

Wednesday, 24 January 2024

1
2 (10.00 am)
3 **LADY HALLETT:** Mr Dawson.
4 **MR DAWSON:** Good morning, my Lady. The first witness this
5 morning is Professor Mark Woolhouse OBE.
6 **LADY HALLETT:** We meet again.
7 **PROFESSOR MARK WOOLHOUSE (affirmed)**
8 **Questions from LEAD COUNSEL TO THE INQUIRY for MODULE 2A**
9 **MR DAWSON:** You are Professor Mark Woolhouse?
10 **A.** I am.
11 **Q.** You have helpfully provided a statement to this module
12 of the Inquiry, along with other statements provided to
13 previous modules. Your modular statement for this
14 Inquiry is dated 14 December 2023 and has the reference
15 INQ000369765. Is that your statement?
16 **A.** It is.
17 **Q.** Do the contents of this statement remain true and
18 accurate as of today's date?
19 **A.** They do, though we have sent a handful of further
20 exhibits to the Inquiry, but I don't think they
21 materially affect this statement.
22 **Q.** Thank you very much indeed.
23 You're a professor of infectious disease
24 epidemiology at the University of Edinburgh?
25 **A.** I am.

1

1 about that to the Inquiry already, but I'd like to ask
2 you some more questions in the particularly Scottish
3 context of this module.
4 Could we have up on screen, please, INQ000352450.
5 If we could go to -- yes, that's the right one.
6 This is a chain of emails which you have helpfully
7 produced to the Inquiry between yourself and
8 Catherine Calderwood; is that correct?
9 **A.** It is.
10 **Q.** And I understand that you first contacted Dr Calderwood
11 in connection with your concerns about the emergence of
12 a new virus on 21 January 2020; is that right?
13 **A.** It is.
14 **Q.** What prompted you to contact Dr Calderwood specifically
15 at that time?
16 **A.** This seemed to be a matter that very quickly would
17 require the Scottish Government to engage with, and
18 since I wasn't at the time part of any formal advisory
19 system, it seemed to me the logical route to channelling
20 my concerns to the government was through the Chief
21 Medical Officer for Scotland.
22 **Q.** And presumably, given the fact that you, as well as
23 having contact with people at a UK level, contacted the
24 Chief Medical Officer for Scotland, you were under the
25 impression that the Scottish Government had the ability

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1 **Q.** You sat during the course of the pandemic on the body
2 called SPI-M-O between January 2020 and early 2022?
3 **A.** That's correct.
4 **Q.** You're also a member of a group about whom we have heard
5 evidence, the Scottish Covid Advisory Group from
6 March 2020. You attended that group regularly, apart
7 from a two-month absence from meetings in February and
8 March 2021?
9 **A.** That's correct.
10 **Q.** You did not attend the SAGE meetings that we've heard
11 about?
12 **A.** I didn't.
13 **Q.** Thank you.
14 You were awarded an OBE in 2002 for service to the
15 control of infectious diseases?
16 **A.** I was.
17 **Q.** You're a fellow of the Royal Society of Edinburgh?
18 **A.** I am.
19 **Q.** Of the Academy of Medical Sciences and the African
20 Academy of Sciences?
21 **A.** I am.
22 **Q.** We've heard some evidence about your role in providing
23 early information and advice to the Scottish Government,
24 in particular through Dr Catherine Calderwood, the then
25 Chief Medical Officer. You have given some evidence

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1 to do something about this?
2 **A.** Yes.
3 **Q.** Health and indeed public health are matters devolved to
4 the competence of the Scottish Parliament and hence the
5 Scottish Government?
6 **A.** Indeed.
7 **Q.** We've looked at some of the text of these emails before.
8 You -- I think the context, please correct me if I'm
9 wrong, of this email is that it follows on from
10 an announcement of recognised human-to-human
11 transmission of the virus the previous day; is that
12 right?
13 **A.** That's right.
14 **Q.** What was the significance of the emergence of that piece
15 of information about the virus?
16 **A.** We already knew about cases of what was then actually
17 called Wuhan pneumonia, at those very early stages, and
18 there was a possibility that these had been acquired
19 from an animal source, a non-human source. And it is
20 possible -- there are many diseases like this -- that
21 the infection would spread from the animal but could not
22 then spread from person-to-person. So a human is
23 a dead end from the virus's point of view.
24 Now, that doesn't mean it's not serious, some of
25 these sorts of infections, like rabies, for example,

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1 around the world are very serious. But nonetheless that
 2 kind of infection would not cause a pandemic.
 3 **Q.** So the evidence which had emerged the day before about
 4 human-to-human transmission was a significant piece of
 5 information which would affect your assessment of the
 6 likelihood of the virus transmitting and potentially
 7 reaching epidemic or pandemic proportions?
 8 **A.** Well, yes, but it confirmed my fears. I had already
 9 received, I think on January 9 or 10, a report from --
 10 that was sent to me, unexpectedly, of the Wuhan
 11 municipal health authority that already was describing
 12 that this was quite a sizeable outbreak and had been
 13 persisting for some weeks. So I was already thinking
 14 this is unlikely to be just an animal origin epidemic,
 15 as in the only cause of human infections is from animal
 16 sources. It was already -- so I was expecting this news
 17 that it was human-to-human transmissible. I'd feared
 18 that for over a week, ten days.
 19 **Q.** I see. So this very recent piece of evidence about
 20 human-to-human transmission had added to and confirmed
 21 your fears about previous information which had been
 22 made available to you earlier in that month?
 23 **A.** Correct. I thought we were going to have a pandemic or
 24 it was very likely that we would have a pandemic from
 25 round about January 10th.

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1 information that you had that suggested that it would be
 2 an epidemic fuelled by mild cases, with mortality
 3 amongst vulnerable patients?
 4 **A.** It's a respiratory infection and that's a pretty
 5 standard textbook expectation for respiratory infection.
 6 **Q.** As far as the ability to detect the spread and therefore
 7 significance of the virus, what is the significance of
 8 the fact that it would be fuelled by mild cases?
 9 **A.** That simply means that it would be very difficult to
 10 track by detecting people with -- reporting with
 11 symptoms. You wouldn't see a lot of the cases, so you
 12 would need other ways of identifying those --
 13 **Q.** Cases --
 14 **A.** They wouldn't know they were cases.
 15 **Q.** Yes, so people would have mild symptoms that they
 16 wouldn't necessarily associate as anything out of the
 17 ordinary and therefore might not report for testing,
 18 such that chains of transmission might go undetected; is
 19 that the broad idea?
 20 **A.** Yes, and, as you may want to discuss later, that turned
 21 out to be a huge problem.
 22 **Q.** Yes, indeed, at the moment I'm focusing on what it was
 23 you were predicting. You were also predicting mortality
 24 amongst vulnerable patients as being a feature of
 25 a respiratory virus of this nature, based on your

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1 **Q.** Thank you.
 2 You say -- it's on the second page of the page we
 3 have here -- in the second paragraph:
 4 "There are some instructive parallels with the H1N1
 5 pandemic in 2009-10. Indeed, one possibility is that
 6 this could turn out to be quite similar in some key
 7 respects: a widespread epidemic fuelled by mild cases
 8 but with mortality among vulnerable patients."
 9 Can you tell us why it was that you were seeking to
 10 draw to Dr Calderwood's attention parallels with the
 11 2009-10 H1N1 pandemic and the various features which you
 12 identified as being a possibility of the pandemic which
 13 you were predicting for the novel coronavirus at that
 14 time?
 15 **A.** I think that was the most instructive parallel
 16 available. And it wasn't just the characteristics of
 17 the infection -- which, as the Inquiry has heard a lot
 18 of evidence for, turned out to be significantly
 19 different from influenza -- but also the nature of the
 20 response. And I had been involved in the Scottish
 21 response to the H1N1 pandemic in 2009, and there were
 22 deficiencies in the response at that time, and I was
 23 very anxious that history didn't repeat itself.
 24 **Q.** Yes, I think we'll get to that very expression that you
 25 use in one of these messages. But what was it about the

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1 extensive experience?
 2 **A.** Yes.
 3 **Q.** You say -- although in that paragraph you are pitching
 4 your prediction as a possibility, in the previous
 5 paragraph, based on the not unexpected announcement, as
 6 you've explained, of human-to-human transmission, you
 7 state that "this will become a pandemic, and therefore
 8 will affect Scotland". That was your position at the
 9 time?
 10 **A.** Yes.
 11 **Q.** And that was why you wanted to bring this to the
 12 attention of the Scottish Government through the Chief
 13 Medical Officer?
 14 **A.** Absolutely.
 15 **Q.** Thank you.
 16 Could I just then go to the next paragraph where you
 17 highlight, in light of your predictions and the
 18 particular features of the prediction you're making,
 19 what it is you think will need to be done to try to cope
 20 with this. You say:
 21 "Such an epidemic would be difficult to track. As
 22 in 2009-2010 what would be needed is an integrated
 23 surveillance set up that combines clinical surveillance,
 24 genomic surveillance, and serological surveillance.
 25 (The latter requiring an appropriate test; we and I am

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1 sure, many others are working on this already). This
 2 should be unexceptionable. My reason for writing now is
 3 to emphasise that, based on experience of 2009-10, that
 4 that system needs to be put in place in advance of the
 5 arrival of the virus, so the sooner the better. If we
 6 wait until after the virus has arrived then we will miss
 7 information of public health value and our efforts to
 8 prevent the control of the pandemic will be
 9 compromised."

10 So the message you were trying to convey was, based
 11 on your previous experience of what you considered to be
 12 similar viral outbreaks, one needed to act fast in order
 13 to try to keep the spread under control?

14 **A.** Correct.

15 **Q.** Can you help us a little bit with the requirement for
 16 clinical surveillance, genomic surveillance and
 17 serological surveillance; what would those different
 18 components have been aimed towards achieving?

19 **A.** So I'm actually taking this straight from what my team
 20 did in 2009/2010 on behalf of the Scottish Government.
 21 They asked us to do this eventually, and that's the work
 22 that we did. There is a clinical surveillance system,
 23 not just in Scotland but more widely, for influenza-like
 24 illnesses, respiratory infections, essentially. That's
 25 useful, but what we'd found in 2009 was it wasn't

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1 systems and develop these systems specific to Covid.
 2 What was your understanding of Scotland's ability to do
 3 that at that point?

4 **A.** So, prior to this chain of emails, I'd been in touch
 5 with my colleague Chris Robertson, at Health Protection
 6 Scotland, and through him with Jim McMenemy, who
 7 I believe you've already heard from.

8 **Q.** That's right.

9 **A.** And so I was getting a sense of what level of activity
 10 was going on in Scotland, and I didn't get the
 11 impression that it was, in my view, treating the
 12 situation with the seriousness or the urgency that
 13 I felt it needed.

14 **Q.** I see. So did that apply simply to the reaction to the
 15 information that was emerging but also to the practical
 16 requirements that were -- you were recommending needed
 17 to be put in place in order to deal with that threat?

18 **A.** Yes. So in a perfect world I would, in this email, be
 19 pushing at an open door, and the reply I would get to
 20 that email was "Thank you, Professor Woolhouse, we're
 21 already doing this". And I believe you heard from
 22 Gregor Smith earlier, and -- I watched his testimony,
 23 and he said, and I'm paraphrasing slightly,
 24 "Professor Woolhouse is just telling us textbook stuff,
 25 we know all this". And he's absolutely right, I was.

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1 extensive enough, and what we were able to do, working
 2 with colleagues in Health Protection Scotland, was get
 3 that -- it's based around general practices, and we got
 4 that scaled up very quickly and that provided very
 5 useful information quickly during 2009.

6 Genomic surveillance -- I don't know how much
 7 evidence the Inquiry's heard about the value of
 8 whole genome sequencing? It wasn't something that
 9 Scotland actually was geared up to do in 2009, so again,
 10 my team, we had to introduce that -- it was relatively
 11 new technology at the time, we had to introduce that
 12 into the process. And that was extraordinarily
 13 valuable, just as it was with Covid-19, but not nearly
 14 as advanced at that time.

15 And serological surveillance, and that's again what
 16 we did in 2009, it's basically detecting people who have
 17 antibodies to infection, so it's tracking an infection
 18 by taking blood samples, and detecting who has had the
 19 infection. So it's not the same as the PCR tests and
 20 the lateral flow tests that came along with Covid. Now,
 21 I -- in this I didn't anticipate those. But it was
 22 a very useful tool in 2009, this serological
 23 surveillance.

24 **Q.** Obviously, as you said, you were seeking to convey
 25 a sense of urgency about the need to create these

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1 **Q.** Right.

2 **A.** But textbook stuff needs to be acted on.

3 **Q.** Yes.

4 **A.** And the thing that I was particularly concerned about
 5 was that although, you know, I'm very well aware of all
 6 the systems in place in Scotland and elsewhere to
 7 respond to an outbreak, including an influenza outbreak,
 8 I was already convinced at this early stage that this
 9 was going to be considerably worse, and so I was really
 10 trying to push this. But I would have been very happy
 11 with a response to this email saying "Thank you, we are
 12 already doing this".

13 **Q.** Right. You say this was your impression. I think from
 14 various materials, including your book, you were also in
 15 contact with other people in the UK at this time, you've
 16 mentioned Chris Robertson, you mention Neil Ferguson,
 17 Jeremy Farrar, and others, some in Scotland, I think,
 18 with whom you were discussing these matters around this
 19 time. Were they of a similar view to you? Was there
 20 a consensus --

21 **A.** Oh, yes, absolutely. Absolutely. No question. We were
 22 all very concerned --

23 **Q.** Yes.

24 **A.** -- at this point, all those people you've mentioned
 25 there.

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1 Q. Lest it be suggested that this was simply your view,
2 this was a view which you had discussed and developed
3 along with other experts in the field?

4 A. Yes.

5 Q. You say in your statement at paragraph 186 that:

6 "Better surveillance, coupled with genomic studies,
7 would have facilitated better advice and better decision
8 making during this crucial period."

9 Had these systems been ramped up in late January and
10 into February, as you had advocated, would this have
11 been early enough to allow for the spread of the virus
12 to have been restricted more than it was before the
13 lockdown was imposed eventually in March?

14 A. Yes. So I'm suggesting a programme of gathering data,
15 gathering information. There's a whole -- obviously
16 another rather important layer of what you then do on
17 the basis of that information, but obviously if we have
18 better information, we are better informed, we can make
19 better decisions, which might well have the consequence
20 that you outlined. But I am here concerned with getting
21 the information.

22 Q. Of course. There is a theme, I think, which we've
23 discussed with some other witnesses, that runs
24 throughout the testimony and the many documents you've
25 provided, which is a frustration, which I think you held

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1 2011/12, so getting on for ten years ago.

2 Q. Right.

3 A. And it hadn't happened, hence the frustration.

4 Q. I see.

5 We heard some evidence from other witnesses,
6 including -- we heard evidence together from two Health
7 Protection Scotland witnesses, you mentioned
8 Dr McMenamin, I think, and we also heard from
9 Professor Nick Phin, who spoke -- although he wasn't in
10 Scotland at this time, spoke on behalf of Health
11 Protection Scotland, and when they described their
12 attitudes over this period, both, if I recall correctly,
13 were keen to emphasise the previous swine flu experience
14 was a substantial factor in their thinking about the
15 threat, but perhaps in the opposite way to the way in
16 which you were using your experience of previous viral
17 outbreaks. You were drawing on your previous
18 experience, which led to you, I think, suggesting this
19 was a significant threat, whereas it seemed that their
20 evidence was to the effect that the swine flu outbreak
21 was something that was making them more cautious about
22 coming to the conclusion that this was a significant
23 threat.

24 I wonder if you could comment on that and whether
25 the attitude, as I've characterised it, from them was

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1 and pre-dated this period and indeed had been the
2 subject of some correspondence with Dr Calderwood in the
3 years prior to this, about the lack of data access for
4 those like yourself in the research community in order
5 to be able to provide the level of assistance, support,
6 input that you would have liked to have provided in
7 a situation like this.

8 Could you tell us what the background to that was,
9 broadly, and whether these frustrations remained active
10 at this time?

11 A. Well, the second point, the answer is a simple yes. The
12 first point, that emerges again from experience in
13 Scotland of 2009/2010 influenza, and -- you mentioned
14 I was a fellow of the Royal Society of Edinburgh, we did
15 a post hoc report of the management of that incident in
16 Scotland, and we made a series of recommendations
17 precisely about this, that we needed to have the
18 mechanisms of obtaining, sharing and analysing data in
19 place, ready to go, should another pandemic arise.
20 Quite a detailed report. And I already was aware that
21 this report had not really been acted on, so that's one
22 of the things about my frustration. What I wanted to
23 know -- what I wanted to happen here, me and others,
24 through the Royal Society of Edinburgh, had recommended
25 over ten years ago. Not quite ten years, sorry,

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1 a prevalent one at the time?

2 A. It was, and the reason is fairly straightforward,
3 actually. In the -- swine flu turned out to be, by the
4 standards of these respiratory infections, really quite
5 benign. Its case fatality rate, the fraction of people
6 who are infected and die, was somewhere in the order of
7 one in a thousand, which is low. Obviously it's
8 significant, it's a public health problem and needed to
9 be managed, but it's relatively low.

10 The early estimates of the infection fatality rate
11 for this virus were, and I think that comes later in
12 this email chain, somewhere in the order of 4%. Well,
13 that's 40 times higher, so you can immediately see that
14 this potentially then is going to be an enormously
15 greater event.

16 The reason why I personally, unlike my colleagues
17 you've mentioned --

18 Q. Yes.

19 A. -- leant towards the more concerning or alarming --

20 Q. Yes.

21 A. -- figure, because we knew, again, going back from
22 the -- certainly the first half of January, well before
23 this, from genome sequencing studies done on material
24 from China, that this virus was extremely closely
25 related to the SARS-CoV-1 virus. That had a case

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1 fatality rate of 10%. So from my point of view we're in
2 this territory. This is a very, very similar virus to
3 something that had a case fatality rate of 10%. That's
4 a completely different magnitude of problem than
5 swine flu.

6 **Q.** Yes. Yes.

7 **A.** That's why I --

8 **Q.** So you are bringing, I think it fair to say, a number of
9 different experiences of previous viral threats,
10 swine flu, H1N1, and the information that you had, the
11 original SARS, as you've just outlined, with its high
12 infection fatality rate, you -- your view, bringing all
13 of this evidence together, was not that there was
14 evidence suggesting that this was not a matter for
15 concern, very much the opposite, it was a matter of
16 significant concern?

17 **A.** Very much the opposite, yes.

18 **Q.** Thank you.

19 You mention in your email the possibility that there
20 could be mortality amongst vulnerable patients. We've
21 heard significant evidence in this and other modules
22 about the fact that Scotland relative to other parts of
23 the United Kingdom had a relatively elderly population
24 with significant health inequalities and comorbidities.

25 Was it therefore all the more necessary, given this

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1 vulnerability, as you well know, is age, so very fact
2 that the whole UK population is actually quite elderly,
3 by global standards, is -- was a concern.

4 **Q.** Yes, indeed, thank you.

5 A number of these emails -- if we could scroll up
6 through the emails, we could see the reply -- scroll
7 backwards, if you like, through the emails, you can see
8 the reply from Dr Calderwood where broadly she says to
9 you that -- she acknowledges your email and I think
10 tells you that PHE and HPS, as it was at that time,
11 before the advent of PHS, were "actively considering the
12 detailed surveillance needs and investigations required
13 for this novel virus", and apparently recognising the
14 value of those surveillance systems.

15 How did you take that response? Were you satisfied
16 that it sounded like they had things under control, or
17 were you expecting a little more, given what you had
18 said in your earlier email?

19 **A.** I don't regard "actively considering" as sufficient.

20 **Q.** Thank you.

21 If we go again back through the previous emails,
22 we're going to one on page 4, which is dated 25 January,
23 and you say -- you write to Dr Calderwood again, and you
24 indicate there that you have discussed the matter with
25 a number of others, including Jeremy Farrar,

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1 possibility of mortality, against that background, to
2 start to consider doing something to protect that large
3 cohort of vulnerable patients in Scotland?

4 **A.** Yes. I wouldn't want to overstate my level of
5 understanding of the situation at this very early stage.
6 We still hadn't -- there still wasn't good evidence as
7 to what a vulnerable patient was for this. You know,
8 there were indications from previous experiences with
9 SARS and indeed influenza, so we had some idea, but,
10 you know, this was all quite uncertain at that stage.
11 But that, as I said, was, seemed to be the most
12 likely --

13 **Q.** Yes.

14 **A.** -- course this would take.

15 **Q.** But if that possibility did eventuate, that would be
16 a particular problem for the particular characteristics
17 of Scottish society, given the pre-existing --

18 **A.** Yes, I would not pretend to you that I was thinking at
19 the time that Scotland -- at the time -- that Scotland
20 was particularly vulnerable to this. Just that Scotland
21 was vulnerable to this, full stop.

22 **Q.** Did that start to become part of your thinking over the
23 subsequent months?

24 **A.** Yes. I mean, it depends what you compare Scotland with
25 but, yes. The vulnerabilities are one thing -- the main

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1 Neil Ferguson, as I've said, and that they had
2 "independently reached the same conclusions and have
3 advised Chris Whitty accordingly".

4 You provide some further information, and then state
5 that based on the case fatality rate, I think, the
6 infection fatality -- or case fatality rate you
7 mentioned a moment ago of 4%:

8 "If you were to put those numbers into
9 an epidemiological model for Scotland (and many other
10 countries) you would likely predict that, over about
11 a year, at least half the population will become
12 infected, the gross mortality rate will triple (more at
13 the epidemic peak) and the health system will become
14 completely overwhelmed. We can formalise those
15 predictions (and there are many caveats to them) but
16 those are the ballpark numbers based on information from
17 WHO. Please note that this is NOT a worst case
18 scenario, this is based on WHO's central estimates and
19 currently available evidence. The worst case scenario
20 is considerably worse."

21 Again, what was the -- what were you trying to
22 convey to Dr Calderwood, again, about your developing
23 understanding, your conversations with others and
24 information that seems to have developed in the days
25 since you last wrote a few days before?

20

1 A. Yes, so the work that we -- the actual science that
 2 we've started to do is -- at this stage, this early
 3 stage, is trying to understand, like in the context of
 4 my team's work, the scale of the threat to Scotland.
 5 And I'm reporting on what we now assess the scale of the
 6 threat to Scotland to be.

7 Q. Yes. A couple of lines down you say:
 8 "Your reply to my earlier e-mail did not give any
 9 indication that here in Scotland we are preparing for
 10 a $R_0=2$, $CF=0.04$ event. And I don't have the sense that
 11 we are from my networks here either."

12 So I think you are there conveying the information
 13 that the case fatality rate is 4% as you said earlier
 14 which is an alarming case fatality rate; is that right?

15 A. Correct.

16 Q. And that the R being 2, that is that the R as 0 of the
 17 virus, which is an indicator of its transmissibility; is
 18 that correct?

19 A. Yes. Actually that one turned out to be
 20 an underestimate, so ...

21 Q. Indeed, but even with those numbers --

22 A. Yes.

23 Q. -- you are expressing there, as you've told us in your
 24 evidence, a degree of dissatisfaction with the level of
 25 the urgency within Scottish Government?

21

1 step.

2 Q. Yes.

3 A. Put all this information together and what's going to
 4 happen, and ...

5 Q. I think, therefore, you're attributing to the medical
 6 advisers of the government at least the ability to do
 7 the basic epidemiology and arithmetic, but are you
 8 suggesting perhaps that, given the number that that came
 9 up with, they rather froze?

10 A. Yes.

11 Q. Thank you.

12 Can we look again -- go further back in -- to
 13 page 2, please. This is a further email which you sent
 14 on 26 January, so the very next day.

15 While we're getting that, one thing that was
 16 mentioned yesterday by Professor Sridhar that I just
 17 wanted to ask you about, a couple of things about the
 18 way in which information is communicated to people like
 19 yourself, she mentioned something called PubMed, which,
 20 as I understand it, is a source of information about
 21 developing epidemics or developing viral threats; is
 22 that right?

23 A. ProMED.

24 Q. ProMED, I'm sorry.

25 A. Yes.

23

1 A. Yes, and again we come back to Gregor's comment that
 2 this is textbook. Yeah, it's textbook. My
 3 undergraduates could do this calculation.

4 Q. Yes.

5 A. My undergraduates could come up with this assessment.
 6 This is not difficult.

7 Q. Yes. One might say that that makes the lack of action
 8 all the more questionable and perhaps culpable?

9 A. I think I'd better leave that to the Inquiry.

10 Q. But in any event, you were, as I say, trying to convey,
 11 based -- applying basic epidemiology, if that's correct,
 12 to the specific characteristics that emerged from the
 13 science, the R_0 and the case fatality rate, to you it
 14 was fairly obvious that this was going to be a huge
 15 problem?

16 A. Yes. And you mentioned the book I wrote. One of the
 17 things I put in that as the final explanation in my mind
 18 for why this wasn't landing in Scotland or elsewhere was
 19 you put all this very, you know, as I say, fairly basic
 20 information together and what you get is an unfolding
 21 catastrophe. And I think a lot of people simply
 22 couldn't get their heads round that. Even though, as
 23 I say, this is very simple. So you add this number and
 24 this number and this number and this number and you get
 25 a catastrophe. I think they couldn't take that final

22

1 Q. Could you just tell us a little bit about what that is
 2 and the extent to which that was used by you and others
 3 to be able to access information about the emerging
 4 virus?

5 A. It's been around a while. It's -- I don't know quite
 6 what you call it, it's maybe something a bit like
 7 a blog, but it pre-dates even blogs, so it's a loose
 8 association of experts in the field who report to one
 9 another concerning events to do with infections, of
 10 which in a given year there will be dozens, if not
 11 hundreds, around the world. And that I'm inferring that
 12 Devi used this as one of the sources of information.
 13 I actually didn't use that one.

14 Q. Okay. We've also heard some evidence from a number of
 15 the witnesses who have helpfully provided our Rule 9
 16 responses of not necessarily at this period but in the
 17 period after this, as information started to emerge
 18 more, about the use of preprints in analysing the
 19 emergence of the threat.

20 Could you tell us what that is and the extent to
 21 which that was used in trying to understand what the
 22 threat was and the characteristics of the virus,
 23 et cetera.

24 A. Yes. The gold standard for communicating scientific
 25 knowledge, of course, is the publication of a piece of

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1 research in a scientific journal, which is done subject
2 to peer review. So it's looked at by experts, it's
3 judged to be sound and it's published. And that remains
4 the gold standard. But in very fast-moving situation
5 like this, that whole process -- well, quite frankly, it
6 can take up to a year sometimes and, in some
7 circumstances, longer. It's clearly far too slow.

8 So preprints is the practice of taking the paper
9 that you've submitted or you're planning to submit, but
10 publishing it immediately. And it's made very clear on
11 the preprint servers that this is not peer reviewed
12 research, so for that reason it hasn't been quality
13 controlled but it's put out there so that the rest of
14 the scientific community can see it. So it's basically
15 a very fast way of communicating your research outputs,
16 but it loses the quality control element of peer review.

17 **Q.** Thank you. The reason I've asked you those questions,
18 Professor, is that a number of other people, including
19 the PHS representatives, suggested that the way in which
20 evidence emerged over these early months, if we put it
21 that broadly, from January onwards about the nature of
22 the virus and hence the nature of the threat, was
23 unreliable or contradictory or difficult to interpret.
24 It doesn't seem to be the case, even at this very early
25 stage, and in fact you've referred to you developing

25

1 **A.** Yes. And during the pandemic I didn't have time to do
2 this for the scientific journals, but it's a job
3 I routinely do for scientific journals, so I was simply
4 doing it in real time in a different context.

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

6 In this message you go back again, as we said this
7 was the next day, and then you set out a number of
8 different scenarios. Could we just scroll down a little
9 bit further in that. There was one aspect of this
10 where -- just a little bit further than that, thanks --
11 it's where you get to:

12 "The measures we could consider are: ..."

13 You talk there about a vaccine being part of the
14 solution, I think. And what at that stage would you
15 have been thinking? Obviously a vaccine would have been
16 a very useful thing to have, but in terms of planning,
17 what would your realistic expectations have been about
18 when a vaccine might become available, based on your
19 extensive previous experience?

20 **A.** At that time I think the fastest a vaccine had ever been
21 rolled out from scratch was four years, previously.
22 Obviously there was going to be a great need to
23 accelerate the process. I really got that estimate of
24 a year through correspondence that you already
25 mentioned, particularly with Jeremy Farrar, who is

27

1 views about this even earlier than this correspondence,
2 that you, although no doubt are taking that into
3 consideration, reliability of the evidence, that is
4 restricting you from reaching the conclusion that this
5 is a very, very significant problem about to happen.

6 Could you tell us about why it is that you felt
7 confident enough in your professional assessment to be
8 able to express these views, despite those concerns
9 expressed by others?

10 **A.** Well, one very simple way to do it is if somebody,
11 whether it's a scientist from China or the UK or
12 anything, is publishing -- wants to publish a paper,
13 something they've put up as a preprint, in -- beyond the
14 preprint someone would have to peer review it, that
15 person would quite likely be me.

16 **Q.** Right.

17 **A.** So I felt perfectly qualified to peer review the
18 evidence I was seeing myself.

19 **Q.** Yes, so you were able to evaluate --

20 **A.** Yes.

21 **Q.** -- what was in the peer review and use your extensive
22 experience to be able to reach a judgement about whether
23 this was reliable and sufficiently reliable information
24 to be able to communicate these sorts of messages to
25 government?

26

1 director of Wellcome Trust, and is very well -- very,
2 very well connected with the vaccine manufacturing base.
3 So, you know, I agreed with Jeremy, but I think his
4 estimate was much more authoritative than mine, and that
5 was --

6 **Q.** So if we just scroll down a little bit further, you
7 mention antivirals there. Again, you say effectively
8 that's something, for the time being at least, we're
9 going to have to live without. So I think you're then
10 pointing towards the need for what I think are
11 non-pharmaceutical interventions in order to try to deal
12 with the situation, and you mention there a number of
13 different things with which we subsequently became
14 familiar, case isolation, infection control and contact
15 tracing, social distancing, but also the thing I wanted
16 to focus in on particularly was public messaging.

17 What was it that you thought -- you rather there
18 suggest -- you hoped that the government was already
19 doing something about that. But what sorts of public
20 messages do you think should have been emanated, sent
21 out from that time onwards, in order to try to manage
22 the balance required between not causing widespread
23 panic but allowing citizens to be part of a bond of
24 confidence with government about how their own health
25 and safety is being managed?

28

1 **A.** You summed it up perfectly, that's exactly what I was
2 worried about.

3 **Q.** Right, so you think that there required to be some level
4 of public messaging that reflected the need to balance
5 those two considerations?

6 **A.** Yes, and I was doing -- as part of my role at the
7 university I would deal in media work, even at that
8 stage, and I was having to walk this tightrope myself,
9 and it would have been very helpful if Scottish
10 Government had actually made some pronouncements that
11 could then be discussed by the media and commentators
12 and so on. So I was tiptoeing around exactly the
13 problem that you --

14 **Q.** I see.

15 **A.** -- identified.

16 **Q.** I see. But is it correct to say, because this is one of
17 things identified here, that a level of engagement of
18 the public appropriately pitched was necessary?

19 **A.** Yes, but I -- and I wanted it to come from government.
20 You know, obviously one thing I could have said in media
21 interviews at that stage was what's in these emails.

22 **Q.** Yes. Yes.

23 **A.** For rather obvious reasons I did not want to do that.
24 That should not come from me. But it wasn't coming from
25 anyone else, that was the problem.

29

1 **Q.** Thank you. Again, I think we have a series of emails
2 again all joined together under this reference. If we
3 scroll up there is a reply on 6 February to that
4 message. You're copied in to these messages, I should
5 say, in which -- indicating that you had emails in the
6 very recent past with some extremely helpful modelling
7 estimates, and she says to you, as you're cc'd in:
8 "... let's find the time to meet face to face."
9 You eventually did have a meeting with her, I think,
10 but on 28 February. Is that right?

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

12 **Q.** Again, did that timescale between your original contact,
13 the need to try to engage the assistance of Dame Sally
14 and the date of the eventual meeting give you the
15 impression that Dr Calderwood was taking on board the
16 level of the threat that you were trying to communicate?

17 **A.** I -- I was less concerned about the actual meeting at
18 that stage. What I hoped that Sally Davies'
19 intervention had done would be -- suggest to the CMO
20 that it might be perhaps wise to revisit my advice and
21 what I'd been telling her and take action accordingly.
22 So I -- I didn't push for that second meeting, I left
23 that to the CMO Scotland.

24 **Q.** I see. Could I just run through some of the things that
25 I understood happened roughly between the time of this

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1 **Q.** You were, I assume, speaking to the very person, these
2 emails, from whom you thought it should be coming --

3 **A.** Yes.

4 **Q.** -- the Chief Medical Officer and the ministers whom she
5 advised?

6 **A.** Yes.

7 **Q.** There was then an exchange of emails, further emails,
8 where you provided more information. Just for the sake
9 of the record, the 31 January email is INQ000103352.
10 Then in a further email which we've seen which is
11 INQ000103215, we've seen an email which was sent not
12 involving you but it was sent by Dame Sally Davies, who
13 I understand was the former Chief Medical Officer to
14 the UK Government, to Dr Calderwood on 5 February in
15 which Dame Sally Davies, oddly, introduces you to
16 Dr Calderwood. Was that email the result of some
17 contact you had had with Dame Sally Davies about the
18 position?

19 **A.** Yes. So we've discussed my frustration with what
20 I continued to perceive as the lack of action, so -- I'm
21 surprised you don't have the email, but maybe you have
22 it somewhere else. I wrote to Sally, who I knew, and --
23 the email is there somewhere but I'm paraphrasing
24 slightly -- I'm saying "Sally, can you get Catherine to
25 listen to me, because she's not listening".

30

1 email and the eventual meeting on the 28th, just in
2 order to try to get some key indicators of the
3 developing knowledge of things that seem to us to be
4 significant in the elevation of the threat.

5 A meeting of SAGE took place on 4 February in which
6 it -- it stated on the basis of their analysis that
7 asymptomatic transmission cannot be ruled out and
8 transmission from mildly symptomatic individuals is
9 likely. It also indicated that human-to-human
10 transmission outside China had occurred.

11 Now, obviously you've given us a lot of information
12 across the various modules about the significance of
13 asymptomatic or mild transmission. You had in fact
14 predicted that it was at least a possibility, some time
15 before that, that this would be the type of virus which
16 could be transmitted by mild patients, and you've
17 explained to us the significance of that.

18 As at that SAGE meeting of 4 February, what was your
19 view about the reliability of the evidence base that the
20 virus was going to be transmitted by either
21 asymptomatic, presymptomatic or mildly symptomatic
22 patients?

23 **A.** Thank you for mentioning presymptomatic, because it's
24 very, very important on this.

25 The data on this was emerging in a very piecemeal

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1 way from China at the time, and me and many, many other
 2 epidemiologists around the world were trying to make
 3 sense of this data. I was -- I had a slight in-built
 4 advantage in that in my research group at the time I had
 5 two very able Chinese students who were very useful in
 6 giving me intelligence and guidance as to what was going
 7 on in China and how we should interpret the sorts of
 8 information that was emerging. But China, and I believe
 9 the WHO, were at the time actively suggesting there was
 10 not much undetected cases, mild cases, that this was not
 11 the pattern. It was completely wrong but that's what we
 12 were suggesting at the time. So this created a lot of
 13 doubt.

14 **Q.** It might be difficult to know how many undetected cases
 15 there were because the mild asymptomatic or
 16 presymptomatic spread means that it's hard to detect
 17 them?

18 **A.** Yes, but -- they did surveys but they didn't interpret
 19 the results the way I interpreted the results.

20 **Q.** Yes. So at what point over this period did the evidence
 21 base, which as you say was not entirely satisfactory,
 22 although you had the advantage of two able Chinese
 23 students assisting you, at what point over this period
 24 did it become apparent to you, based on the kind of
 25 judgement that you have explained you apply to evidence

33

1 **A.** -- of course.

2 **Q.** Well, as far as testing is concerned, that was something
 3 else I was going to ask you about.

4 The earliest record that we have of tests being
 5 conducted in Scotland is around 10 February. When was
 6 it that a test, in its most basic form if you like, was
 7 available?

8 **A.** Wouldn't have been long before that, I don't think
 9 that's -- I don't think there was any -- I don't have
 10 any concerns about that.

11 **Q.** Yes.

12 **A.** I think, you know, that first test date was pretty good.

13 **Q.** Yes. We know that because there were 57 tests conducted
 14 that day and all were negative, so were not contributing
 15 to positive --

16 **A.** Yes, but the principle was established, I'm glad it was,
 17 that was a welcome development.

18 **Q.** Absolutely, thank you.

19 You met Dr Calderwood on 28 February. We have
 20 a briefing note, which is INQ000103216.

21 This is a note, I think, that you sent her in
 22 advance of the meeting. Further down towards the end
 23 you sent her a lengthy analysis of the position as of
 24 that date as things have developed since your initial
 25 correspondence.

35

1 and papers, that asymptomatic, presymptomatic or mild
 2 transmission was going to be a likely feature of this
 3 particular epidemic?

4 **A.** I don't think the evidence for that became firm, the
 5 sort of evidence you would publish in a scientific
 6 journal, for quite some time, I think. I don't think
 7 that happened in February.

8 **Q.** But it was definitely part of the thinking --

9 **A.** Oh, yes -- oh, no, it was absolutely part of the
 10 thinking --

11 **Q.** -- time --

12 **A.** -- where you're concerned, but again the evidence hadn't
 13 emerged.

14 **Q.** Indeed.

15 **A.** There were systems set up which Scotland was involved
 16 in, an exercise called the First Few 100 -- I think
 17 you've heard of that?

18 **Q.** Yes, yes.

19 **A.** And that was designed to provide, among other things,
 20 this sort of information. But of course in order to
 21 activate something called the First Few 100 -- first few
 22 hundred cases -- you have to have 100 cases here, in the
 23 UK or in Scotland -- and we were nowhere near that
 24 number --

25 **Q.** Yes --

34

1 Then a bit further down, thanks.

2 Yes, you say:

3 "There are two scenarios we particularly want to
 4 avoid:

5 "1. Doing nothing, as that is likely to result in
 6 the health system being overwhelmed in a matter of weeks
 7 once an epidemic takes off.

8 "2. Implementing extreme social distancing measures
 9 that, sooner or later, have to be relaxed and then,
 10 having already paid a high social and economic cost,
 11 experiencing a (delayed) epidemic that still overwhelms
 12 the health system."

13 So there's a degree of balancing, I think, required
 14 there as well.

15 What was it you were trying to urge, in advance of
 16 your meeting in this lengthy detailed briefing note,
 17 to -- what were you trying to urge upon Dr Calderwood as
 18 important things to bear in mind in this overall
 19 scenario assessment?

20 **A.** Yep, exactly what I say there. I mean, it was clear to
 21 me at that stage that we were going to have to walk
 22 a tightrope between an epidemic that took off basically
 23 and overwhelmed the health service or -- I didn't --
 24 I wasn't thinking of lockdown in those stages, but -- at
 25 that data, quite, but some very severe social distancing

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1 restrictions that would be extremely damaging in their
2 own right. We were walking between two very, very
3 unsatisfactory outcomes. This was going to be
4 difficult.

5 **Q.** Yes. What was your view at this point, towards the end
6 of February, about what Scotland could have done in
7 order to try to handle the threat as it was at that
8 point?

9 **A.** Well, we started to discuss this in the meeting, I think
10 it's the next day, after this. So it's ... I don't know
11 if I say it in -- using that phrase, in that meeting,
12 but one of the things we'd been working on there was
13 this idea that earlier intervention can be less drastic
14 intervention. So if you want to avoid these very severe
15 social distancing measures, then actually you're going
16 to have to go -- intervene earlier.

17 But I'm not -- I'm not sure I was quite at that
18 stage in my thinking at this meeting. I think that
19 maybe emerged -- the first time I did a briefing on
20 that, and I remember that one, was March 4th.

21 **Q.** Right.

22 **A.** So I may have mentioned it to Catherine --

23 **Q.** Yes.

24 **A.** -- at that meeting, it was certainly in my mind, but
25 I don't think we'd actually written it up that earlier

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1 it's always a balance you're trying to strike. My
2 concern here, and this comes back to the scale of the
3 crisis that didn't seem to be landing in government at
4 that stage, is both harms, the harms that the virus
5 could cause and the harms that the countermeasures could
6 cause, were immense. They were absolutely enormous.

7 So when I'd been doing this sort of exercise over
8 the years, you know, trying to make an intervention,
9 a health intervention efficient, so not too costly, not
10 damaging in other ways, you know, the stakes were
11 nowhere near as high. You know, there's a little bit of
12 wiggle room, I mean, you get it wrong this way a bit or
13 that way a bit and --

14 **Q.** Okay.

15 **A.** -- you know, it costs the government a small amount of
16 extra money, but it isn't -- here the stakes are
17 absolutely enormous. And we have to find the right
18 path. If we go too hard or too soft, we're going to end
19 up paying an enormous penalty, and this was very obvious
20 to me -- well, as you saw from -- during late February,
21 that we were in this position.

22 So I'm trying to -- I'm trying to lay the ground for
23 this sort of decision-making that's going to have to
24 happen --

25 **Q.** Yes.

39

1 intervention could be less drastic intervention.

2 **Q.** There is some other email correspondence that we've
3 seen -- we can take that one down there, thank you very
4 much -- relating to the meeting, slightly after the
5 meeting, in which one of the things that you refer to is
6 social distancing measures were very likely to need to
7 be introduced in Scotland, possibly very soon. In your
8 statement you say that meant days, not weeks. And you
9 also point out that there would be a need for a clear
10 exit strategy, and also some level of analysis of the
11 effect of social distancing, economically, socially and
12 psychologically. So you're setting this out presumably
13 at or immediately after the meeting.

14 Could we just look at those different components.
15 At that stage, as far as the measures that were
16 concerned, what did you think needed to be done? The
17 second was the exit strategy, and the third was some
18 level of analysis of the effect of social distancing
19 measures, economically, socially and psychologically.
20 If you could explain the significance of those and your
21 position at the time?

22 **A.** Yes, so it is as you said, I'm setting out the need to
23 balance harms. And this is absolutely fundamental to
24 public health, in public health you're always balancing
25 harms, even if the harms are just monetary costs, but

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1 **A.** -- if we're not to --

2 **Q.** And here --

3 **A.** -- damage.

4 **Q.** And I think you tell us or these documents show that you
5 were not aware of any, you're talking about the other
6 side of the balance, if you like. We've heard
7 something, which we'll come on to later, which I think
8 the Scottish Government introduced after this, in April,
9 called the four harms strategy, the first harm being the
10 harm of Covid itself, the other harms being harms caused
11 by the measures taken to combat Covid, the non-Covid
12 health harms, the societal harms and the economic harms.

13 Is it your understanding that at this stage within
14 Scottish Government no analysis had been done of the
15 effect of even the social distancing measures short of
16 lockdown, which you were suggesting might be
17 contemplated.

18 **A.** None at all as far as I'm aware.

19 **Q.** Okay. The other element of what we discussed there was
20 the exit strategy. Why was it important to have an exit
21 strategy?

22 **A.** Simply because the sorts of interventions, the social
23 distancing, that were being contemplated at that stage
24 were clear, and they'd include things like school
25 closures that were on the table, were clearly very, very

40

1 harmful, and equally clear they could not be implemented
2 indefinitely. We couldn't -- well, it turned out to be
3 a lockdown in the end.

4 **Q.** Yes.

5 **A.** We couldn't lock down indefinitely. So the lockdown had
6 to come to an end, so what would be the strategy, the
7 exit strategy? What would make you decide that you
8 could exit lockdown?

9 And the reason that's important is because the exit
10 strategy is going to also determine how long the
11 lockdown is. So what are we preparing for? You know,
12 so you can imagine that came up later, the sort of
13 circuit-breaker type approach where actually the
14 lockdown is just a week or something, or all the way up
15 to an indefinite lockdown until we got a vaccine. So
16 there's a range of possibilities.

17 So we -- and it's very difficult to advise on what
18 the best strategy is unless you know what the government
19 is willing to contemplate. I mean, can I give you
20 a very simple example?

21 **Q.** Absolutely, very helpful.

22 **A.** If the government was willing to contemplate
23 an indefinite lockdown, and forget all the costs and the
24 harms that that would do, they were willing to do that,
25 then my advice would be: right, do it now. Lock down

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1 spent years researching before, so that we understood
2 all the nuances and all the trade-offs and how actually
3 we should do it. But none of that work had been done
4 because no one around the world had ever contemplated
5 lockdown. So we were in -- we were frantically trying
6 to catch up.

7 **Q.** Which explains why, I think, that your correspondence at
8 this time isn't referring to lockdown or anything like
9 it, it's referring to social distancing measures or even
10 more extreme social distancing measures, because
11 lockdown simply was not part of the narrative and had
12 never been prepared for?

13 **A.** No -- so of course it was on the radar because, at that
14 stage, the city of Wuhan had been locked down.

15 **Q.** Yes.

16 **A.** Obviously we were very aware of that and discussed --
17 that had been widely discussed. But I think the
18 realisation that something like a lockdown would have to
19 be contemplated for Scotland took rather longer.

20 **Q.** Right.

21 **A.** And --

22 **Q.** Did you have the impression over this period and up to
23 the point at which the lockdown actually occurred that
24 there was any clear exit strategy in the mind of the
25 Scottish Government?

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1 now. That's the way to minimise the impact.

2 **Q.** Mm-hm.

3 **A.** But obviously they can't do that, we'd be locked down
4 for possibly years if we had done that. Completely
5 impossible. So as soon as you accept that the lockdown
6 has to come to an end, then the question arises: well,
7 then when is the best time to do it? And suddenly
8 you're in a different space. The decision is no longer
9 nearly so easy.

10 And the reason this is causing us all such concern
11 at that time, and there was a lot of work going on about
12 the best timing and duration of, what turned out to be,
13 a lockdown should be, so the severity of the
14 intervention as well, is because it hadn't been done
15 before. Because we'd never contemplated lockdown as
16 public health policy at all. This was clearly new.

17 We ourselves -- I mean, you kindly called me
18 an expert in the field, but I've never thought about
19 this before, never contemplated it. So I got my team
20 frantically working out how is this going to work,
21 what's it going to -- what's it going to look like? How
22 long should it be? When should it be implemented?
23 What's the exit strategy? We're -- we're working very,
24 very hard to try to understand something that, if we
25 known it was going to be on the table, we would have

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1 **A.** In the end, when we went into lockdown, I don't think
2 they had the faintest idea how long we would be in it
3 for.

4 **Q.** And as regards the matters we discussed, the systematic
5 analysis of the effect of the lockdown or social
6 distancing measures, economically, socially or
7 psychologically, did you have any impression that any
8 such assessment had been done within Scottish
9 Government?

10 **A.** Absolutely none.

11 **Q.** You met with Dr Calderwood again on 6 March, and there
12 is another email follow-up in the same way as you had
13 done on the previous one summarising your position.

14 There is one element of this advice at this stage
15 that I'd like to just draw your attention to
16 specifically to ask you questions about.

17 You see there, there are three social distancing
18 measures, informed by the modelling work of
19 Imperial College, and communicated through SPI-M. It's
20 the third one I was interested in asking you about, if
21 you could explain. One of the things that you're
22 suggesting is that there should be a policy of
23 "cocooning" populations about the age threshold that
24 you've mentioned. What is cocooning and why was it part
25 of the strategy that you were proposing might be

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1 contemplated by the Scottish Government at this time?
 2 **A.** So our understanding has developed considerably by this
 3 stage. You pointed to my January 21st email that
 4 identified that there would be a sub -- likely to be
 5 a subpopulation of very vulnerable people. We now had
 6 very good data that there was tremendous variation in
 7 the risk with age. So the idea then is: well, how do
 8 you protect people who are very vulnerable? This seems
 9 to me, I have to say, to be actually the absolute
 10 number one public health priority for Scotland and
 11 everyone else.

12 We've identified a subset of the population that's
 13 at very considerable risk. We spoke about the case
 14 fatality rate, and we said that the case fatality rate
 15 of 4% was high, but in the elderly and the frail, it's
 16 way higher than that. So these people are very, very
 17 vulnerable. So how do we protect them? And we
 18 hadn't -- I hadn't thought of this concept of shielding
 19 as it had been -- as it eventually was introduced, which
 20 is basically asking a lot of people in the community to
 21 protect themselves. So we had this idea of actually
 22 protecting people by protecting the people around them.
 23 So carers, family members, same household. That we had
 24 to pay particular attention to this. So that's what
 25 I was proposing, and that's an idea that we went on to

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1 you know, there's a lot of very smart people thinking
 2 about this problem -- come up with a better way of
 3 protecting the vulnerable population. But what we got
 4 was shielding, in the form that it was introduced in
 5 Scotland, which in the community anyway was basically
 6 telling people to cut all contacts out.

7 **Q.** Mm-hm.

8 **A.** Which -- you know, there's lots of evidence now that
 9 that didn't work particularly well, and I can give you
 10 chapter and verse as to why it didn't work if you want,
 11 but yeah, that didn't seem to me, even at this stage, to
 12 be a very good approach.

13 **Q.** Thank you.

14 There's a comment there as well, just on this
 15 particular suggestion, that:

16 "Gregor [who I'm assuming is the now Chief Medical
 17 Officer] raised the point that there might be vulnerable
 18 people below the chosen age threshold as well.
 19 Personally [you write], I don't see any reason why risk
 20 factors other than age couldn't be included in
 21 a cocooning policy, but it is for the clinicians to
 22 advise what those might be."

23 So you've obviously identified age as the main risk
 24 factor on the evidence that you've seen, which of course
 25 turned out to be absolutely right, but there's

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1 develop --

2 **Q.** So --

3 **A.** -- lot over --

4 **Q.** So cocooning then is protecting not only those
 5 vulnerable people but the people who would be likely to
 6 engage with those vulnerable people, their carers and so
 7 on; is that right?

8 **A.** Yes. Likely but not -- not through choice but through
 9 necessity, because elderly people, particularly
 10 of course elderly people with other risk factors, other
 11 comorbidities, need care, whether it's in the home or
 12 it's in a care home, some in hospital, this is -- this
 13 is a subset of the population that really couldn't
 14 socially distance. It's just not possible, they can't.

15 **Q.** Yes.

16 **A.** So clearly that wasn't going to be -- unfortunately was
 17 the strategy that was implemented, but -- just telling
 18 people to isolate themselves -- but it seemed to me that
 19 we needed to actually -- they couldn't isolate
 20 themselves so that wasn't going to work, so how do we do
 21 it, and we do it by cocooning.

22 **Q.** Yes, I see. Was cocooning a policy which ever formed
 23 part of the Scottish Government's response to the
 24 pandemic?

25 **A.** No. And that wouldn't have mattered had somebody --

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1 a suggestion made by the then Deputy Chief Medical
 2 Officer that we might need to consider other groups
 3 vulnerable to the virus as well, and you are open minded
 4 about the possibility of doing that because you
 5 recognise that there might be such groups who could be
 6 protected by a similar mechanism?

7 **A.** Correct.

8 **Q.** Thank you.

9 Can we just go down, have the whole email up as
 10 well, please -- over the page, I think. Yes.

11 Do you conclude this email by saying:

12 "One final point, perhaps the most important of all.
 13 A lot of work went into making containment work. Quite
 14 rightly. But it hasn't, as was to be expected. A lot
 15 of work is now going into making delay work. Quite
 16 rightly. It may work, or partially work. But there
 17 remains every likelihood that it won't work well enough
 18 to prevent an epidemic that does, sooner or later,
 19 completely overwhelm our health systems. This is not
 20 a prediction but it is an entirely possible scenario.
 21 If it happens, it could happen within weeks. So I do
 22 think that we should start thinking about the mitigation
 23 phase now."

24 Can you summarise for us what you were trying to
 25 convey as to the strategy at this stage, what needed to

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1 be borne in mind as strategies started to be put in
2 place in the weeks after this?

3 **A.** Yes, so the UK Government had this strategy:
4 "containment, delay" -- there was a research arm, which
5 is a little bit of a diversion, so "containment, delay
6 and mitigation", and this was -- Chris Whitty, I think,
7 was --

8 **Q.** Yes, I think it was part of the UK coronavirus action
9 plan that was launched on 3 March to which the Scottish
10 Government also subscribed.

11 **A.** Thank you. You're right. So I'm now trying to tailor
12 my comments to fit in with the actual plan. I mean,
13 there is now a plan, so that's progress, but I'm trying
14 to tailor my comments to fit in with that plan, but
15 I don't think that plan is going to work.

16 **Q.** Yes. What is that you're counselling particularly about
17 the dangers that that plan might not work?

18 **A.** Well, I mean, what I'm saying is quite clearly that we
19 should start thinking about mitigation, which is
20 basically: okay, how do we deal with the fact that we're
21 actually going to have an epidemic? We haven't
22 contained it, we've delayed it as long as we can, and
23 here we are, we have a pandemic, what are we going to
24 do?

25 **Q.** Did you understand over this period, did you take the

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1 I don't think and many other people think that those
2 early SAGE meetings were doing a particularly good job
3 of raising the alarm.

4 **Q.** Thank you.

5 After this of course you were attending SPI-M-O and
6 you communicated, I think, some messages with
7 information about what had happened at those meetings in
8 early March to Dr Calderwood and Dr Smith; is that
9 right?

10 **A.** I did, so this became a **modus operandi** for us that
11 I would brief the pair of them on the outputs of
12 SPI-M-O. And I think -- I think that was important.
13 There were, as you well know, there were many sources of
14 information coming in, but, in terms of the sorts of
15 questions that needed to be tackled then, SPI-M-O was
16 absolutely the repository of expertise and knowledge,
17 and so I think it was -- I felt it was important that
18 they were fully appraised of what SPI-M-O's thinking
19 was.

20 **Q.** Okay. We've discussed the absence of certain features
21 of the Scottish Government's strategy before the first
22 lockdown, but in that regard what was your understanding
23 at this time within the Scottish Government of their
24 planning with regard to the way in which Scotland might
25 deal with a second wave of the virus were it to

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1 Chief Medical Officer and other medical advisers to the
2 Scottish Government with whom you were speaking to be
3 receptive to your advice in the period from January up
4 until the first lockdown or not?

5 **A.** Well, we've -- we have discussed the difficulties I had
6 getting myself heard up until February, so I think the
7 only answer I can give you is: no, I wasn't. I feel it
8 did change, the tone did change in March, and that
9 coincides with Gregor Smith getting more actively
10 involved in the discussions I'm having with
11 Catherine Calderwood, and I think the pace did pick up
12 in -- certainly in the first week in March.

13 **Q.** Was Gregor Smith then considerably involved in the
14 planning as far as you were concerned around that time,
15 it wasn't simply Dr Calderwood --

16 **A.** I don't know, I'm simply referring to his involvement in
17 the correspondence with me.

18 **Q.** Yes.

19 **A.** And he was starting to ask questions that were the
20 sort of questions I would, you know --

21 **Q.** Yes, we've heard evidence from him, for example, that he
22 attended a number of the early SAGE meetings as
23 an observer, where he was gathering information, and he
24 was obviously then part of the discussions with you?

25 **A.** Yes, but I -- I mean, we've discussed before here that

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1 eventuate?

2 **A.** I ... I gave -- in my briefings that we have been
3 discussing to Catherine Calderwood, so this is -- well,
4 I think actually some of it's even before we had cases
5 in Scotland, but we're -- we have some idea of the sorts
6 of social distancing intervention we might need. I said
7 then that we were going to get -- well, not that we're
8 going to get, as you well know I don't do that, but we
9 were very likely to get, should plan for the possibility
10 of a second wave. And ... do you want me to give the
11 reasons for that?

12 **Q.** Yes, please, yes.

13 **A.** Right. The reasons for that is I was acutely aware that
14 lockdown or any combination of social distancing
15 measures up to and including lockdown would not solve
16 the problem. All they would do was delay the problem.
17 And the first manifestation of that delay is, okay, you
18 hit another wave, and then you push that -- and I shared
19 this scenario with them -- you push that one down, the
20 second wave, which as it happens in the briefings I gave
21 was September 2020, the second wave, so pretty close,
22 and you squash that one down and then you get another
23 one in the early part of the next year. Now, you know,
24 there's no way you can predict with any precision how
25 something like this is going to unfold over such a long

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1 timetable, so we wrote in very big letters in our graphs
2 and briefings on this "This is an illustration, not
3 a prediction": this is the sorts of scenario that are
4 coming up when we do our work, and we're sufficiently
5 confident in something like this happening, that the
6 government should be aware of it and should be planning
7 for it. I don't think they had any understanding, not
8 just in Scotland but in the UK, that they were going to
9 get a second wave, that that was the likelihood, that
10 they should be planning the expectation they're going to
11 get a second wave.

12 **Q.** Yes.

13 **A.** I think there was a general belief that we would lock
14 down, perhaps for a few weeks, and somehow the thing
15 would be over. Extraordinarily naive view, but it
16 clearly was circulating in political circles around the
17 UK --

18 **Q.** And -- and --

19 **A.** -- temporary measure.

20 **Q.** And indeed contrary, as you said, to the advice you were
21 providing, about your experience of how these things
22 tend to go, in the briefings you were giving directly to
23 the Scottish Government?

24 **A.** Yeah, more than how they tend to go and based on the
25 best analysis we could possibly do of the data on this

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1 misleads -- misleads the public. It gives an entirely
2 false impression of what the future holds, how this
3 pandemic's going to look. The idea implies by "no Covid
4 death is acceptable" is a world where no one dies of
5 Covid. That had gone. That had gone from
6 December 2019, that was -- you know, as it turned out.
7 But certainly I was clear it had gone by February 2020.

8 And that's true, because this year, 2024, at current
9 rates, and similar to last year, hundreds of people in
10 Scotland are going to die of Covid. Is that acceptable?
11 Well, we seem to be accepting it. I mean, that's --
12 there's no great public health effort going on here to
13 spare those hundreds of lives that are going to die of
14 Covid.

15 And as an aside, I think we're now not paying enough
16 attention to Covid right now. It's a serious infection.
17 It's killing people.

18 May I go on?

19 **Q.** Yes, please.

20 **A.** The second issue is, okay, how are you going to achieve
21 this "no death is acceptable"? The only possible way
22 I could see of achieving it, other than literally some
23 miracle cure, let's leave that aside, is a zero Covid
24 policy. And as I've explained to you before, the
25 corollary of a zero Covid policy at that stage, this is

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1 particular infection in the UK, in Scotland. So -- so,
2 no, not just based on expert guesswork, a lot more to it
3 than that.

4 **Q.** At a general level as well, you say this both in your
5 book and also in the evidence you have helpfully
6 provided to the module, that you had the impression that
7 the Scottish Government's policy with regard to the
8 management of the pandemic was that no death from
9 coronavirus was acceptable. I'd be interested in
10 knowing how you got the impression that that was the
11 policy, if you like, or the approach, and also why it
12 was you think that that policy caused significant
13 problems.

14 **A.** So I thought it because the phrase appears in the
15 Scottish Government's -- I've got it here, framework for
16 decision-making --

17 **Q.** -- April document that I referred --

18 **A.** -- 2020, and because, as I recall, the then
19 First Minister said it, on several occasions. That's
20 why I thought this was --

21 **Q.** Thank you.

22 The second part was why, if it is the case at that
23 you consider it to be a problematic approach, it was
24 a problematic approach?

25 **A.** It's empty rhetoric. It misleads everybody, it

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1 April 2020 we're talking about, is indefinite lockdown.
2 And it would still fail eventually. You know, this was
3 being discussed at the time, and of course zero Covid
4 did fail globally eventually, and so therefore it was
5 never deliverable.

6 And the other thing that upset me about this "no
7 death from Covid is acceptable", it devalues non-Covid
8 deaths. And that isn't just a sort of philosophical
9 complaint. The intense, very strong advice in Scotland
10 to spare the NHS during -- particularly during the first
11 wave, and not bother the NHS if you didn't absolutely
12 need to, led to a huge spike -- well, first of all it
13 led, as you'd expect, to a fall-off from a cliff, and
14 the EAVE project, to what I was a part, studied this, on
15 attendance at A&E or admissions to hospital. They just
16 fell off a cliff.

17 Most of the hospitals in Scotland had their quietest
18 time in living memory during the first wave, because
19 no one else was going to hospital, and a lot of those
20 people should have been in hospital. And in the UK
21 thousands of them died at home. There was a massive
22 spike in this. In Scotland I think it was probably
23 hundreds, I wouldn't want to put an exact figure on it.
24 These people died. And so they died because the focus
25 of the government was on preparing the NHS Scotland for

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1 Covid, and concentrating on that -- because no Covid
 2 death is acceptable, other kind of deaths apparently
 3 are, and they rose.

4 **Q.** Thank you, Professor.

5 To put that in the language of the Scottish
 6 Government framework, there was a significant focus on
 7 harm 1, Covid-related harm and death, but too little
 8 concentration on harm 2, non-Covid-related harm and
 9 death?

10 **A.** Absolutely, and -- and that killed people.

11 **Q.** And one, it would be reasonable to assume, would it
 12 not -- you mentioned the death -- the non-Covid deaths,
 13 but of course there may be many people who have suffered
 14 significant morbidity as a result of not attending the
 15 hospital, whether that resulted in their death or not?

16 **A.** Well, indeed. But, I mean, they -- the non-fatal health
 17 harms went beyond that, and there was -- we might come
 18 to this, there was a study looking at the sort of health
 19 effects of both Covid but also the implications of
 20 lockdown --

21 **Q.** Yes.

22 **A.** -- so the indirect effects of the countermeasures, and
 23 that showed, by their best estimation -- this was done
 24 by the Office for National Statistics and the
 25 Department of Health and Social Care, across the UK --

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1 impression of some of the key Scottish Government
 2 policies towards the management of the pandemic and
 3 their effect. I just wanted to ask you about one
 4 particular thing you say in your statement which is
 5 related to the first lockdown, which is at
 6 paragraph 240, where you say:

7 "I do not know what Scottish Government's
 8 understanding of the Covid threat was at the time
 9 Scotland went into lockdown, but I don't believe that
 10 they truly accepted that the virus was here to stay.
 11 I am concerned that this short-term view of the crisis
 12 influenced both the politicians' willingness to impose
 13 lockdown and the public's willingness to accept it. The
 14 politicians were mistaken or misinformed and the public
 15 were misled."

16 You've given some evidence about your general
 17 impression already. Is there anything, any element of
 18 that -- anything you would like to add, based on that
 19 comment, in light of what you've already told us in this
 20 regard?

21 **A.** Well, I can argue that what I say in that paragraph was
 22 correct. The reason I say that is because by the end of
 23 the summer 2020 Scotland was flirting with a zero Covid
 24 strategy. Well, that tells me that they didn't accept
 25 that the virus was here to stay.

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1 that actually those indirect harms, not so much during
 2 2020 but accumulating over time, would be considerably
 3 greater than the harms that would be caused by Covid.

4 Sorry, having gone down this route, I must add an
 5 important rider.

6 **Q.** Yes.

7 **A.** That is not a reason not to intervene against Covid. If
 8 you don't, then that side of the scale increases
 9 enormously, so -- but it is an indication that we
 10 haven't got the balance right. So it's confirmation,
 11 it's another way of looking at the problem that you just
 12 highlighted as -- in terms of neglecting harm 2, this is
 13 another piece of evidence that said: yes, we've
 14 neglected harm 2. But not just in the short term, in
 15 the longer term too.

16 **MR DAWSON:** Thank you.

17 My Lady, if that's a convenient moment.

18 **LADY HALLETT:** Professor, as you know, we take regular
 19 breaks for the stenographer. I shall return at 11.30.

20 **(11.16 am)**

21 **(A short break)**

22 **(11.30 am)**

23 **LADY HALLETT:** Mr Dawson.

24 **MR DAWSON:** Thank you, my Lady.

25 Professor, we were discussing before the break your

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1 **Q.** And you think that was an important error in the way
 2 that they approached really the entire management of the
 3 pandemic, but certainly over 2020?

4 **A.** I -- sorry, what's the error precisely?

5 **Q.** Well, the approach that -- that their approach to the
 6 Covid threat was that they did not accept that the virus
 7 was here to stay.

8 **A.** So I have to say I didn't understand the Scottish
 9 Government's strategy over the summer of 2020. The
 10 emphasis was on a very, very cautious relaxation from
 11 lockdown, and it seemed to be important to the
 12 politicians that it was more cautious than the one in
 13 England, so they were emphasising that. They didn't
 14 articulate in any way that I understood what they
 15 thought the public health benefit of this caution
 16 actually would be, given what we've said about a second
 17 wave, and then they segued into this idea that actually
 18 the fall in cases in Scotland would somehow continue and
 19 we could end up in a zero Covid. So that, to me,
 20 was ... I'm trying to think of a polite way of putting
 21 this. This was not consistent with the evidence that
 22 had been available since February 2020.

23 **Q.** So there's two elements, I think, to that period. One
 24 is whether it was the best way to approach things to
 25 release the lockdown in the gradual fashion that the

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1 Scottish Government did, and secondly, whether the zero
2 Covid policy that you understood to have existed within
3 Scottish Government showed a misconception about whether
4 that could be achieved and sustained.

5 So if we could try to take the two, one after the
6 other. Just to put the first in context, you give
7 an analogy at paragraphs 16 to 17 of your report, which
8 I think attempts to try to explain your views on this,
9 and I just want to try and unpack it a little, to do
10 with a seesaw, whereby you talk about there being
11 a difference between how far you go in relaxing
12 restrictions and how quickly you get to that point.

13 Could you please explain your views about that in
14 the context of the Scottish Government's policy over
15 that period which you've described?

16 **A.** Yes. As I say, I didn't -- I don't think the goals of
17 the policy were clearly articulated. Not so much the
18 immediate goals, they were laid out. I mean, May 2020
19 there was what was called a route map. So, I mean, that
20 was clear, that was absolutely clear. But my concern,
21 and had been for so many months, was: but what is the
22 long-term plan? Where do you see this going? Where are
23 we going to end up? And as you well know I was
24 expecting to end up pretty much where we are now
25 in 2024, but they didn't seem to be thinking that way.

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1 there, as long as you don't go across it. If you want
2 to go across it, then you have to do something else, you
3 have to basically reduce the R number in other ways.

4 So what I wanted to see was two things. So one was
5 immediate, much, much quicker than the Scottish
6 Government did it, relaxation of restrictions that were
7 not clearly going to take us to the tipping point -- and
8 do you want examples --

9 **Q.** For example, please, yes.

10 **A.** Well, I can give you three.

11 **Q.** Yes.

12 **A.** And there's very, very good evidence for three now.

13 The stay-at-home orders, the fact that we were asked
14 to stay in our homes. That was not contributing much,
15 and -- well, this is -- this is getting complicated now.

16 **Q.** Okay.

17 **A.** We can perhaps go back to a graph in the Scottish
18 Government's framework Covid document that shows this,
19 but what that graph shows is essentially the R number
20 coming down before we were told to stay at home. And
21 when we were told to stay at home it didn't actually
22 come down any further. And actually it's worse than
23 that in Scotland, there are more ramifications --

24 **Q.** Just to pause at that point, what you're telling me is
25 that your scientific view was that the policy of

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1 So the seesaw analogy is this: the emphasis on
2 caution was somehow the idea that you could unlock --
3 I think they -- well, I'll come back to this -- all the
4 way, you could come out of the pandemic by going very,
5 very slowly, and the seesaw analogy is you're standing,
6 just you, on the one end of a seesaw, there's a fulcrum
7 in the middle of the seesaw, a tipping point, and the
8 tipping point is actually the value R greater than 1,
9 and the argument is -- that I think the Scottish
10 Government were making -- is that if you go slowly
11 enough along the seesaw you can go past the fulcrum and
12 keep going. No. You can't. It's going to tip down.
13 And I don't think they understood that.

14 And I didn't, I didn't use the seesaw analogy at the
15 time because I wasn't absolutely sure that that's
16 Scottish Government thinking. But it became very clear
17 to me it was when we got into the second Scottish
18 lockdown, in January 2021, and repeatedly we heard that
19 "We're going to come out of this lockdown very, very
20 slowly and cautiously, because we made that mistake
21 before". Well, no. That's not -- that's not correct.

22 So what you have to avoid -- what the strategy
23 should have been was this: you can go as far as you can
24 up the seesaw as quickly as you like, makes no
25 difference at all if you take two great steps and get

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1 gradually easing the lockdown didn't make a great deal
2 of sense to you, didn't have scientific rationale?

3 **A.** No, it --

4 **Q.** In particular -- just take it stage by stage -- in
5 particular because your view was that you could get to
6 the tipping point, ie release restrictions to a point
7 where there was a degree of stability in the situation,
8 and if you moved quickly towards that point rather than
9 gradually, you would offset some of the ill effects of
10 the countermeasures more quickly than a gradual release;
11 is that broadly correct?

12 **A.** Correct. I mean, the effect of the stay-at-home
13 measures really -- and they weren't, I don't think,
14 released until May or June. I mean, it was ages
15 before --

16 **Q.** And what I think you've identified is that there were
17 a number of particular measures that you think could
18 have been released more quickly?

19 **A.** Two more.

20 **Q.** Yes, we'll get on to the others, but just to take it
21 stage by stage, Professor.

22 There were three particular types of restrictions
23 that we all lived with that you think, based on that
24 previous general rationale, should have been released
25 more quickly, which would not have had a significant

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1 effect on the R number, and would have significantly
 2 released some of the other harms related to those
 3 restrictions being in place?
 4 **A.** Yes, not had no effect on the R number but at -- given
 5 our understanding at that stage, we could be very
 6 confident they wouldn't take us past the tipping point.
 7 **Q.** Yes. The tipping point being?
 8 **A.** R becomes greater than 1.
 9 **Q.** Yes, thank you.
 10 **A.** So one was stay at home, the second one was --
 11 **Q.** Could we just deal with the first one quickly, just to
 12 be sure that we've understood this, because, Professor,
 13 it's extremely interesting and important evidence and
 14 a number of people will be listening to this who perhaps
 15 need to be taken through it a little bit more slowly,
 16 just so we absolutely understand everything you say.
 17 The first thing that you suggest could and should
 18 have been released more quickly, from a scientific
 19 perspective, in your analysis, was that the stay-at-home
 20 order could and should have been released earlier and
 21 you say that there is scientific evidence to say that
 22 that would not have tipped the R above 1?
 23 **A.** Yes, I mean, I would take that further, the stay-at-home
 24 order was never necessary.
 25 **Q.** Right.

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1 There are caveats, like if people are outdoors and
 2 being intimate, well, yes, okay, that's something,
 3 but --
 4 **Q.** Outdoors per se?
 5 **A.** Yes. There was never any need for that. And the
 6 evidence for that --
 7 **Q.** Could I just dwell on that before we get to the third
 8 one, again.
 9 **A.** Yes, sorry.
 10 **Q.** Just to understand, the restriction to stay indoors was
 11 something then that you say should have been released
 12 faster and earlier, in fact shouldn't have been there at
 13 all --
 14 **A.** Correct.
 15 **Q.** Would it be fair to say that had there not been
 16 restriction ongoing out of doors, that would have
 17 perhaps contributed to counterbalancing some of the
 18 other harms, such as the mental health harms or the
 19 physical harms that people might have started to suffer
 20 from being inside so much?
 21 **A.** Absolutely. But I heard or saw very, very little
 22 consideration for those harms when we went into
 23 lockdown. To be fair, they were, I think, fairly
 24 quickly recognised by Scottish Government, but when we
 25 took that decision I don't think that was at the

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1 **A.** The job was already done by the measures -- and I say
 2 there's actual evidence in the Scottish Government's own
 3 report that that was the case.
 4 **Q.** Yes, yes. So that is based on evidence which shows that
 5 the R was starting to decline even before the lockdown?
 6 **A.** Yes.
 7 **Q.** Did that result from the fact that people were
 8 voluntarily imposing on themselves a degree of social
 9 distancing such that the R was starting to be brought
 10 under control without the need for that severe
 11 imposition of a lockdown?
 12 **A.** That's my inference, and I think a good inference.
 13 There may be other explanations but that's the one
 14 I would --
 15 **Q.** Thank you.
 16 **A.** -- highlight.
 17 **Q.** And you were going to tell us what the other two
 18 significant restrictions were that you think could and
 19 should have been released more quickly?
 20 **A.** Outdoor activities. We had very good evidence coming
 21 back from China that the novel coronavirus transmits
 22 very poorly outdoors. Very poorly. So there was pretty
 23 much zero public health benefit to keeping us indoors.
 24 That was never required at all. We never needed to do
 25 that.

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1 forefront of people's minds. There was a lot of concern
 2 about how well people would tolerate lockdown, but that
 3 was an unknown. But I felt that discussion was more in
 4 the vein of, well, how long and severe a lockdown could
 5 we get away with, that the public would tolerate, rather
 6 than actually looking at evidence of components of it
 7 and saying we didn't need them.
 8 **Q.** Okay.
 9 **LADY HALLETT:** Professor Woolhouse, sorry to interrupt.
 10 When you talk about outdoor activities, are you meaning
 11 things like going for a walk in the park, or are you
 12 talking also about outdoor activities like football
 13 matches?
 14 **A.** Football matches were on the -- on the cusp.
 15 **LADY HALLETT:** Well, because a lot of people are gathering,
 16 they're going there by public transport, they might go
 17 to a pub together, all those different variables?
 18 **A.** Yes. That would -- I mean, you would need to do,
 19 you know, a fairly detailed public health appraisal of
 20 where you drew the line. But we, in the UK, arrested
 21 people for going on solo walks in the mountains. It's
 22 utterly absurd. That devalues the whole idea of social
 23 distancing, that anyone can see this is nonsense. But
 24 it was done.
 25 May I?

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1 **MR DAWSON:** Absolutely.

2 **A.** Another good example, there was an absolute outcry in
3 the summer of 2020 that people were going to beaches.
4 There was never ever an outbreak of Covid-19 anywhere in
5 the world linked to a beach. It was fine. People could
6 go to the beach. But nonetheless we were very resistant
7 to that.

8 **Q.** Thank you, Professor.

9 The third element that you were going to tell us
10 about that could, should have been released more quickly
11 was?

12 **A.** So this is not in the category of things we knew well
13 enough not to include them in the first lockdown.

14 **Q.** Yes.

15 **A.** The first two we never needed.

16 **Q.** Should never have been --

17 **A.** Yep. Third is schools. And it quickly became apparent
18 through April and May 2020 that schools were
19 contributing a little to the spread of the virus, but so
20 little that there was essentially no danger that
21 re-opening schools would take us past the tipping point.

22 **Q.** Just to pause there, I think -- because you said it very
23 quickly -- I think you said there the closure of
24 schools; is that correct?

25 **A.** Yeah.

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1 Scotland that was safe and so important to do.

2 **Q.** Mm-hm.

3 **A.** And I was feeling that actually being an adviser was
4 quite a good thing, that actually we could get things
5 done that really helped. And then when we had the
6 January lockdown, schools were closed again, arguably,
7 because this was now the Alpha variant and there was
8 more uncertainty, as a precautionary principle, yes, but
9 it very quickly became apparent in that second wave that
10 schools did not need to remain closed and we could still
11 control the virus, and yet they weren't fully re-opened
12 here until May 2021. This was unnecessary. The --
13 well ... forgive me, this is one of the aspects of the
14 pandemic management that I -- I really feel very
15 strongly, what we did to the children. And it would be
16 bad enough if there was a detectable and measurable
17 public health benefit to this, but there wasn't. This
18 wasn't necessary, and we did it anyway.

19 **Q.** Could I just clarify one -- it could be applied in
20 connection with the schools, the evidence you've given,
21 but it could be applied more generally. When you
22 differentiated between the first two categories, which
23 you say should never have been in place, and schools,
24 which you accepted would have needed to have been in
25 place but for a much shorter period than the

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1 **Q.** It just wasn't quite picked up by the stenographer.

2 **A.** I beg your pardon.

3 So closing schools I accept as a -- potentially as
4 a precautionary element of the first lockdown, because,
5 let's face it, we were practically panicking at that
6 stage, it was necessary, or justifiable, but we should
7 have realised much, much more quickly, based on the
8 evidence emerging from around the world, that this was
9 not an essential element of our lockdown.

10 So in my view, and I -- well, we're going to this,
11 I argued it repeatedly and frequently over that whole
12 summer, schools in Scotland could have re-opened in
13 May 2020, just as they did in Denmark.

14 **Q.** What about school closures as part of the second
15 lockdown, which also occurred?

16 **A.** One of the positive elements of the way the pandemic was
17 managed in Scotland was that we were the first nation to
18 re-open schools when, particularly in England, there was
19 a lot of resistance to it. I think we did that
20 partly -- at least partly on the basis of the advice
21 that came out of the Scottish Covid Advisory Group,
22 which I was a part. I think that advice was too slow to
23 pivot to it's safe to re-open schools, but it did get
24 there and we opened them in August. And I thought that
25 was a real success story: an evidence-based decision by

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1 restrictions actually applied, that is based on the
2 position in which Scotland found itself when the
3 lockdown was announced on 23 March; is that correct?

4 **A.** It's based on the evidence that was available when that
5 decision was taken.

6 **Q.** Yes, but is it your position, if one takes it further
7 back in our narrative that we have been discussing, to
8 the discussions that we had about the warnings you were
9 trying to convey to Scottish Government, if we were
10 trying to assume a hypothesis which worked on the basis
11 of those being heeded in the way that you had hoped they
12 would be, would it have been possible to have avoided
13 that happening in that scenario and, indeed, avoided
14 a lockdown at all?

15 **A.** Yes. May I hark back to Module 2?

16 **Q.** Yes, abs -- if it puts it in the context which is
17 required for Scotland --

18 **A.** Yes.

19 **Q.** -- that would be very welcome, thank you.

20 **A.** So, Module 2, Mr O'Connor, who interrogated me quite
21 hard about the difference between my maxim for managing
22 this pandemic, of go early so you don't have to go hard,
23 and he pointed out Patrick Vallance's counter, so --
24 it's that you should go harder than you want, earlier
25 than you want, wider than you want. And

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1 Patrick Vallance, when he gave evidence after me, to
2 Module 2, addressed this and he said "Well, yes, but how
3 hard? You know, Professor Woolhouse says you don't have
4 to go so hard but you still have to do something, so is
5 that not pretty much the same thing?" That was his
6 argument. Well, my counter to that is no, it's not, for
7 the reasons we just gave.

8 So if we had gone earlier and done all the things,
9 apart from the three I mentioned, and seen them working,
10 we would never have had to close schools, we would have
11 seen it wasn't necessary. So I don't accept
12 Patrick Vallance's counter to that at all. You know,
13 his -- his strategy led to us closing schools, mine
14 would have let them stay open the whole pandemic.

15 **Q.** Thank you.

16 Could I address another general concept which flows
17 through all the evidence I think that you've given,
18 which we've touched upon, and again, to try to use
19 the -- developing a theme we've talked about earlier in
20 the context of zero Covid policy, to use the language of
21 the framework, the area that I'd like to explore with
22 you is the extent to which the -- what you perceived and
23 understood the greater focus on harm 1 to be resulted in
24 harms 2 to 4 being much worse than they really should
25 have been.

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1 falling in harms 2 to 4.

2 The remits of those groups are all set out. But if
3 your position is that ultimately, in terms of effect,
4 the Scottish Government's policies failed adequately to
5 recognise those harms over the course of the pandemic,
6 must it be the case that those systems were ineffective,
7 in that the ultimate impact from harms 2 to 4, as
8 I understand your evidence, was larger than it should
9 have been?

10 **A.** I think to a large extent the four harms policy,
11 which -- when the four harms were first mentioned I was
12 greatly encouraged.

13 **Q.** Yes.

14 **A.** I was thinking -- it was rhetoric, it was rhetoric. The
15 emphasis was overwhelmingly on harm 1, even when,
16 particularly during summer 2020, the public health
17 benefits of continuing to suppress the virus were
18 extremely small.

19 **Q.** Thank you.

20 I'd just like to focus in, we've talked about it
21 already, the period when the cases started to rise again
22 which eventuated in the second lockdown. Is it your
23 view, in relation to any of the harms, frankly, that --
24 the harm that you're focused on, harm 1, or any of the
25 other harms -- that you think the Scottish Government

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1 Broadly speaking, can you explain, Professor, your
2 view as to whether the Scottish Government policies took
3 adequate account of the -- we've already covered
4 non-Covid health harms, but wider societal and economic
5 harms?

6 **A.** Very simply, in my view, no, they did not. But then we
7 get into this very difficult territory, which the
8 politicians exploited a lot, if you don't intervene as
9 hard, more people will die. And since they were working
10 on this maxim that no Covid death is acceptable, clearly
11 that's not something they're going to do. So, in order
12 to counterbalance these relaxations you have to do other
13 things. And not only me but Scottish advisory group was
14 very clear on the other things you could be doing to
15 keep the R number low but still allow you to relax
16 restrictions and therefore avoid a lot of the harms that
17 were being caused, harms 2, 3 and 4 as you say.

18 **Q.** We have evidence available to us from Scottish
19 Government that during the course of 2020 for differing
20 periods at different times a number of advisory bodies
21 separate from the body to which you were affiliated, the
22 Scottish Covid Advisory Group, were set up in order to
23 try to provide advice and evidence, information, to the
24 Scottish Government about a wide variety of things,
25 including things that might broadly be described as

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1 learned lessons about the experience of the period up
2 till, say, September 2020, as regards how best to manage
3 the pandemic, or that they repeated the same mistakes?

4 **A.** I think -- now, the second lockdown in Scotland
5 of course was January.

6 **Q.** Yes.

7 **A.** And cases rose in the autumn, as you said, in the second
8 wave, but also came down without a full lockdown in
9 Scotland.

10 **Q.** Yes.

11 **A.** So that -- and that was a big difference from England.
12 And may I --

13 **Q.** Just to be clear, there were -- there was not a full
14 lockdown, what's known in the other nations as
15 a circuit-breaker lockdown, but there were significant
16 restrictions at times --

17 **A.** Yes --

18 **Q.** -- over the --

19 **A.** -- and I think -- sorry, I've completely diverged from
20 your original question, can I address this point and
21 then come back to --

22 **Q.** Absolutely, thank you very much.

23 **A.** Right.

24 I think one of the reasons that we didn't, in
25 lockdown -- sorry, didn't in Scotland go into that

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1 November lockdown was it would have been counter to the
2 advice coming out of the group I was on, Covid-19
3 Advisory Group. We were not in favour of a lockdown at
4 that stage. And, as I say, we had proposed many other
5 interventions that would reduce. But even though most
6 of those weren't taken up, in fact we didn't need the
7 lockdown in Scotland.

8 **Q.** Just to be clear, Professor, you mentioned November,
9 which is obviously when the English lockdown --

10 **A.** Yes.

11 **Q.** -- took place, there were other lockdowns, over that
12 whole period, really from September onwards, there was
13 consideration of a circuit-breaker; did it remain the
14 Scottish Government Covid Advisory Group's position that
15 they didn't recommend a circuit-breaker over that whole
16 period?

17 **A.** Correct.

18 **Q.** Thank you.

19 **A.** Yes, and again harking back to Module 2 I'm afraid,
20 I know the Inquiry was given evidence from a number of
21 very distinguished scientists and advisers about the
22 inevitability that this second lockdown in England was
23 absolutely essential for controlling the virus. Well,
24 we didn't have one in Scotland and we controlled the
25 virus. So I have to say I think that simple fact rather

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1 **Q.** And if I might ask again a question, a broad question,
2 about the approach to the period thereafter, because
3 the Inquiry has heard significant evidence about, as
4 a result of Delta and then subsequently Omicron towards
5 the end of the year, Scotland having very significant
6 cases, even in comparison, obviously, the infectiousness
7 of Omicron was higher, but the numbers compared to the
8 rest of the UK being highest in Scotland, Scotland
9 suffering a significant mortality, almost to the same
10 level as the first two waves, in what one might describe
11 as the third wave, and the NHS being driven to the point
12 of procedures having to be cancelled, the military
13 having to be called in to provide assistance.

14 One of the things that we noticed was that from
15 June 2021 that the group that you sat on, with
16 a considerable amount of expertise, sat much less
17 frequently in that period. Other than a cluster of
18 meetings around about December 2021 it sat really
19 monthly, we think, from June 2021, at a time when the
20 cases started to rise again as a result of Delta.

21 Do you feel that at that stage, although you've
22 pointed earlier to there being a focus on harm 1, that
23 there perhaps was an insufficient focus by that period
24 on trying to control what was going on, such were the
25 consequences which we've seen?

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1 discredits all the evidence the Inquiry's heard on this
2 point before. Scotland proved what I have been
3 claiming, that that second lockdown in England was
4 unnecessary. It wasn't necessary here, it wasn't
5 necessary in England either.

6 **Q.** Thank you. As regards the second lockdown in Scotland?

7 **A.** Right, the second lockdown in Scotland was -- was
8 January. And yes -- you asked me if Scottish Government
9 had learnt some lessons. They learnt some. So the
10 restrictions that were imposed on us during that
11 lockdown were definitely less severe, the very strict
12 stay-at-home orders, the amount of time you could spend
13 outside, those were relaxed in that second lockdown. So
14 that's fine. And again proof of principle, even with
15 a more infectious variant of the virus we didn't need
16 them, we still controlled it, so that proves what I was
17 saying about the first one, we didn't need those
18 elements, but sadly they did close schools and kept them
19 closed, so they didn't --

20 **Q.** Which we've --

21 **A.** Yes, but -- well, I don't understand how we went from
22 the position of actually being quite evidence-based
23 about decisions on school closures to suddenly
24 forgetting all that in early part of 2021. It baffles
25 me.

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1 **A.** I do. We're now at that stage learning what living with
2 this virus looks like, and it's not pretty. It's
3 a serious infection, it's causing a lot of disease, some
4 death, it's causing Long Covid as well, it needs to be
5 managed. That doesn't mean we have to lock down, close
6 schools again, but it means we do need to manage it.

7 This is not a public health problem that has gone or
8 is ever going away, we're going to need to manage it for
9 the foreseeable future.

10 **Q.** And do you think that given certainly the comparative
11 levels of infection and mortality that it was mismanaged
12 over that period?

13 **A.** It's your word, not mine, I hadn't used that before,
14 but I -- the phrase I use, that I don't think we paid
15 sufficient attention to it throughout there. But,
16 I mean, of course, attention was reactivated during the
17 Omicron wave, and now we're back to a stage where we're
18 not paying much attention to it.

19 **Q.** Thank you.

20 Could I ask you just one further series of
21 questions. You were a member of the Scottish Covid
22 Advisory Group, as we have established.

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

24 **Q.** As a member of that group or in any other capacity, did
25 you have any means by which you could contact Scottish

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1 Government ministers directly?
 2 **A.** I don't -- I mean, I imagine I could have done if I'd
 3 wanted to, but I had -- I wasn't -- there was no channel
 4 set up for me to do it. I could have cold called them,
 5 I guess, but I did not do that and I -- I wouldn't have
 6 done it at that time because there was now a formal
 7 advisory structure that I was part of.

8 **Q.** Did you contact or have any means of contacting any
 9 government ministers by email, telephone or other
 10 informal messaging systems?

11 **A.** I never looked to see if I had their email addresses, it
 12 never -- it never came up. I think I had the
 13 First Minister's office email address because we
 14 actually -- my group did a dashboard that -- among other
 15 recipients of that was her office. But, so I suppose
 16 I could have contacted her through that way, but
 17 I didn't do it.

18 **MR DAWSON:** I've no further questions, my Lady. I'll just
 19 check. There are no core participant questions.

20 **Questions from THE CHAIR**

21 **LADY HALLETT:** I have just one question, I just want to make
 22 sure I've got down your evidence correctly,
 23 Professor Woolhouse.

24 Going back to the very cautious approach to the
 25 Scottish Government to relaxing restrictions, you said

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1 Protect system enormously. So that was something.
 2 I had introduced into the discussion as early as
 3 March 2020 that we needed mass testing, and the advisory
 4 group repeatedly referred to the potential of mass
 5 testing all the way through that summer and into the
 6 autumn. It was trialed in England in November of that
 7 year but it wasn't rolled out in Scotland for another
 8 year, the Omicron wave, so we didn't do it.

9 And the final thing that we wanted to do was, going
 10 right back to almost the beginning of this discussion,
 11 was do more to protect the most vulnerable, because
 12 Scottish Government never embraced fully the idea that
 13 you could do more to protect the vulnerable, and that
 14 would just directly save lives. It doesn't matter what
 15 else your strategy is, it could be anything -- you know,
 16 we don't have to argue about the strategy -- just the
 17 plain fact of if you protect people who need protecting,
 18 fewer people will die. And they never embraced that,
 19 and yes, that was a big disappointment.

20 **LADY HALLETT:** That's not as straightforward as just saying
 21 "We're going to put an iron curtain around a care home",
 22 for example, because care home workers move between
 23 different care homes and the like, and they themselves
 24 obviously get infected, you have a shortage of staff, so
 25 it's not as straightforward just to protect the

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1 that the Scottish Covid Advisory Group were very clear
 2 on the other things that could have been done rather
 3 than just being very cautious, which you said wasn't
 4 necessary because of the seesaw effect.

5 What other things do you think could have been done
 6 as opposed to being very cautious about relaxing
 7 restrictions?

8 **A.** So the Scottish Government strategy didn't pay no
 9 attention to this at all, it put all its eggs in one
 10 basket, as far as I could see, really, which was Test --
 11 what we called here Test & Protect, so -- and it -- it
 12 didn't prove sufficient by itself, as we saw during the
 13 second wave, to really keep on top of any possible
 14 resurgence, but -- so there were three ...

15 So Scottish advisory group wanted to strengthen
 16 that, and there were two mechanisms for doing so. First
 17 of all, to increase compliance with the need to
 18 self-isolate. There was evidence that there was a lack
 19 of compliance, so we wanted to do that. I was very
 20 concerned about the fact that even in the second half
 21 of 2020 in Scotland we were only finding half the cases.
 22 We only knew this because of the Office for National
 23 Statistics surveys that started up, but we were only
 24 finding half the cases. If we could find the other
 25 half, we could obviously strengthen the whole Test &

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1 vulnerable, is it?

2 **A.** No, protection of care homes was better in the second
 3 wave, considerably better. So it's not
 4 straightforward -- so -- and you're right, if you want
 5 to avoid the harms of restrictions, all the way up to
 6 lockdown, you have to do the work, you've got to put the
 7 effort in, you've got to invest the resources, the time.
 8 And most importantly of all, you've got to see it coming
 9 and plan ahead. And when we have a government here
 10 that, in whenever it was, July/August was talking about
 11 zero Covid, they have clearly -- clearly -- not got
 12 their minds on preparing for future waves that will
 13 necessitate these alternative interventions, they've
 14 got -- their thinking is completely in the wrong
 15 direction. So it's not going to happen, is it? And we
 16 didn't. We didn't make the investment in all those
 17 alternatives.

18 **LADY HALLETT:** So although you accept it wouldn't be easy,
 19 you think there are ways, if people had put enough
 20 effort and planning and resources into it, it could have
 21 been done?

22 **A.** Oh, absolutely. And actually though the most effective
 23 of these was the mass testing, which I've said I have
 24 been advocating for so long. I see that as -- coupled
 25 with a vaccine, which is obviously important, but the

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1 reason why we managed to bring Omicron under control
 2 without going back into lockdown, and lockdown was being
 3 talked about in that period, that -- it was the mass
 4 testing, I think, that kept us out of lockdown. Well,
 5 if we'd introduced it in Scotland and elsewhere in
 6 late 2020, when we had the technology, we knew it
 7 worked, we wouldn't have needed a second lockdown here.
 8 We could have tested our way out of it. But we took
 9 another year to roll that out.

10 **MR DAWSON:** Thank you, my Lady. There's just one matter
 11 I was going to bring up. The professor earlier talked
 12 about email correspondence he had had with
 13 Dame Sally Davies, which you will recall led to
 14 Dame Sally contacting Dr Calderwood, and he suggested
 15 that we had access to his email to Dame Sally, which
 16 indeed we do. Just to read it into the transcript for
 17 others who may be interested, the reference is
 18 INQ000352401.

19 Thank you.

20 **LADY HALLETT:** Thank you very much indeed,
 21 Professor Woolhouse. I don't know if I can say I'm not
 22 going to ask for your help again, but thank you very
 23 much for the help you've given so far.

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

25 **LADY HALLETT:** Thank you.

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1 and statement of truth. Are you happy that the
 2 statement remains honest and true to the best of your
 3 knowledge and belief?

4 **A.** It does. I mean, I have done a little homework since
 5 and gleaned a little more evidence since, but I think it
 6 only confirms the broad arguments I'm making in the
 7 witness statement.

8 **Q.** Thank you.

9 For reference for those who are interested, we don't
 10 need to bring it up, the INQ for the M2 statement is
 11 INQ000273800.

12 You are a professor of psychology at the University
 13 of St Andrews; is that right?

14 **A.** That is, yes.

15 **Q.** I think you're regularly referred to in the phrase of
 16 "behavioural scientist", but as I understand it, that's
 17 not a term you prefer?

18 **A.** Yeah, I've never been quite clear what "behavioural
 19 scientist" means, I have to say, and I think sometimes
 20 it's a term that we like to get science in to make us
 21 sound a little bit more credible. I'm perfectly happy
 22 with being called a psychologist and, more specifically,
 23 a social psychologist.

24 **Q.** As a social psychologist, your primary interest is in
 25 how humans interact with one another and in a social

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1 **(The witness withdrew)**

2 **MR DAWSON:** The next witness, my Lady, will be
 3 Professor Stephen Reicher. Ms Arlidge will be asking
 4 the questions.

5 **PROFESSOR STEPHEN REICHER (affirmed)**

6 **Questions from COUNSEL TO THE INQUIRY**

7 **LADY HALLETT:** I hope we haven't kept you too long, waiting
 8 too long, Professor Reicher, I'm sorry if we have.

9 **MS ARLIDGE:** Thank you, my Lady.

10 You are Professor Stephen Reicher; yes?

11 **A.** You almost pronounced it correctly. Yes, I am.

12 **LADY HALLETT:** If you do it, then.

13 **MS ARLIDGE:** Please, yes.

14 **A.** "Reicher".

15 **Q.** My apologies. A good start, isn't it?

16 You've provided the Inquiry with two witness
 17 statements, one for Module 2 purposes, you didn't give
 18 oral evidence in Module 2, and obviously Module 2A,
 19 where you are here today.

20 The reference for Module 2A, dated 13 December 2023,
 21 is INQ000370347. That's hopefully come up on your
 22 screen in front of you and is a familiar document to
 23 you.

24 **A.** Yes.

25 **Q.** Page 79, we won't need to turn to it, has your signature

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1 setting; is that right?

2 **A.** Yes, I mean, my research has been, on the whole, on
 3 group processes and collective behaviour, and so on the
 4 one hand I've covered a number of issues relevant to the
 5 pandemic, issues like social influence, social
 6 solidarity and leadership. Most specifically I have
 7 done work on human behavioural emergencies, mass
 8 behavioural emergencies, and I think it's that expertise
 9 which led me into the weird world of pandemic advisory
 10 committees.

11 **Q.** Broadly speaking, is it right to say that the science or
 12 the behavioural science is a matter of understanding the
 13 impact, in terms of the context of this, of the
 14 pandemic, understanding the impact of human behaviours
 15 on how the virus is spreading and then also how to
 16 influence the spread because of the knowledge gained in
 17 respect of how it spreads?

18 **A.** Well, the way I saw the advisory committees working was
 19 that it is for the medical scientists to tell us what
 20 sort of behaviours are likely to spread the virus. I'm
 21 not an epidemiologist or a virologist, as will become
 22 abundantly clear, so I can't tell you what behaviours
 23 are necessary, but once they can say to me "Look, these
 24 are the types of behaviours that increase transmission",
 25 I can begin to think about, well, how might we be able

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1 to change those behaviours so as to reduce transmission.

2 So it's very much, to use a medical term,
3 a biological term, a symbiotic relationship, where each
4 depends upon the other. We very much depended upon
5 them, I think they also depended upon us.

6 **Q.** So to put it with an example, the epidemiologists will
7 come to you and say the evidence suggests that the virus
8 spreads as a result of close contact within
9 15 minutes -- within a metre of one another for
10 15 minutes or more, and you as a behavioural scientist,
11 to use the phrase that you don't like so much, say
12 "Well, how do we think about how we influence behaviour,
13 what do we do to make people not stay within a metre of
14 each other for 15 minutes in unventilated areas?"

15 **A.** To a large extent, although I would make a couple of
16 points in relationship to that. The first is I think
17 the whole dilemma of the pandemic and the reason why
18 it's so difficult is that the core thing we needed to do
19 was to keep people physically apart at a time when we
20 know that being socially together is critical to human
21 wellbeing. And early on in the pandemic, in 2020, we
22 wrote a book called *Together Apart*, and I think it's in
23 the evidence, which tried to summarise the nature of
24 that dilemma. We're trying to deal with something
25 that's really, really difficult.

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1 the transmission of the virus that could kill you. We
2 didn't want to socially distance people, we wanted to
3 keep them together. And the fact we talked -- conflated
4 the two, we talked about everything as "social
5 distancing", meant that we didn't put enough effort into
6 asking the question: how can we keep people socially
7 together, how can we keep people connected, especially
8 more marginalised social groups, during the pandemic?

9 So it wasn't a natural contradiction, I think we
10 turned it into a contradiction by failing to recognise
11 that distinction between physical and social distancing.

12 **Q.** When did you start to see that contradiction really
13 coming to the fore, in terms of the use of "social" --

14 **A.** Well, as soon as the phrase was used. As I say, we
15 wrote a book -- academics are rather slow creatures, as
16 you might have discovered -- we managed to write a book
17 in I think two months because we felt this is such
18 a critical issue. Such a critical issue. In fact there
19 is a whole psychological literature which I've been
20 involved in which shows the importance of social
21 connection not only for physical but for mental health.
22 Feeling part of a community. I could go through a long
23 list, and I won't, of the various ways in which it
24 benefits you.

25 So I was acutely aware of this tension right from

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1 The second thing is, and again this is going to be
2 critical to the points I shall, I think, be making
3 subsequently, depending on your questions, it wasn't us
4 making people do anything, it wasn't us telling people
5 to do anything, it was how can we engage with the public
6 and jointly do something. And I think as long as we see
7 things in a top-down manner actually we get things
8 grievously wrong.

9 **Q.** Again sort of applying what you've just said, in times
10 of -- humans are inherently social creatures, as it
11 were?

12 **A.** Yeah.

13 **Q.** And no doubt in times of strain and stress require more
14 social interaction or would be expected to have more
15 social interaction and sort of community support at
16 exactly the time when that social interaction was
17 causing illness, the spread of the virus and ultimately
18 death and --

19 **A.** Well, you see, I think -- that wasn't necessarily true,
20 but I think we made a huge mistake early on in the
21 pandemic when we talked about "social distancing", and
22 that phrase became virtually universal, we talked --
23 "We've got to socially distance". Actually, we didn't
24 have to socially distance, what we had to do was
25 physically distance, because physical proximity led to

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1 the start and a lot of my work has been around how mass
2 gatherings, collective behaviour, which is often seen in
3 negative terms, is actually rather good for us in
4 fostering a sense of community and improving our
5 physical and mental health.

6 **Q.** We'll come on during the course of your evidence to
7 sort of specific examples but we've started down this
8 path a little so let's continue.

9 So you recognised early on, as soon as the phrase
10 "social distancing" -- was an issue, it created its own
11 issue. Was this something -- was this advice that you
12 were feeding into SGCAG and more broadly, beyond --
13 although I appreciate, having written a book, you might
14 suggest it's out there, as it were?

15 **A.** Well, I think the core psychological issue for me is
16 this: I've already made the point that, for me, one of
17 the major implications of the pandemic as a whole is it
18 told us behaviour matters, it doesn't just matter at an
19 individual level, it's not just a matter of
20 interpersonal relations, it matters at a systemic and
21 societal and policy level. One of the first times that
22 people thought of psychology and policy together.

23 But that then raises the question of what sort of
24 psychology do you use?

25 Now, my work in general and on disasters as well

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1 shows the importance of bringing people together as
 2 a community with a sense of shared identity, a sense of
 3 "we-ness". Often when you look at the popular
 4 representation of crises, there is this notion that we
 5 panic. In other words, in a crisis we act individually,
 6 we all rush for the exits, we trample others, we turn
 7 a crisis into a disaster. Actually the evidence that
 8 I have been involved in, my colleague Professor
 9 John Drury, who's also on SPI-B, has been involved in,
 10 shows that what tends to happen in a disaster is that
 11 you have a common faith, a common experience, and people
 12 come together as a community. It's a frail sense, it
 13 can be undermined by government action, but that sense
 14 of shared community is absolutely critical in the
 15 pandemic response, in a number of ways.

16 First of all, it means people care for others. The
 17 early polling, for instance, showed that the major
 18 factor in adherence to measures was wanting to come out
 19 of this as a community, and our own research shows the
 20 key factor in adherence is not your individual risk,
 21 it's the collective risk, it's the risk to the
 22 community. So effecting a sense of community increases
 23 adherence. It increases solidarity in practical terms.
 24 We saw that 12 to 14 million people became involved in
 25 mutual aid groups, probably more if you include -- we've

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1 **Q.** Could we -- in light of what you were saying about
 2 public adherence, could we look at paragraph 63 of your
 3 witness statement, please.

4 I think this is what you were taking us through, but
 5 I just want to sort of orientate ourselves. You talk
 6 about the -- sort of, how the -- the factors of public
 7 adherence to -- guidance, legislation, we'll come on to
 8 that shortly as well, but you say that the factors that
 9 have been seen before Covid came along were actively
 10 applied, remained the same in terms of the actual -- in
 11 the Covid response, despite the fact that of course
 12 Covid was somewhat unprecedented and rather different,
 13 no doubt, to the studies that had been in terms of
 14 disasters otherwise in terms of longevity and acute
 15 issues.

16 So you say that the first issue or the first factor
 17 is risk perception. So by that do you mean explaining
 18 to people and making everyone aware that this is a big
 19 deal, people can die, people can become very sick, or is
 20 it a broader sense of risk perception in that regard?

21 **A.** Okay, so I'm glad you've brought up risk perception,
 22 because I think it's an absolutely key issue, and
 23 I think there has been much misunderstanding of what was
 24 said around risk perception.

25 One of the criticisms made of SPI-B and of

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1 heard a lot about WhatsApp, but informal, street level
 2 WhatsApp groups where people looked out for neighbours.
 3 And also that sense of community is good for our
 4 physical and mental health.

5 So in a sense, if I had one message, it was: don't
 6 fear the public, don't fear their frailty, don't see
 7 them as a problem, rather understand that if you bring
 8 the public together as a community and, what's more,
 9 that they see government as being with and for that
 10 community, then the public become an absolutely key
 11 resource. They're not the problem, they're the most
 12 precious resource you have.

13 And all my interventions in a sense was about how do
 14 you achieve that, how do you scaffold that, how do you
 15 support that, how do you create that sense of community.

16 So this was one aspect of that absolutely key
 17 critical message that I was trying to get over in all
 18 the various places that I spoke.

19 **LADY HALLETT:** Could you speak a little more slowly, please.

20 **A.** Oh, I'm sorry. That's slow for me.

21 **LADY HALLETT:** Oh, is it? I know the feeling, I speak too
 22 quickly.

23 **MS ARLIDGE:** We have a stenographer who is typing away
 24 frantically.

25 **A.** I'm sorry, stenographer.

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1 behavioural science in general is that we wanted to use
 2 fear to frighten people into adherence, but there is
 3 a huge difference between making people realistically
 4 aware of threat, so they can do something about it, and
 5 fear, which makes you feel "Well, we're doomed, there's
 6 nothing we can do".

7 **Q.** The equivalent of --

8 **A.** The point is -- sorry.

9 **Q.** The equivalent of shouting "Fire!" in a room but not
 10 having fire exits that --

11 **A.** Well, the analogy that I've used is, you know, I don't
 12 say to my child "The world is a terrible dangerous
 13 place, if you go out you'll be killed", I say to them
 14 "Look, there are some real risks out there, like
 15 crossing busy roads, so be careful, this is what you do,
 16 you obey the green cross code and you will be fine". So
 17 if you give people realistic risk information combined
 18 with information about how to mitigate it, actually it
 19 doesn't increase fear, if anything it decreases fear
 20 because it empowers people.

21 And the core concept for me here is empowerment.
 22 You disempower people either by not telling them what's
 23 going on -- to hide risks from people doesn't empower
 24 people, it disempowers people. And you also disempower
 25 people just by talking about threat without mitigations.

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1 If you want to empower you do the two together. And
 2 that's what we were saying time and time and time again.
 3 You need to make people realistically aware of the
 4 threats, because if there's no threat why should you do
 5 anything. Right? If the virus either isn't there or
 6 can't harm us, why would you do anything from getting
 7 vaccinated, to keeping distanced or whatever? And there
 8 is ample research -- both from previous pandemics, the
 9 H1N1 pandemic, lot of research in Hong Kong, but equally
 10 in this pandemic -- that making people realistically
 11 aware is important.

12 Now, if I can just finish by going back to my
 13 previous point. If you have a sense of the public as
 14 psychologically frail, unable to deal with information,
 15 you say to yourself "Well, I can't tell them anything
 16 because they'll panic". Right? But if you actually
 17 have respect for people and are open with people, and
 18 not only give them information but the wherewithal to
 19 deal with that information, actually you can be really
 20 effective. And that's why that general attitude that
 21 the public are a problem, the public will be -- will
 22 panic, gets in the way of doing the things you need to
 23 do in order to be effective.

24 **Q.** And you say in your statement, I think, as hopefully not
 25 paraphrasing too much on this, that the third element or
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1 relatively healthy -- sadly I'm not that young, but if
 2 I'm young, and I'll have my son in mind, he might say to
 3 himself if he was thinking individually "Look, I might
 4 as well go out during Covid because the risk to me is
 5 relatively minor", and the cost of staying in at 18 or
 6 19 with your elderly parents is huge. Okay? So you do
 7 the cost-benefit analysis and you think "Well, I might
 8 as well go out". If you think in collective terms,
 9 right, now not the risks and benefits to myself as
 10 an individual but to the community, I say to myself "If
 11 I go out I might spread the disease and I might kill
 12 somebody who is elderly or vulnerable or whatever", and
 13 so the risk calculation flips over completely.

14 So thinking in terms of "we", having a sense of
 15 "this matters to us", becomes absolutely critical. And
 16 we've confirmed that with a paper published at the
 17 beginning of this year, which is that sense of
 18 collective identity and I care about the community.

19 And one of the things that worried me a lot was that
 20 as we went through the pandemic we started off and
 21 nearly everybody was saying that. Certainly as we
 22 shifted to notions of personal responsibility we began
 23 to help develop a notion of "I'm all right, Jack". And
 24 I think that undermined the response. I think it
 25 undermined it practically. I think also morally and
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1 the third factor is that social identification. So
 2 there's a sense of "all in it together", and that is
 3 part and parcel, is it not, of "we can do something, we
 4 can move forward if we're all in it together and we're
 5 all pulling for the same team, as it were"; is that what
 6 you mean by that?

7 **A.** One of the problems of the pandemic generally is people
 8 talked in terms of binaries, it's either this or it's
 9 that, it's this factor or it's that factor. Of course
 10 when you deal with human behaviour there are always
 11 multiple factors.

12 Now, we tend to like lists of three, so I think I've
 13 given you three factors there, I'm not saying these are
 14 the only factors, however there was a hugely influential
 15 paper, probably one of the most influential papers in
 16 the whole pandemic in terms of behavioural science,
 17 which was published in Nature on harnessing behavioural
 18 science, and there we made the point that when you look
 19 at the research on disasters, this sense of shared
 20 social identity, of "we-ness", is absolutely critical.
 21 And Nature has just published an analysis which looks at
 22 all the literature that came out of the pandemic which
 23 confirms the importance of doing this. This only came
 24 out a month or so ago so I'm not sure if it's in the
 25 bundle, but the point is this: if I am young and
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1 ethically we produced a society which is less concerned
 2 about its more vulnerable members, and I think that is
 3 equally corrosive.

4 **Q.** Might an example of that be, for instance, the vaccine
 5 passport that you speak of in your statement, in terms
 6 of all of a sudden you've got this -- you've been
 7 vaccinated so you've got a -- you've got your own thing
 8 to prove you're fine. And there is a risk, is there
 9 not, in those circumstances of forgetting the
 10 collective, as it were?

11 **A.** Okay, so I think vaccine hesitancy -- you've gone
 12 straight to the heart of it, that's a brilliant example
 13 of these issues and allows me I think to illustrate them
 14 very, very clearly.

15 **Q.** Before you go any further, I suspect our stenographer is
 16 still going to be struggling, because -- so if you could
 17 keep it slowly --

18 **A.** Oh, I --

19 **Q.** -- politely, I'm sorry.

20 **A.** Do help me by telling me to go more slowly.

21 **Q.** Thank you.

22 **A.** There are two broad ways in which you can deal with
 23 vaccine hesitancy. One is to say people don't take the
 24 vaccine because they are too stupid or too immoral to
 25 care, they're selfish. So you can say there's something
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1 wrong with those individuals. Now, the problem with
2 that is that when you look at the figures, the
3 statistics on vaccine hesitancy they are much larger
4 amongst certain groups, more deprived groups, ethnic
5 minorities, in particular black British people, much
6 less likely to get vaccinated.

7 Now if you go down that individualistic route, you
8 then come up with conclusions like black people are
9 either less intelligent or less moral than others. And
10 hopefully none of us want to go down that route.

11 An alternative approach is to say it's not about the
12 information itself, it's about our social relationship
13 to the source of that information, do we trust those who
14 are giving us this information? Do we trust those who
15 are giving us this information? And there is good
16 reason to understand why certain groups have less trust
17 in government, because historically they have been
18 treated differentially. There was a report, for
19 instance, that came out at almost the same time that
20 those statistics came out, from the House of Commons,
21 the House of Lords, which showed that 60% of black
22 people felt that the NHS did not take their
23 priorities as its priorities. So the key issue becomes
24 not the intellectual or moral abilities of the
25 individual, it becomes the issue of building trust. And

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1 I don't want to get into the detail about how it all
2 worked in practice --

3 **A.** Yeah.

4 **Q.** -- I'm sure the Inquiry will be dealing with that in due
5 course, but what I'm interested in is the messaging
6 surrounding that and how that fed into Scottish
7 Government decision-making, because you say in your
8 statement, don't you, that you had -- you were opposed
9 to certification. Why was that?

10 **A.** Okay. So again we published a paper which showed that
11 especially amongst groups who do not trust government,
12 then vaccine certification increased or gave traction to
13 the anti-vaxxer narrative of "They're trying to control
14 us, they're trying to do something to us", and thereby
15 decreased their willingness to get vaccinated.

16 It did have some positive effects, so for instance
17 for people who didn't have that distrust, who hadn't got
18 round to it, then if there were going to be consequences
19 then they might as well do it. What that means is you
20 would more rapidly, in a sense, vaccinate all those
21 willing to be vaccinated, the problem is you would do
22 that at the expense of widening the pool of those who
23 were more resistant to getting vaccinated.

24 So my feeling very strongly was we should focus on
25 engagement, we should focus on working with those

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1 how do you build trust? Well, one of the ways you build
2 trust is not to say there's something wrong with you if
3 you have questions. You should have questions if
4 somebody wants to inject something in your body. It's
5 perfectly reasonable. So you shouldn't treat people in
6 negative terms, you should engage with them, you should
7 have dialogue with them, you should work through their
8 communities. And in fact early on we wrote a paper on
9 community engagement showing historically it had been
10 massively successful around the world, especially with
11 minority communities.

12 So vaccine hesitancy shows us some of the pitfalls
13 of that individualist "there's something wrong with the
14 individual", rather than that issue which says "what's
15 primary are the issues of social relationships". How do
16 we get people to see government as being on their side?
17 Vaccines introduced for them rather than something done
18 to them? How can we make people see government part of
19 us rather than standing outside and waving fingers or --
20 that, or punishing or bearing down upon us?

21 **Q.** We'll move on in a moment to enforcement issues and
22 around legislation, but just coming back to the vaccine
23 passport in particular, because in your statement
24 I think you raise concerns about, paragraph 105 and 106,
25 that -- just the concept of vaccine passports. And

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1 communities, on listening to people. There are some
2 very nice examples of that engagement in fact from
3 Israel, where in Tel Aviv they took trucks to the
4 downtown area of Tel Aviv, Dizengoff, and, you know,
5 people could come in and they could have a snack, they
6 could have a drink -- not alcoholic -- and they could
7 get vaccinated. At the same time they did that in
8 religious communities but there they didn't give them
9 drinks and snacks, they gave them cholent, which is
10 a stew that you -- that religious communities -- and so
11 once you understand the different communities, what
12 matters to them, how you engage to them, how you go to
13 them rather than wait for them to go to you, you have
14 a hugely effective intervention. And that to me was the
15 way to go. Always respect people, listen to them,
16 engage with them.

17 And so it's true of vaccine hesitancy, it's true
18 more generally: respect people.

19 **Q.** You say at paragraph 105 that one of your concerns about
20 it, about vaccine roll-out and vaccine passports per se
21 again was leading to a sense of invulnerability and loss
22 of caution.

23 **A.** Mm.

24 **Q.** Is that -- to bring it full circle to where we started
25 this discussion, is that -- the risk of something like

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1 a vaccine passport gives rise to the breakdown in the
2 social identity, as it were?
3 **A.** Okay, so there has been a lot of discussion about if you
4 make people safer in one dimension will they become less
5 safe in another dimension. If you give people a Volvo,
6 which is supposed to be -- I'm told, I'm not advertising
7 here, but it's supposed to be the safest of cars, or at
8 least was, do people drive more riskily? So risk
9 compensation is the concept.

10 Actually the literature nowadays shows that it --
11 it's not clear there is risk compensation, what is
12 critical is to give people clear messaging about what
13 things do do and what people don't do.

14 Now, there is a danger again that if you don't
15 respect people, if you think people are intellectually
16 impoverished, you try to make things terribly simple.
17 You either say a vaccine is perfect or others say it's
18 completely useless. Okay? Actually I think the
19 important message is to say, "Look, a vaccine is far,
20 far, far better than not a vaccine, it does these
21 various things for you, but it still doesn't do
22 everything for you, so you still need to be careful, you
23 still need to keep your distance, you still need to,
24 you know, self-isolate if you're infected or whatever it
25 might be". And the danger is -- again, it's this

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1 **Q.** You talk in your statement at paragraph 12, the concept
2 of Scottishness.

3 **A.** Ah.

4 **Q.** I'll just allow a moment for this to be brought up. I'm
5 jumping around rather unhelpfully.

6 **(Pause)**

7 Thank you. So it's the second half:

8 "In the Scottish context it is possible to draw on
9 the idea 'We are Scotland' because Scottishness is more
10 likely to be ..."

11 I've lost my note there.

12 "... understood in 'civic' terms (as including all
13 those living in Scotland and committed to Scotland
14 whatever their background) while 'We are England' is
15 more problematic and more likely to be understood in
16 ethnic terms (hence excluding those from ethnic
17 minorities). Consequently, the advice as to how to
18 build cohesion and solidarity was different -- and
19 indeed in ... Scotland I had the pleasure of working
20 with the 'creatives' in crafting public health adverts
21 rooted in norms/values of Scottishness."

22 I'd just like to explore that with you briefly
23 before the lunch break.

24 **A.** Yeah.

25 **Q.** What do you mean by Scottishness in "civic" terms, and

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1 general attitude if you don't respect people, if you
2 have a sense of the intellectual frailty of the public,
3 it leads you to simplify and not do the messaging that
4 you need to do in order to avoid risk compensation.

5 **Q.** And how receptive was Scottish Government to your
6 particular concerns in respect of vaccine passports and
7 the risk of antivax, all that sort of thing?

8 **A.** In general terms, and I think I've given a number of
9 examples of this, nobody's perfect, we all learn and we
10 all make mistakes, but what is undeniable, I think, is
11 that the Scottish Government did far more, both in terms
12 of this general notion of treating the public with
13 respect and as a partner, than the UK Government did.
14 And in my statement, for instance, I have compared and
15 contrasted certain statements at the same time by the
16 Prime Minister and the First Minister showing how, on
17 the one hand, the Prime Minister tends to tell people
18 off and to threaten to punish them, the First Minister
19 tends to recognise the difficulty people have, the
20 efforts that they are putting into compliance, and
21 encourages them to continue with those efforts for the
22 sake of the community.

23 So by and large, comparatively at least, I would say
24 that the Scottish Government did better than the
25 UK Government.

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1 how that impacted the advice you were giving to Scottish
2 Government and their creatives in the messaging?

3 **A.** That was a very dangerous question to ask an academic.

4 I mean, I've worked on national identity. A number
5 of years back, we wrote a book on national identity, on
6 the Scottish identity, called *Self and Nation* --
7 available at all good booksellers -- and I could talk
8 for a long, long time, but I won't, I promise you, and
9 I'll try to say this slowly.

10 I think there are a couple of key issues here that
11 are really important. One is a broad conceptual point,
12 that when I think about human psychology I think we are
13 all equally human and the basic psychological processes
14 we have are the same everywhere. But the way those play
15 out is fundamentally different in different contexts,
16 different cultural contexts. Okay?

17 So I am interested both in the general process --
18 I might say that if you create an inclusive social
19 identity people will support each other within that
20 broad community, but how you achieve an inclusive social
21 identity depends upon the cultural resources and the
22 cultural history that you may or may not have.

23 The second general point -- and I have been
24 listening to you on the TV channel, and so I've heard
25 various times people asking "Why on earth did we need

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1 a Scottish advisory group? I mean, surely it's the same
2 pandemic so why did we have to have a different advisory
3 group?" And the point is again that the context of
4 Scotland is different at a number of levels. People
5 have focused on geography, we are more dispersed, they
6 have focused on comorbidities, we have more
7 comorbidities in various areas, but it's also
8 psychologically different.

9 So when you look at the notion of nationhood,
10 people -- this is too simplistic, but people broadly
11 draw a distinction between ethnic and civic nationhood.
12 Ethnic definition is where I come from. Okay? By that
13 definition I personally am not Scottish because I was
14 born in England, my parents came from Russia and Germany
15 and Poland. Okay. But if I look to my future and my
16 commitments, right, I can call myself Scottish, because
17 I'm -- live in Scotland, I'm committed to Scotland, my
18 son was born in Scotland. So civic is very much about
19 your future and your choice over your future, ethnic is
20 much more to do with where you come from.

21 Now, in England, Englishness historically has been
22 seen as more ethnic. You know, so for instance
23 far-right groups use the flag of St George to denote
24 an England which is defined in terms of whiteness. And
25 the empirical evidence shows that ethnic minorities

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1 **Q.** You spoke about -- well, you were a member of SPI-B in
2 the UK set-up, as it were, and then you joined SGCAG, as
3 we call it, in April -- March 2020, April 2020, just
4 after the lockdown. You joined that -- you joined
5 SGCAG, I think, as a result of -- you reached out and
6 said "Hang on a minute, you're not -- I think I can help
7 and I can bring some expertise". What was your
8 understanding about the Scottish Government and CMOs
9 et cetera -- using the original title of SGCAG -- what
10 was your understanding about the Scottish Government's
11 recognition of behavioural science and behavioural
12 management, as it were, in that sort of regard? Is that
13 why you said "Come on, I can help, I can bring something
14 to bear here"?

15 **A.** The simple answer to that is I have very little
16 understanding of the workings of government. I've
17 always been an academic trying to understand various
18 processes. I have worked with various groups with -- my
19 work on crowd behaviour has influenced public order
20 policing for instance, and I have been on one or two
21 advisory groups about behaviour in emergencies. But by
22 and large my understanding of the workings of government
23 come more from Yes Minister and Yes, Prime Minister than
24 any privileged knowledge.

25 I reached out to Rebekah Widdowfield, because she

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1 would find it very difficult to say, for instance, "I am
2 Pakistani English", they might say "I'm Pakistani
3 Mancunian", because they can relate it to a locality,
4 but not to a nationhood. That's not true in Scotland,
5 because over the last 20 or 30 years -- and these are
6 balances, I'm not saying it's entirely one way or
7 another but the balances move towards a notion of
8 Scottishness which is to do with being here and
9 committed to the nation.

10 It's beautifully expressed by Willie McIlvanney when
11 he used the term the "mongrel nation of Scotland". What
12 makes Scotland is we're not pure breeds, we are
13 a mixture of all sorts of things. That's what makes us
14 Scottish. So when you say "We are Scotland", you
15 include ethnic minorities, you include people who have
16 come from elsewhere. When you say "We are England", you
17 are more likely to exclude and create a sense of
18 division.

19 So it's a beautiful example of the social
20 differences and the way in which you can use
21 Scottishness to create a sense of an inclusive social
22 identity which includes everybody and brings them
23 together as opposed to an ethnic identity which divides
24 people and which could exclude people and at worst can
25 even lead to hostility against minorities.

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1 was then the general secretary of the Royal Society of
2 Edinburgh, in which I was heavily involved, but I knew
3 Rebekah from the past, from some of her directorates,
4 talking about, if you like, the behavioural dimensions
5 of environmentalism, resilience, and so on.

6 I passionately believe, and the important message
7 I want to get over, is that behaviour matters at that
8 systemic level and we need to understand that and learn
9 that, both so we can contribute but also so that we can
10 be involved. And so I knew nothing about the Scottish
11 Government but I thought if anybody might help in making
12 the case for behavioural science being involved in the
13 debate, Rebekah would, because she had been doing that
14 previously when she'd worked for the Scottish
15 Government.

16 **Q.** When you joined SGCAG you were the only, again to use
17 the wrong phrase as it were, behavioural scientist on
18 the --

19 **A.** A little lonely, a little lonely.

20 **Q.** -- start. How did you feel your voice was heard in that
21 room, as it were?

22 **A.** There's always a danger if you think you're going to
23 sound as if you're gushing, okay, but one of the things
24 I learnt, and I learnt many things from my involvement,
25 was how to chair a committee. I think Andrew Morris was

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1 remarkable. There was a -- he included everybody. He
 2 wanted to make sure that everybody had spoken. He
 3 defined a good meeting. He'd often say, "It's been
 4 a good meeting" -- everybody had spoken. He wanted to
 5 make sure that everything was covered. And so I got
 6 a really strong sense -- in part because of the others,
 7 because I think people recognised that symbiotic
 8 relationship I've spoken of, and it was facilitated both
 9 by Andrew and by the civil servants we worked with.
 10 I was very lucky to meet and work with such people.

11 **Q.** Did you feel like the issue of messaging and the issue
 12 of recognising or seeking to influence human
 13 interactions and human movements in the context of the
 14 pandemic was something that was adequately recognised
 15 from the outset?

16 **A.** Okay, so people often when they think of behavioural
 17 science they talk about communication, okay. Now,
 18 I think communication is an aspect of it but I think the
 19 core issue was understanding the centrality of positive
 20 social relationships and in fact, and this is utterly
 21 key, a social relationship of trust both within the
 22 population and between the population and government.
 23 And Andrew used a phrase which I really liked when he
 24 talked about that "social contract of trust", and he was
 25 aware that that was utterly central to everything we

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1 **MS ARLIDGE:** Thank you.
 2 My Lady, would that be a convenient moment?

3 **LADY HALLETT:** Yes, certainly. I shall return at 1.45.

4 **MS ARLIDGE:** I'm grateful, thank you, my Lady.
 5 (12.48 pm)
 6 (The short adjournment)
 7 (1.45 pm)

8 **LADY HALLETT:** I gather we may have had a problem with the
 9 live feed this morning.

10 **MS ARLIDGE:** Used to be, my Lady.

11 **LADY HALLETT:** It's resolved by the sounds of it. Anyway,
 12 apologies to anyone who was watching and was affected by
 13 the problem.

14 **MS ARLIDGE:** Thank you, my Lady.
 15 Professor, before the lunch break, we were talking
 16 about influence -- using messaging to influence
 17 behaviour. In a world of social media disinformation
 18 and people simply not engaging with mainstream media,
 19 with the news, how do you get the message out to those
 20 people who are perhaps less likely to comply in the
 21 first place with that guidance?

22 **A.** That's a really important question, I think, and again
 23 I would want to go back to this core issue of social
 24 relationships and trust.
 25 You see, when people deal with misinformation, the

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1 did.
 2 I used to say at the beginning, as many people did,
 3 that behavioural science would be important until
 4 vaccines come along, but I was wrong. The reason why
 5 I was wrong is that vaccines achieve absolutely nothing
 6 as long as they're in the bottle. It's getting
 7 vaccinated that makes a difference. So as soon as you
 8 have a vaccine, you have a new behavioural set of
 9 questions, which we've addressed in part: how do you get
 10 people to get vaccinated?

11 So it's not as if, you know, the pharmaceutical is
 12 primary, it will be the cavalry charging over the hill
 13 after which everything else becomes irrelevant, it's
 14 that at every single stage the behavioural and the
 15 medical need to go together, and absolutely key to
 16 addressing that is creating that social contract of
 17 trust. And in some ways -- as I say, that phrase came
 18 from Andrew, I think he understood it really well.

19 Now, as to whether others understood it, I don't
 20 know, because my experience was in the advisory group.
 21 I mean, I don't walk the corridors of power, I don't
 22 know what, you know, what ministers say to each other in
 23 private. But I do know that within that group I was
 24 deeply impressed by the extent to which it was seen as
 25 a community of equals from different disciplines.

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1 obvious starting point is to ask about the nature of the
 2 information. But imagine a situation where, you know --
 3 and actually it's a situation that happened to all of
 4 us, that you are sitting there, you're being asked to
 5 take a vaccine, to inject a vaccine into your body, and
 6 some people are saying to you, "This is really
 7 important, this will keep you safe, this will keep your
 8 community safe, it's a personal and a social
 9 responsibility to do it", and others are saying to you,
 10 "Don't trust them, they are not concerned with your
 11 wellbeing, they are trying to control you, and this
 12 vaccine hasn't been properly tested, it hasn't been
 13 properly developed, it's dangerous". Right?

14 Now, we're not vaccinologists, so in the end you've
 15 got to ask: who do I trust? Who do I think is on my
 16 side? Who is giving me this information to help me, who
 17 is giving me this information in order to control me?

18 So when it comes to that issue of information -- and
 19 it's not just about disinformation, the question is: why
 20 do we believe any information we're given? It's not the
 21 information itself, it's our social relationship to the
 22 source of that information that is often absolutely
 23 critical, and that's why trust is absolutely at the core
 24 of how you respond.

25 **Q.** But how does that work in practice in terms of Scottish

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1 Government and when the First Minister, for instance,
2 stands up to --
3 **A.** Okay.
4 **Q.** -- describe what's happening; how do you use that to
5 get --
6 **A.** I think it has to be in the context of that wider policy
7 of engagement. So if -- you know, there you are, you're
8 going for vaccination, and somebody says to you -- and
9 you ask a question, you know, "What effect will this
10 have on me if I'm pregnant?", "What is the impact on
11 sickle cell disease?" These were questions to which
12 non-experts wouldn't know the answer.

13 Do you on the one hand treat that person as
14 dishonourable, as a fool, as -- label them as
15 vaccine hesitant? Or do you say to them, "Really good
16 questions" -- right? "Really good questions, we'll talk
17 to you, we'll listen to you, we'll engage with you". So
18 whatever that Scottish minister says, it will work
19 better in a context where you are building trust, you
20 are showing respect, you're engaging with people, and
21 you're taking their concerns seriously, rather than just
22 dismissing them as fools who are victims of
23 disinformation.

24 **Q.** But to what extent does the existence of those issues in
25 terms of people who don't want to engage affect the

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1 And the final point is in many ways actually you do
2 far better not if a minister gets up but if respected
3 members of a community gets up. If an imam,
4 for instance, says to you "It is perfectly legitimate to
5 take, you know, a vaccine", take a vaccine, you know, at
6 particular times of year and so on. Work through
7 communities. And the way you pose the question, "What
8 does a Scottish minister do?", in a sense presupposes
9 it's the Scottish ministers to do it themselves rather
10 than to engage and facilitate communities doing things
11 for themselves.

12 **Q.** You talk about the need to build trust but in your
13 statement you also -- of course it's -- in terms of
14 compliance, there are two sides to it, isn't there,
15 there is building the trust but then there's people
16 being able to actually comply with the guidance or the
17 rules and things happening, so --

18 **A.** Let me start off with the word "compliance", because the
19 problem with compliance is it's a very top-down term.

20 "You will comply with what I do", right? Whereas
21 actually it has to be much more of a dialogue.

22 **Q.** Well, let's take it in stages --

23 **A.** Okay, yeah.

24 **Q.** -- because I need to take this quite shortly, and
25 I don't -- I apologise for the timing, but I do need to

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1 decision-making, the -- the principles behind the
2 decisions that are being made in government to say "We
3 need to do this, we need to do that" and give advice --
4 and building up that trust relationship? To what extent
5 is, in your view -- were Scottish Government aware of
6 the impact of that sort of issue on the efficacy of
7 their decisions?

8 **A.** Well, I mean, as I've said to you many times, you know,
9 I'm an academic who sat in the advisory group. I don't
10 sit in the corridors of power, I don't chat to
11 ministers. I don't know. I mean, I genuinely don't
12 know what there -- with -- what was going on.

13 In our advice, we said to them the key issue here,
14 as everywhere else, is to do things in an overall
15 context of everything you do of showing -- of building
16 trust.

17 Now, one way you could build trust, for instance,
18 would be for ministers to acknowledge the fact that this
19 is complex and this is difficult and people are right to
20 have questions, and then to build in processes where
21 people can ask those questions. And also the types of
22 initiatives I spoke about that happened in Israel -- not
23 just in Israel, they happened in the UK as well,
24 actually, working with black health workers -- to build
25 those structures of engagement.

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1 take it in stages.

2 You have the -- you mention in your statement about
3 the need for support quite regularly throughout the
4 statement, and I won't take you to all the references
5 but I'll take you to one in a moment, but it's right,
6 isn't it, that the reality is, irrespective of the
7 communications and the trust that can be built up, there
8 will always be people who simply, as you say in your
9 statement, as a result of the lack of support, are just
10 not able to comply -- or not able -- whether the word
11 "comply" is -- or adhere, and that cuts then into the
12 way decision-making is made, is undertaken, because, for
13 instance, if you don't have sufficient funding, support,
14 money in the bank, as it were, and you know that if you
15 get a test and you test positive, you have to
16 self-isolate so you can't go to work, you might be less
17 likely to take the test in the first place. If because
18 you are unable to -- you don't have the money in the
19 bank to buy your groceries at the end of the week, you
20 might not be able to go into lockdown because you're --
21 with a positive test, with self-isolation, with
22 a positive test, because you can't -- you will say you
23 can't afford.

24 Now, in terms of the legality, the use of laws, in
25 your statement you say that laws have -- the imposition

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1 of legislation is actually quite helpful in a lot of
 2 regards. But the simple point or the simple question
 3 I want to ask is: in circumstances where you -- as you
 4 say at paragraph 125 of your statement, that the
 5 Scottish Government "did little to heed the continuing
 6 calls for enhanced support", so effectively the carrot,
 7 as it were. In the presence of -- those people who are
 8 not complying with that legislation are likely to come
 9 from sections of society -- lower socioeconomic groups,
 10 perhaps less engaged in the trust process as well.

11 So in circumstances where the laws can mandate
 12 behaviour, and punish non-adherent behaviour, is there
 13 not a very strong risk that there will be an unequal,
 14 disproportionate impact on groups who are less able to
 15 comply with the laws than general public?

16 A. So that's a wonderful question, and you need to be
 17 careful, you're turning into a behavioural scientist, if
 18 you're not careful you'll be up here.

19 I learnt many things during the pandemic, and one of
 20 the pleasures of being involved in the advisory process
 21 was learning by the other experts, and when it comes to
 22 behaviour my focus has always been on the motivational
 23 dimension, okay, so what is it that make people want to
 24 do adhere -- to do things, and I talked a bit, probably
 25 too much, about that today.

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1 So what is your response? If it to call people
 2 Covidiot, "You're an idiot", or is it to say "Actually,
 3 let's support people to be able to do something that the
 4 good for health", to go out, "and be distanced by
 5 opening more public spaces"?

6 SPI-B and I myself argued time and again: support
 7 people, support people so they can do what you're
 8 asking.

9 And it has a double benefit. Number one, it allows
 10 them to do it. But number two, if I ask you to do
 11 something which you can't do because of your practical
 12 circumstances, all it does is alienates you from me. It
 13 says: these people making the rules don't understand our
 14 lives, they tell us to do these things and we can't do
 15 them. So it undermines that social relationship
 16 fundamentally.

17 So the issue of support, time and time and time
 18 again, was absolutely critical. And time and time and
 19 time again it was: we weren't given enough support.

20 So the key issue here, because it's a key issue as
 21 you've heard from many witnesses, was self-isolation.
 22 The whole point of the testing system, the billions
 23 spent on it, was not to test people, not to trace
 24 contacts, but to get people to self-isolate. And if you
 25 didn't get them to self-isolate, you were wasting your

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1 Others point to the fact that adherence depends upon
 2 three things: it depends on motivation, certainly; it
 3 depends upon in a sense having the capabilities, the
 4 information, so you know what to do; and it depends
 5 critically on the opportunity to support to do it.

6 So early on there was a study, I think it was in the
 7 spring of 2020, which showed that ethnic minorities and
 8 deprived groups are three to six times more likely to
 9 break lockdown. Nothing to do with motivation. Nothing
 10 to do with motivation, everything to do with the
 11 difficulties of more deprived and marginalised groups to
 12 stay at home and put food on the table.

13 So support was critical, and it was critical from
 14 day one of the pandemic.

15 So on day one of the pandemic, a new word entered
 16 the vocabulary, the word "Covidiot". It was the first
 17 time it was used. And this was the problem of people
 18 going out and congregating in parks. And if you
 19 remember, photos of people in parks, "Covidiot, look,
 20 they're congregating". Now, number one, those people
 21 were told that they were allowed to go out. Number two,
 22 if you're in an urban setting and you don't have your
 23 own garden, the only place you can go out is to the
 24 local park. And if there are aren't enough parks then
 25 you're going to cram.

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1 money. Okay?

2 Now, the figures showed that people did quite a lot
 3 of things, and they adhered very highly in some areas.
 4 If you looked at the figures on self-isolation it was as
 5 low as 18.2%, and the reason for that is it's
 6 an extremely difficult thing to do. And after saying
 7 "support, support, support", in the end
 8 the UK Government brought in a scheme, the £500 scheme,
 9 right, which (a) was a small amount of money, (b) only
 10 one in eight workers qualified for it, and (c) 67% of
 11 people who applied didn't get it. So it was a tiny
 12 amount of support.

13 In other places like New York they had a wraparound
 14 system whereby not only did you give people more money,
 15 you offered them hotel accommodation, you even offered
 16 them support to walk the dog -- because that's quite
 17 important; if you're isolated, what are you going to do?

18 So there was a critical need for support.

19 Now, the Scottish Government did a little bit more
 20 and -- but it didn't do enough. Now, whether that was
 21 an ideological issue or a financial issue, that given
 22 the financial settlement they couldn't afford to do it,
 23 I don't know, but I would argue that if I look out, one
 24 of the major failures, in Scotland but in the UK as
 25 a whole, we didn't give enough support.

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1 And I just want to make one final point, very
2 briefly. Jeremy Hunt, before he had his present exalted
3 position, was chairing one of the parliamentary
4 committees, and he asked Matt Hancock the question that
5 we've been asking: why was more support not given for
6 self-isolation? And Hancock's response was: because we
7 were afraid that people would game the system.

8 So again this disrespect, this lack of confidence in
9 people, as being immoral and intellectually disabled,
10 stopped us doing the -- I wouldn't say the one thing,
11 but an absolutely critical thing we should have done in
12 order to make adherence higher in the most critical area
13 of adherence.

14 **Q.** And to be absolutely clear, you were giving that advice
15 to Scottish Government through SCAG on a regular basis,
16 weren't you?

17 **A.** You've already pointed out that at times I'm like
18 a stuck record, and we were like a stuck record on
19 SPI-B. If I give you every quote when we talk about
20 isolation, it would be that long, and the same would go
21 from the Scottish Government -- uh, the Scottish
22 advisory group.

23 **MS ARLIDGE:** Thank you. Just bear with me for one moment,
24 please.

25 My Lady, I think my time is up.

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1 **A.** Yes, it's my statement.

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

4 **A.** Yes, they are.

5 **Q.** I now want to turn to your professional background
6 before we get to the substance of your evidence. You're
7 currently a lecturer in public law at the law school at
8 Strathclyde University; is that correct?

9 **A.** That's correct.

10 **Q.** And you hold an undergraduate law degree from Chile?

11 **A.** Yes.

12 **Q.** A PhD in law from the University of Edinburgh and
13 a Master's in public law from University College London;
14 is that correct?

15 **A.** That's correct.

16 **Q.** You were previously a research associate at Birmingham
17 Law School; is that correct?

18 **A.** That's correct.

19 **Q.** During your time at Birmingham Law School you worked on
20 a project called the *Pandemic Review: Rights and*
21 *Accountability in COVID-19* led by Professor
22 Fiona de Londras; is that correct?

23 **A.** That's correct, I was part of a research team.

24 **Q.** Who were the other members of the research team?

25 **A.** Well, Professor Fiona de Londras was the principal

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1 **LADY HALLETT:** Thank you very much, Ms Arlidge.

2 Thank you very much, Professor. Your passion comes
3 through quite plainly. Thank you for your help.

4 **THE WITNESS:** Thank you.

5 **(The witness withdrew)**

6 **MS ARLIDGE:** My Lady, I'm going to do some musical chairs
7 now with Mr Tariq. Thank you very much.

8 **DR PABLO GREZ HIDALGO (affirmed)**

9 **Questions from COUNSEL TO THE INQUIRY**

10 **MR TARIQ:** Good afternoon, my Lady. May I please call
11 Dr Pablo Grez.

12 Could I confirm that you prefer to be called as
13 Dr Grez?

14 **A.** That's correct. Thank you.

15 **Q.** Thank you for your assistance to date with the Inquiry.
16 There are a few preliminary matters. Could you please
17 keep your voice up, and speak into the microphone so
18 that a stenographer can record your evidence. If any of
19 my questions are unclear, please say so, and I will
20 rephrase.

21 You've provided a statement to the Inquiry dated
22 12 December 2023. The statement is at INQ000369759, and
23 you'll see that it's on the screen before you.

24 **A.** That's correct.

25 **Q.** Is this your statement?

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1 investigator and Dr Daniella Lock, currently at Oxford,
2 and myself were research associates to that project.

3 **Q.** If you could keep your pace slower so that your evidence
4 can be noted.

5 That project that you were involved with led to the
6 establishment of the Covid Review Observatory; is that
7 correct?

8 **A.** That's correct.

9 **Q.** Are you able to tell me about the Covid Review
10 Observatory and the aims of that project?

11 **A.** Yes. So, the research project was mainly focused at
12 looking at the ways how the different parliaments in the
13 UK, either the Westminster Parliament, Holyrood, the
14 Welsh Senedd or the Northern Ireland Assembly to the
15 extent to which they were holding governmental responses
16 to Covid pandemic to account.

17 There were a set of criteria we were interested in,
18 we wanted to look whether these processes of review were
19 evidence-based, whether they were participatory, and
20 whether they were taking into account the human rights
21 impacts that the responses led by the governments had
22 for the rights of individuals.

23 **Q.** We will come to your research shortly, but the project
24 led to a number of publications; is that correct?

25 **A.** Yes.

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1 Q. And I think is it five academic journal articles,
2 20 blog pieces, 16 submissions to the UK parliamentary
3 committee inquiries, six to the Scottish parliamentary
4 committee inquiries, two to the Welsh parliamentary
5 committee inquiries, and two submissions to the UK and
6 Scottish Government's consultation processes; is that
7 correct?

8 A. Yes, that's right.

9 Q. Can we now turn to your statement. It's at page 3,
10 paragraph 6 and 7. I wanted to look at paragraphs 6
11 and 7. Paragraph 6 says:

12 "In my view, the Covid-19 pandemic is a textbook, of
13 legitimate use of emergency powers, including delegation
14 of emergency law-making powers to the executive.
15 A pandemic requires an effective, fast and flexible
16 response that keeps pace with the ever-evolving nature
17 of the virus. The legislative process is designed to
18 slow the pace of law-making by requiring a series of
19 readings that prompt reflection, debate and improvements
20 in the quality of legislation. Hence, the normal pace
21 of the legislative process may not be suited for
22 situations of emergency, although as I explain below an
23 emergency may evolve, thus enabling a more paused
24 law-making process.

25 "7. A framework of emergency powers must strike
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1 it should also take place in the case of exceptional
2 circumstances such as a pandemic.

3 Q. In the context of exceptional circumstances, can the
4 balance between the need to pass laws fast and the need
5 for Parliament to scrutinise those laws change over the
6 course of, say, a pandemic?

7 A. So, when we are in the context of an emergency, there
8 might be competing considerations at stake. Although we
9 might want to protect to the extent that it's possible
10 the idea of parliamentary accountability, compromises
11 may be needed in order to accommodate the situation of
12 urgency.

13 Our view in the Covid Review Observatory, after
14 looking at the literature, the evidence and the way how
15 the pandemic developed through time is that the balance
16 between these considerations of expediency and
17 effectiveness on the one hand and constitutional
18 principle on the other is dynamic.

19 We know that pandemics manifest themselves in waves,
20 and there are moments where the virus spreads quite
21 quickly and moments when that spread is more slowly, and
22 there is room for the freedoms.

23 Using an analogy, we could say also that this
24 balance also manifests itself in waves, and at different
25 stages of the pandemic you can have different balances.

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1 a balance between the need for an effective response to
2 the emergency and the demands of constitutional
3 principle. Among the latter is a requirement to secure
4 parliamentary scrutiny of the governmental response.
5 Parliament must hold the government to account for its
6 Covid-19 policies, for instance to ensure that the
7 response is evidence led, that, whenever reasonably
8 practical to do so the government has consulted with
9 relevant stakeholders, and that it fulfils the human
10 rights requirements, while also not having
11 a disproportionate and unequal impact on those rights."

12 At a very kind of high level, what purpose does
13 parliamentary scrutiny of the government serve in our
14 democratic system?

15 A. Well, the starting point is that in this jurisdiction
16 this is a jurisdiction that abides by the idea of
17 a constitutional democracy, and Parliament performs
18 a key role in legitimising the exercise of powers in
19 this jurisdiction, either exercise by Parliament itself
20 or by any other bodies, including, certainly, the
21 executive.

22 It is the role of Parliament to hold ministers to
23 account for their policies, their extending, and the
24 implementation of their policies, and that certainly
25 takes place in the context of normal circumstances, but
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1 We argue that at the very initial moment of the
2 emergency response, the balance quite heavily shifts
3 towards the need for an effective, fast and flexible
4 response, and therefore unfortunately there might be
5 a compromise in terms of the level of scrutiny that
6 Parliament MSPs or MPs might be able to perform.

7 But our view is that as we go along in the pandemic,
8 as we gain further knowledge of how the pandemic
9 develops, as we gather further evidence, as we learn
10 from our previous responses, this situation of emergency
11 can shift towards a situation of crisis management, and
12 in the crisis management the demands of constitutional
13 principle might weigh more significantly than those of
14 effectiveness and flexibility.

15 Q. So at the initial stage of the pandemic, at an emergency
16 situation, the balance between the need to enact fast
17 legislation, the balance might be different in terms
18 of -- with the constitutional principles of
19 parliamentary scrutiny and oversight, but as we move
20 from that initial phrase into crisis management, say,
21 for instance, summer of 2020, the balance perhaps
22 changes, it's dynamic; do I understand that correct?

23 A. Yes, yes, that would be an appropriate summary of what
24 I'm trying to say.

25 Q. I want to turn to the Scottish Government's legislative
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1 response to the pandemic.

2 The response, the Scottish Government's response was
3 enacted by way of primary and secondary legislation.

4 Are you able to explain to me the difference between
5 primary and secondary legislation?

6 **A.** Yes. So, both primary and secondary legislation are
7 different forms of law-making. From the point of view
8 of constitutional principle, we could say that primary
9 legislation is a superior form of law-making, because it
10 enables full scrutiny of the policies that the
11 government is trying to push forward and implement
12 through legislation. Through us, in the statement that
13 you quote, was explained, through a series of readings,
14 which are designed in order to prompt reflection,
15 paucity(?) in law-making, engagement with potential
16 stakeholders or individuals that might be affected by
17 the legislation, and then taking into account all of
18 this contribution as well as the potential impacts that
19 these measures might have on the rights of individuals.

20 By contrast, secondary legislation is a form of
21 delegated legislation whereby ministers are able to
22 draft legislation and to enact legislation subject to
23 a lesser form of parliamentary scrutiny or maybe we can
24 also call it "light touch" parliamentary scrutiny.

25 **Q.** As far as the Scottish Government's response to the

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1 **A.** Okay. So we were distinguishing between two types of
2 legislation: primary and secondary. Secondary
3 legislation is legislation where most of the burden is
4 on the shoulders of ministers, who have these powers to
5 enact regulations. They are subject to different sort
6 of procedures, and therefore we distinguish different
7 sorts of secondary legislation, secondary legislation
8 which is enacted through what is called the affirmative
9 procedure, whereby the minister drafts the legislation
10 and then lays the legislation before Parliament,
11 Parliament has 40 days to approve that legislation, or
12 to reject that legislation, and that legislation won't
13 be -- won't enter into force unless Parliament approves
14 it.

15 Then you have the negative procedure, which is
16 a procedure whereby ministers enact legislation and
17 Parliament has a window of opportunity to reject those
18 instruments, but if they don't approve it, that's okay,
19 it can become law anyways.

20 And there is also the made affirmative procedure,
21 which is a very prominent procedure in the context of
22 the pandemic, whereby ministers are able to make
23 legislation that can enter into force even before
24 Parliament approves it, but legislation that will lapse
25 unless it is approved by Parliament within 28 sitting

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1 pandemic, the core of that response, in terms of public
2 health measures and international travel restrictions,
3 that was enacted through secondary legislation, this
4 being Scottish statutory instruments; is that correct?

5 **A.** Yes. So in terms of the enabling framework, as you
6 rightly mention, there are pieces of primary legislation
7 coming from the UK Parliament, the Coronavirus Act,
8 there are also two core pieces of primary legislation
9 enacted by the Scottish Parliament, and exercising the
10 powers contained in those pieces of primary legislation,
11 the Scottish Government enacted public health
12 regulations which are those regulations that introduced
13 most of the lockdown measures or any other restrictions
14 that we all experienced, such as mask wearing,
15 restrictions on gatherings, restrictions on businesses,
16 et cetera, et cetera. And on the other hand there was
17 another piece of Scottish legislation which you also
18 mentioned, the Public Health etc (Scotland) Act 2008
19 which enabled the Scottish Government to introduce
20 measures to restrict international travel from Scotland.

21 **Q.** So before we turn to the legislation that was passed,
22 could you describe to me the key milestones in the
23 life cycle of a Scottish statutory instrument, this
24 being the form that was used to enact most of the public
25 health restrictions?

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1 days.

2 **Q.** So you've described three types of different procedures
3 that can be used, there's the affirmative procedure, the
4 negative procedure and then the last procedure you touch
5 upon is the made affirmative procedure?

6 **A.** That's correct.

7 **Q.** And it's the made affirmative procedure that seems to be
8 most prominently used by the Scottish Government across
9 the pandemic; is that correct?

10 **A.** Yes.

11 **Q.** I think the made affirmative procedure is described in
12 some of your academic work as an extreme example of
13 light touch parliamentary oversight, even more so than
14 the other procedures; is that correct?

15 **A.** Yes, and that's correct for a number of complex reasons.
16 These procedures are a bit difficult to understand, and
17 digest, but I guess that the simple way to put this is
18 to imagine that a Scottish minister drafts public health
19 regulations which contain a series of measures that, for
20 instance, prevent people from going outside their homes,
21 they must stay at home, and that legislation enacted by
22 a minister can enter into force almost immediately after
23 being made, without the need for Parliament to discuss
24 whether this is an appropriate measure or not, and to
25 either manifest its approval to that decision or its

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1 decision to reject that measure, and the measure will
2 enter into force immediately and can last for up to
3 28 sitting days, as I said, unless there is an approval
4 by Parliament.

5 **Q.** So the way that made affirmative procedure works is that
6 a minister -- and we'll come to this shortly -- decides
7 to use that process, the regulations come into force
8 almost immediately without there being a parliamentary
9 debate or a vote, and then within 28 sitting days there
10 has to be a parliamentary vote on whether to approve the
11 regulations or not?

12 **A.** Yes.

13 **Q.** And if the regulations are voted down at that point,
14 they no longer remain in force; is that correct?

15 **A.** Yes. And you said that our view was that it was
16 an extremely light touch procedure, and the reason for
17 that is that, as you just mentioned, by the moment where
18 Parliament will have a say on this set of regulations
19 the regulations would have been in place, being in
20 force, being followed, being in the media, for days,
21 weeks and, according to our research, even months before
22 Parliament has an opportunity to have a say about the
23 details of those regulations. And if that is the case,
24 then we might want to wonder what would be the point of
25 parliamentarians voting down a set of regulations that

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1 faced by a parliamentarian when having to vote on
2 regulations that have been in force for at least
3 28 days. Before we turn to that, as far as I'm aware,
4 the made affirmative procedure had been fairly -- had
5 been rarely used in the Scottish Parliament up to the
6 pandemic. I think the Scottish Parliament's Delegated
7 Powers and Law Reform Committee says that between 1999
8 and 2019 the procedure had only been used on average
9 once or twice a year. Is that correct?

10 **A.** That's correct. It was very rarely used, and by
11 contrast it became the normal way of law-making during
12 the pandemic.

13 **Q.** If we are able to turn to your statement, and it's at
14 page 11, paragraph 36, and I think you say it became the
15 normal way of making legislation during the pandemic,
16 this says:

17 "To employ the [made affirmative procedure],
18 Scottish ministers must 'consider that the regulations
19 need to be made urgently' ... A similar test applies in
20 section 122(6) of the Public Health etc (Scotland)
21 Act 2008. The test is subjective, in the sense that
22 there is no objective threshold or criterion, rather it
23 is about whether the Scottish minister thinks there is
24 an urgency situation. On the other hand, during the
25 'specified period' [and for us that's January 2020 to

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1 have been in place for days, weeks and months?

2 If I may expand on this, regulations come to
3 Parliament under the made affirmative procedure as
4 a fait accompli. The police have been enforcing these
5 regulations for a long time. Guidance has been produced
6 in order to illustrate citizens about their duties and
7 obligations under this set of regulations. So it could
8 be that -- and it might well be, if the pandemic is
9 evolving, quite rapidly, that those regulations are
10 about to be superseded by a new set of regulations or
11 there might be a change in the policy which might
12 require those regulations to be amended. And that puts
13 parliamentarians in a very difficult position.

14 On top of that, parliamentarians might have other
15 substantive reasons to be concerned about amending or
16 rejecting -- sorry, about rejecting those regulations.
17 It might be that by rejecting regulations they may
18 undermine the real(?) response of the government to the
19 pandemic, or it might be that they have a specific point
20 of concern about a certain specific regulation or rule,
21 but they are happy with the overall content of the set
22 of regulations that is put to a vote, and they don't
23 have the power to amend regulations, they can only
24 accept them or reject them as a whole.

25 **Q.** I think we'll come to some of the challenges that were

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1 April 2022] there was no ministerial duty to give
2 reasons, for instance in the form of an oral statement
3 before Parliament or a set of explanatory notes attached
4 to the [Scottish statutory instrument] when laid. Nor
5 a duty to provide evidence in support of the ministerial
6 assessment. Scottish ministers enjoyed discretion to
7 decide whether on a given situation the urgency test has
8 been met."

9 Can we then turn to paragraph 9, which is on page 3,
10 I think, or is it page 4? Page 4. Here you say -- if
11 we can go to the last five lines of paragraph 9, you
12 will see there's a sentence that begins:

13 "The [made affirmative procedure] applies when
14 a Scottish minister thinks that an SSI [that's Scottish
15 statutory instrument] needs to be made urgently. The
16 consistent use of the [made affirmative procedure]
17 throughout the pandemic indicates that the Scottish
18 government took the view that there was a more or less
19 constant condition of urgency. In other words, from
20 their perspective, there was never a shift from
21 emergency response to crisis management."

22 If we can take that off screen, thank you.

23 Do you think that the Scottish Government overused
24 the made affirmative procedure throughout the pandemic
25 when there was other procedures such as the affirmative

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1 procedure that was available?
 2 **A.** There's no easy answer to that question. As far as the
 3 enabling frameworks are concerned, the default position
 4 is that public health regulations should be made under
 5 the affirmative procedure. The made affirmative
 6 procedure is only available when a minister takes the
 7 view that there are situations of urgency justifying the
 8 use of this very exceptional procedure. If you look at
 9 the figures, the figures that are contained in our
 10 sample of Scottish statutory instruments that we looked
 11 at and the way that they had been handled and approved,
 12 or if you look at the data, the actual -- this Inquiry
 13 has gathered, it looks like the -- what was supposed to
 14 be under the framework, the exception, became the rule.
 15 Because there is only one Scottish statutory instrument
 16 containing public health regulations that was made under
 17 the affirmative procedure.

18 In other words, the made affirmative procedure was
 19 the default position. All -- almost all of the public
 20 health regulations were made under that procedure.

21 **Q.** I think you've touched upon the research that you
 22 carried out. Can you explain to me -- I think it was
 23 a sample size of 64 Scottish statutory instruments that
 24 you looked at. Can you explain to me how those were
 25 selected and which period they covered during the

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1 a Scottish minister providing a letter to the presiding
 2 officer of the Scottish Parliament with a brief
 3 indication of why it was, in the view of the Scottish
 4 ministers, justified to make those instruments through
 5 the made affirmative procedure. But it was not
 6 a statement that was attached to the instrument itself.

7 The Covid -- the Delegated Powers and Law Reform
 8 Committee took the view that throughout the period of
 9 the pandemic at least five statutory instruments had
 10 been made through the made affirmative procedure without
 11 a clear justification as to the necessity of using this
 12 very exceptional procedure. So here is one indication
 13 from Parliament that there might be instances where it
 14 was not justified.

15 From our point of view, the very fact that there are
 16 alternative ways of making statutory instruments that
 17 are more respectful of the opportunities for Parliament
 18 to hold the government to account for its policies in
 19 the pandemic, that very fact suggests that a different
 20 approach could have been taken at different stages of
 21 the pandemic.

22 In particular, we do understand the necessity of
 23 exercising the made affirmative procedure at the very
 24 early stages of the pandemic, but as we go through the
 25 pandemic we think that there were less compelling

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1 pandemic.

2 **A.** So we covered since the very beginning of the pandemic,
 3 I think that the first instrument dates from 26 March of
 4 2020, until I think that the end of November of 2021,
 5 and throughout that period we were only looking at how
 6 law-making had taken place in terms of the public health
 7 regulations made under schedule 19 of the
 8 Coronavirus Act 2020, which are what we could call
 9 lockdown regulations or in general restrictions to
 10 individual liberties.

11 **Q.** Of the 64 regulations that were within your sample size,
 12 how many had been made using made affirmative procedure?

13 **A.** 63.

14 **Q.** I think we've already touched upon the discretion that
 15 the Scottish ministers had to use the made affirmative
 16 procedure. What was the Scottish Government's practice
 17 towards providing reasons for using this made
 18 affirmative procedure during the pandemic, and did that
 19 practice change as we moved into 2021 and into 2022?

20 **A. (Pause).** There was no statutory duty to provide
 21 a statement of reasons, as you've mentioned, justifying
 22 to Parliament why there were reasons of urgency
 23 justifying the making of these instruments through the
 24 made affirmative procedure.

25 There was a practice, though not consistent, of
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1 reasons for exercising in the pandemic which, even
 2 though might satisfy the view of the Delegated Powers
 3 and Law Reform Committee, maybe from the point of view
 4 of constitutional principle were insufficiently
 5 justified.

6 If I can give an example of this, when the Scottish
 7 Government publishes its policy frameworks outlining new
 8 strategies for approaching the pandemic, that provides
 9 a broad indication of what the direction of travel in
 10 terms of coronavirus regulations might be for the
 11 future, and therefore it would have been desirable that
 12 once the policy had been designed also the draft
 13 instruments could have been provided to Parliament,
 14 because eventually it would be through a draft --
 15 through a statutory instrument that those draft policies
 16 would be implemented in detail.

17 This is not only our view, this is also the view of
 18 parliamentary committees of the UK Parliament.

19 **Q.** We've touched upon the 28-day period. What did your
 20 research show about whether there was in fact a 28-day
 21 period by which the regulations were brought before
 22 Parliament for a vote, or was it often more than
 23 28 days?

24 **A.** So we took this sample of 68 statutory instruments and
 25 we identified certain milestones in the life cycle of

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1 a statutory instrument, being those when the instrument
2 is made, when the instrument enters into force, when the
3 instrument is approved, and debated, if it is debated.

4 What we found, in terms of your question, is that in
5 the -- only there were very, very exceptional
6 circumstances where the Scottish Government did not
7 comply with the 28 sitting -- 28 rules -- 28 days rule.

8 A different question is whether there was always
9 adherence to the spirit of the rule. The spirit of the
10 rule is to bring those statutory instruments to
11 a parliamentary vote as soon as it is reasonably
12 possible to do so, and there were instances where that
13 didn't happen.

14 **Q.** One of the issues, I think, you've raised in some of
15 your writings is the risk that it's possible to chain
16 regulations together so that -- by one extending the
17 expiry date of the other, so in effect you have one
18 regulation which is due to expire on a certain date and
19 it requires a vote and then it's superseded by another
20 set of regulations which extends the expiry date, so the
21 concrete set of regulations or rules remain in force for
22 longer than the 28 days by chaining regulations
23 together, and all of this being without subject to
24 a parliamentary vote.

25 Are you able to explain that concept in more detail?
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1 be the case in that specific example that you mentioned.
2 However, it does indicate that there might be a weakness
3 in the procedure itself that might need to be dealt with
4 in future legislation.

5 **Q.** I now want to turn to the issue of debate, so when one
6 of these regulations is brought before the Parliament.

7 Can we turn to page 17 of your statement at
8 paragraphs 56 and 57. So if I can read paragraph 56:

9 "The [made affirmative procedure] had a significant
10 impact on the Chamber's ability to retrospectively
11 scrutinise public health measures. When motions to
12 approve [Scottish statutory instruments] were moved,
13 MSPs were asked to consider public health regulations
14 that had been in force for weeks, if not months in some
15 cases. By the time the vote took place, the Scottish
16 government had already published guidance to communicate
17 the content of the regulations to the public, which was
18 further communicated by the media. Hence, people,
19 business and workplaces were abiding by these
20 regulations, and the police enforcing them. For this
21 reason, at the CVRO we argued that [Scottish statutory
22 instruments] made under the [made affirmative procedure]
23 came before Parliament as a *fait accompli*."

24 "57. I think there may have been other reasons why
25 MSPs refrained from voting against [Scottish statutory
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1 **A.** Yes. So we would have to imagine a situation where
2 a Scottish minister makes a set of regulations on
3 day one and from that day that set of regulations will
4 have -- will enter into force potentially immediately or
5 at the day that the minister might designate, but it
6 would have to be approved by Parliament before
7 28 sitting days otherwise it will lapse and it will no
8 longer be in force.

9 We identified one situation where that had happened
10 and before that 28 sitting days period had lapsed, and
11 before that instrument had entered -- had been approved
12 by Parliament, a new instrument, instrument 2, had been
13 made which extended the lifetime of the first
14 instrument. Therefore the 28-day sitting day period
15 will be reset, and it will be a new 28 sitting days
16 period that will be operating now.

17 So potentially, theoretically, one weakness that
18 this finding unveils is the possibility of constantly
19 evading parliamentary scrutiny through enacting a set of
20 regulations and then extending the expiry date of that
21 set of regulations through different new regulations
22 that will renew the 28-day period.

23 We don't argue that this possibility was abused by
24 the Scottish Parliament -- by the Scottish Government,
25 I'm sorry. There were specific reasons why that had to
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1 instruments]. For instance, MSPs could take the view
2 that voting down an [Scottish statutory instrument]
3 could confuse the population as it would require a new
4 set of regulations to be put in place very quickly; it
5 could undermine the overall pandemic response and the
6 trust of the public in governmental decision-making;
7 and/or it could be that they only had specific
8 objections concerning some but not all of the rules
9 enacted by a set of public health regulations, and an
10 'all or nothing' vote on the [Scottish statutory
11 instrument] did not accommodate those distinctions."

12 The final point there is when it comes to a vote
13 there isn't an ability to amend the regulations, is
14 there?

15 **A.** That's correct.

16 **Q.** So it's a binary choice that you either vote to keep the
17 regulations in force or you vote to withdraw the
18 regulations; is that correct?

19 **A.** That's correct.

20 **Q.** In your research, in the sample size that you used, of
21 64 Scottish statutory instruments between March 2020 and
22 November 2021, were any of the Scottish statutory
23 instruments made using the made affirmative procedure
24 voted down by a majority of the Scottish Parliament?

25 **A.** No. Our finding is that during the pandemic Scottish
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1 statutory instruments containing public health
 2 regulations were virtually invincible because they would
 3 never be voted down.

4 **Q.** I think in your research it shows that only 9% of the
 5 regulations in your sample size were debated in the
 6 Chamber of the Scottish Parliament; is that correct?

7 **A.** Yes, that's correct. Regulations containing public
 8 health measures were very rarely debated. For
 9 a regulation to be debated there would be a need for
 10 a MSP to raise a point of concern about the broader
 11 policy containing that set of regulations or about the
 12 content of the regulations themselves, and there were
 13 a few examples of MSPs concerned about the procedure as
 14 a whole and trying to make a point by promoting
 15 a debate.

16 **Q.** In the 9% of these regulations in your sample size that
 17 were debated, what was the typical length of the debate?

18 **A.** Well, debates were quite short, they would last between
 19 five to ten minutes.

20 **Q.** And I think you say in your statement that in total the
 21 Scottish Parliament spent 35 minutes debating the
 22 64 Scottish statutory instruments; is that correct?

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

24 **Q.** So that's 35 minutes debating the regulations in your
 25 sample size that were passed between March 2020 and

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1 and senior civil servants will be made available to
 2 attend the session at the -- either COVID-19 Committee
 3 or the COVID-19 Recovery Committee, depending on whether
 4 we were in session 5 or 6 of the Scottish Parliament, to
 5 give evidence and answer questions arising out of this
 6 draft set of regulations which would be then made into
 7 law either on Thursday evening or on a Friday, and might
 8 potentially enter into force the next day.

9 **Q.** So could you explain in a bit more detail the role of
 10 the committees, this being the COVID-19 Committee of the
 11 Scottish Parliament, which later became the COVID-19
 12 Recovery Committee, in terms of parliamentary oversight?

13 **A.** The Scottish Parliament, being a unicameral Parliament,
 14 relies quite heavily on the contribution of its select
 15 committees to perform scrutiny, not only of policies,
 16 and its implementation, but also of legislation. The
 17 scrutiny of primary legislation and synergy of secondary
 18 legislation relies significantly on the work that these
 19 committees perform. The Delegated Powers and Law Reform
 20 Committee performs technical scrutiny, it looks at the
 21 **vires** of the instrument, it looks at any other technical
 22 issues that might arise such as lack of clarity and
 23 aspects of a similar nature, and then there is a lead
 24 committee, which is usually the one that, in terms of
 25 the policy, matches the remit of the committee, which

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1 November 2021?

2 **A.** Yes. That's as far as the Chamber is concerned.

3 **Q.** The Inquiry understands that from autumn 2020 there were
 4 concerns about the lack of parliamentary oversight of
 5 the regulations that had passed, particularly these are
 6 regulations pertaining to the first wave of the pandemic
 7 from March 2020, and parliamentary and government
 8 officials engaged in conversations to enhance
 9 parliamentary scrutiny. What package of measures were
 10 introduced from autumn 2020 to tip the balance more
 11 towards parliamentary scrutiny?

12 **A.** So there were two main types of measures, and the first
 13 and maybe the more important one, I would say, were
 14 those that were trying to design or craft a system that
 15 would enable MSPs to conduct what we could call
 16 pre-enactment scrutiny of statutory instruments made
 17 under the made affirmative procedure, and the dynamic
 18 that was agreed was one where the Scottish Government
 19 will commit to make a policy announcement regarding
 20 public health regulations on a Tuesday afternoon.
 21 Usually they will reconsider whether changes were needed
 22 on that very Tuesday in the morning, then they will make
 23 available to Parliament the draft set of regulations
 24 that will be later made under the made affirmative
 25 procedure on a Wednesday, then the Scottish ministers

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1 will look at the policy implemented in that instrument.

2 During the pandemic, the Scottish Parliament decided
 3 to create a bespoke Covid-19 committee which would look
 4 at the policies in terms of the pandemic, and it was
 5 that committee the one that was in charge of
 6 scrutinising those instruments in more detail.

7 **Q.** There is a particular instance of the Scottish
 8 Government's use of the made affirmative procedure which
 9 I want to explore with you.

10 In summer 2021 the Covid-19 vaccination certificate
 11 scheme was being considered, and the certificate scheme
 12 policy was announced in Parliament by Nicola Sturgeon on
 13 3 August 2021. Then on 9 September 2021 the Chamber in
 14 the Scottish Parliament debated for around two hours
 15 a motion on the Covid vaccine certification scheme, and
 16 the motion provided very broad guidelines on how it was
 17 proposed that the policy would work, and in addition the
 18 government had published, I think it was, a plan or
 19 strategy with the proposals.

20 So it was at a very high, general level about how
 21 the policy would work, and the debate was a clear
 22 indication that the proposal was fraught with
 23 difficulties, because the Scottish Conservatives,
 24 Scottish Labour and the Liberal Democrats all voted
 25 against the motion.

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1 However, despite this being an issue that was
2 fraught with controversy and difficulty, the Scottish
3 Government used the made affirmative procedure on
4 30 September 2021 and the regulations came into force on
5 1 October 2021. I think speaking about some of the
6 improvements that had been made to parliamentary
7 oversight, the government had shared a draft of the
8 regulations with members of the Scottish Parliament to
9 scrutinise only one day in advance of the regulations
10 being made, that was 29 September.

11 So what we have here is a policy announcement made
12 on 3 August 2021, there seems to be quite a lot of
13 political controversy, and then the regulations are
14 introduced using made affirmative procedure and they're
15 introduced, that's the operational regulations, with all
16 the details of how the scheme would work in practice,
17 all without an ability of the Scottish Parliament to
18 debate the details of the policy.

19 What was the urgency that, between 3 August and the
20 end of September, required this procedure to be used as
21 opposed to, for instance, the affirmative procedure?

22 **A.** Well, the example that you provide is a case in point of
23 the tensions that in terms of parliamentary scrutiny
24 arose, and the dissatisfaction that at certain points in
25 time, rightly, members of the Scottish Parliament had

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1 governments in general should exercise more caution when
2 deciding whether to make certain sets of regulations
3 through the made affirmative procedure or whether to opt
4 for a different procedure.

5 In fact, you were referring to the example of the
6 Covid certificate scheme. When the Covid certificate
7 scheme was amended, since it had been controversial,
8 those amendments were introduced through a statutory
9 instrument that was made under the affirmative
10 procedure. And although there were still certain
11 considerations of urgency that needed to be taken into
12 account, an agreement was reached between the government
13 and the COVID-19 Recovery Committee to have
14 an accelerated timetable to introduce those amendments
15 through the affirmative procedure. So the standard
16 affirmative procedure provides 40 days for Parliament to
17 approve regulations in draft; in this case it was agreed
18 that it would have only four days.

19 **Q.** Before we turn to lessons learnt, in the context of the
20 pandemic, where the governments and then parliaments
21 were having to consider legislation that was perhaps
22 some of the most draconian that people have ever had to
23 live through, is that the sort of scenario where in fact
24 even more caution and self-restraint is required with
25 comes with more parliamentary debate so that better

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1 powers, the way how law-making was takes place in the
2 pandemic. There had been a policy announcement more
3 than a month in advance of the detail of the
4 implementation of that policy being put to Parliament,
5 and there was also, as you say, a debate on the policy
6 which had been preceded by a publication of a more fully
7 fledged policy document outlining the content of the
8 policy, and the Scottish Government was aware of the
9 fact that there was some dissatisfaction, certainly
10 among certain political parties in the Scottish
11 Parliament represented, over the policy. So it is hard
12 to understand why those regulations containing the
13 details of that policy that had been controversial had
14 not been shared in advance with the Covid committee and
15 other members of the Scottish Parliament.

16 What you mentioned at the very end shows that what
17 they did was to apply the measures, the enhanced
18 scrutiny measures, but it was clear that a different
19 approach was possible because that policy had been
20 worked out by weeks at that time.

21 **Q.** Overall, should the made affirmative procedure be used
22 or exercised with caution and self-constraint, because
23 of the extremely light touch parliamentary scrutiny that
24 exists if you use that procedure?

25 **A.** I would agree with that claim. I think that the

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1 legislation can be passed that is evidence-based?

2 **A.** I will go back to the idea that there needs to be
3 a compromise and we need to look at on the ground what
4 the circumstances are in order to assess whether we need
5 an emergency procedure for the making of legislation in
6 a given context and circumstance.

7 There might be circumstances where we need a rapid
8 response, where the virus is evolving too quickly or
9 there are many uncertainties, and therefore there is
10 justification for using the made affirmative procedure.

11 There might be other situations where that might not be
12 the case. The made affirmative procedure should be in
13 the toolkit, I would argue, but, as you said, should be
14 exercised with caution.

15 **Q.** I think that's a distinction that you've made between
16 the initial phase of the pandemic and then moving into
17 the crisis management phase where there is a little bit
18 more time and scope to have better parliamentary
19 scrutiny; is that correct?

20 **A.** Yes.

21 **Q.** I want to finally turn to lessons learnt, and the
22 Inquiry understands that from June 2022 the Scottish
23 Parliament passed the Coronavirus Recovery and Reform
24 (Scotland) Act 2022, which reflects some of the lessons
25 learned during the pandemic. Are you able to outline

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1 the main changes that now exist from the legislative
2 framework that existed at the start of the pandemic?
3 **A.** So during the first semester of 2022 the Scottish
4 Parliament had the opportunity to discuss different ways
5 of improving the enabling framework. It was a decision
6 of the Scottish Government to make the powers granted by
7 the UK Coronavirus Act part of Scottish legislation for
8 future pandemics and, in the context of introducing that
9 legislation, some improvements were made. The first and
10 maybe more noticeable improvement is to demand from
11 Scottish ministers in the future to make a statement of
12 the reasons that support the urgency of making
13 regulations under the made affirmative procedure,
14 a requirement that was absent during the pandemic, and
15 that the COVID-19 Committee advocated very strongly in
16 favour of.

17 On top of that, to trigger these emergency powers,
18 now the Scottish Government has to do a declaration of
19 public health emergency, which is subject to a vote in
20 the Scottish Parliament, so now there needs to be a say
21 for MSPs in order to trigger this set of emergency
22 powers.

23 And there are duties to consult relevant
24 stakeholders whenever it is feasible or possible to do
25 so before enacting public health regulations.

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1 that should govern the emergency response for future
2 pandemics, and perhaps there is therefore an opportunity
3 to not only improve our procedures, but also to give
4 Parliament a say or an opportunity to reflect on how the
5 substantive response should look like.

6 And we envisage at least two ways in which that
7 could be possible. One way would be to incorporate into
8 primary legislation some core elements or principles of,
9 for instance, a tier system of lockdown regulations,
10 certainly providing certain flexibility for the
11 government to tailor the specificities of that response
12 to the circumstances that are at hand.

13 Or, alternatively, to draft future public health
14 regulations that are subject to scrutiny. We have some
15 information that the Coronavirus Act took some elements
16 of legislation that had been drafted in the context of
17 Cygnus exercise, so perhaps a similar effort can be made
18 to draft regulations. Or, alternatively, we can think
19 of different ways of accommodating the affirmative
20 procedure to a more constrained timetable but providing
21 an opportunity for Parliament to have a say before
22 regulations are made and entered into force.

23 **Q.** Your second recommendation was to incorporate
24 a ministerial duty on the exercise of emergency powers
25 every two months. Are you able to explain that

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1 And finally, wherever Scottish ministers exercise
2 their powers to make public health regulations under the
3 made affirmative procedure, there is a duty to introduce
4 a sunset clause, so that the regulations expire at
5 a certain point in time.

6 **Q.** So you would welcome all of those changes in terms of
7 striking a better balance.

8 In your statement I think you say that your view
9 remains that more can be done to achieve a better
10 balance in use of these procedures in a future emergency
11 situation. I think you identified two alternative
12 pathways which you recommend for consideration.

13 The first is, in terms of preparing for a future
14 emergency, to amend the statutory framework so that
15 different levels of public health response are outlined
16 in primary legislation with delegation to trigger these
17 powers through secondary legislation.

18 Can you explain that suggestion in more detail.

19 **A.** So I think that during this Inquiry a lot has been
20 spoken about pandemic preparedness from the point of
21 view maybe of material resources, but we can also think
22 about pandemic preparedness for the future in terms of
23 the legislative and regulatory measures that might be in
24 place in the future. A lot has been learned in terms of
25 whether the sort of broad responses or broad principles

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1 proposal?

2 **A.** The Scottish Government developed a quite robust,
3 I would say, practice of reporting on the exercise of
4 the powers under the UK Coronavirus Act and the two
5 Scottish Coronavirus Acts. Those reports provided
6 information of what measures had been taken, how many
7 statutory instruments had been made, when they had been
8 made, what evidence had been taken into account to
9 support those measures, and also -- I would say also
10 a significant engagement with the human rights impact of
11 those legislation. Each of those reports were preceded
12 on publication by a statement made by a relevant senior
13 member of the Scottish Government to Parliament which
14 would introduce very briefly what the content of the
15 report was, and that there would be opportunity for
16 questions. And on top of that the COVID-19 Committee
17 had the opportunity to scrutinise in more detail those
18 reports.

19 Parliamentary accountability, to be possible it
20 needs to be enabled by the government. Transparency and
21 information about what the evidence is, what the impacts
22 of the measures are, et cetera, et cetera, are essential
23 to enable the MSPs to hold the government to account.
24 And in that sense I think that this was a practice that
25 should be kept in mind and should be operating in future

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1 pandemics because it was of a good quality.
 2 **MR TARIQ:** My Lady, there are no further questions from me,
 3 I understand there are no live Rule 10s, so if I, on
 4 behalf of the Inquiry team, can just thank you, Dr Grez,
 5 for your evidence today.

6 **LADY HALLETT:** Thank you very much, Dr Grez, very helpful.

7 **(The witness withdrew)**

8 **LADY HALLETT:** Thank you, I shall return at 3.15.

9 **(2.58 pm)**

10 **(A short break)**

11 **(3.15 pm)**

12 **LADY HALLETT:** Mr Tariq.

13 **MR TARIQ:** Good afternoon, my Lady.

14 May I please call Professor Susan McVie.

15 **PROFESSOR SUSAN McVIE (affirmed)**

16 **Questions from COUNSEL TO THE INQUIRY**

17 **LADY HALLETT:** I hope we haven't kept you waiting too long,

18 Professor, I'm very sorry if we have.

19 **THE WITNESS:** Not at all.

20 **MR TARIQ:** Good afternoon, Professor McVie.

21 There are a few preliminary matters I wanted to
 22 touch on. Can you please keep your voice up and speak
 23 into the microphone so that your evidence can be
 24 recorded by the stenographers; is that okay?

25 **A.** Yes, that's fine.

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1 **LADY HALLETT:** Okay. Sorry if I pre-empted your question,
 2 Mr Tariq.

3 **MR TARIQ:** Prior to this, you were, I believe, a research
 4 fellow and then senior research fellow in the
 5 criminology branch of the central research unit in what
 6 was at the time the Scottish Office and is now the
 7 Scottish Government between 1992 and 1997; is that
 8 correct?

9 **A.** That is correct.

10 **Q.** Then you became a senior research fellow at the law
 11 school at Edinburgh University from 1998, before you
 12 ended up in the position that you currently hold; is
 13 that correct?

14 **A.** That is correct.

15 **Q.** So you have had over 25 years of experience in academia;
 16 is that correct?

17 **A.** Yes.

18 **Q.** And you have many publications in the field of
 19 criminology, including policing policy and practice and
 20 crime trends and patterns; is that correct?

21 **A.** Yes, that's right.

22 **Q.** You have been involved in many advisory committees for
 23 governments in Scotland, the wider UK and
 24 internationally, and this includes membership of two
 25 prior independent advisory groups on Scottish policing

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1 **Q.** If there is any question that I ask which is unclear,
 2 please say so and I will rephrase or repeat the
 3 question.

4 You've provided the Inquiry with a witness statement
 5 dated 12 December 2023. The statement is at
 6 INQ000369767. You have the statement on screen. Can
 7 you confirm if this is your statement?

8 **A.** Yes, it is.

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

11 **A.** Yes, they are.

12 **Q.** I now wanted to turn to your professional background,
 13 Professor McVie. As I understand it, you're a professor
 14 of quantitative criminology in the School of Law at the
 15 University of Edinburgh; is that correct?

16 **A.** That is correct.

17 **Q.** You have held that position since 2010; is that correct?

18 **A.** Yes.

19 **LADY HALLETT:** I know about criminology -- there's
 20 a surprise! -- but quantitative criminology, what's the
 21 difference?

22 **A.** Well, I mainly focus on large research projects
 23 involving quantitative data, large administrative
 24 datasets, surveys, that sort of thing.

25 **MR TARIQ:** And I anticipate coming to some of that data.

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1 on the topic of stop and search powers and police use of
 2 biometric data; is that correct?

3 **A.** That is correct.

4 **Q.** In the context of the pandemic response you became
 5 a member of the Independent Advisory Group on Police Use
 6 of Temporary Powers related to the Coronavirus Crisis in
 7 Scotland, from the inception of the group in April 2020;
 8 is that correct?

9 **A.** That is correct.

10 **Q.** And you remained in the group until it was formally
 11 disbanded in May 2022; is that correct?

12 **A.** Yes.

13 **Q.** We are going to come back to the work of the independent
 14 advisory group, but you're also the principal
 15 investigator for a research project titled "Policing the
 16 Pandemic in Scotland"; is that correct?

17 **A.** Yes.

18 **Q.** Are you able to tell me about this particular project?

19 **A.** Of course. The project arose out of the work that I'd
 20 been doing for the independent advisory group where
 21 I had been tasked with using police data to analyse
 22 patterns and trends and the characteristics of
 23 individuals who had been subject to enforcement. At the
 24 time there was a funding opportunity for rapid response
 25 projects that would be used to help inform policymakers

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1 and ministers about the impact of the pandemic, so I was
2 fortunate enough to receive funding, and I conducted
3 research with a small team of colleagues looking at
4 a detailed analysis of the data that we had around
5 police use of enforcement in Scotland.

6 We conducted interviews with a number of police
7 officers, and we conducted interviews with a small
8 number of members of the public who had been issued with
9 fixed penalties, but that particular piece of research
10 didn't work very well because we didn't have very many
11 people willing to take part. But we've also done
12 research that involves linking police data with health
13 data, which has allowed us to look in a bit more detail
14 at the underlying health vulnerabilities of those who
15 were subject to enforcement.

16 **Q.** I will come to that piece of specific data shortly. But
17 I think you've said that in the context of your project
18 you've interviewed members of the police; is that
19 correct?

20 **A.** Yes.

21 **Q.** Was that in relation to policing during of the pandemic?

22 **A.** Yes.

23 **Q.** And this is in the context of Scotland; is that correct?

24 **A.** Yes.

25 **Q.** Do you know roughly how many police officers you would

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1 powers, and to monitor how policing was being
2 operationalised and developed in Scotland.

3 **Q.** So this independent group was effectively set up by this
4 oversight or monitoring body, this being Scottish Police
5 Authority; is that correct?

6 **A.** Yes. The Scottish Police Authority was the -- provided
7 the secretariat to the group and the independent
8 advisory group reported back to the SPA, but
9 Police Scotland were very core participants in the
10 group.

11 **Q.** In general terms, what was the remit of the group?

12 **A.** Our terms of reference were specifically to look at the
13 police emergency powers that had been issued, so the
14 powers of enforcement, and we were asked to examine the
15 policing of the pandemic in the context of human rights,
16 and also to ensure that enforcement had been
17 administered in line with policing values and principles
18 in Scotland.

19 **Q.** Why was there a need for this group?

20 **A.** I believe that the Chief Constable -- of course
21 I mentioned that Police Scotland had only existed since
22 2013, and in its short lifetime there had been a number
23 of fairly high profile inquiries into specific aspects
24 of policing, including two advisory groups that you've
25 already mentioned on stop and search and police use of

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1 have interviewed in the context of that project?

2 **A.** I think we interviewed around 30.

3 **Q.** And you're also -- and we'll come back to the project,
4 but you're also, in terms of your current roles, are you
5 a consultant, to the National Police Chiefs' Council, on
6 the police use of enforcement in England and Wales?

7 **A.** I was given a consultancy to do work on producing
8 a report for them on their data on police use of
9 enforcement, yes.

10 **Q.** Having set out your background, I wanted to turn to the
11 independent advisory group. This is the Independent
12 Advisory Group on Police Use of Temporary Powers related
13 to the Coronavirus Crisis in Scotland.

14 This advisory group was established by Scottish
15 Police Authority at the request of the Chief Constable
16 of Police Scotland; is that correct?

17 **A.** Yes.

18 **Q.** Are you able to explain to us between the Scottish
19 Police Authority and Police Scotland?

20 **A.** So the Police Service of Scotland is the single unitary
21 police force for the country. It was previously eight
22 legacy forces which were merged together into one single
23 force in 2013, and at that time the Scottish Police
24 Authority was established as the scrutiny body to
25 examine police, police activity, police use of its

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1 biometrics and data. I think the Chief Constable was
2 acutely aware that it was likely there would be scrutiny
3 around police use of these new extraordinary powers,
4 because the police were being asked to enforce
5 activities that, under normal circumstances, would be
6 completely law-abiding behaviours. So he was keen to
7 ensure that there was an independent group that would
8 provide scrutiny, public transparency, and enable the
9 organisation itself to learn from any aspect of the
10 policing work that was being undertaken.

11 **Q.** So one of the purposes was to effectively learn in real
12 time what was happening and what could be improved
13 during the pandemic?

14 **A.** Yes.

15 **Q.** Who were the other members of the group?

16 **A.** The group was chaired by John Scott KC, now Lord Scott,
17 and he invited a range -- or in fact it was
18 David Crichton, who was the chief executive of the
19 Scottish Police Authority at that time, invited a range
20 of individuals to join the group so that it would have
21 quite a broad membership. Do you want the exact list?
22 Because I can refer to my notes for that, or I can try
23 and remember them off the top of my head.

24 **Q.** I don't need a complete list --

25 **A.** Okay.

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- 1 Q. -- it was just trying to get a range, of what range of
2 experience or expertise was on the group.
- 3 A. Okay, so Police Scotland and the Scottish Police
4 Authority I've already mentioned, there was
5 a representative from public health, a representative
6 from the Crown Office, the Crown Agent, sat on the
7 group, the chief inspector of constabulary sat on the
8 group, there was membership from a range of third sector
9 organisations including the Glasgow Disability Alliance
10 and Scottish Women's Autism Network, and there were
11 representatives from a number of human rights and
12 equalities organisations, in addition to myself, and
13 Mr Anwar was a member of that group.
- 14 Q. How frequently did the group meet during the pandemic?
- 15 A. In the early days of the pandemic it met very
16 frequently, at least twice a week, sometimes more
17 frequently than that if there were specific issues to be
18 discussed. Over time, we met less frequently, although
19 at least once a week up until around the end of 2021,
20 and then beyond that we met a bit less frequently until
21 the group was formally disbanded in May 2022.
- 22 Q. Did the group receive regular updates or input from
23 senior police officers about some of the issues that
24 they were facing during the pandemic?
- 25 A. Yes, it did. Deputy Chief Constable Will Kerr attended
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- 1 Authority through their board meetings, and so they were
2 discussed by the SPA and Police Scotland.
- 3 Q. In your statement you explain that -- I think you say
4 you were the only academic on the group, which meant
5 that you took on a role of amassing evidence and
6 advising on research which could help to inform policing
7 practice. You also say that you examined the police use
8 of these new powers under the coronavirus regulations
9 from an empirical perspective, and I think you say that
10 there was a significant amount of data for you to use.
11 What were the sources of data that you used in your
12 research?
- 13 A. So do you mean the research project or the work of the
14 independent advisory group?
- 15 Q. The work of the independent advisory group.
- 16 A. In the independent advisory group, the -- well,
17 Police Scotland had -- with a great degree of foresight,
18 I might add -- had decided to create a coronavirus
19 intervention system to measure the extent of the
20 encounters it was having with members of the public. In
21 one of my previous groups I had been involved in
22 advising around the collection of data and the
23 publication of data on stop and search, so having good
24 data and knowing what the data was telling them about
25 their own activities I think was something that was
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- 1 certainly regularly at the beginning of the pandemic,
2 a bit less so later on, but he was a frequent attendee,
3 and Assistant Chief Constable Gary Ritchie was present
4 at the vast majority of meetings. There was also
5 a police presence. We quite often had senior
6 representatives from different divisions as well,
7 usually, at chief superintendent level, and we were also
8 furnished with a secretariat called the OpTICAL Group,
9 don't ask me to repeat what OpTICAL stood for, because
10 I've forgotten, but it was essentially a group that was
11 providing us with data, information or any intelligence
12 that we needed in terms of our work.
- 13 Q. How did the group report its findings or recommendations
14 to the police?
- 15 A. We -- internally within the group we produced a number
16 of reports. Different members of the -- of the
17 independent advisory group produced reports on specific
18 themes. I, for example, produced quite a number of data
19 reports. And the chair of the group, Lord Scott, was
20 responsible for reporting back to the Scottish Police
21 Authority.
- 22 So all of the work that we undertook and the
23 detailed reports that were produced by Lord Scott and
24 any other work we'd conducted, such as some of my data
25 reports were formally presented to the Scottish Police
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- 1 quite high on their radar.
- 2 The coronavirus intervention system, as it was
3 called, or CVI system allowed us to analyse the relative
4 use of enforcement compared to other aspects of
5 activity. I can speak to the four Es approach later if
6 you wish. But the purpose was to understand to what
7 extent were officers engaging with members of the public
8 around the coronavirus regulations and how often were
9 they resorting to use of enforcement.
- 10 I also had access to individual-level data about
11 individuals who had been issued with a fixed penalty
12 notice, so I had personal information about -- not about
13 their identities but about their age, their sex, their
14 ethnicity, that sort of thing.
- 15 Q. And all of that allowed you to pull together a series of
16 reports that you produced as a member of the independent
17 advisory group; is that correct?
- 18 A. Yes, that's right.
- 19 Q. I want to turn to the use of fixed penalty notices,
20 because it's a subject of, I think, a significant number
21 of reports that you've produced, along with others, and
22 I'm talking about the use of fixed penalty notices in
23 the context of enforcing public health restrictions in
24 Scotland.
- 25 Just to be clear, a fixed penalty notice is
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1 an on-the-spot fine, it's not a criminal conviction, but
2 they are recorded on police systems and may be disclosed
3 via an enhanced disclosure application within a certain
4 period of time; is that correct?

5 **A.** Yes.

6 **Q.** So are you aware of the rationale for using fixed
7 penalty notices as a means of enforcing public health
8 restrictions in Scotland during the pandemic?

9 **A.** Well, I'm aware of the kind of -- the general rationale
10 for using fixed penalties at the level of why they were
11 considered expedient and a good model. It's less clear
12 how they were -- what the purpose of the fixed penalties
13 was supposed to be. That's never really been properly
14 explained in terms of: if you were to have a metric of
15 success, for example, it's difficult to know what that
16 metric would be. Is it the speed of the spread, is it
17 the number of individuals who have the virus or who have
18 sadly passed away?

19 **LADY HALLETT:** You could say that about a lot of sentencing
20 within the criminal justice system.

21 **A.** Indeed, indeed.

22 But in terms of the rationale, it was explained by
23 Kit Malthouse MP, who was the UK Government minister for
24 policing, it was explained as a kind of expedient model
25 of using enforcement that would be familiar to the

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1 they were proposed by the UK Government and they were
2 accepted. There's not really anything in any of the
3 correspondence that I've seen to suggest there was ever
4 any question as to their use.

5 **MR TARIQ:** I think you say in your statement that fixed
6 penalty notices are most suitable for clearly defined
7 objective offences that involve minimum discretion on
8 the part of police officers.

9 **A.** Yes.

10 **Q.** One example might be, for instance, speeding.

11 **A.** Yes.

12 **Q.** It's a binary issue of whether you were speeding or not.

13 You say that their use to enforce public health
14 restrictions during the pandemic was a departure from
15 this traditional model.

16 Can you explain why it was a departure from this
17 traditional model?

18 **A.** It was a departure because, as you say, fines are
19 typically used for well defined -- either well defined,
20 low level offences including speeding, or they might be
21 used for antisocial behaviour offences, which can be
22 broader but there's a lot of case law, so there's a good
23 understanding about what is and isn't an offence in
24 relation to antisocial behaviour.

25 The issue in relation to the Covid fines was that

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1 public.

2 It had a number of appealing aspects to it: it has
3 an established level of legitimacy, the public know what
4 an on-the-spot fixed penalty is, they understand it,
5 they accept that these types of penalties exist.

6 As you mentioned, it means you don't criminalise
7 people because you don't get a criminal record. It
8 represents a relatively minimal administrative burden
9 for both the individual who receives the fine and also
10 for the police themselves, and it keeps people out of
11 the criminal justice system, which was important in the
12 context of the pandemic.

13 I think more people being kept out of the system was
14 considered important, and actually it did because the
15 data in Scotland specifically show that only 121 people,
16 I think, were subject to criminal proceedings up to
17 March 2022 under the coronavirus regulations and only
18 five went to prison.

19 In relation to why were they used in Scotland
20 specifically, that is because they were proposed by
21 the UK Government and, at the beginning of the pandemic
22 when there was a discussion about the extent and the
23 nature of the regulations that would be put in place,
24 there was a high level of commitment from Scottish
25 Government to be part of a four nations approach; so

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1 the extent to which the fines might be used and the
2 types of behaviour that they might be issued for was not
3 necessarily always clearly defined, it changed a lot
4 over the course of the pandemic as the regulations
5 changed, and it was not always clear to either members
6 of the public or police officers themselves what was
7 a breach of the law, and what was merely a breach of
8 guidance, for example.

9 So it was problematic from the point of view that
10 neither the individual nor the police officer might have
11 a clear view of whether an offence had actually been
12 committed.

13 **Q.** What would have been the alternatives to using fixed
14 penalty notices as part of the pandemic response?

15 **A.** Well, I certainly wouldn't have advocated for anything
16 further into the criminal justice system. Formal
17 warnings could have been used.

18 We've seen from the data, if you look at trends over
19 time in the use of police fixed penalty notices, they've
20 been going down for the last decade or so, both in
21 Scotland and in England. I mean, they declined quite
22 markedly by something in the region of 80% to 90%,
23 whereas the use of formal warnings or community dispute
24 resolutions -- in England -- have been increasing.

25 So it felt a bit strange for us when we were looking

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1 at the decision to introduce fixed penalties, that that
2 was against the prevailing trend of summary justice
3 measures in Scotland. But of course, because they were
4 following the English model, then that would explain
5 that, but they have been going down in England as well.

6 So a formal warning could have been used. That has
7 been recommended in some literature in the US, that
8 warnings are a better -- a better approach because the
9 vast majority of people only had contact with the police
10 once, and so therefore a formal warning wouldn't have
11 resulted in some of the inequalities that are inherent
12 in a financial penalty.

13 **Q.** We will come to those inequalities.

14 In your research, have you seen any evidence as to
15 the additional benefits of using sanctions in addition
16 to guidance such as in terms of public compliance with
17 the measures?

18 **A.** So we haven't specifically researched that, and it would
19 be quite difficult to research that in the Scottish
20 context, because of the blurring of -- between rules and
21 guidance and because of the multiple changes to the
22 rules over time, it's actually quite hard to disentangle
23 what would have made a difference.

24 We -- the vast majority of countries did follow
25 a sanctions based model, and I think that probably is

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1 Sweden was relatively low compared to other comparator
2 European countries including the UK, it's almost half
3 the rate in Sweden that it was here.

4 So there's evidence -- there's no clear evidence to
5 suggest that you need enforcement in order to make
6 people comply. It was considered more of a --

7 **LADY HALLETT:** Could I interrupt?

8 **A.** Yes.

9 **LADY HALLETT:** You say comparator countries. I mean, I've
10 been down this road before. Comparisons are very
11 difficult to make.

12 **A.** Yes.

13 **LADY HALLETT:** Sweden's population, probably far more
14 dispersed, don't have as many major cities where people
15 are densely ... it's really difficult to make
16 a comparison between the two countries.

17 **A.** Yes. Absolutely, and actually the level of social
18 support for individuals who may have struggled to comply
19 in Sweden would have been higher.

20 So, I mean, I think what I would say is it's very
21 difficult to know within the UK context whether
22 a guidance only model would have worked, but in the
23 event it was never really considered.

24 **MR TARIQ:** In your report -- and we're going to come to the
25 report shortly -- I think you say it's been very

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1 one of the reasons that the UK Government decided to go
2 down that particular route.

3 There are not very many countries that have focused
4 only on guidance. South Korea is one, but it's a very,
5 very compliant population --

6 **Q.** I think you give the example of, is it Sweden --

7 **A.** Yes.

8 **Q.** -- in one of your research that focused not on the
9 sanctions model but on the guidance model?

10 **A.** That's right, and Sweden is often used as a comparator
11 to Scotland because we're, you know, similar
12 hemispheres, similar population. Sweden decided not to
13 use sanctions, they didn't introduce a lockdown, they
14 introduced -- they banned large gatherings, travel, and
15 social -- they recommended social distancing, they
16 didn't lock down the schools immediately, they didn't
17 introduce face masks immediately. They took a much more
18 kind of what you might describe as lenient approach to
19 managing the pandemic.

20 It wasn't without controversy in Sweden, and many
21 scientists were critical of the government for not
22 introducing some kind of enforcement, and claimed that
23 the lack of enforcement would lead to an increase in the
24 death rate. However, a study that's been conducted
25 fairly recently has identified that the death rate in

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1 difficult to tease out the effect, if any, that
2 enforcement had on preventing the spread of the virus or
3 saving lives. You say that as a principal reason for
4 introducing new policing powers during the pandemic,
5 this does raise questions about testing the efficacy of
6 an enforcement-based model to reduce the spread of the
7 virus.

8 Does that still remain your view and, if so, can you
9 explain your position?

10 **A.** Yeah, so the position is based on the original statement
11 that was made by Priti Patel MP when the enforcement was
12 introduced, and she made a statement regarding the use
13 of enforcement, and she specifically said that the use
14 of enforcement would help to reduce the spread of the
15 disease, protect the NHS and save lives, which was the
16 kind of mantra at that time. And it's -- we don't
17 really have the data that would be necessary to try and
18 determine the cause and effect of the use of police
19 enforcement on patterns of death, but I have mapped it,
20 and what you see is that the -- as the death rate
21 increased, the number of fixed penalties increased, and
22 then as the death rate reduced, the number of fixed
23 penalties reduced.

24 So it tracks pretty closely up until about
25 February 2021, at which point the beneficial effects of

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1 the vaccine kick in and the death rate drops down quite
2 considerably but the rate of enforcement continued to be
3 high for another couple of months.

4 There's no evidence that more enforcement led to
5 less -- less deaths and less spread, and in fact from
6 a logical point of view the police couldn't know where
7 the virus was or how it was spreading or where it was
8 spreading any more than anyone else could.

9 I think the police role was really more about kind
10 of, you know, trying to mitigate potential negative
11 effects of people being in close proximity together
12 rather than a specific impact on the death rate.

13 I mean, and, for example, if a police officer was
14 faced with two individuals, one of whom had a reasonable
15 excuse and wasn't issued with a fixed penalty, and
16 another didn't have a reasonable excuse and was, the
17 officer had no way of knowing which of those two
18 individuals may, if any, have Covid.

19 So I think it was a kind of false impression to link
20 that kind of public health impact with the enforcement
21 itself.

22 **Q.** I understand -- I'm turning to a new topic -- that one
23 of your colleagues on the project sent a Freedom of
24 Information request to the Scottish Government.

25 **A.** Yes.

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1 value of the fines for antisocial behaviour or adopt the
2 proposed value from the UK Government, because the
3 values were slightly different; and also there was
4 an issue around the -- whether fines should be issued to
5 16 or 17-year olds, because the UK Government had
6 proposed that fines be issued to individuals aged 18 or
7 over but the antisocial behaviour legislation in
8 Scotland allowed for 16 and 17-year olds to receive
9 fixed penalties.

10 **Q.** I understand from what you say in your statement, and
11 looking at some of the correspondence, that at the start
12 of the pandemic there was a difference between Scotland
13 and the rest of the UK in terms of -- this is
14 regulation 9 of the health protection regulations in
15 Scotland, that allowed fixed penalty notices to be
16 issued to people aged 16 or over, whereas the position
17 across the rest of the UK was that fixed penalty notices
18 could only be issued to people 18 years or over.

19 In those documents that seems to be a conscious
20 decision, a deliberate decision that's made by the
21 Scottish Government to use the existing model of the
22 antisocial behaviour so that these penalties can be
23 issued to 16-year olds. Is that correct?

24 **A.** Yes. I think the decision to -- the decision to model
25 the Covid fixed penalty on the existing legislation was

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1 **Q.** And what your colleague was seeking to do was looking
2 for correspondence, notes and briefings relating to the
3 decision to include fixed penalty notices as a penalty
4 for breaching coronavirus regulations.

5 I don't intend to take you through each of the
6 pieces of correspondence, you've produced them to
7 the Inquiry, but in general terms what did the
8 correspondence show in terms of the Scottish
9 Government's thinking around the use of fixed penalty
10 notices?

11 **A.** So the correspondence showed that the Scottish
12 Government were committed to a four nations approach.
13 So when the UK Government provided their model of
14 enforcement, the Scottish Government were predominantly
15 interested in considering whether it could be
16 operationalised within Scottish legislation and within
17 the model that operates in Scotland. Information was
18 shared with Police Scotland, with the Scottish Courts
19 tribunal and with the Crown Office, so there was a view
20 from the criminal justice organisations in Scotland as
21 to how appropriate it was.

22 The main discussions in terms of questions to
23 ministers were around the value of the fine, whether to
24 stick with the existing antisocial behaviour legislation
25 and model the fine around that, whether to retain the

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1 partly a practical one, the police were used to issuing
2 antisocial behaviour fines so therefore using the same
3 kind of broad model made sense. If they were in
4 a position where they were having to issue some fines to
5 16, 17-year olds and not others, I think there was
6 a feeling from Police Scotland that, you know, that
7 would cause some confusion. And also I think it was
8 expressed in that particular document that
9 Police Scotland were concerned that younger people may
10 pose a problem in terms of being in large groups and
11 potentially spreading the disease. So in some ways
12 I think Police Scotland had quite a big influence on the
13 decision to maintain that -- to maintain 16, 17-year
14 olds within the legislation as opposed to the English
15 legislation.

16 **Q.** And the Inquiry understands that the Coronavirus
17 (Scotland) (No.2) Act then amended regulation 9 to raise
18 the minimum age to 16, and that Act came into effect on
19 27 May 2020. So within a couple of months of initially
20 deciding to go with the age of 16 years, this was
21 increased to 18 years; and I think in that time there
22 had been calls from the UN to ensure children's rights
23 were being safeguarded during the pandemic in Scotland,
24 and it was thought that this change would bring in line
25 with the UN Convention on the Rights of the Child.

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1 A. Yes.

2 Q. Was that the key driver, the concern from organisations
3 such as the UN which led to the increase of age from 16
4 to 18?

5 A. I think there certainly was messaging from the UN, but
6 actually a primary driver in Scotland, and I should've
7 ment -- they'll be upset with me for not mentioning them
8 -- the Scottish Children's Commissioner, or the
9 Commissioner for Children and Young People, was quite
10 vocal in the discussion around 16 and 17-year olds.

11 It was: having 16, 17-year olds in the legislation
12 felt out of kilter with the prevailing direction of
13 sanctions for children and young people. We've seen
14 a big change in the way that we deal with children and
15 young people who are involved in offending in Scotland,
16 we have a new whole-systems approach, we have a new Bill
17 that's been trying to keep 16, 17-year olds out of the
18 criminal justice system, and the Scottish Government is
19 heavily committed to the UN Convention on the Rights of
20 the Child.

21 So when the legislation was passed and when our
22 advisory group was established, the Scottish Children's
23 Commissioner was quite vocal about the fact that this
24 felt out of kilter with the way that we usually did
25 things.

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1 under the age of 18 after the amended regulation 9. Why
2 would that be?

3 A. I don't know for sure, but I think it's probably --
4 I mentioned earlier -- the confusion between having one
5 type of fixed penalty notice that can be issued to 16
6 and 17-year olds and one that can't, so it may well be
7 that police officers were unaware or had forgotten that
8 the change in the law had been made; if they had already
9 been used to issuing fixed penalty notices to 16,
10 17-year olds, it may just have been an oversight during
11 operational practice.

12 I think the other issue is that it's not always
13 clear at the time when an officer is dealing with
14 a person actually what their age is, so it could well be
15 that it was just that they didn't -- they weren't aware
16 at the time they were 16 or 17.

17 I think it's highly likely -- well, I think it's
18 almost certain that any fixed penalty that was issued to
19 a 16, 17-year old after the legislation had been changed
20 would have been rescinded.

21 Q. I wanted to ask you about equality impact assessments.

22 In your statement you say that:

23 "There is no available evidence to suggest that the
24 Scottish ... law-makers gave consideration to equality
25 issues in respect of the decision to use fixed

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1 And I think, looking at the freedom of information
2 documentation that you mentioned earlier, I'm struck by
3 the fact that no equalities impact assessment was
4 conducted by the Scottish Government on that specific
5 issue.

6 I think Joe Griffin, who's already given evidence to
7 the Inquiry, has spoken to the fact that there wasn't
8 time to do proper equalities impacts assessments of the
9 legislation as it came in at the start of the pandemic,
10 and that's certainly true.

11 I think in my evidence I produced two documents of
12 equalities impact assessment that haven't looked
13 specifically at enforcement but, as far as I'm aware,
14 enforcement hasn't been covered in any subsequent
15 equalities impact assessments. If it had been at the
16 time, I think the 16, 17-year old point would have been
17 picked up and that wouldn't have been allowed to go
18 through.

19 Q. I think you say in your statement that there's data
20 which shows that there was 256 fixed penalty notices
21 that were issued to people under the age of 18 prior to
22 the introduction, or the amendment to regulation 9.

23 A. Yes.

24 Q. I think you also say that data also shows that there was
25 a further 220 fixed penalty notices issued to people

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1 penalties. In Scotland, Equality Impact Assessments
2 published for the Coronavirus (Scotland) Bill ... and
3 the Health Protection (Coronavirus) ... Regulations 2020
4 ... made no reference to the new policing powers or
5 police use of enforcement. Nor can we find evidence
6 that retrospective Equality Impact Assessments
7 considered this issue."

8 Had there been equality impact assessments at the
9 time, what would those -- what sorts of issues would
10 those have identified?

11 A. I think I've mentioned the 16, 17-year old, they would
12 almost certainly have picked that up.

13 The other issue I would have expected them to have
14 picked up is that the -- in a quirk of the coronavirus
15 regulations they introduced an incremental fining
16 system. Now, I mentioned earlier that Mr Malthouse had
17 stated that, you know, introducing Covid fixed penalties
18 was, you know, a known science, that people were
19 familiar with them, that they understood them, that they
20 were easily accepted, and he gave examples of things
21 like littering and dog fouling.

22 What he didn't mention was that, under the new
23 incremental fining system issued through the
24 regulations, that if an individual committed a second
25 offence under the coronavirus regulations, their fine

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1 would double, if they committed a third it would double
2 again, and so on up to a maximum of five offences which
3 would result in a fine of £960.

4 So that is not the kind of light touch, kind of
5 low-level fixed penalty that the public are used to in
6 Scotland or the wider UK, so I would have expected
7 an impact assessment to have picked up on that.

8 You have to also bear in mind at this point there
9 was very little parliamentary scrutiny of regulations,
10 things were happening so quickly. What we did have in
11 Scotland was the Lord Advocate intervened. So when it
12 was observed that there could be a potential for police
13 officers -- and remember a fixed penalty is
14 an on-the-spot fine issued, you know, in terms of the
15 discretion of the officer, officers dealing with new
16 regulations, very unfamiliar with them, sometimes
17 making, you know, good faith mistakes. If officers were
18 issuing fines of up to £960, that would have been out of
19 alignment with the level of fine that could be issued
20 with a Procurator Fiscal in Scotland, which at that time
21 was a maximum fine of £300.

22 So the Lord Advocate stipulate -- issued guidance to
23 say that police officers in Scotland could only issue
24 a fine of up to £480, so that's a maximum four fixed
25 penalty notices, and at the same time legislation went

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1 **Q.** And I think this report analyses over 20,000 fixed
2 penalty notices that were issued by the police to
3 enforce non-compliance with public health restrictions
4 introduced during the pandemic, and I think the dataset
5 is between March 2020 and May 2021; is that correct?

6 **A.** That's right, yes.

7 **Q.** Can we look at page 16, figure 3, please. Thank you.
8 You will see that this breaks down the number of police
9 interventions in Scotland between May 2020 and May 2021
10 by reference to the four Es. Are you able to explain
11 the different stages of escalation? First of all, are
12 you able to explain the four Es strategy and then the
13 different stages of escalation?

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

15 The four Es strategy was introduced very early in
16 the pandemic, in kind of late March, early April 2020,
17 by the College of Policing and the National Police
18 Chiefs' Council, and it was intended as an easy to
19 remember strategy that would minimise the potential --
20 any potential negative consequences or impact of the
21 introduction of the new police powers. I think there
22 was a genuine desire by policing organisations to ensure
23 that any impact that policing might have in the context
24 of the pandemic would be as minimal as possible on the
25 basis that there was an understanding there might be

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1 through -- I think on 7 April 2020 -- which increased
2 the size of a fine that the Procurator Fiscal could
3 issue as a fiscal fine from £300 to £500, so that
4 brought the police and the Procurator Fiscal powers in
5 terms of their use of fixed penalties into alignment at
6 that point.

7 **Q.** I now want to turn to the data that we've discussed kind
8 of in a very high level, and I want to look at the
9 report that you produced. This is the report from the
10 Scottish Centre for Administrative Data Research titled
11 "*Police Use of Covid-19 Fixed Penalty Notices ...*", and
12 it's at INQ000369770.

13 Is this a report that you produced for the
14 independent advisory group?

15 **A.** This one, August 2022, so the independent advisory group
16 by this time had been disbanded in May of that year,
17 so -- but I continued to work on the data that I had
18 been using as part of the independent advisory group, it
19 was shared with members of the advisory group and we did
20 have a meeting with some of those members to discuss it.

21 **Q.** We can see, perhaps at the top left of the top page, it
22 says "Policing the pandemic in Scotland", so this is
23 with your follow-up project after the work of the
24 independent advisory group?

25 **A.** Yes, that's right.

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1 wider inequalities.

2 So the four Es strategy requested that if an officer
3 was to encounter someone that may be breaching the
4 coronavirus regulations, they were to engage with them
5 first and talk to them, find out a little bit about what
6 was happening. If it was clear that the individual was
7 not following the regulations, the officer was to
8 explain -- wasn't aware of what the regulations were,
9 then they were to explain what the regulation was to the
10 individual. If the individual was potentially doing
11 something that was in breach of the regulations, the
12 police were to encourage them to stop doing that and
13 make sure they didn't do that again. And only in the
14 case of individuals who were flagrantly or deliberately
15 or persistently breaking the regulations were they to
16 move to enforcement.

17 So that was the four Es strategy, and the data that
18 you can see there was extracted from the coronavirus
19 intervention system that I mentioned earlier that was
20 constructed by Police Scotland as a way of measuring
21 encounters, and it takes every encounter that was
22 entered on to the system by police officers and it
23 broadly maps on to those four Es. They use slightly
24 different words in the system, but informing people was
25 essentially the kind of engagement and explanation, and

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1 then instructing and removing them was essentially the
 2 kind of encouragement part.

3 **Q.** Can you talk us through what the data shows in terms of
 4 the escalation to enforcement?

5 **A.** Yes.

6 So the data essentially shows that in the vast
 7 majority of cases where the police had encountered
 8 someone under the potential for a breach of the
 9 coronavirus -- in the vast majority of cases they relied
 10 only on the first three Es, so they didn't move to any
 11 kind of formal intervention. In around 11.6% of cases
 12 they reported issuing a fixed penalty notice, and in
 13 0.7% of encounters they noted that an arrest had taken
 14 place, so that's around just over 12% of all recorded
 15 encounters involved enforcement. So that led us to be
 16 confident that the police in Scotland were following the
 17 four Es strategy. It's not possible to compare it with
 18 any other police force because no one else measured it,
 19 but I think it was a really valuable tool that was
 20 introduced by Police Scotland.

21 **Q.** So it's one in eight --

22 **A.** Yes.

23 **Q.** -- roughly, interventions or encounters that led to
 24 enforcement?

25 **A.** Yes, that's one in eight recorded encounters.

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1 backgrounds. It's one of the main ones in Scotland.
 2 And that -- at a kind of high level, that maps on to the
 3 Scottish population, which is predominantly white.

4 However, in order to determine whether there might
 5 be any potential disproportionality, you have to take
 6 the population figures and then calculate a rate per
 7 head of population for enforcement. So that's what you
 8 can see on the right, it's the estimate -- we've called
 9 it the estimated rate because we used the most
 10 up-to-date population data but there's always some level
 11 of uncertainty around population numbers that can
 12 change. So the estimated rate per 10,000 individuals
 13 within each of these ethnic categories. So you can see
 14 that actually when you look at population size that
 15 individuals from black African or Caribbean backgrounds
 16 had the highest rate overall, and people from white
 17 backgrounds had the lowest rate per head of population.

18 **Q.** I think overall does this show that people from ethnic
 19 minority backgrounds were 1.4 times more likely to
 20 receive a fixed penalty notice than those from a white
 21 group during the pandemic?

22 **A.** That was correct yes.

23 **Q.** And I think that figure rises to 1.8 times more likely
 24 for somebody from an African black or Caribbean
 25 background by reference to white popul --

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1 **Q.** Yes.

2 **A.** I suspect there was probably a lot of other informal
 3 stuff that was never really recorded, so I would say
 4 that that was a conservative estimate.

5 **Q.** I think what this shows is even where there was
 6 enforcement, the vast majority of incidents only
 7 involved the issue of a fixed penalty notice?

8 **A.** That's correct.

9 **Q.** And only a very small minority of cases required
 10 escalation to arrest?

11 **A.** Yes.

12 **Q.** Can we then turn to page 25 and figure 11. I'm looking
 13 at figure 11 at the bottom of the page, now it's on the
 14 screen. Are you able to talk us through your findings
 15 as shown in this figure?

16 **A.** Yes.

17 So this was an analysis of the fixed penalty notices
 18 that had been issued, and we were interested to see what
 19 the ethnic profile of individuals who had been fined
 20 was. The vast -- on the left, you can see the total
 21 absolute number of fixed penalty notices that were
 22 issued to individuals from different ethnic backgrounds,
 23 and you can see that by far the vast majority were
 24 issued to people from a white background, which includes
 25 white minorities including people from Gypsy, Traveller

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

2 **Q.** Are these differences explained by differences in, for
 3 instance, compliance rates with public health
 4 restrictions amongst different ethnic groups, or do
 5 these figures show that there was disproportionate
 6 policing of people from black and minority ethnic
 7 backgrounds?

8 **A.** We've been very careful in the reports that we've
 9 published to say that the analysis that we've done
 10 cannot be used to determine whether there was
 11 disproportionate or bias in actual policing. So, in
 12 order to know whether there was bias in policing, you
 13 would need to know the level of compliance within each
 14 of these groups, you would need to know how many of
 15 those individuals had been encountered by the police,
 16 and then you'd need to know how many of them they fined.
 17 We simply don't have that information.

18 So it's impossible to say that there was any
 19 disproportionality in terms of the way in which the
 20 police were approaching.

21 **LADY HALLETT:** Can you just pause there, please?

22 **A.** Yes.

23 **LADY HALLETT:** Mr Tariq, this is a really important topic,
 24 I'm just not sure it's one within my terms of reference.

25 **MR TARIQ:** Yes, I was going to move on, my Lady. I'm

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1 perhaps just following up on an interesting topic
 2 that's --
 3 **LADY HALLETT:** It is extremely important and obviously
 4 an interesting topic, and I do understand that the
 5 professor can give us a great deal of help. As I say,
 6 I just think we're straying.
 7 **MR TARIQ:** Yes.
 8 I wanted to move to some of the policing
 9 challenges --
 10 **A.** Yes.
 11 **Q.** -- during the pandemic, and these stem from Scottish
 12 Government regulations.
 13 Perhaps if it's possible to take the report off
 14 screen.
 15 In your statement I think you state that in research
 16 interviews conducted with frontline police officers they
 17 identified with difficulties with keeping up with
 18 frequent changes in the regulations that were being
 19 enacted by the Scottish Government, and some of these
 20 were made very much at the last minute.
 21 Are you able to provide specific examples of
 22 difficulties that this presented in terms of policing
 23 the pandemic?
 24 **A.** Yes, indeed, and I think it is important to say that
 25 this wasn't unique to Scotland. In fact Tom Hickman has
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1 the meeting, to have something passed to them to say
 2 that there's new legislation coming in around
 3 introducing new police powers of entry so that the
 4 police can go into properties where parties are
 5 happening. And the convener puts this to the Chief
 6 Constable in terms of the level of, you know, the detail
 7 and the Chief Constable, I think in quite uncomfortable
 8 terms, states that, although he's aware of it and has
 9 seen drafts, he wasn't -- he didn't know what was in the
 10 final version.
 11 So, yes, it was a frustration of senior officers
 12 that they didn't always have sight of things.
 13 From an operational point of view, it causes
 14 problems when you've got a police force with over 17,000
 15 officers and you have to roll out training and
 16 instruction to frontline officers who are then going to
 17 go out and implement these new regulations.
 18 Now, I have to say that certainly in Scotland,
 19 Police Scotland took a very pragmatic approach to
 20 changes in regulations and they never wavered from
 21 emphasising the four Es approach and trying to minimise
 22 potential impact of any new regulations. But when we
 23 interviewed frontline police officers, they talked
 24 about, you know, the difficulties of going on annual
 25 leave for two days and coming back to a completely new
 199

1 produced a lovely paper called "*Abracadabra*
 2 *Law-Making ...*" where he describes producing regulations
 3 like pulling rabbits out of a magician's hat. So it
 4 wasn't unique to Scotland.
 5 It caused problems for policing mostly at
 6 an operational level. So when we were working with the
 7 IAG, it was a frustration of senior officers that the
 8 speed and frequency of the regulations was coming
 9 through without -- I mean, it wasn't that the
 10 Police Scotland weren't consulted at all through the
 11 process, but things were happening so quickly and quite
 12 often they weren't consulted until quite late on in the
 13 process that their -- the level of input that they could
 14 have to that was relatively small.
 15 **LADY HALLETT:** I heard in a module in London that sometimes
 16 they got a matter of hours' notice before the
 17 regulations changed. Was that the same here?
 18 **A.** There was at least one occasion I can remember that the
 19 regulations had been enacted before the police even saw
 20 them, so ... and actually this is --
 21 **LADY HALLETT:** No notice?
 22 **A.** No notice at all, and there's one really great example
 23 in the justice -- Holyrood Justice Sub-Committee meeting
 24 where the Chief Constable is being interviewed by the
 25 convener of the justice committee and happens, during
 198

1 set of regulations and they didn't understand what they
 2 were doing. We talked to supervisory officers who said
 3 their staff were coming to them for advice on specific
 4 incidents and issues, and they didn't know how to advise
 5 them. Frontline officers also talked about trying to
 6 find -- they were being -- information was being dripped
 7 down internally within the organisation, although it
 8 wasn't anything like the kind of training that officers
 9 would normally receive. Normally they'd have months, if
 10 not years of preparation, and they didn't have anything
 11 like that. So they were going to Scottish Government
 12 websites to try and find out the information, but the
 13 Scottish Government website itself was blurring the
 14 difference between what was regulation and what was
 15 guidelines, so that didn't always help either.
 16 So, yeah, there were a lot of operational
 17 difficulties.
 18 **MR TARIQ:** I think you say in your statement, and then
 19 I think you've touched upon this earlier in your
 20 evidence as well, that the distinction between law and
 21 guidance --
 22 **A.** Yes.
 23 **Q.** -- was often not clear, not just to decision-makers or
 24 the media but also police officers. Is that based on
 25 the information you were given in research interviews
 200

1 and indeed your work on the independent advisory group?
 2 **A.** Yes. What police officers said was that during the
 3 first lockdown, when it was really -- when the
 4 instruction was really clear, stay at home, then it was
 5 easy to operationalise the regulations. I mean, so
 6 that's not to say there weren't some issues,
 7 particularly at the very beginning before the four Es
 8 strategy really kicked in, but it was clear to the
 9 public what they were supposed to do, it was clear to
 10 the police what they were enforcing.

11 As time went on and things started to be --
 12 you know, ease up and new regulations are brought in
 13 that provided for different circumstances or
 14 an increasing range of reasonable excuses or, you know,
 15 when they were introducing things like the -- when they
 16 were talking about the -- there's a good example I want
 17 to give you of the First Minister talking about the
 18 exercising once a day.

19 Now, there was a lot of discussion about exercising
 20 once a day, not just in -- by Scottish ministers. It
 21 was only ever a law in Wales, it was never a law here,
 22 it was guidance. And when Nicola Sturgeon on the -- if
 23 I get my dates -- in May 2020, on 11 May she said at one
 24 of her daily briefings:

25 "The only change we've made here in Scotland is to
 201

1 when they're trying to work out where they can enforce
 2 and where they can't?

3 **A.** Yes. We didn't -- we weren't able to get access to data
 4 on the reasons that fixed penalty notices were
 5 rescinded. So rescinded is when the police withdraw the
 6 ticket and it's not pursued. But we are aware from
 7 discussions with -- through the independent advisory
 8 group that a lot of the reasons for rescinding were
 9 where an officer had in good faith issued a fixed
 10 penalty notice for something that was guidance and not
 11 rule.

12 **Q.** In your statement you say that during meetings of the
 13 independent advisory group there were discussions with
 14 Police Scotland about new regulations that were
 15 considered very difficult to enforce, and you provide
 16 the example of regulations around quarantine
 17 restrictions on return from overseas travel as being
 18 something that was difficult operationally for the
 19 police to enforce. Can you explain what you were told
 20 about this issue in the independent advisory group?

21 **A.** Yes.

22 So in the independent advisory group, one of the
 23 reports that we would receive on a regular basis was
 24 an update on some of the issues that were facing
 25 Police Scotland. They would quite often tell us about
 203

1 the guidance on exercise. As of today we have removed
 2 a once a day limit on exercise. It is one very minor
 3 change to the existing rules."

4 So in her own statement she conflates guidance and
 5 rules. And of course, taking their cue from her
 6 statement, it was widely reported in the media that the
 7 rule of one exercise a day -- you know, exercising once
 8 a day -- had been relaxed.

9 Now, it might not sound like a very big thing, but
 10 to those individuals who were trying to follow the rules
 11 to the letter and who, you know, who really stuck to
 12 things and were careful, seeing someone going out for
 13 a walk twice a day and thinking that was a rule and not
 14 guidance would have caused some problems within
 15 communities. We know that, you know, a lot of the calls
 16 that came in to Police Scotland around people breaching
 17 the regulations were neighbours looking over the fence
 18 or the garden wall and clipeing on their other
 19 neighbours.

20 So, you know, it did make a difference that there
 21 should be clarity between what is rule and what is
 22 guidance.

23 **Q.** Operationally, this would've -- if the First Minister is
 24 using language that blurs between guidance and rules,
 25 that operationally must present challenges to the police
 202

1 difficult cases, and they gave us a running report on
 2 issues relating to certain types of fixed penalty, one
 3 being travel and another being quarantine. And the
 4 difficulty that they faced with the quarantine
 5 regulations was that -- so the quarantine regulations
 6 were really managed by Public Health Scotland, and if
 7 they could be dealt with satisfactorily through Public
 8 Health Scotland then there was no recourse to the
 9 police. I think it was really only in cases where
 10 Public Health Scotland had tried to contact someone and
 11 hadn't been able to do that, that it was passed on to
 12 the police. Now, the police in these meetings told us
 13 that quite often the information that they were passed
 14 was incorrect, you know, phone numbers that didn't work,
 15 addresses that either didn't exist or the person wasn't
 16 there. But actually a bigger problem was that by the
 17 time Public Health Scotland passed the data on to the
 18 police to deal with, the period of the quarantine had
 19 elapsed, so there was really no point in the police
 20 taking up valuable resource to follow it up in any case.

21 **Q.** You also say in your statement that travel restrictions,
 22 you'll recall, the Scottish Government introduced in
 23 late December 2020 which banned travel between Scotland
 24 and England; that was another example I think you
 25 provide of where it wasn't practical to enforce. Was
 204

1 that an issue that arose in the independent advisory
2 group?
3 **A.** Yes, and it was discussed both in the independent
4 advisory group and John Scott and myself presented to
5 the Holyrood subcommittee on justice and it was
6 discussed there too.

7 Essentially this was a ban on travel, cross-border
8 travel between Scotland and England that was introduced
9 on Boxing Day in 2020, and the specific concern was
10 about the spread of a new variant in England which
11 hadn't really reached Scotland at that point, and
12 I think that the idea was we have a travel ban so that
13 people don't bring this nasty new variant here.
14 Although they also made changes to the local levels at
15 that point, so it was actually quite a complex
16 regulatory shift.

17 So the First Minister announced this at the daily
18 briefing on 19 December 2020 and stated that this travel
19 ban would come in and they would be "asking
20 Police Scotland and transport operators to consider how
21 the enforcement of this can be strengthened in the
22 period ahead". So the insinuation is there's going to
23 be pretty heavy enforcement of people crossing the
24 border.

25 Now, this is another example of where there's
205

1 where a bit more communication between government and
2 the police might have led to more harmonious press
3 releases.

4 **Q.** I now just want to more on to lessons learnt. I'm
5 nearing the end.

6 **LADY HALLETT:** Just before we do, before you go to lessons
7 learned, Mr Tariq, can I ask this.

8 I heard in England about the drafting of some of
9 these regulations and it was -- the drafting went to the
10 Department of Health in England, whereas normally it
11 would be the Home Office responsible for drafting
12 criminal justice regulations, and I suspect partly as
13 a result I had a look at some of the offences. I've got
14 a background in criminal law, so ... and they were
15 nonsensical. I mean, they wouldn't have made sense to,
16 I suspect, a criminal law professor, let alone the poor
17 police officer or alleged offender.

18 What were the regulations like here? Were they
19 better drafted?

20 **A.** Well, I've not compared -- I've not, you know, done
21 a big study of --

22 **LADY HALLETT:** Right, (inaudible), don't --

23 **A.** -- but there are examples of some of the regulations
24 where it was absolute gobbledegook.

25 **LADY HALLETT:** That's what --
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1 a tension between what the government wants to
2 articulate through its messaging, and I can fully
3 understand the intention in terms of trying to make
4 people understand the seriousness of what this might do
5 but tension between that and the practicalities of
6 policing.

7 So almost immediately Alan Speirs, Assistant
8 Chief Constable at the time, released a statement from
9 Police Scotland to say that they would be continuing to
10 focus on the four Es, that they were encouraging people
11 to take personal responsibility, and they would not be
12 routinely stopping vehicles or setting up roadblocks.

13 On the day that the law came in, the Chief Constable
14 reiterated that again, saying that the restrictions were
15 preventative, and they did double the police presence on
16 the border but they made it very clear they would not be
17 proactively stopping vehicles. And when John Scott
18 presented to the Holyrood justice subcommittee, he
19 described it as a restriction that was simply impossible
20 to enforce, it's an example of something that's
21 unworkable, and he gave an example of roadblocks that
22 had been used set up in Melbourne in Australia which had
23 caused absolute chaos and had not had the desired
24 effect.

25 So, yeah, so that was another example of something
206

1 **A.** There's one classic example of an explanation in
2 a policy memorandum which is trying to explain -- it's
3 the rule of six, and it's trying to explain how many
4 adults can meet and how many children there can be and
5 what the ages of the children can be, and it's about two
6 or three sentences long and it is absolutely impossible
7 to fathom; and, again, this is -- kind of speaks to
8 another issue of very fastly drafted legislation.

9 I can see the intention was to try and be clear
10 about, you know, "In this circumstance, based on our
11 legislation, you can have these people", but it was
12 impossible for people to understand, and you can -- you
13 can see why police officers and members of the public
14 would have been very confused about whether they were
15 committing an offence or not.

16 **LADY HALLETT:** And who did the drafting here?

17 **A.** That I do not know because I wasn't involved --

18 **LADY HALLETT:** Maybe we can find out some other way.

19 **A.** Yes.

20 **LADY HALLETT:** Thank you.

21 **MR TARIQ:** It's an area we can explore with subsequent
22 witnesses, my Lady.

23 I now wanted to just turn on to lessons learned.

24 In a future pandemic situation, is there a more
25 proportionate response than using sanctions to enforce
208

1 public health restrictions, in your opinion?
 2 **A.** Well, if you want to include a sanction, the only level
 3 down from a fixed penalty notice -- which is reasonably
 4 proportionate, if you keep them at a low level that the
 5 public expect. You know, there's an inherent inequality
 6 in financial penalties. A fine of £60, which is the
 7 minimum, a fine of £60 for a government minister might
 8 be a small amount of pocket change, but that might be
 9 quite a large amount of money for someone who's
 10 experiencing financial hardship. And remember that the
 11 person that commits the offence doesn't need to pay the
 12 fines, so there are individuals who did have fines paid
 13 for by other people, including a number of well-heeled
 14 students.

15 So that inequality is offset by the fact that these
 16 sorts of on-the-spot fines are relatively pretty small,
 17 but when you start to ratchet up the fines to hundreds
 18 of pounds, that's not a small fine any more and that
 19 inherent inequality is quite large.

20 So -- sorry, I've forgotten the original question,
 21 but ...

22 **LADY HALLETT:** What's the proportionate response?

23 **A.** I mean, if you kept the fines low level, you continued
 24 with the 12 -- the 12 Es? I'm sure we could find a few
 25 more -- the four Es approach and you improved lots of
 209

1 also impacted in terms of health and economics,
 2 potentially education as well.

3 **MR TARIQ:** My Lady, there's no further questions from me,
 4 and I understand there's no live Rule 10s.

5 **LADY HALLETT:** Thank you very much indeed, Professor, I'm
 6 very grateful. As you say, there are many people where
 7 the impact was dreadful, but one of the lessons to be
 8 learned is that when you impose what are essentially
 9 criminal sanctions, even if you don't end up with
 10 a criminal record, you've got to make sure you get it
 11 clear and right. And maybe if we'd been better
 12 prepared, all of us, before, we might have had some
 13 draft bills or offences that we could have implemented,
 14 who knows. But thank you for your help.

15 **THE WITNESS:** You're very welcome. Thank you.

16 **(The witness withdrew)**

17 **LADY HALLETT:** I think it's 10 o'clock tomorrow. For those
 18 who were interested in seeing the evidence of
 19 Alister Jack MP, for reasons that are not his fault,
 20 they are not the Inquiry's fault, I'm afraid we can't
 21 call him tomorrow, I understand, so we'll start with
 22 Elizabeth Lloyd. We hope to call Mr Jack next week.

23 **MR TARIQ:** Thank you.

24 **(4.22 pm)**

25 **(The hearing adjourned until 10 am**

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1 other things like more consistent, clear legislation
 2 that was distinct from guidance, and focused on
 3 supporting people to follow the rules rather than
 4 punishing them for not following the rules, then if you
 5 were to move away from a fixed penalty then a formal
 6 warning would be the next level down.

7 I think you have to remember that laws are there for
 8 the majority -- for the most part to deter the
 9 law-abiding majority, and in the context of the pandemic
 10 most people were the law-abiding majority. You know,
 11 we've talked about enforcement today, but in Scotland
 12 less than 0.5% of the population were subject to
 13 enforcement. So in the grand scheme of other
 14 inequalities and impacts the pandemic had, enforcement
 15 might seem quite a small thing, but it did impact on
 16 thousands of people and it impacted disproportionately
 17 on people from more deprived backgrounds and individuals
 18 from certain social groups.

19 So I think it's always important to try and minimise
 20 the effect of any sanctions in the context of a public
 21 health emergency, where there are lots of other
 22 inequalities that are going to be impacting on these
 23 individuals. And very often the inequalities intersect,
 24 so the people who were subject to repeat fining,
 25 for example, were highly likely to be people who were
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