LADY HALLETT: Mr Tariq.

MR TARIQ: Good morning, my Lady. May I please call Rachel Elizabeth Lloyd.

MS RACHEL ELIZABETH LLOYD (affirmed)

Questions from COUNSEL TO THE INQUIRY

MR TARIQ: Could I check that you’re commonly known as Liz Lloyd?

A. I am indeed.

Q. There’s a few preliminary matters I wanted to discuss with you before we get to the substance of your evidence. Can you keep your voice up and can you speak slowly because there is a stenographer that is taking the evidence. If any of my questions are unclear, please say so and I can repeat or rephrase.

You’ve provided two statements to the Inquiry, and both these statements are dated 15 November 2023. The first statement is on screen. This is at INQ000274006, and this is a statement that explains your role in the Scottish Government’s response to the pandemic.

I understand that there was a correction that you wanted to make at, is it to paragraph 13?

A. Paragraph 13, yes, there’s a fairly obvious, I hope, typographical error. I have used the date “late 2019/early 2020” when that should be “late 2019/early 2020”.

Q. I think it was obvious to the Inquiry that you were talking about 2019 into 2020. So subject to that amendment, can you confirm that this is your statement?

A. It is.

Q. And are you -- are the contents of this statement true to the best of your knowledge and belief?

A. They are.

Q. There’s also a second statement that you gave to the Inquiry, which is also dated 15 November 2023. This is INQ000274004, and this is a statement about the use and retention of informal communications such as WhatsApp messages. Can you confirm that this is your statement?

A. It is.

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

A. They are.

Q. Thank you.

I wanted to move on now to discussing your professional background before we get to your role during the pandemic. You were employed as a special adviser to the Scottish Government from January 2012 to, I believe, 23 March 2021; is that correct?

A. Yes.

Q. And then after a short break, you were back in post as a special adviser from August 2021 to around 28 March 2023; is that correct?

A. That’s correct.

Q. And you served as the chief of staff to the then First Minister of Scotland, Nicola Sturgeon, from January 2015 to 23 March 2021; is that correct?

A. Yeah, that’s correct.

Q. Then you returned to the Scottish Government, as we’ve said, in August 2021, and this time your role was as strategic political and policy adviser to the First Minister within the special adviser team; is that correct?

A. Yes, that’s correct.

Q. And you remained in that role until the resignation of Nicola Sturgeon as First Minister of Scotland at the end of March 2023, at which point you also chose to leave government; is that correct?

A. That is indeed.

Q. And you now work in the private sector, I understand?

A. Yes, I do.

Q. I now want to turn to ask you about the role of special advisers more generally before we get to your involvement in the pandemic.

There is a special advisers’ code of conduct; is that correct?

A. There is, yes.

Q. And this describes the role of a special adviser as adding a political dimension to the advice and assistance available to ministers, and the code notes that one of the reasons for the role is to reinforce the political impartiality of the permanent civil service so that the political advice can come from the special advisers as opposed to the permanent civil servants; is that correct?

A. That is correct.

Q. Professor Paul Cairney gave evidence in week 1 to the Inquiry, and in his report he says that special advisers are appointed by the First Minister personally and ultimately the responsibility for the management of the special advisers rests with the First Minister. Is that your understanding?

A. That is correct. I would say the day-to-day management of the special adviser team is delegated to the chief of staff.

Q. Yes, but ultimately the --

A. Ultimately, it’s the First Minister.

Q. -- responsibility rests with the First Minister.

In your first statement, you say, and I’ll simply
quote at this stage:

"Special Advisers are not decision takers but support the decision-making process by supporting ministerial thinking and assist in the application, understanding of and communication of ministerial decisions."

Therefore, am I correct to understand that the role of a special adviser is not to take the decisions themselves.

A. That is correct, yes.

Q. And there has to be clear boundaries between the decision-makers, such as the Scottish ministers, and special advisers as it's only the ministers who are elected and therefore accountable to the public; is that correct?

A. That's correct.

Q. And as special advisers you're neither elected nor accountable to the public?

A. That is broadly correct, yes. I always felt accountable to the public.

Q. But in terms --

A. But not formally.

Q. Not formally. And your role is generally not meant to be public-facing, unlike the politicians, is it?

A. That's correct.

well, would receive advice from scientists, they would be looking at, you know, broader information on legislative proposals, policy proposals, and sometimes ministers need a place or a person where they can essentially think out loud without that being taken as their definitive view. So my role and the role of other special advisers frequently is to engage with them to help them stress test ideas, to talk out what might the consequences of a particular route of action be, help them come to, you know, are there other questions they should ask, do they have all the information they need, and to help them explore, if you like, the advice and information before them.

Q. So in the context of a particular decision that the First Minister or another minister needs to make, there may be competing considerations, there may be competing almost briefings coming from different interests, whether it be economic, whether it be scientific or medical, and part of the role of the special adviser is to be able to almost stress test the different perhaps conflicting advice so that the minister can make the decision?

A. Yes, yes.

Q. In your statement, and I won't take you to this particular part, but I think you say that it would be

normal for you to attend decision-making meetings with the First Minister where she was in attendance, and this included meetings with the Scottish Government Cabinet, the Scottish Government Resilience Room, the gold meetings, COBR meetings, and the four nations calls with Boris Johnson and Michael Gove. Is that correct?

A. That's correct.

Q. So it's fair to say that you were a particularly important part of the Scottish Government's response to the pandemic until at least March 2021; is that correct?

A. That's for others to judge, but I was certainly there and certainly participating in the response.

Q. You were there in almost all the --

A. Yes.

Q. -- meetings --

A. Yes.

Q. -- important meetings and in the rooms where the decisions were being made?

A. Yes.

Q. And you were the thought partner or the sounding board for the First Minister when it came to stress testing perhaps the different conflicting advice that was being received?

A. Yes.

Q. And there would be, I think, is it fair to say, very few
people within the Scottish Government that would perhaps be in the room for all the key meetings with the First Minister during the course of the pandemic?

During the course of the pandemic, it was common for -- there would be a few other people that you would see at most of the meetings. So the Cabinet Secretary for Health would be present very frequently, the Deputy First Minister was present a lot, sometimes remotely because, for reasons, he would be working from home, ken Thomson, the Chief Medical Officer, or one of the other medical advisers, but there was a core group who were in St Andrew's House a lot and in a lot of those meetings together.

Q. And you were part of that core group?

A. And I was part of that, yeah.

Q. Can we turn to your first statement, and it's at paragraph 36, page 9. Here I think you say: "I would not say I advised on the adoption or not of specific NPIs [that’s non-pharmaceutical interventions], that was for the clinicians and officials, but I would have given views at certain points on the interpretation of the data, of public mood and compliance, of communications and where there was politics involved -- for example securing the support of other parties or governments or impact on stakeholders such as through border controls -- on that aspect."

Q. Yes, so you advised but I think your position, I think more accurately, is you didn’t make the ultimate decision?

A. Yes, and nor did I sort of say "Here is your selected list of NPIs", they would come in proposals from the Chief Medical Officer, for example, and we would then discuss the kind of things that were on the table.

Q. Can we turn to some WhatsApp messages that you have disclosed to the Inquiry between yourself and Nicola Sturgeon. I will come back to the circumstances of the disclosure later on.

A. Okay.

Q. But first of all can we turn to INQ000287766, and we’re looking at page 9. And by way of context, the Scottish Government announced the rules that permitted 20 people at funerals, weddings and civil partnerships, and those rules kicked into force on 14 September 2020, and Nicola Sturgeon was due to announce new restrictions to the Scottish Parliament on 22 September 2020, and in fact the usual briefing time was changed from 12.15 that day to 2.20 that afternoon, and here we have an exchange of messages, this is shortly before Nicola Sturgeon was due to make the announcements about the new restrictions that day, and this exchange relates to a discussion about whether the rules should be changed for weddings, civil partnerships and funerals.

If we start by reading the top message, so Nicola Sturgeon says -- and this is on 22 September at 12.09, so shortly before she’s due to make the public announcement: "We haven’t thought about weddings. They are reducing but not sure what to."

You reply: "I think as we only just put them up just leave it."

Then you go on to say: "They aren’t including churches etc as far as I know and I think -- though will check -- that they were higher than us."

Then you say: "They had 30....we have 20."
1. seeking scientific advice would have been the
2. on-the hoof aspect; suggesting that you stick at the
3. decision that had been taken based on information was
4. a more coherent position.
5. Q. But we can see that Nicola Sturgeon's first WhatsApp to
6. you is "We haven't thought about weddings", that seems
7. to suggest that there wasn't really much thought process
8. that had gone into the decision until this exchange with
9. you, which begins at around 12.10?
10. A. No, I think she means we haven't thought about changing
11. weddings, if you like, in response to the UK Government
12. changing weddings. We had thought about weddings when
13. the decision had been taken positively and proactively
14. in Cabinet to set the limit at 20.
15. Q. So is it fair to say that because Nicola Sturgeon comes
16. to you, not being sure what to do, and ultimately, as
17. the Inquiry has seen, that on this date there was no
18. change to the rules, and you were the one that suggests
19. that "we stay at 20", are you effectively the main
20. driver of this decision?
21. A. No, I don't think so. If the First Minister has -- the
22. First Minister has a strong enough mind that if she had
23. felt that my advice was not the right advice, she would
24. have said so or she would have acted in another
25. capacity, asked for further advice, delayed the position

1. at 20. If she had wanted to pursue it, to consider it
2. further, perhaps after receiving the statement she may
3. have, there would be exchanges in some other fashion.
4. Q. There wasn't any scientific briefing that you received
5. that appears to have informed your view, let's stick
6. with 20, was there?
7. A. There would have been on the decision which had very
8. recently, I think that, you know, a day or two before, 20.
9. had been taken to set it at 20.
10. Q. I believe that the decision to move it down to 20 had
11. been taken around maybe 10 September, and the decision
12. had come into force on 14 September, and what we are
13. talking about is, here, looking at 22 September, and
14. from the documents that have been disclosed to
15. the Inquiry, there -- between -- the Inquiry's looked at
16. all of the documents between 10 September and
17. 23 September, and the Inquiry can see no advice being
18. given between these dates about whether the number
19. should remain at 20 or whether it should go up or down.
20. So is this not an example of a decision simply being
21. made on the hoof, shortly before the First Minister is
22. meant to be announcing restrictions?
23. A. I would think that advising that shortly before the
24. statement on restrictions was about to be made that
25. a decision should be taken to change the limit without

1. on weddings, she would have acted on that. I am
2. advising. I sought the correct information, if you
3. like, on the factual basis to give that advice, but the
4. decision is very much hers.
5. Q. If these messages had been deleted by you -- and they
6. haven't, because that's why we have them -- how would
7. the Inquiry and the public be able to understand how and
8. why the decision was made at this time not to change the
9. number of people that can attend funerals or weddings?
10. A. So as I've said in this regard I have recollection of
11. contacting, I think on Teams, the official responsible
12. for the sort of framework documents, if you like, to
13. check my facts, to check what it was. They would be
14. able to see the decision that was made, which was the
15. decision to stay at 20 being made previously, as
16. essentially the decision to set at 20 through the
17. process of advice and Cabinet papers, so that decision
18. would be very -- set out in very great detail. The
19. exchange I will have had the official will have said
20. "The First Minister is asking about weddings, what's the
21. position?"
22. Q. But ultimately the public, if this message had been
23. deleted, and the Inquiry, would not know that the
24. decision -- ultimately the First Minister, as at 12.10
25. that day, wasn't sure what to do and in fact within
a couple of hours when she announced the restrictions
she'd reached a view that the numbers would not be
changed and all of that had occurred within a very short
time involving a WhatsApp discussion with you.
That wouldn't be the sort of insight that the public
or the Inquiry would have if these messages had been
deleted; is that correct?
A. I think there may not be that insight into, if you like,
the moment of "Oh, should we think about this?" The
sort of -- the reflection on "Is the advice that we have
at the moment the correct advice?" But they would know
why the decision on weddings was that there should be
20 people.
Q. And the reflection is part of the decision-making
process, isn't it?
A. It can be. I think in this it is, "Are the UK doing
something that we should be doing?" That will be --
I would expect to find in notes from officials providing
"This is what the UK is doing", and considering, in
slower time, perhaps before the next update of the
regulations, should we adopt any of this. But that
split second, if you like, of indecision would not
necessarily be recorded elsewhere.
Q. Could I just confirm, so do you agree with me that this
would be an important part of the specific decision that

Q. -- but you've also got the human side that you've
touched upon, which is as being a thought partner or
a sounding board, where you get to see people's real
maybe struggles with the decisions that they're making,
needing different viewpoints and insights, and together
that forms the full context to that decision, doesn't
it?
A. Yes, I think there can be moments where a bit of,
perhaps, reassurance is required or making sure that we
essentially don't take informal decisions when formal
decisions have been taken. So had there been a decision
here to change, that would have been a decision based on
no scientific advice at all, taken in, you know, the
space of 20 minutes. When you have a full, proper
process this is essentially deferring back to the proper
formal process.
Q. The formal process which, I think, in this instance, had
occurred about 12 days before or --
A. Yes.
Q. -- there or thereabouts?
A. Yes.
Q. Can we turn to INQ000287766.
This is again your WhatsApp messages, we're looking
at page 35.
A. Sorry, can that be made just a touch bigger?

Q. I think they will hopefully come on screen a little bit
bigger?
A. They're a little blurry.
Q. We are looking at -- does that help?
A. Yes, that does help.
Q. Thank you, helps me as well, so I think we can both
read.
So this is a discussion between you and
Nicola Sturgeon about the number of people who could
meet indoors from March 2021, so if we look at the first
message, it's from you saying:
"When you respond on Cabinet paper -- in June --
could we make it 6/3 indoors -- it's just much more
normal!"
Can I just pause there, what's the significance of
the numbers 6 and 3?
A. I believe that would be 6 people, 3 households.
Q. And then if we -- Nicola Sturgeon's reply is:
"That will be after 4/3 mid may I assume?"
You reply saying:
"Indoors April 4/2, May 6/2....is what I currently
have."
Nicola Sturgeon replies:
"Is that indoors in pubs etc? thought we were
waiting til may for indoor households."
You reply saying:

"We appear to be waiting till June for indoors at home..."

You also reply:

"So in pubs etc it's 4/2 in April, 6/2 in may ... and then in June it should go to 6/3 and we allow you to meet in your own home."

You reply -- you again say:

"Cabinet paper doesn't actually run all the way to June but my mock graphics do."

Nicola Sturgeon replies:

"We should bring indoor houses to mid may."

You reply saying:

"Can you make that your feedback or do you want me to do it."

And she replies:

"I'll do it."

So if we pause there, in this exchange, you are pushing for or maybe advising --

A. Advising.

Q. -- that there is a change of the rules on the amount of people who can socialise indoors; is that right?

A. So this refers to a proposal, so the numbers 4/2, 6/2, I'm not just pulling those out of the air, this is a proposal and a draft of a Cabinet paper and in a draft

they were proposed in the abstract without considering the way in which people function in their real life, and particularly around how people interact with each other, you were seeking to balance caution and protection from the virus with the kind of normality that might be good for people in a more societal sense.

Q. Was that a consistent theme up until -- your involvement till March 2021, that the advice that you were -- the scientific and medical advice that you were receiving often seemed very much in the abstract, devoid of kind of the real world and how people live?

A. I think -- I don't want to suggest that the people giving the advice were sort of abstract and devoid of understanding, but it was their job to provide, you know, what is the appropriate regulation at a very -- on a very strict basis, it was not their job to consider what does this mean for people's mental health, what does it mean for their family relationships. They were there to consider what will keep the R number to its lowest level, if you like.

There were other people who would feed in points about "Well, actually, if you could make a slight tweak to that, does that make it better for people societally or in a mental health sense?" and "What's the impact of that on -- is that -- does that have serious consequences?" or "Is that a move we have space to make?" if you like.

Q. So it wasn't strictly the case that the Scottish Government was following the science, because the science had a role to play but there was this other element that you, for instance, and other special advisers, and indeed other stakeholders, would bring into the decision that wouldn't necessarily be science-based?

A. The science underpinned everything, and if you suggested changes, if ministers wanted to do something different, there would normally be a sort of referral back to see if we could calculate what that might do, if a minister proposed something that would push the R -- or that would be calculated or modelled to push the R number above, then that would likely not be taken forward. So you were underpinned by the science and, if you like, cautioned by the science in how far you could go.

Q. But not necessarily -- science wasn't the be-all and end-all of the Scottish Government's approach?

A. It was dominant but I don't think you can take decisions in a situation without being aware of other factors.

Q. And what we see here in this exchange is that there is a decision to go to Cabinet with, I think, what yourself and the First Minister have discussed and that's going...
to be Nicola Sturgeon's view presented to Cabinet in terms of the change of rules.

A. Well, this confirms that it's going to be her feedback to the Cabinet paper. That would create an opportunity, if the clinicians, for example, thought that was inappropriate, for them to come back on her feedback -- and this would all be in formal exchanges, if they did this -- to say "First Minister, actually we would rather not do that and this is why we would rather not do that".

Q. Is it fair to describe the role of the Scottish Cabinet at times as being a decision-making ratifying body as opposed to a decision-making body, so it ratified decisions that had been made elsewhere, whether it's in informal communications, whether it's in gold command meetings or in other one-on-one discussions between key decision-makers, and the role of Cabinet was, at times, simply just to ratify those decisions?

A. No, I don't think so. I think everything that went to Cabinet was a proposal and Cabinet ministers would push back sometimes, ask for amendments, ask for changes, some decisions may be deferred because Cabinet members wanted more information or the First Minister wanted more information. There was an extensive process of engagement with clinicians, advisers and Cabinet ministers before the Cabinet paper would come to Cabinet, so there would be opportunities prior the Cabinet for people to feed in, but there would also be genuine discussion at Cabinet.

Q. Would there often be instances where the ultimate decision was delegated by Cabinet to, for instance, Nicola Sturgeon or John Swinney?

A. There were certainly occasions where Cabinet would agree to delegate a decision, yes.

Q. What sorts of decisions do you recall that were delegated to Nicola Sturgeon or John Swinney during your involvement in the pandemic?

A. Decisions that were delegated were, tended to be -- sometimes in the relationship to the communications around a decision, sometimes in relation to the timing of the announcement of a decision, and sometimes where an additional piece of information or a piece of analysis was to come in, and Cabinet members would have the chance to put their views in writing or to speak directly to the First Minister but there would not be another Cabinet meeting called. If, for example, you had the Cabinet meeting, say, on the Tuesday and you were looking at something that you might announce on the Thursday and an additional piece of information was requested, you wouldn't necessarily recall Cabinet, the information.

Q. Was an example of a decision that was delegated to Nicola Sturgeon, or maybe perhaps John Swinney, around the local restrictions? You'll remember when the levels system came in and decision-making around, for instance, whether Glasgow would remain in level 3 or 2 or whether Edinburgh would go up or down. Is that the sort of detail that was delegated to the First Minister to make?

A. You would have a broader discussion around what the levels would be, but the final check, if you like, on the morning of the announcement against that day's figures would be delegated, so to check that there wasn't a need to adjust, if you like, what had been agreed in the broader discussion.

Q. That's maybe an issue that we'll explore with further later witnesses.

I wanted to turn to the political strategy behind the Scottish Government's response to the pandemic. Is it fair to say that you spent a lot of your career, perhaps less so now, strategising about Scottish independence?

A. I think supporters of Scottish independence might be disappointed with what my answer is, but not as much as people would have thought or would have liked. A large part of my political career's been spent strategising about what the Scottish Government does in other policy areas, but yes, I have had a role throughout in the progress of Scottish independence.

Q. And how many years would you say that you've had a role in the strategy for independence?

A. Probably from around 2012.

Q. Could we turn to the Cabinet minute from 30 June 2020. If we look at the first page, you will see that this is a Cabinet conclusion, and it's from 30 June 2020. If we look at the first page, you will see that this is a Cabinet meeting which is attended by everyone, in terms of the Cabinet secretaries, that you would expect, including the First Minister, and you're also in attendance, you're noted as a special adviser.

Can we turn to page 13, paragraph 56(e), and you will see here that one of the Cabinet conclusions is, and if it can be -- thank you. If I can read, it says: "Agreed that consideration should be given to restarting work on independence and a referendum, with the arguments reflecting the experience of the coronavirus crisis and developments on EU exit."

So this is a Cabinet conclusion, and it's from 30 June 2020. Are you able to tell us what the significance of a Cabinet conclusion is?
Yes, so you would have a Cabinet paper, I think in this case it was on EU exit, and at the end of a Cabinet paper there are normally a set of actions proposed, and this would have been one of the actions proposed in the paper on EU exit. I -- the fact that something is in the Cabinet conclusion does not necessarily mean there was an active discussion on that particular issue. So this is (e), so there would have been five points in the EU exit paper. I have -- as you know, I have contemporaneous notes of some of these meetings. If we had had a discussion on independence and the constitution, it would have been in my notes, I was the chief political adviser to the government. It is not. So my recollection and what that tells me is that there was no substantive discussion on issues around independence and a referendum at this meeting. There was a discussion around EU exit and this had been included in the paper. You've already discussed that there's a place for formal structures and informal discussions within the decision-making process. One can't get any more formal in terms of decision-making than what's in the Cabinet minutes as the agreed actions. Do you accept that?

Yes.

And it carries perhaps more weight about what the references that I can think of in the programme for government of the following year, so that would be the programme for government 2021/2022, where there's maybe one or two paragraphs, and they make clear that any action would be contingent on the state of the Covid pandemic. I don't think anything happens until at least after the 2021 election. But there is, from late 2020, some press coverage where other politician parties are telling the Scottish Government to stop talking or concentrating on independence and focusing on the pandemic response. Do you recall those sorts of press coverage starting from late 2020 going into early 2021?

I think the constitutional position of the Scottish Government, and I don't mean to be flippant in this reply, but any breath of the word "independence" would lead the opposite parties to say "You are focusing on independence over the pandemic". You could have been working 18 hours, 20 hours a day on the pandemic, not seen anything on independence for the course of the year, it would not stop an opposition member saying that we were focusing too much on independence.

We'll come back to the topic of independence.

Can we look now at your notebook, and this is at INQ000346141. Just before we look at the specific page, Scottish Government is seeking to do than informal notes that may exist, this being in a Cabinet meeting minutes?

A. Normally I would agree with you, and in the other points I do. What strikes me about this point is it was agreed that "consideration should be given"; it wasn't agreed that we would do something other than think. And the -- following this period no action is taken on independence or a referendum during this period, so to the end of 2020. If it had been, I would have been involved in it. There is nothing that I am aware of that the government proactively did. If the government had proactively done something, there would be much evidence of it: there would be published papers, there would be statements and there would be occasions in Parliament. This was a focus on the fact that we were about to leave the EU, which was, during 2020, the dominant constitutional concern of the Scottish Government.

Q. So when do you say that independence became a subject matter under discussion in the Scottish Government during the pandemic?

It generally didn't. So I worked on the pandemic March 2020 to March 2021. One of the first steps we did was suspend work on independence and the referendum. The team that worked on it was disbanded and sent to work on Covid-related activities. There are a few references that I can think of in the programme for government of the following year, so that would be the programme for government 2021/2022, where there's maybe one or two paragraphs, and they make clear that any action would be contingent on the state of the Covid pandemic. I don't think anything happens until at least after the 2021 election. But there is, from late 2020, some press coverage where other politician parties are telling the Scottish Government to stop talking or concentrating on independence and focusing on the pandemic response. Do you recall those sorts of press coverage starting from late 2020 going into early 2021?

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Q. We'll come back to the topic of independence.

A. That's correct.

Q. If we are able to look at the -- I'm just waiting for -- it's the next page.

(8) Pages 29 - 32
Q. -- is that correct?

We have heard evidence from witnesses, including Professor Devi Sridhar, of the importance of cohesion in the response between the UK Government and the Scottish Government, and this is in the context of public health. These tactics, whether you can call them political tactics, of going public would create more division with the UK Government, wouldn't they?

A. As I said, in an ideal situation the UK Government would have agreed that funding would be provided so that the Scottish Government could put in place the public health restrictions that we wanted and then there would have been no need for any pressure. Sorry, the -- it's disappeared from the screen. The purpose of this is not division, it's not to have an argument, it's to be able to put in place the public health restrictions that we were being advised were required at that time. When private discussions do not get you to the place where you have access to the finances that you need to do that, you have to explain to the public why you're not doing it, and in opening that up it's to be very clear that it's the UK Government's decision not to provide finances that is impacting on your ability to put in place the public health measures that you want. I don't call that a spat.

Although I wrote "political [tactic]", it's not partisan, it's not about boosting or, you know, knocking support for one government or one party. It's about trying to do the job that we were trying to do and finding ourselves very frustrated in doing. Why did you feel in terms of intergovernmental regulations that you needed to go public with your concerns and you weren't able to raise these privately with the UK Government?

A. I think there would be a number of issues that we would resolve privately but this one was not being resolved privately. We were in this position, the Welsh Government were in this position, the Northern Ireland Government were in this position and we were making no headway, so you reach a point where you have to say to the people you represent why you are not able to do something that you are being advised to do. That means going public on the fact that you can't afford it, that means going public on the fact that you may have asked the Treasury for money and they were not providing it. It's not a "we are doing this to stir up political contest", it's "we can't do what we're trying to do and we need to tell you why".

Q. Can we go back to your WhatsApp messages, and this time, political strategy was to create what might be seen as a public spat with the UK Government to force their hand. What was the political advantages of that sort of strategy?

A. It's not about a spat. This would be about putting pressure on the UK Government. It's not deliberately falling out; in the ideal world they would have accepted the points that we were making to them.

For -- if I can give a bit of context and then get to -- this was weighing up how we could put further restrictions on, potentially, a circuit-breaker with minimal economic impact, because the Scottish Government didn't have the means to provide economic support to individuals or businesses if we went for the full circuit-breaker. What we needed was the UK Treasury to open up additional funding, to extend furlough, to enable us to take actions to do that. And this, I think, is about us setting out very clearly what we wanted to do in public health terms but what we couldn't do to try to build pressure on the UK Government, who were not amenable to this discussion in private, to force a change of position.

Q. And you would need to do that publicly, and that's the reference to the political tactic --

A. Yes.
my Lady, I wanted to give a warning that there will be some bad language in some of these.

LADY HALLETT: I'm used to it.

MR TARIQ: Yes. I think it's partly for the broadcasters rather than your Ladyship.

A. Apologies, I thought I'd been quite restrained.

Q. We're looking at page 20.

A. Oh, it's not my language?

Q. Yes. And just to give some context, on 31 October 2020 at 6.30 pm the Prime Minister Boris Johnson began his address announcing the second national lockdown, and I want to pick up the messages between yourself and Nicola Sturgeon which starts ten minutes into the address.

So if we read the first message on 31 October at 6.40 you say: "Hitting the 15 [minutes] between the rugby and strictly to lock the country up... let us never do this like this."

Nicola Sturgeon replies: "Their comms are behind awful. We're not perfect but we don't get nearly enough credit for how much better than them we are."

She then replies: "This is fucking excruciating -- their comms are work hard to mitigate, because people in Scotland see both. So, yeah, we were clearly not very complimentary about their communications handling that day.

Q. Is it fair to say that the relationship between Nicola Sturgeon and Boris Johnson by this date had completely broken down?

A. I think "broken down" to a degree overstates what was there to break. They had met on a number of occasions, there was always a politeness, a business-like approach to it. When Boris Johnson first became Prime Minister and came to meet Nicola Sturgeon in Scotland, they had a discussion that I think has been described pub -- as it was more like a debate, you know, two intelligent people engaged in discuss about policy issues.

When we got to Covid, I think it was much harder. It was evident in his exchanges with the Scottish Government, with the First Minister -- and I think with the other First Ministers, because we would all be on the same call -- that he didn't want to be on those calls, he wasn't necessarily well briefed on those calls, and he wasn't listening to the points we were making on those calls. And so I think engagement with him came to be seen as slightly pointless during this period.

Q. I think it's going as early as -- it was March 2020,
they didn't get us anywhere.

So we started with a very clear approach that we should all try to work together, and moving into lockdown was all done in a co-ordinated fashion, but when you got to what I think the First Minister wanted to be substantive discussions about what direction to go in, a thrashing out of different proposals and different ideas, that wasn't what we got. We got a Prime Minister who, it certainly felt at the end of the video screen or at the end of the line, was reading a script and would summarise the contributions of the three First Ministers and the Deputy First Minister from Northern Ireland in ways which largely ignored the points that they had made.

Q. How early on in the pandemic response did you come to that realisation?

A. It was difficult -- I mean, it was more effective at the beginning, sort of March, although it was obvious that they were not, you know, hugely keen on having us there and being in the room. It was actually quite effective with Dominic Raab for the period in which the Prime Minister was in hospital. And it's when the Prime Minister sort of re-engages in the discussions that it is evident, as you're talking about the lifting of restrictions for example, changes in messaging, to be substantive discussions about what direction to go in, a good old fashioned rammy so can think of functioning relationship between the two leaders of the respective governments, does it?

A. I mean, this is later than that point that you raised earlier about May, by which point I can't think of conversations in this period that were happening directly with the Prime Minister, they were happening with Michael Gove.

Q. Can we now turn to page 21, and we are now looking -- we've now moved on to 1 November 2020, and I wanted to look at messages that begin at 6.29 pm. Here you say: "My reason for setting a timeline for them to answer us on furlough is purely political -- especially as we expect the answer to be no, it looks awful for them, and creating that kind of pressure could possibly result in a yes (though agree we shouldn't bank on it). Think I just want a good old fashioned rammy so can think about something other than sick people."

Nicola Sturgeon replies: "Yeah I get it. And it might be worth doing. I've sent a rough formulation of what I might say tomorrow -- I could for it in there."

So if we pause there, can you help us, what do you mean by "good old fashioned rammy" with the UK Government?

A. I think this is an expression of frustration that we were not able to manage the pandemic at this point in time in the way that we wanted and -- I mean, "a good old fashioned rammy" is language I would rarely use, actually, but, you know, is that we needed to have the argument in public. There were a lot of things in Covid where we didn't have the argument in public, there were a lot of things in Covid where the UK Government did something and we just let it go or they didn't do something and we just let it go. I particularly felt this issue of furlough at a time when we wanted to apply restrictions and furlough was ending was -- was materially important to the handling of the pandemic. It was a hindrance to our ability to handle the pandemic. And I can't deny it, I was angry about that position because it really did block our ability to do what we wanted to do. So I think the message reflects that frustration perhaps bubbling over a little bit.

Q. Yes, I think earlier on we'd looked at your notebook and the entry from the gold command from 28 September and I think you'd said you take an issue with how I characterised it as a public spat. By this stage on 1 November you are looking for a public spat with the Prime Minister of the United Kingdom was a clown, or didn't want to be there. I could for it in there."

I just want a good old fashioned rammy so can think of restrictions in England is going to be different to the approach to lifting restrictions in Scotland, Wales and Northern Ireland, and that I think the sort of philosophy or ideology behind the lifting of restrictions was coming from a different place. So that is, I think, the point at which it becomes clear that we're going to go in slightly different directions and we have to try to work out how to go in different directions within the UK as a whole. Is this the point where it becomes clear that there is going to be a difference in approach between the two governments, that the approach to lifting restrictions in England is going to be different to the approach to lifting restrictions in Scotland, Wales and Northern Ireland, and that I think the sort of divergence in the approach between the two governments, or did it occur earlier than that?
A. I am definitely looking -- you know, I'm clearly looking to air the issue strongly and publicly, and, as I say, in the vague hope that it might get us an answer, might get us a yes.

LADY HALLETT: You were looking for a public spat?

A. I'm looking for a public spat for a purpose. A public spat could often deliver results. If the public pressure on the UK Government was there, it had been shown in the past that they would sometimes change their mind if they felt that pressure, and what I want them to do is change their mind.

MR TARIQ: So the discussion is whether the furlough scheme should be available to Scotland, because at this stage England had just entered into the second national lockdown in England, and you're setting what is effectively a political trap for the UK Government if it refuses to extend the furlough scheme to Scotland it looks awful for them and strengthens the argument for independence, because you need to go alone, or if it extends the furlough scheme to Scotland there is additional funding available to Scotland. Therefore, for the Scottish Government, a good old fashioned rammy with the UK Government is a win-win situation; is that not the essence of the point that you're making here, that you're looking at this from purely political

Q. Can we turn to now page 23 in these WhatsApp messages, and here, just by way of context, what's being discussed here is efforts to have a four nations approach to restrictions over Christmas in 2020, and you'll see messages from you that begin at 9.04 pm and you say:

"Gove wants to talk tomorrow -- have said to ..."

And there is a name redacted.

"... to hold off going back till the morning and suggest waiting for the proposal before agreeing."

Nicola Sturgeon replies:

"I've just seen the email. I'm happy to do call, subject to proposal...but I wonder if we should make clear in advance we won't agree anything without cabinet approval (and get Wales to sign up to that)."

You reply:

"Yep Cabinet Tuesday is a good marker. Tuesday or [Wednesday] might not be bad days for us to announce either. I am increasingly leaning to just one other household after seeing the poll. But I'm also a grinch about Christmas."

Then Nicola Sturgeon replies:

"I am too -- but on this I (reluctantly) think there's merit in uk wide position. Let's see the proposal."

So Nicola Sturgeon's reply to you on 20 November,
the public domain that people will be getting some
sort of relief from Covid over Christmas. We have not
seen a proposal that we are about to go onto a phone
call and be asked to agree to. So this again goes to
some of that what was to us a chaotic and shambling
sort of approach. So it's very hard to sign up to
something and to enthusiastically embrace something that
you have had no input into.

Q. Were your advisers, whether it be scientific, clinical,
medical advisers, advising you about the benefit of
having a cohesive approach across the UK around the
restrictions over Christmas 2020?

A. Yes, to an extent, in part because of travel, and it was
trail that led us largely to look for a cohesive
approach. What I recall of the advice from advisers
around Christmas was, you know: we don't think this is
a good idea, make it as minimal as you can if you have
do to it at all.

Q. I now want to move on in the period to, you left your
role as chief of staff in March 2021, and you say that
after a short break you came into the role of strategic
political and policy adviser to the First Minister in
August 2021. I think you say in your statement that you
didn't have any involvement in the pandemic response
beyond this date except for COP26, which took place in

things like the new economic strategy, the draft energy
strategy, the resource spending review. I attended some
of the constitution secretary's independence meetings
but I did very little work on it. It was not my
purpose.

Q. Just so I understand, in your role as strategic
political and policy adviser to the First Minister, and
this is around the same time that there's movement
towards a second independence referendum, your position
is that you didn't actually do very much work on
independence?

A. I didn't. There was a delegated special adviser whose
role was the constitution, he covered Brexit, primarily,
and the development of the work on independence.
I think it might be useful to say I had not been in
government over that summer and I think -- there's has
been a reference or material provided -- a BBC article
sort of headlining this independence issue on that date
in September that you remembered -- or cited, which is,
again, the publication of a programme for government.
I had had no involvement in the writing of that
programme for government. Unusually. It was the first
one in probably ten years that I hadn't been part of.

And it has maybe a page's worth of references to
independence in a 180-odd page document. It was

Glasgow I think, in November 2021; is that correct?

A. That's correct.

Q. On 7 September 2021 Nicola Sturgeon announced that work
would start again on the second independence referendum
campaign. Does this announcement or did this
announcement coincide with your change of position from
chief of staff to becoming the chief political adviser
and strategic --

A. It broadly coincides in date terms but it doesn't
coincide in reason. I did not take a post -- my post
was not involved in any move on independence.
I attended the odd call, but it was not -- it was far
from the principal purpose of my job.

Q. What was the principal purpose of your job after
August 2021?

A. Initially it was the COP26 summit and to lead the sort
of Scottish Government's policy work in preparation work
in preparation for that. It was then to focus -- and
this was something I had felt as chief of staff we were
missing, was to step back from the frontline, from the
media, from the Parliament, from the day-to-day, and to
focus on some of the long-term commitments that we had
as a government and that we'd made in the 2021 election
around moving to renewable energy, around reaching net
zero, around tackling child poverty. So I worked on

a programme for government that set out, as we had in
the election, a number of key policy objectives within
government and I had moved to lead on those policy
objectives because I had a reflection, which the
First Minister had shared, that you needed a special
adviser who could work across portfolios, with her
certainty, to try to inject some energy into them.

Q. Did the move towards pushing for a second independence
referendum, did that reflect a change of priority for
Nicola Sturgeon away from the pandemic response and to the
second independence referendum campaign in the
middle of 2021?

A. At that time, no, for her. I mean, I wasn't there day
to day, but my recollection of her in that time is that
she remained incredibly focused on the Covid pandemic.
You can think about more than one thing at a time when
you're First Minister, but she devoted vast amounts of
time to the Covid pandemic during this period, so ...

Q. Was she devoting vast amounts of time to the
independence strategy around this time?

A. It was largely led by the Cabinet Secretary for the
Constitution.

Q. I wanted to move on to another area, and this is around
the public health messaging during the pandemic.

You say in your first statement, and I don't intend

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to bring this up, that you’ve considerable experience in
public communications. Is it fair to say that until at
least March 2021 you played an important role in the
Scottish Government’s communications strategy in
relation to the pandemic?

A. Yes.

Q. And this included leading on, for instance, the
preparations for the daily media briefings; is that
correct?

A. I would share that responsibility with the head of the
Covid briefing unit, but yes.

Q. And in fact we’ve seen some WhatsApp messages that you
were actually one of the people that would decide, for
instance, which adviser would appear on any given day.
Does that accord with your recollection?

A. “Decide” is possibly strong. I would suggest who would
come on what day, they would tell me what days they were
and were not available and we would work out how we
going to cover the whole week, in co-ordination with the
health communications desk.

Q. Were you the one effectively choosing, at least before
checking their availability, who would be the one that
would front a particular media briefing?

A. I generally sought to simply just share it around and
consider what each of them was working on and what we
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were likely to be speaking about. So if we were going
to be speaking about a, you know, piece of Public Health
Scotland work that had come out, I would probably look
for Professor Smith, Dr Smith, to do that. If it was we
need to give people a general update on a reminder about
behaviours because the polling maybe shows that
behaviours were slipping, I would look for
Professor Leitch to do that.

Q. So in broad terms what was the Scottish Government’s
strategy around public health communications, at least
until the period that you were in position?

A. It was to be honest, to be clear, to trust people and to
try to build cohesion amongst the public about the
actions we were asking them to take. There was a lot of
focus on explaining to people why we were asking them to
do certain things, because that would boost the
compliance, helping people understand the situation they
were in and that we were in, and encouraging the
behaviours that we needed people to undertake in order
to mitigate the spread of the virus.

Q. I think you said honest -- to be honest with the people,
to be clear, to trust the people and try to build
cohesion amongst the public so that the public -- you
were able to explain to the public and the public
understood why they were being asked to comply with --
"Cab Sec, FM and Gregor ..."
If I can pause there, is that Gregor Smith?
Yes, it is.
(Q. "... (who can discuss directly what we're looking for) -- are conscious that a number of Scotland's cases now connect to one event -- and that we are at a point where that could be reassuring information for the public around the increase in numbers, demonstrate we're still at containment, that contact tracing works and be a legitimate public interest matter.
"Ahead of the update to numbers at 2pm can FM and Cab Sec receive as full information as possible about that event, what's been done, the contract tracing, success etc. And can consideration be given with comms as to what can be said around it."
So I asked you about Professor Smith. Does this indicate that he was providing advice, information and advice, on the NIKE conference around this time?
A. I think what happened, not specifically on the conference, I think the reason I'm referring to cab sec, FM and Dr Smith at the same time is, from my recollection, he had come from a meeting of SAGE to report to the Cabinet secretary and the First Minister what had been discussed and to update them, and so they were all in one room at this point. At the same time we were becoming aware that I think it was the second case and then a couple of subsequent cases of Covid originated with a particular event. I can't say at the time that I knew it was a Nike conference until the following email, and in a discussion with the three of them we collectively thought, "Well, perhaps we should -- if we tell people about this, it might reassure them that we don't have Covid springing up in lots of different places", although perhaps in hindsight we did, but that these three or four cases, I think it was, are all from one event.
Q. So at least your email seems to suggest that you and potentially the First Minister, the Cabinet Secretary for Health Jeane Freeman and perhaps even Professor Smith were in favour of telling the public about the link between this one event and the number of Scotland's first known cases of Covid-19; is that correct?
A. Yeah, I think the Cabinet secretary, the First Minister and myself were -- and Dr Smith was asked, you know, do you think we can and had advised that yes he thought we could, hence why I'm saying he can discuss directly what we're looking for. He had given us a bit of advice on -- verbally on, you know, there will be limits, but yes.
So he had given you advice saying that this can be -- the link can be --
That's my recollection.
Q. -- disclosed to the public?
A. If we then turn to page 1, which is a reply from Dr Catherine Calderwood, and you will see that this is on 6 March and I wanted to look at the final two, the end of that first page, her response is:
"My strong advice would be not to say anything here specifically naming the conference risks breaching patient confidentiality as a delegate list will be available."
So you've received some advice from Gregor Smith saying that he thinks that this can be disclosed, and then the CMO at the time, Dr Calderwood, says her strong advice is not to disclose.
At the time, did you think Dr Calderwood's advice about not saying anything was the correct position?
A. I suppose I didn't think it was necessarily for me to judge the correct position, I would still have favoured making information available, but she was the doctor, she was the senior clinician, and she cited patient confidentiality, and ultimately the First Minister accepted that advice.
Q. Would it not have been entirely possible to tell the public about what had happened without breaching patient confidentiality?
A. That was, if you like, the purpose of my request in the email, to say "Can we have some advice with comms about what can be said?" I think is how it's framed, something like that. Well, sorry, that's -- "What is the boundary of what we can say? What is the limit?"
Dr Calderwood I think probably had a concern heightened because the first case of Covid in Scotland had had media on their doorstep and you, know, not been named as an individual but it was quite well known who that person was. This was cases, you know, 2 and 4 and 5, I think. So I think there was -- her concern was that it is quite easy to find people in Scotland and they didn't want to open that prospect up. I -- that's my speculation as to why she was so strong on the patient confidentiality issue here.
Q. Does this not give the impression of a cover-up?
A. Because the link only becomes known to the public after a BBC Disclosure documentary in 2020, and that's when we're still in the first lockdown. Does this not impact the public's level of trust in the Scottish Government's attitude?
A. As I've said, my preference was to say that there were a number of cases connected to a conference. I don't
think this is as you've described it, because the cases
themselves are publicly identified. Like, not
identified as individuals but the fact that there is
an increase in Covid cases, that there have been four or
five cases, is not kept within the government. That is
published in the statistical update that went out every
day. So that is known, as are the health boards in
which those individuals are located.
If -- I think I understand why people think,
you know, oh, we should have said this was a conference.
I thought that at the time. But I can also see the view
that Dr Calderwood had, that actually you had people who
were in quite a vulnerable position and you could be
putting undue pressure on them at a time when they were
unwell.

MR TARIQ: My Lady, I'm conscious of the time. Would this
be a good time to break?

LADY HALLETT: Certainly.

Just I have one question on -- I confess I don't
quite understand Dr Calderwood's advice. The delegate
list would, what, be hundreds on it?
A. I can't recollect the size of the conference.

LADY HALLETT: The chances are, if it's an international
company like Nike, it's going to be --

A. I honestly can't -- I think that is actually contained

again your notebook that we looked at in the morning
session. Can we look at page 37 you will see that this
is an entry that's undated but if you see at the top it
says:

"Not to be public.
"French national -- other conditions.
"Limited factual [information]."

Do you see that?
A. Yes.

Q. There was an article in the Edinburgh Evening News
suggesting that the first death from Covid-19 in
Scotland was a Frenchman who had attended our rugby
international, I think it was a Six Nations, between
Scotland and France on 8 March 2020. Why were details
not publicised at the time that the fact that this
person had travelled from France to Edinburgh to watch
the rugby?
A. So what was publicised at the time was that
an individual had died and that they had another
condition. This refers to advice -- I can't remember
who I was being given it from, but it's clearly a note
of somebody telling me that we are not to release the
fact that they were French. Again, this is not an issue
about trying to avoid disclosing the fact that they had
been at the rugby. I think, from memory, though my

somewhere in this Freedom of Information request, but
I can't recollect it.

LADY HALLETT: I do understand what you say about easier to
find people in Scotland, I just can't make the link
between a delegate list being available and the patients
being identified. But did you or the First Minister not
challenge that assertion?
A. I can't remember. This would -- is a question that you
would need to put to the First Minister, that there may
have been a conversation after this advice, but this was
at a time when I think if you were told this was patient
confidentiality, you didn't necessarily feel like you
could challenge that. And, you know, the next day there
were five, ten more cases and it quickly moved on.

LADY HALLETT: I think you could challenge it, but there we

Q. I think Dr Calderwood had said at the time that the
patient was an older man who died under the care of
NHS Lothian. Did that not give the impression to the
public that the first person to die from Covid-19 in
Scotland was a local person and not a Frenchman?
A. It may have.

Q. And had the Scottish Government told the public that the
first person to die from Covid-19 in Scotland was
a French national who had travelled from France to
Edinburgh to watch the rugby, would this not have led to
some uncomfortable questions for the Scottish
Government's role in allowing the match to proceed in
the first place on 8 March 2020?
A. It may have but that was not the reason for not
disclosing the fact that they were French as far as
I can recall. There was no discussion about, you know,
did this or did this not relate to whether or not the
rugby should have gone ahead, this was an issue about

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the patient, the person who had died and, as far as
I can recall, either their family or the procedures
around working with the French Government.
Q. But telling the Scottish public that a French national
had died would not breach patient confidentiality when
there's potentially hundreds, if not thousands of people
travelling to the rugby from France, would it?
A. It would not. And again I would say I did not know the
individual was connected to the rugby until shortly --
a few days afterwards, from an external source.
LADY HALLETT: Also, if it was to do with the contacting the
family and the French consul, surely it would be "not to
be public until family informed" or something of that
kind, wouldn't it?
A. It may have been, that may have been just shorthand, but
the death was to be announced kind of straightaway. The
French part was not to be public, certainly, at that
time; I can't recollect if there was a "you can say this
afterwards". But I did not know in this note that they
were connected to the rugby, so the issue of not
revealing the rugby was not a consider --
MR TARIQ: But that became --
A. -- in my mind.
Q. -- known pretty soon to the Scottish Government --
A. Yes.

pandemic, and I think you had said -- you had identified
patient confidentiality, which we've discussed, but you
also said it might be that one can't tell the public
because -- for the purpose of the process of managing
Covid itself, by making something more public. Can you
explain what you meant by that?
A. One of the issues around the Nike conference, and
I think it was perhaps the subsequent line of
Dr Calderwood's email, was the contact tracing, and that
you -- or certainly clinicians, quite often, at the very
beginning, wanted this to conclude and to be done in
a contained way rather than to create some sort of
panic, if you like, around people who would not be
contact traced because they hadn't, in their view, been
exposed.
Q. But does that not contradict what you said earlier on
about the values of public health communication, being
clear with the public, trusting the public?
A. It is a balance. So you lean towards always putting the
information in the public domain -- there has to be
a reason to not put the information in the public domain
and that reason has to be, you know, clinical,
scientific, you know, proven to be worth it. But these
are, you know, a very small number of examples, and
I can think of no others, to be honest, where
Q. -- didn't it? And there was no decision made that "we
need to be honest" -- I think your words -- "honest,
clear with the public, trust them, and tell them that
the first person that died from Covid-19 was in fact
a French person who had entered Scotland to watch our
rugby international", that the Scottish Government
hadn't tried to stop?
A. I think it became known to me certainly that they were
from the rugby at the same point it became known to the
public through other means. I don't disagree with what
you're saying. The circumstances at the time were that
we were -- a lot of the time you were simply just
chasing your tail and you moved from one thing to the
next very quickly. The moments of reflection that
you're perhaps suggesting would have led us to say "Oh,
actually, that death from two days ago, we can now
confirm this" just didn't occur.
Q. Could another way of looking at it be that this is
another example of a Scottish Government trying to cover
up what might be seen as uncomfortable information
during the early months of the pandemic?
A. That would be an inaccurate way of looking at it.
Q. Before the break I'd asked you about what good reasons
could exist for not telling the public, not being honest
with the public about events happening during the
relating to the pandemic, these being, for example, relevant WhatsApp messages, and I think it's important I place in context my questions. You voluntarily provided the first batch of your WhatsApp messages with Nicola Sturgeon along with the first draft of your statement in July 2020; is that correct?

A. That's correct.

Q. These were messages between yourself and Nicola Sturgeon dated between 1 September 2020 and 16 March 2021?

A. That's correct.

Q. A period of about six and a half months. We've already looked at some of those messages this morning and those were the first messages that had been provided by anyone involved in the Scottish Government's response to the pandemic to this Inquiry.

Then in November 2023, in response to a further request by the Inquiry, you provided a page of additional messages between you and the First Minister, and these were dated over one day, this being 31 August 2020 and 1 September 2020.

At the same time you provided some additional messages between yourself and Jeane Freeman, Kate Forbes and Shirley-Anne Somerville, and these messages were provided after the Inquiry had raised, publicly, concerns at the preliminary hearing about the disclosure of informal communications from the Scottish Government, and at that stage, when those concerns were raised publicly, you were still the only person who had provided any WhatsApp messages from the Scottish Government to this module.

Then, in response to another request to Nicola Sturgeon for her messages relating to the pandemic response, she provided in November 2023 copies of the same first batch of messages that you had provided to the Inquiry in July 2023, and I think she had said that those messages were not retained on her phone but she held copies.

Did you discuss with Nicola Sturgeon that you were going to voluntarily disclose some of the WhatsApp messages between you and her to the Inquiry, and if so what was discussed?

A. I told her that I -- so I received the Inquiry's request. I told her that I had messages that I was submitting them to the Inquiry when I submitted them to the Inquiry. I also submitted them to the government and asked the government to pass them to the former First Minister. I asked the government to do the same with the messages I submitted from Ms Freeman, Ms Sommerville, Ms Forbes.

Q. Were you aware at that stage that she had deleted all the messages from her phone when you submitted your messages to the Inquiry and then passed them to the Scottish Government for her?

A. Yes, I think I had become aware at that point that she didn't have the messages any more.

Q. And are you aware of how then Nicola Sturgeon came into possession of those messages? Was it through the Scottish Government?

A. Yes, I asked the Scottish Government to pass the messages to Ms Sturgeon.

Q. Why is it that you retained these messages but she has not?

A. I can't speak for her, I'm not going to speculate on the reasons here, with the one exception of saying that, in this conversation between us, I am the official and -- she can answer if this is the case -- she may have had reason to think, "Well, Liz has them, that's the official part taken care of", because I am the official in that exchange.

I -- to be clear, all the sort of relevant, salient, Covid management stuff in those emails is in the system in government -- sorry,WhatsApps -- in other forms.

I retain messages for my reference, initially.

You know, it's good to be able to look back -- similar to my notebook, you know, I can go back and check: have things happened as and when they are supposed to have happened? I then thought I should keep them because of the nature of this Inquiry.

Q. So just so I'm clear, we've looked at some of these messages and I think we've agreed, tell me if I'm incorrect, that they place important context on some of the decisions that were being made; do you accept that?

A. I do.

Q. And those messages would be important to understand the how, the whys, the whens, the wheres of how the Scottish Government came to make certain decisions during the pandemic. Do you accept that?

A. I think that they are important but I think that the how, why, where decisions are made is contained in the official record, or it certainly should be.

Q. But they're important context.

A. Yes.

Q. And they're part of the decision-making process. They may not be the only part of the decision-making process but they're part of the process; do you accept that?

A. Yes, to an extent, yes.

Q. You were her chief of staff --

A. Yes.

Q. -- during -- up till March 2021. Was it your
LADY HALLETT: And so me simply knowing that does not facilitate the day, and are about co-ordinating some of those things, to be about things that are happening that day, the next very much about immediate issues. You know, they tend to the relevant official saying, "FM's asking me this the weddings example, I think I would have been on Teams private office to put it in, I might email an official. system somehow. It has to be communicated to information, with the First Minister and for that to be actually during Covid where we were in the same place is handled a conversation in the pre-Covid world and with". Nicola Sturgeon and ..." It might be "I have been in discussion with" or, you know, "I have had an exchange with". It's reflective of the way in which I would have handled a conversation in the pre-Covid world and actually during Covid where we were in the same place is you have a conversation or an exchange of discussion, information, with the First Minister and for that to be useful to anyone, including me, it has to go into the system somehow. It has to be communicated to an official, to her private office, I might ask her private office to put it in, I might email an official. Some of this might have been -- so if we go back to the weddings example, I think I would have been on Teams to the relevant official saying, "FM's asking me this question, can you provide me with information?" I think you can see from the exchanges that they are very much about immediate issues. You know, they tend to be about things that are happening that day, the next day, and are about co-ordinating some of those things, and so me simply knowing that does not facilitate the business of government. It needs to enter the record to facilitate the business of government. Didn't you have a WhatsApp exchange with Nicola Sturgeon and ...? It might be "I have been in discussion with" or, you know, "I have had an exchange with". It's reflective of the way in which I would have handled a conversation in the pre-Covid world and actually during Covid where we were in the same place is you have a conversation or an exchange of discussion, information, with the First Minister and for that to be useful to anyone, including me, it has to go into the system somehow. It has to be communicated to an official, to her private office, I might ask her private office to put it in, I might email an official. Some of this might have been -- so if we go back to the weddings example, I think I would have been on Teams to the relevant official saying, "FM's asking me this question, can you provide me with information?"

A. I think I, in the second submission to the Inquiry, have set out my knowledge of Scottish Government policies in this regard. In relation to records management policy -- and I'm going to have to talk about the two policies to give the full context here. In relation to the records management policy it has always been my understanding of the need, whatever form the communication takes, to put salient material into the official records. It's useless on my phone, it achieves nothing sitting on my phone, it needs to be somewhere in the government system to have any form of effect or to inform government's broader thinking. I, to the best of my recollection, was not familiar with the mobile messaging policy. Do you know, as Nicola Sturgeon's chief of staff, whether she was familiar with the mobile messaging policy?

A. I couldn't speak to that.

LADY HALLETT: So you weren't aware of the policy that others have told me about where they claim the policy was to delete, "a bedtime ritual"?

A. I have no recollection. I can't be categoric because I have no recollection. I can't be categoric because I couldn't speak to that. Yes, largely. It would not -- and I think I set this corporate record?

A. Yes, largely. It would not -- and I think I set this out in my evidence -- it's not that I would write an email saying, "I have had a WhatsApp exchange with Nicola Sturgeon and ..." It might be "I have been in discussion with" or, you know, "I have had an exchange with". It's reflective of the way in which I would have handled a conversation in the pre-Covid world and actually during Covid where we were in the same place is you have a conversation or an exchange of discussion, information, with the First Minister and for that to be useful to anyone, including me, it has to go into the system somehow. It has to be communicated to an official, to her private office, I might ask her private office to put it in, I might email an official. Some of this might have been -- so if we go back to the weddings example, I think I would have been on Teams to the relevant official saying, "FM's asking me this question, can you provide me with information?"

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A. I have no recollection. I can't be categoric because I have no recollection. I can't be categoric because I couldn't speak to that.

Yes. So some of the WhatsApp messages that we've seen which show some of the context or some of the decision-making process, was it your habit to then record those messages into an email so it could be uploaded on to the
A. I think if you're asking did I, you know, transcribe verbatim, no. I treat those messages in the same way that I would have treated a conversation with the First Minister and input the material parts of the discussion to the system in order that they could facilitate the business of government or, you know, be recorded in some way.

Q. I now wanted to move on to a related matter. In your first statement, you said, and I'll quote this, I won't bring the statement up: "I have indicated to the Scottish Government that I expect all messages to be submitted."

A. I think the timing of this correlates to a UK Government case about whether they had to provide messages that were not Covid related, about who got to do the, you know, redacting, if you like, and the Scottish Government had said to me that I could wait for the conclusion of that before deciding whether to give you everything or who was going to do the redactions and my view was: just give them it.

Q. The messages that you have produced between yourself and

Nicola Sturgeon cover, as I said, a six and a half month period, and that's between 1 September 2020 and 16 March 2021, and then there's the later additional messages spanning one day.

Is it fair to assume that you were in WhatsApp communication with Nicola Sturgeon about the pandemic before 1 September 2020?

A. Yes, it would be, I think at a lesser extent and, for the record, I would like to say that I regret not being able to give the Inquiry those messages. I thought I had them, I had sourced them, I have done everything that I am able to do, as far as I can, to find them.

I thought I had retained them and they're not there.

Q. Why do you say that you would be in communication with the First Minister before 1 September 2020 over WhatsApp to a lesser extent --

A. We were --

Q. -- when we would be going through the first lockdown, for instance?

A. Because we were in the same place more than we were at a later date. So I think I attended St Andrew's House the vast majority of days, including Saturdays and Sundays. Every day there would have been a briefing. I would have been there from early in the morning until late at night and so would she.

So, during that very intense period, the majority of the discussion that she and I would have about thrashing out what we were going to do would have been happening in person but there would be some messages. I think a lot of them would have been logistical around the briefings, who was going to be there, the BBC are offering you an address to the nation, that kind of thing, if I had been in a different room, for example.

Q. But there would also be, for instance -- you weren't working with her through every night, but there would be -- you would both go home, there would be messages that would continue, the conversations would continue sometimes over on WhatsApp. In fact, we've seen many of your messages that are late into the night, and those would be messages, for instance, around March 2020 that would shed perhaps some light on decision-making around the first lockdown?

A. I genuinely do not think there would be much of significance around early March 2020 in the WhatsApp messages between us and around the decision-making on lockdown because those discussions and decisions, and I remember them very clearly, happened in St Andrew's House, normally with Dr Calderwood, Jeane Freeman, and, if you like, at that point, you know, yes, we did go home but I think there was very
And there's also -- there were instances where I think I do.  It's in, I think, the exchanges of Ms Freeman.  And occasionally I think there was some push-back from opposition parties about the fact that an independent adviser to the Scottish Government was straying into constitutional arguments.

Was the distinction between politics and medical or scientific or clinical advice always clear to the Scottish Government's advisers?

I think it was.  So just -- I had no conversation with Professor Sridhar about her articles or any of her contributions.  I think it is clear, I think it was clear.  I think Professor Leitch and Dr Smith, they took on a communications duty that they were not used to, and they made themselves incredibly available to all forms of media, and again they weren't used to that, and I think their, if you like, enthusiasm to try and give the public answers sometimes led to them accidentally overstepping a line that they would not be as well versed as I might be in seeing.  So I would occasionally have conversations with Professor Leitch, for example, if there was a political

Professor Sridhar -- Professor Sridhar -- the other day.  I do know that those exchanges entered into her formal accounts.  People can send -- what people externally send you something on is for them rather than you, if you like.  The obligation on you as a government member or a civil servant is to then put that into the system.

But if you're openly -- or did she openly volunteer her SNP email accounts to others to use to be --

You would need to ask the First Minister -- former First Minister these questions.

There was one further question I wanted to ask before I believe that there is a question from one of the core participants, and this was around the -- the question is around advisers straying into, perhaps, political space.  There was a few instances, for instance, during the pandemic.  I think at one stage Jason Leitch got into a Twitter exchange with Richard Leonard who was part of, I think -- he was the leader of Scottish Labour at the time.  And I think we've seen WhatsApp messages where I think there is reference to you and Nicola Sturgeon speaking to Jason Leitch and telling him to stay out of the political space.  Do you recollect that?

I do.  It's in, I think, the exchanges of Ms Freeman.
issue running in the day and he was going on the radio, to say "If they raise this, you have nothing to say, this is not a matter for you, and you refer them back to the government or to a politician or to me". And he would sometimes ask ahead of things, if he knew that something was running today that was political, "How do I get away from this subject, because this is not one that I should speak to", but occasionally -- and I think this is clear from the messages with Ms Freeman -- they succumbed to the pressure, I think, of being asked questions and feeling that they had an obligation to answer because they were out there to try and inform the public.

Q. And that would create issues, potential issues, around trust of Scottish Government communications if some of the messaging coming from scientific advisers or medical advisers or clinical advisers was seen to be -- whether it's party political, it was perceived to be that way, that would create issues of trust, wouldn't it?

A. I have, I think, more faith in the Scottish public than some people do that they are able to differentiate what is political from what is medical and clinical, and they watched a lot of information during that time. They watched these people give public statements a lot during that time and I think the public knew. I don't think part of an argument for advancing independence and therefore using it politically? When you see it's associated with EU exit, which obviously a lot of people in Scotland who didn't want to leave the European Union reckon reflects badly on the UK Government, it does look a bit as if -- politicisation of the coronavirus pandemic, doesn't it?

A. I think the fact that this says "consideration should be given", my recollection, my view, my understanding, my experience of all of this period is that the consideration given was: we're not doing this right now. There is subsequently much after this, you know, there has been a lot said and reflected on about the way in which people in Scotland looked to the Scottish Government to provide the leadership in the Covid pandemic and what they then felt about the constitutional situation, but our actions were not designed to produce that result. If the public were making their own decisions on that, we were not driving it through our actions on the pandemic.

LADY HALLETT: It's not the point of my question, really, which is that --

A. Sorry.

LADY HALLETT: Well, I understand why you answered in the way you did but my question is: doesn't it look as if at least some members of the Cabinet, and eventually the Cabinet agreed, to capitalise on the pandemic to advance the cause of independence? Doesn't that look --

A. So, as I say, the consideration given to this was this was not done at this time.

LADY HALLETT: No, but --

A. I think if you take the discussion that we had earlier about the difficulties of funding and financing the mitigations required for applying public health interventions, that was, at times, not in our presentation of it at that time but it did show, and arguments could be made at a later date, that there was a hampering that would not have been there had we been independent.

But I would be at lengths to say to you that this was not done at this point in time. I have no recollection, no notes, no work. If anything had been done in this period, it would be publicly available. There would be, you know, reams of evidence of the Scottish Government going out and selling independence during this period, and there just isn't.

LADY HALLETT: Thank you.

Ms Mitchell.

Questions from MS MITCHELL KC

MS MITCHELL: I'm obliged.
Ms Lloyd, I appear as instructed by Aamer Anwar & Company on behalf of the Scottish Covid Bereaved. I’m obliged to my learned friend for his questioning, which raises a lot of issues the Scottish Covid Bereaved are interested in, but I would just like to ask you one thing, and it relates to paragraph 42 of your statement. I don’t need that brought up but I’ll just read it out so you can understand the question that I’m asking. You say: "Communication within Scottish Government and the stakeholders whilst strong and effective under considerable pressure could at times have been improved, particularly around the application of the framework and the application or the lifting of restrictions. Teams within [Scottish Government] did not always appear to be hearing each other, particularly on the interaction between economic and Covid harms, and economic teams did not seem equipped or prepared to explain to stakeholders why certain restrictions were in place and why decisions were taken not to lift them."

Now, can I ask you to expand upon that. In particular, why do you think that was, and my second question is: if that being so, what could be put in place to improve it?

A. When your role, I think, as a civil servant, as a policy official, is to engage with stakeholders, it often becomes your job to listen to them rather than to make arguments back as to why the government is doing a particular thing. I think that’s something I’ve experienced in the Scottish Government frequently, and the economic officials I found in particular — and they worked incredibly hard, I don’t want to cast any sort of aspersions on them — when they were engaging with economic stakeholders, I felt, and had reports back from some of the calls, that they would not explain why certain things were happening. They would listen to why stakeholders perhaps didn’t want certain things to happen but they would not make the argument for.

I know that the clinicians who were often on these calls felt that they were sort of left to be the bad guys, if you like, explaining why we cannot open your pub this week, or we cannot allow shops to open just yet, and the balance of the virus. In that particular case, I think this was — this was a very difficult situation because you were taking actions to save people’s lives but they impacted people’s livelihoods, and, you know, you had to acknowledge that was a very difficult balance to strike.

I’m not sure what can be put in place to deal with it. I think there are broader reflections on the government’s engagement with economic stakeholders, which I think the relationship was not great going into it, so it deteriorated over time. But I’m not sure you can put that in place other than a sort of building the confidence of the officials that you are asking to explain the situation in the information that you’re asking them to explain.

Q. The reluctance of those people whose job it was to explain that sort of pass over to those who were the scientists, as it were, is that a reflection of the anxiety about the information or just an unwillingness to be the ones who were breaking the bad news?

A. I think it’s a reflection of the pressure you can feel in government. When a group of people are telling you that they disagree strongly with the actions that you’re taking, to be the one that has to then stand up for those actions, explain them, defend them, that can, I expect — and I think I understand this — feel like quite a burden on somebody. If you are in a call and there are 15 people telling you that they’re wrong — that you are wrong, they may be right and you have a duty to listen to them and to feed that back.

Q. Indeed, but —

A. But if you’ve been given information to put out there, it’s your duty to put that out there, and I think people tended to step back a little bit when confronted with arguments against the actions we were taking.

Q. Indeed, one would think it would be an important part of the communication between government and stakeholders that they listened to what they were saying, and if there was a good argument, which no doubt the Scottish Government would contend that the argument was good, to give that to them so, even if they didn’t accept what it was, they understood and what you are saying was that was lacking within the ministers —

A. I’m not saying they didn’t do it; I’m not always convinced it was done with a level of detail, understanding, explanation, that was helpful. It didn’t help bring people to a better understanding of what was happening.

MS MITCHELL: My Lady.

LADY HALLETT: Thank you, Ms Mitchell.

Further questions from THE CHAIR

LADY HALLETT: Just before you go, Ms Lloyd, may I ask you to help me on another matter, in relation to M2. As you may have followed, I heard a certain amount of evidence about the role of special advisers in Number 10 and the role of Mr Dominic Cummings as an example. You talked about the — there’s a special...
advisers code that applied to you. I think technically
what happens is that special advisers, as you were and
Dominic Cummings was, are technically part of the civil
service but they don't answer to any of, as it were, the
governance or management structure of the civil service,
they answer to the minister or the First Minister or the
Prime Minister?
A. Yeah.

LADY HALLETT: I just find that a bit troubling. I, mean,
don't you end up with a conflict then between ...?
A. I think it's how you do it. I don't think I ended up
with a conflict. The special adviser code sits
alongside the Civil Service Code. You are governed by
both, with an exemption from certain parts of the Civil
Service Code that enables your political activities, and
you are appointed by the First Minister.
I think if you are conscious that the civil servants
around you have to comply with the Civil Service Code,
and they have obligations on them, then a conflict
doesn't arise. And whilst the First Minister is, if you
like, my line manager, the person that appointed me, the
person that could fire me, I was cognisant of the senior
officials in the Scottish Government and my relationship
with them. So as much as I was sort of on a par, if you
like, I knew that, you know, I needed to be aware if
they were unhappy, perhaps thought a special adviser was
stepping over the line. That is a back and forth
relationship. That's a relationship that exists because
you build that relationship.
But I don't think I found a conflict, and I don't
think such a conflict existed in the Scottish
Government.

LADY HALLETT: So it's not a question of improving
structures or anything, you think it's a personality
matter?
A. My views on the operation at Number 10 are available in
my notebooks. I don't think I should particularly
comment on the relationship between Dominic Cummings --
LADY HALLETT: I've probably pressed you too far.
Thank you very much indeed, Ms Lloyd, very grateful
for your help.

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1. correct?
2. A. That is correct.
3. Q. The first role was Cabinet Secretary for Justice, which you held from 26 June 2018 to 19 May 2021?
4. A. That is correct.
5. Q. And the second, following the Scottish Parliamentary election in May 2021, you took over the Health and Social Care portfolio, you took that over from Ms Jeane Freeman, who had held the role during the earlier stages of the pandemic. Is that correct?
6. A. That is correct.
7. Q. And you held that portfolio until you became First Minister on 28 March 2023?
8. A. Absolutely correct.
9. Q. Could I just clarify that when Ms Freeman held the role, prior to the election, I understand the role was entitled Cabinet Secretary for Health and Sport, but when you held it, Cabinet Secretary for Health and Social Care; is that correct?
10. A. That is correct.
11. Q. Is there any significance in the change of name with regard to the portfolios that you covered in your ministerial Cabinet secretary role?
12. A. No, I don't think there would have been much of a change, although having taken sport out of the title, I'd like to ask you some questions about some of the decision-making structures which existed within the Scottish Government during the course of the pandemic. Some of these are things we've heard about, but we think you might have some insights into how they operated. We've heard some talk, and you mention in your statement, of a group or decision-making body called "gold" or "gold command". Are you aware of what that group did?
13. A. I am.
14. Q. I understand that you attended that group, not always but sometimes?
15. A. Correct.
16. Q. Am I correct in understanding that this was a selected group of Cabinet ministers which would tend to include -- it would always include Ms Sturgeon and sometimes include others, including Mr Swinney, yourself, Ms Forbes at various different times?
17. A. Absolutely correct.
18. Q. Thank you. Could I have a look, please, at paragraph 35 of your statement where you provide us a little bit more detail about this. You say at paragraph 35 that: "In relation to how decision-making could have been improved during the pandemic, I believe there were times when a decision made by the former First Minister was then entrusted to make those decisions Cabinet would agree to that and the former First Minister was then entrusted to make those decisions. Is that correct?"
19. A. That's correct.
20. Q. So you and she were both responsible for health, including public health?
22. Q. And you and she were both responsible for social care?
23. A. Absolutely correct.
24. Q. And you and she were both responsible for the entirety of the portfolio, but sometimes include others, including Mr Swinney, Ms Jeane Freeman, who had held the role during the earlier stages of the pandemic. Is that correct?
25. A. That is correct.
cascaded to the rest of Cabinet until that decision was announced, and that happened on the rare occasion, but we were often -- I know special advisers, I know government officials worked hard to ensure that Cabinet was informed of decisions when they were made as opposed to once they were announced.

Q. So I think you've identified there situations in which decisions were made by the First Minister, the former First Minister, based on a delegated authority from Cabinet. That's one type of decision-making process; is that right?

A. That's absolutely correct.

Q. And there were other times when I think you characterised them as being -- because of the pressures of the pandemic, decisions taken by the First Minister where there had not been that delegation but that that process was necessary because a decision needed to be made immediately; is that right?

A. That would be correct.

Q. So therefore it is the case, I think, that you're saying that some decisions were made in those circumstances which did not have the approval of the Cabinet?

A. So, again, there would have been some decisions that may have been made in that way. For the most part Cabinet would agree decisions that had to be made. There may be times when the exact detail of a decision, so for example if we were to -- if Cabinet agreed to impose restrictions around household numbers mixing indoors, there may be not a final decision on the number of households or the number of people from a certain number of households, and therefore we would seek to delegate that decision to the First Minister, to the Deputy First Minister, Cabinet Secretary for Health to make. And that may well be because the decision was going to be announced in a couple or a few days' time and of course the situation could develop in terms of the epidemiology of the virus and factors such as the R number, so we would -- there would be times when we would entrust the former First Minister to make that decision, on delegated authority.

It would be unusual, rare, very rare, I think, for the former First Minister to make a decision without either that delegated authority or without informing Cabinet. The decision was made before it was announced.

Q. Were decisions made in Cabinet or were they made by the First Minister and/or within this gold command structure?

A. A variety of all of those. Decisions were made at Cabinet, and of course the Inquiry has a number of documents in relation to Cabinet minutes and meetings.

So discussions were engaging in Cabinet. There was sometimes differences of opinion, as you can well imagine, but decisions were made often at Cabinet. Gold command, though, was there for a reason because the situation could of course change between one week's Cabinet meeting and the next, given the fast paced nature of the virus that we were dealing with.

So gold command was an important structure and ultimately also the First Minister, we knew, was doing daily briefings, virtually every single day, and therefore there was also that delegated authority, should she have to make a decision because of a development in the virus that particular day.

So I think it is, to answer your question, a mixture of all of those.

Q. We've heard evidence about the constitutional structure within which the Scottish Government purports to operate, from a political expert, Professor Paul Cairney. He confirmed that the basic structure is that decisions are to be made in Cabinet, as is the case within the UK Government, and that there are good constitutional reasons for that.

Do you accept that as a matter of principle, as the way in which decisions are meant to be made within our constitutional system?
Q. But, to be clear, you’ve told us that there were occasions on which the First Minister either with or without the benefit of discussions within gold command took decisions without the delegated authority of the Cabinet?
A. Again, I think those times would be very rare, very rare occasions. Often the former First Minister would seek Cabinet’s delegated authority, but I think there was an understanding in exceptional cases, where the epidemiology of the virus had changed, if there had been a sudden spike in cases in 24 hours and therefore a decision had to be made there and then, that there was an understanding that, given this was not normal times, that such decisions could be made by the First Minister.

Q. You suggested, I think, in your evidence that there was a certain regularity with which Cabinet met. Was it not possible to convene Cabinet meetings at short notice in those urgent situations?
A. Of course it could, gold command, in essence, was a tighter cast list of Cabinet secretaries that were necessary to make a particular decision. Gold command and the attendance of gold command, of course, would change depending on the decision that was required to be made. I attended some gold command meetings in my various Cabinet secretary roles and in other I did not.

Q. Was the Scottish Cabinet during the pandemic a decision-ratifying body rather than the main decision-making body?
A. No, I wouldn’t agree with that characterisation. For my attendance at Cabinet meetings there was good engaging conversation, as I said at times disagreement on the approach that was to be taken, but our Cabinet meetings were a good discursive fora by which to have those discussions. We weren’t there simply to ratify. As I say, I can think of instances where challenge was brought forward and what was in the original submission or advice from officials was therefore amended accordingly depending on the decision that was then taken.

Q. Was it the former First Minister’s practice to take important decisions as a result of discussions with a close group of ministerial colleagues, whether in gold command or not, not calling upon Cabinet or the wider advisory structures available to the Scottish Government?
A. Again, it will be for the former First Minister of course to answer exactly how she would make decisions, but in my experience as a Cabinet secretary who served under her, in a variety of roles, she found great value in the discursive nature of Cabinet, of gold command. But also, equally, if Cabinet as a whole did not have to be brought together, given the very precise nature of a decision that had to be made, then gold command was the -- I think the appropriate fora by which to make that decision.

Q. Could I have you -- you’ve provided to the Inquiry a number of WhatsApp exchanges in which you were involved from the period of the pandemic, as requested by the Inquiry; is that not correct?
A. That is correct.

Q. Thank you.

Could we have a look, please, at INQ000334792.

This is a record of some WhatsApp exchanges between yourself and Professor Jason Leitch, who was the National Clinical Director; is that correct?

A. That is correct.

Q. In fact, I think this comes from the very day on which you were appointed as Cabinet Secretary for Health and Social Care; is that right?
A. I think that is correct.

Q. Yes. There’s some discussion here which we’ll get on to in a bit more detail about you arriving at your desk,
approaching the new job and immediately getting stuck into some of the difficult decisions that you had to engage in, in particular the context is that you are discussing figures which have arisen relating to the rise in cases in the Glasgow area and in particular East Renfrewshire, which seemed, on your analysis, to be indicating a cause for concern as the cases were going up. Is that a fair summary of the context?

A. That is fair.
Q. You are seeking Professor Leitch's input and counsel on that decision; is that right?
A. That is correct, yeah.

Q. And you refer at 11.52, wrapping up, I think, your discussion with Professor Leitch on that subject, that you'll be "on the deep dive", and then Professor Leitch replies:

"Good. There was some FM 'keep it small' shenanigans as always. She actually wants none of us."

This is Professor Leitch giving you guidance and advice on your first day in the new job; is that right?

A. Yes.

Q. And he refers to the First Minister's "keep it small" shenanigans* and that "She actually wants none of us". Was this an indication in fact that the First Minister

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gold command could often come in or gold command may well come in, when there was a development in the virus and a decision had to be made either that evening or indeed the next day.

Q. So to put this in this particular context, because one sees in the period of you being Cabinet Secretary for Health and Social Care a number of exchanges of this nature where you are trying to take the counsel of Professor Leitch in particular around the question of levels that different areas should be applied -- should be put into, when you say the principle would be agreed by Cabinet but the finer detail delegated, in this context would that mean that the Cabinet had said there should be a levels system but the First Minister and her close group would decide which levels would be applied to which areas?

A. So, forgive me, I couldn't tell you exactly the -- how the final decision on this particular --

Q. I'm talking more broadly about that type of --

A. Yes --

Q. -- decision --

A. -- answer that question.

It would often be the case that we would come to an agreement in Cabinet about exactly what level a particular area would be in. There would be some

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areas where, given the thresholds that we'd look at, in terms of whether a local authority was in one level or another, that they might well be right on that threshold or close to that threshold, so there would be the decision to delegate the final decision on East Renfrewshire or Glasgow or Moray to gold command or to First Minister to make that very final decision.

Q. So in essence it was the small group and the First Minister who made the decision, which is important, which is which level the particular area something into?

A. Not always. As I said, on a number of occasions Cabinet would agree the exact level for the exact local authority to have to go on. There was always going to be, within 32 local authorities, some that were perhaps on the cusp of going into level 3, some on the cusp of level 2. And ultimately, before a decision was made, it was right that that final decision was delegated, be it to the First Minister, the Cabinet Secretary for Health or others, with the most up-to-date information on case numbers, the R number and test positivity.

Q. The Inquiry has heard significant evidence about the principles of transparency and accountability in documents such as the National Performance Framework. These are principles to which the Scottish Government is
Q. We have also seen these principles reiterated throughout documents relating to the pandemic response itself. For example, the four harms framework of April 2020. Is that correct?
A. That is correct.
Q. And that tells us that the Scottish Government's position, as far as its public-facing aspect was concerned, was that it wished to apply those important principles in the way that it handled the pandemic; is that correct?
A. That is correct.
Q. And indeed there have been a number of opportunities for yourself and others on behalf of the Scottish Government to reiterate your commitment to those principles with regard to your participation in this very Inquiry; is that correct?
A. That is correct.
Q. On 29 June you said to the -- in response to a question in the Scottish Parliament:
"It is important that I abide by the rules of the UK public inquiry and the Scottish public inquiry ... to ensure that there is simply no doubt whatsoever, any material that is asked for -- WhatsApp messages, emails, signal messages, Telegram messages or whatever -- will absolutely be handed over to the Covid inquiries and handed over to them in full."
Has that always been your position?
A. That has been my position, yes.
Q. This remains your position?
A. Yes, that any messages we have should be handed over in full.
Q. It is important, is it not, not just for the very important purpose of engaging with subsequent public inquiries such as this and the Scottish Inquiry, but also, during the course of a public emergency which does not derive from a single event but is continuous, that material relating to the way in which decisions were taken must be retained so that proper lessons could be learned and a better response to the pandemic developed; is that correct?
A. That is correct. And perhaps on this issue of informal messaging, including of course WhatsApp messages, let me reiterate what I have said in the Chamber just a couple of hours ago. Let me unreservedly apologise to this Inquiry but also to those who are mourning the loss of a loved one, that was bereaved by Covid, for the government's frankly poor handling of the various Rule 9 requests in relation to informal messaging, messages.

There is no excuse for it, we should have done better, and it's why I reiterate that public apology today.

Ministers are -- and there is awareness amongst ministers, amongst Cabinet secretaries, regardless of the medium of communication, that any key decision that is in relation to government business should be recorded in the corporate record, and the salient points recorded on the corporate record, and that's usually done via the private office or via government officials. But I'm afraid for a long time the corporate mindset of the government -- the organisational mindset of the government was, because the corporate record had those key decisions and salient points, that was the only thing really that was required to hand over to the Inquiry, when the Inquiry made it clear, of course, that you were seeking more than that.

And there is a gap -- regardless of the Records Management Plan, the mobile messaging policy, there is a clear gap that exists in relation to how material in informal communications should be retained in relation to a statutory public inquiry, and that's why I've instructed an externally-led review to look at this issue and other issues such as what ministers and Cabinet secretaries should do should they, for example, change device in the midst, particularly, of an emergency such as a pandemic or anything that is analogous to that.

In answering questions about this area, one of the senior civil servants, Ms Fraser, from the Corporate directorate general, accepted that it was important in the interests of transparency and accountability to the Scottish public that information about how decisions were reached should be retained. Do you agree with her?
A. I do.
Q. You mentioned in your response there the requirement, as I understood you, to retain information within the system about key decisions that were made. Would you accept that both the policy in existence at the time and indeed the principles of transparency and accountability require there to be careful record-keeping of how decisions are made, meaning that discussions leading to decisions also require to be recorded?
A. Yes, and again our record management policy will make clear that it's not just the decision that has to be recorded but -- I think the wording is used, "the salient points of any decisions that are made should also be recorded for the corporate record".
Q. There's a difference, though, perhaps, it might be quite subtle, but the salient points of a decision is one...
thing, but the salient government business involved in the process leading to the decision is another. Do you accept that both categories require to be retained in order to fulfil the ultimate objective of transparency and accountability?

A. Yes, and I accept the point that you’re making. I would say, of course, our Records Management Policy is important for a couple of reasons: one, of course, for all of the reasons that you have just articulated in relation to transparency, good governance, but also for record management. We cannot possibly, as an organisation, keep every single piece of documentation that is produced by the organisation, it would be very, very challenging and difficult to do so, so there is a need for that Records Management Policy, and ultimately there will be a point where it is for the interpretation -- the interpretation of the receiver of that information to decide whether or not that should be recorded in the corporate record or not.

Q. But those principles of transparency and accountability should aid in that interpretation?

A. They should, of course.

Q. Because if there’s material relating to discussions in the business of government, it would be necessary for an interested member of the Scottish public to be able to amongst other things in this table what we see is the Scottish Government’s response as to what was used during the course of the pandemic, and it says there, as regards your WhatsApp, other informal communication systems, that you:

“Used WhatsApps with Nicola Sturgeon and John Swinney to discuss matters. Any decisions made were recorded through the appropriate channels as per Scot Gov guidance. No other informal communications platforms were used.

“Communicated with Kevin Stewart and Maree Todd through WhatsApp.”

Just to pause there, they were ministers who were working with you in the time as health secretary; is that right?

A. That’s absolutely right, yeah --

Q. Yeah --

A. -- ministers in my portfolio.

Q. Thank you very much.

“WhatsApp used to discuss information and advice relating to Covid-19, more frequently at the beginning of the pandemic due to restrictions on in person meetings. Deleted all messages after a month for cyber security purposes as per their understanding of the Scottish Government Mobile Messaging Apps Usage and

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that your understanding of the Scottish Government guidance or policy was that only decisions made required to be recorded through the appropriate channels?

A. No, decisions and salient points in relation to decision-making should have been recorded in the corporate record.

Q. Thank you, so the reference to decision there is really a shorthand for that wider group that we discussed earlier; is that correct?

A. Yes.

Q. When you say "recorded through the appropriate channels" is that another way of saying -- we've heard this expression before, from Ms Fraser and others -- that that material has been recorded on the corporate record?

A. Yes.

Q. And how, as a matter of practice, would you have gone about transferring the salient points of discussions relating to important decisions onto the corporate record as a matter of practicality?

A. Yes -- and forgive me, I said that this was a statement that was correct as per 13 October, there's probably some areas that were obviously updated thereafter which would abrogate some of what is in here, but I assume --

Q. I am -- to be absolutely fair, what I'm trying to do is just understand your position at that time. I will take

after that, and in between the material would be communicated through your private office and put on the corporate record by whoever it was in your private office?

A. That was the guidance in the mobile messaging policy.

Q. So at that stage you hadn't produced any messages to us because they had by that time, 13 October, been deleted in accordance with the practice that you have laid out?

A. They were no longer available. Or so I thought of course.

Q. Yes, indeed.

So after that, there were discussions -- there was a development in your position, as I understand it, and you provided a supplementary statement to the Inquiry explaining what the process had been, because although your position as at 13 October was that you didn't have any messages because they weren't available to you, you found a phone on -- where the messages were ascertainable; is that right?

A. I wouldn't say I found, I retained a handset, my previous handset, that I used up until about the middle of March --

Q. Sorry, of?

A. Of last year.

Q. So you were aware that you still had in your possession you to the developments thereafter, I won't --

A. Of course.

In terms of how that was recorded, if there was a discussion of salient points or a decision that was made over any informal communication, then it would often be for one of the Cabinet secretaries or ministers to inform their private office or another government official, who would then put it into the corporate record. No decision could be actioned, of course, unless it was in some way in the system, and that was usually done through private office.

Q. And your position is you did that in connection with all of the communications that you had but then you deleted the actual original messages; is that right?

A. Some messages would have been deleted, still recoverable but not -- but may well have been deleted.

I have to confess in the midst of a global pandemic and the issues that we were engulfed in at that point, deleting messages routinely was not always the top priority.

Q. But your understanding of the policy was that what you needed to do was to record the information on the corporate record through that mechanism, your private office, and that there was then an obligation to delete the messages for cybersecurity reasons a month that handset before 13 October; is that right?

A. Yeah, that's correct.

Q. Had you not checked that when you said that all the messages had been deleted?

A. I had. And because I had migrated my WhatsApp account on to the new device, so same number, migrated it on to the new device, when I went back to the old handset, when I went back to WhatsApp, there was just -- there was no messages at all, it was blank. Now, of course I'm happy to talk to the fact that messages were recoverable, thankfully, by -- not any amazing technical wizardry but actually by logging out of the WhatsApp account in my current handset and logging back in on the old handset. Because those messages were still on the phone storage, they would be able -- they were fairly easily recoverable.

Q. So you were under the impression that the messages had been deleted previously in accordance with an existing government policy, but in fact it transpired that they had not been deleted and that they were in fact recoverable relatively easily?

A. Yes.

Q. The position then was that you were able to provide us with a large number of messages, including, for example, with a number of other people, but including extensive
exchanges between yourself and Professor Leitch, of the nature that we’ve looked at already, so that there was a large number of messages on that handset, although in some way embedded within it in a way that you couldn’t originally access; is that correct?

Q. In a way that was -- I didn’t realise I could access
when I changed device, yes, that’s correct.

A. Yes.

Q. Thank you.

Your position is, I think, that those messages were -- or the salient business points relating to discussions or decisions, were uploaded to the corporate record at or around the time when they were exchanged before the 30-day deadline expired --

A. Yes.

Q. -- is that right?

So we have recovered, as you have said, during the course of your evidence and, you have said, in other fora, a significant amount of documentation which the Scottish Government has provided to us which relates to decision-making discussions relating to the way that the Covid-19 pandemic was managed in Scotland; that’s correct, isn’t it?

A. Yes.

Q. Given the fortuitous revelation of the messages which were unavailable to you but became available when you

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1 followed the process that you’ve set out, it would now be possible, would it not, for us to conduct a comparison between effectively what the government has given us, the corporate record relating to these matters, and your messages, in order to ascertain whether in fact you had recorded the salient points on the corporate record?

A. Yes, although I would make the point that salient points as -- is open to interpretation. Key decisions of course and salient points relating to that decision should be noted in the corporate record, but you’re absolutely right, you could cross-reference.

Q. And we’ll find there, will we, that the salient points of the business you conducted over WhatsApp will be included within the corporate record?

A. Key decisions and salient points related to that decision should, of course, be recorded, and it was my practice to then inform my private office of those key decisions of any salient points related to that. And if I did not do that then of course those decisions would not be taken forward.

Q. Just to be clear, again, slightly terminology but it might be important, again you’re talking about decisions and salient points of decisions, but what I think you accept you were required to put on the corporate record

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1 decision also.

Q. And in your case they were so we should find them on that corporate record?

A. Certainly that was always my intention to do that.

Q. But just to be clear, I’m not asking you about your intention, my understanding is that you have told us in your evidence and also previously that you did make sure that the stuff, the relevant material was on the corporate record?

A. Yes, although I would make the point that salient points

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1 were discussions relating to decisions, so will that be included on the corporate record?

A. I think salient points would be recorded on the records, salient points, and that includes decision-making but any other salient points in relation to that decision.

Q. Will that include the types of discussions or the tenor of the types of discussions that you have been having with Professor Leitch in the exhaustive messages that you have now sent to this Inquiry?

A. So not every sentence, full stop, apostrophe, would be recorded, nor would it be required to be recorded, but if a decision was made and -- any of the salient points related to that decision being made, they should be of course recorded on the corporate record.

Q. Because, of course, you’re now telling me that they should be recorded but you represented previously that they were on the corporate record; is that right?

A. I would always endeavour to put them on the corporate record, yes.

Q. Yes.

A. If there was any times that that was not done then that would have been a mistake made by a Cabinet secretary, by a minister, if they did not do that, but of course the guidance is that those decisions made should be recorded and the salient points in relation to that
any of those messages conducted -- the WhatsApp
messages -- involving conversations with you or indeed
anyone else.
Did you discuss the production of your WhatsApp
messages to this Inquiry with the First Minister, the
former First Minister?
A. No.
Q. We noted in your WhatsApp messages with Professor Leitch
that there were frequently voice notes received from
him. Was that a frequent practice of his, do you
recall?
A. It was certainly on occasion and I would also
occasionally use voice notes as well.
Q. Were the contents of those voice notes, in so far as
relating to significant decisions made in the course of
the pandemic or discussions around them, transcribed or
copied into the corporate record?
A. Again, if there were salient points from those voice
notes, then they would -- and decisions that were made
in those voice notes, then of course we would always
seek to record them on the public record, on the
corporate record.
Q. You would say you would seek to do so but can you tell
me whether that did happen or not?
A. Again, when so many decisions were made in the course of
the pandemic, it would always be the practice that we
would seek to do that, government ministers,
Cabinet secretaries would seek to do that. If there was
occasions when that did not happen -- that, I would
hope, would be the very rare occasion but it should not
happen -- it should be the case that every single
minister, Cabinet secretary, myself included, would
ensure that those decisions and salient points related
to those decisions were indeed on the corporate record.
Q. As you used your personal phones, because there were
multiple phones, for conducting these exchanges, and
you've explained to us the process by which the
corporate record would be updated by you passing
material to your private office, who would then include
it in the corporate record, was it your habit then to
give your phone, including these messages and voice
notes, et cetera, to your private office to undertake
that process?
A. No, because -- that would not be the usual practice,
because, again, it wouldn't be the case that we would
expect every word verbatim, full stop, apostrophe, to be
recorded, it's the salient points. So if I had a voice
note from the former First Minister about a decision
that we had made and it was for me to action, then
I would make sure that I would inform my private office
about the decision that was made after discussion with
the former First Minister, and if there are salient
points to record as well as that decision, then I would
pass them on usually through an email in to my
private office or indeed through a telephone call or
a face-to-face exchange.
Q. So the process by which the information was passed was
by email, so those emails should also exist showing how
the --
A. Emails or face-to-face or telephone calls. Granted,
less face-to-face during the early parts of the
pandemic, given the restrictions, but there could be
a number of ways of communicating the decision, or
indeed the salient points, it wouldn't just be by email.
Certainly it was not done by handing a phone over or
copying and pasting a whole WhatsApp exchange. It would
be, again, the decision that was made and the salient
points thereafter.
Q. Okay. But on the occasions when you did pass that
information by email, those emails would still exist and
we would be able to look at those emails to understand
what you had passed on?
A. Yes, and I hope they would be passed on to the Inquiry
already if requested.
Q. Sometimes the exchanges -- a good example actually is

Government and its key ministers upholding the principles of accountability and transparency upon which their bond of trust with the Scottish people is based; is that correct?

A. Yes.

Q. If it were to transpire that the material which we can now see in the messages has not been put onto the corporate record and therefore would not be available for a citizen to see on the corporate record, would that bond of trust have been broken?

A. No, I would disagree with that characterisation.

I think it’s important that we record the decisions that are made and any salient points related to that decision. We cannot, I don’t think, reasonably be expected as a government to record every single sentence, as I say, every full stop or apostrophe, nor is that required of us. I think what’s really important in terms of that bond of trust, and this was exceptionally important for issues around public compliance with restrictions, was explaining the rationale for why we made certain decisions. And that was done regularly. It was the former First Minister’s practice to, almost daily, do a briefing with the media, to explain -- they were well watched, as the Inquiry will know, and therefore exceptionally important that we demonstrate the rationale for the decisions that were made. That isn’t always done through the corporate record, maybe it will be done through ministerial statement, through daily briefing, through questioning from journalists or parliamentarians.

Q. Thank you.

I’d like to ask you some questions about the Cabinet Secretary role you held in the early pandemic; that was the Cabinet Secretary for Justice. I think you were able to be -- you were present at a number of the early meetings which took place in February of 2020 when information about the emerging threat had started to come through and the Scottish Government was trying to put together some element of co-ordination of its response, is that right?

A. That’s correct.

Q. For example, you attended a meeting of a body called SGoRR, the Resilience Room, about which we’ve heard other evidence, on 17 February. Is that right?

A. That is correct.

Q. One of the responsibilities you had was for policing; is that right?

A. That is correct.

Q. Could I have paragraph 143, please, of the statement up, where you helpfully give us some information about this situation. You say:

"In February 2020, my awareness of the number of people likely to be infected with Covid-19 in Scotland and in the UK (including details of any reasonable worst-case scenario (RWCS)) was dependent on the advice that we received from the CMO in terms of the forecast numbers of those affected. The SGoRR paper dated 17 February 2020 noted the RWCS figures and this was discussed at Cabinet the day after SGoRR met on 18 February 2020. These figures were clearly alarming and only underlined the rationale for the Government’s focus being dominated by its response to the pandemic.”

At around this time, can you tell us what steps you took to try to prepare the justice system for this clearly alarming situation, in particular because within the document that was prepared for that very meeting criminal justice is an entire section that is highlighted as something likely to be impacted by the threat?

A. Yes, there was immediate discussions of course with my officials, and they focused -- and with stakeholders, some external and some as part of government bodies and agencies. They were predominantly focused on three areas: on the court system, what might be the impact, although that came slightly later on than this; clearly in relation to prisons, and that's where some of the early focus was if this virus spread throughout a prison population, which I'm afraid to say was and continues to be overcrowded; and with police. And again I think conversations with the police came slightly later than this, but those were the areas of focus for me immediately, once we received this reasonable worst-case scenario modelling paper.

Q. Well, that's a very helpful summary, because I was going to ask you about the prison situation as well, because that was another thing within your portfolio; is that right?

A. That's correct.

Q. You've touched on the very issue which I wanted to address with you, which was prisons, for example, weren't discussed at Cabinet until 17 March. Is it the case that as far as policing and prisons were concerned, it was predictable that this alarming threat would require action both in terms of policing for enforcement but also in terms of the real risk that it posed to the prison population, given their particular circumstances, by this virus?

A. I think it was immediately clear once we had detail of the significant threat of Covid how damaging it could be to a prison population and there was European examples...
of where prisons had seen the virus rip through it,
through the prison estate, and therefore that was one of
the earliest conversations I had with my prison
officials and, where necessary, with the Scottish
Prison Service.

Q. Given that there was no discussion of prisons until
17 March does it suggest that perhaps Scotland was
a little slow off the mark to deal with the policing and
prison situation?

A. No, no, just because it wasn’t discussed at Cabinet,
that didn’t stop or inhibit Cabinet secretaries and
myself, as Cabinet Secretary for Justice, from having
those conversations earlier, be it with officials or
indeed with the bodies themselves, be it Police Scotland
or the Scottish Prison Service.

Q. But what systems were -- discussions, obviously, but
what systems were put in place, first of all, to deal
with what I would suggest would be the inevitable
requirement for the police to be involved in some level
of enforcement of rules, but also the very real threat
that would be posed to the prison population? The
prison population not, in some ways, being that
different from the type of situation one saw with the
Diamond Princess; although it wouldn’t necessarily have
an elderly population, it would involve people in

Q. Could Cabinet determine how they enforced and the four Es
approach that they took was an example of a decision
that was made very much by the Chief Constable.

A. The discussions were held around -- with clinical
experts to understand what needed to be done to try to
slow the transmission of the virus in a setting such as
a crowded prison estate. So at the time the Scottish
Prison Service tried to use whatever capacity it had,
whatever additional space it had, to try to create,
for example, social distancing measures. We were,
of course, in the early, early days of trying to see
what testing was available, at that stage, of course, in
its development phase.

And then regular discussions with Police Scotland --
and I instructed regular discussions with Police
Scotland in order to determine what actions we could
take collectively in relation to enforcement when --
when that became apparent.

Q. Another area which I think from your statement you had
responsibility for was travel restrictions in that post;
is that right?

A. For a period, yes.

Q. Yes -- for a period? Over what period was that?

A. Yes, I think it should be, I hope, in my statement but
there was a point where later, after a number of months,
I think the transport minister ended up taking
responsibility for measures -- forgive me if I don’t
have the exact date before me --

Q. Yes, I think that may be in the statement,
First Minister, but what I was interested in was the way
in -- over the period for which you were -- when you
were responsible for this, the way in which that worked.
In particular you mention in your statement that there
was a requirement for you to engage in discussions at
a four nations level to deal with travel restrictions.
It’s an area in which we have an interest. You explain
in your statement that the engagement was primarily at
the UK Government level for the transport minister but
that you did have limited engagement with Mr Jack, who
was the Secretary of State for Scotland.

Was the -- what role did Mr Jack play? Because in
our assessment one might have expected in an area like
this, where there is an obvious need for UK four nations
cross-border co-operation to the extent that it could be
achieved, for the Secretary of State for Scotland to
play some sort of role more than what you describe as
limited engagement?

A. Yes and I can’t obviously speak for the

Q. So these matters were, you explain, not necessarily
matters that Cabinet would have to decide but they were
within your remit to decide; is that right?

A. They were my remit to have an overview. I should stress
the point about operational independence for the police.
I mean, it would absolutely a matter for the Chief

Constable to sign off the Scottish Prison Service looking
at the prison estate, and therefore that was one of
the earliest conversations I had with my prison
officials and, where necessary, with the Scottish
Prison Service.

Q. Given that there was no discussion of prisons until
17 March does it suggest that perhaps Scotland was
a little slow off the mark to deal with the policing and
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prison population not, in some ways, being that
different from the type of situation one saw with the
Diamond Princess; although it wouldn’t necessarily have
an elderly population, it would involve people in

A. I think this is exactly the point, there was no need for
Cabinet to sign off the Scottish Prison Service looking
to, for example, create extra capacity so they can try
to introduce some sort of measure of be it social
distancing or, for example, to see if they could remove
people from double cells into single cells if possible,
and those decisions wouldn’t require a Cabinet decision
to have to be made.

Similarly discussions with police. When it came to
issues of potential enforcement when it comes to
legislation being introduced to the Scottish Parliament
and being passed by Scottish Parliament, it wouldn’t
necessarily require a Cabinet decision in relation to
the operational independence of the police,
Police Scotland had operational independence to make
decisions based on any legislation that was passed and
the subsequent enforcement action.

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matters that Cabinet would have to decide but they were
within your remit to decide; is that right?

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Constable to determine how they enforced and the four Es
approach that they took was an example of a decision
that was made very much by the Chief Constable.

Q. What concrete plans were put in place with regard to the
police and prisons at this early stage in March?

A. The discussions were held around -- with clinical
experts to understand what needed to be done to try to
slow the transmission of the virus in a setting such as
a crowded prison estate. So at the time the Scottish
Prison Service tried to use whatever capacity it had,
whatever additional space it had, to try to create,
for example, social distancing measures. We were,
of course, in the early, early days of trying to see
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responsibility for was travel restrictions in that post;
is that right?

A. For a period, yes.

Q. Yes -- for a period? Over what period was that?
Secretary of State for Scotland in terms of what engagement he had with his UK counterparts. I can only speak for the fact that when we’re on these four nation calls, his engagement was very limited and there would often be meetings where he wouldn’t say anything at all, and perhaps he was there to observe what was said on the meetings as opposed to necessarily contribute, but of course I couldn’t speak to the discussions he was involved in privately with colleagues and UK counterparts behind the scenes.

Q. Constitutionally would you have expected the Secretary of State for Scotland to have played a more prominent role in these discussions, given the importance, I think you’ll accept, of the need to try to come so some sort of consensus over travel restrictions?

A. I was curious at times why he was on the calls if there was no contribution that was being made, call after call, if that was the case. But no, ultimately there was a devolved responsibility for us in the Scottish Government and there was devolved responsibility to other governments in terms of their jurisdictions, England, Wales and Northern Ireland. With travel it was always going to be more difficult for those other nations outside of England because whatever decisions were made by the UK Government for England were largely for example, but that was rarely done because ultimately there was implications when the UK Government made a decision to put a country -- England -- on a green list, ultimately if we went -- put that country on an amber or red list, people may well just arrive into a port in England and come up to Scotland, therefore we would be at a disadvantage both in terms of the virus but also in terms of our airports as well.

So we could make decisions around inbound travel and what lists countries were on. Immigration of course mattered. It was still a reserved matter and remains that way.

Q. So would you say that in practice and constitutionally the question about who ultimately controlled the borders was a blurry distinction?

A. Yes, to an extent I think that’s right. I think it was known that we could -- when it came to determining whether countries were on a particular list, we could, as a Scottish Government, make a decision, and that decision could be different to other nations in the UK, and vice versa, but I think it was also well understood that if there was divergence then ultimately the decision that was made by the UK Government for England, that was going to have an impact on Scotland, Wales and Northern Ireland, given the ports of entry.
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particularly in relation to international travel, where 1
I was deeply frustrated with the fact that either 2
information coming to us -- and it was usually 3
information from the JBC, the Joint Biosecurity Centre, 4
or other sources -- was coming to us at the absolute 5
last minute before a meeting, five, ten minutes before 6
a meeting was to start, or we were reading about 7
an announcement of a decision already being made by 8
the UK Government -- which, again, was their 9
prerogative, it was their right to make a decision about 10
what countries were on what list for England, but that 11
undoubtedly had an impact on decisions that we were then 12
going to have to make.

Q. You say as a result of that phenomenon, at paragraph 53 13
of your report, that:

“... if the UK Government had decided unannounced, 14
in relation to international travel restrictions, that 15
a country was on the green list, the Scottish Government 16
would often have to follow the decision made by the 17
UK Government, as international travellers could arrive 18
in England and travel domestically to Scotland 19
otherwise. This is also an example of decision-making 20
by the UK Government which was driven by an England-only 21
understanding of policy issues.”

So from that assessment and the analysis you have 22

very clear about that, but he was looking to increase 1
the number of police assets near the border to 2
effectively act as a deterrent.

Q. So when you say there was a ban, it seems that there was 1
a reluctance on the part of Police Scotland to do very 2
much about enforcing it; is that correct?

A. Again, I think there was an understanding also from the 1
Scottish Government that police resources were very, 2
very stretched. Nobody expected there to be a mass 3
deployment of police resources down at the border. We 4
understood how busy Police Scotland were and they were 5
very integral to our response to ensuring public health 6
at the time of the pandemic.

Q. Thank you.

While we're on the subject of enforcement, I had 1
a few questions for you about that as well. The 2
government, the Scottish Government chose to enforce the 3
regulations such as the stay-at-home requirements by way 4
of fixed penalty notices; is that correct?

A. That is correct.

Q. And we understand from your statement that the level of 1
the fixed penalty notices were a matter which you 2
decided upon; is that right?

A. Yes, that's correct.

Q. A fixed penalty notice is, in essence, an on-the-spot 1

A. No, again, it was done on occasion and that was 1
frustrating but ultimately I found that where we had to 2
work together, where we had to collaborate with the 3
UK Government, in the areas where I had responsibility, 4
as Justice Secretary and as Cabinet Secretary for Health 5
and Social Care, often we could collaborate in the 6
interests of public health. But, to be frank, it could 7
be frustrating on occasion.

Q. What responsibilities did you have in that post for the 1
internal border, the border between Scotland and 2
England?

A. Could you say that again?

Q. Sorry. What responsibilities did you have in that post 1
for the border between Scotland and England, the 2
internal border?

A. Yes, for the internal border, again, where decisions 1
were made, and there was periods throughout the pandemic 2
where decisions were made around cross-border travel, 3
the responsibility I would have would be liaising with 4
1 fine typically issued by police officers in respect of
2 minor breaches of the law which does not count as
3 a criminal conviction but is recorded on police systems
4 and may be disclosed via an enhanced disclosure
5 application within a certain period of time; is that
6 your broad understanding?
7 A. Yes, that is correct.
8 Q. Why was it that you chose to enforce -- the Scottish
9 Government chose to enforce the regulations in that
10 particular way?
11 A. Can I say that I understand that there would be very
12 different viewpoints on the use of fixed penalty notices
13 and, from a government perspective, we had to have some
14 sort of deterrent once the regulations were in place, we
15 thought that was important in relation to compliance,
16 but understanding that the vast majority of compliance
17 would take place without any police interaction
18 whatsoever.
19 In fact if I went a step further, even when it came
20 to police interaction or police activity, the vast
21 overwhelming majority of that would be done without
22 enforcement. The police had their four Es approach,
23 with enforcement being the very last E that they chose
24 to deploy. And my understanding from the figures that
25 I've seen is that police activity during this period --
26 more difficult and nuanced question to answer?
27 I'm interested in whether consideration was given
28 within the Scottish Government to alternative means of
29 trying to ensure that the rules were followed other than
30 the FPN system?
31 A. Forgive me, I would have to look over previous Cabinet
32 discussions, but certainly I know that there was
33 certainly an understanding that there was other systems
34 available, such as formally recorded police warnings.
35 I think for the confidence that we had in police
36 officers was that every single day, I suspect, police
37 officers have to try to exercise judgement. You're
38 right, there are some issues which are just cut and
39 paste, they are dry, they are black and white, you
40 understand exactly whether or not an offence has been
41 committed and therefore a fixed penalty notice must be
42 issued, but Police Scotland, police officers I think
43 every day probably are in that area where they have to
44 make a judgement about whether an offence has been
45 committed or not, so there was certainly a belief in
46 Police Scotland's ability, it if was necessary to issue
47 a fixed penalty notice, that they would do that in the
48 correct and appropriate manner.
49 There was also an understanding amongst all of us,
50 government, Police Scotland, that enforcement such as
51 94% of police activity didn't require an FPN, a fixed
52 penalty notice, whereas only 6% required that level of
53 enforcement action.
54 Q. Did you or the Scottish Government more broadly give
55 consideration to the possibility of seeking to enforce
56 the regulations without using the fixed penalty notices?
57 A. I think our -- my recollection is that our concern would
58 be that if we used anything else, so, for example,
59 a recorded warning, that it would not have the same
60 impact or effect or understanding. I think we were very
61 conscious that people understood what a fixed penalty
62 notice was, people may have had it for speeding,
63 littering and so on, so it was an understood -- well
64 understood system. Whereas a formal police recorded
65 warning might not have the same impact or effect. So it
66 was the government's view that a fixed penalty notice
67 was the right mechanism to use for deterrence purposes.
68 Q. Was it -- was that not precisely potentially the problem
69 with fixed penalty notices in this circumstance?
70 Because whereas they might be used and there is
71 an existing administrative system to process them for
72 things like speeding, speeding offences are relatively
73 cut and dry, whereas the question as to whether someone
74 is breaking one of these regulations by, for example,
75 not being at home without a reasonable excuse, is a much
76 A. I think our default position was to go down the fixed
77 penalty notice route, so Professor McVie, whose
78 evidence I've read, and summary of her work I've also
79 read, makes some very important points for us to
80 absolutely reflect on as a government. I think it was
81 our default to go to the FPN -- down the FPN route
82 because it was well understood and all of our
83
MR DAWSON: I gather we're back up and running.

LADY HALLETT: Mr Dawson. If it happens again, I will continue on the basis that we can still have a transcript made, because obviously although I have a duty to make sure these proceedings are as accessible as possible, there are limits when technology fails us.

LADY HALLETT: Thank you very much, my Lady.

First Minister, it was -- the Coronavirus (Scotland) (No.2) Act amended the existing regulation 9 to raise the age to 18, which came into effect on 27 May 2020. (3.10 pm)

MR DAWSON: Thank you very much, my Lady.

In Scotland, the Scottish Government's international obligations with regard to the Convention of the rights of the child, so it was raised to 18. The reason why that was perhaps not given consideration early on was the thinking that if this was to act as a deterrent, it should capture as many people as possible in order to then subsequently have the public health benefits. But on reflection that wasn't the right calculation to make, or the right factors to consider. The correct factor in relation to those who are 16 to 18 is, of course, their rights, and that's why we made the change, as I say, to align us more closely with the UNCRC.

LADY HALLETT: We were discussing matters on the basis that Cabinet minutes would be accessible, and they've asked me to clarify or point out, perhaps, that in fact automatically Cabinet minutes are not released until after a period of 15 years. Is that your understanding?

LADY HALLETT: Yes, but -- but for our purposes in our discussion, I think the material point is: do you accept that documents which exist are susceptible to a Freedom of Information request by an interested citizen, documents which do not exist are not, isn't that right?

MR DAWSON: We can look into that, of course, my Lady.

LADY HALLETT: Thank you. I shall be back in -- provided everything is up and running -- at 3.10.

(A short break)

(3.57 pm)

LADY HALLETT: I've just had a -- the transcript's got "(Webinar freeze)" at the bottom? I'm wondering whether we ought to take the break now.

MR DAWSON: We're very close to the break anyway, my Lady, I think that sounds like a good option.

LADY HALLETT: Sorry about this, but it's obviously important. I don't know if that means that people aren't following it -- it follow it online.

MR DAWSON: We can look into that, of course, my Lady.

LADY HALLETT: Thank you. I shall be back in -- provided everything is up and running -- at 3.10.

(A short break)

(3.57 pm)
Q. In her report Professor McVie suggests at paragraph 8.3 that there is no available evidence to suggest that Scottish or UK lawmakers gave consideration to equality issues in respect of the decision to use fixed penalties. Is that a correct assessment of the position?
A. It is technically correct, although we used EQIAs, equalities impact assessments, across a range of different decisions. I don't think --

Q. -- I'm interested in --
A. -- specifically on the issue around fixed penalty notices.
Q. So there was no such assessment and Professor McVie's impression is correct?

"Maximalist approach" appears in inverted commas; was that your expression?
A. I don't recall if it was my expression or another Cabinet secretary's expression, but I certainly associated myself with the remarks and with that approach.
Q. Whether you used that exact word or not, what was meant by that approach?
A. Yes, what was meant by a maximalist approach was -- and, again, setting the context exactly as you have already done -- that we were dealing with the resurgence of the virus, I think at that point a new variant of the virus recently having been discovered, more transmissible than the previous, real concern around the spread of that virus, and therefore a real need to ensure that restrictions were abided by. So "maximalist approach" meaning, I suppose, what is said in -- in the rest of that sentence, that there would be a greater police resource allocation towards enforcement of the regulations, and again that enforcement always took that four Es approach, with enforcement being the very last resort.
Q. Does it not suggest that there should be more emphasis on the enforcement element rather than the other Es in the policy?

A. Her impression is correct.

Q. Thank you very much.

In January 2021, as we know, the Scottish Government introduced a new stay-at-home order and some consideration was given around that time, as I understand it, to the way in which the enforcement should continue over that period, and you were involved in that at that time; is that correct?
A. Yes, that's correct.

Q. Could I look, please, at INQ000214456. I'm looking at paragraph 20, please.
A. Excuse me just one second.

Yes, sorry, I think I have -- I think it's subsection (h). This is from the minutes of 4 January. It says there -- obviously there was a question about how enforcement should work in the second lockdown, effectively. You said -- where it says: "Mr Yousaf undertook to speak to the Chief Constable to ensure that enforcement actions were being taken forward with due speed and rigour, based on a 'maximalist' approach, and that it was likely this would be met with a call for increased police resources."

In addition, Environmental Health Officers, with appropriate police support, would need to enhance their monitoring of compliance with local restrictions."

As opposed to any additional focus on the enforcement element. That was never a conversation that was had. The Chief Constable was very, very -- the former Chief Constable was always very, very keen to stress to me that he did not want the policing by consent model to be diluted in any way, shape or form, and that he and his officers would always put an emphasis on the first three Es, the engage, the explain, the encourage, before they would end up at the enforcement space.

Q. What equality impact assessment was done of your proposal that there should be a new maximalist approach?
A. I don't think there would be an EQIA on a decision to, for example, increase police resource. There will have been EQIAs in relation to the regulations themselves, but you wouldn't necessarily do an equalities impact
assessments on an approach, an operational approach, that was perhaps taken.

Q. It would be important in order to try to adhere to the four Es approach that you’ve referred to that people should be able to understand the regulations clearly; is that correct?
A. That is correct.
Q. What was done at this time in particular to try to ensure that people understood precisely what the regulations were?
A. A whole range of activity. Of course, the well watched media briefings were going to be important. There was communication that would have gone out from the government, where necessary from Police Scotland as well, and that would be materials not just on the television, on the radio, social media assets would be deployed as well. So we always endeavoured to do our best to ensure that there was as wide understanding as possible of the regulations and indeed the guidance, and we know that at times and on occasion that could be particularly complex.
Q. The rules required to be clear so that people could comply with them; is that correct?
A. Yes, as clear as they could be would help in relation to compliance, yes, that’s correct.

face masks, what chance do others have in understanding the rules?
A. Look, again, as -- let me try to wrap some context, if I can.
As the Cabinet Secretary for Health and Social Care, I didn’t just double check the rules, triple check them, I would quadruple check them if I had to, because the intensity of the public scrutiny that we were under, as politicians of all stripes and colours, but particularly as the Cabinet Secretary for Health, I knew that I would always be under scrutiny to make sure that I was absolutely following every regulation and every guidance. And so it should be thus, that is absolutely right and I’m not complaining about that. So it would not be unusual for me to check in with either the National Clinical Director, Professor Leitch, or the CMO to, as I say, double, triple, quadruple check my understanding of particular nuances in relation to guidance. I always wanted to make sure that I was absolutely complying. And this was a nuance in particular guidance.
And I also can’t deny, Mr Dawson, that there was times when the rules were complex and we got ourselves into a position, I remember, during the course of the pandemic where we were talking about things like "vertical drinking". I mean, these were phrases that we hadn’t used before, didn’t mean much to folk, and we were responding in real time to events, trying to balance the four harms as best we possibly could.
So I would say on the vast overwhelming majority of cases when we produced regulation and the associated guidance they were well understood, but clearly -- I believe one of the lessons we could and should learn is that in a development of that guidance could we have taken a bit more time, engagement sometimes with industry, be it hospitality or others, and was there more that we could have done to simplify some of the more complex guidance, as this was.
But look, my ultimate assertion is that for the vast overwhelming majority of cases the rules were well understood, aided by media briefing, aided by additional marketing, social media campaigns, et cetera.
The requirement to wear a face mask in certain circumstances was a part of the Scottish Government’s strategy towards fighting the virus at this time?
A. Yes.
Q. It was an important part or else it wouldn’t have been part of the strategy; isn’t that right?
A. That is correct, yes.
Q. Was it a matter of concern to you that the National
Clinical Director informed you that "literally no one" 
follows this particular rule?

A. Again, for those that know Jason, I think by his own 
admission he would perhaps have a casual way of speaking 
and perhaps overspeak, as he described it. So when he 
says "But literally no one does", that to me suggested 
that yes, on this particular nuance, when it comes to 
being at a dinner or a reception, that when standing 
speaking to people there wasn't people wearing masks as 
per the guidance we had.

Q. You were seeking his counsel as regards what the rule 
was; isn't that right?

A. Yes.

Q. And, as you said already, as the Cabinet Secretary for 
Health and Social Care, you were under particular 
scrutiny to follow the rules to the letter; isn't that 
right?

A. Yes.

Q. Professor Leitch was giving you a loophole or 
a work-around to try to enable you not to comply with 
the rules; isn't that right?

A. No, again, I was asking if I -- just a clear 
clarification on how to comply. He was of course 
telling me how to comply. If someone comes over to you 
and you stand and you lift your drink, so if you have 
a drink in your hand, if you're sipping, taking a drink, 
then obviously you cannot do that with a mask. I never 
asked for a work-around or how not to comply, and 
neither would I suggest that he was giving that.

For me, it was important, given the public scrutiny, 
in my role, that I absolutely double and triple checked 
the rules, and I did that on occasion with Jason, 
sometimes with others as well.

Q. Thank you, First Minister.

I'm sorry to jump around in the time, in the 
chronology, but I would like to ask you a question about 
something which happened again in your first role, 
before the election.

Could I look at INQ000334682, please.

This, again, is in a slightly different format,
I think, some of the WhatsApp messages that you 
helpfully provided to us. It's a WhatsApp exchange.
The one I'm looking at is between yourself and 
Mr Swinney. I'm looking at 19/6/2020 at 10.26.

Mr Swinney says to you that you have just caught up 
with the "latest insight into SPF thinking".

Is that the Scottish Police Federation?

A. That's correct.

Q. And you reply:

"They're a disgrace. Right through this pandemic 
166
available for anyone without symptoms.

On 26 April there had been a significant opening up, with non-essential shops, gyms, swimming pools, pubs, restaurants and cafés allowed to re-open, while travel between Scotland and the rest of the UK was also permitted again.

On 6 May, which was the day of the election, you’ll recall, First Minister, public health officials warned in that Moray they were experiencing an uncontrolled sustained community transmission of Covid-19, with a case rate of 81 in 100,000.

On 17 May most of mainland Scotland, with the exception of Moray and Glasgow, moved from level 3 to level 2 restrictions, allowing pubs and restaurants to open for indoor service.

And indeed, as I think we’ve seen from some earlier messages, there was a concern -- really at almost exactly the point of your appointment, First Minister -- about cases started to rise in the Glasgow area.

Does that give a fair description as to the background of the situation that you walked into, or are there any other salient features of the pandemic that you would wish to point out?

A. No, I think that's a fair description of the point by which I was appointed. I think the only thing I would have been aware of was associated with the Delta variant of the virus; is that your broad recollection?

Q. Yes, it is.

A. And as you say correctly, cases remained high, they were up and down, but they remained comparatively high in Scotland compared with the rest of the United Kingdom over that period. Do you remember that being the case?

Q. Over what period?

A. The period from the summer till the Omicron arrival towards the end of the year that you described.

Q. Yes, cases were fluctuating, rising often. In terms of how they compared to the rest of the UK throughout that period, from the summer till the arrival of Omicron, there will have been, I'm sure, periods where case numbers in Scotland -- the R number may well have been lower than other nations in the UK, but, for a period, absolutely, were higher.

Q. I'm simply seeking to paint a broad picture,

A. First Minister, we have been through the detail of it with other witnesses, but, as you say, what then happened towards the end of the year is it was a further wave of the Omicron which was a much more transmissible variant of the virus, resulting in huge increases in the number of cases in Scotland; would that be broadly fair?

Q. It would be, broadly speaking.

A. Yes.

Was that the general view that you had of the R number? Would it be fair to say that your period in office was characterised by very considerable rises in the number of cases, broadly speaking, from around about the summer of 2021?

A. Yes, there would be fluctuations, of course there would be, but at the time that I was appointed there was a number of waves of the pandemic and of course in 2021 we also then had to deal with the Omicron variant.

Q. Yes, if we just take it in a stepwise fashion, we’ve seen some evidence from some statistical experts that in the summer of 2021, not long after your appointment to this post, cases started rising significantly and that add to that is there continued to be extreme pressure on the health service as well --

Q. We’ve seen some statistics that would suggest that at the peak of the Omicron wave 8% of people in Scotland were infected whereas at the peak of the first wave only around 1% were infected, based on analysis of retrospective figures. So there were huge numbers of infections to deal with. And is that broadly, again, your recollection?

A. Yes, absolutely.

Q. Again over this period we’ve seen evidence that although the Omicron variant was generally deemed to be less virulent, it was much more transmissible, but it also resulted in Scotland, in this third wave combined, in very nearly as many deaths as had occurred in each of the first two waves, with somewhere around about 5,000 deaths having occurred in each wave, broadly. Again, is that broadly your recollection of the experience that you had as Cabinet Secretary over that period?

A. Yes, I couldn’t swear by the exact number, but broadly -- broadly that's --

Q. I’m simply seeking to illustrate that, even although Omicron was less virulent, it was way more transmissible.

A. Way more transmissible, highly transmissible.

Q. Which resulted in the same number of deaths in this third wave as there had been in each of the first two
waves; was that broadly your recollection?

A. Yes.

Q. And another characteristic which you touched upon

you yourself of this period was that, in many areas,
hospitals started to become overwhelmed; isn't that
right?

A. Extreme pressure on our hospitals, yes.

Q. Many health boards required to suspend non-urgent
surgery at different times?

A. That is correct. Particularly in the run-up to winter
they had to make the really difficult decision of
stopping elective care, in some cases, altogether.

Q. The military required to be called until at times to
assist?

A. Yes, we made MACA requests at times, in relation to
ambulance services in particular.

Q. You described at one point over this period as
Scotland -- the situation as Scotland facing a perfect
storm; do you recall that?

A. I do.

Q. Given that NHS capacity had been such a priority in the
strategy which had been adopted in connection with the
first wave of the virus, why was it that hospitals were
allowed to become overwhelmed in this wave of the virus?

A. It wasn't the case that they were "allowed to become
overwhelmed", we had a perfect storm of issues and
factors that came together. We had, as you have very
well articulated, a highly transmissible variant of the
virus. We had, of course, been opening up society; that
was right because of the vaccination programme. We had
some element of other respiratory viruses, although flu
didn't hit in as big a way as it did in 2022. And of
course we had the other peak pressures that you tend to
see during the winter period.

But when you have a highly transmissible variant, as
Omicron was, way more transmissible than previous
variants, hitting you at about the winter time, where
of course not just where you often see other respiratory
viruses but people tend to mingle more, go to social
events more often, Christmas parties, New Year
functions, then all of these factors coming in together
made the pressure on the NHS extreme.

Q. You say in your statement at paragraph 23 that you were
provided with advice, information and evidence from
a myriad of clinical and scientific experts, Scottish
and intergovernmental advisory groups and stakeholders.

Then you say at paragraph 63 that there wasn't a risk of
information overload or repetition for key
decision-makers.

Would it be fair to say that the main person to whom
you turned for clinical, rather than medical, advice was
Professor Leitch?

A. Yes, and the CMO, who would attend virtually every
Cabinet, but I probably spoke to the National Clinical
Director more than I spoke to another clinical expert.

Q. But on a day-to-day basis the WhatsApps, which you
helpfully provided, show you interacting with
Professor Leitch on a regular basis?

A. Yes.

Q. Sometimes several times an hour in relation to queries
which have arisen from your analysis of the paperwork or
the issues and seeking counsel from him. Was that your
default position, to use your own expression?

A. Yes. It would depend also on the nature of the advice
that was required, but yes, I would turn to
Professor Leitch as the health adviser and a clinical
expert when I needed that health advice. And you're
right, that could be multiple times a week, it could be
multiple times a day, depending on what was going on at
the time.

Q. You say it would depend on the type of advice that would
be required as to when you would turn to
Professor Leitch or perhaps others. What advice would
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you seek from others that you wouldn't seek from
Professor Leitch?
A. I think from my perspective it was only natural that the C-19 advisory group would be relied on more heavily in the early days of the emergency phase of the pandemic, while we're still trying to grapple with the epidemiology of the virus, the characteristics of the virus, and of course work was still ongoing in relation to a vaccine, what can you do in relation to NPIs -- non-pharmaceutical interventions in advance of a vaccine, so the reliance on an advisory group that would often engage with the CMO or would give written submissions to Cabinet secretaries or the government as a whole, the reliance on that group would have been far greater when the group first set up and in that real emergency phase of the pandemic.

You're right to point out that the frequency of the meetings increased when the Omicron variant came in, and that stands to reason, because during the recovery phase by this point, by just kind of pre-Omicron, we would have had a good handle on understanding the characteristics of the virus, we would have had, of course, our vaccination programme under way, we would have understood the non-pharmaceutical interventions and the impacts that they would have on the virus and containment and delay of the spread of the virus. But where we needed that C-19 group, for example, if a new variant came on, and to understand its impact and effects, then we knew we could always rely on the C-19 group.

And there was, of course, other groups, which I know the Inquiry is well aware of. Some are UK level, SAGE, NERVTAG and the Joint Biosecurity Council(sic), UKHSA, and some, of course, at a Scotland level that we could rely on too.

Q. Eight times as many infections as in the first wave, almost 5,000 deaths, hospitals overwhelmed, the military called in. Why was this not an emergency phase of the pandemic?

A. The emergency phase that we tend to talk about, I think, was pre -- when the virus first came and arrived into the UK and therefore the very first non-pharmaceutical interventions had to be considered. In my experience, and I said this, I believe, at the time, this was an emergency in relation to our health service, there was no doubting that, but you yourself have used the phrase that this was seen as the recovery phase.

I think that's right, we were generally seen as being in that recovery phase at this point. But was it a health emergency? Was it a health crisis? For sure. We were facing the most extreme pressure that the NHS had seen at that point in its over 70-year existence. I think, again, up until that point, the winter of 2021, I don't think the NHS would have had a more difficult winter in its history.

Q. In the period before your appointment we're aware of a number of what were called "deep dive" meetings taking place -- there were a number of deep dive meetings in a number of different areas but the deep dive meetings with the Covid-19 Advisory Group?

A. I was aware of them.

Q. On various issues, testing and the like?

A. I was aware of them.

Q. In the period when you were Cabinet Secretary only one such meeting took place as far as we're aware, right at the end of the period in which we're interested, to do with the future of Covid.

Is it the case that in this significant health emergency, more reliance should have been placed on that expert group in order to assist with the response?

A. Not necessarily. And the example that you gave I think is very pertinent. You mentioned the C-19 group did a deep dive, I think you said testing or the like. So...
single week during this phase. My point being is that
the C-19 group, as you yourself said, was there to help
with deep dives into things like testing. These were
already established. I wouldn't have to bring the C-19
group back in to have a deep dive into testing
established, vaccination established, and so on and so
forth. But, again, there was advisers available within
the C-19 group should I have needed them bilaterally as
well as part of a group.

Q. Even although systems were in place, would that C-19
group not have been able to assist with the strategy in
this further emergency phase of the pandemic?
A. I think, again, advisers took advice from clinical
advisers, from the Chief Medical Officer, from the chief
executive of the NHS, from health boards directly, from
experts in social care, a range of experts and advisers,
but I think we knew, given that we were facing this
highly transmissible variant, one of the pieces of
advice that we got was that we had to increase quite
significantly the booster vaccine programme, and that's
why the decision was taken to implement what was known
as the "boosted by the bells" programme, effectively,
getting as many people their booster vaccination before
the end of the year.

Q. What briefing did you receive on taking the post about
the period before that.
Was it the case that your impression of the vaccine
being a game-changer resulted in the fight against the
virus, harm 1, getting less attention than it ought to
have done?
A. It's not my impression at all. And maybe I'm saying
this as the person who was Cabinet Secretary for Health
and Social Care, but harm 1 was always the one that was
at the forefront of my mind. Harm 1 and harm 2 are
probably the ones that were the most forefront of my
mind, given that I was Cabinet Secretary for Health and
Social Care from May 2021 to -- the period of interest
to you. So for me there was never any dilution,
diminution of harm 1, it was at the forefront of our
minds as a government constantly throughout the course
of the pandemic.

Q. As far as harm 2 is concerned, which you've mentioned,
obviously that would fall within your remit as well
because although it's not Covid harms -- there's other
health harms --
A. Yes.
Q. -- to remind people -- what information were you
provided with in order to try to manage the extent of
that harm?
A. Again, I think when we had conversations, we were alive

the role that vaccination was likely to play in the
pandemic in Scotland in that period?
A. When I first came into role -- again, I would have to
look back over of course paperwork, but there was no
doubt at all even before I was in the role as
health secretary that we all knew what a game-changer
the vaccination was.

Now, the question when a new variant always came
into play was whether or not it had what was termed at
the time -- it's still used, the terminology -- immune
escape, and for me there was no doubting at all when
I had my first briefing with the Chief Medical Officer,
with the National Clinical Director and others that
vaccination was the game-changer in how we respond to
the virus and open our society back up as best we can in
the face of Covid-19.

Q. In her evidence Professor Devi Sridhar, she was
of course a member of the Covid-19 Advisory Group, she
explained that at the time when the vaccination
programme started, which was towards the end of 2020
increasing into the beginning of 2021, that her advice,
had her role in providing advice relating to what was known
within the four harms strategy as harm 1, the harm
caused by the virus, diminished, on the basis that her
role had been more prominent in fighting the virus in
Q. So the discussion -- sorry.
A. So there's undoubtedly an impact on their health. It may be chronic health, it may be that hip replacement that Mrs Smith needed and that she now had to wait a year later would undoubtedly mean further deterioration, deconditioning and then impacting the quality of her life. That was absolutely a harm that we had to try to balance, and that's why nobody took the decision at that health board level, government level or any other level, to stop elective care lightly at all.

We absolutely understood that if we took these decisions to protect people from -- and protect their lives in relation to the first harm, harm 1, then that would have an impact potentially on other aspects, including those that fall under the bracket of harm 2.

Q. During the period when you were Cabinet Secretary for Health and Social Care, significant harm under harm 1 was done, the virus was rampant, thousands of deaths, and record levels compared to the rest of the pandemic and the rest of the UK as regards the number of infections; is that correct?
A. Well, I would say that the emergence of Omicron, and of course the Delta variant that was more transmissible than the Alpha variant before it, that was the reason why we had high levels of infection, and in terms of Covid deaths that was a result of course of the Omicron variant, not because -- and I would contend -- of particular policy choices that I made as Cabinet Secretary for Health and Social Care or indeed that the government made. We were dealing with a highly transmissible virus that you have rightly described in your earlier contributions as being far more transmissible than the previous variant.

But yes, that resulted, I'm afraid, in a number of people losing their lives.
And ultimately I remember the First Minister was asking questions to which, to be frank, you would not be able to answer: if you close the fan zone, how many people, extra people end up in pubs? And therefore this was -- I think the message exchange demonstrates that this was not an easy decision to make, and saying that: yes, the First Minister who -- the former First Minister had shown very good instincts, I believe, in relation to decisions being made in regards to the pandemic. There was ultimately a decision that had to be made here and we had provided her clinical advisers and I had also spoken to her, of course, about the fan zone and given my view, but it was not an easy decision to make at all. I think ultimately the right decision was made, given the mitigations that we were able to put in place in relation to testing and so on and so forth.

Q. And I think your position here, as I understand, is that you are quite concerned about whether these events could be allowed to go ahead, given the fact that the background is there's high levels of cases, and you are rightly debating that with Professor Leitch; is that right?

A. Very concerned.

Q. Could we then go to pages 12 to 13. I think it's the same exchange, yes, 4792, pages 12 to 13.

   This is now on 10 June, I'm looking at 10/6/2021 at 11.45. Just up at the top there you can see Professor Leitch says: "And it still goes on...FM wants more advice. Her instinct says cancel fanzone. Her office will write back (which Ken is writing) to ask for more and then Ken will gather the legal etc to reply."

   Then there's a further exchange. You indicate that there's been some attention paid to the cost of cancelling the event, which might be £6 million. You raise the question of whether that would or would not include compensation for those who have lost money. And then at 11.55 Professor Leitch says: "Yep. I think that's costs not profit."

   In the £6 million analysis.

   And then he says:

   "And ultimately I remember the First Minister was asking questions to which, to be frank, you would not be able to answer: if you close the fan zone, how many people, extra people end up in pubs? And therefore this was -- I think the message exchange demonstrates that this was not an easy decision to make, and saying that: yes, the First Minister who -- the former First Minister had shown very good instincts, I believe, in relation to decisions being made in regards to the pandemic. There was ultimately a decision that had to be made here and we had provided her clinical advisers and I had also spoken to her, of course, about the fan zone and given my view, but it was not an easy decision to make at all. I think ultimately the right decision was made, given the mitigations that we were able to put in place in relation to testing and so on and so forth."

Q. My question was whether ultimately it was a matter which relied -- this very difficult situation with lots of different considerations, financial, health, moving picture -- ultimately that relied on an instinctive judgement by the First Minister?

A. No, didn't rely on that. Her instinctive judgement was important but it relied on, I think, being -- all of those involved in the decision being confident that the appropriate mitigations were in place and understanding...
the impacts and potential effects of cancelling the
fan zone and what that would mean for public health as
well as other issues too.

**Q.** There is a further exchange at page 17, which is
a little bit later, I think after, perhaps, the fan zone
has, at least to some extent, been in existence. This
is now on 24 June, looking at the exchange, which starts
at the 24th at 12.26.

You are discussing, I think, the position with
regard to the numbers and you say:

"I was certain we'd be well above the 3,000 mark...
"Just doesn't feel right that we aren't effectively
able to do anything in the immediate and short term to
drive those numbers down, other than imposing
restrictions, which as the FM says the public just
wouldn't stand for."

Professor Leitch says:

"Keep your fingers crossed it [is] a temporary Euros
phenomenon."

The expression "keep your fingers crossed" is one
which appears on a number of occasions in these
exchanges. Is it the case by this stage that you were
relying on instinct and luck to manage the pandemic?

**A.** No, I would reject that charge in its entirety.

Look, I'm -- I was the Cabinet Secretary for Health
of the public such that you just allowed the virus to
run rampant?

**A.** No. You see, it's not a case of simply losing the
dressing room, or the public won't stand for it. What
that in effect means, of course, is that we don't -- we
will not have compliance, and that is the worst of both
worlds. So you end up in a position where people aren't
complying, they just won't stand for it -- at this point
we'd been living with the virus for over a year and
people have been through numerous restrictions -- so you
get the worst of both worlds: they don't comply and then
that therefore means that you continue to get increased
levels and numbers of cases.

I think that was particularly -- it was more
difficult, I think, to bring forward the NPIs, the
non-pharmaceutical interventions, when we had
a vaccination programme also well under way and
a testing system that was well established as well.

But I go back to the central point in this exchange,
that we were facing an incredibly difficult set of
circumstances, with not just the fan zone but, generally
speaking, having lived for over a year with this virus
people's patience, understandably so, with restrictions
wearing relatively thin.

**Q.** But at this stage was it not possible to try to mitigate
the possibility of losing the dressing room by using
strategies you suggested were used early in the
pandemic: explaining things to people, explaining what
the data was, explaining why it was in their interests
to adhere to the restrictions. It seems here that there
is a discussion about those risks, a discussion about
that data, but you simply give up and rely on instinct?

**A.** No, again, I don't agree that we gave up. There was
first and foremost at this point restrictions in place.
It'd be wrong for anybody to suggest there wasn't any
level of restriction in place. But what we also did was
we took additional measures, particularly in relation to
the fan zone but also of course, you'll be aware, in
addition to the fan zone there was some matches being
played at Hampden, with a reduced capacity, so we made
sure that significant mitigations were put in place in
relation to testing availability, test kits being sent
out to people, mitigations around hand hygiene, one-way
systems, and so on and so forth. We took a number of
mitigations. So this wasn't a case of, "Look, we're not
going to take any action, we just have to live with what
will happen".

And ultimately of course the data demonstrates that,
when we look at the Public Health Scotland Covid-19
statistical report of 28 June 2021, that between 11 and
immune escape, such that the vaccines might not work as effectively against this new variant. Is that broadly correct?

A. Yes, correct.

Q. Yes. So at this stage one might think that one required to reimpose or reconsider a precautionary approach, because of the possibility that the great protector, the game-changer, as you described it, the vaccine, may no longer be the protection which it might at once have been; is that right?

A. That is one conclusion, yes.

Q. Is that a fair assessment of the approach which ought to have been taken?

A. Well, again, it depends when the decision was taken because every day we were learning more and more about the variant, its characteristics, possible immune escape, et cetera, et cetera.

Q. So if I could take you to an exchange, please -- I'd taken you to at page 45, sorry, before asking you that question -- at 13 December at 19.56.

A. Yeah.

Q. Discussion here in this context where you again discussing, as we see often, with Professor Leitch: "Keep me updated on what comes out FM call. I will be really disappointed if we end up with just window dressing."

To which, at 20.13, Professor Leitch described: "It's window dressing. We edged her to limiting households everywhere we could but it's marginal.

Nothing significant."

You say:

"Just don't get it. Take it it's coming down to finance? So big events can continue, people can meet in as big as numbers as they like in pubs and restaurants? Madness."

You say:

"Working from home?"

Professor Leitch says:

"All about money."

Professor Leitch says:

"Yep."

"Yes. In regs."

You say:

"Frustrating. Thought Kate [which I assume is a reference to Ms Forbes, is that right?] might have pulled something out of the bag. Was she on the call? I have might try and call her tonight will have limited effect I suspect but be helpful to understand the analysis she has done of costs involved."

So is the position here that you are suggesting that
So there is no doubt that I had thought at this period in time that we should have gone further, and I'm not sure if it's quite at this time or slightly later in the month that we end up with an options paper around various different options that Cabinet considers. Now it's no surprise that I am the one who opts for what I think was option C at the time, which was the one with the most restriction in place, including further restriction on hospitality and leisure. But we had to consider not just all four harms, which was our guiding light, but we had to consider whether or not we would be able to compensate businesses or not if we added further restriction.

So, yes, I think your summary is fair, I wanted to go further, but ultimately that had to be a collective decision that Cabinet would have had in considering all of the factors, including finance of course, as well as ultimately the priority, which is public health.

Q. First Minister, over this period, as we describe, there was considerable uncertainty as to what might happen. There was a threat from a new variant, cases were rising; there was a need to take a precautionary approach, was there not?

A. Yes, and that's why further limitations were brought in and you can see that from the exchange with Jason, I think was option C at the time, which was the one with the most restriction in place, including further restriction on hospitality and leisure. But we had to consider whether or not we would be able to compensate businesses or not if we added further restriction.
in recent times, and we didn't just ask the public to do that once, we asked them to live by these restrictions on multiple occasions.

So there's not a blame here, neither on the public but nor do I think it is correct to attribute blame to the government for the fact that the public had had enough of restrictive measures. But when you have a vaccination programme in place that was effective, when you have a testing system that's in place that has shown to be effective, then -- and when we are seeing a new variant but that new variant, thankfully, because of the vaccine, largely down to the vaccine, is not causing as much severe illness perhaps as if we didn't have the vaccine, and people are hearing that there's one person in ICU for example with Omicron, then it would have been if not virtually impossible, extremely difficult to impose a level of restriction akin to lockdown that would have undoubtedly had the impact of reducing case numbers, but I don't think we would have had compliance with – from the public.

Q. I've two very brief further questions.

I understand that during the course of your evidence, I think you alluded to this earlier in connection with the WhatsApp situation, that you have announced an externally led review into the Scottish care homes of patients being discharged to care homes from hospital care. The Scottish Government are aware that older people were more at risk of serious illness from the virus, but in the initial stages of the pandemic there was an evolving understanding of asymptomatic transmission. As the knowledge and understanding grew, our testing regime was changed accordingly in response.

Then you explain that this is why there was a change in routinely testing from those -- from hospital to care homes who were asymptomatic to testing all people moving from hospital to care homes on 21 April 2020.

We see from our discussion of Cabinet meetings that the issue of care homes was frequently discussed, and I would like to ask you, as a member, I appreciate of the Cabinet but not as the member who had specific responsibility for this, but nevertheless a member of the Cabinet who was making these decisions: what was your understanding, and when did you become aware of the possibility of asymptomatic transfer of Covid-19?

Now, before you respond to that, I use the word "possibility" with care. Not when did it become clear that that was an issue, but can you recall when the live issue of asymptomatic transfer was a possibility?

A. Thank you.

Can I reiterate, now that I'm speaking directly to you as the representative of Scottish Covid Bereaved, can I reiterate that apology that I made at the beginning for the way that we've handled the WhatsApp issue. It was not good enough and it has caused, I think the issue around possible asymptomatic transmission was a possibility, but can you recall when the live issue became clear. As you can imagine, many of us in government, regardless of whether they were health secretary at the time or not, have reflected on this issue and this question of asymptomatic testing for those who were being discharged from hospitals into care homes, and there will be a long list of potential lessons that the government and governments could have learnt.

I think the issue around possible asymptomatic transmission of the virus was known as a possibility early on, through various international journals, through various academic articles, and there will be a number of things that we could have done better.

It is in my view, as the current First Minister, that we should have been testing those who were leaving
Scotland, in June 2021, indicating that older
the elderly are different, and also Public Health
multiple comorbidities.
years were not manifesting in the same way as in
Scottish Care that symptoms demonstrated as being Covid
Dr Donald Macaskill saying that they were aware at
and certainly in March of 2020, we heard evidence from
the piece.
We were always trying to balance a number of factors and
out, that was a risk you had to take?
But prior to that time it appears that, balancing things
(pre-21 April 2020 I think it would be fair to say that
there was a possibility -- and that was the word you
very specifically used -- because it wasn't clear, may
not have been clear well in advance of that date, but it
was certainly a possibility that asymptomatic
transmission could have happened and therefore, as
I say, if there's an area of reflection that I think
about very often, it is whether we should have -- and it
is my view actually we should have -- perhaps more
routinely tested those moving from hospitals to care
homes who were asymptomatic sooner.
I understand that you've reflected upon that and that's
your view now. Can you explain to the Inquiry what your
thinking -- what the impact of that was at the time,
what your thinking was at the time when you decided:

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tests, rapid tests, which became -- again, evolved over
time to become far more accurate than they were.
But when it became clearer, because we talked about
a possibility of asymptomatic transmission, when it
became clearer of course we moved to a position of
routinely testing.
Q. But prior to that time it appears that, balancing things
out, that was a risk you had to take?
A. We were always trying to balance a number of factors and
risks, overwhelming of the NHS, nosocomial infection,
impact on care homes, and so on and so forth, and --
Q. May I move on to my next question, and that is in
relation to the changing picture of Covid symptoms over
the piece.
Now, we've heard evidence even as early as February
and certainly in March of 2020, we heard evidence from
Dr Donald Macaskill saying that they were aware at
Scottish Care that symptoms demonstrated as being Covid
symptoms were not manifesting in the same way as in
a population which was particularly old and with
multiple comorbidities.
We have then at a later stage, June 2020, Public
Health Scotland highlighting the fact that symptoms in
the elderly are different, and also Public Health
Scotland, in June 2021, indicating that older
compromised residents may present with atypical or
non-specific symptoms, and list them.
My Lady, for reference, that is INQ000241655.
After you became Cabinet Secretary for Health and
Social Care in May 2021, you met the group now known as
the Scottish Covid Bereaved on 17 August 2021, and
during the course of that conversation they raised with
you the issue of Covid-19 symptoms being restricted to
temperature, persistent cough and a loss of sense of
taste or smell, and you recall that you confirmed that
the UK Health Security Agency was responsible for the
symptoms and would not at that stage change it.
You say that in respect of the steps taken to revise
the symptoms, you recall enquiring of the CMO as to the
potential scope for expanding the line of symptoms.
In that regard, this would be Gregor Smith that you
would have been asking, do you recall if you asked him
in person or in writing?
A. Forgive me, it certainly would have been in person,
I can't remember whether or not there was also a written
exchange, be that over informal communication or
formally, but the Scottish Covid Bereaved of course
raised it, as you rightly say, and that's minuted. It
was also raised by other groups as well that there may
be additional symptoms, and there was of course primary
core symptoms and then what was known sometimes as secondary symptoms. But ultimately these were clinical decisions. There is no way that I, nor the previous DFM, who met Scottish Covid Bereaved --

Q. No, I'm sorry to interrupt you, First Minister, I'm just wanting to see whether or not you asked him, and presumably he followed that up, because in the paragraph you give, we don’t hear what the response was. Can you remember what the response --

A. Yes, he would have had a discussion with the other CMOs of the United Kingdom and for -- the clinical expertise would have been to maintain those core symptoms as they were. Now, they would have taken a whole raft and range of clinical advice and used their clinical expertise to come to that decision, and I go back to saying that ultimately it was always going to be a clinical decision.

Q. Finally, why when health is a devolved matter did it require the UK Health Security Agency to identify the symptom profile, as fed into it by the four CMOs? Why couldn't Scotland go its own way in that regard?

A. Yeah. I think in essence if we had -- if the CMO and the clinical advice had come back to say very strongly that "We believe that there should be XYZ symptom added to the core symptoms", that may have been a possibility.

I think we were very, very keen in this sense to try to keep UK alignment, to try to make the issue more simply understood in relation to the core symptoms right across the UK. But this again, I go back to the point, there’s always going to be an issue of clinical advice as opposed to ministerial decision or direction.

MS MITCHELL: My Lady, those are my questions.

LADY HALLETT: Thank you, Ms Mitchell.

Thank you very much, First Minister, I'm very grateful to you.

Sorry about the constant coughing, I'm afraid it's been a feature of this Inquiry, certainly in Scotland. I will see everybody on Monday at 10 am.

THE WITNESS: Thank you my Lady.

(4.33 pm)

(The witness withdrew)

(The hearing adjourned until 10 am on Monday, 29 January 2024)
days [12] 19/18 47/17 53/17 65/10 66/16 68/2 72/99 78/19 139/13 177/7 188/18 230/20 155/17

days' [1] 10/2 102/10
deadline [1] 125/13
deal [10] 90/24 137/8 137/17 140/12 170/21 172/6 192/7 221/1 201/14 204/2
dealing [6] 100/17 103/7 118/23 159/11 186/8 201/11
deal [1] 106/23
dead [4] 63/11 64/7 65/16 66/6
debate [2] 39/5

debating [1]
debate [2] 185/21 186/4 203/24

deadly [1] 20/21 208/24
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days' [1]
days [12] 19/18 47/17 53/17 65/10 66/16 68/2 72/99 78/19 139/13 177/7 188/18 230/20 155/17

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deal [1] 106/23
dead [4] 63/11 64/7 65/16 66/6
debate [2] 39/5

debating [1]
debate [2] 185/21 186/4 203/24

(63) cross-reference... - developed
(65) don't... - equipped