdown. So care homes were
3 used to lockdowns, not least for norovirus, but they
4 were time-limited and they were proportionate to the
5 risk which was occurring. By the time that we'd got to
6 April, a number of us were already beginning to ask the
7 question about: what impact of a long lockdown, what was
8 that going to be? Yes, we were keeping people safe, and
9 I remember writing this, life is not just the ability to
10 draw breath in and out, it's also the relationships, the
11 purpose that you have in continuing to live. And we
12 were hearing from frontline staff as early as April in
13 2020 that people were turning their face to the wall,
14 that they were losing a sense of desire to continue,
15 they were losing a sense of purpose, because they didn't
16 have contact with their family and they didn't have
17 contact with their wider community.

18 The burden of that upon staff, who were depleted in
19 number, who were having to manage Covid risk, who were
20 having to manage under a guidance system and
21 an infection prevention and control methodology which
22 was not fit for a social care environment, was massive,
23 when most of them would have wanted to spend time with
24 individuals who -- unlike the patient in an acute
25 setting, who the staff is unlikely to know, these were

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1 people who were known to staff, in some instances, for
 2 many years, and they could see that deterioration right
 3 in front of their eyes.

4 **Q.** Were you raising these issues directly with the Scottish
 5 Government in March 2020?

6 **A.** The issue of deterioration and decline -- so we thought
 7 it entirely appropriate that lockdown happened for
 8 a period of time because that had been the pattern of
 9 behaviour and we felt that it was a legitimate action to
 10 achieve an end which was to keep people safe. As April
 11 began to -- sorry, as April came and as April began to
 12 move forwards with no indication, except actually
 13 a worsening of the disease, a number of us -- and
 14 I said -- you know, I wrote articles, I appeared in the
 15 media, I engaged with a number of individuals at
 16 government about "we need to start thinking about ways
 17 in which we can manage the pandemic without the level of
 18 restrictions on social interaction and engagement", but
 19 instead what we got, later on, was the establishment of
 20 a clinical approach to care homes which turned them into
 21 clinical environments.

22 **Q.** We will come back --

23 **A.** Yeah.

24 **Q.** -- to issues from about May 2020. I want to focus on
 25 the initial phase in March leading up to 21 April where
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1 Ms Freeman.

2 **Q.** Can we look at the briefing paper that was prepared for
 3 Ms Freeman in advance of her meeting with you?

4 **A.** Yeah.

5 **Q.** This briefing paper is at INQ000261341. You will see
 6 that it says at the top:

7 "Briefing for Cabinet Secretary for Health and
 8 Sport", and it says "Meeting with Scottish Care", on
 9 Wednesday 18 March, and the meeting is at 1.30 in the
 10 Scottish Parliament.

11 Can we look at page 2, and under the heading
 12 "Testing", here it says, and this is -- by reference
 13 "they" is Scottish Care:

14 "They have concerns regarding the current testing
 15 arrangements and would like:

16 "- people tested before they are discharged from
 17 hospital to care homes so that care homes feel confident
 18 in accepting admissions from hospitals; and

19 "- testing for frontline social care staff in order
 20 to avoid 14 day isolation periods to enable them to
 21 return quickly to work."

22 Thereafter, this is then the briefing paper for
 23 Ms Freeman, it's telling her what lines to take, and it
 24 says:

25 "Testing for patients/people is currently being
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1 the guidance on testing was changed.

2 The Inquiry understands that you had a meeting with
 3 Jeane Freeman, who was the Cabinet Secretary for Health
 4 and Social Care, on 18 March 2020 to discuss issues
 5 relating to the care sector. Was your broad position at
 6 the time that the existing guidance which had been
 7 issued by, at the time, HPS on 13 March was not fit for
 8 purpose?

9 **A.** At that meeting we had had, after the 13th, already two
 10 meetings of our members where over 250 members attended
 11 virtually, and we were being told -- and we communicated
 12 this to the CMO's office and to others, and indeed that
 13 communication led to a change in the guidance the
 14 following week, that it simply wasn't working, that we
 15 needed a degree of more robust clinical assessment at
 16 point of admission, that we needed a sensitivity to the
 17 implementation of infection prevention and control, that
 18 we needed to have a bit of a reality check about how
 19 reasonable it was to expect somebody living with
 20 dementia to remain in their own room and not to use
 21 public environments and not to move around. So there
 22 were a whole list of areas which we had especial concern
 23 over, but one of the predominant ones was in relation to
 24 admission and testing, which is the subject of
 25 a considerable amount of the conversation with
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1 triaged into four different categories in the following
 2 order 1) patients needing critical care/ventilated 2)
 3 admissions to hospital with pneumonia/influenza like
 4 illness or acute respiratory distress syndrome, 3)
 5 clusters of outbreaks such as in care homes and 4) if
 6 there is capacity -- testing of staff."

7 Then bullet point number 2:

8 "Testing for staff -- currently neither health or
 9 social care staff are being tested unless they fall
 10 under categories 1 or 2. This is mainly due to testing
 11 capacity issues with [laboratories] etc, however the
 12 policy of testing staff may change."

13 So at this meeting I think you say that the focus of
 14 the meeting was around the admission criteria. Did you
 15 explain the sorts of issues you've raised with me today
 16 to Ms Freeman at the meeting with her on 18 March?

17 **A.** Yes, and as you will have seen from the note, they were
 18 expecting the line that I've addressed to you today,
 19 which is the lack of trust and our desire to have a more
 20 robust process of testing to give clinical assurance.

21 **Q.** What was her response?

22 **A.** As far as I can recall, Ms Freeman's response was as
 23 stated in the lines to be adopted, which was that there
 24 was insufficient numbers of tests available and that
 25 priority would be given to those who were being admitted
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1 to hospital who may have manifested pneumonic or other
2 respiratory conditions and that where there was
3 a cluster in the care home.

4 I remember saying, you know, that's a bit like
5 bolting the door after the horse has bolted. That yes,
6 we need to know if there is an outbreak in a care home
7 and how many individuals may have the virus as a result,
8 and how many staff, though that wasn't considered for
9 testing in that regard in that time. We wanted to get
10 ahead of the game. And I go back to what I said
11 earlier, it wasn't that we were saying "Don't use what
12 tests you have available for the NHS", but begin at
13 least to start thinking about the relative priority
14 which you need to give to social care.

15 And I remember saying at the time that, you know,
16 the lack of the engagement of social care operators in
17 pandemic planning in all the exercises which we and
18 the Inquiry knows about, is illustrative of the fact
19 that if social care operators are not there and not
20 social care policymakers, if social care operators are
21 not there at the table, then clinical care decisions are
22 going to be misplaced, as it evidenced in this regard.

23 **Q.** Do you think she appreciated or understood the gravity
24 of the situation that you were telling her in the
25 early weeks of March leading up to this meeting on

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1 surveillance", and its purpose is, at paragraph 1:

2 "To provide initial advice on our approach to
3 Covid-19 testing and monitoring following the decision
4 to move from containment to delay in response to the
5 outbreak."

6 Can we turn to page 2, and I want to look at
7 paragraph 11, and if I may read:

8 "If our aim is ultimately to contribute to saving
9 lives then we will not be able to limit testing to
10 hospitals. A substantial proportion of those who are
11 likely to be infected by the virus will remain in
12 a community setting, in particular care homes.
13 Colleagues in HPS are currently modelling this demand.
14 What we know is that there are 35,989 residents in 1,142
15 care homes. Testing a significant proportion or all of
16 these residents would significantly exceed the available
17 capacity in laboratories."

18 So you will see that the advice that was being given
19 on 18 March to Ms Sturgeon and Ms Freeman is that the
20 testing arrangements would need to be expanded to save
21 lives and that care home residents are identified as
22 being those particularly at risk.

23 There is also a reference you see to "Colleagues in
24 HPS ... currently modelling this demand". Do you know
25 what the issues were around modelling of care homes?

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1 18 March?

2 **A.** I've absolutely no doubt that Ms Freeman appreciated
3 that what I was telling her was what I believed and what
4 was being communicated to me by our members. I had
5 frequent meetings with Ms Freeman and I think she would
6 probably agree that we did not always agree, we had
7 often robust exchanges, but both of us sought to be
8 constructive and positive in moving things forward.

9 I understood and understand the emphasis on the NHS
10 from her perspective, but I have to say at the time, as
11 it evidenced here, but also subsequently, I do call into
12 question the prioritisation of the acute and secondary
13 NHS with the limited degree of resource available at the
14 expense of the social care sector and those who it
15 supported.

16 **Q.** On the same day that you met with Ms Freeman,
17 the Inquiry has seen a paper that was prepared by
18 Derek Grieve from the Health and Social Care Directorate
19 of the Scottish Government for Ms Sturgeon and
20 Ms Freeman. This is a paper that's dated 18 March 2020.

21 And it's at INQ000222973.

22 You will see that, on page 1, at the very top it
23 says that the -- this is a paper that's addressed to the
24 Cabinet Secretary for Health and Sport and the
25 First Minister, and it's titled "Covid-19 testing and

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1 **A.** In relation to that specific section, I don't know what
2 the issue for colleagues at HPS would have been, but as
3 you have, I think, heard at different points during
4 the Inquiry, the issue of data in care homes has been
5 a long-lasting issue of concern, and the availability of
6 social care data, and very much, you know, pre-dates the
7 2020 pandemic.

8 I sat in many rooms talking about the data gaps
9 which existed in social care. But that gap was itself
10 the result of a myopic concentration and data in the NHS
11 and particularly around delayed discharge. Had we given
12 as much resource to developing datasets and supporting
13 the social care sector to give and develop data, then we
14 would have had more understanding.

15 But actually in this regard and with regards to
16 testing, I'm not at all convinced, having seen some of
17 the other written evidence statements from other
18 parties, that it was just an issue around availability.
19 And whilst Ms Freeman makes that statement very clearly
20 in her own written statement that "we didn't have
21 sufficient tests", I note in the statement from
22 Ms Sturgeon, evidence from the CMO at the time, of
23 a resistance to using testing per se because it was a --
24 there was a danger of it creating a false positive, and
25 indeed that it wouldn't assist the clinical management

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1 of an individual in a care home whether or not you knew
2 that they were positive. I'm paraphrasing that.

3 So I do wonder, and I think it's something that we
4 need to ask, whether or not there were clinical
5 resistance to undertaking testing within a care home
6 environment, or indeed any environment.

7 From our perspective, we were very clear: testing
8 wasn't a panacea but it was an additional tool to give
9 assurance, to help individual residents in a care home
10 reduce the risk of being isolated for long periods of
11 time and to enable staff to return to work as quickly as
12 possible.

13 **Q.** You've referred to other evidence that you've seen, and
14 I think that's a reference to witness statements that
15 you've seen --

16 **A.** Yeah.

17 **Q.** -- within this module. But in the context of what you
18 were being told at the time, and we've seen the lines
19 that Ms Freeman was given to take in her meeting with
20 you, was the absence of testing in care homes for
21 residents that were being discharged from hospital into
22 care homes, was a reason the absence or lack of testing
23 capacity?

24 **A.** Ms Freeman indicated at the meeting that lack of
25 capacity was the main reason, but around that at the

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1 untested only came out in October 2020, would
2 Scottish Care have been able to assist the Scottish
3 Government, if the Scottish Government had come to
4 Scottish Care and said "Can you give us a broad estimate
5 of the number of admissions that are happening from
6 hospitals into the care homes over this rough period?"

7 **A.** We would technically have had the ability to do so by
8 asking our members. We probably wouldn't have had the
9 capacity as a small organisation to engage in that
10 exercise but local health and social care partnerships
11 could have gained that information from providers.

12 **Q.** So it might have been that whilst -- one doesn't --
13 needn't wait until October 2020 to at least get a rough
14 ballpark figure in March 2020 if one is looking for
15 smaller testing capacity for that limited group of
16 people being admitted from hospitals into care homes; is
17 that correct?

18 **A.** Yeah, I think so. So if what lies behind is the
19 assertion that: could we have -- from the limited
20 capacity that we were told -- have prioritised those
21 being admitted into care homes, could we have used those
22 tests, then the numbers certainly say yes. Our argument
23 was that the lives of those moving into care homes but
24 also those who were residents and staff in care homes
25 should have had as equal a priority as those working in

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1 time there was a clinical discussion around the
2 effectiveness of testing and the risks attached to it.

3 **Q.** If we look at what is being said in the paper, what is
4 being mentioned is that there are nearly 36,000
5 residents and it's in that context it says "Testing
6 a significant proportion or all of these residents would
7 significantly exceed the available capacity". But what
8 is not being said here, as far as I can see, is there
9 being some analysis of one of the positions that
10 Scottish Care had advanced, which was: we ought to be
11 prioritising testing of those that were coming from
12 hospitals into the care homes. Is that correct?

13 **A.** That's correct.

14 **Q.** We now have seen from later data that was published by
15 PHS -- this is a report from October 2020 -- that
16 between 1 March and 21 April 2020, 82% of the 3,595
17 patients discharged from hospital to care homes were not
18 tested. Therefore in the context of trying to
19 prioritise those people for testing, one would have
20 perhaps only required a much smaller number of tests
21 than the 36,000-plus that is being discussed in this
22 briefing paper. Is that right?

23 **A.** That would be right.

24 **Q.** Whilst the data from PHS around the number of discharges
25 from hospitals into care homes of people that were

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1 NHS settings.

2 **Q.** You have provided documents -- or, before I turn to
3 documents, there was some evidence yesterday from
4 Roger Halliday and Scott Heald that data relating to the
5 number of people going between care homes and hospitals
6 and the number of people entering care homes from the
7 community was not available at the time. Is it your
8 position that whilst the exact numbers might not be
9 available at the time, that there would be a way, such
10 as contacting your organisation, so that you then
11 connect the Scottish Government to some of your members,
12 where one can get a ballpark figure if needs be?

13 **A.** It would have been very difficult, particularly in the
14 midst of an emergency situation, as we were in at this
15 time, for that exercise to be carried out. One of the
16 continual issues facing the care sector, both in
17 care homes and in home care, is the lack of robust data,
18 and very little overarching data analysis work has been
19 undertaken.

20 So we could have asked the question. Whether there
21 would have been an ability to respond at local level at
22 the time would have been challenging. And though data
23 was developed, what became known as the Turas platform,
24 that was during the stage -- during a relatively early
25 stage of the pandemic, in order to give the whole system

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1 the information that it needed.

2 **Q.** Would Scottish Care or your members be able to at least
3 provide the Scottish Government some ballpark that maybe
4 3,000 tests are needed --

5 **A.** Yes.

6 **Q.** -- not necessarily the 36,000 tests?

7 **A.** Yes. Nobody came to us to say or ask "How many tests do
8 you think would be needed?" in order to enable admission
9 to care homes from either the acute sector or,
10 importantly, from the community, because there continued
11 to be need in the community of people who weren't able
12 to live independently. And lockdown, we often forget,
13 impacted on the ability of families to care for
14 individuals, especially with geographical distance. So
15 there was a demand from the community to move into
16 care homes as much as there was from hospitals.

17 **Q.** Where some of the evidence the Inquiry's heard is that
18 that sort of data was lacking, and if you put yourself
19 in the position of the Scottish Government in
20 March 2020, would an obvious source of trying to at
21 least establish what that figure might be, would it not
22 be contacting Scottish Care, considering there was
23 already direct lines of communication?

24 **A.** That could have been a means of communication, but
25 equally if I was running the Health Department I would

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1 Is Donald a reference to you?

2 **A.** It is.

3 **Q.** If I can read from the second paragraph, it says:
4 "The sector needs much clearer admissions guidance
5 and policy from Central Government/[Care Inspectorate]
6 on how we can admit Residents.
7 "What we have at present is dangerous.
8 "I appreciate the NHS is at breaking point.
9 "We are there 100% to help.
10 "But we have a duty of care to our Staff and
11 Residents and we are breaking so many codes by being
12 forced to take in admissions the way we are when it's
13 not safe and breaking so many codes by refusing as well.
14 Dreadful dilemma."
15 So your member here accepts that there is a focus on
16 creating capacity for the NHS, and that care homes are
17 part of assisting in that strategy, your member says
18 they're 100% to help; is that right?

19 **A.** Yeah, I think that sentiment articulates very clearly
20 and succinctly what was being said by dozens, hundreds
21 of our members. They were caught between the stirrup
22 and the ground.

23 **Q.** Can you describe what the dreadful dilemma was facing
24 care homes at this time in March?

25 **A.** I think the dreadful dilemma goes to what I said

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1 contact the hospitals who were discharging individuals
2 into the community, because they have very robust data
3 at point of discharge and had spent years developing
4 that whole framework because of the -- as I said
5 earlier, the concentration and focus on hospital
6 discharge. So they would have evidence of where people
7 were moving to, which is the evidence that Public Health
8 Scotland later used.

9 **Q.** And that would have been evidence that would have been
10 available in March 2020 had somebody sought to try to
11 explore it or at least estimate what the numbers might
12 be?

13 **A.** I don't think it's beyond the realms of very practical
14 possibility for that data to have been gathered in very
15 short order.

16 **Q.** You've provided some documents to the Inquiry which show
17 the type of issues that your members were raising with
18 you around this time.

19 Can we look at an email that Scottish Care received
20 on 25 March 2020. This email is at INQ000249952.
21 The subject heading of the email is "Admissions
22 Criteria for Care Homes". And if we can look at this
23 second email, and it's addressed -- it's sent to your
24 organisation, from one of your members, and it reads:
25 "Hi Karen/Donald."

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1 earlier, which was we needed guidance which gave us
2 robust assurance that as much as possible, in the
3 constraints of a new virus, that people entering the
4 care home as new residents or as returning residents
5 were Covid-free and as safe as possible.

6 And the other side of that dilemma was the desire to
7 support the NHS when there was the perception that the
8 NHS could be overtaken by the rise in the number of
9 cases. And the dilemma faced by many managers and staff
10 at local level was: how do you keep people who are
11 existing residents and staff safe and at the same time
12 recognise that -- if somebody's fit for discharge,
13 a hospital's certainly not where they want to be, and
14 they should be discharged, either home to the care home
15 or into the care home for the first time. So how do you
16 balance both of those whilst at the end of the sentence
17 recognising that there were pressures, because of
18 contractual pressures and existing relationships with
19 health and social care partners, not to break, in this
20 case, the National Care Home Contract.

21 **Q.** Is that what the reference to breaking codes means?

22 **A.** Yeah.

23 **Q.** If we read on:
24 "Scottish Care needs to sort at least Guidance for
25 Homes in my view and be much much more specific and

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1 proactive to ensure our Sector is acting as correctly
2 and professionally as we can at this unprecedented time.
3 There's multiple things we could do to make it at least
4 safer.

5 "The NHS/SW Policy seems to be 'NHS need the beds so
6 your taking them'.

7 "Worrying way to work.

8 "So greatly flawed and I don't like to be emotive
9 but a disaster waiting to happen is probably a balanced
10 phrase to use.

11 "A few worrying points.

12 "Here's what we seemed to be getting told.

13 "- 'as long as you keep them isolated in their
14 bedrooms for 7 days'there's too many flaws to list
15 regarding this so I'm not going to start....but just one
16 is not Care Homes have dedicated staff in dedicated
17 isolation or separation areas."

18 So if we pause there, for whom was there a seven-day
19 isolation requirement? Was this positive patients?

20 A. So the guidance, both the 13th and the later guidance,
21 indicated that individuals should be isolated for
22 a period of seven days, because at that time the sense
23 was that the virus would manifest itself within
24 a seven-day period, and if somebody was not positive at
25 the end of that seven-day period then they were safe to

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1 nursing/infection control/isolation good
2 practice!....I have friends who are Doctors/Intensive
3 Care Staff/Anaesthetists/Nurse lecturers who are as
4 trained as anyone in this in the very short time anyone
5 has had (and have at least had some training previously
6 for such events) and they feel exposed and underprepared
7 in their PPE management and practice with better
8 equipment. Many are frightened by this disease and its
9 potential for spread....never mind an army of Care Home
10 Carers and Elderly Care and Dementia Staff."

11 So is the point here that infection control measures
12 that might be appropriate in an acute setting just
13 aren't going to work in a care home?

14 A. Yes, and it's the sort of issues that I've reflected
15 earlier about, you know, a containable infectious unit
16 in a hospital is "easy", in inverted commas, to manage,
17 to curtail, but when you're talking about an environment
18 with free flow of individuals, with individuals who
19 might remember for a minute what you've said to them but
20 then will forget why they shouldn't touch that or why
21 they shouldn't go and speak to somebody or why they
22 shouldn't go into that room, it becomes really
23 difficult. And I think what the writer is indicating is
24 that with this new virus even those who were very
25 skilled and experienced in infection control and

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1 move around and engage in other activity.

2 So the recommendation in the guidance and certainly
3 our recommendation was that if you cannot be sure about
4 the status of an individual, and that means if you can't
5 do a Covid test, then you should as far as possible
6 isolate that person for seven days, and ideally barrier
7 nurse that person. But I've already talked about the
8 impracticalities and the availability of staff and
9 resourcing like PPE to enable that to happen on a wide
10 scale.

11 Q. If we read on in this email, it says:

12 "Cross infection rates of Covid-19 is very high in
13 prepared well trained ICU units and hospital units never
14 mind a communal care of 50+ beds."

15 Then:

16 "- 'as long as staff wear the appropriate PPE' --
17 That's not possible. No Care Home has the appropriate
18 equipment. None. A low grade face mask, a plastic
19 apron and a pair of latex gloves is not the appropriate
20 equipment for barrier nursing a potential carrier
21 transferred from a high risk area in the middle of
22 a deadly highly contagious Pandemic by a Care Assistant
23 with no training in High Risk Infectious Diseases in
24 a Care Home not equipped or designed for such.

25 "- 'tell your staff to follow barrier

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1 management were really anxious and worried, that fear
2 I spoke about earlier, and even they struggled in such
3 an environment. So why did we expect an under-resourced
4 and understaffed social care sector to be able to step
5 up to the plate when the NHS wanted to clear its decks?

6 Q. And part of that, in your witness statement, you explain
7 for the cause of this guidance, I think you describe
8 Public Health Scotland as being distant and detached
9 from the care sector during the pandemic and not
10 appreciating the practical requirements of the sector.
11 Is guidance such as this the manifestation of Public
12 Health Scotland not understanding, in your words, the
13 care sector?

14 A. I think this was the beginning of an evidence that HPS
15 and then Public Health Scotland didn't fully understand
16 the unique particularities of delivering social care.
17 They clearly understood acute and secondary care
18 settings, but at various points what I began to call
19 an IPC fundamentalism failed to appreciate that
20 a care home, or indeed a person's own home, was not
21 equivalent to or the same as an acute sector. And that
22 perhaps was enshrined in an example which I frequently
23 heard, when the process of inspections and scrutiny
24 using these IPC standards began in the care home sector
25 and when the care home sector was literally hung out to

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1 dry on failing to achieve these standards, where
 2 a common complaint would be that in an individual
 3 resident's care home, especially a resident with --
 4 living with dementia, articles of significance, of
 5 memory, items which are important to them were often
 6 described as "clutter which risk infection and should be
 7 removed". So care staff were told by IPC specialists
 8 "get rid of that stuff", and yet these objects were
 9 intrinsic markers of identity for that person, they were
 10 things that rooted them to their self, to their family
 11 and their story, and yet they became for IPC specialists
 12 objects which were a risk of infection.

13 I think we failed to balance the rights, the
 14 individuality of individual care home residents in
 15 guidance which was developed by people who had no
 16 contextual understanding and, to be blunt, showed no
 17 interest in gaining that understanding from people like
 18 myself and other practitioners, that that guidance
 19 treated people as a group, as a blanket entity, instead
 20 of the individuals with rights and autonomy which they
 21 deserve to be treated as.

22 **Q.** We may have time to come back to that, but I want to
 23 finish with this email, if we can read on the next
 24 section, it says:

25 "Also the position of 'if a Resident gets Covid-19
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1 clinical colleagues, a -- there was the presumption that
 2 if an individual contracted Covid in a care home then
 3 they should be supported and enabled in the care home
 4 and should not be transferred out of the care home.
 5 Now, in many instances I'm not denying that for many
 6 individuals that was the right clinical decision, to
 7 support an individual, often with palliation, to enable
 8 the end of their life in as supportive and dignified
 9 manner as possible. But the presumption that that
 10 should be the result and the end decision and clinical
 11 assessment for all is simply wrong.

12 And at the same time I was commenting publicly about
 13 the draft ethical(?) framework which was developed by
 14 the clinic -- by the CMO at the time, which had used age
 15 as a proxy for decision-making should we get to
 16 a situation where there were limits on resources
 17 available for clinical intervention. And that existence
 18 of an age proxy, age discrimination, was evidenced,
 19 I believe, in the presumption that if somebody developed
 20 a condition such as dementia in a care home they should
 21 not ordinarily be transferred to hospital. And it
 22 wasn't just -- sorry, Covid.

23 It wasn't just Covid that was preventing somebody
 24 being transferred, it was other conditions where
 25 ordinarily they might have been transferred because of
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1 they stay in the Home until the recover or die' is again
 2 a real worry -- how does that work with the main aim of
 3 'protecting our elderly and most vulnerable'??? It may
 4 meet the other aim of 'protect the NHS' but it doesn't
 5 meet the first one.

6 "Again, surely there's a better way."

7 And that's a matter that's touched upon in
 8 Scottish Care's statements, it says that the guidance
 9 that was published from 13 March caused confusion within
 10 the care sector which led to the belief that individual
 11 residents who were Covid-19 positive should not be
 12 transferred to hospitals, and I think in the statement
 13 there's a reference to a presumption of a blanket ban on
 14 care homes transferring residents who had tested
 15 positive to hospitals.

16 Can you explain why care homes had come to believe
 17 that there was a form of blanket ban on transferring
 18 residents into hospital?

19 **A.** They arrived at that belief because it was their
 20 experience, in numerous instances, of attempting to gain
 21 access to a hospital or indeed to a GP to enable
 22 an admission to hospital. There developed very quickly
 23 after the 13 March guidance was produced until later on
 24 in the month where significantly following our
 25 remonstrations and from work that we did with other
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1 the desire to make sure the NHS acute and secondary
 2 setting was as clear as possible. And I have absolutely
 3 no doubt that individuals whose lives could have been
 4 saved were not saved because of the nature of that
 5 uncertainty caused by this guidance.

6 **MR TARIQ:** My Lady, would this be an opportune time to
 7 pause?

8 **LADY HALLETT:** How much longer do you think you have?

9 **MR TARIQ:** I was planning on being maybe around 15 more
 10 minutes.

11 **LADY HALLETT:** And I think there is one question from
 12 Ms Mitchell.

13 **MR TARIQ:** Yes.

14 **LADY HALLETT:** Very well, we will break now and I shall
 15 return at 3.05.

16 (2.50 pm)

(A short break)

18 (3.05 pm)

19 **LADY HALLETT:** Mr Tariq.

20 **MR TARIQ:** I'm obliged, my Lady.

21 Are we able to go back to the email that was on
 22 screen that, if you recall, Dr Macaskill, we were
 23 looking at this email. If I can read on from the
 24 paragraph that begins:

25 "I don't have a problem taking Residents.
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1 "I absolutely have a problem with how this is being
2 forced on us and implemented.

3 "It's so flawed I don't know where to start.

4 "The Horse may well have bolted on this though for
5 some or many Care Homes and their Staff and
6 Residents....but we surely can find a better way from
7 now?"

8 Your member in this email has described the
9 admission criteria for care homes in March 2020 as
10 a disaster waiting to happen. Do you agree with your
11 member's sentiment?

12 **A.** I think he was reflective of the views of many people
13 that the lack of robustness in those guidance, the
14 prioritisation of the NHS, the presumption that people
15 should not be transferred to hospitals, the level of
16 presumption around what it was like to manage somebody
17 in a care home, an IPC fundamentalism, I think he was
18 absolutely right, yes.

19 **Q.** So you would share, as at March 2020, being able, with
20 all the experience and knowledge that you had, including
21 seeing what was happening around the world, your view
22 was that this was potentially a disaster waiting to
23 happen?

24 **A.** Our view was without the issues I've talked about today,
25 and to a certain extent that began to be sorted by the

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1 two negative tests before discharge, and all new
2 admissions should be tested and isolated for 14 days on
3 arrival in the care home.

4 What were you being told about the rationale now, on
5 21 April, for having two negative tests?

6 **A.** The primary reason given to us was the argument that
7 there was sufficiency of testing availability.

8 **Q.** What was the impact on residents of Scottish Government
9 delaying till 21 April before being in a position to
10 introduce this guidance?

11 **A.** All I can say is, from the perspective of our members
12 and what we were hearing from frontline staff, was
13 an absolute conviction on their part that unnecessarily
14 people died during that period of time, and I'm very
15 aware of Public Health Scotland's statistical minimum
16 assessment of discharge impact, but as I said when that
17 report came out, statistics tell one story but if you go
18 and speak to the women and men who worked in care homes,
19 they will tell you a very different story.

20 **Q.** We know that beyond 21 April 2020 there were still
21 issues that were arising in relation to discharge of
22 patients from hospitals into care homes. What were
23 those issues that existed after the guidance had been up
24 updated?

25 **A.** Regrettably there were instances where it became clear

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1 end of March with the additional guidance, we got closer
2 to a set of guidance which was more appropriate.
3 Unfortunately, what we then saw was a period of scrutiny
4 and inspection and implementation of guidance which was
5 just as insensitive to the context of a care home as
6 some of the guidance.

7 **Q.** There was between your meeting with Jeane Freeman on
8 18 March -- sorry, 13 March -- sorry, 18 March -- so
9 between your meeting with Jeane Freeman on 18 March and
10 the change of guidance on 21 April, there was 34 days
11 and -- 34 days that it took from Jeane Freeman's meeting
12 with you to the Scottish Government's guidance and the
13 PHS guidance coming to the position that had been
14 suggested by you, which was testing of admissions into
15 care homes.

16 Why were there, as far as -- to the best of your
17 knowledge, why was there this delay of 34 days between
18 Scottish Care meeting with Ms Freeman and the guidance
19 being updated to reflecting the position that
20 Scottish Care were advocating for?

21 **A.** I'm not in a position to answer that, but all I can say
22 is that we continued to make overtures during that
23 period.

24 **Q.** And as we know, on 21 April Ms Freeman announced that
25 Covid-19 patients discharged to care homes should have

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1 that assurances that the policy was being implemented
2 were not upheld and people were discharged, as they had
3 been before, without robust clinical assessment, without
4 testing or being tested at an inappropriate time.

5 You know, for instance, there was examples of people
6 being tested when they went into hospital but not at the
7 point of discharge. So -- and both into the community
8 and into care homes. So by no means, despite a very
9 clear ministerial lead, did clinicians and practitioners
10 in the acute and secondary sector follow the rules at
11 all times.

12 **Q.** I now want to turn to another issue that you've touched
13 upon, which is around visitor restrictions in
14 care homes, and we know that care home residents were
15 subject to quite severe restrictions for many months,
16 including bans on visits, being unable to leave the
17 home, being cared for primarily in their room. What was
18 the impact of these restrictions on the health and
19 wellbeing of residents?

20 **A.** It was profound. It's difficult to imagine that level
21 of restriction happening to any of us, but when it
22 happens to somebody with limited or fluctuating
23 cognitive ability, it was deeply traumatic for them.
24 I would also say it was deeply traumatic for staff who
25 quite frequently used phrases like "We felt as if we

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1 were wardens". Previous to the pandemic you could count
 2 on two hands the number of incidents of complaints
 3 around visiting, around access between family members
 4 and care homes, and yet instantly over a period of time
 5 care home staff were put in an invidious position of
 6 keeping people apart who they knew wanted to be
 7 together. And they had to do so by following guidance,
 8 but they also had to do so because of fear of the
 9 violence(sic) and fear of any repercussions that might
 10 follow as a result of them appearing to breach the
 11 guidance.

12 So it was an invidious position for staff but, much
 13 more traumatically, it was a devastating experience for
 14 residents, their families, and undoubtedly caused a harm
 15 which, whilst it may not have been brought about by the
 16 virus, was certainly brought about by the protective
 17 measures.

18 **Q.** In Scottish Care's statement it has said that as early
 19 as April 2020 Scottish Care made representation to the
 20 Scottish Government that the restrictions on visiting to
 21 care homes was disproportionate, that it was failing to
 22 meet the pastoral needs of individuals and having
 23 a traumatic effect on residents and families. It is
 24 also said that Scottish Care called on the Scottish
 25 Government to adopt a human rights-based approach to

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1 amorphous group but addresses the particularity of each
 2 individual.

3 Care homes spend most of their time talking about
 4 and engaging in person-led or person-centred care and
 5 support. Overnight that was thrown out because of the
 6 constraints put upon frontline staff and providers of
 7 care.

8 **Q.** So is it your position that in respect of visiting
 9 restrictions the Scottish Government hadn't adopted
 10 a human rights-based approach during much of 2020?

11 **A.** That is my conviction.

12 **Q.** What was, in the absence of a human rights-based
 13 approach, the main driver for the Scottish Government in
 14 respect of the policies and guidance around visiting
 15 restrictions?

16 **A.** Risk aversion, and an inappropriate balancing of what
 17 was acceptable.

18 Now, I know that in a shared environment, in
 19 a congregated living environment you have to balance the
 20 desires of one individual over and against another.
 21 Care homes are really good at doing that. They
 22 recognise that there is always a dynamic of give and
 23 take in any context. If there had been sufficient trust
 24 and regard to the professionalism of frontline care
 25 staff and clinical staff in the care sector, if that had

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1 visiting in care homes.

2 We've heard some evidence this morning about a human
 3 rights-based approach in the language of the Scottish
 4 Government's policies. What do you mean by calling on
 5 the Scottish Government to adopt a human rights-based
 6 approach on this issue?

7 **A.** You will be aware that previous to the role I undertook
 8 at Scottish Care I ran a human rights consultancy for
 9 nearly a decade and a half, so I was very aware of what
 10 a human rights-based approach should be, and indeed had
 11 recently lectured on the difference between the rhetoric
 12 of human rights and the reality of implementation. So
 13 for me very clearly, in terms of visiting restriction,
 14 one demand with which made, which was never listened to,
 15 was the necessity of upholding and undertaking a human
 16 rights-based assessment. That did not happen on the
 17 visiting restrictions.

18 But the principles of human rights best practice, of
 19 enabling voice of ensuring participation, of treating
 20 each individual on their own -- in their own right, of
 21 ensuring that no harms resulting in terms of Article 3
 22 but also Article 8 in terms of the right to family life,
 23 the balancing of appropriate privacy, we continually
 24 said we needed to adopt a human rights-based approach
 25 which does not treat care home residents as this

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1 been heard and listened to at all periods of the
 2 pandemic, then I'm quite convinced that we would have
 3 restrict -- we would have withdrawn visiting
 4 restrictions much earlier. And I reached a point of
 5 personal despair, having drawn up guidance to enable the
 6 freeing up of visiting, that after drawing those up it
 7 took over six weeks before they began to even being to
 8 be considered. We took too long and as a result we
 9 limited the lives of people.

10 **Q.** Was this guidance, draft guidance that you had prepared,
 11 to assist the Scottish Government and PHS around
 12 visiting restrictions?

13 **A.** The draft guidance was developed as part of the --
 14 a clinical and professional advisory group, and I'm --
 15 myself and three others contributed to the first stage
 16 of draft, but we all of us despaired about the length of
 17 time it took to turn that guidance into reality, as many
 18 in the care home sector and wider care felt that when
 19 the rest of society was opening up, care homes were
 20 still being closed down.

21 **Q.** We know that visitor restrictions were eased in autumn
 22 2020 but the guidance on outbreaks meant that many
 23 residents still faced severe restrictions for
 24 many weeks. Do you consider that the Scottish
 25 Government's approach on this issue in late 2020, going

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1 into 2021 and 2022, did it move towards considering
 2 properly the human rights of the residents and their
 3 families?
 4 **A.** No, it did not.
 5 **Q.** Why would you say that the Scottish Government didn't
 6 move to a human rights-based approach later on in the
 7 pandemic?
 8 **A.** I think the fear of repeating the trauma of the spring
 9 and of there being a resultant increase in death as
 10 a result of not tightly managing a care environment, was
 11 an overriding concern. And ultimately, as people kept
 12 saying to me, can we live our lives rather than exist in
 13 an imprisoned environment? Which was a sentiment
 14 expressed by staff as much as it was by family,
 15 residents and carers.
 16 **Q.** I now want to move to a separate topic, and something
 17 that you've touched upon several times already, and
 18 that's around inspections, oversight and investigations.
 19 On 21 April Ms Freeman -- 21 April 2020 -- announced
 20 that NHS directors of public health were required to
 21 taken enhanced leadership for care homes.
 22 Multidisciplinary care and professional oversight teams
 23 were convened, and Scottish Care says in its witness
 24 statement that in addition to inspections from the Care
 25 Inspectorate, care homes were being inspected and

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1 part of staff knowledge and awareness, and suddenly
 2 care homes were expected to be able to adhere to
 3 standards which (a) they disagreed with and still
 4 significantly today disagree with and (b) over which
 5 they had no control, and that resulted in a real sense
 6 of de-professionalising individuals working in
 7 care homes.
 8 **Q.** We also know that in May 2020 the Crown Office initiated
 9 a process of reporting an investigation of deaths that
 10 were occurring in care homes, and it is said within
 11 Scottish Care's statement that this caused considerable
 12 trauma within the care home sector. What was the impact
 13 on -- the Crown Office investigations on care homes,
 14 what was the impact on care homes and care home staff?
 15 **A.** So the impact on care homes of an investigation that was
 16 solely directed at the care sector was increased risk
 17 aversion because of the fear of being prosecuted for
 18 criminal action if they were seen to be in breach of any
 19 of the regulations, whether it be on visiting, whether
 20 it be on IPC or on any other area. The impact on staff
 21 was profoundly damaging. And I would have to say, of
 22 the whole pandemic experience, this has been a lasting
 23 damage because it's still ongoing. I know of a number,
 24 of hundreds of individuals who have communicated with me
 25 about the mental distress and upset that they have

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1 visited by oversight teams and by health improvement
 2 Scotland.
 3 What was the impact on care homes of this increased
 4 regulatory oversight and inspection during the pandemic?
 5 **A.** Profoundly negative, and we developed a report to
 6 indicate that. It is very rare in an emergency for
 7 significant change and improvement to occur when those
 8 carrying out those inspections and scrutiny are not
 9 respected, have no professional regard, and don't
 10 understand the context in which they were inspecting.
 11 And that was the experience of having NHS practitioners
 12 assessing the validity or otherwise of IPC measures in
 13 a social care environment.
 14 **Q.** What impact did this increased regulatory requirements
 15 and inspections have on care home residents?
 16 **A.** In a sense, it perpetuated and continued a practice of
 17 what I called the clinicalisation of care settings.
 18 Inevitably, in order to comply with a scrutiny approach
 19 which was much more clinical, much more medical in
 20 nature, care homes had to change their practice,
 21 otherwise they would lose their registration. And
 22 a number of us at the time spoke about the fact that new
 23 standards and frameworks were introduced virtually
 24 overnight with minimal consultation, absolutely no
 25 training, learning and development resource in -- on the

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1 experienced. I know of dozens who have left the sector
 2 solely as a result of the investigations of the
 3 Crown Office, because a whole sector has been held up as
 4 being culpable for actions -- only in Scotland, in no
 5 other administration that I am aware of national -- in
 6 the UK or internationally.
 7 Yes, it's appropriate that the public are assured of
 8 best practice and that everything is done, but in order
 9 to achieve that, the holding up of every single worker
 10 in every single care home as potentially culpable has
 11 been emotionally and psychologically hugely damaging.
 12 **MR TARIQ:** My Lady, that concludes my questions. There is
 13 a question on behalf of Scottish Covid Bereaved.
 14 **LADY HALLETT:** Ms Mitchell.
 15 **Questions from MS MITCHELL KC**
 16 **MS MITCHELL:** I am obliged, and indeed I am obliged to my
 17 learned friend Mr Tariq, who has posed many of the
 18 questions that the Scottish Covid Bereaved wished to be
 19 placed to this witness.
 20 You have already touched upon one of the questions
 21 I really wanted to ask, so it's really just to explore
 22 it with you a little bit further.
 23 You have spoken about the imposition of visiting
 24 restrictions in care homes and it's the experience of
 25 the Scottish Covid Bereaved that there was differences,

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1 broad differences in fact, in approaches taken by
2 different care homes to the implementation of visiting
3 restrictions.

4 Were you, first of all, aware of the fact that they
5 weren't being implemented uniformly?

6 **A.** Absolutely, yes. We are very aware that there were some
7 of our members who simply refused to implement the
8 restrictions full stop, because they didn't feel them
9 acceptable, and there were others who followed them to
10 the letter because they were frightened to do otherwise.

11 **Q.** You have indicated quite clearly in the evidence to this
12 Inquiry that in relation to Scottish Government and
13 Public Health Scotland that their provision of guidance
14 in relation to various matters wasn't, as you put it,
15 informed by the views of those with a proper
16 understanding of the matter. Would it have been useful
17 or helpful for your body to have provided any
18 supervision or specific guidance during the pandemic to
19 care home providers in relation to the implementation of
20 visiting restrictions?

21 **A.** Apart from the reality that we didn't have resource or
22 capacity so to do, what we did do during the pandemic
23 was, through surgeries and through webinars, to
24 encourage or members to be as flexible as possible,
25 recognising that there were issues to do with Operation

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1 authority to start on a new track, but if my Lady would
2 think it would be of any assistance to the Inquiry to
3 hear about that issue, I would be happy to ask
4 a follow-up question in that regard.

5 **LADY HALLETT:** My only concern is we have another witness
6 that we're trying to get in, so how long do you think it
7 would take?

8 **MS MITCHELL:** Just to ask him to expand upon the issue of
9 the removal of insurance and what effect that had.

10 **LADY HALLETT:** If you can do it in summary, Dr Macaskill.

11 **MS MITCHELL:** I'm obliged.

12 **A.** Very quickly, at the start of the pandemic there were
13 multiple providers for insurance for the care sector;
14 within weeks that reduced to around about half a dozen.
15 And at the same time there was an exorbitant increase in
16 the cost of premiums, upwards of 200-300% increases. It
17 was one of our major headaches. And one of the main
18 reasons was that insurers would not cover Covid and
19 insurers set additional conditions including the latest
20 care inspection report on IPC, and one of the risks to
21 that was increased visiting access. So we engaged with
22 insurers both in Scotland and nationally and with the
23 support of government, Scottish Government, to try to
24 ease the system, but the lack of -- or the issue around
25 insurance definitely impacted on the willingness of care

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1 Koper, which was a huge negative cloud over them, there
2 were issues to do with insurance, which we've not talked
3 about because of the withdrawal of multiple insurance
4 coverage for care homes, which made many more risk
5 averse of appearing to break guidance.

6 But we did everything we could, we worked in the
7 early stages with groups like Care Home Relatives
8 Scotland to try to increase the willingness of our
9 members to open up when it was appropriate to do so.
10 I'm sure we could have done more, but we were very clear
11 that the best interests of individuals was that we
12 opened care homes as quickly as possible, but it was
13 extremely difficult to challenge particularly small
14 providers.

15 And I think we forget the vast majority of provision
16 of care homes in Scotland is by small, single operators
17 or small, double, three operators. It's very difficult
18 in that environment to give them the assurance that by
19 appearing to act against guidance, whose status was
20 never confirmed, they weren't at risk of deaths
21 occurring and Operation Koper investigations resulting.

22 **MS MITCHELL:** I'm obliged for the detail given in your
23 response.

24 My Lady, a new issue was touched upon, and that is
25 one insurance. I am loathe to start and I don't have

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1 providers to open up to visiting.

2 **MS MITCHELL:** I'm obliged.

3 **LADY HALLETT:** Thank you very much, Ms Mitchell.

4 Forgive the cough.

5 Thank you very much, Dr Macaskill, I'm very grateful
6 to you, and having heard your advocacy I'm surprised
7 that anyone didn't pay immediate attention to you, so
8 thank you very much indeed.

9 **THE WITNESS:** Thank you, my Lady.

10 **(The witness withdrew)**

11 **LADY HALLETT:** Mr Tariq.

12 **MR TARIQ:** My Lady, may I please call Ms Nicola Dickie.

13 **MS NICOLA DICKIE (affirmed)**

14 **LADY HALLETT:** Sorry if we've kept you waiting.

15 **Questions from COUNSEL TO THE INQUIRY**

16 **MR TARIQ:** Good afternoon, Ms Dickie. Thank you for your
17 assistance to the Inquiry to date.

18 There are a few preliminary matters that I wanted to
19 discuss with you before we get into the substance of
20 your evidence. Can you please keep your voice up and
21 speak slowly, because the evidence is being transcribed.
22 If any of my questions are unclear, please say so and
23 I will rephrase.

24 COSLA has provided the Inquiry with a witness
25 statement that's dated 7 September 2023. This is

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1 a statement which is INQ000273700, and this is
2 a corporate statement that's submitted to this module of
3 which you were the author. Is that correct?

4 **A.** That's correct, yes.

5 **Q.** If we turn to page 18, I was going to say is that your
6 signature, but would that have been your signature?

7 **A.** Yes, it would.

8 **Q.** COSLA has also provided an addendum to the witness
9 statements dated 24 October 2023, which is at
10 INQ000327643, and this is -- if we turn to page 5, this
11 is again where your signature would be.

12 Are you content for the statement and the addendum
13 to the statement to form your evidence to the Inquiry?

14 **A.** Yes, of course.

15 **Q.** Are the contents of the statement true to the best of
16 your knowledge and belief?

17 **A.** They are, yes.

18 **Q.** Just before we look at COSLA's role in the pandemic,
19 I just wanted to touch very briefly with you on COSLA as
20 an organisation.

21 COSLA is a national association of Scottish
22 councils; is that right?

23 **A.** Yeah.

24 **Q.** It's a membership organisation of all 32 local
25 authorities in Scotland; is that correct?

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1 and social care and including public health.

2 As the pandemic emerged, I also took on the lead
3 role across the organisation. So I played

4 a co-ordination role -- given that the pandemic was
5 primarily in health and social care settings -- in terms
6 of guidance. But it also meant I had a co-ordinating
7 role across the rest of the policy teams that the
8 organisation has. So we also look after education,
9 children and young people, housing, homelessness, so
10 I was playing that co-ordination and lead role as well
11 as doing the policy related to health and social care.

12 **Q.** In October 2021, you became the director of people
13 policy in COSLA. What was your role and responsibility
14 in that position in relation to the pandemic response of
15 COSLA?

16 **A.** So the previous role was the chief officer for health
17 and social care. The director sits above that role in
18 the organisation, so -- and I have teams that directly
19 report to me who deal with health and social care,
20 children and young people policy and indeed COSLA's
21 strategic migration team which deals with asylum and
22 refugee issues.

23 **Q.** I understand that you remain in that position to this
24 day, is that right?

25 **A.** That's correct, yes.

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1 **A.** Yes, that's correct.

2 **Q.** What functions does COSLA perform for its members in
3 a non-pandemic time?

4 **A.** So COSLA is the membership organisation for the 32 local
5 authorities in Scotland. We are a politically-led
6 organisation. The Inquiry I'm sure will have heard from
7 our sister associations across the rest of the UK, the
8 Local Government Association. We provide
9 representation, negotiation, for our members in support
10 of access to legislation, finance and policy that
11 supports the communities that they serve up and down the
12 length and breadth of Scotland. We are also the
13 employers association for the 32 councils, so we
14 negotiate the terms and conditions of the local
15 government workforce and indeed pay.

16 **Q.** Would it be possible, Ms Dickie, just to keep the pace
17 slightly slower, because there is a stenographer that is
18 trying to transcribe the evidence.

19 As far as I understand it, you were the chief
20 officer, health and social care, in COSLA between
21 February 2020 and September 2021. What was your role
22 and responsibilities in that position in relation to
23 COSLA's pandemic response?

24 **A.** So as the health and social care chief officer, I was
25 responsible for all the policy as it related to health

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1 **Q.** I now want to turn to the issue of the relationship
2 between the Scottish Government and local government.

3 In the expert report of Professor Paul Cairney, who
4 gave evidence this morning, he says -- well, I'll simply
5 quote:

6 "Overall, COSLA/local government is an important but
7 subordinate partner in Scottish central-local
8 relations."

9 The Scottish Government retains responsibility for
10 the management of emergencies in Scotland, including
11 health emergencies, within the limits of devolution.
12 Local government plays a role of strategic partner for
13 the delivery of policy in each local authority area.

14 Similar to that there is a report that I will come
15 to later on, it's a report by Professor Kevin Orr of the
16 University of St Andrews and the improvement service,
17 which is titled "Good governance during Covid-19,
18 learning from the experience of Scottish local
19 authorities", and in that report it said, and I quote:

20 "There is a long-standing and well-developed
21 academic literature analysing the tendency of central
22 governments to regard local authorities as delivery
23 agents for national policies."

24 Do you agree with this assessment that the Scottish
25 Government has a tendency to view local authorities as

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1 delivery agents for national policy?
 2 **A.** I don't think it's as straightforward as that at all
 3 times. I would also question the word "subordinate".
 4 I think from a local government perspective we are
 5 absolutely clear that we are a legitimate sphere of
 6 elected government in this country and we deliver
 7 functions for the communities that we serve.
 8 I think we recognise that there will be times where
 9 things are best done nationally and there are things
 10 that are best done locally. So I recognise that the
 11 devolution settlement and indeed what's further devolved
 12 down to local government -- it's not the same across all
 13 of the policy teams that COSLA has access to, but I do
 14 think that there is a time when local government is more
 15 than a delivery agent of colleagues in Scottish
 16 Government, and I don't believe that that's true across
 17 all of the Scottish Government all of the time.
 18 **Q.** So my question was about the perception that the
 19 Scottish Government has of local government and local
 20 authorities, that they sometimes view local government
 21 as a delivery agent for its national policies. Is that
 22 a tendency that you see coming from the Scottish
 23 Government towards local governments or local
 24 authorities?
 25 **A.** I think it's some that many in local government would

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1 are alluded to in my statement but also in terms of
 2 those political relationships.
 3 **Q.** So does COSLA feel that it had sufficient opportunities
 4 to communicate the views and concerns of local
 5 government to the Scottish Government during the
 6 pandemic?
 7 **A.** I think we do, I think in my statement I refer to the
 8 first time that COSLA and indeed representatives from
 9 the chief executives of Scottish local authorities saw
 10 this, we were in -- the first time we were in a SGoRR
 11 meeting was 16 March, COSLA and Scottish Solace, who are
 12 the chief exec in local government, attended SGoRR, both
 13 at official level and at ministerial level throughout
 14 the pandemic. I think that demonstrates that there was
 15 a concerted effort to bring the views of Scottish local
 16 government into the thinking and the decision-making
 17 processes of colleagues in Scottish Government. I think
 18 that engagement was on the basis of the statutory
 19 legislation that had been introduced made it clear that
 20 decisions were for Scottish ministers to make, but there
 21 was engagement and COSLA were consulted throughout the
 22 various stages of the pandemic.
 23 **Q.** Do you consider that the view -- so you say the
 24 engagement was vast, but engagement is one thing, and
 25 then properly listening, understanding and factoring in

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1 see as true at times.
 2 **Q.** In COSLA's corporate statement, it is said at
 3 paragraph 3.2, I don't want intend to take you to it but
 4 I'll read out what it said, it says:
 5 "COSLA played a key role in the framework set up by
 6 the Scottish Government to respond to the pandemic."
 7 In the corporate statement, it's explained that
 8 COSLA was represented in a number of groups set up by
 9 the Scottish Government, it had bilateral regular
 10 meetings with the former Deputy First Minister of
 11 Scotland, John Swinney, COSLA had meetings with other
 12 Cabinet Secretaries and ministers in the Scottish
 13 Government. Overall, how would you describe the
 14 Scottish Government's engagement with COSLA during the
 15 pandemic?
 16 **A.** So I would describe the Scottish Government's engagement
 17 with COSLA throughout the pandemic as vast. There was
 18 a lot of conversations, engagement going on both at
 19 political and official level. As I've already said, we
 20 carry out all of the policy teams and the devolved
 21 functions that local government has, and there wasn't
 22 a part of our organisation or the services provided by
 23 local government that weren't touched by the pandemic,
 24 so we were in regular contact and there was good
 25 engagement both in terms of the formal structures that

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1 those views into the decision-making might be something
 2 different. Do you feel that the Scottish Government
 3 always listened, understood and then factored in the
 4 views of local government into its decision-making
 5 during the pandemic?
 6 **A.** So I think colleagues in government always listened,
 7 I think they tried their best to understand what we were
 8 saying, I think it becomes more difficult to understand
 9 how that was factored into the decision-making process
 10 because those decision-making processes were for
 11 Scottish Government and therefore we were not
 12 necessarily party to how that evidence was then weighed
 13 up.
 14 **Q.** How that evidence was then effectively --
 15 **A.** Yes.
 16 **Q.** -- going to the key decision-makers who were then making
 17 the decisions that affected local government; is that
 18 correct?
 19 **A.** Yes.
 20 **Q.** We know from COSLA's statement that it was a member of
 21 the National Incident Management Team. These were
 22 meetings that were usually chaired by Public Health
 23 Scotland's Dr Jim McMenamin, and one of the functions of
 24 the National Incident Management Team was to provide
 25 strategic public health leadership and to advise the

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1 Scottish Government on measures to control the pandemic.

2 Can we look at the meeting minutes from the NIMT
3 from 2 December 2020. This is at INQ000197243.

4 You, as I understand it, had attended by this stage,
5 I think, a prior NIMT meeting on behalf of COSLA; is
6 that correct?

7 **A.** Yes, that's correct.

8 **Q.** And it appears, as we will go through the minutes, that
9 this meeting was attended by Jane O'Donnell. Can you
10 tell me what Ms O'Donnell's position was as at
11 December 2020?

12 **A.** Yep, so Ms O'Donnell was the director of people policy
13 in COSLA in December 2020.

14 **Q.** You will see that the document at the top, it's got the
15 logos of Health Protection Scotland and Public Health
16 Scotland. It says "National Incident Management Team",
17 and it's a meeting of 2 December 2020.

18 If we're able to go to page 2, I want to read from
19 the second entry. This says -- and it's attributed to
20 AB, who we understand to be an official from the
21 Scottish Government, it says:

22 "The [Deputy First Minister] will have a call with
23 the local authority Chief Executive -- my understanding
24 is the DPH ..."

25 Is that the director of public health?

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1 So the concern here of Ms O'Donnell appears to be
2 that if you bring in local authority voice into each of
3 these individual decisions, their position might then
4 conflict with the advice that the NIMT is giving to the
5 Scottish Government; is that correct?

6 **A.** No, I have to say I don't -- that's not the way I read
7 that, because when I'm talking about local authority
8 colleagues, I think, "putting up", I suspect that's the
9 conversation that the chief executive of the council was
10 having with their council leader. So I don't think this
11 is about when local government's view was being fed into
12 Scottish Government, I think what we're getting at here,
13 having read before and after, is that the directors of
14 public health should be working with the council
15 chief exec so that they're sitting down with their
16 council leader and saying: here are our statistics, this
17 is what this means, here's what our trajectory looks
18 like, and then potentially, for example, and what we're
19 hearing in the public health community is that we've got
20 another wave coming or there's a different -- you know,
21 there's a different variant of concern.

22 So I think the "putting up" there is putting up to
23 their council leader. I don't know that it's feeding
24 into Scottish Government. That was certainly my reading
25 of that and I certainly know that there were

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1 **A.** Yep.

2 **Q.** "... is not on those calls, but following cabinet this
3 week one of the ways to resolve would be to have the
4 local authority Chief Executive and [director of public
5 health] on the same call. Supplementary to that could
6 be to get a short joint paper agreed by the local
7 authority Chief Executive and DPH about where you think
8 you are and the evidence that has been done to show why
9 you should move up or down a level."

10 So this appears to be a proposal from or
11 a suggestion from an official within the Scottish
12 Government on how to better involve local authorities in
13 the decision-making process around local restrictions,
14 such as keeping them informed of the evidence upon which
15 the decision is made. Is that right?

16 **A.** I believe so, yeah.

17 **Q.** Can we then read the next entry, and this is from
18 Ms O'Donnell of COSLA, and it says:

19 "I think it's vital we don't end up in a situation
20 where local authority colleagues are putting up
21 different advice from what advice is given here --
22 whatever we do -- the NIMT considers the data and that
23 we are only supplementing with local colour. We are
24 cautious we don't act in a way that would be
25 inadvertent."

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1 conversations in and around about that time to make sure
2 that council leaders had exactly the same information
3 that Scottish ministers were looking at so that they
4 could draw conclusions, as it were.

5 **Q.** But if we look at the first sentence, the concern seems
6 to be that:

7 "... local authority colleagues are putting up
8 different advice from what advice is given here --
9 whatever we do -- the NIMT considers the data and we are
10 only supplementing with local colour."

11 So is the concern not here that actually if you
12 engage with local authorities their position on what
13 level, for instance, of restriction should apply might
14 be different from what has been advised by the NIMT and
15 if you involve -- and that then means that there isn't
16 a single piece of advice going up to the Scottish
17 Government to make the ultimate decision?

18 **A.** That's not what I take from that, and I have to say that
19 the way that the NIMT advice was formulated was that it
20 was done on the basis, as you know, as you can see from
21 the rest of the minute, what are the facts and the
22 figures telling us. We had absolute conversations
23 around about everyone needing to be faced with the facts
24 before they went any conversations around about levels.

25 What I would say is both the documents that

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1 government published, so the strategic framework
2 document that laid out the phases early on in the
3 pandemic, so kind of April, April/May 2020, and then the
4 subsequent advice that was published around about the
5 tiering system, both were quite specific around about
6 engagement with local government.

7 So it doesn't suggest to me if you're publishing in
8 a publicly available document that you're going to try
9 to subvert any information that local systems will be
10 providing to you.

11 **Q.** If we then read the entry below, this is from TP, who is
12 a director of public health, and it says:

13 "... issue is that we are being asked to give advice
14 in the absence of all the harms."

15 That's, I think, a reference to the four harms
16 strategy, and the NIMT is only looking at the first harm
17 here, and not looking at some of the other harms such as
18 the economic harms.

19 "England agreed to share their 3 harms and I think
20 Scotland should share the harms papers with DPH and
21 local authorities and then we will have all the
22 information."

23 So is this a recognition that actually local
24 authorities weren't getting the full picture that would
25 then inform the decision-making that the Scottish

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1 minute would suggest that would be the case. Forgive
2 me.

3 **Q.** I appreciate that we're talking about events from some
4 time ago. If we read on, I want to look at the entry
5 that is SG, who we understand to be a representative of
6 HPS, and it says:

7 "... the calls with [Deputy First Minister] are
8 essentially political with leaders of each council.
9 Chief executives when they are invited to speak they
10 talk about their engagement with the DPHs. Also to
11 highlight either the CMO or DCMO takes part in that call
12 and goes through the data -- I think there is a process
13 of engagement and I'm not entirely sure if we are over
14 complicating things with having another report."

15 So is that some effectively -- or what do you
16 understand or could be meant by the fact that calls
17 between local authorities and the Deputy First Minister
18 might be perceived as political in nature?

19 **A.** The 32 council leaders are politicians first and
20 foremost, so it's factual that they are calls between
21 two politicians.

22 **Q.** But they are elected, and they're trying to do the best
23 for their --

24 **A.** Yes.

25 **Q.** -- whether it's a local authority or whether it's

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1 Government were making?

2 **A.** I think you can take that from that, and the paragraph
3 before, from Jane, to say that we need all of the
4 information so that when council leaders are going into
5 conversations with Scottish ministers that they have the
6 exact same facts and figures and understanding as
7 Scottish ministers were.

8 I think we were coming from the position that if you
9 provide all of the facts and figures and a reasonable
10 decision has been taken, I think reasonable people
11 should come to a similar conclusion, but we needed to
12 make sure that everybody was aware of the same
13 information so that we didn't have misunderstandings
14 unnecessarily because people only had partial
15 information.

16 **Q.** And it was the position, as far as I can see from this
17 minute, that local authorities only did have part of the
18 information upon which decisions were being made; is
19 that right?

20 **A.** At what stage, sorry?

21 **Q.** At this stage, at this time of this minute, that they
22 weren't, for instance, having access to the four harms
23 assessment that was being undertaken, local authorities?

24 **A.** So I think -- I can't recall exactly at what point all
25 of the four harms information was going out, but that

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1 central government. In the context of a pandemic why
2 would those calls be necessarily political or
3 essentially political, as is being said here?

4 **A.** So I think the fact that you've touched on, local
5 elected members are first and foremost there to advocate
6 on behalf of their local community, their local
7 businesses, the parents, the relatives who were
8 contacting them. So I suspect that essentially
9 "political" is a recognition that local elected members
10 would want to put their point across and be putting
11 their intelligence from the communities that they were
12 supporting forward in a way that paid officials were
13 perhaps not.

14 **Q.** What you see here is it was being suggested that having
15 another report, and you'll recall that was the initial
16 proposal, which outlines the evidence upon which
17 a decision is made to move a local authority up or down
18 a level would be, I think what's being suggested here,
19 overcomplicating things. Is that right?

20 **A.** Sorry, give me the first part of the question again,
21 sorry.

22 **Q.** You recall that the initial proposal --

23 **A.** Yeah, got that bit.

24 **Q.** -- was about -- it's the second entry on the page, and
25 the suggestion was that we could get a short joint paper

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1 agreed by the local authority chief executive and the
2 DPH about where you think you are and the evidence that
3 has been done to show why you should move up or down
4 a level. So that's the suggestion. And then the
5 response further down in the minutes is that that would
6 be overcomplicating things with having another report.
7 Do you see that?

8 **A.** I don't have a view on whether that's overcomplicating
9 things or not. I would suggest that providing as much
10 information as we possibly can to all parts of the
11 system is the most useful thing that we can do.

12 **Q.** And I think if we then read on to the sixth entry, this
13 is from Dr Jim McMenamin of PHS, it says:

14 "... in a paper as yet to be circulated for broader
15 consideration, on the basis of what Andy has outlined we
16 can see any opportunity that exists to have alignment of
17 our thoughts to ensure there is a single public health
18 interpretation of the data as it stands, how that
19 summary is used is very much in the hands of Scottish
20 Government colleagues. Often case studies can be
21 helpful and my understanding for Grampian is at least in
22 some of the discourse I was privy to, sometimes there
23 were various things that were then suggested
24 constructively about how things could be improved.
25 Perhaps the simplest things are on the Thursday on

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1 harms 3 and 4.

2 So I think what you're hearing here is local
3 government saying "We need the complete picture", but
4 also Scottish Government and Public Health Scotland
5 saying as an NIMT if we look at the figures and we say
6 this is what the figures are saying, but then when the
7 minister speaks to the council leader or the chief exec
8 they are then able to provide some information about the
9 harms that are being caused to community or a particular
10 business sector, we need to be in a situation where all
11 of that information is being gathered together at the
12 one stage.

13 **Q.** In the various Scottish Government groups that COSLA was
14 a member, some of which you attended, did you get the
15 sense that there was reluctance by the Scottish
16 Government or others within those groups to engage more
17 fully with local authorities in relation to the
18 decisions that affected them?

19 **A.** That's not a sense that I got, no.

20 **Q.** It's been suggested by some in local government that the
21 Scottish Government's approach to decision-making was
22 too centralised, with insufficient input from local
23 authorities into decision-making process that affected
24 them. Do you agree with that assessment, that the
25 decision-making from the Scottish Government was too

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1 receipt of the information and when the spreadsheet is
2 being added to that's the point where perhaps we should
3 be engaging with our stats colleagues to see if this
4 does equate with what you see and if not, have that
5 local discussion on a scientific basis for common
6 ground. That might allow us on Friday to afford that
7 opportunity for that clear single version of the truth
8 to be imparted. I trust there is a broad consensus
9 agreement and we can proceed on that basis."

10 So is this not where again the NIMT seems to be
11 concerned with a clear single version of the truth that
12 is being imparted to the Scottish Government about what
13 advice is around restrictions for local government,
14 whether they move up or down a level? Is this not in
15 this context a resistance to engaging better with local
16 authorities so that they have the full picture, so that
17 there is this joint paper where they can see the
18 evidence, and they have more access to central
19 governments?

20 **A.** So I think that's true on both sides here, because you
21 said yourself in the earlier extract of this that this
22 NIMT was only looking at harm 1. I think there's
23 a sense that when ministers then speak to local
24 government, local government are potentially providing
25 more information and analysis and local information on

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1 centralised?

2 **A.** I think I can say that the period of the pandemic was
3 a long time and I think there were times when the
4 decision-making and the input from local government was
5 very good. I think there are times when individual
6 local authorities felt that their engagement was very
7 good. I think there were also times when individual
8 local authorities didn't feel that things had gone so
9 well. So I think in the same way that local government
10 is not a homogeneous group, every decision that was
11 taken in Scottish Government was not taken through
12 a standard process because of the speed that we were
13 moving at.

14 So I think it does feel like a bit of a mixed
15 picture. I think there were good engagement, I think
16 there were genuine intentions there. I think the areas
17 of decision-making inside government that COSLA and
18 local government had long-standing relationships with,
19 so for example education, those were tried and tested
20 relationships, if you like, we were used to dealing hand
21 in glove, because the competencies there are very
22 similar. I think when we got into other areas where we
23 didn't have such a close working relationship things got
24 a bit more difficult. So I don't think it's as
25 straightforward as saying it was good or bad, I think

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1 there were peaks and troughs and I think individual
2 local authorities at times fell one way or another.
3 Depended on where they were in the pandemic, depended on
4 how the engagement was going and ultimately what was
5 happening at a local level.

6 **Q.** I want to take you to the report which I've referred to
7 before from Professor Kevin Orr of the University of
8 St Andrews. It's at INQ000351044.

9 And you will see that the report is headed "Good
10 governance during COVID-19: learning from the experience
11 of Scottish Local Authorities".

12 Are you familiar with this report?

13 **A.** Yes.

14 **Q.** For your Ladyship's information, this is a paper which
15 provides some findings and learning from discussions
16 that the researchers and the authors had with senior
17 officials and the elected members of six local
18 authorities in Scotland, and these six local authorities
19 were chosen for this project to provide a mixture of
20 different geographies, so from the islands, from the
21 mainland, different governance arrangements, and also
22 different political compositions, so it's meant to
23 reflect across the board of the 32 local authorities.

24 The researchers then conducted interviews with
25 representatives of these local authorities, and the

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1 the nationally set approach, which was an unrelenting
2 single focus on health harm rather than the 4 harms
3 approach that was claimed. There was no real local
4 decision-making and no real opportunity to influence
5 the response/actions to be taken. It was a here it is
6 and it's to be implemented. Since devolution in
7 Scotland, there has been a growing tension between the
8 Scottish Government and local government and the
9 pandemic has exacerbated that tension not only between
10 respective politicians but also across officials. Local
11 political leaders were being held to account for
12 decisions they had no locus in and privately were being
13 criticised by the Government for not doing enough to
14 support the response, when they were not being treated
15 as a partner in the response."

16 Did COSLA's members communicate concerns of this
17 nature to COSLA during the pandemic?

18 **A.** I think there were times where COSLA leaders
19 collectively raised concerns. I think in evidence we've
20 provided there were times when Mr Swinney came and
21 addressed council leaders to listen to their concerns,
22 when Scotland's Chief Medical Officer or Scotland's
23 clinical leads came to COSLA leaders, so there was
24 an opportunity for COSLA leaders to feed that
25 information in, for us to impart that to government, and

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1 purpose of the paper was to help local authorities learn
2 from the experience of the pandemic and to inform future
3 reviews of governance.

4 The names of the six local authorities and the
5 interviewers have been anonymised in this report to
6 allow them possibly to speak a little bit more freer
7 about their experiences.

8 Can we look at page 34 of the report, and I want to
9 look at the quote on the second half, so it says:

10 "One chief executive was directly critical of what
11 was felt to be an unnecessarily centralised approach by
12 the Scottish Government."

13 The quote reads, and this is based on the interview:

14 "The public face of the pandemic for both
15 governments, was their respective political leader. In
16 Scotland's case, that was the First Minister. It was
17 clear from a delivery partner perspective, that the
18 political involvement in all the decision-making
19 associated with the response was all pervading and on
20 some occasions, the political 'optics' seemed the
21 guiding force. And of course, because of the 24/7 media
22 world we now live in, the respective national political
23 leaders were centre stage of that 24/7 media word. In
24 the gold command structures put in place by the Scottish
25 Government, there was no scope for any departure from

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1 at times for the government to hear that direct from
2 council leaders.

3 **Q.** But this seems to be at least a criticism that isn't
4 limited to one moment in time or one particular
5 decision, it's an impression of the Scottish
6 Government's approach across the pandemic; is that
7 right?

8 **A.** I think that's what that quote is suggesting there,
9 I mean, I think this report is dated December 2020, so
10 that was, you know, first part of the pandemic,
11 I suspect it was wishful thinking on our part that we
12 were through the worst of it and we should take the
13 temperature of local government. I suspect if this had
14 been re-run again you would get a slightly different
15 result. Some of that might be better, some of that
16 might be worse, but I think that's what that is saying
17 there.

18 I think the other report, Mr Orr's report,
19 Professor Orr's report that you reported to there speaks
20 of the tension around about the devolution settlement
21 that's been around since Scottish Parliament came to
22 fruition. So, as I said earlier on, I think it's
23 a version of something that many across the local
24 government family might recognise.

25 **Q.** We will come to other evidence from local authorities

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1 that is being provided to the Inquiry, but do you agree,
2 does COSLA agree with the statement that the political
3 involvement in all the decision-making associated with
4 the response was all pervading and on some occasions the
5 political optics seemed to be the guiding force?

6 **A.** That's not something that I can agree or disagree on
7 behalf of COSLA.

8 **Q.** Did you get the impression at least that some of the
9 Scottish Government's decision-making during the
10 pandemic was at least in part guided by political
11 considerations of the political optics?

12 **A.** I didn't, no, on a personal level, no.

13 **Q.** There is a reference here to:

14 "In the gold command structures put in place by the
15 Scottish Government, there was no scope for any
16 departure from the nationally set approach, which was
17 an unrelenting single focus on health harm rather than
18 the 4 harms approach that was claimed."

19 You will have had some insight into the four harms
20 by attending some of the NIMT meetings. Did you have
21 an impression that the Scottish Government's focus was
22 on effectively the first harm to the detriment of the
23 other harms that are identified in the four harms
24 approach?

25 **A.** I think all of the harms were discussed all of the time.

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1 something specific, but if the local knowledge then told
2 you that there was -- a particular sector was going to
3 be -- do you know, if I give the example of fruit
4 picking, do you know, that's one of the areas that
5 four harms looked at, and -- and for, do you know,
6 two-thirds of the councils in Scotland it made no
7 difference, but it made a difference for the council
8 areas in Scotland that were waiting to do that. So
9 I think that's why we were always keen to make sure that
10 the local concept and what Ms O'Donnell called "colour"
11 was being fed into those conversations, because
12 four harms is -- you're right, it wasn't necessarily
13 a decision-making tool, it was one way of looking at the
14 pandemic and the various harms that were being done, but
15 it was certainly being followed up by some of that
16 localised and -- intelligence.

17 **Q.** So would you then disagree with the sentiment in this
18 quote that there was no real local decision-making and
19 no real opportunity to influence the response actions to
20 be taken?

21 **A.** So I think I would go back to the point that the
22 legislation that was passed was clear that the
23 decision-making through that emergency legislation was
24 for Scottish ministers. We didn't have the power to
25 take decisions at a local area around about stopping

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1 I think it was often not clear what was being weighed in
2 amongst those harms. I think there were times when the
3 health -- when harm 1, which were direct Covid harms,
4 were absolutely front and centre, but I can also
5 remember being in NIMTs where harm 4, around about
6 economy, was certainly at the forefront of the
7 discussions.

8 I think with hindsight the four harms approach,
9 understanding what the weighting was in advance would be
10 something that would be quite useful. So I think we
11 were discussing and we were feeding in information
12 across the four harms, but, as I said earlier, not being
13 party to the decisions that were then taken inside
14 government, it's difficult for us to work out what was
15 the weighting that was applied across those harms
16 throughout.

17 **Q.** I think the related point to that is it's not really
18 a science, is it, the four harms approach? It's not
19 a decision-making tool that you input in what the harm
20 is for harm 1, 2, 3, 4 and it tells you what the answer
21 is, it's more akin to guiding principles; is that right?

22 **A.** Yeah, I think that's absolutely right, and I think
23 that's also one of the reasons that feeding in the
24 information from local areas was so critical because on
25 paper harm 4, around about economy, could look like

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1 transport and stopping people doing things. So I think
2 we've got to think about the practical legal machinery
3 that was there was not for local -- local decision.

4 I do think that there was an opportunity to
5 influence -- as I've said already, it's difficult to
6 work out, if things changed, was that as a direct result
7 of COSLA's influence or was that a direct result of
8 an individual's influence or was that something that had
9 changed in the pandemic? It was a bit difficult to work
10 out, if something had changed, why that was the case.
11 That said, everything was moving at pace, so ...

12 **Q.** At the outset you'll recall that I quoted a passage,
13 I think it was from Professor Cairney's report, which
14 had described the relationship between central
15 government and local government as one of the local
16 government being the subordinate partner. I think you
17 took issue with that. Would that, in this context, in
18 the pandemic, is it fair to say local government was the
19 subordinate partner, if you're explaining that
20 ultimately the decisions lay with central government?

21 **A.** I think that's fair.

22 **Q.** If we turn to page 35 of the report, and you will see
23 the quote at the top:

24 "Indeed another chief executive commented:

25 "I think there was a tendency from the government to

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1 act as though local authorities were the same as NHS
2 boards and they could just say, 'We want you to do this
3 and we want it by Friday,' rather than the way they
4 would normally engage with local authorities."

5 And then there is another extract from an interview
6 further down the page, where it says:

7 "One council leader whose area was placed in a local
8 lockdown is also critical of the relationship with
9 central government:

10 "We got involved in the decision-making process very
11 late in the day. It was frustrating for us that we felt
12 that our voices weren't really being heard. I feel that
13 although a lot was said about partnership working
14 between Scottish Government and local authorities, that
15 didn't really happen on the ground. We were given the
16 opportunity to meet with people, but we didn't really
17 feel that we were able to get the opportunity to
18 influence those decisions. We were just being paid lip
19 service."

20 Is that sentiment or those impressions, impressions
21 that you formed as being a senior individual within
22 COSLA, who sat on many of these Scottish Government
23 groups?

24 **A.** So I think it's fair to say the top quote around about
25 the chief executives, I've already alluded to the fact
201

1 process was running, but local government in Scotland
2 don't -- don't tend to shy away from telling people if
3 they think lip service is being paid, so, again, if that
4 was the case, these issues would have been raised by
5 COSLA, raised with the ministers, and the opportunity
6 for council leaders to meet with politicians was
7 provided.

8 **Q.** Did you form the impression that only lip service was
9 being paid to the voices of local authorities in the
10 decisions that affected them?

11 **A.** No.

12 **Q.** If we're then able to turn to page 34 of the report, and
13 it says, if I can read the quote at the top, it says:

14 "On that tension [and the tension here is referring
15 to the flow of the information from the Scottish
16 Government to local authorities] one chief executive
17 offered the following perspective:

18 "We were getting no advance insight from the
19 Scottish Government around what was going to happen next
20 in terms of public health measures to be put in place,
21 so we couldn't brief our members in advance of the
22 public announcements. This created a suspicion amongst
23 members, that its own staff were not keeping them
24 briefed -- when in reality, their own staff had no
25 advance notice either. As a staff base, and a delivery
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1 that we had many ministers and civil servants who had
2 never worked with COSLA or local government closely,
3 I think in some of the reports that I've read as well
4 the recognition around about the democratic mandate that
5 elected members across Scotland's local authorities
6 have -- was not necessarily understood across --
7 understood to the same extent across all parts of
8 Scottish Government, so I think there was a tendency
9 early on in the pandemic to say "We want this and we
10 want it done by then and this is how we want it to be
11 done". I think that's one of the reasons that COSLA
12 kept our decision-making and governance going, because
13 there is -- no individual in COSLA has executive
14 decision-making powers so everything had to be done
15 using our existing governance structures so that all
16 32 council leaders were given the opportunity.

17 So I think there was a tendency right at the start,
18 maybe through a lack of understanding about just how
19 councils are structured and what our democratic mandate
20 is.

21 I think on -- on the second one, as I said, I think
22 across the piece, across local government, council
23 leaders didn't feel like that all of the time, I think
24 there were fits and starts -- or I think there were
25 differences about how they felt the decision-making
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1 partner of Scottish Government being informed at the
2 same time as the public, was hugely frustrating and
3 unhelpful."

4 Is this the sort of feedback that COSLA was getting
5 from local authorities during the pandemic about the
6 fact that the Scottish Government's communications to
7 local authorities was not particularly good and in fact
8 was causing all sorts of issues because some local
9 authorities were finding out about restrictions in their
10 local area at the same time as the public?

11 **A.** So I think it's fair to say that there was an element of
12 that. That feedback provided, I mention it in my
13 statement, and indeed the surveys we undertook from the
14 32 local authorities in advance of these modules, that
15 that comes through loud and clear, certainly from some
16 of those submissions. So I think that's fair to say
17 that that tension was there. COSLA were regularly
18 feeding that back.

19 At times, there was an element of things were just
20 moving really, really fast, so it might be the case that
21 COSLA's chief executive was aware and perhaps the chair
22 of Solace, as a representative of the 32, where those
23 phone calls or ability to catch up with everybody
24 between a decision being made and it being imparted it
25 was not always a situation that we were able -- so I
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1 think we did get some of that feedback, we did provide
 2 that feedback to colleagues in Scottish Government, and
 3 as the pandemic went on and decisions were being taken
 4 at a slower pace I would have to say that did improve.

5 **Q.** If it was the case that local authorities were sometimes
 6 finding out about public health measures that were
 7 imposed in their local areas at the same time as the
 8 public, say for example by watching Nicola Sturgeon's
 9 daily coronavirus briefing, what challenges might this
 10 present on the ground for local authorities?

11 **A.** So I think again in the surveys from the 32 local
 12 authorities the types of challenges were almost
 13 immediately from an announcement being made, members of
 14 the public were contacting council officers asking for
 15 what that meant or what happened next, and that does
 16 lead to a level of challenge and frustration in local
 17 areas.

18 What I would say is that where the guidance was
 19 directly related to functions of local government, we
 20 would normally have a bit more notice than that. So if
 21 we take, do you know, the schools being closed, that
 22 information was available, but where things were
 23 ancillary to what local government was doing, so if it
 24 was happening in a transport section or something, that
 25 might be slightly different. But it is something that

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1 **A.** So COSLA were engaged in that process in the way that we
 2 were throughout, which was colleagues in government
 3 would contact us to say "This is potentially where we're
 4 going, this is where we're thinking", and then they
 5 would provide us with early drafts of what the broad
 6 parameters were.

7 We would then take that out across our professional
 8 associations and our member councils, and we would be
 9 looking for does it work in general terms for local
 10 government, and other issues around about the various
 11 regulatory services, access to core services. And then
 12 what we would also be doing is we would be looking at
 13 the tiering system, not just in the generic functions of
 14 local government but also in the specifics for remote
 15 and rural communities, for our island communities,
 16 making sure that worked for our border authorities, and
 17 then feeding that information back to local authorities
 18 so that we got, at the point of publication, something
 19 that local government could operationalise at a local
 20 level. And that meant across all of the tiers and all
 21 of the various interventions that local government would
 22 have a part to play.

23 **Q.** So am I correct to understand that COSLA had quite
 24 a significant engagement in relation to the introduction
 25 of the five levels system?

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1 was an issue throughout the period of the pandemic.

2 **Q.** But if it's a decision, for instance, about a certain
 3 area being placed in level 3 instead of level 2, that
 4 impacts a local area because it's a degree of the
 5 restrictions in that area, and it would surely cause all
 6 sorts of problems for the local authority that needs to
 7 implement those restrictions if it's finding out at the
 8 same time as the public?

9 **A.** Yeah, I mean, absolutely. I think again in the survey
 10 responses that came in from the 32, that was absolutely
 11 crystal clear from a number of areas. What I would say
 12 is that it was 32 councils and how often that happened
 13 it's difficult to tell because things were changing that
 14 often, but any time that feedback was provided to COSLA
 15 we were sure to feed that in to colleagues in government
 16 and try to make sure it didn't happen on a future
 17 occasion.

18 **Q.** I'll come back to some of the survey response, but
 19 I want to just explore the levels system that was
 20 introduced in October 2020 in a bit more detail.

21 Was COSLA engaged in the decision-making process by
 22 the Scottish Government to introduce the five levels
 23 framework in Scotland?

24 **A.** Yes, we were.

25 **Q.** How was COSLA engaged in that process?

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1 **A.** So the introduction of the levels and what those levels
 2 meant and the various NPIs that sat against the levels,
 3 COSLA was engaged in that and took a sounding from all
 4 of our professional associations that would support us.

5 **Q.** In mid-October 2020 it was said at the time that the
 6 Scottish Government planned to introduce a three-tier
 7 system similar to that which had been announced in
 8 England, and in fact Nicola Sturgeon was quoted as
 9 saying that the Scottish Government was seeking to align
 10 as closely as possible with other UK nations on
 11 a strategic level, although she stressed that the
 12 ultimate decision lay with the devolved government, this
 13 is the Scottish Government.

14 So were you aware that in mid-October 2020 the
 15 Scottish Government was contemplating a three-tier
 16 system similar to that in England?

17 **A.** I don't recall that off the top of my head.

18 **Q.** Do you see that there might be some strategic benefits
 19 in having the same three-tier system in Scotland as
 20 exists in England, so that it would be easier for the
 21 public to understand that roughly Tier 2 means the same
 22 north and south of the border?

23 **A.** I can see from a strategic perspective how that might've
 24 been useful.

25 **Q.** And in fact, and you've touched upon this already, that

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1 the local authorities have provided survey responses to
2 a survey, this was provided to the Inquiry by COSLA, and
3 they'd been asked to answer various questions, and
4 Moray Council said in its survey response:

5 "Changes of levels and having different levels
6 across local authority boundaries caused some confusion,
7 as did it being called 'levels' in Scotland and 'tiers'
8 in England. This caused outbreaks of arguments on our
9 social media channels which we worked hard to contain as
10 there were often contributors giving conflicting
11 information depending on whether they were personally
12 choosing to follow UK Government or Scottish Government
13 guidance."

14 In kind of similar sentiments, East Lothian
15 Council's response was:

16 "Confusion arose due to UK Government and Scottish
17 Government issuing separate guidance, regulation and
18 imposing different Covid-19 regulations, constraints and
19 effective dates. As a country bordering England, this
20 led to much confusing for local residents, visitors and
21 businesses."

22 So do you agree with these responses, that having
23 a three-tier system in England and a five-level system
24 in Scotland at the same time created public confusion,
25 or at least quite a significant risk of public

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1 stops with me' on Scottish Covid tiers", and you will
2 see that it's dated 20 October 2020, and just below the
3 photograph of Nicola Sturgeon it says:

4 "Nicola Sturgeon has insisted that she will have the
5 final say on local Covid-19 restrictions in different
6 parts of Scotland saying 'the buck stops here'."

7 If we read over the page:

8 "The Scottish first minister said she would not
9 'offload' decisions about local alert levels onto
10 councils.

11 "A lengthy row has played out between UK ministers
12 and leaders in Manchester over imposing stricter rules
13 there.

14 "Ms Sturgeon said it was her 'driving ambition' not
15 to repeat this when a new multi-tier system begins in
16 Scotland.

17 "She said the government would 'consult and be as
18 collaborative as possible', but would ultimately make
19 the decisions and would not be getting into
20 'standoffs'."

21 If we then scroll to the top of page 3, and this is
22 a fuller quote from Ms Sturgeon, and it says:

23 "The first minister said: 'I believe it's really
24 important that the really important that the buck for
25 these difficult decisions stops here, with me and

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1 confusion?

2 **A.** I think there was definitely the potential for public
3 confusion.

4 **Q.** So we know that from the press coverage, and indeed
5 Nicola Sturgeon is quoted in that press coverage, in the
6 middle of October what is being considered is
7 a three-tier system to align as closely as possible to
8 England for strategic benefits; and then on
9 23 October 2020 the Scottish Government introduces
10 a bespoke five-level system that didn't align with the
11 system that was being operated in England. Do you know
12 why that decision was made?

13 **A.** I can't recall, and I haven't seen any of the -- we're
14 not core participants, so I haven't seen the document
15 that you're referring to --

16 **Q.** I'm not talking about a specific document. It was the
17 public announcement on 23 October 2020 when the five
18 levels system came in, and what I was trying to
19 ascertain was: if COSLA was engaged and consulted in the
20 process, was it consulted in how the system came about,
21 whether it was going to be three tiers or five levels?

22 **A.** Not that I can recall.

23 **Q.** Can we turn to an article from the BBC News website,
24 this is at INQ000351050, it's an article from the
25 BBC News website and it's headed "Nicola Sturgeon: 'Buck

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1 government.

2 ""We are asking people to do extraordinary things
3 right now, and it's not fair for me and the government
4 to try to offload those onto other people, be it local
5 authorities or health boards.

6 ""We have to consult and be as collaborative as
7 possible -- we will absolutely be engaging with local
8 authorities. And as we take decisions about which
9 levels apply in which parts of the country we will want
10 that to be collaborative.

11 ""But ultimately we have to be able to take the
12 decisions'."

13 If we can pause there, so this is quoting
14 Nicola Sturgeon from her daily coronavirus briefing, and
15 her intention is that ultimately the responsibility for
16 these decisions about which level a local authority
17 might find itself in is a matter -- the decision for the
18 Scottish Government, and she says the buck stops with
19 her and the Scottish Government; but she also indicated
20 the Scottish Government wants to be as collaborative as
21 possible with local authorities, and that includes
22 consulting with them in the decision-making process.

23 Is it fair to say that the local authorities'
24 experience of the Scottish Government's engagement with
25 them in the decision-making process perhaps painted more

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1 of a mixed picture than what Nicola Sturgeon aspired to?
 2 **A.** I think that's fair to say in the early stages of the
 3 levels system being brought in. I suppose it's also the
 4 reason why, come April 2021, we entered into
 5 an engagement protocol between Scottish Government and
 6 COSLA that would lay out exactly what the engagement
 7 protocol would look like. So I think in the period
 8 between the levels system being published and us getting
 9 to that, there were different experiences across local
 10 authorities, and that was something that we sought to
 11 rectify come April 2021. So I think that's a fair
 12 assertion.

13 **Q.** I now want to turn to some of the local authority
 14 responses that the Inquiry has received, because this is
 15 the local authorities being able to reflect on matters
 16 in 2023, when they produced these responses to
 17 the Inquiry. And some local authorities, it is fair to
 18 say, reported in their survey responses that the
 19 Scottish Government did engage with them in relation to
 20 decisions about local restrictions, and examples of
 21 local authorities falling into that category include
 22 Aberdeen City Council, Dundee City Council and the City
 23 of Edinburgh Council.

24 However, other local authorities reported very
 25 different experiences.

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1 council hearing of new rules, initiatives and
 2 restrictions at the same time as the public,
 3 specifically UK Government 5 pm briefings and
 4 unscheduled Scottish Government briefings. This meant
 5 that if the rules were complex, contradictory and/or
 6 poorly articulated, the public would look to the council
 7 for guidance when we had no further information to give.
 8 This was frustrating. It diminished the council's
 9 credibility as a trusted source of information and was
 10 therefore counterproductive in disseminating key
 11 messages."

12 So what we have here is not just the occasional
 13 one-off bad experience; these are local authority
 14 responses to the Inquiry given in 2023 which seems to
 15 paint -- it's not one local authority, it's numerous
 16 local authorities, and in fact there's others which I've
 17 not gone through the responses for the sake of time, and
 18 their experiences seem to all be that the Scottish
 19 Government failed in its intention, as communicated by
 20 Nicola Sturgeon, to consult and be as collaborative as
 21 possible about which levels applied in their local area.

22 In that context -- and because it's not one
 23 response, it's multiple responses from a range of local
 24 authorities from different areas, different geographical
 25 areas, different political compositions -- is there not

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1 For example, Aberdeenshire Council said that it was
 2 not involved in the decisions of the Scottish Government
 3 to impose local restrictions. It added that it was not
 4 asked to agree or participate in Scottish Government's
 5 decision-making in relation to local restrictions
 6 imposed on its area.

7 North Lanarkshire Council said that the Scottish
 8 Government determined the local level placing of
 9 North Lanarkshire Council, and the council was not
 10 involved in the decision-making.

11 South Lanarkshire Council says that Scottish
 12 Government determined the local level placing of
 13 South Lanarkshire Council, in consultation with Public
 14 Health Scotland, and the council was not involved in the
 15 decision-making. Any dialogue with the Scottish
 16 Government related to advising the council of a change
 17 of tier. The council was not involved in any meetings
 18 with the Scottish Government to determine the placing of
 19 the council into a local level.

20 West Dunbartonshire Council said that there was
 21 little opportunity to influence the decision-making.

22 Angus Council says that it was difficult to see
 23 where local needs were considered, and indeed Angus
 24 Council adds:

25 "The main causes of confusion resulted from the

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1 a pattern here that the Scottish Government's rhetoric,
 2 Nicola Sturgeon's rhetoric that she was going to be as
 3 collaborative as possible wasn't actually borne out in
 4 the reality on the ground?

5 **A.** I think that those surveys that are being sent in from
 6 individual local authorities are their experience, and
 7 whether that's a pattern is not for me to determine.
 8 I think they've provided their experience of it and, as
 9 I said, the engagement protocol that subsequently came
 10 in in April 2021 was in and around about exactly what
 11 those local authorities have highlighted there.

12 **Q.** Yes, but the engagement protocol came in -- there was
 13 an engagement protocol COSLA had worked on, is it right,
 14 with the Scottish Government and it came in in
 15 April 2021, but the evidence of these local authorities
 16 isn't in the survey responses that the Scottish
 17 Government's engagement fundamentally changed in
 18 character post April 2021, is it? Not in their survey
 19 responses, they're not making that point?

20 **A.** Not in the survey responses, but then I don't know if
 21 the survey responses -- I don't think we asked
 22 specifically for a date before or after, if I'm ... but
 23 it's a long time since I looked at the survey responses
 24 on the way out.

25 **Q.** But you would expect, for instance, if it was that there

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1 was a fundamental change in the way Scottish Government
2 engaged with local authorities, they might say to local
3 authorities, "Yes, the situation was bad in late 2020,
4 but then COSLA and the Scottish Government introduced
5 this engagement protocol and things significantly
6 improved"; but that's not what is said, is it?

7 **A.** That's not what's in the survey responses, no.

8 **Q.** In the addendum statement to the witness statement of
9 COSLA, COSLA was asked to explain why some local
10 authorities appeared to be frequently involved in the
11 Scottish Government's decision-making and others appear
12 to have had no involvement in the Scottish Government's
13 decision-making, and the response was:

14 "Some local authorities were frequently on the cusp
15 of different tiers of restrictions and discussions would
16 be held in relation to the most appropriate way forward.
17 Some local authorities such as North Lanarkshire were
18 never in that position as they had high infection rates
19 throughout the use of the tier system."

20 That's you explaining why perhaps North Lanarkshire
21 Council were never -- their position is "We were never
22 consulted", and you say: well, the ones that may be
23 consulted were ones that were on the cusp of different
24 tiers. Was that your explanation of why maybe the
25 engagement differed between local authorities?

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1 mutual aid from another local authority around about
2 Trading Standards officers, for example, or, as the
3 example I gave earlier is a particular sector, "Is there
4 a particular issue with your local authority that's
5 staying in this tier that Scottish ministers need to be
6 aware of before they make that decision?"

7 So that was certainly -- we started off with
8 everyone having a call and then we moved to those who
9 were on the cusp, or indeed those who potentially were
10 moving up the way, would have a conversation with
11 Scottish ministers.

12 **LADY HALLETT:** Wrap it up or I'm going to have a screaming
13 stenographer. Not screaming because she's remote.

14 **MR TARIQ:** I will be just one or two more questions, if your
15 Ladyship allows.

16 **LADY HALLETT:** If you could.

17 **MR TARIQ:** Yes.

18 **LADY HALLETT:** And if you could keep answers to a minimum.

19 **MR TARIQ:** So you've given the example of North Lanarkshire
20 Council, it's an authority that didn't have any
21 engagement, it says, with the Scottish Government. But
22 the Inquiry's seen evidence that on 28 October 2020
23 North and South Lanarkshire Councils published a letter
24 to the Scottish Government urging Nicola Sturgeon not to
25 place the councils in level 4 -- which would have been

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1 **A.** Yes, so I think when the original levels system came in,
2 we started out that every local authority in Scotland
3 would have a conversation with Scottish ministers at
4 every review. That quickly became unworkable, given the
5 level of work that was going on for Scottish ministers,
6 and indeed council leaders and their chief execs. Then
7 we moved to a situation where if councils -- council
8 areas were moving through the trajectory as they would
9 expect, so their figures were coming down, they were
10 moving down the levels, and there were no issues with
11 that, then they wouldn't necessarily step forward and
12 ask for a conversation.

13 Those local authorities who were on the cusp or who
14 were going in the wrong direction, potentially, as it
15 were, in terms of severity of restrictions, could expect
16 that engagement and would be in a situation where they
17 would be able to talk through some of the stuff that
18 we've covered already on the NIMT.

19 As part of those conversations, that was also
20 an opportunity for local areas to provide information on
21 any other support that they may require, so that
22 included things like if they were going to have to go
23 from one level to another. And that meant that you had
24 to start looking at restaurant premises again, the --
25 the local authority would be asked do they need some

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1 the strictest -- in level 4. The letter was signed by
2 the chief executive of NHS Lanarkshire and Police
3 Scotland's divisional commander for Lanarkshire, the
4 councils argued that they should remain in level 3, and
5 we know the following day Nicola Sturgeon announced that
6 North and South Lanarkshire Councils were placed in
7 level 3. She described it as a borderline decision,
8 which suggests that the local authority was on the cusp
9 of two different tiers, but their position is, as I've
10 said, in the survey responses "We were never consulted
11 in respect of the decision-making".

12 Do you consider that it would have been better for
13 local authorities such as North Lanarkshire Council and
14 South Lanarkshire Council to be involved in the
15 decision-making process in the first place, as opposed
16 to needing to publicly argue their case with the
17 Scottish Government about not being placed in a higher
18 level?

19 **A.** I would say it's always better to engage before
20 decisions are taken and the need for things to get
21 difficult.

22 **Q.** Does the fact that some local authorities had to resort
23 to publicly arguing their case not create the risk that,
24 if the Scottish Government didn't accept the case, there
25 might be less compliance in the local area as the public

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1 perceived the restrictions as unfair or unjustified?
 2 **A.** I think there's a -- there's potential for that to
 3 happen. The other thing I'll say is that at a local
 4 level, people were coming under sustained pressure from
 5 various groups to make sure that they were advocating on
 6 behalf of their local areas. So I think both of those
 7 things are true, that local elected members and senior
 8 leaders had to demonstrate that they were in many
 9 respects putting forward the case for their area, but
 10 similarly I recognise that that -- doing that publicly
 11 does have the potential for compliance to be --
 12 **Q.** The final question from me: does the fact that some
 13 local authorities were not involved in the Scottish
 14 Government's decision-making process but had to resort
 15 to publicly arguing their case, does that not create the
 16 very risk of the standoffs that Nicola Sturgeon had said
 17 that she wished to avoid when she set out her plans for
 18 the levels system?
 19 **A.** I think that does create that risk.
 20 **MR TARIQ:** There's no further questions from me.
 21 **LADY HALLETT:** No, thank you very much indeed.
 22 Thank you for your help, Ms Dickie.
 23 Just one thing: you did say that you didn't have
 24 access to material because you weren't -- or COSLA
 25 weren't a core participant. COSLA did make
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1 an application, but it was nearly a year late, and that
 2 was the basis upon which your application was refused.
 3 Had you made it earlier, you might well have been made
 4 a core participant.
 5 So on that note, I shall return at 10 o'clock
 6 tomorrow.
 7 **(The witness withdrew)**
 8 **MR TARIQ:** There is one final matter.
 9 **LADY HALLETT:** Is it publication?
 10 **MR TARIQ:** Yes. My Lady, I would invite your Ladyship to
 11 allow permission to publish all the statements that have
 12 been referred to, including the documents that have been
 13 referred to in the --
 14 **LADY HALLETT:** What I did in previous modules, Mr Tariq,
 15 just if it helps everybody here, I'm happy to make that
 16 the default setting. So unless someone brings to my
 17 attention that there's a good reason not to publish it,
 18 either in full or in part, then otherwise they'll be
 19 published.
 20 **MR TARIQ:** That might make the job of counsel easier.
 21 Thank you.
 22 **LADY HALLETT:** One less sentence at the end of the day.
 23 Thank you very much, 10 o'clock tomorrow.
 24 **(4.33 pm)**
 25 **(The hearing adjourned until 10 am**
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1 **on Friday, 19 January 2024)**
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