

1 **Wednesday, 8 June 2022**

2 **(10.00 am)**

3 **SIR BRIAN LANGSTAFF:** Good morning, Mr Lister.

4 **THE WITNESS:** Good morning.

5 **SIR BRIAN LANGSTAFF:** In a moment or two, I'm going to ask

6 Ellie to ask you to take the affirmation, and then
7 you're going to be asked questions by Ms Scott.

8 The audience you see in front of you are
9 participants in the Inquiry. There is a wider audience,
10 generally numbers in three figures, which is beyond this
11 room, watching on YouTube or live stream. So you're
12 addressing them, the audience in front of you, and the
13 lawyers to the left, as well as Ms Scott and myself.

14 Ellie, please.

15 **CHARLES EDWARD LISTER (affirmed)**

16 **Questioned by MS SCOTT**

17 **MS SCOTT:** Mr Lister, I'm going to start with an overview of
18 your career. So we know from your witness statement
19 that you were employed by the Department of Health
20 between 1971 and 2011, save for a period between 2003
21 and 2009, when you were employed by the Human
22 Fertilisation and Embryology Authority; is that right?

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

24 **Q.** Now, you've given us some detail in your witness
25 statement about the roles that you had in the Department

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1 I went to -- back to -- I'm trying to remember the right
2 order of things -- I went back to Medicines Division,
3 managing, among other things, the yellow card scheme, or
4 the administration of the yellow card scheme, on adverse
5 reactions. I went then to something called the policy
6 secretariat which was looking at a range of
7 cross-cutting issues across Government that the
8 Department of Health was interested in, and then
9 managing the -- also acting as secretariat for the
10 departmental board.

11 Then went on to -- and this is the last of these
12 roles up until '91 -- working on NHS finance, managing
13 the allocations to Health Authorities, but also the --
14 what was known as the top slicing process which meant
15 that when the Treasury allocated funds to the
16 Department, the Secretary of State's objective was for
17 most of that funding to go to the NHS. But there were
18 budgets that were spent by the Department, and my job
19 was to allocate those, trying to get as much money as
20 possible out to the NHS.

21 **Q.** So that takes to us 1991 --

22 **A.** Mm-hm.

23 **Q.** -- where you took up a role where you had
24 responsibilities, is this right, for various aspects of
25 the microbiological safe food safety policy?

3

1 from 1991. I just wonder if you could give us an idea
2 of what you were doing between 1971 and 1991.

3 **A.** Okay. Well, I joined the Civil Service straight from
4 school, straight after doing O levels, and I started off
5 in York in the local Social Security office.

6 In 1973, I got myself a job in the Secretary of
7 State's Private Office in London -- that was Sir Keith
8 Joseph at the time -- but for most of the time I was in
9 private office, the Secretary of State was Barbara
10 Castle.

11 I then moved into doing work for the Occupational
12 Pensions Board, and then after that, moved to what was
13 then the Department's Medicines Division on the
14 secretariat for the Committee on Safety of Medicines,
15 focusing largely on adverse reactions to drugs. The big
16 issue at the time was concern about the side effects of
17 oral contraceptives.

18 From there, I went to do a role on policy for care
19 of elderly people. Then on -- back to occupational
20 pensions again, working on the 1985 and 1986 Social
21 Security Acts. I'm afraid it's a very long career.
22 *[laughs]*. During that time, I got on to the
23 Department's management development programme which
24 meant that I was then doing a series of short-term jobs
25 intended to improve my knowledge and experience. So

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1 **A.** That's right. That included things like salmonella.
2 Salmonella in eggs was still a bit of an issue at that
3 stage. And this was before the establishment of the
4 Food Standards Agency. So I also had responsibility for
5 things like the food hazard alert system dealing with
6 emergencies and our response to those.

7 **Q.** In that role, you took over responsibility for BSE; is
8 that right?

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

10 **Q.** And that included acting as a secretariat for the
11 Spongiform Encephalopathy Advisory Committee, or SEAC as
12 we have been calling it for short.

13 **A.** Yes. As I used to call it as well.

14 **Q.** And is it right that your team held the budget from
15 May 1994 for the CJD Research & Surveillance Unit?

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

17 **Q.** And as a result of that role, you were called to give
18 both written and oral evidence to the BSE Inquiry.

19 **A.** That's correct, yes. That would have been in 1998.

20 **Q.** And for the transcript, the -- your written statement is
21 BSEI0000015 and your oral evidence is BSEI0000018.

22 Then in May 1995, you took up a role as a team
23 leader on the -- in HIV and AIDS, working in sexual
24 health promotion; is that right?

25 **A.** Yes, that's correct. So it was on HIV, but it was

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1 entirely on sexual health promotion at a point where we
2 were particularly concerned about the prevalence of HIV
3 among sub-Saharan African communities in the UK, so
4 I worked a lot with community groups there.

5 Q. So is it right to understand from that that you had no
6 role in working -- in any policy areas to do with the
7 role of transmission of HIV via blood and blood
8 products?

9 A. I didn't. No, I was aware of those issues in the wider
10 context, and I was aware at that time of the Macfarlane
11 Trust, for example, as part of the sort of wider context
12 in which I was working, but I had no direct involvement.

13 Q. And then in October 1998, you took up a role as the head
14 of the Blood Policy Unit. We're going to come back to
15 that because that's going to be the focus of the
16 questions that I ask you today.

17 A. Mm-hm.

18 Q. Then in May 2003, you left the Department of Health for
19 a period of about five years to work as head of policy
20 at the Human Fertilisation and Embryology Authority.

21 A. Correct, yes.

22 Q. And then you returned to the Department of Health in
23 2008, working on the programme management for the HFEA
24 Human and Fertilisation Embryology Authority's change
25 programme.

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1 Service Code, which was published in 1996, and then ask
2 you some questions. It's RLIT0001626. If we could go,
3 please, straight to page 46 of that document.

4 So this is the Civil Service Code, which is
5 printed within another document, a research paper, which
6 sets out a number of different codes and procedures for
7 ministers. We can see here that it sets out, at
8 paragraph 1:

9 "The constitutional and practical role of the
10 Civil Service is, with integrity, honesty, impartiality
11 and objectivity, to assist the duly constituted
12 Government, of whatever political complexion, in
13 formulating policies of the Government, carrying out
14 decisions of the Government and in administering public
15 services for which the Government is responsible."

16 Then paragraph 2:

17 "Civil servants are servants of the Crown.
18 Constitutionally, the Crown acts on the advice of
19 Ministers and, subject to the provisions of this Code,
20 civil servants owe their loyalty to the duly constituted
21 Government."

22 Then if we could just go over the page, please,
23 and pick up paragraph 5:

24 "Civil servants should conduct themselves" --

25 If we could just go down, paragraph 3 deals with

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1 A. That was still at the HFEA, not back in the Department.

2 Q. And then, is this right, in 2009, you became a senior
3 business manager in the Department of Health for the
4 Director General NHS workforce and head of NHS
5 leadership?

6 A. That's right, yes.

7 Q. And then you retired from the Department of Health in
8 2011.

9 A. Correct.

10 Q. And you took up a role in August 2011 as a trustee of
11 the Caxton Foundation.

12 A. Correct.

13 Q. And you have given both written evidence to this Inquiry
14 and oral evidence to this Inquiry remotely on 25 and
15 26 March 2021 in relation to your role as a director of
16 the Caxton Foundation.

17 A. **(Witness nodded)**

18 Q. As I've already said, the focus of today's questions is
19 going to be your role as head of the Blood Policy Unit
20 between October 1998 and May 2003. But before I ask you
21 questions about that, can you help us to understand
22 a bit more about the role of administrative civil
23 servants, I'm going to call it, rather than medical
24 civil servants, such as yourself.

25 I'm going to turn, first of all, to the Civil

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1 the responsibility of ministers. Paragraph 5:

2 "Civil servants should conduct themselves with
3 integrity, impartiality and honesty. They should give
4 honest and impartial advice to Ministers, without fear
5 or favour and make all information relevant to
6 a decision available to Ministers. They should not
7 deceive or knowingly mislead Ministers, Parliament or
8 the public."

9 Then paragraph 6 deals with the civil servants'
10 duties, if that's the right word, in dealing with the
11 affairs of the public.

12 "[They] should endeavour to deal with the affairs
13 of the public sympathetically, efficiently, promptly and
14 without bias or maladministration."

15 If we go over the page and I just want to pick up
16 paragraph 7:

17 "Civil servants should endeavour to ensure the
18 proper, effective and efficient use of public money."

19 Then there are other provisions and dealing with
20 not misusing official positions and what civil servants
21 should do when they're required to act in a way which
22 they consider to be illegal or improper, and so on.

23 Is it right to understand that this 1996 code was
24 the first time that the obligations and the duties of
25 the Civil Service were set out in a document?

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1 A. In this way, yes.
 2 Q. Were you familiar with the Code during your time at the
 3 Department, from 1996 to --
 4 A. I was, yes.
 5 Q. Was it something you were trained on, how to adhere --
 6 how to upkeep these duties of honesty, integrity, and so
 7 on, or was it something you picked up on the job as
 8 a matter of judgement?
 9 A. The latter.
 10 Q. What, generally speaking, was your understanding of your
 11 duty, as a civil servant, to give impartial advice to
 12 ministers?
 13 A. Well, as a civil servant, my responsibility was to
 14 support the Government and the ministers in delivering
 15 their key objectives and an important part of that role
 16 is the provision of advice to ministers. So as a civil
 17 servant, I was responsible for understanding the issue
 18 in depth and the context of that issue, making sure that
 19 we gathered evidence from -- around the issue, and had
 20 analysed that, and that we, from that analysis, and work
 21 with a range of expert colleagues and external
 22 stakeholders, provide advice to ministers on the best
 23 way forward on particular issues.
 24 And that would normally be providing advice with
 25 ministers often on -- with options on the way forward

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1 A. It's a sort of middle ranking role, and grade 7 was the
 2 team leader role. So if you think of Government
 3 Departments having a range of portfolios for particular
 4 issues, you would have a Director General who would have
 5 responsibility, for example, for the whole of -- a whole
 6 set of issues to do with provision of health services,
 7 and then there would be a set of branch heads, who would
 8 be the bottom rung of the senior Civil Service, who
 9 would have a narrower set. And then at grade 7 you
 10 would have much more specific set of responsibilities.
 11 So very much a sort of middle rank.
 12 Q. When you joined the Unit, it was part of Health Service
 13 Directorate 1; is that right?
 14 A. That's correct.
 15 Q. HSD1?
 16 A. Mm hm.
 17 Q. You reported to Dr Mike McGovern, a haematologist?
 18 A. Yes.
 19 Q. But he wasn't part of the Blood Policy Unit itself, he
 20 sat above the Blood Policy Unit, did he?
 21 A. No, I think -- as part of the context here, up until the
 22 mid-'90s in the Department of Health, there was
 23 a separate medical and administrative hierarchy. And in
 24 the mid-'90s, those were brought together. So if you
 25 were a doctor at that point, at the point I joined the

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1 and a recommendation.
 2 Q. So the obligation to act impartially is not to just put
 3 forward what you think is the best idea, but to, as you
 4 say, set out what the potential options are and then
 5 advise on what you think is the best --
 6 A. Yes, I think the challenge for civil servants is
 7 objectivity in the review of evidence, I think it's easy
 8 sometimes, as a civil servant, to think that you know
 9 what the answer is, but what you should be doing is
 10 exercising objectivity and looking at the range of
 11 evidence and making sure that ministers are advised
 12 about all the evidence available so they can take
 13 a properly informed decision.
 14 And I think that is key, that when ministers take
 15 decisions, they should do that on the basis of the full
 16 range of available evidence.
 17 Q. Turning then to your role at the Blood Policy Unit, was
 18 your role title the Head of Blood Policy?
 19 A. That was a little later. I think it was a team leader
 20 role to begin with. The Head of Blood Policy title came
 21 later when the role expanded.
 22 Q. What grade of civil servant were you when you took up
 23 the role?
 24 A. I was a grade 7.
 25 Q. What does that mean, in terms of your seniority?

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1 Blood Policy Unit in the Department of Health, you were
 2 part of the Unit. You weren't working separately, which
 3 is why I was reporting to Dr Mike McGovern, as opposed
 4 to another administrative civil servant.
 5 Q. But did he have other responsibilities as well as
 6 working with the Blood Policy Unit?
 7 A. I don't recall that he did. It's possible that he did
 8 but I don't recall that.
 9 Q. David Hewlett was head of branch; is that right?
 10 A. That's correct.
 11 Q. Dr Sheila Adam was head of the Directorate?
 12 A. Yes.
 13 Q. Your witness statement tells us that you had a team of
 14 two staff reporting to you at that stage?
 15 A. I did.
 16 Q. So there were three of you, plus Dr Mike McGovern?
 17 A. Yes.
 18 Q. Is that the size of the team? Then in July 2001, the
 19 Unit moved to the Public Health Directorate; is that
 20 correct?
 21 A. That's correct, yes, as part of a departmental
 22 reorganisation.
 23 Q. That Public Health Directorate was headed by
 24 Dr Pat Troop, who was the Deputy Chief Medical Officer?
 25 A. Correct.

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1 Q. You reported to Vicki King?
 2 A. Mm-hm, who was a scientist.
 3 Q. The branch head was Dr Mary O'Mahony?
 4 A. Correct.
 5 Q. You tell us in your witness statement that, by this
 6 stage, you had three members of staff reporting to you,
 7 so again, you were still a four-person team?
 8 A. Yes, yes, absolutely. That was the basic position. We
 9 had additional people brought in at various times but
 10 the core team was a team of four. By that stage, the
 11 work had expanded quite considerably, both because of
 12 things like the European Tissues and Cells Directive --
 13 sorry, not tissues and cells. Sorry, the European Blood
 14 Directive.
 15 Q. Is it also right to understand that for a period after
 16 the move to the Public Health Directorate, you didn't
 17 have access to an in-house haematologist?
 18 A. That's correct, yes. Mike McGovern didn't move with us.
 19 So we lost that access. So for a while, I was getting
 20 that advice externally.
 21 Q. Did that cause any difficulties that you can recall?
 22 A. Not that I can recall. I think there was a gradual
 23 movement within the Department to feel that they -- that
 24 the Department didn't need to have a whole lot of
 25 in-house medical expertise, that there were medical

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1 measures to reduce the risk of vCJD and HCV transmission
 2 through blood, including funding of measures introduced
 3 by National Blood Service and the provision of
 4 recombinant clotting factors for people with
 5 haemophilia."

6 I'll come back to ask you a handful of questions
 7 about vCJD and recombinant factor products:

8 "Ensuring sufficiency of supplies of key blood
 9 products for UK patients, including sourcing of blood
 10 plasma supply from the US."

11 And I'll come back and ask you a handful of
 12 questions about that:

13 "Negotiating and implementing a new EU Blood
 14 Directive on standards and quality of blood; drafting
 15 responses for ministers on calls for compensation and
 16 a public inquiry into the contamination of blood with
 17 HCV."

18 I'll come back to ask you questions about both of
 19 those issues. And:

20 "Sponsorship of the Alliance House charities, the
 21 AHOs."

22 Again, I'll come back and ask you a handful of
 23 questions in relation to the AHOs as well.

24 Now, we can see the broad range of matters that
 25 you were involved in, and you've told us in your witness

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1 experts externally that it was possible to call on, and
 2 that became more and more the trend within the
 3 Department. So what I experienced was not unusual.
 4 Q. Were you given any briefing or guidance on key issues
 5 and priorities when you took up your role, or was it
 6 very much hit the ground running? "Here, this is what's
 7 coming across your desk?"
 8 A. Well, it's always hit the ground running, but I had
 9 a good induction from Mike McGovern into all the key
 10 issues at that time.
 11 Q. And who was your predecessor?
 12 A. Christine Corrigan.
 13 Q. Can we have a look at the way that you describe the role
 14 of the Blood Policy Unit and the overview of the work
 15 that you were involved in, in your second witness
 16 statement, WITN4505002. If we could go to page 5,
 17 please, of that document. We can see paragraph 1.7, you
 18 say this:
 19 "I made a lateral move to Head of Blood Policy.
 20 This involved a wide range of responsibilities, which
 21 increased during my time in my role, including
 22 development of government policy on the safety and
 23 supply of blood and blood products to the NHS;
 24 sponsorship of the National Blood Authority ... the
 25 Better Blood Transfusion initiative; development of

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1 statement that the Unit was understaffed. Can you
 2 explain to us what problems that caused for you and your
 3 colleagues on a practical level?

4 A. On a practical level, it meant that we needed to
 5 prioritise the work that we focused on. The downside
 6 was that occasionally it meant that we missed things
 7 that we should perhaps have dealt with.

8 Q. Were there areas of work that you would have liked to
 9 have been able to work on, or matters you would have
 10 liked to have achieved that you weren't able to do so
 11 because of the understaffing?

12 A. I don't think so. Again, I think as context, the
 13 issue -- when you have -- you know, you are responsible
 14 for everything to do with blood. When things come in
 15 that are new that you have to deal with, it -- you have
 16 to manage that within the resources that you've got.
 17 And as we've discussed, I was successful in bidding for
 18 extra resources, but there was always quite
 19 a considerable lag between getting those. And so that
 20 meant that we were very hard pressed. I mean, which
 21 meant working very long hours, mostly. I think that's
 22 the other side of it. But I don't think there was
 23 anything -- any key objectives that we had that didn't
 24 get achieved because of it.

25 Q. And you've also identified in your statement that

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1 shortly after the move to the Public Health Directorate,
2 the Deputy Chief Medical Officer, Dr Pat Troop and her
3 team, were dealing with the aftermath of September 11
4 and so were not able to devote much time to the Blood
5 Policy Unit.

6 How long did that aftermath last, in terms of
7 taking up time of the DCMO, Dr Troop?

8 **A.** To be honest, I don't remember exactly. We managed that
9 by finding somebody else externally who supported as the
10 senior departmental sponsor for the National Blood
11 Service -- that was Professor Lindsey Davis, who was
12 a director of public health. What I can't remember is
13 the gap between losing a lot of Pat Troop's and Lindsey
14 coming in to provide support.

15 **Q.** And so the impact of losing your sponsor and the top
16 decision-maker was what?

17 **A.** Was that more fell on me in the meantime.

18 **Q.** Before I turn to ask you questions about calls for
19 a public inquiry, I want to ask you whether you can help
20 us understand how and in what circumstances issues were
21 escalated to ministers and in what circumstances civil
22 servants could make decisions for themselves.

23 So, first of all, dealing with the process, as
24 Head of Blood Policy, could you make a unilateral
25 decision to send a submission up to a minister, or did

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1 there were certain things that absolutely had to go to
2 ministers, so decisions on issues, anything to do with
3 spending public money.

4 So, for example, all the submissions about whether
5 to find the money for recombinant clotting factors or --
6 not covered in the evidence, but for NAT testing, for
7 example; issues that involved previous decisions taken
8 by ministers, so further discussion on the compensation
9 issue, for example. Anything that was going to go
10 public from the Department needed to go through
11 ministers.

12 So a whole range of -- if anything involving
13 anything legislative, anything involving anything going
14 to Parliament, so a whole range of things which, from my
15 experience as a civil servant, I knew required
16 ministerial decision. And then I would take a view on
17 whether an issue had wider implications that needed
18 senior input.

19 **Q.** Now, we can see from your witness statement a number of
20 different ministers making decisions about blood policy
21 during your time there.

22 **A.** Mm-hm.

23 **Q.** That seems to be for two reasons: first, because there
24 were a number of ministers in the Department and,
25 secondly, because there was a turnover of those

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1 that decision need to be cleared by somebody more
2 senior?

3 **A.** I think there were times when I could take that decision
4 if it was something urgent. There are plenty of
5 examples of submissions discussed in my evidence which
6 had a lot of discussion with senior people, but some
7 came straight from me with limited discussion. It did
8 vary a lot.

9 **Q.** And what was the process when you authored a submission
10 to the minister? Could you simply author it yourself
11 and send it off to the minister's office, or would it
12 involve going to senior colleagues to get submissions
13 cleared and so on?

14 **A.** It was usually a judgment call for me, I think. I could
15 put submissions directly to ministers. I have to say,
16 in the Civil Service now at that level, that would not
17 be possible, but then that was, and I did. It would be
18 normally my judgment whether I thought I needed senior
19 input.

20 **Q.** And then how did you decide whether or not something
21 was -- whether or not there was an -- the issue was
22 something that you could decide for yourself, or that
23 you had to escalate to senior colleagues, or that you
24 had to indeed go to the Minister for a decision?

25 **A.** I think that depended on the size of the issues. So

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1 ministerial posts. What impact do you think that the
2 range, the range of ministers, the number of ministers,
3 that you had to deal with had on decision making in the
4 Department?

5 **A.** I think the first thing to say is that there was
6 certainly a turnover among junior ministers at the
7 Parliamentary secretary level but actually not at the
8 Secretary of State level. There were only two
9 secretaries of state during my time, Frank Dobson
10 initially, and then --

11 **Q.** Mr Milburn, Alan Milburn?

12 **A.** Alan Milburn, thank you. So there was that consistency
13 at Secretary of State level. And I think, as my
14 evidence shows on, you know, certain key questions,
15 Parliamentary secretaries would refer matters up to the
16 Secretary of State for a view.

17 So although there was turnover -- we had four
18 ministers responsible for blood during my five years --
19 it was more an issue of getting them up to speed with
20 the issue and establishing a relationship with them.
21 And it could be frustrating if a minister left rather
22 quickly because you had just established a relationship
23 and an understanding of the issues, and then they'd move
24 on and you would have to start again.

25 **Q.** In an already stretched team?

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1 A. Yes.
 2 Q. Was it always clear to you which minister should be
 3 sighted on which particular issue?
 4 A. Yes, the ministerial portfolios were very clear.
 5 Q. I'm going to turn now to ask you some questions about
 6 calls for a public inquiry. So is it right that when
 7 you started at the Blood Policy Unit, there was already
 8 a view that there should not be a public inquiry?
 9 A. That's correct.
 10 Q. That was a view that had been held both by the
 11 Department and by the Government more widely for some
 12 significant amount of time?
 13 A. That's correct.
 14 Q. I want to explore with you how Government avoids
 15 long-existing policies never being challenged because,
 16 on the one hand, you have civil servants saying,
 17 effectively, these are the lines that have been taken
 18 before, this is the policy, and when coming to brief
 19 ministers, the same lines to take are rehearsed and sent
 20 to ministers.
 21 A. **(Witness nodded)**
 22 Q. So the advice can remain the same.
 23 A. Mm-hm.
 24 Q. On the other hand, you've got ministers saying, "Well,
 25 that's what I was being advised by my civil servants and

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1 Would you challenge or would you review -- relook
 2 at a long held and existing policy when a new minister
 3 arrives?
 4 A. When a new minister arrives, we would brief them on the
 5 current policies, but we wouldn't review it just because
 6 we have a new minister.
 7 Q. Presumably, sometimes when a new minister arrives they
 8 have a view about a particular policy, which may then
 9 call for a review?
 10 A. It's always open to a minister to challenge anything
 11 they think isn't right, in their view.
 12 Q. Is that the same process under a new government, when
 13 the government changes? Again, are those circumstances
 14 in which reviews often take place of policies?
 15 A. When governments change, new ministers are presented
 16 with a massive briefing pack which describes current
 17 policies but also suggests ways forward for that
 18 government's manifesto commitments.
 19 Q. Can we turn to what you say in your witness statement
 20 about the policy. It's your third witness statement
 21 which is WITN4505389. And can we go, please, to
 22 page 66. At 4.64, at the top there, you say:
 23 "On a general level, my overall view is that
 24 I essentially maintained the existing government line on
 25 the public inquiry issue. I certainly do not recall

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1 so I took the advice of my civil servants". So one can
 2 see that long-existing policies may never be looked at
 3 and challenged.

4 What are the circumstances in which a civil
 5 servant, such as yourself, would challenge a long-held
 6 and existing policy, such as no public inquiry?
 7 A. I think if there are changes in circumstances, which --
 8 so new evidence or changes in circumstances which
 9 suggest that a review is justified. So as a civil
 10 servant, I would certainly not, you know -- if ministers
 11 had decided a position, I would not be going back to
 12 them and saying, "Are you sure? Are you sure?"
 13 Q. Because you didn't agree with it, for example?
 14 A. Even if I didn't agree with it, because it was my job,
 15 as a civil servant, to ensure that what ministers wanted
 16 happened. But if there were changes of circumstances --
 17 and I'm sure we'll talk about this -- for example, the
 18 HCV litigation, that then was an opportunity to go back
 19 to ministers with a review of the issues. So those are
 20 the points at which you can say "This has happened" or
 21 "We have this new evidence", or "This has changed, and
 22 let's take a fresh look at this".
 23 Q. We will come back to look at precisely what you've just
 24 mentioned: what happened after the HCV litigation came
 25 to an end.

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1 there being substantive discussion at the time (for
 2 example with Branch or Divisional Heads) that we needed
 3 to think again and that an inquiry was after-all
 4 merited. Nor do I recall ministers voicing concern that
 5 an inquiry was the way to go."

6 Then you set out some reflections at the end of
 7 your statement about the collective mindset and
 8 groupthink, and I'll come back to ask you some questions
 9 about that later on today.

10 Then you set out a little bit later -- earlier, in
 11 fact, in that statement, at 4.60 -- if we can just have
 12 a look at that, at page 64 -- the Government's reasons
 13 against commissioning an inquiry. You say:

14 "There was no evidence of wrongdoing by the
 15 Government or the NHS."

16 Here you're setting out the reasons relied on by
 17 the government in written -- answers to written
 18 questions in the statements in the House.

19 A. Yes, this is my attempt to summarise the various
 20 statements that ministers made over the period I was
 21 involved, and that first one, no evidence of wrongdoing
 22 that -- that the NHS did everything it could, as soon as
 23 it could, I think, was the main plank, both on
 24 compensation and on the public inquiry.

25 Q. There was nothing of fundamental significance that was

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1 not already known, and the relevant facts were in the
 2 public domain:
 3 "... no evidence Parliament had been misled.
 4 "This was a problem linked to the state of science
 5 and technology at the time, rather than an isolated UK
 6 problem, and so any inquiry would be unlikely to provide
 7 the infected and affected with a satisfactory answer.
 8 "The focus was instead on looking forward on how
 9 to assist the infected and affected with improving their
 10 health and wellbeing. An inquiry would not help prevent
 11 future transmission.
 12 "There was concern that a public inquiry would
 13 raise the profile of potential no-fault compensation at
 14 a time when litigation in the NHS was an increasing
 15 problem.
 16 "The time that a public inquiry would take to
 17 complete."
 18 Then if we go over the page:
 19 "The initial trawl of documents had concluded that
 20 the reason self-sufficiency had not been achieved was
 21 due to increased demand for clotting factors, not
 22 a failure to implement Ministerial initiatives. On the
 23 contrary, there was evidence significant efforts had
 24 been made to achieve self-sufficiency.
 25 "Self-sufficiency in blood products would not have
 25

1 missing. So that line to take, in fact, became
 2 inaccurate, did it?
 3 **A.** I think that line to take about the relevant facts being
 4 in the public domain was simply about the dates at which
 5 heat treatment was introduced and testing of blood. So
 6 it was about the -- those issues. And looking at it
 7 again, clearly not every fact available was in the
 8 public domain. It was the -- this really referred to
 9 those key facts about the point at which action was
 10 taken to remove the risk of hepatitis C transmission
 11 through blood.
 12 **Q.** So really action taken by the Department of Health,
 13 looking at it very much through the prism of the
 14 Department of Health's knowledge --
 15 **A.** Yes.
 16 **Q.** -- ignoring, perhaps, then, the submissions or evidence
 17 that those that were infected or affected could bring to
 18 bear on the issue.
 19 **A.** I think arguably, at the time, the infected and affected
 20 were making their points loud and clear and those points
 21 were also being heard in Parliament, increasingly.
 22 **Q.** Would you accept that that line to take prejudices
 23 whether there may be information that has not come to
 24 the attention of the Department?
 25 **A.** Yes, I would. I would accept that. I mean, you could
 27

1 prevented haemophiliacs from being infected with
 2 hepatitis C."
 3 Just pooling those two parts of your statement
 4 together, is it right to understand that, save for the
 5 bit we see at the top of this second page here, "the
 6 initial trawl of documents", concluding that the reason
 7 self-sufficiency had not been achieved was due to
 8 increased demand for clotting factors, save for the work
 9 that was done in investigating that, these lines to take
 10 didn't emerge from new reconsideration by your team of
 11 what had happened in the past; they were essentially --
 12 **A.** (Witness nodded)
 13 **Q.** -- the lines to take that had been taken previously, and
 14 they were being trotted out again.
 15 **A.** Exactly.
 16 **Q.** So if we look back -- if we go back, please, a page,
 17 Paul, to the second bullet point there:
 18 "There was nothing of fundamental significance
 19 that was not already known, and the relevant facts were
 20 all in the public domain."
 21 In fact, during your time -- I'll come on to ask
 22 you questions about this but, during your time at the
 23 Blood Policy Unit and as a result of the work you did,
 24 looking back at the documents on self-sufficiency, you
 25 discovered that some of the information was, in fact,
 26

1 say it was a little bit of a circular argument.
 2 **Q.** Can I ask you then about a comment you make at
 3 DHSC5541783. Can we go, please, to page 3 of this
 4 document. In fact, I think we need to go to the bottom
 5 of page 2 to understand what it is. At the bottom,
 6 we've got Charles Lister to Peter Thompson and then, if
 7 we go over the page, we've got a date 16/4/03, and then
 8 an email for Peter Thompson. Then if we go down the
 9 page it says, "Peter", and if we go over the page, at
 10 the bottom there it says, "Charles".
 11 So is this is an email from you, dated
 12 16 April 2003, to Peter Thompson?
 13 **A.** Can you go back to the top again? It looks like it, but
 14 just --
 15 **Q.** I think we need to go -- if we go back to the top of
 16 that page --
 17 **A.** Yes, it is.
 18 **Q.** Yes. It looks, from the first paragraph there, that
 19 you're seeking advice from Peter Thompson about the
 20 constitutional position where Scotland announces
 21 an inquiry into decisions made by the UK Government
 22 pre-devolution.
 23 **A.** Mm.
 24 **Q.** You say:
 25 "Bob Stock in the Scottish Exec has recently
 28

1 updated me on his perception of likely developments in
2 Scotland are the election. Just prior to the election
3 the outgoing Parliamentary Health Committee expressed
4 some support for continuing demands from Scottish
5 haemophilia patients with hepatitis C for a public
6 inquiry. Those same demands are being made here. Bob
7 expects these demands to be renewed with some vigour
8 after the election with a good deal of support from the
9 Scottish Parliament. Should Scottish Ministers concede
10 on this under Parliamentary pressure, we will inevitably
11 find ourselves dragged in despite our Ministers'
12 determination to resist an inquiry. Any inquiry would
13 focus on events in the '70s and '80s when policy in
14 Scotland was largely determined by Whitehall and by DH
15 in particular. It therefore seems to me that even if
16 an inquiry were to be set up only in Scotland it would
17 become de facto a UK inquiry. Do you have any advice on
18 what the constitutional position would be in such
19 a situation?"

20 We can see from earlier in the document but later
21 in time that the advice coming back that the view that
22 you've taken is agreed by somebody called David Hill
23 from the Proprietary and Ethics Team, but this was
24 shortly before you left.

25 A. Mm.

29

1 a civil servant, it was my responsibility to maintain.
2 Q. Can you think of anything that would have been grounds
3 for the policy to change during your tenure?

4 A. I think if evidence had emerged, for example, that
5 suggested that, as we had said, you know, everything
6 that had been done as soon as it could possibly have
7 been done, et cetera, that that was not correct.
8 I think had something emerged that really put that
9 position in question, then that would have been possibly
10 a reason to go back on this as an issue.

11 Q. And what is your view now with the benefit of hindsight
12 as to whether an earlier UK public-wide inquiry was
13 justified?

14 A. I do say something about that in my statement. Could we
15 go to that?

16 Q. Yes. If we go to ...

17 A. And this is very much with the benefit of hindsight, the
18 comment I make --

19 Q. If we go back to WITN505389. Can we go to page 77,
20 please. You say:

21 "With the benefit of hindsight, I accept that
22 there is a good argument to say that an earlier UK-wide
23 public inquiry would have been justified."

24 You say because you understand:

25 "... the only statutory prerequisite for

31

1 Q. So I'm not going to ask you any questions about what
2 eventually became of that, but can you recall who you
3 were talking about when you say "Despite our ministers'
4 determination to resist an inquiry" which minister you
5 were talking about?

6 The reason I ask the question is because this is
7 dated 16 April. Is that right? Sorry, yes, 16 April.

8 SIR BRIAN LANGSTAFF: It's "ministers" with an apostrophe
9 after the "S", and so it's plural.

10 A. Yes, it is.

11 MS SCOTT: Yes.

12 A. I'm referring there to successive -- you know, current
13 and previous ministers, so an established government
14 position that they did not want an inquiry.

15 Q. So -- and you've described it in terms of
16 a determination, so can you describe how strongly held
17 the view were by successive ministers?

18 A. I'm slightly reluctant to do that because I would be,
19 I think, relying on a pretty faulty memory. I mean, the
20 ministers were -- there was never a time when a minister
21 said to me, "I think we should reconsider this issue of
22 an inquiry". Ministers were always very clear in their
23 minds that an inquiry, in their view, was not warranted.
24 And that applied to successive ministers, so it was very
25 much an established government position which, as

30

1 a statutory public inquiry now is the existence of
2 'public concern' ... that both Houses of Parliament
3 resolved that it was expedient that a tribunal be
4 established for inquiring into a definite matter
5 described in the Resolution as of urgent public
6 importance."

7 And you accept that:

8 "Under either test, it seems ... that the
9 statutory prerequisite could have been met, and it was
10 therefore a question of political judgment whether an
11 inquiry should be held."

12 And then you say at paragraph 3:

13 "The measures that were taken (including DH's
14 internal review and the subsequent report in 2007) and
15 the litigation that was concluded did not dissipate
16 public concern; and

17 "An earlier UK ... inquiry would have answered
18 campaigners' questions about what had happened sooner
19 and perhaps achieved much needed closure; reduced the
20 stress on campaigners who had had to fight for
21 an inquiry for longer; ensured that more campaigners
22 would have lived to see the outcome; had the opportunity
23 to call on witnesses now too ill or deceased and would
24 have benefited from clearer memories."

25 Then if we go over the page:

32

1 "While blood policy and safety had already moved
2 on considerably, the lessons derived from a full inquiry
3 could have been acted upon sooner."

4 **A.** I think those are all reasons, as I say in my statement,
5 that, with hindsight, I can see why an earlier public
6 inquiry would have had a great deal of value.

7 **Q.** I am going to ask you some questions now about what
8 became known as the Burgin report, so -- and look at the
9 circumstances that gave rise to that report.

10 So is it right to understand this: that while you
11 were drafting a submission to Lord Hunt in October 2001,
12 you went back to the files from the 1970s in order to
13 deal with a new allegation that Lord Owen had made that
14 officials had failed to honour his pledge to Parliament
15 in relation to self-sufficiency?

16 **A.** That's right. So Lord Morris raised Lord Owen's
17 concerns. So, as you say, I went back to the files from
18 that period to see for myself what happened and, as a
19 result of that, to produce a chronology so that we could
20 advise ministers but also that could be made public.

21 **Q.** And in the process of going back to the files from the
22 1970s, your statement tells us that you discovered that
23 some of the papers that you would expect to have seen
24 there were missing; is that right?

25 **A.** That's correct. What I didn't see were the submissions
33

1 be difficult to answer any accusations levelled against
2 the Department by Lord Owen and others."

3 Just pausing there. Is it right to understand
4 that although you'd done a chronology from what you
5 could find, what was being suggested here was that,
6 actually, a rather deeper search and more information
7 needs to be put into the chronology from what the
8 Department have?

9 **A.** Yes. I mean, I was conscious myself that I'd only had
10 the time to delve into part of the story and that it
11 needed someone who had more time to go into the issues
12 in greater depth. And I think there's something in my
13 statement that shows that was discussed with the
14 minister who was Yvette Cooper at the time.

15 **Q.** At that time, you were asking for funds, effectively,
16 for somebody outside the team to do it because you
17 didn't have the manpower; is that right?

18 **A.** Yes, exactly, and this looks like I'd gone to
19 Janet Walden to get her advice on the way to go with
20 this.

21 **Q.** Then she says this, in the second paragraph:
22 "It may of course be the case that papers have
23 been destroyed -- in which case the exercise remains
24 useful in that we can be open about being unable to
25 accurately establish what exactly happened in the 1970s
35

1 that I would have expected to have seen to ministers, to
2 Lord Owen and his successor, Roland Moyle, reporting
3 back on the self-sufficiency issue. So there was a lot
4 of evidence about what had happened and how the money
5 provided by Lord Owen had been spent and what the
6 results of that were, and that was included in the
7 information I provided to ministers and in my statement.
8 But what wasn't there were the submissions to ministers.

9 **Q.** I'll come on towards the end of the day to ask you
10 questions about what was done as a result of the fact
11 that you found files -- found documents missing. I'm
12 not going to ask you questions about that now.

13 Can we look at DHSC0041379_023. We are now
14 looking at a document from April 2002. So the
15 submission that you made to Lord Hunt and the chronology
16 that you did for Lord Hunt was October 2001. We're now
17 in April 2002, and this is a memo to you from Janet
18 Walden of the Investigations and Inquiry Unit, entitled
19 "Haemophiliacs and hepatitis C: events in the 1970s and
20 1980s". And she says this:

21 "Just to confirm our discussion earlier this week
22 that I think it's important that you locate whatever
23 papers are now in existence and ask someone fairly
24 senior and experienced to put together a chronology of
25 events and key background papers. Without that, it will
34

1 and 1980s. Whatever the outcome we should be in a much
2 better position to advise on whether or not a further
3 investigation or inquiry is justified should there be
4 continuing pressure to go down this route."

5 So is it right to understand that the second
6 rationale, if you like, for what then became of the
7 Burgin report was to be able to look at and be able to
8 advise ministers on whether or not a further
9 investigation or inquiry was justified?

10 **A.** Yes, I don't think this was necessarily talking about
11 a public inquiry, though, a full-blown public inquiry.
12 I think that's unclear from what's being said here but
13 I don't recall that being part of the reason for the
14 Burgin review to address the issue of whether there
15 should be a public inquiry.

16 **Q.** So your recollection is that this -- further
17 investigation or inquiry would have been what,
18 an internal -- further internal investigation?

19 **A.** Yes, potentially or some other form of review.

20 **Q.** Potentially by somebody outside the Department --

21 **A.** For example, yes.

22 **Q.** -- but falling short of a public inquiry?

23 **A.** Yes, yes.

24 **Q.** So you don't recall the discussion, there ever being
25 a discussion about the potential for a public inquiry?
36

1 A. I don't, no.
 2 Q. Shall we look then at Mr Burgin's report, which is at
 3 WITN4505401.
 4 Now, who was Mr Burgin?
 5 A. He was a departmental official. As I say in my
 6 statement, I can't recall now why he was selected.
 7 I think what I would probably have done is to cast
 8 around for people of the right seniority who had the
 9 time to do this. And I would have used my contacts
 10 within the Department, and Peter's name was mentioned
 11 and I do recall having a meeting with him to discuss the
 12 work that we wanted to do, yes. So he was
 13 a departmental official.
 14 Q. Now, we're looking at a report which, is this right to
 15 understand from your statement, you were provided
 16 shortly before Christmas 2002 from Mr Burgin?
 17 A. Yes.
 18 Q. That you, in fact, is this right, didn't get to review
 19 it before you left the Department?
 20 A. That's correct. I think I recognised that there was
 21 some work needed but we were so involved with the
 22 roll-out of recombinant clotting factors at the time
 23 that I didn't get the opportunity to review it properly,
 24 and you'll see in my statement that there's a quote from
 25 a note I wrote afterwards to a former member of my team

37

1 have asked officials to investigate this. This report
 2 is the result ..."
 3 Is it right to understand that that was the
 4 primary topic, if you like, issue, that Mr Burgin was
 5 investigating?
 6 A. On self-sufficiency, yes.
 7 Q. "This report is the result of a review of surviving
 8 documents from 1973 (when a decision was made to pursue
 9 self-sufficiency for England and Wales) to 1985 (when
 10 viral inactivation was introduced for all the [BPL]
 11 products). It contains a chronology of the events ...
 12 and an analysis of the key issues, including:
 13 "the developing understanding of the seriousness
 14 of non-A Non-B hepatitis
 15 "the evolving understanding of the viral risks
 16 associated with pooled blood products, both domestically
 17 produced and imported, and how this influenced policy
 18 "the development of policy on UK self-sufficiency
 19 in blood products, the factors that influenced it and
 20 the reasons why it was never achieved;
 21 "the developing technologies to enable viral
 22 inactivation of blood products and the timing of their
 23 introduction in the UK
 24 "the ability of BPL to produce the volumes of
 25 products required."

39

1 with suggestions about the way forward.
 2 Q. That email is dated 10 June, which is after you left the
 3 Department?
 4 A. Indeed.
 5 Q. Is it right, had you come back in to the Department to
 6 deal with outstanding matters; is that how that arose?
 7 A. I don't remember. There's a reference in there to me
 8 appearing at the weekend or something?
 9 Q. Yes. Yes.
 10 A. I don't remember doing that but I clearly did. There
 11 were some things that I presumably came back to finish
 12 off.
 13 Q. We'll look at that email. We may look at that email
 14 later but, in that email, you're effectively saying that
 15 some more work needs to be done to this, it's
 16 effectively still a draft report.
 17 A. Yes, indeed.
 18 Q. I just wanted to look at what Mr Burgin says about the
 19 purpose of the report at the top there. So:
 20 "About 3000 haemophilia patients treated with
 21 blood products in the 1970s and early 1980s were
 22 infected with hepatitis C, many with HIV. A number of
 23 MPs have suggested that this might have been avoided had
 24 the UK achieved self-sufficiency in blood products,
 25 a policy the Government initiated in 1975, and Ministers

38

1 Can you help us with why, if this report had this
 2 dual purpose, first of all, to look at the question of
 3 self-sufficiency but also to look at whether or not
 4 further inquiry or investigations were required, why it
 5 had such a narrow remit? I mean, for example, for
 6 a start it only goes up to 1985. It doesn't really deal
 7 with hepatitis C, it doesn't deal with introducing donor
 8 screening for non-A, non-B, or hepatitis C, or even
 9 indeed HIV.
 10 A. To be honest, I can't recall what the discussion was
 11 about setting the remit for this review. The email
 12 I referred to earlier gave my version of what the remit
 13 was, that there was a slightly different version when
 14 the report was published. It certainly wasn't -- it was
 15 a fairly narrow remit but I'm afraid I do not recall the
 16 discussion that led up to the decision to have that
 17 remit and nothing wider.
 18 Q. Do you know, can you help us with this: why it didn't
 19 include an investigation into what happened to the
 20 documents you had noted were missing on the official
 21 files, so those submissions to minister that you had
 22 noticed in October 2001 were missing from the original
 23 1970s file?
 24 A. I think possibly because I felt at the time I'd got as
 25 far with that in drawing a blank as I possibly could.

40

1 I mean, my understanding, though I don't recall now how
2 I reached that understanding, was that the submissions
3 had been taken out of the files for public interest
4 immunity for the HIV Litigation in the '90s. That
5 they'd gone over to solicitors, and when I made
6 enquiries, nobody in the Solicitors' Division could find
7 them. And I pushed on that quite hard. The evidence
8 for that isn't available unfortunately, we weren't able
9 to find any of the emails I wrote trying to locate those
10 submissions, but I do recall very clearly drawing
11 a blank.

12 So I would imagine that Peter Burgin wasn't tasked
13 to enquire into that because I felt it had gone as far
14 as it could.

15 Q. To be clear, I'll be coming back to the steps that you
16 took in relation to those missing papers later on this
17 afternoon.

18 So having received the report in December 2002,
19 not taken any steps in relation to it until June 2003,
20 and by that stage not being employed by the Department
21 of Health, did you have anything more to do with that
22 report after June 2003?

23 A. I didn't, no.

24 Q. So it follows from that that you can't help us with
25 understanding what was subsequently done to the report,

41

1 Q. I'm going to turn now to ask you some questions about
2 the campaign for a hepatitis C payment scheme. Now,
3 just to put this in context, is it right to understand
4 that you commenced your post shortly after Frank Dobson
5 had turned down The Haemophilia Society request for
6 a special payment scheme?

7 A. That's correct.

8 Q. Now, one of the reasons given by the Government for
9 refusing the scheme when a scheme for those infected by
10 HIV existed in the Macfarlane Trust and the Eileen Trust
11 was that there was a distinction between -- to be made
12 between hepatitis C -- infection by hepatitis C and
13 infection by HIV, and I want to ask you about that and
14 the Government's policy in relation to that. Can we
15 look at an email, please. DHSC0041305_128.

16 Now, this is an email -- the date is not clear at
17 the top there. It's in July '99, and it must be after
18 16 July because of the first line, but it's sent by you
19 to Sheila Adams -- Sheila Adam, rather.

20 I just wanted to draw your attention to the first
21 paragraph -- second paragraph; first main paragraph
22 there. You were talking about changes you've made to a
23 draft minute to Lady Hayman, and you say:

24 "Part of the difficulty with defending the
25 distinction between HIV and HCV is that the decision to

43

1 by whom and when?

2 A. That would have been picked up by my successor,
3 Richard Gutowski.

4 Q. What relevance did the fact that this report was being
5 undertaken -- this investigation, this inquiry, was
6 being undertaken -- by Mr Burgin have on the
7 Government's ongoing decision not to hold the public
8 inquiry?

9 A. Again, I addressed this in my evidence. Could we --

10 Q. Yes, we can. If we go back to your third statement,
11 which is at WITN4505389. If we go, please, to page 74
12 of that statement, paragraph 4.86 at the bottom there.

13 "The Inquiry asks what role this review played in
14 the government's decision not to hold a public inquiry.
15 I do not think that this was central to the decision
16 making in my time. The government's response to calls
17 for a public inquiry was firmly established long before
18 the review was commissioned. However, the fact that
19 there was an internal review ongoing would have been
20 a further factor in reject -- while it was still
21 ongoing -- the calls for an Inquiry. I cannot speak to
22 the role it played once published."

23 A. So, yes, I don't believe that it had any impact on the
24 government's view, at this time and for some time
25 afterwards, that a public inquiry wasn't justified.

42

1 give financial assistance to haemophiliacs with HIV was
2 arguably not very logical in the first place. It was
3 very much a decision bound up with contemporary feelings
4 about HIV, although this was not reflected in the public
5 statements made at the time (Gwen Skinner's note below
6 sheds some light on this). However, from today's
7 perspective, there are enormous difficulties in making
8 a distinction between haemophiliacs and others
9 inadvertently harmed by NHS treatment. Another example
10 that comes to mind, which you may wish to use, is MMR
11 vaccine. There is therefore a strong argument for
12 continuing to say that haemophiliacs and HIV were
13 a special case and for drawing the line there.
14 Otherwise, the only logical step is to move towards
15 a system of no fault compensation."

16 Now, it's a little bit difficult to understand
17 that because at the beginning of that paragraph you seem
18 to be saying --

19 A. Yes.

20 Q. -- it's not really logical to draw a distinction between
21 HIV and HCV, but by the end of that paragraph you seem
22 to be suggesting that there is in fact a strong argument
23 for maintaining the division.

24 Had you by this time, by July 1999, come to a view
25 that the distinction between HIV and HCV was illogical

44

1 and difficult to defend to the public?

2 **A.** I can't say at -- what my view was at that time. It's

3 difficult because so many years have passed, and I've

4 had so much involvement since then to remember at what

5 point I recognised that as difficult.

6 What I can say is that the submission that I wrote

7 to Yvette Cooper about a year after this describes HCV

8 as a devastating and debilitating disease. So I think

9 by then my view was very clear that you really couldn't

10 make a distinction between the two.

11 **Q.** So if not by 1999, certainly by the time you wrote to

12 Yvette Cooper in those terms?

13 **A.** Yeah. I think it was a developing understanding.

14 **Q.** Was that a view -- as it developed in your mind, was

15 that a view that developed, to your recollection, in the

16 minds of your colleagues and the ministers that you were

17 advising?

18 **A.** I think so, yes. Ministers met representatives not just

19 from the Haemophilia Society but from the Manor House

20 Group, from Haemophilia Action UK, so people who were

21 directly affected by hepatitis C, so they had direct

22 testimony about the impact on people's lives. So, yes,

23 I think ministers -- junior ministers, anyway -- were

24 clear about that.

25 **Q.** But the Government line remained during your time there?

45

1 to some extent on compensation issues."

2 This is in relation to the BSE Inquiry statement

3 being announced "this Thursday":

4 "... announcement of a substantial compensation

5 offer, speakers in the debate next week will probably

6 want to forecast on compensation for [hepatitis C]

7 sufferers."

8 So it says:

9 "He has asked if you can prepare a note for

10 [Secretary of State] this weekend. He said:

11 "The note will need to set out:

12 "1. What we can say next week (about compensation

13 issues) and how this can be differentiated from the BSE

14 Inquiry compensation", and about a package of care.

15 Then he says:

16 "Can you let me have a draft note for SoS for Lord

17 Hunt ... Then if Lord Hunt agrees the draft I will send

18 it to SoS on Friday for his consideration over the

19 weekend. I know that you have previously set out

20 a package of care (rather than cash compensation) for

21 HCV, but I think Lord Hunt is hoping to convince SoS

22 that there is little difference really between the

23 2 types of case and to seek his permission to work up

24 something more for HCV.

25 "Happy to discuss."

47

1 **A.** Indeed.

2 **Q.** There was a distinction and therefore we will not move

3 to compensation scheme.

4 **A.** Or the line was: we did all we could as soon as we

5 could. Therefore, there is no -- there was no

6 negligence on the part of the Government and therefore

7 no justification for compensation because it was

8 non-negligent harm.

9 **Q.** So you might expect to see then, as you progress through

10 your tenure, the dropping off of this distinction

11 between HIV and HCV and going with different lines to

12 justify the no compensation scheme?

13 **A.** You might, yes.

14 **Q.** Can we look at another document, then. DHSC0020784_029.

15 And this is -- if we can go, please, actually to -- this

16 is -- the front page is an email from Sue Cartwright to

17 you about Lord Hunt wanting to do something with package

18 of care for HCV sufferers. But it was actually page 3

19 I wanted to draw your attention to.

20 This is an email from Sue Cartwright to Jane, and

21 I'm not quite sure who -- to Jane Verity it looks like,

22 and to yourself. There are a number of people cc'd in,

23 and it says -- if we go down the page:

24 "Jane/Charles,

25 "Lord Hunt does indeed think the debate will focus

46

1 Then I just wanted to ask you whether or not you

2 recall Lord Hunt being of the view that there was no

3 difference -- there shouldn't be a differentiation

4 between those with vCJD and those with HCV in terms of

5 compensation scheme or financial schemes?

6 **A.** I don't. I can certainly recall Lord Hunt being very

7 affected by what he heard from people with hepatitis C,

8 and I know that he really disliked having to go into the

9 House and repeat the lines about this. So he was keen

10 to get something done, if possible.

11 **Q.** Do you recall whether you or your civil servant

12 colleagues shared Lord Hunt's views that there really

13 was not a sufficient difference between vCJD and HCV to

14 merit different treatment in terms of compensation

15 schemes?

16 **A.** I can't, in all honesty. I think the best

17 representation of my view on this is that note I wrote

18 to Yvette Cooper, suggesting possible possibility for

19 a compensation package. But I think the sticking point

20 that kept coming up over this was this issue of whether

21 giving compensation to people with hepatitis C would

22 open the floodgates, as it was seen to claims for other

23 cases involving non-negligent harm. And that was really

24 the sticking point.

25 I mean again, when we get to that submission,

48

1 I wrote to Yvette Cooper I kind of put an argument that
 2 finds a way around that to see if we can -- I could
 3 persuade ministers to go for something.
 4 But that really ended up being the sticking point,
 5 I think.
 6 **Q.** The impression that one gets from this document we've
 7 just looked at is that Lord Hunt is convinced that there
 8 should be some kind of package of -- financial package
 9 for HCV sufferers --
 10 **A.** Mm.
 11 **Q.** -- but it's the Secretary of State, Alan Milburn, who is
 12 against it, is that your recollection?
 13 **A.** That's my recollection.
 14 **MS SCOTT:** Sir, I note the time. I wonder if now is
 15 an appropriate time for a break?
 16 **SIR BRIAN LANGSTAFF:** Yes, it would be. We'll take a break
 17 now until 11.45.
 18 Now Mr Lister, I think you know what I'm going to
 19 say and I'm sure you've heard it before. You're under
 20 oath. You must not discuss the evidence you've given
 21 with anyone, whoever that person may be, nor any
 22 evidence which you think you may yet be asked to give.
 23 Apart from that, you can talk about anything you like.
 24 **A.** Thank you.
 25 **SIR BRIAN LANGSTAFF:** 11.45.
 49

1 "My concern, however, has been around the terms of
 2 such a settlement. I want to ensure that there is
 3 a clear and defensible distinction between settlement of
 4 this litigation and our continued refusal to compensate
 5 haemophiliacs infected with HCV through blood products
 6 on the basis of non-negligent harm."
 7 Can you recall what the concern was about there
 8 having to be a defensible distinction?
 9 **A.** Give me a moment just to reflect back on that. Um ...
 10 **Q.** Perhaps I can ask the question in a different way. One
 11 of the concerns that the Department had had -- or one of
 12 the lines to take -- the Department had used as a reason
 13 for not having a compensation scheme was that they
 14 didn't pay out for non-negligent harm, effectively?
 15 **A.** Yes.
 16 **Q.** And here we have this litigation which is making
 17 a payment for non-negligent harm --
 18 **A.** On a different basis, under the Consumer Protection Act,
 19 so on the basis of it being a faulty product,
 20 essentially.
 21 **Q.** And was there a concern, then, that that was an inroad
 22 into that line that the Department was taking?
 23 **A.** I think it was probably more of a concern
 24 presentationally that we have one group receiving
 25 a settlement through the court, and what does that say
 51

1 (11.18 pm)
 2 (A short break)
 3 (11.46 am)
 4 **SIR BRIAN LANGSTAFF:** Yes.
 5 **MS SCOTT:** I'm going to pick it up now in June 2000 with
 6 a note, a submission from Lord Hunt to the Secretary of
 7 State. It's DHSC5297720. So we can see here from
 8 Philip Hunt. That's Lord Hunt, is it?
 9 **A.** That's correct, yes.
 10 **Q.** To Alan Milburn who was then the Secretary of State for
 11 Health. And is it right to understand from your witness
 12 statement that you drafted this for Lord Hunt to send to
 13 Mr Milburn?
 14 **A.** Yes. Yes. I recognise the style.
 15 **Q.** And it's in the context of seeking his agreement for
 16 a strategy for settling the *A and Others* HCV litigation.
 17 **A.** Correct.
 18 **Q.** And the reason I'm taking you to it now is in relation
 19 to (2) and the second bullet point there:
 20 "Settling the litigation has significant
 21 presentational difficulties, given that we are refusing
 22 financial assistance to haemophiliacs infected with HCV
 23 through blood products prior to 1985."
 24 Can we go over to page 3, please, to pick up
 25 a couple of points there at paragraph 9 at the bottom:
 50

1 for everyone else who is looking for compensation?
 2 **Q.** Then it goes on at paragraph 10:
 3 "The main plank of our argument for refusing
 4 payments to haemophiliacs has been that heat treatment
 5 to eliminate HCV from blood products was introduced as
 6 soon as the technology was available. This is not true
 7 for the introduction of the screening test for HCV, and
 8 a financial settlement can be justified on that basis."
 9 I just wanted to ask you about that. Is it right
 10 to understand from this, from what we've just looked at,
 11 that the internal position of the Department is that HCV
 12 testing could have been introduced sooner, or was that
 13 just your view or, indeed, Lord Hunt's view?
 14 **A.** I think that would have been my understanding, and it
 15 would have been based on a view from within the
 16 Department generally.
 17 **Q.** Do you think that is at odds with the public position
 18 and the lines to take that we've been discussing this
 19 morning about the fact that there was no wrongdoing and
 20 that matters were done as quickly as possible?
 21 **A.** I think it's the distinction that's been discussed here
 22 between the inactivation of plasma-based products and
 23 the introduction of a screening test for labile blood
 24 products.
 25 **Q.** Would this -- going back to the discussion we had this
 52

1 morning about what could have triggered a review of the
2 policy on whether or not to have an inquiry, is this
3 precisely this: that the Department view was that
4 screening for HCV hadn't been introduced as quickly as
5 possible? Would that not have been something that could
6 have or even should have triggered a public inquiry?

7 **A.** I don't honestly think I can speculate on that. It was
8 not something that was discussed at the time as
9 a weakness to the stance on not having an inquiry.

10 **Q.** Can we then go --

11 **SIR BRIAN LANGSTAFF:** Just before we do that, if we can just
12 go back for a moment to your paragraph 9 which is in
13 front of you on the screen, you raise an issue as to the
14 difference that there might be between those who sued,
15 as claimants in the litigation, and those others who
16 suffered from exactly the same problem, having
17 contracted HCV as a result of blood products.

18 Given that the litigation was essentially in
19 respect of a defective product, if the claimants were to
20 succeed, presumably that would be on the basis that the
21 product was indeed defective?

22 **A.** Yes.

23 **SIR BRIAN LANGSTAFF:** And that must apply to everyone who
24 had received it.

25 **A.** Um --

53

1 **SIR BRIAN LANGSTAFF:** Yes. Thank you.

2 **MS SCOTT:** So if we then turn to matters in July 2001, could
3 we have DHSC0041379_177. And here we have a submission
4 to Yvette Cooper from Briony Enser, "Haemophiliacs
5 infected with hepatitis C by blood products". And it
6 says:

7 "As requested, to provide a position paper on the
8 above in the light of the recent High Court judgment
9 which awards damages to people infected with hepatitis C
10 through NHS blood transfusion and to outline the options
11 for action."

12 So the purpose of this is to look -- relook at the
13 position as a result of the conclusion of the
14 hepatitis C litigation; is that right?

15 **A.** Yes. I mean, we did see this as an opportunity to
16 review the issue, and Briony joined my team on
17 a temporary basis just to do this.

18 **Q.** Picking up on the point that you were just discussing
19 just a moment ago, if we go to the bottom of the page,
20 last bullet point before "Timing":

21 "Although this judgement only places a legal
22 obligation on Government to make payments to those
23 awarded damages by the Courts, it introduces further
24 questions of inequity and increases the moral pressure
25 to do so."

55

1 **SIR BRIAN LANGSTAFF:** At the time at least it was held to be
2 defective.

3 **A.** Yes, although the settlement would only apply to those
4 who were parties to the --

5 **SIR BRIAN LANGSTAFF:** Precisely.

6 **A.** -- to the group action.

7 **SIR BRIAN LANGSTAFF:** So what you were looking for was a --
8 or what Lord Hunt was looking for was a distinction
9 between settling a case and others. And you, I think,
10 were concerned that there might not be any logical
11 distinction between the position in which the two groups
12 were. Both had suffered the results of having
13 a defective product.

14 **A.** I think we were clear still about a distinction between
15 the -- between clotting factors which had been heat
16 treated as soon as it was possible to do that and
17 virally inactivated for HCV, and so that's the argument
18 that everything was done as soon as it could possibly be
19 done, and blood for transfusion, which was the subject
20 of the litigation.

21 So, yes, I think there was a question: okay, let's
22 sit down. Is -- what are the implications of this
23 judgment more widely?

24 **SIR BRIAN LANGSTAFF:** Yes.

25 **A.** And that was the issue that we were concerned with.

54

1 So is it right to understand that that is one of
2 the drivers for relooking at this question of
3 compensation?

4 **A.** Yes, I think the whole question: if one group is
5 compensated, why not everyone?

6 **Q.** Then if we go, please, to page 4, the "Options" set out
7 there:

8 "There are five main options for action:

9 "i. Do nothing (This, like all the options,
10 entails compliance with the letter of the CPA Judgment
11 ..."

12 That's the hepatitis C judgment.

13 **A.** Yes.

14 **Q.** "... and the legal precedents that it sets)

15 "ii. Public Inquiry, lump sum and hardship fund
16 for all haemophiliacs infected with Hep C by blood

17 "iii. Lump sum and hardship fund for all
18 haemophiliacs infected with Hep C by blood and low key
19 Inquiry

20 "iv. Lump sum or hardship fund for all or some
21 haemophiliacs infected with Hep C by blood

22 "v. Hardship fund for haemophiliacs infected with
23 Hep C by blood and who have severe liver disease."

24 Then it refers to an attached options paper which
25 we will look at in a minute.

56

1 A. Mm-hm.
 2 Q. Then the advice is, at 18:
 3 "If Ministers wish to consider making payments to
 4 haemophiliacs with hepatitis C option v is recommended",
 5 and the reasons are set out.
 6 It:
 7 "a. re-establishes the Government's stance on no
 8 fault compensation ...
 9 "b. provides an equitable outcome for
 10 haemophiliacs in a way that the Judgment does not;
 11 "c. effectively diffuses the campaign on behalf of
 12 all haemophiliacs by targeting only those as sick as the
 13 victims of HIV/AIDS;
 14 "d. entails relatively modest costs."
 15 Then it talks about the impact on the devolved
 16 administrations --
 17 A. Mm.
 18 Q. -- and ministers needing to be asked for a decision
 19 before the recess.
 20 So the advice, on this document at least, is
 21 somewhat equivocal. It's not saying, "we are putting
 22 forward option v"; it's saying "If you want to do
 23 something" --
 24 A. It's a toe in the water, really.
 25 Q. -- "if you want to do something, we would suggest
 57

1 infection in blood."
 2 It then sets out that the Macfarlane Trust already
 3 administers the hardship fund. So is this, in a sense,
 4 the rationale for choosing Option 5, that it's more
 5 logical and it's an easier line to hold?
 6 A. And less costly than some of the other options, yes. So
 7 it's a cautious -- I think it is probably deliberately
 8 cautious, given ministers' previous view on
 9 compensation, but it is providing ministers with
 10 an opportunity to say "Yeah, let's do this".
 11 Q. It's going to Yvette Cooper, not to the Secretary of
 12 State, even though he would ultimately be the
 13 decision-maker, given what you've told us this morning,
 14 because she asked for it, she's interested in it?
 15 A. And she's the minister, at this stage, responsible for
 16 this particular issue so it would go to her first. It
 17 would then get accelerated up the ministerial line, as
 18 it did do later on to John Hutton, as the Minister of
 19 State.
 20 Q. Indeed, we'll come to that.
 21 If we can then turn to the paper that you've
 22 referenced several times this morning which is your
 23 submission to Yvette Cooper of 19 July, which is
 24 DHSC0006983_129.
 25 Here we can see it's from you, 19 July to PS(PH),
 59

1 option v".
 2 A. M.
 3 Q. If we can just then turn to the options paper,
 4 DHSC0020756_025, and we can see there it's headed
 5 "Hepatitis C Options":
 6 "Options for haemophiliacs infected with
 7 hepatitis C through blood products in the wake of the
 8 [CPA] Judgment ..."
 9 Then if we turn over to page 2, we can see how
 10 it's set out. So "Option 1":
 11 "Compliance with the letter of the CPA Judgment
 12 and the legal precedents that it sets (the 'do nothing'
 13 option)."
 14 Then it sets out the "For" and the "Against", and
 15 then it has a comment at the bottom.
 16 So I wanted to just draw your attention to what's
 17 said about Option 5, which is at page 5.
 18 A. Mm-hm.
 19 Q. Again, we've got the same outlay there, the options set
 20 out, then the "For" and "Against", and it's the bit at
 21 the bottom I wanted to draw your attention to. It talks
 22 about the government being able to recover the moral
 23 high ground, and then that second sentence:
 24 "This is an easier line to hold than continuing to
 25 exclude those dead and dying from [hepatitis C]
 58

1 "Haemophiliacs with Hepatitis C", and then you say
 2 you've asked for a response to three questions.
 3 A. And this would have been in response to Briony's
 4 submission.
 5 Q. Indeed, so Briony's submission has gone to
 6 Yvette Cooper, she has asked three questions and you're
 7 responding to those three questions.
 8 A. Mm.
 9 Q. "What would have happened if the no fault compensation
 10 scheme had been put in place at the time of the
 11 Judgment?" is the first question.
 12 Second question:
 13 "By giving haemophiliacs money, what other groups
 14 would then want compensation?" and the floodgates point.
 15 Then, if we turn over the page, please, to page 3:
 16 "If we were to make some sort of symbolic gesture,
 17 what could that be? What would a money package look
 18 like? What kind of sums are we talking?"
 19 If we look at paragraph 8, you set out -- well,
 20 first of all you set out the principles in paragraph 7:
 21 it needs to be affordable and it needs to be acceptable
 22 to the Haemophilia Society.
 23 Then, at paragraph 8, you say:
 24 "A package which we can be fairly confident the
 25 Haemophilia Society would find acceptable is at
 60

1 Annex A."
 2 We will have a look at that in a minute. That is
 3 going to cost 37 million, with the bulk falling in
 4 year 1. Then you talk about being able to reduce that
 5 to 20 million if you restrict payments to those with
 6 cirrhosis and end stage liver disease and those who have
 7 already died.
 8 Then at paragraph 9, you look at a cheaper package
 9 in the short-term: no cash payments but a hardship fund
 10 run by the Macfarlane Trust, to make monthly payments to
 11 haemophiliacs with HCV who are at the advanced stage of
 12 illness.
 13 Then at paragraph 10 you make the point that:
 14 "If, additionally, payments were made to
 15 non-haemophiliacs this would push the cost up
 16 considerably."
 17 Then if we turn to Annex A, which sets out the
 18 scheme, we go to WITN4505025. We can see that you set
 19 out, at the top half of that page the numbers that
 20 you're talking about and those you've got from the
 21 UKHCDO. Then if we look at the bottom half, you set out
 22 what the possible package is, and you say:
 23 "One-off cash payments on a rising scale depending
 24 on the stage of illness reached ... worked out in detail
 25 but could look something like:

61

1 A. That's right, yes. The other -- the thing I thought was
 2 an important message to -- a point made to Yvette Cooper
 3 as well is -- in the submission, is the point about the
 4 questions she raised about "Would this open the
 5 floodgates to others", and I said, "Yes, but there would
 6 still be -- there could still be an argument for making
 7 an exception for people with hepatitis C."
 8 Q. We can look at that if -- so if we look back -- if we go
 9 back to DHSC0006983_129. So we've got that question at
 10 the bottom of the first page about the floodgates. If
 11 we turn over the page, you set out your thinking on
 12 that, and it's I think at paragraph 6 --
 13 A. Yes, that's right.
 14 Q. -- you say:
 15 "Despite the existence of these groups, it would
 16 be possible to justify payments to haemophiliacs as
 17 exceptional given that Hepatitis C related illness,
 18 which can lead to cirrhosis and liver cancer, is
 19 a devastating, debilitating disease. Around 200
 20 haemophiliacs have died as a result of this infection
 21 and at least as many again are likely to die in the
 22 future."
 23 So was this a shift in emphasis in terms of advice
 24 to ministers, then?
 25 A. This is me trying to push it, I think, giving ministers

63

1 "Antibody positive -- [5,000]
 2 "PCR positive -- [10,000]
 3 "Fibrosis -- [15,000]
 4 "Cirrhosis -- [25,000]
 5 "End stage liver disease -- [40,000]
 6 "Payment in respect of throws who have already
 7 died -- [40,000]."
 8 Then you say:
 9 "The sums suggested are illustrative and are at
 10 a lower rate than damages awarded in the recent High
 11 Court action which ranged from around [10,000] for
 12 antibody positive patients to [£60,000] for a patient
 13 with cirrhosis."
 14 So you've caveated those figures, saying that very
 15 much would need to be worked out in detail and are
 16 illustrative, but how did you come to those figures?
 17 A. I don't recall, in all honestly. I mean, it refers to
 18 this being based on the Canadian scheme, so it's
 19 possible I looked at the amounts awarded in Canada, and
 20 came up with an equivalent but I don't recall exactly,
 21 I'm afraid.
 22 Q. Having done your best to work out the numbers and cost
 23 out the package, that then went back to Yvette Cooper
 24 and I think you then said that that was then escalated
 25 to John Hutton; is that right?

62

1 an argument that they could use if they really wanted to
 2 go for a scheme.
 3 Q. We know from your witness statement that this was
 4 escalated to John Hutton and he was against
 5 a compensation scheme; is that right?
 6 A. That's correct.
 7 Q. Do you know why that was?
 8 A. I don't, no.
 9 Q. I just wanted to pick up one more point on this document
 10 that we've got in front of us and it's in paragraph 3,
 11 and you talk there about the numbers of the scheme and
 12 you say this:
 13 "These numbers may be manageable within any
 14 scheme."
 15 You're talking there about the numbers of -- the
 16 numbers in the group, 669 patients that had been
 17 identified from a look-back exercise conducted by the
 18 Blood Service, 113 of whom had received damages through
 19 the High Court, leaving 556 patients uncompensated. You
 20 say this:
 21 "These numbers may be manageable within any
 22 scheme. More worryingly, it is estimated that there are
 23 between 4,000 and 5,000 other patients still living who
 24 were infected with HCV through blood transfusion who
 25 cannot be traced. These people may or may not know that

64

1 they are infected and a proportion of them could well
2 come forward if a compensation scheme is announced. It
3 is likely that the existence of a scheme would encourage
4 people who have had a blood transfusion to seek an HCV
5 test. For the vast majority there will be no
6 documentary evidence to prove that blood transfusion was
7 the cause of their infection. However we would probably
8 be obliged, if we had a scheme, to award damages on the
9 basis of probable cause."

10 Now, leaving aside for the moment the point about
11 documentary evidence and a scheme awarded on the basis
12 of probable cause, I want to come and ask you a question
13 about that in relation to another document. Was any
14 consideration given at this stage to trying to trace
15 those 4,000 to 5,000 patients who you thought were
16 infected with HCV but couldn't be traced?

17 A. No, I don't believe so. And, of course, that was still
18 an issue at the point the Caxton Foundation was set up.

19 Q. And do you know why that was the case? Why thought
20 wasn't given to it at that stage to try and find them
21 and to give them treatment?

22 A. I don't. I don't know how easy it would have been to
23 trace people. So there may have been obstacles there.

24 Q. Now, you've noted in your statement that matters in
25 Scotland were taking rather a different course to that

65

1 Scotland, about the direction that Scotland was going?

2 A. Are you referring to anything specific here?

3 Q. No. It's a general question.

4 A. Um --

5 Q. I'm talking about the hepatitis C payment scheme,
6 but ...

7 A. Until the issue of Scotland's powers and the devolution
8 came up raised by Mr Milburn, no, I don't believe I did.

9 Q. And given the direction that Scotland was going in, was
10 there any consideration given in England to -- any
11 thought given to whether England should follow Scotland?

12 A. I think on compensation, the thought was that Scotland
13 should follow England.

14 Q. We'll come, then, to the point you've just referred to,
15 Mr Milburn raising the question of whether or not the
16 compensation scheme was a devolved matter.

17 A. Mm.

18 Q. And can we do that by reference to the chronology that
19 you created, and that we can find at WITN4505035, and it
20 starts at page 7. Your witness statement tells us that
21 this was a chronology created by you. What was the
22 purpose of creating this chronology; can you recall?

23 A. I was just trying to remember. Um ... it might have
24 been for -- I don't know. It may have been for
25 a briefing for Hazel Blears possibly. To be honest,

67

1 in England, and that the Scottish Parliament's Health
2 Committee had published a report in October 2001 calling
3 on the Scottish Executive to implement financial support
4 for those infected with HCV via blood and blood
5 products. And for the transcript, that is WITN4505027.

6 And then that the -- an expert group, often
7 referred to as the Ross Committee, had been instructed
8 to make recommendations for compensation, and its
9 preliminary report had been published in July 2002. And
10 again for the transcript, that's DHSC0042275_132.

11 So who was your point of contact in Scotland for
12 receiving updates and for being kept up to date about
13 what was going on and the developments there?

14 A. I'm trying to remember his name. I mention him a lot in
15 my --

16 Q. Mr Stock?

17 A. Mr Stock. Bob Stock. That's it.

18 Q. And what was the relationship between Scotland and
19 England like? Were you kept up to date adequately?

20 A. Yes, I think there are various points through my
21 evidence where it shows us in touch with Scotland, and
22 we tried to ensure that we kept each other informed so
23 there were no surprises on either side.

24 Q. And did you, on behalf of the Department, express
25 concerns to Mr Stock, or indeed to other colleagues in

66

1 I just don't recall what prompted me to do this. I was
2 quite keen on chronologies, just as a way of seeing the
3 sequence of events, but I don't honestly recall why
4 I produced this one.

5 Q. And then if we go, please, over to page 8 and pick up on
6 the last entry there, 4 November:

7 "Malcolm Chisholm phones SofS to inform him that
8 [and if we go over the page] the expert group were about
9 to publish a preliminary report calling for financial
10 and other practical support for all people infected with
11 HCV through blood, blood products and tissues.

12 "Scottish ministers felt they had to offer
13 something, probably payments to people once they became
14 seriously ill, and that an announcement would be made on
15 6 November.

16 "SofS said that he thought this would be a grave
17 mistake and that once the principles that we'd
18 established had been breached, then we were on
19 a slippery slope to payments running into the millions
20 across the UK. He said he thought Malcolm Chisholm
21 needed to tough it out.

22 "Malcolm Chisholm said that the advice he had was
23 that this was a devolved matter for the Scots. However,
24 he wasn't sure that this was right.

25 "SofS subsequently asked officials to find some

68

1 way of showing that the Scots don't have the devolved
2 power to go it alone on this and thereby prevent them
3 going ahead with any kind of announcement on
4 6 November."

5 Now, can I ask whether or not you were present
6 during this telephone conversation?

7 **A.** No, I was not.

8 **Q.** So how was that reported to you?

9 **A.** It would have been reported to me by Alan Milburn's
10 private secretary.

11 **Q.** And then that last paragraph there that I've just read
12 out, the Secretary of State subsequently asking
13 officials to find some way of showing that Scots don't
14 have the devolved power. Was that a request made to
15 you?

16 **A.** It was.

17 **Q.** So we can see the submission that you drafted at
18 WITN4505036.

19 So did you understand the purpose of -- what you'd
20 been asked to do, effectively, was to go away and find
21 a way of showing that the Scottish did not have -- if
22 there was a way -- of showing that the Scottish were not
23 able to have their own scheme. Go it alone,
24 effectively?

25 **A.** Yes, or at least to be clear what the devolved powers
69

1 does not fall within Scotland's devolved powers."

2 Then you go on to talk about the Social Security
3 scheme reservations. And at paragraph 9, you say this,
4 at the bottom of paragraph 9:

5 "As this is not about the legal liabilities of the
6 health service -- no such liabilities exist -- there
7 would seem to be a strong case for arguing that the
8 principal purpose of a payment scheme is to relieve
9 financial hardship and is therefore not health related."

10 And then paragraph 10:

11 "SOL have stressed that this is not definitive
12 advice and that, if SoFS wants to use it [I think it
13 must be] --

14 **A.** Must be, yes.

15 **Q.** "... it would be best not to go into too much detail at
16 this stage. However, we could certainly say that we
17 also have doubts about whether such a scheme is within
18 Scotland's devolved powers; that given this and the
19 considerable implications of such a scheme for the rest
20 of the UK that Malcolm Chisholm should not go public
21 until these issues have been resolved. Our lawyers
22 could then take this up with their opposite numbers in
23 DWP."

24 So, again, it looks like the beginning of that
25 submission you're suggesting that the arguments are
71

1 were in this case. Given that Malcolm Chisholm himself
2 had doubts about what the devolved powers were, it was,
3 in that sense, a useful thing to do to establish that
4 position.

5 **Q.** So we can see here that this is a submission from you to
6 Secretary of State, 5 November 2002. And the background
7 is set out at paragraph 2, the developments in Scotland.
8 And that paragraph 4, the concerns that the Scottish
9 Cabinet have to establish that any difficulties
10 associated with disregarding payments for Social
11 Security purposes can be overcome. And also that the UK
12 Government agrees that the establishment of a scheme to
13 make ex gratia payments of this nature falls within
14 devolved powers, and the steps that Malcolm Chisholm
15 will be taking to address those points with Andrew
16 Smith.

17 Then if we go over the page, you say this under
18 the devolution issue, at paragraph 7:

19 "Health is devolved, with one or two exceptions
20 that don't help us. However, Social Security is not
21 devolved. Our lawyers have suggested that a scheme
22 which makes payments to people incapacitated or
23 suffering hardship through illness is arguably a Social
24 Security, not a health scheme. Therefore, we could run
25 the argument that the establishment of such a scheme
70

1 pretty equivocal, but then you say at one point, well,
2 there's a strong argument. And then at the end, the
3 solicitors seem to be saying, well, not definitive
4 advice; best not to go into too much detail at this
5 stage.

6 Was the aim to try and put the brakes on the
7 Scottish from announcing the scheme in order to give
8 time to try to persuade them out of it, or in order to
9 give time for the Department to consider the
10 implications for themselves?

11 **A.** I think it was to try to maintain an agreed UK-wide
12 position. The concern being that if the Scots made this
13 announcement, as the Secretary of State had commented
14 earlier, we would no longer have an agreed UK position.
15 So the attempt, really, was to sort of go back to having
16 an agreed position, whatever that was.

17 And it's interesting that at paragraph 11 here, as
18 well, with the office of the deputy Prime Minister's
19 comment.

20 **Q.** Which bit is --

21 **A.** I think where I've said --

22 **Q.** This is more of a -- so:

23 "ODPM ..."

24 Is that what you say:

25 "... see this as more of a political issue than
72

1 one that can be resolved through legal arguments."

2 A. Mm.

3 Q. So was it, in a sense, trying to buy some time in order
4 for the political issue to be worked through?

5 A. Yes. I think it was going back to Malcolm Chisholm and
6 saying, "We agree with you. We're not sure that you do
7 have the devolved powers to this, so please don't rush
8 into an announcement. Let's look into this in more
9 detail. Try to resolve it. Either resolve it legally
10 or resolve it through political discussion."

11 Q. And is it your view that the most significant issue in
12 moving England towards a hepatitis C compensation scheme
13 were the developments in Scotland?

14 A. I think so, yes. I think it moved things on in a way
15 that nothing else had.

16 Q. I want to return to the issue that we -- I said I would
17 in relation to the documentary proof of people being
18 infected with hepatitis C in the submission that we
19 looked at to Yvette Cooper. But I want to do it with
20 reference to a different document which says a -- makes
21 a similar point. It's DHSC0004601_021. This
22 a submission from you, dated 12 November 2001, to MS(H).
23 Is that Mr Hutton?

24 A. That would have been Mr Hutton, yes.

25 Q. "People infected with hepatitis C through blood and

73

1 So we've seen in two documents you making this
2 point that -- unlikely to be direct evidence linking
3 individuals' hepatitis C infection with their treatment.
4 What was the factual basis upon which you'd arrived at
5 that conclusion?

6 A. I honestly don't recall. I mean, it would have been
7 based on discussion with -- possibly with the UKHCDO or
8 with other experts, but at this distance in time,
9 I honestly can't recall what that was.

10 Q. And are you there referring to the fact that it was your
11 understanding that there would be gaps in medical
12 records, for whatever reason, so that people wouldn't be
13 able to prove that they'd had a blood transfusion, for
14 example?

15 A. Yes. I think that was the assumption that -- yes,
16 I would say so.

17 Q. And while -- I don't want to make too much of this
18 because you're clearly not being asked to devise
19 a scheme and the procedure for a scheme.

20 A. Mm.

21 Q. But in both of the documents we've seen you expressing
22 a view about this, you have made the point that that
23 factor would need to be taken into account in the design
24 of the scheme. So, for example, here you're saying:
25 well, you know, there are precedents for schemes for

75

1 blood products". Then you set out the purpose of the
2 submission:

3 "When we met in September to discuss the campaign
4 to compensate haemophiliacs with hepatitis C, you took
5 the view that compensation for this group was not
6 appropriate but asked us to investigate ex gratia
7 payments for people infected with hepatitis C through
8 blood after the introduction of the Consumer Protection
9 Act who, on the basis of ... [the] High Court judgment,
10 would have received damages had they gone to court.
11 These people are now caught by a time bar preventing
12 them taking their own legal action under the CPA.

13 "A care package for haemophiliacs with hepatitis C
14 on the lines of the one developed for people with CJD."

15 It's really what's written over the page on
16 page 2, and this is under the "Size and the cost of the
17 scheme" that I want to ask you about, and it's the top
18 paragraph there, the bit in brackets at the end.

19 So you're talking there about the total cost of
20 the scheme, total cost of a scheme, and you say this:

21 "Although there is unlikely to be any direct
22 evidence linking these individuals' hepatitis C
23 infection with blood, there are precedents for schemes
24 which award payment if the person has not been exposed
25 to other known risk factors, eg injecting drug use."

74

1 saying if you haven't been exposed to any other risk
2 factors, you would meet the test.

3 A. Yes. Yeah. I mean, recognising there would need to be
4 some kind of test, whatever it was.

5 Q. But a test that would take into account the fact that
6 you would expect to find medical records not being
7 terribly helpful to prove the link between the
8 transfusion and hepatitis C.

9 A. Yes. Yes, indeed.

10 Q. Now, you left the Department in May 2003, and the scheme
11 Skipton Fund wasn't announced until August 2003. Had
12 there been discussions about -- by the time you left the
13 Department -- about there being a scheme and what it
14 might look like?

15 A. No. No. There had been nothing since the proposals
16 that had gone to Yvette Cooper and then to John Hutton
17 which had some similarity, I think, with how the
18 Skipton Fund turned out, but there'd been no further
19 discussion.

20 Q. And were there any discussions after the memo we looked
21 at where the devolution point was raised? Were there
22 any discussions between the Department and Scotland
23 about setting up a national scheme, or any further
24 discussions with Scotland about what was going to
25 happen?

76

1 A. There were not. As I recall, the devolution issue went
 2 to the law offices for a decision, and that decision had
 3 not been reached at the point I left.
 4 Q. So just reflecting back on the approach taken to the
 5 compensation scheme during your time at the Blood Policy
 6 Unit, was there, to your mind, a serious exploration of
 7 alternative options, ie a real look at reviewing the
 8 policy of no compensation?
 9 A. Other than the exploration of the issue with
 10 Yvette Cooper and with John Hutton, no, that was the
 11 only occasion where we went back to ministers and said,
 12 "This is what you could do". I mean, we did that,
 13 I certainly did that in the hope that ministers would
 14 decide that they wanted to come up with a scheme, and
 15 I think we pushed it cautiously at first, and then
 16 a little more firmly but, after the decision that, no,
 17 there wouldn't be a compensation scheme, certainly in my
 18 time there was no further discussion about it.
 19 Q. So you've described that as a toe in the water to begin
 20 with, but is it right to understand then that, having
 21 done that, it was your view that it was for ministers to
 22 pick up and run with it, and having not got that, there
 23 was nothing further you could do?
 24 A. I think the submission I wrote to Yvette Cooper with
 25 a possible scheme and an argument for justifying that

77

1 always that risk.
 2 Q. So do you think that decision making in the Department
 3 on both of these issues that we've been looking at this
 4 morning, the HCV payment scheme and the public inquiry,
 5 were affected by groupthink or the collective mindset?
 6 A. I think the point I make in my second witness statement
 7 when I refer to this is that, looking back on this,
 8 I asked myself whether I could have, you know, done
 9 anything differently, and I said I wasn't honestly sure
 10 that I could have done. And I think that's where I am
 11 still at, that, although we might have all felt that we
 12 were right about this, that, you know, there wasn't
 13 a case to answer, that there wasn't a case for
 14 compensation, that there wasn't a case for a public
 15 inquiry, I'm not sure that I was in a position, you
 16 know, as a middle-ranking civil servant, with views
 17 taken by many more senior people and by ministers, to
 18 challenge that, even if it had occurred to me to do
 19 that.
 20 Q. I'm going to ask you some questions now about your role
 21 as liaison with the Alliance House Organisations?
 22 A. Mm-hm.
 23 Q. Of course, at the time you were in post at the Blood
 24 Policy Unit, there were just two of them: there was the
 25 Macfarlane Trust and the Eileen Trust; is that right?

79

1 scheme against the argument that it would open the
 2 floodgates, for example, was quite a sort of firm -- it
 3 was giving ministers a real opportunity to do something.
 4 Q. You've reflected in both your second and third
 5 statements on whether or not there was a collective
 6 mindset or a groupthink in the Department about issues
 7 such as public inquiry, the HCV compensation scheme.
 8 What do you mean by a collective mindset or
 9 a groupthink?
 10 A. I think in situations where a decision is taken, like
 11 a set of lines to take, those lines to take get used
 12 again and again, nobody particularly questions them,
 13 a debate happens in the Commons, and we use the same
 14 lines to take, there is a risk that you don't
 15 question -- you stop questioning that. I think as well,
 16 you know, from everything I heard, from the point of
 17 joining the blood team to when I left, was the view that
 18 everything was done as soon as it could be done, that
 19 was something that everyone believed. I didn't
 20 challenge it.
 21 So that's what I mean as well. There's that risk
 22 that, if enough people believe something, it becomes
 23 quite difficult to say "Actually, maybe that's not the
 24 case. Maybe we should look at this differently".

I'm not saying that happened, but I think there is

78

1 A. That's right, yes.
 2 Q. What was your role as head of liaison with the
 3 Macfarlane Trust and the Eileen Trust?
 4 A. There were two key roles. One was about ensuring that
 5 they received the funding they need to continue
 6 operating. And the other was on the appointment of
 7 trustees, the trustees which, according to the Trust
 8 deed were in -- to be appointed by the Secretary of
 9 State.
 10 There was also a general -- an accountability
 11 relationship, if you like, with the Department of Health
 12 as the sole funder. There were regular discussions with
 13 the Alliance House about their needs, the ongoing needs
 14 and changing needs of their beneficiaries and how those
 15 should best be met.
 16 Q. In your statement, you describe the two charities as
 17 being operationally independent of Government --
 18 A. Mm-hm.
 19 Q. -- and, as you've just said, the nature of the
 20 relationship being an accountability relationship. You
 21 have described it as being "light touch". Is that
 22 really right when the Department of Health is the sole
 23 funder and so is able to have a significant say on all
 24 matters of reserve policies, for example, operating
 25 balances, whether or not particular payments should be

80

1 made to -- for particular beneficiaries, and so on?

2 **A.** Our main concern was around good governance,

3 essentially. We wanted to ensure that we established

4 a budget for the Trust to work to and that they operated

5 within that budget, and the story, if you like, you

6 know, is towards us establishing a framework where they

7 were in receipt of regular capital or top-up funding,

8 from the Department, within an agreed budget, with

9 a system that allowed them to put the case for increases

10 on the basis of the needs of beneficiaries.

11 It started off as a some what ad hoc system and

12 what we wanted to do was to get it into a place where

13 there was both certainty for the Trusts and certainty

14 for the Department.

15 **Q.** So is this right, in terms of the process by which the

16 Macfarlane Trust got top-up funding from the Department:

17 that they had a reserve and when it got close to

18 4 million or dipping below 4 million, that was the point

19 at which they knew that they could come to the

20 Department and say, "We need a top-up of our funds"?

21 **A.** Yes.

22 **Q.** What was the reason for the reserve being so high?

23 **A.** I mean, that was something that was set before my time,

24 and the Trust, as they continue to do, put that reserve

25 into investments, and gained income from that. I think

81

1 **A.** Yes, and also, without any real discussion about if they

2 needed additional money about why that was, with no

3 business case supporting it.

4 **Q.** When you say a "business case", what do you mean by

5 that?

6 **A.** By that, I mean -- and this did get better. I mean,

7 something that says, you know, we have a group of

8 beneficiaries who are now expected to live longer, who

9 are marrying, who are going to have children, so the

10 needs of those beneficiaries are changing and,

11 therefore, the type of support we want to give is

12 changing and that's going to require more funding.

13 **Q.** So, in effect, a properly -- a worked-up plan about how

14 much need there was in the beneficiary community --

15 **A.** Mm-hm.

16 **Q.** -- how the Trust proposed to meet that need and what it

17 would cost and why it would cost that much, and then

18 what that would cost the Department in terms of funding?

19 **A.** Yes.

20 **Q.** Is that what you're talking about?

21 **A.** Exactly. And we had some -- certainly, we had some

22 discussions about whether, for example, the Trust might

23 be considering providing funds to things that would

24 otherwise be provided by the Social Security system or

25 by local authorities and, therefore, was this the best

83

1 it was to give -- I mean, essentially it gave the Trust

2 a high level of security. I mean, there was never any

3 suggestion or possibility that the Department would stop

4 funding the Trust but that security was there for them.

5 **Q.** Is this right: that the process by which the Trust would

6 make applications for funding was, as you said, ad hoc

7 but also, in a sense, informal. It was simply

8 a question of writing a letter?

9 **A.** (Witness nodded)

10 **Q.** -- and saying, "Can we have some more money"?

11 **A.** Yes, it was. And the difficulty was that, quite often,

12 we would end up having to have an end of year

13 negotiation with DH Finance to say "Can you find

14 2 million", or whatever it was, "for us to give to the

15 Macfarlane Trust out of end of year underspend", which

16 is not a very satisfactory way of funding any

17 organisation.

18 **Q.** The reason for that is because the Macfarlane Trust were

19 coming to you -- effectively the Department of Health is

20 setting its budgets and financial allocations in

21 advance, and the Department of Health -- I mean, the

22 Macfarlane Trust is coming to you after that process had

23 been undertaken --

24 **A.** Yes.

25 **Q.** -- and saying, "Can we have it now, please?"

82

1 use of the money that the Department was providing? We

2 certainly had those kind of discussions as well.

3 But where we ended up is that I put a bid in to

4 the 2002 spending review so, for the first time, there

5 was a budget allocated through the spending review

6 process for the Macfarlane Trust three years ahead. So

7 they knew exactly what their income was going to be over

8 those three years, and could work to that with

9 an agreement that, for the next spending review round,

10 we would look at their case for what future funding

11 should be.

12 **Q.** So that budget that was set in advance, was based not on

13 a proper business case but on an estimate of what they

14 said they needed?

15 **A.** It was based on what they felt they needed, and was --

16 I mean, at the start of this, the figures are in the --

17 my witness statement and, forgive me if I don't remember

18 them exactly, but we were providing roughly 2 million

19 a year and we moved that up to 3 million a year. So in

20 a very short space of time it was a 50 per cent increase

21 on what they had been spending.

22 **Q.** How do you think a proper business case would have been

23 received by the Department during your tenure? If it

24 was to ask for an increase in funds, how do you think

25 that would have been received during that period?

84

- 1 A. Well, we did provide an increase in funds, and beyond --
 2 the next opportunity to do that would have been the
 3 following spending review, which was after my time, and
 4 I'm not sure what happened at that point. But I think
 5 the point is that they did make a case quite clearly
 6 both to us and to ministers for additional funds based
 7 on the needs of beneficiaries, the kind of needs that
 8 I described earlier. And we did provide that. So we
 9 went from roughly 2 million a year up to just over
 10 three.
- 11 Q. Would a request for increased funds with a worked-up
 12 business case have made it more likely that additional
 13 funds would be granted, as a matter of generality?
- 14 A. I think it depends. I mean, once we'd established the
 15 funding through the spending review, there wasn't then
 16 an opportunity to add anything to that until the next
 17 opportunity for the spending review. So I think --
- 18 Q. But at the point that the budget -- at the point that
 19 the budget was being set --
- 20 A. Yes.
- 21 Q. -- at the spending review?
- 22 A. Yes, I mean, the Department would have listened to it.
 23 Whether it would have agreed, I don't know. I mean, it
 24 would have depended on what was being asked for.
- 25 Q. And why, presumably?

85

- 1 withdrawn funding from the Macfarlane Trust, the Trust
 2 was set up by the Department to provide support for
 3 beneficiaries through the trust, and there's no way we,
 4 you know, we would have pulled the plug on that.
- 5 Q. Do you think that if, in terms of what was put to the --
 6 what was put to some of these witnesses was, "Well,
 7 look, why didn't you make the case publicly for more
 8 funds?" They were saying that the Trust was, in their
 9 view, underfunded, "Why didn't you make the case
 10 publicly for more funds?" and the response was concern
 11 about the Department withdrawing funds.
- 12 Do you think the Department would have been
 13 responsive to a case made publicly for more funds?
 14 Would that have been an effective way of trying to get
 15 more money out of the Department?
- 16 A. I'm not sure it would have been necessarily more
 17 effective. It certainly would have put pressure,
 18 perhaps, on ministers. But, in the same way that, you
 19 know, ministers resisted calls for compensation over
 20 many years, despite very effective campaigning by the
 21 Haemophilia Society and others. They could, I guess,
 22 have -- this is speculation, but they could have
 23 similarly resisted campaigns by the Macfarlane Trust.
- 24 Q. I'm going to turn then to issues about trustee
 25 nominations from the Department of Health.

87

- 1 A. And why, yes, indeed.
- 2 Q. You were asked by the Inquiry when you were writing your
 3 witness statement about whether or about what the -- and
 4 I'm paraphrasing, so I may get the question slightly
 5 wrong -- but about what the Department's view would have
 6 been if the trustees had campaigned or lobbied for
 7 a change in Government policy, or a question of that
 8 nature. You say in your witness statement that there
 9 was nothing to stop them from doing so but you don't
 10 recall an instance of when trustees did do that when you
 11 were Head of Blood Policy.
- 12 In February and March last year, when the Inquiry
 13 was hearing evidence from trustees of certainly the
 14 Macfarlane and Eileen Trust, what was said by one,
 15 possibly more, of them, was that their view was that if
 16 they had engaged in such campaigning or lobbying there
 17 was a risk that the Department would have withdrawn
 18 funding.
- 19 Now, obviously that's their view --
- 20 A. Mm.
- 21 Q. -- but is there anything you could assist us with, in
 22 understanding how they could have come to that view
 23 or --
- 24 A. I don't know. In my view, there is no conceivable
 25 circumstance under which the Department would have

86

- 1 SIR BRIAN LANGSTAFF: Just before we do that, I wonder if
 2 I may ask something.
- 3 When the evidence was given to me by those who
 4 were engaged in running the Macfarlane Trust in
 5 particular, and Peter Stevens was particularly strong on
 6 this, the fear was that the Department would withdraw
 7 funding. Now, you're saying "Well, there never was any
 8 possibility of that", which is a diametrically opposed
 9 view. Are you aware of any statement made in Parliament
 10 or any letter written by any minister to the Trust to
 11 state to them "You needn't worry, we'll go on funding
 12 you for however long it takes", or words to that effect?
- 13 A. I am not. I mean, certainly at the point we provided
 14 funding through the 2002 spending review for the
 15 Macfarlane Trust, there was that assurance of three-year
 16 funding.
- 17 SIR BRIAN LANGSTAFF: At that stage?
- 18 A. At that stage.
- 19 SIR BRIAN LANGSTAFF: That's what, 14 years in, roughly.
- 20 A. Yes. And normally, once you go into the spending review
 21 cycle, these things renew. So, although there's never
 22 any guarantee, it gave, I think, at that point, the
 23 Macfarlane Trust a good deal more certainty than they'd
 24 had previously, and that came along with some very
 25 positive messages, I think, that Hazel Blears gave to

88

1 the Macfarlane Trust around the same time.
 2 So I can only speak for the time when I was
 3 working on blood policy but, at that point in time,
 4 I think the Macfarlane Trust were, you know, given
 5 a good deal of clarity about ministers' ongoing support
 6 and the certainty of that three-year funding.
 7 **SIR BRIAN LANGSTAFF:** Now, in the course of that answer you
 8 said that it gave them a good deal more certainty,
 9 about, if you like, their future funding. Which might
 10 suggest that your view of what they had felt in the past
 11 might not entirely have been unjustified.
 12 **A.** I don't think so. By "certainty", I simply meant that
 13 we'd moved away from the ad hoc style of funding we'd
 14 discussed earlier, where the Trust would come to us and
 15 say, "We need an extra 2 million next year", and we'd go
 16 away and find it.
 17 We always went away and found it, and sometimes
 18 a little more than they'd asked for. But it because
 19 done in that ad hoc, end of year underspend way that
 20 didn't feel satisfactory for me, and was one year at
 21 a time.
 22 **SIR BRIAN LANGSTAFF:** Yes.
 23 **A.** So there was never an occasion where -- you know,
 24 I think always they had no reason to believe that if
 25 they asked for money we wouldn't find it, because we

89

1 Macfarlane Trust wanted the Department of Health to
 2 nominate retired civil servants as the Department of
 3 Health appointed trustees for the Macfarlane Trust?
 4 **A.** Yes.
 5 **Q.** Is that right?
 6 **A.** Yes, that's correct. Both Peter Stevens, when he became
 7 chair, and Ann Hithersay, his chief executive, were very
 8 keen on that.
 9 **Q.** I think there's also reference to Peter Stevens'
 10 predecessor having the same view as well?
 11 **A.** Yes, Alan Tanner. Yes, I believe he did, yes.
 12 **Q.** Why did you understand that to be the case?
 13 **A.** Why did they value --
 14 **Q.** Yes.
 15 **A.** -- ex-civil servants? Peter Stevens set out that for me
 16 and it's mentioned in my witness statement, it was at
 17 the point where Yvette Cooper questioned it as well.
 18 And from recollection, Peter's argument was that ex-civil
 19 servants knew how the system worked, and knew how to
 20 make difficult decisions often with limited or competing
 21 evidence and, you know, knew how to make a case for
 22 funding to ministers, I think those were the kind of
 23 things that he was looking for. So it was that
 24 expertise that the Trust found valuable.
 25 **Q.** For the transcript, the documents you've just referred

91

1 did. But what we were able to do later on was to say
 2 "Well, you know, you've not only got funding for next
 3 year but you've got funding clearly set out for the next
 4 three, that will hopefully then go on to a rolling
 5 cycle".
 6 **SIR BRIAN LANGSTAFF:** Yes, thank you.
 7 **MS SCOTT:** So you mentioned at the beginning of me asking
 8 you questions about your role in relation to the
 9 Alliance House Organisations that one of the key matters
 10 that you were concerned with was the appointment of
 11 trustees, and is it right to understand, then, that the
 12 Department of Health was responsible for nominating some
 13 of the trustees for the Macfarlane Trust and all of the
 14 trustees for the Eileen Trust?
 15 **A.** Yes. Now, for the Macfarlane Trust, some trustees were
 16 nominated by the Department of Health, some by the
 17 Haemophilia Society. I'm trying to remember what the
 18 Eileen Trust situation was. I think what normally
 19 happened is that Macfarlane Trust trustees would then
 20 sit on the Eileen Trust or some of them would sit on the
 21 Eileen Trust as well, and, to be honest, I don't recall
 22 whether those were also the Department of Health
 23 nominees.
 24 **Q.** Now, during your time at the Blood Policy Unit, and we
 25 see this reflected in your witness statement, the

90

1 to are Yvette Cooper's views are set out in an email
 2 WITN4505330, and Peter Stevens' response to you is set
 3 out at WITN4505331. As a result of Yvette Cooper's
 4 concerns, is this right, you sought some advice from
 5 Nigel Crisp about the appointments process?
 6 **A.** That's right. That was because we -- because the Trust
 7 wanted retired civil servants, we advertised the role
 8 through the Cabinet Office list of retired civil
 9 servants who were interested in public appointments. We
 10 didn't advertise it publicly because it was a very
 11 specific requirement. And Yvette Cooper commented and
 12 asked whether this was a case of the old boys' network.
 13 And because the Permanent Secretary has, in a sense, the
 14 last word about proper process within government and, in
 15 this case, the Nolan principles around public
 16 appointment, we went to the Permanent Secretary to get
 17 a view about whether he thought that we had done enough
 18 to satisfy the Nolan principles in making these
 19 appointments.
 20 **Q.** His response was that he was satisfied that you had; is
 21 that right?
 22 **A.** That's correct.
 23 **Q.** Do you now, looking back, consider that only advertising
 24 of vacancies to retired civil servants may have meant
 25 there was, or appeared to be at least, a lack of

92

1 independence from the Department of Health?

2 **A.** I mean, that question came up around my own appointment

3 later on to the Caxton Foundation, of course.

4 My feeling is that when people were appointed as

5 trustees, even if they were, you know, former Department

6 of Health, their -- well, to begin with, their

7 responsibility as trustees was to the charity. There

8 was certainly no expectation on the Department's part

9 that they would somehow be Department of Health people

10 within the charity. I certainly had no individual

11 contact with them as trustees. My contact was through

12 the Chief Executive and the Chair. So there was nothing

13 in the way that this was set up that would introduce any

14 biases as far as I can tell.

15 Now, had we done this today, we would certainly

16 have advertised, or even, you know, five years later

17 I suspect, we would have advertised these roles

18 publicly. In those days, it was acceptable to say:

19 we've got a pretty circumscribed role here, we know the

20 group of people we want, so we will just advertise it to

21 that group of people. I don't think that would be

22 acceptable now, certainly.

23 **Q.** You've set out in some detail in your statement, and

24 I don't want to go to it, but what you term as entirely

25 avoidable and embarrassing delays --

93

1 wasn't, and it's the sort of thing I look at now and

2 squirm over.

3 **Q.** Does that tell us anything about where in the priority

4 list -- you talk about having to prioritise the work --

5 where in the priority list the Alliance Health

6 Organisations came for the Unit?

7 **A.** I don't think so. It was a piece of paperwork that

8 needed doing, and I think it was just a bit of

9 bureaucracy that needed to be done, and we were focused

10 on, if you like, sort of -- we had, you know, regular

11 meetings through that time with the Macfarlane Trust and

12 the Eileen Trust discussing issues. I was constantly in

13 touch with Ann Hithersay as the Chief Executive. We had

14 an ongoing dialogue.

15 So, if you like, we were dealing with the big

16 issues while neglecting something small and bureaucratic

17 that could have been dealt with easily and would have

18 saved some grief.

19 **MS SCOTT:** Sir, I wonder if now would be an appropriate time

20 for the lunch break?

21 **SIR BRIAN LANGSTAFF:** Yes, it would. We'll come back at

22 2.00. 2.00.

23 (1.00 pm)

(The Luncheon Adjournment)

25 (1.59 pm)

95

1 **A.** Yes.

2 **Q.** -- in the allocation of Section 64 funding --

3 **A.** Indeed.

4 **Q.** -- to with the Macfarlane Trust. Section 64 funding

5 being the funding that the Trust needs to fund its

6 operations -- fund its --

7 **A.** Yes, so we had a sort of two funding streams: one to

8 support the Trust's work with beneficiaries, and then

9 one for the admin, which was the section 64, and that

10 meant that there was clear separation between the two.

11 And, yes, as you say, we -- there were some

12 dreadful delays early on -- well, indeed, and later as

13 well for slightly different reasons in awarding those

14 Section 64 grants.

15 **Q.** And was that as a result of what you were telling us

16 this morning about the understaffing and the pressure of

17 work in your unit?

18 **A.** I think so. But what I say in my statement is, looking

19 at this now, it's so embarrassing because this was

20 probably a couple of hours' work at some point, and we

21 could have dealt with it so much more quickly and

22 avoided the irritation felt by the Macfarlane Trust and

23 the embarrassment to us. So it was one of those

24 avoidable things that should have been done much, much

25 earlier, and because of everything else going on, it

94

1 **MS SCOTT:** Before we start this afternoon, can I just

2 correct something for the transcript and for everyone

3 that's listening.

4 I was asking Mr Lister about a document,

5 a submission that was sent to Yvette Cooper. We don't

6 need to look at it, but it's DHSC0041379_177, and

7 I asked: why did that go to Yvette Cooper rather than

8 the Secretary of State? It was given that it was

9 a submission about HCV compensation scheme. It has been

10 pointed out to me that it was addressed to Yvette Cooper

11 but also to the Secretary of State. I just wanted to

12 make that clear.

13 The second thing before I ask you some questions

14 about vCJD and recombinant, Mr Lister, is I understand

15 that you've been reflecting over lunch about one of the

16 questions I asked you before lunch and would like to

17 update us on your reflections, if I can put it that way.

18 **A.** Yes. You asked me why I thought ministers refused the

19 idea of a compensation scheme, and I was trying to think

20 back to the context of that period, the new Labour

21 administration that, you know, in -- but ministers at

22 that time were having to take some very, very difficult

23 decisions about priorities on public spending. The

24 Blair administration decided for its first two years

25 that it was going to retain the previous Government's

96

1 spending limits so that by 1999, I think, public
 2 spending was at the lowest since the early '60s. But at
 3 the same time, the NHS was in major difficulty. There
 4 was a big, big crisis over waiting times. I mean, far
 5 too many people were dying because they were on waiting
 6 lists, and it was one of those issues that ministers
 7 were determined to tackle. And there were a lot of
 8 other issues as well around poor outcomes for people
 9 with heart disease, poor outcomes for people with
 10 cancer.

11 And I think trying to put myself in the shoes of
 12 ministers at that time, their overwhelming priority was
 13 to improve those, you know, critical frontline NHS
 14 services. So they were constantly having to decide
 15 whether to fund something that would take money away
 16 from those frontline services or not. And I think
 17 that's the context you probably have to think about
 18 ministers' deliberations on this. You know: do I take
 19 money for a compensation scheme away from the money that
 20 would otherwise go into frontline NHS services? And my
 21 feeling is that that would have been, you know, what was
 22 upmost in their mind.

23 **Q.** Now I'm going to ask you some questions about vCJD, but
 24 can you help us understand this: we see in the
 25 records -- obviously, we know about you and the Blood

97

1 for transfusion.

2 **Q.** And so, as you say, those two key decisions had been
 3 made by the time you arrived, but --

4 **A.** But had not yet been fully implemented.

5 **Q.** Indeed. And it is also right to understand, is it, that
 6 UK plasma was still being used for FFP, fresh frozen
 7 plasma?

8 **A.** It was, yes. The distinction being that fresh frozen
 9 plasma was single -- from a single donor, as opposed to
 10 pooled plasma products from many thousands of donors,
 11 and I think the issue was about the lack of availability
 12 of alternatives, initially at least.

13 **Q.** And at some point during your time at the Blood Policy
 14 Unit, a decision was made to buy a US manufacturer of
 15 plasma, or collector of plasma, I should say.

16 **A.** Mm-hm.

17 **Q.** Life Resources Incorporated. Can you tell us a little
 18 bit about why that decision was taken.

19 **A.** Yes, I can. So after the decision was taken to stop the
 20 collection of UK donor plasma, the Bio Products
 21 Laboratory had to find alternative sources of plasma and
 22 contracted with various providers all in the US where
 23 there'd been no cases of BSE to supply bulk plasma for
 24 fractionation.

25 In 2001, the Bio Products Laboratory learnt that

99

1 Policy Team, but we see in the records references to
 2 a CJD team. Was there a CJD team at the time that you
 3 were in the Blood Policy Unit?

4 **A.** There was, yes. That was headed by Dr White. So she
 5 would have been responsible for all the issues around
 6 variant CJD and tracking that with Dr Will's CJD
 7 Surveillance Unit. And it was that unit as well that
 8 was responsible for setting up the CJD Incidents Panel,
 9 chaired by Professor Banner, that looked at the whole
 10 issue of people potentially exposed to variant CJD
 11 through surgical instruments and through blood. So,
 12 yes, there was a separate CJD unit.

13 **Q.** And so how was your -- what was your responsibility for
 14 vCJD? How was that defined?

15 **A.** I should also say, that unit would also have been the
 16 secretariat for SEAC as well. So Alan Harvey, who
 17 I corresponded with a lot, was part of that team as
 18 secretary to SEAC.

19 But the distinction was that I was looking at the
 20 whole question of variant CJD risk in blood and, in
 21 particular, the risk reduction measures that had already
 22 started to be introduced at the point that I joined. So
 23 the medicine commission's decision to decide that we
 24 should no longer be using UK source plasma for plasma
 25 based products and the decision to leukodeplete blood

98

1 those contracts or at least two of the biggest contracts
 2 were going to be withdrawn. There was a notice period.
 3 It was maybe 12 or 18 months, something like that. But
 4 we recognised that we were facing a crisis that
 5 potentially there would be no or hardly any supply of
 6 plasma for fractionation coming in to BPL for the
 7 products it was manufacturing. So we had to address
 8 that crisis.

9 One of the key drivers on that was around
 10 intravenous immunoglobulin, which was one of the
 11 products manufactured by BPL, for which there was
 12 generally a shortage on the international market. So
 13 the option, for example, of simply buying in product
 14 rather than manufacturing it in the UK was one that we
 15 looked at and rejected as high risk.

16 We -- so at that time, one of the other things
 17 that was happening that had precipitated the withdrawal
 18 of contracts was that multinational pharmaceutical
 19 companies were buying up the plasma collectors in the
 20 US, taking them into their own ownership and -- because
 21 they wanted to secure those supplies for themselves
 22 against shortages in the market. And I simply thought:
 23 well, why can't the British Government do the same?

24 And I think fairly recent to that, there'd been
 25 changes in the law which would allow the UK Government

100

1 to take a private company into ownership. And given
2 that, I made the proposal to the Secretary of State
3 in -- it was July of 2001, that we consider the purchase
4 of this company Life Resources Incorporated which had
5 already been a supplier to BPL, which was in private
6 ownership, which was at risk of being bought up by the
7 multinationals, and we knew that the owner was coming
8 up, was getting to a point there he wanted to retire,
9 would be interested in selling.

10 So that was the sort of background to it all. We
11 didn't go straight into that. I mean, that was the
12 option that we were looking at, the main option, but we
13 also then investigated a whole series of other
14 alternatives for securing bulk plasma for BPL to
15 fractionate and went through a series of options, most
16 of which were looking at the US market because nowhere
17 else supplied the quantity of plasma that BPL would
18 need. But we came down in the end to the purchase of
19 Life Resources Incorporated being the only way of
20 securing the supplies of plasma we needed at the safety
21 level we needed and the quantity we needed.

22 Q. And is it right to understand that you spent quite
23 a significant amount of your time on the purchase of
24 Life Resources Inc?

25 A. Yes. So there was a lot of time spent in discussion,

101

1 A. Yes, hugely. I was leading the UK negotiations so
2 I attended all the EU expert committee meetings with
3 other Member States to agree the Directive and, of
4 course, we needed to put the Directive into UK law
5 through regulation.

6 Q. I'm going to ask you a couple of questions now about the
7 notification process and by that I mean the process by
8 which those that had either received blood transfusions
9 or blood products that had plasma or a blood components
10 contributed to by somebody who had later gone on to be
11 diagnosed with vCJD.

12 A. Mm-hm.

13 Q. I'm going to call them "implicated products", so when
14 I say "implicated products" I mean the blood product has
15 had plasma contributed to it by somebody that has vCJD.

16 Can we go to WITN4505071. So we can see here this
17 is a fax from you to David Dunleavy, 1 October 1999
18 about a meeting with the NBA on 6 October and you say --
19 he's kindly agreed to come to the meeting and that
20 you're attaching a minute so that before the meeting you
21 can discuss the key issues.

22 So if we can just turn over to the minute, please,
23 which is the next page. We can see again from you to
24 Mr Dunleavy, which is a solicitor, "SOLC2", that means
25 he's a solicitor; is that right?

103

1 initial discussion with the company. There was a lot of
2 time spent looking at all those possible alternatives.
3 And then, when we decided to move ahead with the
4 purchase of Life Resources, there was the whole process
5 of a company acquisition, and after that the question of
6 how we would manage the governance of a US company from
7 Whitehall.

8 I didn't do that alone. I had a lot of support
9 from the Department's commercial team. They brought in
10 consultants from KPMG to help with the company purchase.
11 There were also external -- an external law firm who
12 helped with the legal issues around all of it as well.
13 So it was actually quite a big team, a project team that
14 I was managing, but essentially I acted as the principal
15 for the company purchase, attending the negotiations,
16 and communicating with ministers and with Nigel Crisp as
17 the Permanent Secretary.

18 Q. Can you recall the date when that was completed?

19 A. I think we completed it by the end of 2002, roughly.
20 There was something there, it is covered in my statement
21 when the announcement was, but I think it was towards
22 the end of 2002. That was happening concurrently with
23 the negotiations on the European Blood Directive, which
24 had started earlier in 2001, but continued into 2002.

25 Q. Again, did that take up quite a lot of your time?

102

1 A. Yes, yes.

2 Q. 1 October 1999, you set out the background at
3 paragraph 2. You explain that:

4 "... it has been agreed that the [National Blood
5 Service] will exclude from the blood supply blood
6 donated by people who have received transfused blood
7 from a donor who subsequently developed vCJD;

8 "there are only a small number of such people at
9 present in this category who [are the right age] to give
10 blood. None of them are currently blood donors."

11 Then you explain that:

12 "The [National Blood Service] have set up
13 a flagging system on their donor database to ensure that
14 if those people present themselves as blood donors,
15 a means can be devised of either deferring them (in
16 which case donors would have to be told why) or
17 discarding their donations (which could be seen as
18 deception)."

19 Then you say:

20 "This raises a number of legal and ethical issues
21 which the NBA have put to their solicitors,
22 Le Brasseur J Tickle."

23 Then you attach a copy of the advice and you set
24 out what the advice is and, effectively, their solicitor
25 has taken the view that it's:

104

1 "difficult from an ethical point of view to say
2 that such a donor should not be told that he or she
3 received possibly CJD-infected blood or blood products,
4 because failing to tell the donor involves an element of
5 deception rather than a simple, considered omission."
6 If we could turn over the page, please, we can see
7 why you're coming to him to advise at paragraph 6.
8 "The NBA is now looking to the Department for
9 advice on what to do. The Department's current advice
10 on this issue is set out in a circular (PL(CO)(98))",
11 and you attach that and that's a document that we've
12 looked at in previous hearings.
13 A. That's the Graham Winyard document.
14 Q. Indeed, Graham Winyard, indeed. Then you set out what
15 that concludes.
16 "This concludes, on the basis of advice 'from
17 ethics experts and other advisory bodies' that there is
18 no need to inform patients who have received
19 vCJD-implicated blood components because:
20 "i. it is thought unlikely that nvCJD will be
21 transmitted in this way;
22 "ii. there is no diagnostic test for nvCJD;
23 "iii. even if a test was available, there is no
24 preventative treatment that could be offered."
25 Then you make the point that:

105

1 guarantee that notification will be of no purpose
2 whatsoever or be sure that we would pick up the case in
3 the future when a test or treatment had been developed.
4 If patients are to be notified then a further duty of
5 care arises as to the manner in which it is done.
6 "You will note, therefore, that I think the duty
7 very probably requires notification to any recipients of
8 transfusions. With regard to affected potential donors
9 I think it is even more difficult to see how they could
10 be kept in the dark given that they would surely have to
11 be told why their blood could not be accepted ..."
12 So that is the advice that you receive in advance
13 of the meeting. Then, if we could turn, please, to
14 WITN4505072, we can see an email, I think this is
15 an email, from you to David Dunleavy and various other
16 people, including Dr Troop and Dr McGovern. You say
17 that:
18 "I attach a draft letter which records the outcome
19 of our meeting on 6 October with members of the NBA
20 Board and Executive and DH and NBA lawyers. The main
21 conclusions were that (i) the NBA should set up
22 immediately a system to exclude individuals from giving
23 blood who have been identified by the NBA/CJDSU study as
24 having received blood from people who subsequently
25 developed vCJD ..."

107

1 "These ... statements still hold true. However,
2 they do not necessarily override the specific legal
3 concerns raised by Sephen Janisch in connection with the
4 NBA. It may also be becoming harder, giving
5 an increasing emphasis on patients' rights and
6 a distrust of paternalism, to justify the stance that
7 information should be withheld from patients on the
8 grounds that it might cause unjustified worry."
9 Then you say:
10 "In preparation for Wednesday's meeting, we would
11 welcome your views on the specific legal issues
12 raised ..."
13 So that is your request, then, for legal advice.
14 If we can just turn, please, to DHSC0041362_009. We can
15 see the response that you received from David Dunleavy
16 on 5 October 1999, and then the first big paragraph
17 there, second sentence in:
18 "In brief, I think that the duty of care owed to
19 patients extends to their being made aware of possible
20 problems for them arising out of their treatment.
21 Whilst the circumstances of particular individuals might
22 excuse their being told, eg elderly person living alone
23 with bad nerves, I am extremely doubtful that one can
24 lawfully have an across the board decision not to notify
25 affected patients. The point is that we cannot

106

1 So that deals with the --
2 "... and (ii) that, if these people present as
3 blood donors, the NBA has a duty to tell them why it is
4 not possible to accept their donation."
5 Then you go on to say:
6 "Given the importance of this decision, we want to
7 get this letter off to the NBA with the minimum of
8 delay", instructing them, presumably, to implement those
9 conclusions.
10 So with that rather long introduction, my question
11 to you is this: clearly, the meeting dealt with the
12 question of patients who have received implicated
13 products turning up to the blood services to be a donor,
14 and the meeting came to a conclusion they should be told
15 that they have received implicated blood products, they
16 should be notified that they are at risk whatever the
17 level of their risk is.
18 What this meeting doesn't appear to address is the
19 point being made by David Dunleavy in his advice to you
20 that, actually, his view is that there's a duty to tell
21 patients about their treatment, whether or not they
22 attend as a blood donor or not. Can you recall why the
23 meeting didn't address that issue, given that that was
24 the advice you'd received?
25 A. I suspect that it was because the meeting was

108

1 specifically about what the NBA should do and that
 2 question was a wider question to be addressed by the
 3 Department. Which, as you know, was subsequently
 4 addressed but over a rather prolonged period.
 5 **Q.** Yes, so indeed we can see, and you've set out in your
 6 witness statement, we can see various -- at various
 7 different stages meetings occurring, and this matter
 8 being discussed. I'm not going to take you through the
 9 chronology of that because you've set it out in a great
 10 deal of detail in your witness statement.
 11 We've looked at some of the events in that
 12 chronology with some other witnesses. But by the
 13 time -- this issue having arisen reasonably early on in
 14 your time at the Department -- 1999, by the documents we
 15 just looked at -- and we know that the notification
 16 process that the Department of Health eventually rolled
 17 out took place after you left the Department --
 18 **A.** Indeed.
 19 **Q.** -- so, at the start of the end of 2003, can you help us
 20 with understanding from your perspective why it took so
 21 long?
 22 **A.** It's difficult to do that without getting into the
 23 chronology, but the issue became one that the
 24 CJD Incidents Panel set up, chaired by Michael Banner,
 25 who was an ethicist, which looked at this issue in

109

1 their own thing, and therefore we'd have no consistency
 2 in the way in which patients were told, which didn't
 3 feel acceptable.
 4 **Q.** So while you were waiting for the CJD Incidents Panel to
 5 hand down their advice which would apply across the
 6 board, you thought: draft some interim guidance. But
 7 that never got issued?
 8 **A.** No. As my witness statement says, Michael Banner
 9 thought there were serious issues with it, though
 10 I don't think I was very clear even at the time what
 11 those issues were. He said: well, the Department could
 12 send it out, but it wouldn't have our support.
 13 And after an attempt at redrafting, I think the
 14 idea was abandoned as the Incidents Panel continued to
 15 consider the issue as part of its overall framework of
 16 advice.
 17 **Q.** One of the periods of delay that's been identified was
 18 when the CJD Incidents Panel were waiting for the Chief
 19 Medical Officers to sign off on the -- what became the
 20 framework document, the framework document that set out
 21 who should be notified and how that should go forward.
 22 Can you help us at all with why that period -- why
 23 the Chief Medical Officers had the document for so long,
 24 and --
 25 **A.** I can't, I'm afraid. What period was that?

111

1 relation to blood but also in relation to treatment with
 2 surgical instruments, and they looked at it over
 3 a rather a prolonged period. There was a point at which
 4 I drafted a suggested set of guidance to go out to the
 5 NHS for Pat Troop but Michael Banner felt that there
 6 were issues with it, and so it didn't get sent.
 7 But, I think, for all kinds of good reasons, there
 8 were sort of constant referrals to expert after expert
 9 and the whole thing dragged on for quite some time.
 10 **Q.** So the interim guidance that you're referring to,
 11 I think -- I'm not going to take you to it because we've
 12 looked at it with other witnesses --
 13 **A.** Right.
 14 **Q.** -- but for the transcript it's WITN4505126. The Inquiry
 15 has got two versions of it, one from February and
 16 I think the one from --
 17 **A.** It was a later --
 18 **Q.** One from February 2001 and one from May 2001. Is it
 19 right to understand that this was drafted by you because
 20 you were concerned that hospitals were effectively
 21 waiting for the CJD incident panel to tell them what to
 22 do when patients came to them and said, "Have received
 23 an implicated product?"
 24 **A.** Yes. There was also a concern that without guidance,
 25 individual clinicians might decide, as they did, to do

110

1 **Q.** It's October -- it was sent to them in October 2002, and
 2 the response is June 2003.
 3 **A.** My guess is that that would have been dealt with by the
 4 CJD team, and I don't recall anything coming across my
 5 desk about it.
 6 **Q.** Can I show you another document, as well, to ask
 7 a question about perhaps another reason for the delay.
 8 WITN4505201. This is a letter dated 26 March 2003, and
 9 it's to Sir Liam Donaldson from Martin Gorham, the Chief
 10 Executive of the National Blood Service, and we can see
 11 in the stamp at the top, it says:
 12 "To Charles Lister."
 13 **A.** Ah.
 14 **Q.** Do we understand, then, that that would have been copied
 15 to you? Is that what that means?
 16 **A.** Yes. I assume it would have been sent to me to draft
 17 a reply.
 18 **Q.** In fact, it looks like it's been sent by rather
 19 old-fashioned telefax.
 20 **A.** Yes. And, actually -- yes, it's been sent -- I see it's
 21 been sent to me by Jane Minifie who was Martin Gorham's
 22 PA. So it's been, yeah, sent to me so that I was made
 23 aware of what had been sent to the CMO.
 24 **Q.** Right. Rather than it coming via the Department for you
 25 to action --

112

1 A. Yes.
 2 Q. -- it's been sent to you for information by the National
 3 Blood Service.
 4 A. Yes.
 5 Q. I understand. He says this:
 6 "I have been instructed by my Board to write to
 7 you on this topic as they are concerned about the delay
 8 in providing definitive advice to the UK blood services
 9 regarding notification ..."
 10 Then there's a word missing, but presumably that
 11 says:
 12 "... two or four individuals who have been
 13 transfused with blood from donors who have subsequently
 14 developed vCJD.
 15 "All these cases have been notified to the CJD
 16 Incidents Panel, and we are still awaiting confirmed
 17 advice from this Panel as to what action the Blood
 18 Service should take. I am aware that one of the issues
 19 is provision of adequate support mechanisms for
 20 individuals once they have been notified of their
 21 exposure."
 22 Then he goes on to say:
 23 "However, our concern is a fail-safe mechanism to
 24 protect the safety of the blood supply, and an important
 25 element of this safety mechanism is to inform these

113

1 notification process, who was in the lead on that?
 2 A. That would have been the CJD team because they were
 3 responsible for everything addressed by the Incidents
 4 Panel.
 5 Q. And there's just one further document I want to ask you
 6 about in relation to vCJD, and that's DHSC0004122.
 7 Now, this is a memo from Howard Roberts, who
 8 appears to be a solicitor, 5 March 2001, to A Harvey,
 9 who I think you said was in the CJD team.
 10 A. Yes, that's Alan Harvey, absolutely. Yes.
 11 Q. And you've been copied in.
 12 A. Mm-hm.
 13 Q. And it's in relation to legal advice on the system that
 14 was being used by the National Blood Authority, the
 15 flagging system. So we can see there at paragraph 2:
 16 "In your minute, you ask about the legality of
 17 passing on patient information about vCJD to a central
 18 registry. The short answer is that the only safe basis
 19 in law for passing on such information is informed
 20 patient consent. Ministers have also expressed their
 21 view that informed consent should these days be the norm
 22 for information sent to registries as well as for other
 23 purposes, which are not directly related to the
 24 treatment and care of the patient in question."
 25 Then it goes on to make some points in paragraph 3

115

1 individuals that they should not donate blood, tissues
 2 or organs."
 3 And then he makes the point about the CJD clinical
 4 Incidents Panel finalised guidance being available from
 5 October 2002, provided to the CMO colleagues, he says,
 6 in November 2002, and so saying that:
 7 "... the delay in providing the UK blood services
 8 with regard to notification of exposed blood recipients
 9 being unduly prolonged."
 10 Now, you say in your witness statement that you
 11 haven't been able to trace a response to this, but what
 12 I was interested in asking you about is whether you can
 13 recall what the problem was, or what the issue was,
 14 about the provision of adequate support mechanisms for
 15 individuals once they'd been notified of their exposure.
 16 Was that something you would have got involved in?
 17 A. I assume he's probably talking about counselling
 18 services, and there was a lot of discussion over all of
 19 this period about the importance of people having access
 20 to counselling if they were given this very devastating
 21 news, potentially.
 22 So that's the issue. I am not able to answer your
 23 question, though, I'm afraid.
 24 Q. And in terms of whether it was your team or the CJD team
 25 who was leading from the Department of Health and the

114

1 about the increasingly strict construal of the doctrine
 2 of implied consent, and then makes some points about the
 3 fact that the law may be changing.
 4 Then over the page, the advice is given in
 5 paragraphs 5 and 6, second paragraph -- I mean second
 6 sentence -- first sentence:
 7 "Until the new power is enacted, we need to
 8 consider the three principal legal constraints on
 9 disclosing information."
 10 And then goes on to set out what those are.
 11 And the conclusion at paragraph 6:
 12 "Under the law as it stands, in my opinion
 13 particular disclosures might -- depending on the
 14 facts -- be defended, but a general policy of disclosure
 15 without consent would present unacceptable legal risks."
 16 Now, I just want to ask you -- I'm conscious this
 17 is legal advice that was not given to your unit; it was
 18 given to the CJD team. I am also conscious that this
 19 was in respect of a system that the NBA were operating,
 20 the National Blood Authority, not the Department of
 21 Health, albeit it was on the Department of Health's
 22 direction.
 23 Do you know whether or not any steps were taken by
 24 the Department following receipt of this advice?
 25 A. I don't recall at all, I'm afraid.

116

1 Q. Do you know, and you may not know the answer to this,
2 but do you understand that the system, the NBA flagging
3 system, continued to operate during your time at the
4 Blood Policy Unit?
5 A. Yes.
6 Q. I'm going to turn now to ask you some questions about
7 recombinant factor products. Is this right, that in
8 England, at any rate, when you took up your role at the
9 Blood Policy Unit, a recombinant Factor VIII was
10 available for those under the age of 16 and to new
11 patients?
12 A. That's correct, yes.
13 Q. And what was the position in Scotland and Wales, can you
14 recall?
15 A. I can't at that point in time. Scotland was certainly
16 ahead of England in the provision of recombinant, and
17 they certainly provided recombinant for everyone before
18 we did in England. I think Wales similarly.
19 But, yes, at the time I joined, it was only
20 available for patients under 16, although with the
21 assumption that when they got beyond the age to 16, they
22 would continue receiving it.
23 Q. And is it also right to understand that your position
24 was always that England should adopt recombinant factor
25 products for all adults?

117

1 You were advising ministers from January 2001 that
2 there ought to be a phased introduction of recombinant
3 Factor VIII over four to five years, and that that was
4 accepted by Alan Milburn at the end of February 2001.
5 A. Mm-hm.
6 Q. But initially the funds couldn't be found; is that
7 right?
8 A. If I remember correctly, the suggestion was from Alan
9 that -- well, I think we had suggested possibly that the
10 NHS might fund this directly. I think for the reasons
11 I mentioned at the start of this discussion,
12 Alan Milburn said no to that.
13 The other possibility was that the money for it
14 could be found within my Directorate's existing
15 spending, but that was not possible either.
16 So that left us with ultimately not being able to
17 do anything until we could bid for funding through the
18 next spending review round, which was the 2002 round.
19 Q. And that was a successful bid which led to the
20 February 2003 announcement that £88 million was
21 available on a three-year roll-out; is that right?
22 A. That's correct.
23 Q. Is this right: that even then, you were concerned that
24 that was actually not enough money for the three-year
25 roll-out?

119

1 A. I think from fairly early on, yes. Yes.
2 Q. And why did you come to that view?
3 A. I came to that view particularly after all the concerns
4 were raised about variant CJD, so it felt that although
5 we had dealt with the issues around HIV and hepatitis C,
6 and blood and blood products were free from those risks,
7 that variant CJD indicated that there was this potential
8 for new risks that hadn't been anticipated through human
9 sourced plasma.
10 So with the availability of recombinant products,
11 it felt only right that we should look to provide those
12 for all patients. The question as ever was about both
13 the availability of the product, and there was
14 a question about whether enough product was available
15 for all patients in England, and also the cost, bearing
16 in mind that there were first and second generation
17 products on the market and the prospect of a third
18 generation entirely albumin free product, each of which
19 was more expensive than the other.
20 Q. You've set out again in detail in your second witness
21 statement the steps that were taken through your tenure
22 at the Blood Policy Unit in relation to recombinant
23 factor, and I'm not going to go through those. I'll
24 just summarise them as a sort of introduction to my next
25 question.

118

1 A. Yes.
2 Q. And why was that?
3 A. I think that was largely to do with the cost of third
4 generation products. We were relying a great deal, as
5 well, on trying to get reductions in the price, the unit
6 cost, through bulk buying, and I was working with the
7 NHS Purchasing and Supply Agency for some months leading
8 up to that to see if we could get the price down. But
9 I think there was a concern, certainly, that with rising
10 costs and -- but, you know, it might not be enough.
11 Q. Then in order to roll the programme out amongst patient
12 groups, you formed a working party; is that correct?
13 A. That's correct.
14 Q. And that was to look at the contracting arrangements and
15 how to allocate funds to primary care trusts, and then
16 how to actually roll it out amongst patient groups,
17 ie who should get the recombinant first --
18 A. Mm-hm.
19 Q. -- and how should it be rolled out between patient
20 groups.
21 A. Yes, and I very much wanted patient representatives to
22 be involved in that decision.
23 Q. So the working group consisted of members of the
24 Haemophilia Society, the UKHCDO members, Royal College
25 of Nursing, Nurses' Association, Primary Care Trusts,

120

1 commissioners of haemophilia services, and people from
 2 the NHS Purchasing and Supply Agency, as well as the
 3 Department of Health; is that right?
 4 **A.** That's right. I think we added at least one person to
 5 the membership after the first meeting and another
 6 patient representative at the Haemophilia Society's
 7 suggestion.
 8 **Q.** So at the first meeting, no patient representatives, but
 9 then coming on --
 10 **A.** Well, apart from the Haemophilia Society themselves,
 11 yes.
 12 **Q.** Then coming on patient representative for the second and
 13 third meeting.
 14 **A.** Yes, that's my recollection. I think in those days the
 15 idea of open and collaborative Government was a bit new,
 16 but it just felt to me that it was -- these weren't
 17 decisions that the Department of Health could just take
 18 without consideration of the views of those people who
 19 would be directly impacted.
 20 **Q.** So this idea of a working party to work out
 21 operationally how a Department of Health decision was
 22 going to work was a new one, was it?
 23 **A.** It was -- I mean, I had worked a good deal with the
 24 Haemophilia Society and had a very good relationship
 25 with them for some period before that, and it just

121

1 **Q.** So dealing first then with the papers that you had
 2 discovered were missing in October 2001, when you were
 3 preparing the chronology and submission for Lord Hunt,
 4 as a result of the allegation being made by Lord Owen
 5 that the Civil Service had frustrated his pledge to
 6 Parliament about self-sufficiency, and you've already
 7 told us a little bit about that. It's right to
 8 understand, is it, that you were looking at this stage
 9 at official or registered files, were you?
 10 **A.** Correct.
 11 **Q.** Can you just tell us what the difference is between
 12 official files or are they called -- are they registered
 13 files or official files? What's the --
 14 **A.** Registered files.
 15 **Q.** Registered files.
 16 **A.** Yes.
 17 **Q.** What's the difference between registered files and
 18 private papers?
 19 **A.** Department of Health officials -- any Government
 20 Department officials -- are expected to keep a very
 21 clear audit trail of all decisions made, and those
 22 decisions in those -- you know, until, you know, the
 23 early 2000s were all on paper files. So you would go
 24 into a paper file, and you would find a succession of
 25 minutes and submissions and briefings and papers that

123

1 seemed -- I mean, it was my initiative, and it just
 2 seemed to me natural that they should be involved, along
 3 with others.
 4 **Q.** And is it right to understand that that process, the
 5 rolling out of the programme, had not completed by the
 6 time you left the Unit?
 7 **A.** No. We'd had three meetings, but it hadn't completed at
 8 all, no.
 9 **Q.** I'm going to now turn to ask you some questions about
 10 documents and destruction of documents or missing
 11 documents. I am going to ask you about three different
 12 categories of documents. First of all, the papers that
 13 we've already discussed to a certain extent that you
 14 discovered were missing from the 1970s files --
 15 **A.** Mm-hm.
 16 **Q.** -- when you were preparing your submission for
 17 Lord Hunt, those being the submissions to ministers, in
 18 particular, Lord Owen and his successor. So that's the
 19 first paper I'm going to ask you about; the second is in
 20 relation to Lord Owen's private papers; and the third is
 21 in relation to the ACVSB minutes and underlying
 22 documents that were contained within GEB files and, in
 23 other places, as well, that you were involved in looking
 24 for as part of the hepatitis C litigation?
 25 **A.** Mm-hm.

122

1 would give you a complete story, if you like, about what
 2 happened. And it was the responsibility of people
 3 working on a policy issue to make sure that all the
 4 relevant papers were put on a registered file, and by
 5 registered, I mean a file which would then go into the
 6 departmental archives, once the issue had been
 7 addressed.
 8 So it would have a number that it was given and it
 9 would then -- in theory, you should be able to look back
 10 and find all the information about that particular
 11 issue.
 12 Most offices at that stage had a whole series of
 13 filing cabinets full of registered files, so you could
 14 look back and see what was available. Periodically,
 15 files were sent back to the central records unit and
 16 might have to be retrieved from there. And, in this
 17 case, I can't remember whether we already had the files
 18 in the office or whether I had to send off for them.
 19 **Q.** And --
 20 **A.** Oh, and you asked me the difference between private
 21 papers?
 22 **Q.** Yes.
 23 **A.** Um, individuals might well keep their own sets of
 24 papers. That's more likely to be senior people or
 25 ministers. So if you were anybody who was the chair of

124

1 an expert committee, for example, might well have hung
2 on to the papers that they were sent for that expert
3 committee. And there was no reason why they shouldn't
4 do that.

5 The issue, with ministers is a little different
6 and I don't know how often ministers would keep back
7 papers they'd looked at, if they were planning to write
8 their memoirs or whatever. It clearly happened.

9 So that's the distinction, that the registered
10 files should contain the official record of all the
11 decisions made. There shouldn't be anything contained
12 in private papers that is not also on the registered
13 file and I think that's an important point.

14 Q. Are there other categories of papers? So could you have
15 registered files and then another category of paper?

16 A. No, I don't think so.

17 Q. So all correspondence would be in the registered file?

18 A. All correspondence should be on the registered file,
19 absolutely.

20 Q. And legal advice?

21 A. Yes. I think -- I remember back in the '70s, when
22 everything was handwritten and sent to typing pools, to
23 be honest, those files were kept in a lot better
24 condition than they were later. There was a very strict
25 process where you would handwrite all the minutes and

125

1 not everybody read it as well as they should have done.
2 The process of sending files back to the register,
3 usually with a docket that would say, "Review in so many
4 years", or "Destroy", or whatever, we usually delegated
5 to junior members of staff and the guidance was that
6 those decisions would be taken at executive -- well, the
7 most senior sign-off would be at executive officer
8 level, which is still fairly junior.

9 So I suspect, I don't know, I suspect that there
10 were some rather haphazard and inconsistent decisions
11 on -- well, there clearly were, on destruction of files.

12 Q. Was the expectation that all emails, notes of telephone
13 calls, notes of meetings, letters, records, would go on
14 to the file and then they would only be destroyed in
15 accordance with the destruction policy that had been
16 decided on for that file?

17 A. Yes, I think there was a policy that if there was --
18 nothing new had gone on to that file about that
19 particular issue for five years, say -- I can't --
20 I think it was five years, I can't remember exactly --
21 then you could consider that file for destruction.

22 Q. The expectation was that things wouldn't be thrown away
23 before they got into the file. People wouldn't be
24 making decisions about "Oh, this isn't really relevant,
25 I'm not going to put it" --

127

1 notes and records of telephone conversations, et cetera
2 on the left-hand side of the file and, on the
3 right-hand, would be all the briefings and submissions
4 and decision papers. Those were usually wonderfully
5 kept. Once we got into email, I think the process got
6 a lot more sloppy.

7 Q. Was the expectation once you get into email that you
8 should print the email up and have it in the paper file?

9 A. Initially, yes. And then we moved into electronic
10 filing, which was another issue again.

11 Q. Did you have training or instruction on record keeping
12 and filing?

13 A. In the sense that -- I mean, when I started in a much
14 more junior role and was expected to make sure that
15 files were upkept properly, then, yes, it was part of
16 the job to do that. So I certainly grew in my Civil
17 Service career to know what a well-kept file should look
18 like.

19 Q. How about training about when you could destroy or throw
20 away records, papers, emails, documents, anything of
21 that sort?

22 A. There was a guidance document produced by the Department
23 on management of registered files, which you included in
24 the documents that you sent me, which I recollected. It
25 was very long and I suspect because it was so long that

126

1 A. No, absolutely not. I've always thought that having
2 a very clear audit trail of decisions is essential,
3 otherwise, you know, if you look back at them, you can
4 never be clear about what happened. It wasn't always
5 done as well as it should have been, you know, busy
6 people neglected to do what they should have done a lot
7 of the time, I think.

8 And there wasn't always -- when you have a team of
9 people working on something, from a branch head through
10 to an executive officer, you know, who decides whose
11 papers go on the file and how is that managed and,
12 again, I'm not sure that process was always done as well
13 as it should have been.

14 Q. But what you're describing is there was a process by
15 which somebody made a decision about which papers should
16 go on the file? So not everything would automatically
17 go on to the file? There was a decision-making process
18 about what should go on to the file?

19 A. I think people got out of the habit of recording things
20 like telephone conversations. Those tended to get
21 missed. I think most -- my experience, most of the
22 essential material went on to files. What wasn't always
23 as clear, I think, are those sort of missing bits in the
24 middle "Why did we go from A to B to C?" You've just
25 got the documents but not necessarily the information

128

1 that leads you to the, you know, to some of the
2 questions you're asking me today about, you know, why
3 and what happened next.

4 **Q.** Were there record managers and archivists working
5 through your time in the Civil Service?

6 **A.** There were certainly records managers. I think --
7 I mean, for the paper files there was the central
8 records unit and they were the people who issued the
9 guidance as well. I don't recall any central review
10 about what individual teams were doing. That happened
11 more later on, when I went back to the Department and
12 there was a concern that there was inconsistency in the
13 way that electronic records were being managed. At that
14 point there was -- record managers were trying to ensure
15 that everybody was approaching electronic filing in the
16 same way.

17 **Q.** Going back, then, to the papers that you discovered were
18 missing from the registered files, that you would have
19 expected to see in the 1970s, dealing with
20 self-sufficiency, is it right to understand that you
21 searched all the surviving files that you could find and
22 didn't find these submissions?

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

24 **Q.** And --

25 **A.** Just to be clear, I looked at only a couple of years,
129

1 earlier in the '90s. But then the Solicitors' Division
2 didn't have them any longer or weren't able to find
3 them.

4 **Q.** Is this right: that if you were taking documents off
5 a registered file, in order to provide them to the
6 solicitors for a disclosure exercise in litigation, you
7 would be expected to take copies?

8 **A.** They should have done, yes. Absolutely.

9 **Q.** So I'm just trying to understand whether you think you
10 were told by somebody that is what happened to them or
11 whether that's your -- that's what you think must have
12 happened to them because they're not on the file and
13 that's the most likely explanation?

14 **A.** My memory is of being totally convinced that that's what
15 happened to them but I can't remember what convinced me.
16 I do recall badgering Anita James and her people on
17 several occasions to search for them, see what happened,
18 if they could find them. Because it seemed to me, as
19 part of the chronology I was providing to ministers,
20 that we wanted them to pass on to the Haemophilia
21 Society and others that it was really important to have
22 those.

23 **Q.** Then, as to what happened to the files once they'd gone
24 to the solicitor, is this right: that it's really
25 supposition when you say that they were destroyed in
131

1 I suspect, of papers. So I tried to trace through what
2 happened to the 500,000 et cetera, that Lord Owen
3 provided and where that money went and how it was spent,
4 et cetera. So to try to answer the question about
5 whether it was spent as it should have been on
6 self-sufficiency, which I didn't go much beyond that.

7 **Q.** So the missing documents you noticed would have been in
8 relation to that issue?

9 **A.** It was recognising that there would have been points at
10 which officials would have given ministers an update,
11 and they clearly did, because, later on, Roland Moyle
12 gave an update to the House of Commons as well as
13 writing to the Haemophilia Society saying what had
14 happened about funding of self-sufficiency. So that
15 communication with ministers was clearly happening but
16 the evidence of that was not on the files.

17 **Q.** Your statement tells us -- and I think you told us
18 earlier today -- that you were told that the files had
19 been provided to the solicitors; is that right?

20 **A.** I can't remember how I came to that conclusion.
21 Somebody might have suggested to me, Mike McGovern might
22 have suggested to me that that's what had happened.
23 So -- and Anita James I think confirmed that they would
24 have been taken out of the files for public interest
25 immunity as part of the HIV Litigation disclosure
130

1 a clearout by the solicitor? You don't know that, that
2 supposition, but you think that is the most likely
3 explanation?

4 **A.** That I supposition and I think again somebody might have
5 suggested oh this could have happened in the solicitors
6 branch. So, yes, I drew a complete blank and gave up in
7 the end.

8 **Q.** To be clear, did you play any part in the HIV
9 Litigation, the decisions made at that time --

10 **A.** No.

11 **Q.** -- to take documents off the file?

12 **A.** No, entirely before my time, I was working on other
13 things then.

14 **Q.** Can I then turn to Lord Owen's private papers. We heard
15 this morning that you spent some time in Private Office.

16 **A.** Mm-hm.

17 **Q.** Can you tell us what the practice was during your time
18 at the Civil Service for dealing with a minister's
19 private papers when there was a change of government?

20 **A.** Well, ministers' private offices would keep all the
21 copies of anything that had gone into the minister. So
22 submissions from officials, cabinet papers, et cetera.
23 But there's a convention that a -- and a longstanding
24 convention within Government, that if you have a change
25 of government then the new set of ministers are not
132

1 allowed to see of the documents provided to their
 2 predecessors.
 3 And certainly when I was in Private Office and
 4 this would have been at the -- well, the 1974 election,
 5 there were two that year, I certainly remember having,
 6 you know, a clearout of documents as part of the general
 7 procedure. So you would wait -- there is guidance
 8 issued by Cabinet Office about what to do in the event
 9 of general elections, which includes what to do about
 10 papers from the previous administration and usually you
 11 have to wait to know what the result of the election is
 12 because it might be the same administration returning,
 13 in which case you don't do anything. If it's a complete
 14 change of administration, then you need to dispose of
 15 cabinet papers, et cetera, that had been held by you.
 16 Now, what I've never been quite clear about, to be
 17 honest, is what Lord Owen means by his "private papers".
 18 So I must sort of give that particular caveat there. So
 19 when ministers are sent submissions by officials, they
 20 would usually go into a ministerial box and the minister
 21 will -- often with a note from the private secretary and
 22 the minister will write something in return, either to
 23 say they agree or disagree, and to make some other
 24 comment.
 25 So there will sometimes be annotated submissions

133

1 the minister?
 2 **A.** Yes.
 3 **Q.** You have described it as a convention that this was done
 4 on a change of government.
 5 **A.** Mm-hm.
 6 **Q.** Was that, as far as you were aware, widely applied on
 7 changes of government?
 8 **A.** Yes, it's part of the Cabinet Office guidance. So it
 9 applies across all Government departments.
 10 **Q.** Can you recall when you were involved in this process,
 11 whether you would have carried out checks before
 12 destroying the private papers, to make sure that those
 13 submissions and documents, and so on, were replicated in
 14 the registered files?
 15 **A.** I'm afraid I was very, very, very junior back in 1974
 16 and I would have been just been handed a pile of stuff
 17 and told to shred it. But I think, quite often, I mean
 18 instead of -- so things like cabinet papers, I think,
 19 would certainly just be shredded by Private Office, but
 20 I think copies of submissions or folders about
 21 a particular policy issue, the Private Office might just
 22 decide to send that back. I am sure that I can recall,
 23 for example, when I worked on HIV, which I was still
 24 doing in night '97, at the change of government, having
 25 stuff sent back to me in folders from Private Office and

135

1 by ministers but not always, because they might write on
 2 the note that the private secretary appended. The
 3 private secretary will then relay that to -- back to the
 4 officials, these days with an email saying, you know,
 5 "The minister has said X and Y and we've got plenty of
 6 examples in the disclosure documents here".
 7 Sometimes, very occasionally, you'd get the
 8 minister's actual annotated comments back. But probably
 9 more often than not, those would be kept by the Private
 10 Office. And then, on a change of government, those
 11 would probably be shredded in line with the usual
 12 convention.
 13 It shouldn't be the case that -- anything that
 14 a private office disposes of should be available
 15 elsewhere. So if it's -- we're talk about submissions,
 16 those should be on the registered file in the policy
 17 area, so Private Office disposing of them is not getting
 18 rid of that particular evidence, but I guess what it
 19 might do, what you might lose, are the annotated
 20 comments from ministers, unless a private secretary
 21 thinks, "Oh, this is so important, I'd better shunt this
 22 back to officials."
 23 **Q.** So just to be clear, the clearout of the private papers
 24 is nothing to do with the registered files, this is the
 25 private papers that are kept by the Private Office of

134

1 then checking to see if it was a duplicate of things
 2 I had already.
 3 **Q.** Is there any direct evidence you can give to the Inquiry
 4 about what happened to Lord Owen's private papers?
 5 **A.** No.
 6 **Q.** I'm going to turn now, then, to the third category of
 7 papers or documents, and that is the ACVSB, the Advisory
 8 Committee on the Virological Safety of Blood papers,
 9 consisting of minutes and background papers --
 10 **A.** Mm-hm.
 11 **Q.** -- and ask you some questions in relation to those.
 12 So is it right to understand that you first became
 13 involved in trying to find these missing papers when
 14 Ms James, a solicitor, explained to you by email that
 15 she was minded to agree to disclose relevant documents
 16 in the hepatitis C litigation, even though the
 17 Department of Health wasn't a party to that litigation.
 18 **A.** Mm-hm. Yeah, I mean, at that stage, I wasn't aware that
 19 we were talking about missing documents. This was, you
 20 know, a disclosure exercise and I assumed that we would
 21 find them quite easily.
 22 **Q.** This was in November 1999, was it?
 23 **A.** Yes.
 24 **Q.** Perhaps -- and so you were asked, is this right, you
 25 were effectively tasked by Ms James to find the

136

1 documents that she wanted to disclose that she thought
 2 were held by your Directorate?
 3 **A.** Yes.
 4 **Q.** Why were you tasked with that? Why you?
 5 **A.** Because the papers would be held by our team.
 6 **Q.** So it was because the papers should have come from your
 7 team or should have been by your team?
 8 **A.** Yes, yes. I mean, either as, you know, registered files
 9 which we could retrieve or from other documents we had
 10 in the office. So for example, Andrzej Rejman, who had
 11 chaired the ACVSB, had retired, but Mike McGovern,
 12 I think, who had taken over from him, still had some of
 13 Andrzej's old papers.
 14 **Q.** So you said that, at first, you didn't realise that the
 15 files were missing or at least that it was going to be
 16 difficult --
 17 **A.** No.
 18 **Q.** -- to find them. What subsequently happened?
 19 **A.** Yes. I'm trying to remember the -- again, the sequence
 20 of events is in my written statement. Would it be
 21 possible to have -- my screen has gone blank, by the
 22 way. I don't know if it should have done.
 23 **Q.** Well, let me ask you, because we're just about coming up
 24 to the break so I'll ask you some questions that don't
 25 involve you looking at documents and perhaps we can sort

137

1 At the bottom it says:
 2 "Meanwhile, I'll find out what I can about the
 3 destroyed files."
 4 So is it right to understand that, at least by
 5 25 February 2000, you had been informed that the GEB
 6 files had been destroyed?
 7 **A.** Or some of them, yes. I think among the recently
 8 disclosed documents there was one from the file, the
 9 registered file, people to Ann Willins, confirming
 10 documents destroyed. I think that was something like 25
 11 or 26 February, something like that.
 12 **Q.** And you deal with it ...
 13 **A.** Yes. So, yes, Ann wrote to the DRO, the register, on
 14 the 24th to ask about them and got an email on the 28th
 15 with the list of destroyed files and the dates when
 16 they'd been destroyed.
 17 **Q.** We don't need to turn the document up, but there should
 18 be a reference on the bottom of that document you're
 19 just looking at, that you --
 20 **A.** I don't have the document itself. It's just my note --
 21 **Q.** Okay, thank you.
 22 Dr Rejman gave evidence to the Inquiry that, at
 23 least in relation to GEB 4, that it was -- it had been
 24 discovered that that had been destroyed in 1994. By the
 25 time you were in correspondence with the records office,

139

1 your screen out at the break.
 2 **A.** Okay.
 3 **Q.** The first question I wanted to ask you was this: that we
 4 learnt from the evidence of Dr Rejman that some of these
 5 documents were on a file called GEB, which he thought
 6 was General Blood? Does that ring a bell with you? Are
 7 you able to assist us with that?
 8 **A.** I am not. I think there's a reference to GEB in my
 9 evidence because it comes up in the papers. And I -- to
 10 be honest, I had completely forgotten what it stood for,
 11 so that's ...
 12 **MS SCOTT:** Sir, I wonder whether we could take a break now
 13 so that we can sort out --
 14 **SIR BRIAN LANGSTAFF:** Well, that sounds very sensible.
 15 Let's take a break now until 3.40. 3.40.
 16 **(3.10 pm)**
 17 **(A short break)**
 18 **(3.40 pm)**
 19 **MS SCOTT:** Perhaps we could have on screen your third
 20 witness statement, which is WITN4505389. Could we go,
 21 please, to page 11. So if we look at paragraph 2.20:
 22 "On 25 February 2000, I received an email from
 23 Ms James seeking a progress update."
 24 Then if we go to the next paragraph:
 25 "I replied by email on the same day stating ..."

138

1 more files had been destroyed, had they?
 2 **A.** They had, yes. And there's an email between Dr Rejman
 3 and Anita James in the disclosed documents which
 4 I wasn't aware of at the time that confirms that earlier
 5 destruction.
 6 **Q.** And I think your witness statement tells us that by the
 7 time you were looking into this, GEB 5 to 17 had also
 8 been destroyed.
 9 **A.** Yes.
 10 **Q.** And that those GEB files contain minutes, background
 11 papers to the ACVSB between May 1989 and February 1992.
 12 **A.** Yes.
 13 **Q.** And just, again, to be clear, is it right that the
 14 actions which led to those GEB files 4 to 17 being
 15 destroyed some time between 1994 and 1999 were nothing
 16 to do with you?
 17 **A.** That is correct. That's covered in the subsequent audit
 18 investigation.
 19 **Q.** So you can't assist us with understanding why particular
 20 dates were put for destruction of those files on the
 21 dockets?
 22 **A.** No. I mean, they shouldn't have been marked for
 23 destruction at all, so the dates are almost irrelevant.
 24 But, yes, it makes no sense that they were marked for
 25 destruction at any stage.

140

1 Q. And do you know the name of the person who ordered the
2 destruction of the GEB files 4 to 17?
3 A. I do not. As I said in my witness statement, I might
4 have known at the time, but if I did, I've certainly
5 forgotten now.
6 Q. Now, your witness statement sets out the significant
7 amount of steps that you took to try and find the files.
8 A. (Witness nodded)
9 Q. I'm going to come on to talk about what you found out
10 about what happened to them, but I'm focusing now on
11 what steps you took to try and effectively reassemble
12 those files that were missing so that they could be
13 provided as disclosure in the hepatitis C litigation.
14 I'm going to do it by running through what I've gleaned
15 from your witness statement.
16 A. Okay.
17 Q. So, first of all, you looked at the policy files held by
18 the Health Service Division; is that right? So your
19 division, effectively?
20 A. Yes.
21 Q. And you found some documents from an earlier discovery
22 exercise.
23 A. Yes.
24 Q. And that we see at paragraph 2.9 of your witness
25 statement.

141

1 A. Possibly. I will be honest, apart from one or two --
2 the general sense of frustration and, for example going
3 to Professor Zuckerman's office at the Royal Free, my
4 memory of this is quite limited, and it's been mostly
5 jogged by seeing the papers from the time.
6 Q. And you've set that all out in the witness statement.
7 A. As well as I can, yes.
8 Q. And, as you say, you approached Professor Zuckerman.
9 You approached Sandra Falconer --
10 A. Scotland, yes. Yes, I approached Scotland, colleagues
11 in Scotland, and Wales as well, I think.
12 Q. And Dr Perry as well, who was another member of the
13 ACVSB.
14 A. Yes. I think Angela Robinson who was at that stage
15 Medical Director of the National Blood Service.
16 Q. You also got some papers from Justin Fenwick. Perhaps
17 that was Ms James that did that.
18 A. I think Ms James got them following our meeting with him
19 when he gave advice.
20 Q. And I'm going to come on to that.
21 And there were also -- some papers were obtained
22 from Dr Metters' secretary. Is that you, or was that
23 Ms James, can you recall?
24 A. I thought we didn't obtain papers from Dr Metters'
25 secretary. I thought the dreadful bombshell was that

143

1 Do you know what that discovery exercise was or
2 what litigation it was in?
3 A. I do not.
4 Q. You checked the files of the Hepatitis C Advisory Group,
5 in particular John Canavan's old papers?
6 A. I started to identify people who might have kept
7 papers -- former members or secretariat to the
8 Committee, so they were my next sort of set of go-to
9 people -- with some success but not complete.
10 Q. So that was the Hepatitis C Advisory Group.
11 A. Yes.
12 Q. Then you spoke to Mike McGovern who had taken over as
13 the secretariat for ACVSB from Dr Metters; is that
14 right?
15 A. Yes, I think so. I mean, by my time, that committee
16 didn't exist -- it was MSBT -- but yes, he had.
17 Not taken over from Dr Metters, no. Mike McGovern
18 took over from Andrzej Rejman.
19 Q. Sorry. Andrzej Rejman. And so did you speak to
20 Mike McGovern and see whether he had any papers?
21 A. Yes, I would have done. We were, you know, desk feet
22 apart, so, yes, I would have done that. First thing
23 I would have done, I imagine.
24 Q. You looked in the basement at Eileen House for any
25 records. Is that something you did?

142

1 Dr Metters' secretary had disposed of all Dr Metters'
2 papers.
3 Q. I think there's reference to her having found some.
4 A. Right.
5 Q. So despite all of those efforts, is it right to
6 understand that while you found quite a lot of the
7 documents that were missing, there were still some that
8 you weren't able to find?
9 A. That is correct.
10 Q. I'm now going to ask you someone questions to illicit
11 what you found out about what happened to those
12 documents that were lost, that were missing.
13 Can I start by going to DHSC0046972_133. No,
14 that's not the one I want. DHSC0046972_131. I think
15 I gave you the wrong reference. Yes, I did.
16 So here we've got instructions to counsel to
17 advise, addressed to Justin Fenwick QC. And if we go
18 over the page, we can see that counsel is instructed to
19 advise in conference fixed for 3 March about the closure
20 of documents in relation to hepatitis C.
21 And is it right to understand from your witness
22 statement that you attended that conference with
23 Ms James?
24 A. I did.
25 Q. And then we can see the context:

144

1 "By consent, it was agreed that the Department of
2 Health should disclose on a non-party basis all
3 documents, letters, reports, internal memoranda and
4 other documentation relating to the introduction of
5 surrogate or routine anti-HCV screening generated during
6 the period 1 March '98 to 1 September 1991 and the
7 minutes of the meetings of the Advisory Committee on
8 Hepatitis."

9 A. Mm-hm.

10 Q. So in broad terms, those were the documents that you
11 were seeking to find, in order to disclose in the
12 hepatitis C litigation; is that right?

13 A. I'm not -- I don't recall looking for the Advisory
14 Committee on Hepatitis papers. It may be that
15 Anita James had those already.

16 Q. So you were looking for the ACVSB papers.

17 A. Yes.

18 Q. Then it's paragraph 5 over the page, please, that I want
19 to draw your attention to. So Ms James, I think, who
20 drafted this, is setting out the facts, and she says
21 this:

22 "When DMS ..."

23 And I understand DMS are the solicitors --

24 A. (Unclear)

25 Q. -- in the hepatitis C litigation.

145

1 the papers considered by ACVSB."

2 So is this right: that by 8 March you knew that
3 Dr Metters had kept papers in anticipation of HCV
4 litigation?

5 A. Yes.

6 Q. And that his secretary had destroyed the papers because
7 she was concerned about the BSE -- because the BSE
8 disclosure had caused her great difficulties?

9 A. Yes. I mean, her reasoning for doing that had been
10 communicated to Anita James, not to me, but that came
11 out at the meeting with Justin Fenwick. And, yes, it
12 was something of a bombshell. It was -- we were
13 incredulous to say the least.

14 Q. Would -- as a secretary, would she have had the
15 authority to destroy Dr Metters' private papers?

16 A. That's a difficult question because these were not
17 papers on a registered file so they did not fall within
18 the rules on destruction of registered files. However,
19 she clearly understood their importance and destroyed
20 them nonetheless. So I would say that it was entirely
21 wrong of her to have done that.

22 Q. Presumably, she should have cross checked those papers
23 against the registered files, should she, before
24 destroying them?

25 A. If she'd have thought about that; I would guess she

147

1 A. Yes.

2 Q. "When DMS first intimated that they were going to seek
3 disclosure, your instructing solicitor approached
4 Dr Metters' former secretary Yvonne de Sampayo who now
5 works for Dr Pat Troop the current Deputy Chief Medical
6 Officer/public health. Quite to the incredulity of
7 Mrs James, Ms de Sampayo told her that she had destroyed
8 the documents because the BSE disclosure proceed [that
9 must mean process] had caused her great difficulty.
10 Dr Metters' records are therefore not available."

11 Can I just then show you one more document before
12 I come to ask you questions. DHSC -- no. In fact,
13 let's deal with this through your witness statement.

14 If we go back to your witness statement. It's
15 WITN4505389. Page 18, please. You set out at
16 paragraph 2.40. On 8 March 2000, so five days after the
17 conference with counsel, you received an email from
18 Dr Metters, and it says this:

19 "I no longer have any documents relating to HCV.
20 I had however retained copies of all the minutes of
21 ACVSB after I became chairman in August 1989, and all
22 MSBT minutes in my personal file, when I demitted from
23 my DCMO role on 31 August. I do not know where these
24 are now, but I had retained them because of the expected
25 HCV litigation. I did not however have copies of all

146

1 didn't think about that.

2 Q. Did you speak to or interview Ms de Sampayo?

3 A. I did not. All the interviews following this were
4 conducted by the internal audit people.

5 Q. Did you report her actions in destroying those papers to
6 anyone?

7 A. I didn't. It was mentioned as an exchange between me
8 and Pat Troop because Yvonne de Sampayo was working for
9 Pat Troop at the time so Pat was aware then of what had
10 happened, and there is a response from Pat among the
11 papers.

12 Q. Yes, so the -- well, the memo that I found, it may be
13 that there's another one that I have missed but from you
14 to Dr Troop is at DHSC00046972_126. I wonder if this is
15 the one you're --

16 A. It may be.

17 Q. -- thinking of. Yes, so this is your memo to Pat Troop
18 on 3 March 2000:

19 "This note is to make you aware of an issue which
20 Marilynne Morgan will be raising in a minute to
21 Chris Kelly on Monday."

22 So who are Marilynne Morgan and who is
23 Chris Kelly?

24 A. Chris Kelly was the Permanent Secretary at the time;
25 Marilynne Morgan because the lead solicitor for the

148

1 Department.

2 **Q.** Then they set out the background of the hepatitis C

3 litigation at paragraph 2 and the background to the

4 discovery exercise undertaken by the Department in

5 paragraph 3. Then in paragraph 4, it says:

6 "SOL Litigation have consulted Counsel today on

7 the best way of handling the situation."

8 Then you set out counsel's advice, so we know this

9 memo is after you'd learned from the actions of

10 Ms de Sampayo.

11 Then if we go over the page, we can see what you

12 tell her about the events.

13 You establish that there are missing documents and

14 you say:

15 "SOL Litigation will need to inform DMS of the

16 situation next week. This will be embarrassing for the

17 Department, and DMS could, if they were so minded, make

18 a stink about the destruction of documents vital to

19 their clients' case. We think this is unlikely, but

20 Marilynne Morgan will need to appraise the

21 Permanent Secretary of the situation. I understand that

22 Marilynne Morgan's minute will also refer to the

23 destruction of Dr Metters' personal papers on ACVSB,

24 which SOL Litigation understand took place shortly after

25 his retirement. Although these papers were not on

149

1 **Q.** I'll come on to Marilynne Morgan's memo in a moment, but

2 the response from Dr Troop -- I don't think we need to

3 go to it but it's at WITN5426214, and you set it out at

4 paragraph 2.39 of your witness statement -- and she

5 emails you on 7 March saying:

6 "Thank you for alerting me to this. As you say,

7 they were Dr Metters' private papers so there should not

8 really be an issue."

9 Is that what you were thinking of?

10 **A.** That's what I was thinking of.

11 **Q.** So I. Perhaps then we can go to Marilynne Morgan's memo

12 to the Permanent Secretary --

13 **SIR BRIAN LANGSTAFF:** Can we just pause there for a moment?

14 A moment or two ago you suggested that there was

15 a reason for the destruction of the papers, which in

16 part was to avoid them being disclosed in litigation.

17 If that is so, then did Dr Troop not understand that

18 this was being suggested, because she says, "As they

19 were Dr Metters' private papers, there should not really

20 be an issue"? They were papers produced by Dr Metters',

21 after all, Deputy CMO, and they were relevant to the --

22 might be relevant, one doesn't know without seeing them

23 but suppose they're relevant -- to the litigation. It's

24 a curiosity, isn't it?

25 **A.** Yes. And I am sorry that my memory of these events is

151

1 registered files, the implication may be that their

2 destruction was ill advised.

3 "Happy to discuss."

4 So is that what you were thinking of?

5 **A.** That's what I was thinking of. I assume I deliberately

6 didn't go into detail because that's what Marilynne

7 Morgan was going to do in her note to the Permanent

8 Secretary.

9 **Q.** Do you not think that Dr Troop should have been informed

10 that her own had apparently deliberately destroyed

11 documents in an attempt, so it seems, to interfere with

12 the disclosure process in anticipated litigation?

13 **A.** What I cannot recall is any conversation that I may have

14 had around this note. The way I've written it, and

15 I understand it will also refer to the destruction, it

16 almost sounds as if it was something that I'd mentioned

17 to Dr Troop already, but I don't have enough

18 recollection to say if that's the case or not.

19 **Q.** Is this a case of trying to present events in the best

20 light to Dr Troop?

21 **A.** I don't think so. No. And I think -- I mean, she would

22 have been copied into Marilynne Morgan's note to the

23 Permanent Secretary and other documents which were far

24 more explicit, so I wasn't trying to sugar the pill in

25 any way.

150

1 so poor that I can't put any more -- do any more than my

2 best interpretation of what's there in the papers.

3 **SIR BRIAN LANGSTAFF:** Well, you didn't do the destruction

4 but somebody needs to -- or at least there needs to be

5 a satisfactory explanation for them.

6 **A.** Yes.

7 **SIR BRIAN LANGSTAFF:** Yes. Thank you.

8 **MS SCOTT:** So if we look at WITN6955032. So here we've got

9 what looks like a typed memo from Marilynne Morgan dated

10 8 March 2000, and it's got a sticky over it with some

11 handwritten notes on it.

12 I haven't noted down the other -- we've got a copy

13 of this memo without the sticky on it and it's clear

14 that it's to the permanent secretary --

15 **A.** Yes.

16 **Q.** -- but I haven't got the reference to hand.

17 **A.** And the note will be from the Permanent Secretary's

18 private secretary.

19 **Q.** Right. So if we look first at what is said by

20 Marilynne Morgan and then look at the handwriting.

21 **A.** Mm-hm.

22 **Q.** I think that's probably the most sensible way to deal

23 with it. So:

24 "Issue: A potential problem in relation to the

25 disclosure of documents in the Hepatitis C litigation.

152

1 "Recommendation: That the Department sets up
2 a small internal investigation to determine what
3 happened in this case and to make representations to
4 prevent such a thing happening again."

5 Then she sets out the background first of all to
6 the hepatitis C litigation, explaining that there's two
7 claims: one is claims brought against the Department,
8 which has been stayed; and the second claim is a claim
9 in which the Department is not involved, and in which
10 the Department was being asked for disclosure on
11 a non-party basis, and that was where you'd become
12 involved looking for those documents.

13 A. Yes.

14 Q. Then, if we go over the page, we can see that she sets
15 out some information about the disclosure process and
16 what the Department had been advised by Justin Fenwick
17 at paragraph 2, and Dr Rejman's involvement in
18 extracting documents kept by the Department.

19 Then at paragraph 3, Anita James's involvement
20 taking over the case in June 1999, and she telephoned
21 Dr Metters' former secretary to ask for Dr Metters'
22 personal papers on the subject, which she had seen when
23 she was previously in SOL Litigation:

24 "Dr Metters had been chairman of the Advisory
25 Committee on the Virological Safety of Blood which had
153

1 this is under the heading "Counsel's Advice". So
2 counsel has given some advice about duty to the court
3 not to destroy documents, and so on, because the
4 Department is in stayed litigation. Then at
5 paragraph 7:

6 "In addition Counsel was of the view that there
7 should be a small, and probably in-house, investigation
8 into the destruction of the documents. The investigator
9 should interview Dr Metters and his secretary, the
10 person at DH, who signed the destruction authorisation
11 (whom we know to still be at DH) and Dr Rejman. This
12 should not be a witch hunt but the investigator should
13 report and make recommendations about such matters in
14 the future. Counsel was of the view that as part of the
15 investigation Heywood Stores should be visited. In this
16 way, the Department would have audited what has
17 happened. It occurs to me that this is a function which
18 could properly be carried out by internal audit."

19 Just pausing there, can you recall why counsel
20 took the view that it shouldn't be a witch hunt?

21 A. I can't. I am, I'm afraid, entirely reliant on the
22 record that we have here. My supposition would be that
23 because the people involved in the destruction were very
24 junior, that counsel felt that it would be better to use
25 this as an opportunity to learn lessons and improve
155

1 looked into the adequacy of the tests and given final
2 advice on their introduction in 1991. It transpired
3 that his former secretary had had a clearout when
4 Dr Metters retired and that the copy papers no longer
5 existed."

6 Then it sets out the steps, or some of the steps,
7 that you had taken to try to retrieve the registered
8 files, and so on.

9 Then it sets out advice about the disclosure
10 process.

11 Just pausing there, it doesn't look like
12 Marilynne Morgan told the Permanent Secretary the
13 information that you'd received from Ms de Sampayo
14 either?

15 A. I think, firstly, the information about Ms de Sampayo's
16 motives for disposing of the documents came from
17 Anita James. I don't think I heard that directly. And
18 no, she doesn't. I mean that may well, because the
19 earlier discussion about having an audit to look into
20 this and learn lessons from it made clear that it wasn't
21 going to be a witch hunt. So it may well be that she
22 deliberately chose not to seek to put the blame on one
23 individual.

24 Q. So picking up on that point then, if we can look at what
25 counsel says over the page, please, at paragraph 7, so
154

1 procedures, rather than seek to single out very junior
2 individuals.

3 Q. Then we've got some handwriting there:

4 "Interviews:
5 "1. Dr Metters
6 "2. Secretary
7 "3. Destructor!
8 "4. Dr Rejman
9 "Establish:
10 "What happened
11 "What should have happened" --
12 Does that say "department"?

13 A. "Department guidelines", I think.

14 Q. -- and "Recommendations". Do you know whose writing
15 that is?

16 A. I do not.

17 Q. Is it yours?

18 A. No.

19 Q. Then if we go back over to the front, the first page,
20 sorry, try and read the handwritten writing there, it's
21 very unclear at the top, but it seems to say:

22 "David Clark
23 "Flora Goldhill."

24 A. Yes, I think that's right.

25 Q. "[Permanent Secretary] thinks it sounds as if we ought
156

1 to take the advice to have a quick investigation. He'd
 2 be grateful if you could let him know if you're content
 3 with this or have alternative suggestions. If you are
 4 content, he'd be grateful if David Clark could set it in
 5 hand with his internal audit team.
 6 "Many thanks."
 7 So is it right to understand, then, that the
 8 decision about internal audit was made on the advice of
 9 counsel, by the Permanent Secretary, in consultation
 10 with David Clark and Flora Goldhill?
 11 **A.** Yes, on the advice of Marilynne Morgan.
 12 **Q.** Were you involved in the decision about the form that
 13 the internal investigation audit should take?
 14 **A.** No.
 15 **Q.** Can we look, then at the in-house investigation report,
 16 NHBT0000193_137.
 17 So we can see this is dated April 2000 and if we
 18 turn, please, to page 3 we can see the audit scope and
 19 coverage of the report at section 2:
 20 "Broadly, Internal Audit were asked to:
 21 "establish what happened;
 22 "identify the extent to which procedures have not
 23 been followed; and,
 24 "make recommendations to prevent such incidents
 25 from occurring again.

157

1 happened and not going on to look at who took the
 2 actions and why they took the actions that they did to
 3 destroy documents or -- is a lost opportunity to learn
 4 lessons? You don't really get to the root of or
 5 understand why documents were destroyed.
 6 **A.** I can -- yeah, I think that's a fair point.
 7 **Q.** Do you -- and you may not be able to answer this given
 8 the evidence you've already given us, but do you
 9 understand why this internal audit only looked at the
 10 destruction of the GEB files 4 to 17, ie the registered
 11 files, and didn't consider the destruction of
 12 Dr Metters' private papers by Ms de Sampayo?
 13 **A.** Again, I don't because I had no involvement in the
 14 setting of the remit for this. Again, I can only
 15 suppose that they were focusing on the process for
 16 managing registered files which, as I explained before,
 17 should contain all the records of departmental decision
 18 making. So any papers held privately by individuals
 19 should have been duplicated on those files.
 20 **Q.** So is it right to understand, then, that in relation to
 21 the actions Ms de Sampayo that there's -- the cabinet
 22 secretary wasn't -- doesn't appear to have been made
 23 aware, at least from that memo that we looked at, of the
 24 actions that she took.

Dr Troop, at least from the memo that we looked

159

1 "Internal Audit has not sought to apportion any
 2 blame. The purpose of the review is to help prevent
 3 such things from happening again."

4 Is it your understanding that the reason why they
 5 took the view they did at 2.4 was because that's what
 6 they were asked to do, they were asked not to apportion
 7 blame?

8 **A.** Yes, that's my understanding.

9 **Q.** Do you understand why that approach was taken: not to
 10 apportion blame? I think you said it was because the
 11 people involved were junior, is that --

12 **A.** That was my supposition, that because the people
 13 involved were junior and the fault, if it, you know,
 14 probably lay with more senior people who should have
 15 supervised what they were doing.

16 And I think Marilynne Morgan had made the point
 17 earlier on. I think she'd not been aware of anything
 18 like this happening previously in other disclosures, so
 19 this was something that was unfortunately -- well,
 20 possibly a one-off, so that what we needed to do was to
 21 improve the guidance to ensure that this didn't happen
 22 again, so it was an exercise in learning lessons and
 23 improving procedure which seemed to be more beneficial
 24 than simply pointing the finger at individuals.

25 **Q.** Would you accept that stopping the investigation at what
 158

1 at, may not have been made aware -- although I'm
 2 conscious that you said that you may have spoken to her
 3 about the actions of Ms de Sampayo -- and there's been
 4 no investigation by this internal audit into her
 5 actions.

6 **A.** Yes. I can't add anything more, I'm afraid.

7 **Q.** Do you know whether or not Dr Metters and Ms de Sampayo
 8 were interviewed as part of this audit process?

9 **A.** I do not.

10 **Q.** Do you know whether the person who signed the document
 11 destruction docket on the GEB files was interviewed?

12 **A.** I do not. It was evidently the intention that that
 13 person should be, but I cannot say for sure if they
 14 were.

15 **Q.** And lastly, do you know whether Heywood Stores were
 16 investigated, and do you know what Heywood Stores are?

17 **A.** That's the file registry unit, so these are the people
 18 who are responsible for receiving registered files and
 19 acting on the instructions of officials on reviewing
 20 them periodically and destroying them, if that's what
 21 the instruction is.

22 **MS SCOTT:** Sir, those are the questions I have for
 23 Mr Lister.

24 **SIR BRIAN LANGSTAFF:** Yes.

25 **MS SCOTT:** I will need an opportunity to see if there are
 160

1 any further questions from Core Participants and their
2 legal representatives that they would wish me to put to
3 him.
4 **SIR BRIAN LANGSTAFF:** Do you have any sense of how long you
5 might need?

6 **MS SCOTT:** I think I'll probably need half an hour.

7 **SIR BRIAN LANGSTAFF:** Very well.

8 As you know, this is an opportunity for Core
9 Participants to put further questions to you through
10 counsel, and we have to give them time to do that. So
11 we will meet again not before 4.45. Not before 4.45.

12 **(4.16 pm)**

13 **(A short break)**

14 **(4.59 pm)**

15 **MS SCOTT:** These questions are going to move from topic to
16 topic, so you'll have to bear with me on that one.

17 **A.** Okay.

18 **Q.** Was any thought given during your time at the Blood
19 Policy Unit to an ex gratia payment scheme for those
20 infected with hepatitis B as a result of infected blood?

21 **A.** No.

22 **Q.** Can we turn, please, to DHSC0034270. This is a letter
23 4 November 2002 to Nigel Crisp, and it's from -- we see
24 on the second page; we don't need to go to it -- from
25 Martin Gorham, and you were asked questions about this

161

1 ongoing issues and developments, and I am aware that I
2 think the run-up to this letter, I hadn't been to at
3 least probably two of those.

4 But I think -- I mean, this letter doesn't
5 entirely tell the full story, and I think there was
6 a sort of -- my view of it was set out in a briefing
7 note I provided for Hazel Blears before she met
8 Martin Gorham early the next year because there were
9 also things that we felt that the Blood Service should
10 be doing that they didn't see as priorities. So I think
11 there was a little bit of a sort of disagreement about
12 what the priorities should be for focusing on. So we
13 didn't entirely accept the criticism here. That's also
14 reflected, I think, in the response that Nigel Crisp
15 sent back to this letter.

16 But I'm afraid, and I'm really sorry for this,
17 I can't remember the specifics of the types of testing
18 that Martin Gorham is referring to.

19 **Q.** And do you know why he was suggesting that there was
20 delay on the part of the Department of Health in
21 responding to -- I think to give policy advice?

22 **A.** I think that's his point in the next paragraph.

23 **Q.** Yes, that you've got no -- yes, so the reason why you're
24 saying you've got no support:

25 "... and it's made more acute by the fact the NBS

163

1 and refer to this in your witness statement.

2 Can I draw your attention to something -- the last
3 paragraph on this page. Mr Gorham is making complaint,
4 effectively, about the service, if I can put it that
5 way, that the Blood Policy Unit has provided to the NBA.
6 He says you've provided -- been the main link and has
7 provided excellent support, but you have been completely
8 overwhelmed by the amount of business that needs to be
9 conducted, and then sets that out. But that's been
10 exacerbated by a number of issues.

11 Then it says this. There are number of essential
12 capital proposals being delayed: tactical and strategic
13 redevelopment of blood centres and the replacement of IT
14 systems, for example.

15 Then it goes on to say this:

16 "Nor has the DoH been able to respond in a timely
17 fashion to policy advice we require on the future of all
18 hepatitis C testing and on issues relating to the
19 detection of vCJD through blood testing."

20 I'm asked to ask you this: can you recall what
21 those testing technologies were and why they were being
22 considered at that stage?

23 **A.** I'm afraid I can't. We had a meeting with key people
24 from the National Blood Service -- Martin Gorham, Angela
25 Robinson and other scientists there -- to discuss

162

1 is essentially a major operational service and is
2 looking for the sort of policy and management support
3 that other operational bodies at arm's length nature in
4 the NHS currently receive."

5 I think I asked the question rather badly.

6 What were the consequences on the delay on the
7 testing? You may not be able to answer that if you
8 can't remember what the testing was.

9 **A.** I can't, I'm afraid.

10 **Q.** On that paragraph I've just read, what were the
11 differences -- sorry.

12 You've said that there were differences in view
13 between the Department of Health and NBA on what should
14 be prioritised. Can you recall what those differences
15 were?

16 **A.** Well, very different from these issues. So, for
17 example, we were putting a lot of pressure on the Blood
18 Service to be for customer orientated in the way that
19 they treated blood donors, allowing blood donors to make
20 appointments, for example, which wasn't possible at this
21 stage; people just had to turn up. The Blood Service
22 wasn't very friendly for people who had busy jobs and
23 couldn't turn up when the Blood Service needed them to.

24 And this was something that National Audit Office
25 had raised that had been discussed at the Public

164

1 Accounts Committee, and which we were still meeting some
2 resistance from the Blood Service for.

3 But, I mean, I think, as I say, if it's -- if
4 you're happy to refer to it, the briefing I did
5 Hazel Blears contains, I think, a good summary of where
6 we felt we were at.

7 **Q.** I'm not sure if this is the right document. Is it
8 DHSC0042275_114? Is it from you, from 4 December 2002,
9 meeting with Mike Fogden and Martin Gorham?

10 **A.** Yes, it probably is. You need to go on to the next page
11 at least, I think.

12 **Q.** So you set out the history, and then if you go to
13 page 2 -- there isn't a page 2.

14 **A.** Ah.

15 **Q.** Oh, that is the next page. Sorry. If you go over the
16 next page, you've set out the key areas of weakness.
17 You say you're "broadly happy" -- under "Performance" --
18 with their performance. Then you set out their key
19 areas of weakness: need to improve their service to
20 blood donors; introduce new terms and conditions for
21 blood donor carers; and management of the various silos
22 within NBA.

23 **A.** I'm afraid this doesn't help to address the issue about
24 the testing that Martin Gorham was referring to, but it
25 does, I think, help to illustrate that, as ever with

165

1 So at the point where I joined the blood team, the
2 Blood Service still had a lot of work to do to turn
3 itself into a proper national body, and also the main
4 concern at that point from the Secretary of State was
5 just supply of blood. We were still had shortages of
6 blood through the winter, so it was a major issue for
7 ministers, given winter pressures on the health service.
8 So our big push initially was to sort out the Blood
9 Transfusion Service and to make sure that it was
10 delivering what the NHS needed.

11 We also at that time introduced the first TV
12 advertising for blood, which helped a great deal. So
13 that was in my first year.

14 **Q.** I asked you questions this morning about when you would
15 escalate a submission to a minister or a decision to
16 a minister, and you said that you were able to do that
17 on your own, but that the Civil Service had changed
18 since then so somebody of your grade, as head of blood
19 policy, wouldn't now be able to make that decision on
20 their own.

21 **A.** Rarely, I think, these days.

22 **Q.** I've been asked to ask you why has that changed, or what
23 has changed about the decision-making process?

24 **A.** This is something that goes back, really, to probably
25 around 2006/07 when there was another of the periodic

167

1 these things, there were two sides to the discussion
2 about where the priorities lay.

3 **Q.** Can we go back, please, to the previous page. Under
4 "Brief History", so it says -- it talks about the
5 process of reorganisation of the NBA between '93 and
6 2000:

7 "In the early stages this involved rationalisation
8 of facilities which in some cases were poorly handled.
9 In August 1997, the Secretary of State commissioned a
10 review of the clinical concerns raised about the
11 Service's proposals to transfer processing of blood from
12 Liverpool to Manchester. The report led to the
13 dismissal in 1998 of the Services' previous Chair and
14 Chief Executive because of serious concerns about the
15 way the service had been managed."

16 What can you tell us about that?

17 **A.** Prior to this, the Blood Service had been a regional
18 Blood Transfusion Services mirroring the Regional Health
19 Authorities. In moving to a national service, they
20 needed to close some centres and they made a decision to
21 close a centre in Liverpool and move their operations to
22 Manchester, but they mismanaged the local politics
23 around that, which became a major issue and that's why
24 the Secretary of State decided, in the end, to dismiss
25 the chair.

166

1 reorganisations at the Department of Health, and
2 I think, for the sake of consistency, again, in the way
3 in which issues were brought to ministers' attention,
4 there was a rule that everything essentially had to go
5 through at branch head level before going to ministers,
6 or if not more senior.

7 **Q.** In relation to the questions I asked you about the
8 submission that you did for Alan Milburn following his
9 telephone conversation with Malcolm Chisholm, about the
10 Scottish compensation scheme. What was your primary
11 concern at that stage? Was it whether there was
12 a devolved power or was it the ability to debate,
13 thoroughly debate the immediate impact of any such
14 scheme on the other UK countries, and the wider
15 implications for the handling of future compensation
16 claims?

17 In other words, did the Department truly consider
18 this to be an issue of devolution, reserved competency,
19 or was it more the case of political inexpediency for
20 Westminster more generally, in light of the position
21 taken by that government over the years?

22 **A.** I mean, from my point of view, my aim was to address the
23 issue of whether there was a devolved power, which is
24 what the Secretary of State had asked for and which had
25 been the subject of his discussion with

168

1 Malcolm Chisholm. I didn't think about it beyond that,
 2 personally. Though the more political consideration
 3 would have been for ministers.
 4 **Q.** Was it Malcolm Chisholm's concern as to whether
 5 instituting a hepatitis C payment scheme was a devolved
 6 matter that set the devolution question in train, as far
 7 as you're aware?
 8 **A.** Yes, as far as I'm aware. The question came to me
 9 following Alan Milburn's discussion with
 10 Malcolm Chisholm in which Malcolm Chisholm -- I mean,
 11 again, I had all this relayed to me third-hand, bearing
 12 in mind, at which Malcolm Chisholm questioned -- you
 13 know, said he wasn't sure himself what the devolved
 14 powers were.
 15 I think we've got to remember that the Scottish --
 16 you know, devolution for Scotland had only happened
 17 a year or two previously, so this was very, very new,
 18 and I think everybody was probably still finding their
 19 way on this.
 20 **SIR BRIAN LANGSTAFF:** Can I just ask you this. The
 21 impression which you have given me by reference to the
 22 documents, let it be said, earlier in your evidence was
 23 this: that the ministers in London, the ministers of the
 24 UK Government, were determined to hold the line against
 25 extending compensation to those who had suffered

169

1 **MS SCOTT:** I took you to some correspondence where you
 2 sought advice on the repercussions for England if there
 3 was a Scottish-only Inquiry.
 4 Can you recall the extent to which that matter was
 5 being raised by your counterpart in Scotland, Mr Stock?
 6 **A.** I can't, again. I mean, I raised the issue because
 7 I wanted to understand legally what the UK's position
 8 would be in the event of a Scottish Inquiry which would
 9 inevitably touch on decisions made by the Department of
 10 Health in London. So it was my concern to sort of
 11 understand that legal position as part of my role and
 12 the need to advise ministers if necessary.
 13 **Q.** And do you recall having any discussion with the
 14 Scottish Executive representatives, Mr Stock or others,
 15 about that issue?
 16 **A.** I don't, I'm afraid.
 17 **Q.** I'm going to ask you now some questions about the GEB or
 18 ACVSB files as we've been calling them.
 19 **A.** Yes.
 20 **Q.** First of all, we've been talking about the GEB files.
 21 Do you know what was in the GEB files that were
 22 destroyed?
 23 **A.** I do not because -- I cover this in my statement --
 24 because I wasn't involved at the point at which those
 25 documents were produced. I am unable to say what wasn't

171

1 hepatitis infection through blood transfusion.
 2 Ministers in Scotland rather wanted there to be a form
 3 of payment for those who had suffered in that way.
 4 And so you have ministers in London not wanting to
 5 be bounced, as might inevitably happen if Scotland went
 6 alone, into doing what they didn't really want to do but
 7 might have to do in response to public opinion. And one
 8 way of -- the ministers might have been looking for ways
 9 in which they could at least have a debate with Scotland
 10 to see if they could persuade them to do otherwise, or
 11 to stop what they thought was an undesirable
 12 development, and so looked for a possible solution which
 13 was: was it within devolution powers? If Scotland had
 14 wanted to do what England would also have wanted to do,
 15 devolution wouldn't have come into it, would it?
 16 **A.** No. I mean, it only arose because Scotland was
 17 considering doing something different from England, and
 18 so the political issue, as you say, was that there was
 19 no longer a consensus. And, you know, the note that I
 20 wrote based on what I'd been told is Alan Milburn
 21 telling Malcolm Chisholm to tough it out.
 22 **SIR BRIAN LANGSTAFF:** So I've understood it correctly, have
 23 I?
 24 **A.** I think you have, yes.
 25 **SIR BRIAN LANGSTAFF:** Thank you.

170

1 there.
 2 **Q.** When you recall a file, a paper file, so from in the
 3 time we're talking about, the late 1980s, early 1990s,
 4 a file that's gone off to the Records Office, and you
 5 recall it back to your desk to have a look at, where is
 6 the document destruction label on the file, so the date
 7 with the review on it?
 8 **A.** From memory, the front of these files had a section in
 9 which you could put a review date and/or a destruction
 10 date. So it was on the -- if you think of this as
 11 essentially a paper file on the front cover, there was
 12 something printed which enabled you to put that
 13 information on.
 14 **Q.** So if you were looking at a file that had come back from
 15 the Records Office and there was a document destruction
 16 date on it, it would be very clear to the person looking
 17 at that file when the document destruction date was?
 18 **A.** Yes, I think so.
 19 **Q.** Can I ask you to look at, please, WITN6955040. So this
 20 is an email sent from you to Laurence George,
 21 Laurence George was one of the investigators, is that
 22 right, of the Internal Audit?
 23 **A.** That's right.
 24 **Q.** If we go down to the bottom, you say there:
 25 "This is the information we got from file store on

172

1 when the ACVSB papers were destroyed."
 2 Then if we go down to the bottom, we can see it
 3 says:
 4 "DRO file requests."
 5 Then it sets out number of file references from
 6 the GEB series:
 7 "... 1 [Volume] 4 was destroyed in 1994
 8 "Vol, S" --
 9 Do you know that signifies?
 10 **A.** I don't know what the "S" signifies, no.
 11 **Q.** "... 5-6-7-8-11-12-14 ... in 1997
 12 "... S 9-10-13 ... destroyed in 1998
 13 "... 15 ... destroyed in 1996
 14 "... 16 ... destroyed in 1997."
 15 Is that the information that you had about the GEB
 16 file destruction dates from the Records Office?
 17 **A.** It is.
 18 The "S", I think it is a typo. It's "volumes", I
 19 think that's all it means.
 20 Yes, that's certainly the information that Ann on
 21 my team obtained and then passed onto me and then
 22 I passed on to the audit people.
 23 **Q.** Now, I asked you some questions about whether or not you
 24 knew the name of the person that had ordered the
 25 destruction of the files and you said you couldn't

173

1 **Q.** Does that ring any bells with you?
 2 **A.** I'm afraid not and it is very hard to interpret what it
 3 means.
 4 **Q.** Do you know who -- does the name John Rutherford or
 5 Rutherford ring any bells with you?
 6 **A.** No, it doesn't. I assume that -- I mean, again, this is
 7 an assumption on my part that the docket would be
 8 a record that the file office kept. If the file was
 9 destroyed, they would have a little piece of paper that
 10 they kept that indicated when it was destroyed. That's
 11 probably what the docket was, but I don't know.
 12 **Q.** Now, we don't have this on the system today, and it's
 13 not a document that Mr Lister has been shown, but I'm
 14 just going to read this reference into the transcript.
 15 It's a document that Ms Richards took Dr Rejman to
 16 during his evidence, and it's the docket, I believe, on
 17 the GEB 4 file which sets out the information, the
 18 docket destruction sticker, if I can describe it in that
 19 way. And it's WITN4486013. I can't show it on the
 20 screen, and I haven't shown it in any event to Mr Lister
 21 in advance, but there are initials there, and so you may
 22 wish to have a look at those initials and see whether
 23 they may say "JR" or not.
 24 **SIR BRIAN LANGSTAFF:** Yes, thank you.
 25 **MS SCOTT:** In your second witness statement, I don't think

175

1 remember now and if you'd ever known, you couldn't now
 2 remember.
 3 Can I ask you to turn -- can we look at
 4 WITN6955061. This is a document called "Charles Lister
 5 Interview", and it is extremely difficult to read.
 6 **A.** Yes.
 7 **Q.** But is it right to understand that this is a handwritten
 8 note from one of the investigators carrying out the
 9 audit of what happened to the files?
 10 **A.** I believe so. I hadn't seen it before it was disclosed,
 11 but that's certainly what it looks like. I also found
 12 it very difficult to read.
 13 **Q.** Now, if we look halfway down the page it says, "Who
 14 destroyed", and then underlined it says "Dockets", and
 15 then it says something:
 16 "1st [something] not destroyed ..."
 17 **A.** "... later ones were."
 18 **Q.** "... later ones were."
 19 Then it says:
 20 "John [Rutherford or Rutherford], intel on docket,
 21 did not [something], telephoned."
 22 **SIR BRIAN LANGSTAFF:** "Remember".
 23 **MS SCOTT:** "... did not remember, telephoned. Not directly,
 24 to [something]".
 25 **A.** Mm.

174

1 we need to go to it necessarily, but you suggest that
 2 the identity of at least one of the people employed in
 3 the destruction of the GEB 4 files may have had
 4 a smallholding. Are you able to give us any
 5 information?
 6 **A.** That was something that Anita James commented on, and
 7 I think after my time.
 8 **Q.** So we can pick that up with her.
 9 **A.** Yes.
 10 **Q.** I think the last question that I'm going to ask you then
 11 from Core Participants is in relation to Ms de Sampayo.
 12 You told us that you didn't speak to her. Do you
 13 know -- other than within the audit investigation, do
 14 you know whether any other Department of Health
 15 officials spoke to her or got a written statement from
 16 her about what had happened?
 17 **A.** I do not.
 18 **Q.** I'm just looking behind me. No, I'm not going to ask
 19 any more questions from Core Participants. I believe
 20 Mr Moss doesn't have any questions.
 21 Sir, do you have any questions?
 22 **Questions from SIR BRIAN LANGSTAFF**
 23 **SIR BRIAN LANGSTAFF:** Yes, I do.
 24 It really arises from what you were saying in
 25 something of a side remark when you were speculating

176

1 about the circumstances of destruction when you were
2 being asked about the question of witch hunt and blame.

3 You said: well, perhaps -- or you thought that
4 perhaps really rather more senior managers than the
5 junior people who did the act of destruction might be,
6 in inverted commas, "to blame". What gave rise to that
7 speculation?

8 **A.** I think more by failing to supervise a decision on
9 destruction of documents properly.

10 **SIR BRIAN LANGSTAFF:** Now, if they were, let us suppose,
11 failing in that responsibility, I can understand that
12 the -- at least the logic -- people may argue one way or
13 the other about it, and I have to make my mind up --
14 about junior staff not being blamed so that they --
15 lessons can be learned for the future. But wouldn't it
16 be important to know that senior staff who may therefore
17 be moving on in the Civil Service are wanting in
18 fulfilling their important responsibilities?

19 **A.** Certainly, that's -- I can't disagree with that. One of
20 the things that the audit recommended was that the
21 supervision should be conducted at a more senior level
22 than it had been.

23 **SIR BRIAN LANGSTAFF:** Yes.

24 **A.** And I think that's partly in recognition that if
25 documents are to be destroyed, then it needs the

177

1 that suggested that if the last document in the file was
2 older than five years -- I can't remember exactly what
3 it was -- then that file could be considered for
4 destruction. But that, of course, doesn't take account
5 of the content of the file and the importance of it.

6 And, again, in speculating, I guess it is possible
7 that this person had -- saw this sequence of files, all
8 of which had -- hadn't been added to for a while and put
9 a destruct date on five years after the last document to
10 appear on the file. And did that all at the same time.

11 **SIR BRIAN LANGSTAFF:** It would be really quite important,
12 would it not, in working out how to stop this happening
13 again, when your plain view is that this simply should
14 not have happened --

15 **A.** Hmm.

16 **SIR BRIAN LANGSTAFF:** -- to know why the member of staff,
17 assuming it to be the same person, on each of these
18 occasions, had done it and done it repeatedly,
19 thinking -- presumably thinking -- well, one doesn't
20 know because one hasn't asked him.

21 **A.** No.

22 **SIR BRIAN LANGSTAFF:** So what was in his mind or her mind?

23 **A.** Yes.

24 **SIR BRIAN LANGSTAFF:** Without knowing the reasons for the
25 destruction, one wouldn't be able to apportion blame, if

179

1 sign-off by somebody who understands the implications of
2 doing so.

3 **SIR BRIAN LANGSTAFF:** Going back to the question of the
4 junior member of staff. Now, it has been rather assumed
5 that the documents destroyed in '96, '97, '98, were all
6 destroyed by one and the same person. Was that your
7 general understanding?

8 **A.** That was my understanding, but I can't at this point
9 swear to that, I'm afraid.

10 **SIR BRIAN LANGSTAFF:** So it would follow that some junior
11 member of staff had, if you're right, and if the
12 understanding you were given -- because you didn't
13 yourself see it and you didn't yourself investigate
14 it -- but if that's right, would it follow that somebody
15 who sees on the face of a document that there is
16 a review date which has not yet been passed has taken
17 a decision to destroy that document and then come back
18 to destroy another either group of documents or
19 documents at different times on no less than three or
20 four occasions?

21 **A.** Yeah, I think it does go back to that question of why
22 those particular dates were chosen. Was this something
23 that was done on one occasion with a sequence of dates?

24 So, again, a speculation on my part, but if
25 I recollect rightly, the guidance included something

178

1 blame was then to be considered, and isn't there perhaps
2 a structured approach that one should look, first of
3 all, at why something happened and then say, "Well, is
4 there blame to be apportioned here? Should we apportion
5 blame?"

6 **A.** I think this does then go to the question of whether the
7 audit properly addressed the issue, as it didn't look at
8 those things.

9 **SIR BRIAN LANGSTAFF:** Yes. So the conclusion might be that
10 the audit was lacking?

11 **A.** Yes, it might be.

12 **SIR BRIAN LANGSTAFF:** Thank you. That's all that I ask.

13 **MS SCOTT:** Sir, I am afraid we don't have the dockets on the
14 system but I'm being told that there are three different
15 signatures on the various dockets.

16 **A.** Ah.

17 **SIR BRIAN LANGSTAFF:** Very well. In that case, the
18 information that was given misleading and the same
19 question then arises as to why three separate people,
20 assuming there were three separate people, did
21 essentially the same action in respect of files, in the
22 same policy area, in the same department, in the times
23 that they did.

24 **A.** Yes, I'd be curious to know if I recognised any of the
25 names but presumably you're not able to say.

180

1	MS SCOTT: They're not documents that were provided to you	1	(5.32 pm)
2	and we don't have them on the system. But, yes, there's	2	(The hearing adjourned until 10.00 am the following day)
3	no reason why we can't provide them to you --	3	
4	SIR BRIAN LANGSTAFF: I don't know if there's a further	4	
5	question that arises out of that.	5	
6	MS SCOTT: No, sir. There isn't.	6	
7	Do you have anything that you'd like to say?	7	
8	A. I don't, I think. I think I've attempted to provide as	8	
9	thorough a set of written statements as possible and	9	
10	I just hope that they are helpful to the Inquiry.	10	
11	SIR BRIAN LANGSTAFF: Well, thank you for giving evidence	11	
12	which has certainly been engaging. It's been of real	12	
13	value having the insight of an insider over many years	13	
14	into the workings of the Civil Service and the	14	
15	interactions with the ministers and how perhaps	15	
16	decisions are formed, helping us to understand that.	16	
17	There may have been, as I called it earlier,	17	
18	speculation at some stages. That's perhaps inevitable	18	
19	with the passing of time but, to us, it has the value of	19	
20	being the speculation of an insider. So thank you for	20	
21	that.	21	
22	MS SCOTT: Sir, tomorrow we have the evidence of	22	
23	Mr Fenwick QC.	23	
24	SIR BRIAN LANGSTAFF: Yes. So Justin Fenwick QC tomorrow at	24	
25	ten o'clock.	25	

181

182

INDEX

1		
2	CHARLES EDWARD LISTER (affirmed)	1
3	Questioned by MS SCOTT	1
4	Questions from SIR BRIAN LANGSTAFF	176
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

183

MS SCOTT: [22] 1/17 30/11 49/14 50/5 55/2 90/7 95/19 96/1 138/12 138/19 152/8 160/22 160/25 161/6 161/15 171/1 174/23 175/25 180/13 181/1 181/6 181/22 SIR BRIAN LANGSTAFF: [47] 1/3 1/5 30/8 49/16 49/25 50/4 53/11 53/23 54/1 54/5 54/7 54/24 55/1 88/1 88/17 88/19 89/7 89/22 90/6 95/21 138/14 151/13 152/3 152/7 160/24 161/4 161/7 169/20 170/22 170/25 174/22 175/24 176/23 177/10 177/23 178/3 178/10 179/11 179/16 179/22 179/24 180/9 180/12 180/17 181/4 181/11 181/24 THE WITNESS: [1] 1/4 ' ' 60s [1] 97/2 ' 70s [2] 29/13 125/21 ' 80s [1] 29/13 ' 90s [4] 11/22 11/24 41/4 131/1 ' 91 [1] 3/12 ' 93 [1] 166/5 ' 96 [1] 178/5 ' 97 [2] 135/24 178/5 ' 98 [2] 145/6 178/5 ' 98 to [1] 145/6 ' 99 [1] 43/17 ' do [1] 58/12 ' from [1] 105/16 ' i [1] 105/20 ' ii [1] 105/22 ' iii [1] 105/23 ' public [1] 32/2 0 009 [1] 106/14 021 [1] 73/21	023 [1] 34/13 025 [1] 58/4 029 [1] 46/14 03 [1] 28/7 07 [1] 167/25 1 1 March [1] 145/6 1 October 1999 [2] 103/17 104/2 1 September 1991 [1] 145/6 1.00 [1] 95/23 1.59 [1] 95/25 1.7 [1] 14/17 10 [3] 52/2 61/13 71/10 10 June [1] 38/2 10,000 [2] 62/2 62/11 10.00 [2] 1/2 182/2 11 [3] 17/3 72/17 138/21 11.18 [1] 50/1 11.45 [2] 49/17 49/25 11.46 [1] 50/3 113 [1] 64/18 114 [1] 165/8 12 [1] 100/3 12 November 2001 [1] 73/22 126 [1] 148/14 128 [1] 43/15 129 [2] 59/24 63/9 13 [1] 173/12 131 [1] 144/14 132 [1] 66/10 133 [1] 144/13 137 [1] 157/16 14 [1] 173/11 14 years [1] 88/19 15 [1] 173/13 15,000 [1] 62/3 16 [6] 30/7 30/7 117/10 117/20 117/21 173/14 16 April 2003 [1] 28/12 16 July [1] 43/18 16/4/03 [1] 28/7 17 [4] 140/7 140/14 141/2 159/10 177 [2] 55/3 96/6	18 [3] 57/2 100/3 146/15 19 July [2] 59/23 59/25 1970s [8] 33/12 33/22 34/19 35/25 38/21 40/23 122/14 129/19 1971 [2] 1/20 2/2 1973 [2] 2/6 39/8 1974 [2] 133/4 135/15 1975 [1] 38/25 1980s [4] 34/20 36/1 38/21 172/3 1985 [4] 2/20 39/9 40/6 50/23 1986 [1] 2/20 1989 [2] 140/11 146/21 1990s [1] 172/3 1991 [5] 2/1 2/2 3/21 145/6 154/2 1992 [1] 140/11 1994 [4] 4/15 139/24 140/15 173/7 1995 [1] 4/22 1996 [4] 7/1 8/23 9/3 173/13 1997 [3] 166/9 173/11 173/14 1998 [5] 4/19 5/13 6/20 166/13 173/12 1999 [10] 44/24 45/11 97/1 103/17 104/2 106/16 109/14 136/22 140/15 153/20 1st [1] 174/16 2 2 million [3] 82/14 84/18 85/9 2 million next [1] 89/15 2 types [1] 47/23 2.00 [2] 95/22 95/22 2.20 [1] 138/21 2.39 [1] 151/4 2.4 [1] 158/5 2.40 [1] 146/16 2.9 [1] 141/24 20 million [1] 61/5 200 [1] 63/19 2000 [8] 50/5 138/22	139/5 146/16 148/18 152/10 157/17 166/6 2000s [1] 123/23 2001 [16] 12/18 33/11 34/16 40/22 55/2 66/2 73/22 99/25 101/3 102/24 110/18 110/18 115/8 119/1 119/4 123/2 2002 [17] 34/14 34/17 37/16 41/18 66/9 70/6 84/4 88/14 102/19 102/22 102/24 112/1 114/5 114/6 119/18 161/23 165/8 2003 [12] 1/20 5/18 6/20 28/12 41/19 41/22 76/10 76/11 109/19 112/2 112/8 119/20 2006/07 [1] 167/25 2007 [1] 32/14 2008 [1] 5/23 2009 [2] 1/21 6/2 2011 [3] 1/20 6/8 6/10 2021 [1] 6/15 2022 [1] 1/1 24th [1] 139/14 25 [2] 6/14 139/10 25 February 2000 [2] 138/22 139/5 25,000 [1] 62/4 26 February [1] 139/11 26 March 2003 [1] 112/8 26 March 2021 [1] 6/15 28th [1] 139/14 3 3 March [1] 144/19 3 March 2000 [1] 148/18 3 million [1] 84/19 3.10 [1] 138/16 3.40 [3] 138/15 138/15 138/18 3000 [1] 38/20 31 August [1] 146/23 37 million [1] 61/3	4 4 December 2002 [1] 165/8 4 million [2] 81/18 81/18 4 November [1] 68/6 4 November 2002 [1] 161/23 4,000 [2] 64/23 65/15 4.16 [1] 161/12 4.45 [2] 161/11 161/11 4.59 [1] 161/14 4.60 [1] 24/11 4.64 [1] 23/22 4.86 [1] 42/12 40,000 [2] 62/5 62/7 46 [1] 7/3 5 5 March 2001 [1] 115/8 5 November 2002 [1] 70/6 5 October 1999 [1] 106/16 5,000 [3] 62/1 64/23 65/15 5-6-7-8-11-12-14 [1] 173/11 5.32 [1] 182/1 50 [1] 84/20 500,000 [1] 130/2 556 [1] 64/19 6 6 November [2] 68/15 69/4 6 October [1] 103/18 60,000 [1] 62/12 64 [5] 24/12 94/2 94/4 94/9 94/14 66 [1] 23/22 669 [1] 64/16 7 7 March [1] 151/5 74 [1] 42/11 77 [1] 31/19 8 8 June 2022 [1] 1/1
--	--	---	---	--

8	achieved [7] 16/10 16/24 25/20 26/7 32/19 38/24 39/20 acquisition [1] 102/5 across [7] 3/7 14/7 68/20 106/24 111/5 112/4 135/9 act [5] 8/21 10/2 51/18 74/9 177/5 acted [2] 33/3 102/14 acting [3] 3/9 4/10 160/19 action [11] 27/9 27/12 45/20 54/6 55/11 56/8 62/11 74/12 112/25 113/17 180/21 actions [9] 140/14 148/5 149/9 159/2 159/2 159/21 159/24 160/3 160/5 acts [2] 2/21 7/18 actual [1] 134/8 actually [10] 20/7 35/6 46/15 46/18 78/23 102/13 108/20 112/20 119/24 120/16 acute [1] 163/25 ACVSB [12] 122/21 136/7 137/11 140/11 142/13 143/13 145/16 146/21 147/1 149/23 171/18 173/1 ad [4] 81/11 82/6 89/13 89/19 ad hoc [4] 81/11 82/6 89/13 89/19 Adam [2] 12/11 43/19 Adams [1] 43/19 add [2] 85/16 160/6 added [2] 121/4 179/8 addition [1] 155/6 additional [4] 13/9 83/2 85/6 85/12 additionally [1] 61/14 address [7] 36/14 70/15 100/7 108/18 108/23 165/23 168/22 addressed [8] 42/9 96/10 109/2 109/4 115/3 124/7 144/17 180/7 addressing [1] 1/12	adequacy [1] 154/1 adequate [2] 113/19 114/14 adequately [1] 66/19 adhere [1] 9/5 adjourned [1] 182/2 Adjournment [1] 95/24 admin [1] 94/9 administering [1] 7/14 administers [1] 59/3 administration [6] 3/4 96/21 96/24 133/10 133/12 133/14 administrations [1] 57/16 administrative [3] 6/22 11/23 12/4 adopt [1] 117/24 adults [1] 117/25 advance [4] 82/21 84/12 107/12 175/21 advanced [1] 61/11 adverse [2] 2/15 3/4 advertise [2] 92/10 93/20 advertised [3] 92/7 93/16 93/17 advertising [2] 92/23 167/12 advice [50] 7/18 8/4 9/11 9/16 9/22 9/24 13/20 21/22 22/1 28/19 29/17 29/21 35/19 57/2 57/20 63/23 68/22 71/12 72/4 92/4 104/23 104/24 105/9 105/9 105/16 106/13 107/12 108/19 108/24 111/5 111/16 113/8 113/17 115/13 116/4 116/17 116/24 125/20 143/19 149/8 154/2 154/9 155/1 155/2 157/1 157/8 157/11 162/17 163/21 171/2 advise [8] 10/5 33/20 36/2 36/8 105/7 144/17 144/19 171/12 advised [4] 10/11	21/25 150/2 153/16 advising [2] 45/17 119/1 advisory [8] 4/11 105/17 136/7 142/4 142/10 145/7 145/13 153/24 affairs [2] 8/11 8/12 affected [9] 25/7 25/9 27/17 27/19 45/21 48/7 79/5 106/25 107/8 affirmation [1] 1/6 affirmed [2] 1/15 183/2 affordable [1] 60/21 afraid [17] 2/21 40/15 62/21 111/25 114/23 116/25 135/15 155/21 160/6 162/23 163/16 164/9 165/23 171/16 175/2 178/9 180/13 African [1] 5/3 after [32] 2/4 2/12 13/15 17/1 22/24 24/3 29/8 30/9 38/2 41/22 43/4 43/17 45/7 74/8 76/20 77/16 82/22 85/3 99/19 102/5 109/17 110/8 111/13 118/3 121/5 146/16 146/21 149/9 149/24 151/21 176/7 179/9 after-all [1] 24/3 aftermath [2] 17/3 17/6 afternoon [2] 41/17 96/1 afterwards [2] 37/25 42/25 again [40] 2/20 13/7 15/22 16/12 20/24 23/13 24/3 26/14 27/7 28/13 42/9 48/25 58/19 63/21 66/10 71/24 78/12 78/12 102/25 103/23 118/20 126/10 128/12 132/4 137/19 140/13 153/4 157/25 158/3 158/22 159/13 159/14 161/11 168/2 169/11 171/6	175/6 178/24 179/6 179/13 against [11] 24/13 35/1 49/12 58/14 58/20 64/4 78/1 100/22 147/23 153/7 169/24 age [3] 104/9 117/10 117/21 Agency [3] 4/4 120/7 121/2 ago [2] 55/19 151/14 agree [6] 22/13 22/14 73/6 103/3 133/23 136/15 agreed [9] 29/22 72/11 72/14 72/16 81/8 85/23 103/19 104/4 145/1 agreement [2] 50/15 84/9 agrees [2] 47/17 70/12 Ah [3] 112/13 165/14 180/16 ahead [4] 69/3 84/6 102/3 117/16 AHOs [2] 15/21 15/23 AIDS [2] 4/23 57/13 aim [2] 72/6 168/22 Alan [14] 20/11 20/12 49/11 50/10 69/9 91/11 98/16 115/10 119/4 119/8 119/12 168/8 169/9 170/20 Alan Milburn [8] 20/11 20/12 49/11 50/10 119/4 119/12 168/8 170/20 Alan Milburn's [2] 69/9 169/9 Alan Tanner [1] 91/11 albeit [1] 116/21 albumin [1] 118/18 alert [1] 4/5 alerting [1] 151/6 all [76] 6/25 8/5 10/12 14/9 17/23 19/4 24/3 26/20 33/4 39/10 40/2 46/4 48/16 56/9 56/16 56/17 56/20 57/12 60/20 62/17 68/10
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(48) 8 March - all

A				
all... [55] 79/11 80/23 90/13 98/5 99/22 101/10 102/2 102/12 103/2 110/7 111/22 113/15 114/18 116/25 117/25 118/3 118/12 118/15 122/8 122/12 123/21 123/23 124/3 124/10 125/10 125/17 125/18 125/25 126/3 127/12 129/21 132/20 135/9 140/23 141/17 143/6 144/1 144/5 145/2 146/20 146/21 146/25 148/3 151/21 153/5 159/17 162/17 169/11 171/20 173/19 178/5 179/7 179/10 180/3 180/12 allegation [2] 33/13 123/4 Alliance [5] 15/20 79/21 80/13 90/9 95/5 allocate [2] 3/19 120/15 allocated [2] 3/15 84/5 allocation [1] 94/2 allocations [2] 3/13 82/20 allow [1] 100/25 allowed [2] 81/9 133/1 allowing [1] 164/19 almost [2] 140/23 150/16 alone [5] 69/2 69/23 102/8 106/22 170/6 along [2] 88/24 122/2 already [18] 6/18 20/25 21/7 25/1 26/19 33/1 59/2 61/7 62/6 98/21 101/5 122/13 123/6 124/17 136/2 145/15 150/17 159/8 also [41] 3/9 3/13 4/4 13/15 16/25 23/17 27/21 33/20 40/3 70/11 71/17 80/10 82/7 83/1 90/22 91/9	96/11 98/15 98/15 99/5 101/13 102/11 106/4 110/1 110/24 115/20 116/18 117/23 118/15 125/12 140/7 143/16 143/21 149/22 150/15 163/9 163/13 167/3 167/11 170/14 174/11 alternative [3] 77/7 99/21 157/3 alternatives [3] 99/12 101/14 102/2 although [12] 20/17 35/4 44/4 54/3 55/21 74/21 79/11 88/21 117/20 118/4 149/25 160/1 always [15] 14/8 16/18 21/2 23/10 30/22 79/1 89/17 89/24 117/24 128/1 128/4 128/8 128/12 128/22 134/1 am [18] 1/2 33/7 50/3 79/10 88/13 106/23 113/18 114/22 116/18 122/11 135/22 138/8 151/25 155/21 163/1 171/25 180/13 182/2 among [5] 3/3 5/3 20/6 139/7 148/10 amongst [2] 120/11 120/16 amount [4] 21/12 101/23 141/7 162/8 amounts [1] 62/19 an accountability [2] 80/10 80/20 an across [1] 106/24 an agreed [1] 81/8 an agreement [1] 84/9 an analysis [1] 39/12 an appropriate [2] 49/15 95/19 an argument [4] 49/1 63/6 64/1 77/25 an attempt [1] 150/11 an audit [1] 154/19 an easier [2] 58/24 59/5	an effective [1] 87/14 an element [1] 105/4 an email [7] 28/8 28/11 92/1 107/14 107/15 134/4 172/20 an end [2] 22/25 82/12 an equivalent [1] 62/20 an estimate [1] 84/13 an ethical [1] 105/1 an ethicist [1] 109/25 an exception [1] 63/7 an exchange [1] 148/7 an exercise [1] 158/22 an expert [1] 125/1 an extra [1] 89/15 an HCV [1] 65/4 an implicated [1] 110/23 an important [3] 9/15 63/2 125/13 an increasing [2] 25/14 106/5 an Inquiry [8] 24/3 24/5 24/13 25/10 28/21 29/16 32/21 42/21 an insider [2] 181/13 181/20 an instance [1] 86/10 an internal [2] 36/18 42/19 an investigation [1] 40/19 an isolated [1] 25/5 an issue [4] 20/19 148/19 151/8 168/18 an occasion [1] 89/23 an opportunity [4] 22/18 59/10 85/16 155/25 an understanding [1] 20/23 an update [1] 130/10 analysed [1] 9/20 analysis [2] 9/20 39/12 Andrew [1] 70/15 Andrzej [3] 137/10	142/18 142/19 Andrzej Rejman [3] 137/10 142/18 142/19 Andrzej's [1] 137/13 Angela [2] 143/14 162/24 Anita [8] 130/23 131/16 140/3 145/15 147/10 153/19 154/17 176/6 Anita James [7] 130/23 131/16 140/3 145/15 147/10 154/17 176/6 Anita James's [1] 153/19 Ann [5] 91/7 95/13 139/9 139/13 173/20 Ann Hithersay [1] 91/7 Annex [2] 61/1 61/17 Annex A [2] 61/1 61/17 annotated [3] 133/25 134/8 134/19 announced [3] 47/3 65/2 76/11 announcement [7] 47/4 68/14 69/3 72/13 73/8 102/21 119/20 announces [1] 28/20 announcing [1] 72/7 another [14] 7/5 12/4 44/9 46/14 65/13 112/6 112/7 121/5 125/15 126/10 143/12 148/13 167/25 178/18 answer [11] 10/9 25/7 35/1 79/13 89/7 114/22 115/18 117/1 130/4 159/7 164/7 answered [1] 32/17 answers [1] 24/17 anti [1] 145/5 anti-HCV [1] 145/5 antibody [2] 62/1 62/12 anticipated [2] 118/8 150/12 anticipation [1] 147/3 any [68] 5/6 13/21 14/4 16/23 25/6 29/12	29/17 30/1 35/1 41/9 41/19 42/23 49/21 54/10 64/13 64/21 65/13 67/10 67/10 69/3 70/9 74/21 76/1 76/20 76/22 76/23 82/2 82/16 83/1 88/7 88/9 88/10 88/10 88/22 93/13 100/5 107/7 116/23 117/8 123/19 129/9 131/2 132/8 136/3 140/25 142/20 142/24 146/19 150/13 150/25 152/1 152/1 158/1 159/18 161/1 161/4 161/18 168/13 171/13 175/1 175/5 175/20 176/4 176/14 176/19 176/20 176/21 180/24 anybody [1] 124/25 anyone [2] 49/21 148/6 anything [26] 16/23 19/2 19/9 19/12 19/13 19/13 19/13 23/10 31/2 41/21 49/23 67/2 79/9 85/16 86/21 95/3 112/4 119/17 125/11 126/20 132/21 133/13 134/13 158/17 160/6 181/7 anyway [1] 45/23 apart [4] 49/23 121/10 142/22 143/1 apostrophe [1] 30/8 apparently [1] 150/10 appear [3] 108/18 159/22 179/10 appeared [1] 92/25 appearing [1] 38/8 appears [1] 115/8 appended [1] 134/2 applications [1] 82/6 applied [2] 30/24 135/6 applies [1] 135/9 apply [3] 53/23 54/3 111/5 appointed [3] 80/8 91/3 93/4 appointment [4] 80/6

(49) all... - appointment

A	160/16 160/17 160/18 160/22 160/25 161/15 162/11 175/21 176/4 177/17 177/25 180/14 181/10 181/16 area [2] 134/17 180/22 areas [4] 5/6 16/8 165/16 165/19 arguably [3] 27/19 44/2 70/23 argue [1] 177/12 arguing [1] 71/7 argument [14] 28/1 31/22 44/11 44/22 49/1 52/3 54/17 63/6 64/1 70/25 72/2 77/25 78/1 91/18 arguments [2] 71/25 73/1 arisen [1] 109/13 arises [4] 107/5 176/24 180/19 181/5 arising [1] 106/20 arm's [1] 164/3 arm's length [1] 164/3 arose [2] 38/6 170/16 around [18] 9/19 37/8 49/2 51/1 62/11 63/19 81/2 89/1 92/15 93/2 97/8 98/5 100/9 102/12 118/5 150/14 166/23 167/25 arrangements [1] 120/14 arrived [2] 75/4 99/3 arrives [3] 23/3 23/4 23/7 as [228] as I [1] 33/4 aside [1] 65/10 ask [60] 1/5 1/6 5/16 6/20 7/1 15/6 15/11 15/18 15/22 17/18 17/19 21/5 24/8 26/21 28/2 30/1 30/6 33/7 34/9 34/12 34/23 43/1 43/13 48/1 51/10 52/9 65/12 69/5 74/17 79/20 84/24 88/2 96/13 97/23 103/6	112/6 115/5 115/16 116/16 117/6 122/9 122/11 122/19 136/11 137/23 137/24 138/3 139/14 144/10 146/12 153/21 162/20 167/22 169/20 171/17 172/19 174/3 176/10 176/18 180/12 asked [37] 1/7 39/1 47/9 49/22 57/18 59/14 60/2 60/6 68/25 69/20 74/6 75/18 79/8 85/24 86/2 89/18 89/25 92/12 96/7 96/16 96/18 124/20 136/24 153/10 157/20 158/6 158/6 161/25 162/20 164/5 167/14 167/22 168/7 168/24 173/23 177/2 179/20 asking [6] 35/15 69/12 90/7 96/4 114/12 129/2 asks [1] 42/13 aspects [1] 3/24 assist [5] 7/11 25/9 86/21 138/7 140/19 assistance [2] 44/1 50/22 associated [2] 39/16 70/10 Association [1] 120/25 assume [4] 112/16 114/17 150/5 175/6 assumed [2] 136/20 178/4 assuming [2] 179/17 180/20 assumption [3] 75/15 117/21 175/7 assurance [1] 88/15 attach [3] 104/23 105/11 107/18 attached [1] 56/24 attaching [1] 103/20 attempt [4] 24/19 72/15 111/13 150/11 attempted [1] 181/8 attend [1] 108/22 attended [2] 103/2	144/22 attending [1] 102/15 attention [8] 27/24 43/20 46/19 58/16 58/21 145/19 162/2 168/3 audience [3] 1/8 1/9 1/12 audit [23] 123/21 128/2 140/17 148/4 154/19 155/18 157/5 157/8 157/13 157/18 157/20 158/1 159/9 160/4 160/8 164/24 172/22 173/22 174/9 176/13 177/20 180/7 180/10 audited [1] 155/16 August [5] 6/10 76/11 146/21 146/23 166/9 August 1989 [1] 146/21 August 1997 [1] 166/9 August 2003 [1] 76/11 August 2011 [1] 6/10 author [1] 18/10 authored [1] 18/9 authorisation [1] 155/10 authorities [3] 3/13 83/25 166/19 authority [6] 1/22 5/20 14/24 115/14 116/20 147/15 Authority's [1] 5/24 automatically [1] 128/16 availability [3] 99/11 118/10 118/13 available [15] 8/6 10/12 10/16 27/7 41/8 52/6 105/23 114/4 117/10 117/20 118/14 119/21 124/14 134/14 146/10 avoid [1] 151/16 avoidable [2] 93/25 94/24 avoided [2] 38/23 94/22	avoids [1] 21/14 awaiting [1] 113/16 award [2] 65/8 74/24 awarded [4] 55/23 62/10 62/19 65/11 awarding [1] 94/13 awards [1] 55/9 aware [17] 5/9 5/10 88/9 106/19 112/23 113/18 135/6 136/18 140/4 148/9 148/19 158/17 159/23 160/1 163/1 169/7 169/8 away [8] 69/20 89/13 89/16 89/17 97/15 97/19 126/20 127/22
B	back [69] 2/19 3/1 3/2 5/14 6/1 15/6 15/11 15/18 15/22 22/11 22/18 22/23 24/8 26/16 26/16 26/24 28/13 28/15 29/21 31/10 31/19 33/12 33/17 33/21 34/3 38/5 38/11 41/15 42/10 51/9 52/25 53/12 62/23 63/8 63/9 64/17 72/15 73/5 77/4 77/11 79/7 92/23 95/21 96/20 124/9 124/14 124/15 125/6 125/21 127/2 128/3 129/11 129/17 134/3 134/8 134/22 135/15 135/22 135/25 146/14 156/19 163/15 166/3 167/24 172/5 172/14 178/3 178/17 178/21 background [9] 34/25 70/6 101/10 104/2 136/9 140/10 149/2 149/3 153/5 bad [1] 106/23 badgering [1] 131/16 badly [1] 164/5 balances [1] 80/25 Banner [4] 98/9 109/24 110/5 111/8 bar [1] 74/11 Barbara [1] 2/9			

(50) appointment... - Barbara

B	been [159] 4/12 4/19 16/9 21/10 21/17 25/3 25/20 25/24 26/7 26/13 31/2 31/6 31/7 31/9 31/23 32/9 33/3 34/5 35/23 36/17 38/23 41/3 42/2 42/19 51/1 52/4 52/12 52/14 52/15 52/18 52/21 53/4 53/5 54/15 60/3 60/10 64/16 65/22 65/23 66/7 66/9 67/24 67/24 68/18 69/9 69/20 71/21 73/24 74/24 75/6 76/1 76/12 76/15 76/18 77/3 79/3 82/23 84/21 84/22 84/25 85/2 86/6 87/12 87/14 87/16 89/11 94/24 95/17 96/9 96/15 97/21 98/5 98/15 99/2 99/4 99/23 100/24 101/5 104/4 107/3 107/23 111/17 112/3 112/14 112/16 112/18 112/20 112/21 112/22 112/23 113/2 113/6 113/12 113/15 113/20 114/11 114/15 115/2 115/11 118/8 124/6 127/15 128/5 128/13 130/5 130/7 130/9 130/19 130/24 133/4 133/15 133/16 135/16 135/16 137/7 139/5 139/6 139/16 139/23 139/24 140/1 140/8 140/22 143/4 147/9 150/9 150/22 153/8 153/16 153/24 157/23 158/17 159/19 159/22 160/1 160/3 162/6 162/7 162/9 162/16 163/2 164/25 166/15 166/17 167/22 168/25 169/3 170/8 170/20 171/18 171/20 175/13 177/22 178/4 178/16 179/8 181/12 181/12 181/17 before [31] 4/3 6/20 17/18 21/18 29/24	37/16 37/19 42/17 49/19 53/11 55/20 57/19 81/23 88/1 96/1 96/13 96/16 103/20 117/17 121/25 127/23 132/12 135/11 146/11 147/23 159/16 161/11 161/11 163/7 168/5 174/10 begin [3] 10/20 77/19 93/6 beginning [3] 44/17 71/24 90/7 behalf [2] 57/11 66/24 behind [1] 176/18 being [64] 21/15 21/25 24/1 26/1 26/14 27/3 27/21 29/6 35/5 35/24 36/12 36/13 36/24 41/20 42/4 42/6 47/3 48/2 48/6 49/4 51/19 58/22 61/4 62/18 66/12 72/12 73/17 75/18 76/6 76/13 80/17 80/20 80/21 81/22 85/19 85/24 94/5 99/6 99/8 101/6 101/19 106/19 106/22 108/19 109/8 114/4 114/9 115/14 119/16 122/17 123/4 129/13 131/14 140/14 151/16 151/18 153/10 162/12 162/21 171/5 177/2 177/14 180/14 181/20 believe [9] 42/23 65/17 67/8 78/22 89/24 91/11 174/10 175/16 176/19 believed [1] 78/19 bell [1] 138/6 bells [2] 175/1 175/5 below [2] 44/5 81/18 beneficial [1] 158/23 beneficiaries [8] 80/14 81/1 81/10 83/8 83/10 85/7 87/3 94/8 beneficiary [1] 83/14 benefit [3] 31/11 31/17 31/21 benefited [1] 32/24	best [12] 9/22 10/3 10/5 48/16 62/22 71/15 72/4 80/15 83/25 149/7 150/19 152/2 better [6] 14/25 36/2 83/6 125/23 134/21 155/24 between [39] 1/20 1/20 2/2 6/20 16/19 17/13 43/11 43/12 43/25 44/8 44/20 44/25 45/10 46/11 47/22 48/4 48/13 51/3 52/22 53/14 54/9 54/11 54/14 54/15 64/23 66/18 76/7 76/22 94/10 120/19 123/11 123/17 124/20 140/2 140/11 140/15 148/7 164/13 166/5 beyond [5] 1/10 85/1 117/21 130/6 169/1 bias [1] 8/14 biases [1] 93/14 bid [3] 84/3 119/17 119/19 bidding [1] 16/17 big [7] 2/15 95/15 97/4 97/4 102/13 106/16 167/8 biggest [1] 100/1 Bio [2] 99/20 99/25 bit [14] 4/2 6/22 24/10 26/5 28/1 44/16 58/20 72/20 74/18 95/8 99/18 121/15 123/7 163/11 bits [1] 128/23 Blair [1] 96/24 blame [10] 154/22 158/2 158/7 158/10 177/2 177/6 179/25 180/1 180/4 180/5 blamed [1] 177/14 blank [4] 40/25 41/11 132/6 137/21 Blears [4] 67/25 88/25 163/7 165/5 blood [151] 5/7 5/7 5/14 6/19 10/17 10/18 10/20 11/19 11/20	12/1 12/6 13/13 14/14 14/19 14/23 14/23 14/24 14/25 15/2 15/3 15/8 15/9 15/13 15/14 15/16 16/14 17/4 17/10 17/24 19/20 20/18 21/7 25/25 26/23 27/5 27/11 33/1 38/21 38/24 39/16 39/19 39/22 50/23 51/5 52/5 52/23 53/17 54/19 55/5 55/10 56/16 56/18 56/21 56/23 58/7 59/1 64/18 64/24 65/4 65/6 66/4 66/4 68/11 68/11 73/25 74/1 74/8 74/23 75/13 77/5 78/17 79/23 86/11 89/3 90/24 97/25 98/3 98/11 98/20 98/25 99/13 102/23 103/8 103/9 103/9 103/14 104/4 104/5 104/5 104/6 104/10 104/10 104/12 104/14 105/3 105/3 105/19 107/11 107/23 107/24 108/3 108/13 108/15 108/22 110/1 112/10 113/3 113/8 113/13 113/17 113/24 114/1 114/7 114/8 115/14 116/20 117/4 117/9 118/6 118/6 118/22 136/8 138/6 143/15 153/25 161/18 161/20 162/5 162/13 162/19 162/24 163/9 164/17 164/19 164/19 164/21 164/23 165/2 165/20 165/21 166/11 166/17 166/18 167/1 167/2 167/5 167/6 167/8 167/12 167/18 170/1 blown [1] 36/11 board [6] 2/12 3/10 106/24 107/20 111/6 113/6 Bob [3] 28/25 29/6 66/17 bodies [1] 164/3
----------	--	---	--	---

(51) based - bodies

<p>B</p> <p>bodies' [1] 105/17</p> <p>body [1] 167/3</p> <p>bombshell [2] 143/25 147/12</p> <p>both [16] 4/18 6/13 13/11 15/18 21/10 24/23 32/2 39/16 54/12 75/21 78/4 79/3 81/13 85/6 91/6 118/12</p> <p>bottom [16] 11/8 28/4 28/5 28/10 42/12 50/25 55/19 58/15 58/21 61/21 63/10 71/4 139/1 139/18 172/24 173/2</p> <p>bought [1] 101/6</p> <p>bounced [1] 170/5</p> <p>bound [1] 44/3</p> <p>box [1] 133/20</p> <p>boys' [1] 92/12</p> <p>BPL [7] 39/10 39/24 100/6 100/11 101/5 101/14 101/17</p> <p>brackets [1] 74/18</p> <p>brakes [1] 72/6</p> <p>branch [7] 11/7 12/9 13/3 24/2 128/9 132/6 168/5</p> <p>Brasseur [1] 104/22</p> <p>breached [1] 68/18</p> <p>break [10] 49/15 49/16 50/2 95/20 137/24 138/1 138/12 138/15 138/17 161/13</p> <p>BRIAN [2] 176/22 183/4</p> <p>brief [4] 21/18 23/4 106/18 166/4</p> <p>briefing [5] 14/4 23/16 67/25 163/6 165/4</p> <p>briefings [2] 123/25 126/3</p> <p>bring [1] 27/17</p> <p>Briony [2] 55/4 55/16</p> <p>Briony's [2] 60/3 60/5</p> <p>British [1] 100/23</p> <p>broad [2] 15/24 145/10</p>	<p>broadly [2] 157/20 165/17</p> <p>brought [5] 11/24 13/9 102/9 153/7 168/3</p> <p>BSE [8] 4/7 4/18 47/2 47/13 99/23 146/8 147/7 147/7</p> <p>BSEI0000015 [1] 4/21</p> <p>BSEI0000018 [1] 4/21</p> <p>budget [8] 4/14 81/4 81/5 81/8 84/5 84/12 85/18 85/19</p> <p>budgets [2] 3/18 82/20</p> <p>bulk [4] 61/3 99/23 101/14 120/6</p> <p>bullet [3] 26/17 50/19 55/20</p> <p>bureaucracy [1] 95/9</p> <p>bureaucratic [1] 95/16</p> <p>Burgin [9] 33/8 36/7 36/14 37/4 37/16 38/18 39/4 41/12 42/6</p> <p>Burgin's [1] 37/2</p> <p>business [7] 6/3 83/3 83/4 84/13 84/22 85/12 162/8</p> <p>busy [2] 128/5 164/22</p> <p>but [176] 2/8 3/13 3/17 4/25 5/12 6/20 10/3 10/9 11/19 12/5 12/8 13/9 14/8 16/18 16/22 18/6 18/17 19/6 20/7 22/16 23/5 23/17 26/22 28/13 29/20 29/23 30/2 33/20 34/8 36/12 36/22 37/21 38/10 38/14 40/3 40/15 41/10 43/18 44/21 45/19 45/25 46/18 47/21 48/19 49/4 49/11 59/9 61/9 61/25 62/16 62/20 63/5 65/16 67/6 68/3 72/1 73/19 74/6 75/8 75/21 76/5 76/18 77/16 77/20 78/25 82/4 82/7 84/3 84/13 84/18 85/4 85/18 86/5 86/9 86/21 87/18</p>	<p>87/22 89/3 89/18 90/1 90/3 93/24 94/18 96/6 96/11 96/21 97/2 97/23 98/1 98/19 99/3 99/4 100/3 101/12 101/18 102/14 102/21 102/24 109/4 109/12 109/23 110/1 110/5 110/7 110/14 111/6 111/12 113/10 114/11 116/14 117/2 117/19 119/6 119/15 120/8 120/10 121/8 121/16 122/7 128/14 128/25 130/15 131/1 131/15 132/2 132/23 134/1 134/8 134/18 135/17 135/19 137/11 139/17 140/24 141/4 141/10 142/9 142/16 146/24 147/10 148/13 149/19 150/17 151/1 151/3 151/23 152/4 152/16 155/12 156/21 159/8 160/13 162/7 162/9 163/4 163/16 165/3 165/24 166/22 167/17 170/6 174/7 174/11 175/11 175/13 175/21 176/1 177/15 178/8 178/14 178/24 179/4 180/14 180/25 181/2 181/19</p> <p>buy [2] 73/3 99/14</p> <p>buying [3] 100/13 100/19 120/6</p> <p>by [169] 1/7 1/16 1/19 1/21 3/18 12/23 13/5 13/10 15/3 17/9 18/1 19/8 21/10 21/11 21/25 24/14 24/16 26/10 27/12 28/21 29/14 29/14 29/22 30/17 34/5 35/2 36/20 41/20 41/20 42/1 42/2 42/6 43/8 43/9 43/12 43/13 43/18 44/9 44/21 44/24 44/24 45/9 45/11 45/11 45/21 48/7 55/5 55/23 56/16 56/18 56/21 56/23 57/12 60/13</p>	<p>61/10 64/17 67/8 67/18 67/21 69/9 74/11 76/12 78/8 79/5 79/17 79/17 80/8 81/15 82/5 83/4 83/6 83/24 83/25 84/23 86/2 86/14 87/2 87/20 87/23 88/3 88/10 89/12 90/16 90/16 94/22 97/1 98/4 98/9 99/3 100/11 101/6 102/19 103/7 103/7 103/10 103/15 104/6 106/3 107/23 108/19 109/2 109/12 109/14 109/24 110/19 112/3 112/18 112/21 113/2 113/6 115/3 115/14 116/23 119/4 122/5 123/4 124/4 126/22 128/14 131/10 132/1 133/8 133/15 133/17 133/19 134/1 134/9 134/25 135/19 136/14 136/25 137/2 137/5 137/7 137/21 138/25 139/4 139/24 140/6 141/14 141/17 142/15 143/5 144/13 145/1 147/1 147/2 148/4 149/4 151/20 152/19 153/16 153/18 155/18 157/9 159/12 159/18 160/4 162/8 162/10 163/25 168/21 169/21 171/5 171/9 177/8 178/1 178/6 183/3</p> <p>C</p> <p>cabinet [8] 70/9 92/8 132/22 133/8 133/15 135/8 135/18 159/21</p> <p>cabinets [1] 124/13</p> <p>call [7] 4/13 6/23 14/1 18/14 23/9 32/23 103/13</p> <p>called [7] 3/5 4/17 29/22 123/12 138/5 174/4 181/17</p> <p>calling [4] 4/12 66/2 68/9 171/18</p> <p>calls [7] 15/15 17/18</p>	<p>21/6 42/16 42/21 87/19 127/13</p> <p>came [17] 10/20 18/7 22/24 38/11 62/20 67/8 88/24 93/2 95/6 101/18 108/14 110/22 118/3 130/20 147/10 154/16 169/8</p> <p>campaign [3] 43/2 57/11 74/3</p> <p>campaigned [1] 86/6</p> <p>campaigners [2] 32/20 32/21</p> <p>campaigners' [1] 32/18</p> <p>campaigning [2] 86/16 87/20</p> <p>campaigns [1] 87/23</p> <p>can [143] 6/21 7/7 10/12 13/21 13/22 14/13 14/17 15/24 16/1 17/19 19/19 21/22 22/1 22/20 23/19 23/21 24/11 28/2 28/3 28/13 29/20 30/2 30/16 31/2 31/19 33/5 34/13 35/24 40/1 40/18 42/10 43/14 45/6 46/14 46/15 47/9 47/12 47/13 47/16 48/6 49/2 49/23 50/7 50/24 51/7 51/10 52/8 53/7 53/10 53/11 58/3 58/4 58/9 59/21 59/25 60/24 61/18 63/8 63/18 67/18 67/19 67/22 69/5 69/17 70/5 70/11 73/1 82/10 82/13 82/25 89/2 93/14 96/1 96/17 97/24 99/17 99/19 102/18 103/16 103/16 103/21 103/22 103/23 104/15 105/6 106/14 106/14 106/23 107/14 108/22 109/5 109/6 109/19 111/22 112/6 112/10 114/12 115/15 117/13 123/11 128/3 132/14 132/17 135/10 135/22 136/3 137/25 138/13 139/2 143/7</p>
--	--	--	---	---

C	81/9 83/3 83/4 84/10 84/13 84/22 85/5 85/12 87/7 87/9 87/13 91/12 91/21 92/12 92/15 104/16 107/2 124/17 133/13 134/13 149/19 150/18 150/19 153/3 153/20 168/19 180/17 cases [4] 48/23 99/23 113/15 166/8 cash [3] 47/20 61/9 61/23 cast [1] 37/7 Castle [1] 2/10 categories [2] 122/12 125/14 category [3] 104/9 125/15 136/6 caught [1] 74/11 cause [5] 13/21 65/7 65/9 65/12 106/8 caused [3] 16/2 146/9 147/8 cautious [2] 59/7 59/8 cautiously [1] 77/15 caveat [1] 133/18 caveated [1] 62/14 Caxton [4] 6/11 6/16 65/18 93/3 cc'd [1] 46/22 cells [2] 13/12 13/13 cent [1] 84/20 central [5] 42/15 115/17 124/15 129/7 129/9 centre [1] 166/21 centres [2] 162/13 166/20 certain [3] 19/1 20/14 122/13 certainly [31] 20/6 22/10 23/25 40/14 45/11 48/6 71/16 77/13 77/17 83/21 84/2 86/13 87/17 88/13 93/8 93/10 93/15 93/22 117/15 117/17 120/9 126/16 129/6 133/3 133/5 135/19 141/4 173/20 174/11 177/19 181/12	certainty [6] 81/13 81/13 88/23 89/6 89/8 89/12 cetera [6] 31/7 126/1 130/2 130/4 132/22 133/15 chair [5] 91/7 93/12 124/25 166/13 166/25 chaired [3] 98/9 109/24 137/11 chairman [2] 146/21 153/24 challenge [6] 10/6 22/5 23/1 23/10 78/20 79/18 challenged [2] 21/15 22/3 change [10] 5/24 23/15 31/3 86/7 132/19 132/24 133/14 134/10 135/4 135/24 changed [4] 22/21 167/17 167/22 167/23 changes [7] 22/7 22/8 22/16 23/13 43/22 100/25 135/7 changing [4] 80/14 83/10 83/12 116/3 charities [2] 15/20 80/16 charity [2] 93/7 93/10 CHARLES [7] 1/15 28/6 28/10 46/24 112/12 174/4 183/2 cheaper [1] 61/8 checked [2] 142/4 147/22 checking [1] 136/1 checks [1] 135/11 chief [10] 12/24 17/2 91/7 93/12 95/13 111/18 111/23 112/9 146/5 166/14 children [1] 83/9 Chisholm [13] 68/7 68/20 68/22 70/1 70/14 71/20 73/5 168/9 169/1 169/10 169/10 169/12 170/21 Chisholm's [1] 169/4 choosing [1] 59/4 chose [1] 154/22	chosen [1] 178/22 Chris [3] 148/21 148/23 148/24 Chris Kelly [3] 148/21 148/23 148/24 Christine [1] 14/12 Christmas [1] 37/16 Christmas 2002 [1] 37/16 chronologies [1] 68/2 chronology [14] 33/19 34/15 34/24 35/4 35/7 39/11 67/18 67/21 67/22 109/9 109/12 109/23 123/3 131/19 circular [2] 28/1 105/10 circumscribed [1] 93/19 circumstance [1] 86/25 circumstances [10] 17/20 17/21 22/4 22/7 22/8 22/16 23/13 33/9 106/21 177/1 cirrhosis [4] 61/6 62/4 62/13 63/18 civil [47] 2/3 6/22 6/24 6/25 7/4 7/10 7/17 7/20 7/24 8/2 8/9 8/17 8/20 8/25 9/11 9/13 9/16 10/6 10/8 10/22 11/8 12/4 17/21 18/16 19/15 21/16 21/25 22/1 22/4 22/9 22/15 31/1 48/11 79/16 91/2 91/15 91/18 92/7 92/8 92/24 123/5 126/16 129/5 132/18 167/17 177/17 181/14 CJD [24] 4/15 74/14 98/2 98/2 98/6 98/6 98/8 98/10 98/12 98/20 105/3 109/24 110/21 111/4 111/18 112/4 113/15 114/3 114/24 115/2 115/9 116/18 118/4 118/7 CJD Incidents [1] 109/24	CJD-infected [1] 105/3 CJDSU [1] 107/23 claim [2] 153/8 153/8 claimants [2] 53/15 53/19 claims [4] 48/22 153/7 153/7 168/16 clarity [1] 89/5 Clark [3] 156/22 157/4 157/10 clear [26] 21/2 21/4 27/20 30/22 41/15 43/16 45/9 45/24 51/3 54/14 69/25 94/10 96/12 111/10 123/21 128/2 128/4 128/23 129/25 132/8 133/16 134/23 140/13 152/13 154/20 172/16 cleared [2] 18/1 18/13 clearer [1] 32/24 clearly [12] 27/7 38/10 41/10 75/18 85/5 90/3 108/11 125/8 127/11 130/11 130/15 147/19 clearout [4] 132/1 133/6 134/23 154/3 clients' [1] 149/19 clinical [2] 114/3 166/10 clinicians [1] 110/25 close [3] 81/17 166/20 166/21 closure [2] 32/19 144/19 clotting [6] 15/4 19/5 25/21 26/8 37/22 54/15 CMO [3] 112/23 114/5 151/21 CO [1] 105/10 code [5] 7/1 7/4 7/19 8/23 9/2 codes [1] 7/6 collaborative [1] 121/15 colleagues [9] 9/21 16/3 18/12 18/23 45/16 48/12 66/25 114/5 143/10
----------	---	--	--	---

(53) can... - colleagues

C	165/1	concern [19] 2/16 24/4 25/12 32/16 51/1 51/7 51/21 51/23 72/12 81/2 87/10 110/24 113/23 120/9 129/12 167/4 168/11 169/4 171/10 concern' [1] 32/2 concerned [8] 5/2 54/10 54/25 90/10 110/20 113/7 119/23 147/7 concerns [9] 33/17 51/11 66/25 70/8 92/4 106/3 118/3 166/10 166/14 concluded [2] 25/19 32/15 concludes [2] 105/15 105/16 concluding [1] 26/6 conclusion [6] 55/13 75/5 108/14 116/11 130/20 180/9 conclusions [2] 107/21 108/9 concurrently [1] 102/22 condition [1] 125/24 conditions [1] 165/20 conduct [2] 7/24 8/2 conducted [4] 64/17 148/4 162/9 177/21 conference [3] 144/19 144/22 146/17 confident [1] 60/24 confirm [1] 34/21 confirmed [2] 113/16 130/23 confirming [1] 139/9 confirms [1] 140/4 connection [1] 106/3 conscious [4] 35/9 116/16 116/18 160/2 consensus [1] 170/19 consent [5] 115/20 115/21 116/2 116/15 145/1 consequences [1] 164/6 consider [10] 8/22 57/3 72/9 92/23 101/3	111/15 116/8 127/21 159/11 168/17 considerable [2] 16/19 71/19 considerably [3] 13/11 33/2 61/16 consideration [5] 47/18 65/14 67/10 121/18 169/2 considered [5] 105/5 147/1 162/22 179/3 180/1 considering [2] 83/23 170/17 consisted [1] 120/23 consistency [3] 20/12 111/1 168/2 consisting [1] 136/9 constant [1] 110/8 constantly [2] 95/12 97/14 constituted [2] 7/11 7/20 constitutional [3] 7/9 28/20 29/18 Constitutionally [1] 7/18 constraints [1] 116/8 construal [1] 116/1 consultants [1] 102/10 consultation [1] 157/9 consulted [1] 149/6 Consumer [2] 51/18 74/8 contact [3] 66/11 93/11 93/11 contacts [1] 37/9 contain [3] 125/10 140/10 159/17 contained [2] 122/22 125/11 contains [2] 39/11 165/5 contamination [1] 15/16 contemporary [1] 44/3 content [3] 157/2 157/4 179/5 context [10] 5/10 5/11	9/18 11/21 16/12 43/3 50/15 96/20 97/17 144/25 continue [3] 80/5 81/24 117/22 continued [4] 51/4 102/24 111/14 117/3 continuing [4] 29/4 36/4 44/12 58/24 contraceptives [1] 2/17 contracted [2] 53/17 99/22 contracting [1] 120/14 contracts [3] 100/1 100/1 100/18 contrary [1] 25/23 contributed [2] 103/10 103/15 convention [4] 132/23 132/24 134/12 135/3 conversation [3] 69/6 150/13 168/9 conversations [2] 126/1 128/20 convince [1] 47/21 convinced [3] 49/7 131/14 131/15 Cooper [20] 35/14 45/7 45/12 48/18 49/1 55/4 59/11 59/23 60/6 62/23 63/2 73/19 76/16 77/10 77/24 91/17 92/11 96/5 96/7 96/10 Cooper's [2] 92/1 92/3 copied [3] 112/14 115/11 150/22 copies [5] 131/7 132/21 135/20 146/20 146/25 copy [3] 104/23 152/12 154/4 core [5] 13/10 161/1 161/8 176/11 176/19 correct [35] 1/23 4/9 4/16 4/19 4/25 5/21 6/9 6/12 11/14 12/10 12/20 12/21 12/25
----------	-------	---	---	---

(54) collection - correct

<p>C</p> <p>correct... [22] 13/4 13/18 21/9 21/13 31/7 33/25 37/20 43/7 50/9 50/17 64/6 91/6 92/22 96/2 117/12 119/22 120/12 120/13 123/10 129/23 140/17 144/9 correctly [2] 119/8 170/22 corresponded [1] 98/17 correspondence [4] 125/17 125/18 139/25 171/1 Corrigan [1] 14/12 cost [12] 61/3 61/15 62/22 74/16 74/19 74/20 83/17 83/17 83/18 118/15 120/3 120/6 costly [1] 59/6 costs [2] 57/14 120/10 could [87] 2/1 7/2 7/22 7/25 14/16 17/22 17/24 18/3 18/10 18/14 18/22 20/21 24/22 24/23 27/17 27/25 31/6 31/14 32/9 33/3 33/19 33/20 35/5 40/25 41/6 41/14 42/9 46/4 46/5 49/2 52/12 53/1 53/5 54/18 55/2 60/17 61/25 63/6 64/1 65/1 70/24 71/16 71/22 77/12 77/23 78/18 79/8 79/10 81/19 84/8 86/21 86/22 87/21 87/22 94/21 95/17 104/17 105/6 105/24 107/9 107/11 107/13 111/11 119/14 119/17 120/8 121/17 124/13 125/14 126/19 127/21 129/21 131/18 132/5 137/9 138/12 138/19 138/20 141/12 149/17 155/18 157/2 157/4 170/9 170/10 172/9 179/3</p>	<p>couldn't [6] 45/9 65/16 119/6 164/23 173/25 174/1 counsel [12] 144/16 144/18 146/17 149/6 154/25 155/2 155/6 155/14 155/19 155/24 157/9 161/10 counsel's [2] 149/8 155/1 counselling [2] 114/17 114/20 counterpart [1] 171/5 countries [1] 168/14 couple [4] 50/25 94/20 103/6 129/25 course [8] 35/22 65/17 65/25 79/23 89/7 93/3 103/4 179/4 court [7] 51/25 55/8 62/11 64/19 74/9 74/10 155/2 Courts [1] 55/23 cover [2] 171/23 172/11 coverage [1] 157/19 covered [3] 19/6 102/20 140/17 CPA [4] 56/10 58/8 58/11 74/12 created [2] 67/19 67/21 creating [1] 67/22 crisis [3] 97/4 100/4 100/8 Crisp [4] 92/5 102/16 161/23 163/14 critical [1] 97/13 criticism [1] 163/13 cross [2] 3/7 147/22 cross-cutting [1] 3/7 Crown [2] 7/17 7/18 curiosity [1] 151/24 curious [1] 180/24 current [5] 23/5 23/16 30/12 105/9 146/5 currently [2] 104/10 164/4 customer [1] 164/18 cutting [1] 3/7 cycle [2] 88/21 90/5</p>	<p>D</p> <p>damages [5] 55/9 62/10 64/18 65/8 74/10 dark [1] 107/10 database [1] 104/13 date [12] 28/7 43/16 66/12 66/19 102/18 172/6 172/9 172/10 172/16 172/17 178/16 179/9 dated [7] 28/11 30/7 38/2 73/22 112/8 152/9 157/17 dates [7] 27/4 139/15 140/20 140/23 173/16 178/22 178/23 David [9] 12/9 29/22 103/17 106/15 107/15 108/19 156/22 157/4 157/10 David Dunleavy [4] 103/17 106/15 107/15 108/19 Davis [1] 17/11 day [3] 34/9 138/25 182/2 days [6] 93/18 115/21 121/14 134/4 146/16 167/21 DCMO [2] 17/7 146/23 de [13] 29/17 146/4 146/7 148/2 148/8 149/10 154/13 154/15 159/12 159/21 160/3 160/7 176/11 de Sampayo [1] 146/4 dead [1] 58/25 deal [19] 8/12 16/15 20/3 29/8 33/6 33/13 38/6 40/6 40/7 88/23 89/5 89/8 109/10 120/4 121/23 139/12 146/13 152/22 167/12 dealing [9] 4/5 8/10 8/19 17/3 17/23 95/15 123/1 129/19 132/18 deals [3] 7/25 8/9 108/1</p>	<p>dealt [6] 16/7 94/21 95/17 108/11 112/3 118/5 debate [6] 46/25 47/5 78/13 168/12 168/13 170/9 debilitating [2] 45/8 63/19 deceased [1] 32/23 deceive [1] 8/7 December [2] 41/18 165/8 December 2002 [1] 41/18 deception [2] 104/18 105/5 decide [7] 18/20 18/22 77/14 97/14 98/23 110/25 135/22 decided [5] 22/11 96/24 102/3 127/16 166/24 decides [1] 128/10 decision [44] 8/6 10/13 17/16 17/25 18/1 18/3 18/24 19/16 20/3 39/8 40/16 42/7 42/14 42/15 43/25 44/3 57/18 59/13 77/2 77/2 77/16 78/10 79/2 98/23 98/25 99/14 99/18 99/19 106/24 108/6 120/22 121/21 126/4 128/15 128/17 157/8 157/12 159/17 166/20 167/15 167/19 167/23 177/8 178/17 decision-maker [2] 17/16 59/13 decision-making [1] 167/23 decisions [21] 7/14 10/15 17/22 19/2 19/7 19/20 28/21 91/20 96/23 99/2 121/17 123/21 123/22 125/11 127/6 127/10 127/24 128/2 132/9 171/9 181/16 deed [1] 80/8 deeper [1] 35/6 defective [4] 53/19</p>	<p>53/21 54/2 54/13 defend [1] 45/1 defendable [2] 51/3 51/8 defended [1] 116/14 defending [1] 43/24 deferring [1] 104/15 defined [1] 98/14 definite [1] 32/4 definitive [3] 71/11 72/3 113/8 delay [7] 108/8 111/17 112/7 113/7 114/7 163/20 164/6 delayed [1] 162/12 delays [2] 93/25 94/12 delegated [1] 127/4 deliberately [4] 59/7 150/5 150/10 154/22 deliberations [1] 97/18 delivering [2] 9/14 167/10 delve [1] 35/10 demand [2] 25/21 26/8 demands [3] 29/4 29/6 29/7 demitted [1] 146/22 department [113] 1/19 1/25 3/8 3/16 3/18 5/18 5/22 6/1 6/3 6/7 9/3 11/22 12/1 13/23 13/24 14/3 19/10 19/24 20/4 21/11 27/12 27/14 27/24 35/2 35/8 36/20 37/10 37/19 38/3 38/5 41/20 51/11 51/12 51/22 52/11 52/16 53/3 66/24 72/9 76/10 76/13 76/22 78/6 79/2 80/11 80/22 81/8 81/14 81/16 81/20 82/3 82/19 82/21 83/18 84/1 84/23 85/22 86/17 86/25 87/2 87/11 87/12 87/15 87/25 88/6 90/12 90/16 90/22 91/1 91/2 93/1 93/5</p>
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D	139/6 139/10 139/15 139/16 139/24 140/1 140/8 140/15 146/7 147/6 147/19 150/10 159/5 171/22 173/1 173/7 173/12 173/13 173/14 174/14 174/16 175/9 175/10 177/25 178/5 178/6 destroying [4] 135/12 147/24 148/5 160/20 destruct [1] 179/9 destruction [35] 122/10 127/11 127/15 127/21 140/5 140/20 140/23 140/25 141/2 147/18 149/18 149/23 150/2 150/15 151/15 152/3 155/8 155/10 155/23 159/10 159/11 160/11 172/6 172/9 172/15 172/17 173/16 173/25 175/18 176/3 177/1 177/5 177/9 179/4 179/25 Destructor [1] 156/7 detail [10] 1/24 61/24 62/15 71/15 72/4 73/9 93/23 109/10 118/20 150/6 detection [1] 162/19 determination [3] 29/12 30/4 30/16 determine [1] 153/2 determined [3] 29/14 97/7 169/24 devastating [3] 45/8 63/19 114/20 developed [7] 45/14 45/15 74/14 104/7 107/3 107/25 113/14 developing [3] 39/13 39/21 45/13 development [5] 2/23 14/22 14/25 39/18 170/12 developments [5] 29/1 66/13 70/7 73/13 163/1 devise [1] 75/18 devised [1] 104/15 devolution [10] 28/22	67/7 70/18 76/21 77/1 168/18 169/6 169/16 170/13 170/15 devolved [17] 57/15 67/16 68/23 69/1 69/14 69/25 70/2 70/14 70/19 70/21 71/1 71/18 73/7 168/12 168/23 169/5 169/13 devote [1] 17/4 DH [5] 29/14 82/13 107/20 155/10 155/11 DH's [1] 32/13 DHSC [1] 146/12 DHSC0004122 [1] 115/6 DHSC0004601 [1] 73/21 DHSC00046972 [1] 148/14 DHSC0006983 [2] 59/24 63/9 DHSC0020756 [1] 58/4 DHSC0020784 [1] 46/14 DHSC0034270 [1] 161/22 DHSC0041305 [1] 43/15 DHSC0041362 [1] 106/14 DHSC0041379 [3] 34/13 55/3 96/6 DHSC0042275 [2] 66/10 165/8 DHSC0046972 [2] 144/13 144/14 DHSC5297720 [1] 50/7 DHSC5541783 [1] 28/3 diagnosed [1] 103/11 diagnostic [1] 105/22 dialogue [1] 95/14 diametrically [1] 88/8 did [71] 11/20 12/5 12/7 12/7 12/15 13/21 17/6 17/25 18/7 18/17 18/20 24/22 26/23 27/2 30/14 32/15	34/16 38/10 41/21 42/4 46/4 55/15 59/18 62/16 66/24 67/8 69/19 69/21 77/12 77/13 83/6 85/1 85/5 85/8 86/10 90/1 91/11 91/12 91/13 96/7 102/25 110/25 117/18 118/2 126/11 128/24 130/11 132/8 141/4 142/19 142/25 143/17 144/15 144/24 146/25 147/17 148/2 148/3 148/5 151/17 158/5 159/2 165/4 168/8 168/17 174/21 174/23 177/5 179/10 180/20 180/23 didn't [45] 5/9 13/16 13/18 13/24 16/23 22/13 22/14 26/10 33/25 35/17 37/18 37/23 40/18 41/23 51/14 78/19 87/7 87/9 89/20 92/10 101/11 102/8 108/23 110/6 111/2 129/22 130/6 131/2 137/14 142/16 143/24 148/1 148/7 150/6 152/3 158/21 159/11 163/10 163/13 169/1 170/6 176/12 178/12 178/13 180/7 die [1] 63/21 died [3] 61/7 62/7 63/20 difference [7] 47/22 48/3 48/13 53/14 123/11 123/17 124/20 differences [3] 164/11 164/12 164/14 different [17] 7/6 19/20 40/13 46/11 48/14 51/10 51/18 65/25 73/20 94/13 109/7 122/11 125/5 164/16 170/17 178/19 180/14 differentiated [1] 47/13 differentiation [1] 48/3	differently [2] 78/24 79/9 difficult [15] 35/1 44/16 45/1 45/3 45/5 78/23 91/20 96/22 105/1 107/9 109/22 137/16 147/16 174/5 174/12 difficulties [5] 13/21 44/7 50/21 70/9 147/8 difficulty [4] 43/24 82/11 97/3 146/9 diffuses [1] 57/11 dipping [1] 81/18 direct [5] 5/12 45/21 74/21 75/2 136/3 direction [3] 67/1 67/9 116/22 Directive [6] 13/12 13/14 15/14 102/23 103/3 103/4 directly [7] 18/15 45/21 115/23 119/10 121/19 154/17 174/23 director [5] 6/4 6/15 11/4 17/12 143/15 Directorate [7] 11/13 12/11 12/19 12/23 13/16 17/1 137/2 Directorate's [1] 119/14 disagree [2] 133/23 177/19 disagreement [1] 163/11 discarding [1] 104/17 disclose [4] 136/15 137/1 145/2 145/11 disclosed [4] 139/8 140/3 151/16 174/10 disclosing [1] 116/9 disclosure [14] 116/14 130/25 131/6 134/6 136/20 141/13 146/3 146/8 147/8 150/12 152/25 153/10 153/15 154/9 disclosures [2] 116/13 158/18 discovered [6] 26/25 33/22 122/14 123/2 129/17 139/24
----------	--	--	---	--

(56) department... - discovered

D	149/17	7/5 8/25 14/17 28/4	135/24 147/9 158/15	donors [10] 99/10
discovery [3] 141/21	do [130] 2/18 5/6 8/21	29/20 34/14 46/14	163/10 170/6 170/17	104/10 104/14 104/16
142/1 149/4	10/15 11/6 16/10	49/6 57/20 64/9 65/13	178/2	107/8 108/3 113/13
discuss [7] 37/11	16/14 19/2 20/1 23/25	73/20 96/4 105/11	domain [4] 25/2 26/20	164/19 164/19 165/20
47/25 49/20 74/3	24/4 29/17 30/18	105/13 111/20 111/20	27/4 27/8	doubtful [1] 106/23
103/21 150/3 162/25	31/14 35/16 37/9	111/23 112/6 115/5	domestically [1]	doubts [2] 70/2 71/17
discussed [9] 16/17	37/11 37/12 40/15	126/22 139/17 139/18	39/16	down [13] 7/25 28/8
18/5 35/13 52/21 53/8	40/18 41/10 41/21	139/20 146/11 160/10	don't [72] 12/7 12/8	36/4 43/5 46/23 54/22
89/14 109/8 122/13	42/15 46/17 48/11	165/7 172/6 172/15	16/12 16/22 17/8	101/18 111/5 120/8
164/25	52/17 53/11 54/16	172/17 174/4 175/13	36/10 36/13 36/24	152/12 172/24 173/2
discussing [3] 52/18	55/17 55/25 56/9	175/15 178/15 178/17	37/1 38/7 38/10 41/1	174/13
55/18 95/12	57/22 57/25 59/10	179/1 179/9	42/23 48/6 53/7 62/17	downside [1] 16/5
discussion [24] 18/6	59/18 64/7 65/19	documentary [3] 65/6	62/20 64/8 65/17	Dr [51] 11/17 12/3
18/7 19/8 24/1 34/21	67/18 68/1 69/20 70/3	65/11 73/17	65/22 65/22 67/8	12/11 12/16 12/24
36/24 36/25 40/10	73/6 73/19 77/12	documentation [1]	67/24 68/1 68/3 69/1	13/3 17/2 17/7 98/4
40/16 52/25 73/10	77/23 78/3 78/8 79/2	145/4	69/13 70/20 73/7 75/6	98/6 107/16 107/16
75/7 76/19 77/18 83/1	79/18 81/12 81/24	documents [63]	75/17 78/14 84/17	138/4 139/22 140/2
101/25 102/1 114/18	83/4 84/22 84/24 85/2	25/19 26/6 26/24	85/23 86/9 86/24	142/13 142/17 143/12
119/11 154/19 166/1	86/10 87/5 87/12 88/1	34/11 39/8 40/20 75/1	89/12 90/21 93/21	143/22 143/24 144/1
168/25 169/9 171/13	90/1 92/23 97/18	75/21 91/25 109/14	93/24 95/7 96/5	144/1 146/4 146/5
discussions [7] 76/12	100/23 102/8 105/9	122/10 122/10 122/11	111/10 112/4 116/25	146/10 146/18 147/3
76/20 76/22 76/24	106/2 109/1 109/22	122/12 122/22 126/20	125/6 125/16 127/9	147/15 148/14 149/23
80/12 83/22 84/2	110/22 110/25 112/14	126/24 128/25 130/7	129/9 132/1 133/13	150/9 150/17 150/20
disease [6] 45/8	116/23 117/1 117/2	131/4 132/11 133/1	137/22 137/24 139/17	151/2 151/7 151/17
56/23 61/6 62/5 63/19	119/17 120/3 125/4	133/6 134/6 135/13	139/20 145/13 150/17	151/19 151/20 153/17
97/9	126/16 128/6 131/16	136/7 136/15 136/19	150/21 151/2 154/17	153/21 153/21 153/24
disliked [1] 48/8	133/8 133/9 133/13	137/1 137/9 137/25	159/4 159/13 161/24	154/4 155/9 155/11
dismiss [1] 166/24	134/19 134/24 140/16	138/5 139/8 139/10	171/16 173/10 175/11	156/5 156/8 159/12
dismissal [1] 166/13	141/1 141/3 141/14	140/3 141/21 144/7	175/12 175/25 180/13	159/25 160/7 175/15
dispose [1] 133/14	142/1 142/3 146/23	144/12 144/20 145/3	181/2 181/4 181/8	Dr Mary O'Mahony [1]
disposed [1] 144/1	150/7 150/9 152/1	145/10 146/8 146/19	Donaldson [1] 112/9	13/3
disposes [1] 134/14	152/3 156/14 156/16	149/13 149/18 150/11	donate [1] 114/1	Dr Metters [9] 142/13
disposing [2] 134/17	158/6 158/9 158/20	150/23 152/25 153/12	donated [1] 104/6	142/17 146/18 147/3
154/16	159/7 159/8 160/7	153/18 154/16 155/3	donation [1] 108/4	153/24 154/4 155/9
disregarding [1]	160/9 160/10 160/12	155/8 159/3 159/5	donations [1] 104/17	156/5 160/7
70/10	160/15 160/16 161/4	169/22 171/25 177/9	done [38] 26/9 31/6	Dr Metters' [14]
dissipate [1] 32/15	161/10 163/19 167/2	177/25 178/5 178/18	31/7 34/10 35/4 37/7	143/22 143/24 144/1
distance [1] 75/8	167/16 170/6 170/7	178/19 181/1	38/15 41/25 48/10	144/1 146/4 146/10
distinction [17] 43/11	170/10 170/14 170/14	does [13] 10/25 46/25	52/20 54/18 54/19	147/15 149/23 151/7
43/25 44/8 44/20	171/13 171/21 171/23	51/25 57/10 71/1 95/3	62/22 77/21 78/18	151/19 151/20 153/21
44/25 45/10 46/2	173/9 175/4 176/12	138/6 156/12 165/25	78/18 79/8 79/10	153/21 159/12
46/10 51/3 51/8 52/21	176/13 176/17 176/21	175/1 175/4 178/21	89/19 92/17 93/15	Dr Mike [3] 11/17
54/8 54/11 54/14	176/23 181/7	180/6	94/24 95/9 107/5	12/3 12/16
98/19 99/8 125/9	Dobson [2] 20/9 43/4	doesn't [13] 40/6 40/7	127/1 128/5 128/6	Dr Pat Troop [3]
distrust [1] 106/6	docket [7] 127/3	108/18 151/22 154/11	128/12 131/8 135/3	12/24 17/2 146/5
division [7] 2/13 3/2	160/11 174/20 175/7	154/18 159/22 163/4	137/22 142/21 142/22	Dr Perry [1] 143/12
41/6 44/23 131/1	175/11 175/16 175/18	165/23 175/6 176/20	142/23 147/21 178/23	Dr Rejman [4] 138/4
141/18 141/19	dockets [4] 140/21	179/4 179/19	179/18 179/18	139/22 155/11 175/15
Divisional [1] 24/2	174/14 180/13 180/15	DoH [1] 162/16	donor [10] 40/7 99/9	Dr Rejman's [1]
DMS [5] 145/22	doctor [1] 11/25	doing [16] 2/2 2/4	99/20 104/7 104/13	153/17
145/23 146/2 149/15	doctrine [1] 116/1	2/11 2/24 10/9 38/10	105/2 105/4 108/13	Dr Sheila Adam [1]
	document [38] 7/3	86/9 95/8 129/10	108/22 165/21	12/11

D	dying [2] 58/25 97/5	106/22	8/17	42/17 68/18 81/3
Dr Troop [9] 17/7	E	election [5] 29/2 29/2	ended [2] 49/4 84/3	85/14
107/16 148/14 150/9	each [3] 66/22 118/18	29/8 133/4 133/11	engaged [2] 86/16	establishes [1] 57/7
150/17 150/20 151/2	179/17	elections [1] 133/9	88/4	establishing [2]
151/17 159/25	earlier [21] 24/10	electronic [3] 126/9	engaging [1] 181/12	20/20 81/6
Dr White [1] 98/4	29/20 31/12 31/22	129/13 129/15	England [15] 39/9	establishment [3] 4/3
Dr Will's [1] 98/6	32/17 33/5 34/21	element [2] 105/4	66/1 66/19 67/10	70/12 70/25
draft [7] 38/16 43/23	40/12 72/14 85/8	113/25	67/11 67/13 73/12	estimate [1] 84/13
47/16 47/17 107/18	89/14 94/25 102/24	eliminate [1] 52/5	117/8 117/16 117/18	estimated [1] 64/22
111/6 112/16	130/18 131/1 140/4	Ellie [2] 1/6 1/14	117/24 118/15 170/14	et [6] 31/7 126/1
drafted [5] 50/12	141/21 154/19 158/17	else [5] 17/9 52/1	170/17 171/2	130/2 130/4 132/22
69/17 110/4 110/19	169/22 181/17	73/15 94/25 101/17	enormous [1] 44/7	133/15
145/20	early [9] 38/21 94/12	elsewhere [1] 134/15	enough [6] 78/22	et cetera [6] 31/7
drafting [2] 15/14	97/2 109/13 118/1	email [25] 28/8 28/11	92/17 118/14 119/24	126/1 130/2 130/4
33/11	123/23 163/8 166/7	38/2 38/13 38/13	120/10 150/17	132/22 133/15
dragged [2] 29/11	172/3	38/14 40/11 43/15	enquire [1] 41/13	ethical [2] 104/20
110/9	easier [2] 58/24 59/5	43/16 46/16 46/20	enquiries [1] 41/6	105/1
draw [7] 43/20 44/20	easily [2] 95/17	92/1 107/14 107/15	Enser [1] 55/4	ethicist [1] 109/25
46/19 58/16 58/21	136/21	126/5 126/7 126/8	ensure [8] 8/17 22/15	ethics [2] 29/23
145/19 162/2	easy [2] 10/7 65/22	134/4 136/14 138/22	51/2 66/22 81/3	105/17
drawing [3] 40/25	EDWARD [2] 1/15	138/25 139/14 140/2	104/13 129/14 158/21	EU [2] 15/13 103/2
41/10 44/13	183/2	146/17 172/20	ensured [1] 32/21	European [3] 13/12
dreadful [2] 94/12	effect [2] 83/13 88/12	emails [4] 41/9	ensuring [2] 15/8	13/13 102/23
143/25	effective [4] 8/18	126/20 127/12 151/5	80/4	even [13] 22/14 29/15
drew [1] 132/6	87/14 87/17 87/20	embarrassing [3]	entails [2] 56/10	40/8 53/6 59/12 79/18
drivers [2] 56/2 100/9	effectively [15] 21/17	93/25 94/19 149/16	57/14	93/5 93/16 105/23
DRO [2] 139/13 173/4	35/15 38/14 38/16	embarrassment [1]	entirely [9] 5/1 89/11	107/9 111/10 119/23
dropping [1] 46/10	51/14 57/11 69/20	94/23	93/24 118/18 132/12	136/16
drug [1] 74/25	69/24 82/19 104/24	Embryology [3] 1/22	147/20 155/21 163/5	event [3] 133/8 171/8
drugs [1] 2/15	110/20 136/25 141/11	5/20 5/24	163/13	175/20
dual [1] 40/2	141/19 162/4	emerge [1] 26/10	entitled [1] 34/18	events [10] 29/13
due [2] 25/21 26/7	effects [1] 2/16	emerged [2] 31/4	entry [1] 68/6	34/19 34/25 39/11
duly [2] 7/11 7/20	efficient [1] 8/18	31/8	equitable [1] 57/9	68/3 109/11 137/20
Dunleavy [5] 103/17	efficiently [1] 8/13	emergencies [1] 4/6	equivalent [1] 62/20	149/12 150/19 151/25
103/24 106/15 107/15	efforts [2] 25/23	emphasis [2] 63/23	equivocal [2] 57/21	eventually [2] 30/2
108/19	144/5	106/5	72/1	109/16
duplicate [1] 136/1	eg [2] 74/25 106/22	employed [4] 1/19	escalate [2] 18/23	ever [4] 36/24 118/12
duplicated [1] 159/19	eggs [1] 4/2	1/21 41/20 176/2	167/15	165/25 174/1
during [21] 2/22 9/2	Eileen [10] 43/10	enable [1] 39/21	escalated [3] 17/21	every [1] 27/7
14/21 19/21 20/9	79/25 80/3 86/14	enabled [1] 172/12	62/24 64/4	everybody [3] 127/1
20/18 26/21 26/22	90/14 90/18 90/20	enacted [1] 116/7	essential [3] 128/2	129/15 169/18
31/3 45/25 69/6 77/5	90/21 95/12 142/24	Encephalopathy [1]	128/22 162/11	everyone [6] 52/1
84/23 84/25 90/24	Eileen Trust [8] 79/25	4/11	essentially [11] 23/24	53/23 56/5 78/19 96/2
99/13 117/3 132/17	80/3 86/14 90/14	encourage [1] 65/3	26/11 51/20 53/18	117/17
145/5 161/18 175/16	90/18 90/20 90/21	end [19] 22/25 24/6	81/3 82/1 102/14	everything [11] 16/14
duties [3] 8/10 8/24	95/12	34/9 44/21 61/6 62/5	164/1 168/4 172/11	24/22 31/5 54/18
9/6	either [10] 32/8 66/23	72/2 74/18 82/12	180/21	78/16 78/18 94/25
duty [7] 9/11 106/18	73/9 103/8 104/15	82/12 82/15 89/19	establish [6] 35/25	115/3 125/22 128/16
107/4 107/6 108/3	119/15 133/22 137/8	101/18 102/19 102/22	70/3 70/9 149/13	168/4
108/20 155/2	154/14 178/18	109/19 119/4 132/7	156/9 157/21	evidence [44] 4/18
DWP [1] 71/23	elderly [2] 2/19	166/24	established [8] 20/22	4/21 6/13 6/14 9/19
		endeavour [2] 8/12	30/13 30/25 32/4	10/7 10/11 10/12

E	171/14	express [1] 66/24	falling [2] 36/22 61/3	131/12 132/11 134/16
evidence... [36] 10/16	exercise [8] 35/23	expressed [2] 29/3	falls [1] 70/13	138/5 139/8 139/9
18/5 19/6 20/14 22/8	64/17 131/6 136/20	115/20	familiar [1] 9/2	146/22 147/17 160/17
22/21 24/14 24/21	141/22 142/1 149/4	expressing [1] 75/21	far [8] 40/25 41/13	172/2 172/2 172/4
25/3 25/23 27/16 31/4	158/22	extending [1] 169/25	93/14 97/4 135/6	172/6 172/11 172/14
34/4 41/7 42/9 49/20	exercising [1] 10/10	extends [1] 106/19	150/23 169/6 169/8	172/17 172/25 173/4
49/22 65/6 65/11	exist [2] 71/6 142/16	extent [4] 47/1 122/13	fashion [1] 162/17	173/5 173/16 175/8
66/21 74/22 75/2	existed [2] 43/10	157/22 171/4	fashioned [1] 112/19	175/8 175/17 179/1
86/13 88/3 91/21	154/5	external [3] 9/21	fault [5] 25/13 44/15	179/3 179/5 179/10
130/16 134/18 136/3	existence [4] 32/1	102/11 102/11	57/8 60/9 158/13	files [69] 33/12 33/17
138/4 138/9 139/22	34/23 63/15 65/3	externally [3] 13/20	faulty [2] 30/19 51/19	33/21 34/11 40/21
159/8 169/22 175/16	existing [6] 21/15	14/1 17/9	favour [1] 8/5	41/3 122/14 122/22
181/11 181/22	22/2 22/6 23/2 23/24	extra [2] 16/18 89/15	fax [1] 103/17	123/9 123/12 123/13
evidently [1] 160/12	119/14	extracting [1] 153/18	fear [2] 8/4 88/6	123/13 123/14 123/15
evolving [1] 39/15	expanded [2] 10/21	extremely [2] 106/23	February [9] 86/12	123/17 123/23 124/13
ex [5] 70/13 74/6	13/11		110/15 110/18 119/4	124/15 124/17 125/10
91/15 91/18 161/19	expect [3] 33/23 46/9	F	119/20 138/22 139/5	125/15 125/23 126/15
ex gratia [3] 70/13	76/6	face [1] 178/15	139/11 140/11	126/23 127/2 127/11
74/6 161/19	expectation [4] 93/8	facilities [1] 166/8	February 1992 [1]	128/22 129/7 129/18
ex-civil [2] 91/15	126/7 127/12 127/22	facing [1] 100/4	140/11	129/21 130/16 130/18
91/18	expected [7] 34/1	fact [18] 24/11 26/21	February 2001 [2]	130/24 131/23 134/24
exacerbated [1]	83/8 123/20 126/14	26/25 27/1 27/7 28/4	110/18 119/4	135/14 137/8 137/15
162/10	129/19 131/7 146/24	34/10 37/18 42/4	February 2003 [1]	139/3 139/6 139/15
exactly [11] 17/8	expects [1] 29/7	42/18 44/22 52/19	119/20	140/1 140/10 140/14
26/15 35/18 35/25	expedient [1] 32/3	75/10 76/5 112/18	feel [3] 13/23 89/20	140/20 141/2 141/7
53/16 62/20 83/21	expensive [1] 118/19	116/3 146/12 163/25	111/3	141/12 141/17 142/4
84/7 84/18 127/20	experience [3] 2/25	facto [1] 29/17	feeling [2] 93/4 97/21	147/18 147/23 150/1
179/2	19/15 128/21	factor [8] 15/7 42/20	feelings [1] 44/3	154/8 159/10 159/11
example [25] 5/11	experienced [2] 14/3	75/23 117/7 117/9	feet [1] 142/21	159/16 159/19 160/11
11/5 19/4 19/7 19/9	34/24	117/24 118/23 119/3	fell [1] 17/17	160/18 171/18 171/20
22/13 22/17 24/2 31/4	expert [8] 9/21 66/6	Factor VIII [2] 117/9	felt [14] 40/24 41/13	171/21 172/8 173/25
36/21 40/5 44/9 75/14	68/8 103/2 110/8	119/3	68/12 79/11 84/15	174/9 176/3 179/7
75/24 78/2 80/24	110/8 125/1 125/2	factors [9] 15/4 19/5	89/10 94/22 110/5	180/21
83/22 100/13 125/1	expertise [2] 13/25	25/21 26/8 37/22	118/4 118/11 121/16	filing [4] 124/13
135/23 137/10 143/2	91/24	39/19 54/15 74/25	155/24 163/9 165/6	126/10 126/12 129/15
162/14 164/17 164/20	experts [3] 14/1 75/8	76/2	Fenwick [6] 143/16	final [1] 154/1
examples [2] 18/5	105/17	facts [6] 25/1 26/19	144/17 147/11 153/16	finalised [1] 114/4
134/6	explain [3] 16/2 104/3	27/3 27/9 116/14	181/23 181/24	finance [2] 3/12 82/13
excellent [1] 162/7	104/11	145/20	Fertilisation [3] 1/22	financial [9] 44/1 48/5
exception [1] 63/7	explained [2] 136/14	factual [1] 75/4	5/20 5/24	49/8 50/22 52/8 66/3
exceptional [1] 63/17	159/16	fail [1] 113/23	FFP [1] 99/6	68/9 71/9 82/20
exceptions [1] 70/19	explaining [1] 153/6	failed [1] 33/14	Fibrosis [1] 62/3	find [30] 19/5 29/11
exchange [1] 148/7	explanation [3]	failing [3] 105/4 177/8	fight [1] 32/20	35/5 41/6 41/9 60/25
exclude [3] 58/25	131/13 132/3 152/5	177/11	figures [4] 1/10 62/14	65/20 67/19 68/25
104/5 107/22	explicit [1] 150/24	failure [1] 25/22	62/16 84/16	69/13 69/20 76/6
excuse [1] 106/22	exploration [2] 77/6	fair [1] 159/6	file [47] 40/23 123/24	82/13 89/16 89/25
Exec [1] 28/25	77/9	fairly [6] 34/23 40/15	124/4 124/5 125/13	99/21 123/24 124/10
executive [11] 66/3	explore [1] 21/14	60/24 100/24 118/1	125/17 125/18 126/2	129/21 129/22 131/2
91/7 93/12 95/13	exposed [4] 74/24	127/8	126/8 126/17 127/14	131/18 136/13 136/21
107/20 112/10 127/6	76/1 98/10 114/8	Falconer [1] 143/9	127/16 127/18 127/21	136/25 137/18 139/2
127/7 128/10 166/14	exposure [2] 113/21	fall [2] 71/1 147/17	127/23 128/11 128/16	141/7 144/8 145/11
	114/15		128/17 128/18 131/5	finding [2] 17/9

(59) evidence... - finding

F	follows [1] 41/24 food [3] 3/25 4/4 4/5 forecast [1] 47/6 forgive [1] 84/17 forgotten [2] 138/10 141/5 form [3] 36/19 157/12 170/2 formed [2] 120/12 181/16 former [6] 37/25 93/5 142/7 146/4 153/21 154/3 formulating [1] 7/13 forward [9] 9/23 9/25 10/3 23/17 25/8 38/1 57/22 65/2 111/21 found [13] 34/11 34/11 89/17 91/24 119/6 119/14 141/9 141/21 144/3 144/6 144/11 148/12 174/11 Foundation [4] 6/11 6/16 65/18 93/3 four [6] 13/7 13/10 20/17 113/12 119/3 178/20 fractionate [1] 101/15 fractionation [2] 99/24 100/6 framework [4] 81/6 111/15 111/20 111/20 Frank [2] 20/9 43/4 Frank Dobson [1] 43/4 free [3] 118/6 118/18 143/3 fresh [3] 22/22 99/6 99/8 Friday [1] 47/18 friendly [1] 164/22 from [186] front [8] 1/8 1/12 46/16 53/13 64/10 156/19 172/8 172/11 frontline [3] 97/13 97/16 97/20 frozen [2] 99/6 99/8 frustrated [1] 123/5 frustrating [1] 20/21 frustration [1] 143/2 fulfilling [1] 177/18	full [5] 10/15 33/2 36/11 124/13 163/5 fully [1] 99/4 function [1] 155/17 fund [12] 56/15 56/17 56/20 56/22 59/3 61/9 76/11 76/18 94/5 94/6 97/15 119/10 fundamental [2] 24/25 26/18 funder [2] 80/12 80/23 funding [30] 3/17 15/2 80/5 81/7 81/16 82/4 82/6 82/16 83/12 83/18 84/10 85/15 86/18 87/1 88/7 88/11 88/14 88/16 89/6 89/9 89/13 90/2 90/3 91/22 94/2 94/4 94/5 94/7 119/17 130/14 funds [15] 3/15 35/15 81/20 83/23 84/24 85/1 85/6 85/11 85/13 87/8 87/10 87/11 87/13 119/6 120/15 further [17] 19/8 36/2 36/8 36/16 36/18 40/4 42/20 55/23 76/18 76/23 77/18 77/23 107/4 115/5 161/1 161/9 181/4 future [9] 25/11 63/22 84/10 89/9 107/3 155/14 162/17 168/15 177/15	175/17 176/3 general [11] 6/4 11/4 23/23 67/3 80/10 116/14 133/6 133/9 138/6 143/2 178/7 generality [1] 85/13 generally [5] 1/10 9/10 52/16 100/12 168/20 generated [1] 145/5 generation [3] 118/16 118/18 120/4 George [2] 172/20 172/21 gesture [1] 60/16 get [24] 3/19 16/24 18/12 35/19 37/18 37/23 48/10 48/25 59/17 78/11 81/12 83/6 86/4 87/14 92/16 108/7 110/6 120/5 120/8 120/17 126/7 128/20 134/7 159/4 gets [1] 49/6 getting [6] 13/19 16/19 20/19 101/8 109/22 134/17 give [20] 2/1 4/17 8/3 9/11 44/1 49/22 51/9 65/21 72/7 72/9 82/1 82/14 83/11 104/9 124/1 133/18 136/3 161/10 163/21 176/4 given [39] 1/24 6/13 14/4 43/8 49/20 50/21 53/18 59/8 59/13 63/17 65/14 65/20 67/9 67/10 67/11 70/1 71/18 88/3 89/4 96/8 101/1 107/10 108/6 108/23 114/20 116/4 116/17 116/18 124/8 130/10 154/1 155/2 159/7 159/8 161/18 167/7 169/21 178/12 180/18 giving [7] 48/21 60/13 63/25 78/3 106/4 107/22 181/11 gleaned [1] 141/14 go [103] 3/17 7/2 7/22 7/25 8/15 14/16 18/24	19/1 19/9 19/10 22/18 23/21 24/5 25/18 26/16 28/3 28/4 28/7 28/8 28/9 28/13 28/15 28/15 31/10 31/15 31/16 31/19 31/19 32/25 35/11 35/19 36/4 42/10 42/11 46/15 46/23 48/8 49/3 50/24 53/10 53/12 55/19 56/6 59/16 61/18 63/8 64/2 68/5 68/8 69/2 69/20 69/23 70/17 71/2 71/15 71/20 72/4 72/15 88/11 88/20 89/15 90/4 93/24 96/7 97/20 101/11 103/16 108/5 110/4 111/21 118/23 123/23 124/5 127/13 128/11 128/16 128/17 128/18 128/24 130/6 133/20 138/20 138/24 142/8 144/17 146/14 149/11 150/6 151/3 151/11 153/14 156/19 161/24 165/10 165/12 165/15 166/3 168/4 172/24 173/2 176/1 178/21 180/6 go-to [1] 142/8 goes [7] 40/6 52/2 113/22 115/25 116/10 162/15 167/24 going [70] 1/5 1/7 1/17 5/14 5/15 6/19 6/23 6/25 18/12 19/9 19/13 21/5 22/11 30/1 33/7 33/21 34/12 43/1 46/11 49/18 50/5 52/25 59/11 61/3 66/13 67/1 67/9 69/3 73/5 76/24 79/20 83/9 83/12 84/7 87/24 94/25 96/25 97/23 100/2 103/6 103/13 109/8 110/11 117/6 118/23 121/22 122/9 122/11 122/19 127/25 129/17 136/6 137/15 141/9 141/14 143/2 143/20 144/10 144/13
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(60) finding... - going

G	135/9 135/24 168/21 169/24 government's [9] 23/18 24/12 42/7 42/14 42/16 42/24 43/14 57/7 96/25 governments [1] 23/15 grade [5] 10/22 10/24 11/1 11/9 167/18 grade 7 [2] 11/1 11/9 gradual [1] 13/22 Graham [2] 105/13 105/14 Graham Winyard [2] 105/13 105/14 granted [1] 85/13 grants [1] 94/14 grateful [2] 157/2 157/4 gratia [3] 70/13 74/6 161/19 grave [1] 68/16 great [6] 33/6 109/9 120/4 146/9 147/8 167/12 greater [1] 35/12 grew [1] 126/16 grief [1] 95/18 ground [2] 14/6 58/23 grounding [1] 14/8 grounds [2] 31/2 106/8 group [15] 45/20 51/24 54/6 56/4 64/16 66/6 68/8 74/5 83/7 93/20 93/21 120/23 142/4 142/10 178/18 groups [7] 5/4 54/11 60/13 63/15 120/12 120/16 120/20 groupthink [4] 24/8 78/6 78/9 79/5 guarantee [2] 88/22 107/1 guess [5] 87/21 112/3 134/18 147/25 179/6 guidance [13] 14/4 110/4 110/10 110/24 111/6 114/4 126/22 127/5 129/9 133/7 135/8 158/21 178/25	guidelines [1] 156/13 Gutowski [1] 42/3 Gwen [1] 44/5 H habit [1] 128/19 had [212] hadn't [6] 53/4 118/8 122/7 163/2 174/10 179/8 haematologist [2] 11/17 13/17 haemophilia [17] 15/5 29/5 38/20 43/5 45/19 45/20 60/22 60/25 87/21 90/17 120/24 121/1 121/6 121/10 121/24 130/13 131/20 Haemophilia Society [1] 43/5 haemophiliacs [25] 26/1 34/19 44/1 44/8 44/12 50/22 51/5 52/4 55/4 56/16 56/18 56/21 56/22 57/4 57/10 57/12 58/6 60/1 60/13 61/11 61/15 63/16 63/20 74/4 74/13 half [3] 61/19 61/21 161/6 halfway [1] 174/13 hand [8] 21/16 21/24 111/5 126/2 126/3 152/16 157/5 169/11 handed [1] 135/16 handful [3] 15/6 15/11 15/22 handled [1] 166/8 handling [2] 149/7 168/15 handwrite [1] 125/25 handwriting [2] 152/20 156/3 handwritten [4] 125/22 152/11 156/20 174/7 haphazard [1] 127/10 happen [3] 76/25 158/21 170/5 happened [43] 22/16	22/20 22/24 26/11 32/18 33/18 34/4 35/25 40/19 60/9 78/25 85/4 90/19 124/2 125/8 128/4 129/3 129/10 130/2 130/14 130/22 131/10 131/12 131/15 131/17 131/23 132/5 136/4 137/18 141/10 144/11 148/10 153/3 155/17 156/10 156/11 157/21 159/1 169/16 174/9 176/16 179/14 180/3 happening [7] 100/17 102/22 130/15 153/4 158/3 158/18 179/12 happens [1] 78/13 happy [4] 47/25 150/3 165/4 165/17 hard [3] 16/20 41/7 175/2 harder [1] 106/4 hardly [1] 100/5 hardship [8] 56/15 56/17 56/20 56/22 59/3 61/9 70/23 71/9 harm [5] 46/8 48/23 51/6 51/14 51/17 harmed [1] 44/9 Harvey [3] 98/16 115/8 115/10 has [37] 22/20 22/21 27/23 28/25 47/9 50/20 51/1 52/4 58/15 60/5 60/6 74/24 92/13 96/9 103/14 103/15 104/4 104/25 108/3 110/15 134/5 137/21 153/8 155/2 155/16 158/1 162/5 162/6 162/16 167/22 167/23 175/13 178/4 178/16 178/16 181/12 181/19 hasn't [1] 179/20 have [258] haven't [5] 76/1 114/11 152/12 152/16 175/20 having [28] 11/3 37/11 41/18 48/8 51/8 51/13 53/9 53/16	54/12 62/22 72/15 77/20 77/22 82/12 91/10 95/4 96/22 97/14 107/24 109/13 114/19 128/1 133/5 135/24 144/3 154/19 171/13 181/13 Hayman [1] 43/23 hazard [1] 4/5 Hazel [4] 67/25 88/25 163/7 165/5 Hazel Blears [2] 88/25 165/5 HCV [37] 15/1 15/17 22/18 22/24 43/25 44/21 44/25 45/7 46/11 46/18 47/21 47/24 48/4 48/13 49/9 50/16 50/22 51/5 52/5 52/7 52/11 53/4 53/17 54/17 61/11 64/24 65/4 65/16 66/4 68/11 78/7 79/4 96/9 145/5 146/19 146/25 147/3 he [41] 11/19 11/19 11/20 12/5 12/7 12/7 37/5 37/6 37/12 47/9 47/10 47/15 48/7 48/8 48/9 59/12 64/4 68/16 68/20 68/20 68/22 68/24 91/6 91/11 91/23 92/17 92/20 101/8 105/2 111/11 113/5 113/22 114/3 114/5 138/5 142/16 142/20 143/19 162/6 163/19 169/13 he'd [2] 157/1 157/4 he's [3] 103/19 103/25 114/17 head [16] 5/13 5/19 6/4 6/19 10/18 10/20 12/9 12/11 13/3 14/19 17/24 80/2 86/11 128/9 167/18 168/5 headed [3] 12/23 58/4 98/4 heading [1] 155/1 heads [2] 11/7 24/2 health [60] 1/19 3/8 3/13 4/24 5/1 5/18 5/22 6/3 6/7 11/6
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(61) going... - health

H	38/22 39/14 40/7 40/8 43/2 43/12 43/12 45/21 47/6 48/7 48/21 55/5 55/9 55/14 56/12 57/4 58/5 58/7 58/25 60/1 63/7 63/17 67/5 73/12 73/18 73/25 74/4 74/7 74/13 74/22 75/3 76/8 118/5 122/24 136/16 141/13 142/4 142/10 144/20 145/8 145/12 145/14 145/25 149/2 152/25 153/6 161/20 162/18 169/5 170/1 hepatitis B [1] 161/20 hepatitis C [45] 26/2 27/10 29/5 34/19 38/22 40/7 40/8 43/12 43/12 45/21 47/6 48/7 48/21 55/5 55/9 55/14 56/12 57/4 58/5 58/7 58/25 60/1 63/7 63/17 67/5 73/18 73/25 74/4 74/7 74/13 74/22 75/3 76/8 118/5 122/24 136/16 141/13 142/4 142/10 144/20 145/12 149/2 152/25 153/6 162/18 her [21] 17/2 35/19 59/16 131/16 144/3 146/7 146/9 147/8 147/9 147/21 148/5 149/12 150/7 150/10 160/2 160/4 176/8 176/12 176/15 176/16 179/22 here [25] 7/7 11/21 14/6 24/16 26/5 29/6 35/5 36/12 50/7 51/16 52/21 55/3 59/25 67/2 70/5 72/17 75/24 93/19 103/16 134/6 144/16 152/8 155/22 163/13 180/4 Hewlett [1] 12/9 Heywood [3] 155/15 160/15 160/16 Heywood Stores [3] 155/15 160/15 160/16 HFEA [2] 5/23 6/1	hierarchy [1] 11/23 high [8] 55/8 58/23 62/10 64/19 74/9 81/22 82/2 100/15 Hill [1] 29/22 him [9] 37/11 66/14 68/7 105/7 137/12 143/18 157/2 161/3 179/20 himself [2] 70/1 169/13 hindsight [4] 31/11 31/17 31/21 33/5 his [24] 29/1 33/14 34/2 47/18 47/23 50/15 66/14 91/7 92/20 108/19 108/20 122/18 123/5 133/17 147/6 149/25 154/3 155/9 157/5 163/22 168/8 168/25 175/16 179/22 history [2] 165/12 166/4 hit [2] 14/6 14/8 Hithersay [2] 91/7 95/13 HIV [21] 4/23 4/25 5/2 5/7 38/22 40/9 41/4 43/10 43/13 43/25 44/1 44/4 44/12 44/21 44/25 46/11 57/13 118/5 130/25 132/8 135/23 HIV/AIDS [1] 57/13 hm [24] 3/22 5/17 11/16 13/2 19/22 21/23 57/1 58/18 79/22 80/18 83/15 99/16 103/12 115/12 119/5 120/18 122/15 122/25 132/16 135/5 136/10 136/18 145/9 152/21 Hmm [1] 179/15 hoc [4] 81/11 82/6 89/13 89/19 hold [6] 42/7 42/14 58/24 59/5 106/1 169/24 honest [9] 8/4 17/8 40/10 67/25 90/21	125/23 133/17 138/10 143/1 honestly [6] 53/7 62/17 68/3 75/6 75/9 79/9 honesty [4] 7/10 8/3 9/6 48/16 honour [1] 33/14 hope [2] 77/13 181/10 hopefully [1] 90/4 hoping [1] 47/21 hospitals [1] 110/20 hour [1] 161/6 hours [1] 16/21 hours' [1] 94/20 house [13] 13/17 13/25 15/20 24/18 45/19 48/9 79/21 80/13 90/9 130/12 142/24 155/7 157/15 Houses [1] 32/2 how [44] 9/5 9/6 17/6 17/20 18/20 21/14 25/8 30/16 34/4 38/6 39/17 41/1 47/13 58/9 62/16 65/22 69/8 76/17 80/14 83/13 83/16 84/22 84/24 86/22 91/19 91/19 91/21 98/13 98/14 102/6 107/9 111/21 120/15 120/16 120/19 121/21 125/6 126/19 128/11 130/3 130/20 161/4 179/12 181/15 Howard [1] 115/7 however [13] 42/18 44/6 51/1 65/7 68/23 70/20 71/16 88/12 106/1 113/23 146/20 146/25 147/18 HSD1 [1] 11/15 hugely [1] 103/1 human [4] 1/21 5/20 5/24 118/8 hung [1] 125/1 hunt [22] 33/11 34/15 34/16 46/17 46/25 47/17 47/17 47/21 48/2 48/6 49/7 50/6 50/8 50/8 50/12 54/8 122/17 123/3 154/21	155/12 155/20 177/2 Hunt's [2] 48/12 52/13 Hutton [7] 59/18 62/25 64/4 73/23 73/24 76/16 77/10 I I accept [1] 31/21 I acted [1] 102/14 I addressed [1] 42/9 I also [2] 4/4 174/11 I am [14] 33/7 79/10 88/13 106/23 113/18 114/22 116/18 122/11 135/22 151/25 155/21 163/1 171/25 180/13 I ask [5] 5/16 6/20 30/6 96/13 180/12 I asked [7] 79/8 96/7 96/16 164/5 167/14 168/7 173/23 I assume [4] 112/16 114/17 150/5 175/6 I assumed [1] 136/20 I attended [1] 103/2 I became [1] 146/21 I believe [2] 91/11 175/16 I called [1] 181/17 I came [2] 118/3 130/20 I can [16] 33/5 45/6 48/6 51/10 53/7 89/2 93/14 96/17 99/19 139/2 143/7 159/6 159/14 162/4 175/18 177/11 I can't [18] 17/12 37/6 40/10 45/2 48/16 111/25 117/15 127/19 130/20 155/21 160/6 162/23 163/17 164/9 171/6 175/19 177/19 178/8 I cannot [3] 42/21 150/13 160/13 I certainly [5] 23/25 77/13 93/10 126/16 133/5 I clearly [1] 38/10 I come [1] 146/12
----------	--	--	--	--

I	102/8 121/23 136/2 146/24 159/13 I hadn't [1] 163/2 I have [4] 18/15 148/13 160/22 177/13 I haven't [3] 152/12 152/16 175/20 I heard [2] 78/16 154/17 I honestly [2] 75/6 75/9 I imagine [1] 142/23 I joined [4] 2/3 11/25 117/19 167/1 I just [11] 8/15 38/18 43/20 48/1 52/9 64/9 68/1 96/11 116/16 146/11 181/10 I kind [1] 49/1 I knew [1] 19/15 I know [2] 47/19 48/8 I left [2] 77/3 78/17 I look [1] 95/1 I looked [2] 62/19 129/25 I made [2] 14/19 41/5 I make [2] 31/18 79/6 I may [2] 86/4 88/2 I mean [38] 16/20 27/25 30/19 40/5 41/1 55/15 62/17 77/12 78/21 81/23 82/1 82/2 82/21 83/6 84/16 85/22 88/13 93/2 101/11 103/14 116/5 121/23 122/1 124/5 126/13 129/7 135/17 137/8 147/9 150/21 154/18 163/4 165/3 168/22 169/10 170/16 171/6 175/6 I mentioned [1] 119/11 I might [1] 141/3 I must [1] 133/18 I needed [1] 18/18 I no [1] 146/19 I passed [1] 173/22 I possibly [1] 40/25 I presumably [1] 38/11 I produced [1] 68/4	I provided [2] 34/7 163/7 I pushed [1] 41/7 I raised [1] 171/6 I reached [1] 41/2 I recall [2] 24/4 77/1 I received [1] 138/22 I recognise [1] 50/14 I recognised [3] 37/20 45/5 180/24 I recollect [1] 178/25 I recollected [1] 126/24 I refer [1] 79/7 I referred [1] 40/12 I remember [2] 119/8 125/21 I replied [1] 138/25 I said [4] 63/5 73/16 79/9 141/3 I say [4] 37/5 94/18 103/14 165/3 I see [1] 112/20 I should [1] 98/15 I simply [2] 89/12 100/22 I start [1] 144/13 I started [3] 2/4 126/13 142/6 I suspect [6] 93/17 108/25 126/25 127/9 127/9 130/1 I take [1] 97/18 I then [1] 2/11 I think [162] 10/6 10/7 10/14 10/19 11/21 13/22 16/12 16/21 18/3 18/14 18/25 20/5 20/13 22/7 24/23 27/3 27/19 28/4 28/15 30/19 30/21 31/4 31/8 33/4 34/22 35/12 36/12 37/7 37/20 40/24 45/8 45/13 45/18 45/23 48/16 48/19 49/5 49/18 51/23 52/14 52/21 54/9 54/14 54/21 59/7 62/24 63/12 63/25 66/20 67/12 72/11 72/21 73/5 73/14 73/14 75/15 76/17	77/15 77/24 78/10 78/15 78/25 79/6 79/10 81/25 85/4 85/14 85/17 88/22 88/25 89/4 89/24 90/18 91/9 91/22 94/18 95/8 97/1 97/11 97/16 99/11 100/24 102/19 102/21 106/18 107/6 107/9 107/14 110/7 110/11 110/16 111/13 115/9 117/18 118/1 119/9 119/10 120/3 120/9 121/4 121/14 125/13 125/21 126/5 127/17 127/20 128/7 128/21 128/23 129/6 130/17 130/23 132/4 135/18 135/20 137/12 138/8 139/7 139/10 140/6 142/15 143/11 143/14 143/18 144/3 144/14 145/19 150/21 152/22 154/15 156/13 156/24 158/10 158/16 158/17 159/6 161/6 163/4 163/5 163/10 163/14 163/21 163/22 164/5 165/3 165/5 165/11 165/25 167/21 168/2 169/15 169/18 170/24 173/18 176/7 176/10 177/8 177/24 178/21 180/6 181/8 181/8 I thought [5] 18/18 63/1 96/18 143/24 143/25 I took [2] 22/1 171/1 I tried [1] 130/1 I turn [1] 17/18 I understand [4] 96/14 113/5 145/23 150/15 I used [1] 4/13 I very [1] 120/21 I want [8] 17/19 21/14 43/13 65/12 73/16 73/19 115/5 145/18 I wanted [5] 46/19 58/16 58/21 138/3 171/7	I was [32] 2/8 5/10 5/12 9/4 9/17 10/24 12/3 13/19 16/17 21/25 24/20 35/9 68/1 69/7 89/2 95/12 96/4 96/19 98/19 102/14 103/1 111/10 112/22 114/12 120/6 131/19 132/12 133/3 135/15 135/23 150/5 151/10 I wasn't [5] 79/9 136/18 140/4 150/24 171/24 I went [5] 3/1 3/2 3/5 33/17 129/11 I will [3] 47/17 143/1 160/25 I wonder [4] 49/14 88/1 138/12 148/14 I worked [2] 5/4 135/23 I would [15] 19/16 22/10 27/25 30/18 37/7 37/9 41/12 73/16 75/16 135/16 142/21 142/22 142/23 147/20 147/25 I wrote [5] 37/25 41/9 48/17 49/1 77/24 I'd [7] 35/9 35/18 40/24 134/21 150/16 170/20 180/24 I'll [13] 15/6 15/11 15/18 15/22 24/8 26/21 34/9 41/15 118/23 137/24 139/2 151/1 161/6 I'm [75] 1/5 1/17 2/21 3/1 6/23 6/25 21/5 22/17 30/1 30/12 30/18 34/11 40/15 43/1 46/21 49/18 49/19 50/5 50/18 62/21 66/14 67/5 78/25 79/15 79/20 85/4 86/4 87/16 87/24 90/17 97/23 103/6 103/13 109/8 110/11 111/25 114/23 116/16 116/25 117/6 118/23 122/9 122/19 127/25 128/12 131/9 135/15
----------	--	--	--	---

(63) I corresponded - I'm

I	76/1 78/22 79/18 80/11 81/5 83/1 84/17 84/23 86/6 86/15 87/5 88/1 89/9 89/24 93/5 95/10 95/15 95/19 96/17 103/22 104/14 105/6 105/23 106/14 107/4 107/13 108/2 114/20 119/8 120/8 124/1 124/25 125/7 127/17 128/3 131/4 131/18 132/24 133/13 134/15 136/1 137/22 138/21 138/24 141/4 144/17 146/14 147/25 148/14 149/11 149/17 150/16 150/18 151/17 152/8 152/19 153/14 154/24 156/19 156/25 157/2 157/2 157/3 157/4 157/17 158/13 160/13 160/20 160/25 162/4 164/7 165/3 165/3 165/7 165/12 165/15 168/6 170/5 170/10 170/13 171/2 171/12 172/10 172/14 172/24 173/2 174/1 174/13 175/8 175/18 177/10 177/24 178/11 178/11 178/14 178/24 179/1 179/25 180/24 181/4	130/25 immunoglobulin [1] 100/10 impact [6] 17/15 20/1 42/23 45/22 57/15 168/13 impacted [1] 121/19 impartial [2] 8/4 9/11 impartiality [2] 7/10 8/3 impartially [1] 10/2 implement [3] 25/22 66/3 108/8 implemented [1] 99/4 implementing [1] 15/13 implicated [6] 103/13 103/14 105/19 108/12 108/15 110/23 implication [1] 150/1 implications [6] 19/17 54/22 71/19 72/10 168/15 178/1 implied [1] 116/2 importance [5] 32/6 108/6 114/19 147/19 179/5 important [10] 9/15 34/22 63/2 113/24 125/13 131/21 134/21 177/16 177/18 179/11 imported [1] 39/17 impression [2] 49/6 169/21 improper [1] 8/22 improve [5] 2/25 97/13 155/25 158/21 165/19 improving [2] 25/9 158/23 inaccurate [1] 27/2 inactivated [1] 54/17 inactivation [3] 39/10 39/22 52/22 inadvertently [1] 44/9 Inc [1] 101/24 incapacitated [1] 70/22 incident [1] 110/21 incidents [9] 98/8 109/24 111/4 111/14 111/18 113/16 114/4	115/3 157/24 include [1] 40/19 included [5] 4/1 4/10 34/6 126/23 178/25 includes [1] 133/9 including [6] 14/21 15/2 15/9 32/13 39/12 107/16 income [2] 81/25 84/7 inconsistency [1] 129/12 inconsistent [1] 127/10 Incorporated [3] 99/17 101/4 101/19 increase [3] 84/20 84/24 85/1 increased [4] 14/21 25/21 26/8 85/11 increases [2] 55/24 81/9 increasing [2] 25/14 106/5 increasingly [2] 27/21 116/1 incredulity [1] 146/6 incredulous [1] 147/13 indeed [20] 18/24 38/4 38/17 40/9 46/1 46/25 52/13 53/21 59/20 60/5 66/25 76/9 86/1 94/3 94/12 99/5 105/14 105/14 109/5 109/18 independence [1] 93/1 independent [1] 80/17 indicated [2] 118/7 175/10 individual [4] 93/10 110/25 129/10 154/23 individuals [10] 106/21 107/22 113/12 113/20 114/1 114/15 124/23 156/2 158/24 159/18 individuals' [2] 74/22 75/3 induction [1] 14/9 inequity [1] 55/24	inevitable [1] 181/18 inevitably [3] 29/10 170/5 171/9 inexpediency [1] 168/19 infected [27] 25/7 25/9 26/1 27/17 27/19 38/22 43/9 50/22 51/5 55/5 55/9 56/16 56/18 56/21 56/22 58/6 64/24 65/1 65/16 66/4 68/10 73/18 73/25 74/7 105/3 161/20 161/20 infection [8] 43/12 43/13 59/1 63/20 65/7 74/23 75/3 170/1 influenced [2] 39/17 39/19 inform [4] 68/7 105/18 113/25 149/15 informal [1] 82/7 information [23] 8/5 26/25 27/23 34/7 35/6 106/7 113/2 115/17 115/19 115/22 116/9 124/10 128/25 153/15 154/13 154/15 172/13 172/25 173/15 173/20 175/17 176/5 180/18 informed [6] 10/13 66/22 115/19 115/21 139/5 150/9 initial [3] 25/19 26/6 102/1 initially [5] 20/10 99/12 119/6 126/9 167/8 initials [2] 175/21 175/22 initiated [1] 38/25 initiative [2] 14/25 122/1 initiatives [1] 25/22 injecting [1] 74/25 input [2] 18/19 19/18 inquiring [1] 32/4 inquiry [71] 1/9 4/18 6/13 6/14 15/16 17/19 21/6 21/8 22/6 23/25 24/3 24/5 24/13 24/24 25/6 25/10 25/12
----------	---	--	---	---

I	interfere [1] 150/11	investigate [3] 39/1	98/10 99/11 105/10	its [6] 66/8 82/20 94/5
inquiry... [54] 25/16	interim [2] 110/10	74/6 178/13	108/23 109/13 109/23	94/6 96/24 111/15
28/21 29/6 29/12	111/6	investigated [2]	109/25 111/15 114/13	itself [3] 11/19 139/20
29/12 29/16 29/17	internal [17] 32/14	101/13 160/16	114/22 124/3 124/6	167/3
30/4 30/14 30/22	36/18 36/18 42/19	investigating [2] 26/9	124/11 125/5 126/10	iv [1] 56/20
30/23 31/12 31/23	52/11 145/3 148/4	39/5	127/19 130/8 135/21	
32/1 32/11 32/17	153/2 155/18 157/5	investigation [16]	148/19 151/8 151/20	J
32/21 33/2 33/6 34/18	157/8 157/13 157/20	36/3 36/9 36/17 36/18	152/24 165/23 166/23	James [16] 130/23
36/3 36/9 36/11 36/11	158/1 159/9 160/4	40/19 42/5 140/18	167/6 168/18 168/23	131/16 136/14 136/25
36/15 36/17 36/22	172/22	153/2 155/7 155/15	170/18 171/6 171/15	138/23 140/3 143/17
36/25 40/4 42/5 42/8	international [1]	157/1 157/13 157/15	180/7	143/18 143/23 144/23
42/13 42/14 42/17	100/12	158/25 160/4 176/13	issued [3] 111/7	145/15 145/19 146/7
42/21 42/25 47/2	interpret [1] 175/2	investigations [2]	129/8 133/8	147/10 154/17 176/6
47/14 53/2 53/6 53/9	interpretation [1]	34/18 40/4	issues [42] 3/7 5/9	James's [1] 153/19
56/15 56/19 78/7 79/4	152/2	investigator [2] 155/8	9/23 11/4 11/6 14/4	Jane [4] 46/20 46/21
79/15 86/2 86/12	interview [3] 148/2	155/12	14/10 15/19 17/20	46/24 112/21
110/14 136/3 139/22	155/9 174/5	investigators [2]	18/25 19/2 19/7 20/23	Jane Minifie [1]
171/3 171/8 181/10	interviewed [2] 160/8	172/21 174/8	22/19 27/6 35/11	112/21
inroad [1] 51/21	160/11	investments [1]	39/12 47/1 47/13	Jane/Charles [1]
insider [2] 181/13	interviews [2] 148/3	81/25	71/21 78/6 79/3 87/24	46/24
181/20	156/4	involve [2] 18/12	95/12 95/16 97/6 97/8	Janet [2] 34/17 35/19
insight [1] 181/13	intimated [1] 146/2	137/25	98/5 102/12 103/21	Janet Walden [1]
instance [1] 86/10	into [49] 2/11 14/9	involved [20] 14/15	104/20 106/11 110/6	35/19
instead [2] 25/8	15/16 28/21 32/4 35/7	14/20 15/25 19/7	111/9 111/11 113/18	Janisch [1] 106/3
135/18	35/10 35/11 40/19	24/21 37/21 114/16	118/5 162/10 162/18	January [1] 119/1
instituting [1] 169/5	41/13 48/8 51/22	120/22 122/2 122/23	163/1 164/16 168/3	January 2001 [1]
instructed [3] 66/7	68/19 71/15 72/4 73/8	135/10 136/13 153/9	it's [79] 2/21 7/2 10/7	119/1
113/6 144/18	73/8 75/23 76/5 81/12	153/12 155/23 157/12	11/1 12/7 14/8 23/10	job [5] 2/6 3/18 9/7
instructing [2] 108/8	81/25 88/20 97/20	158/11 158/13 166/7	23/20 30/8 30/9 34/22	22/14 126/16
146/3	100/20 101/1 101/11	171/24	38/15 43/17 43/18	jobs [2] 2/24 164/22
instruction [2] 126/11	102/24 103/4 109/22	involvement [5] 5/12	44/16 44/20 45/2	jogged [1] 143/5
160/21	123/24 124/5 126/5	45/4 153/17 153/19	49/11 50/7 50/15	John [8] 59/18 62/25
instructions [2]	126/7 126/9 127/23	159/13	52/21 57/21 57/22	64/4 76/16 77/10
144/16 160/19	132/21 133/20 140/7	involves [1] 105/4	57/24 58/4 58/10	142/5 174/20 175/4
instruments [2] 98/11	150/6 150/22 154/1	involving [3] 19/12	58/20 59/4 59/5 59/7	John Canavan's [1]
110/2	154/19 155/8 160/4	19/13 48/23	59/11 59/25 62/18	142/5
integrity [3] 7/10 8/3	167/3 170/6 170/15	irrelevant [1] 140/23	63/12 64/10 67/3	John Hutton [3]
9/6	175/14 181/14	irritation [1] 94/22	72/17 73/21 74/15	62/25 64/4 77/10
intel [1] 174/20	intravenous [1]	isn't [7] 23/11 41/8	74/17 91/16 94/19	joined [7] 2/3 11/12
intended [1] 2/25	100/10	127/24 151/24 165/13	95/1 96/6 104/25	11/25 55/16 98/22
intention [1] 160/12	introduce [2] 93/13	180/1 181/6	109/22 110/14 112/1	117/19 167/1
interactions [1]	165/20	isolated [1] 25/5	112/9 112/18 112/20	joining [1] 78/17
181/15	introduced [8] 15/2	issue [64] 2/16 4/2	112/20 112/22 113/2	Joseph [1] 2/8
interest [2] 41/3	27/5 39/10 52/5 52/12	9/17 9/18 9/19 16/13	115/13 123/7 131/24	JR [1] 175/23
130/24	53/4 98/22 167/11	18/21 19/9 19/17	133/13 134/15 135/8	judgement [2] 9/8
interested [5] 3/8	introduces [1] 55/23	20/19 20/20 21/3	139/20 143/4 145/18	55/21
59/14 92/9 101/9	introducing [1] 40/7	23/25 27/18 30/21	146/14 151/3 151/23	judgment [12] 18/14
114/12	introduction [9]	31/10 34/3 36/14 39/4	152/10 152/13 152/14	18/18 32/10 54/23
interested in [4] 3/8	39/23 52/7 52/23 74/8	48/20 53/13 54/25	156/20 161/23 163/25	55/8 56/10 56/12
59/14 101/9 114/12	108/10 118/24 119/2	55/16 59/16 65/18	165/3 173/18 175/12	57/10 58/8 58/11
interesting [1] 72/17	145/4 154/2	67/7 70/18 72/25 73/4	175/15 175/16 175/19	60/11 74/9
	inverted [1] 177/6	73/11 73/16 77/1 77/9	181/12	July [9] 12/18 43/17

J	justifying [1] 77/25 Justin [5] 143/16 144/17 147/11 153/16 181/24 Justin Fenwick [4] 143/16 144/17 147/11 153/16 Justin Fenwick QC [1] 181/24	96/21 97/13 97/18 97/21 97/25 109/3 109/15 116/23 117/1 117/1 120/10 123/22 123/22 125/6 126/17 127/9 128/3 128/5 128/10 129/1 129/2 132/1 133/6 133/11 134/4 136/20 137/8 137/22 141/1 142/1 142/21 146/23 149/8 151/22 155/11 156/14 157/2 158/13 160/7 160/10 160/15 160/16 161/8 163/19 169/13 169/16 170/19 171/21 173/9 173/10 175/4 175/11 176/13 176/14 177/16 179/16 179/20 180/24 181/4 knowing [1] 179/24 knowingly [1] 8/7 knowledge [2] 2/25 27/14 known [7] 3/14 25/1 26/19 33/8 74/25 141/4 174/1 KPMG [1] 102/10	24/9 24/10 29/20 38/14 41/16 59/18 90/1 93/3 93/16 94/12 103/10 110/17 125/24 129/11 130/11 174/17 174/18 lateral [1] 14/19 latter [1] 9/9 laughs [1] 2/22 Laurence [2] 172/20 172/21 Laurence George [2] 172/20 172/21 law [7] 77/2 100/25 102/11 103/4 115/19 116/3 116/12 lawfully [1] 106/24 lawyers [4] 1/13 70/21 71/21 107/20 lay [2] 158/14 166/2 Le [1] 104/22 Le Brasseur J Tickle [1] 104/22 lead [3] 63/18 115/1 148/25 leader [3] 4/23 10/19 11/2 leadership [1] 6/5 leading [3] 103/1 114/25 120/7 leads [1] 129/1 learn [3] 154/20 155/25 159/3 learned [2] 149/9 177/15 learning [1] 158/22 learnt [2] 99/25 138/4 least [20] 54/1 57/20 63/21 69/25 92/25 99/12 100/1 121/4 137/15 139/4 139/23 147/13 152/4 159/23 159/25 163/3 165/11 170/9 176/2 177/12 leaving [2] 64/19 65/10 led [4] 40/16 119/19 140/14 166/12 left [14] 1/13 5/18 20/21 29/24 37/19 38/2 76/10 76/12 77/3 78/17 109/17 119/16	122/6 126/2 left-hand [1] 126/2 legal [18] 55/21 56/14 58/12 71/5 73/1 74/12 102/12 104/20 106/2 106/11 106/13 115/13 116/8 116/15 116/17 125/20 161/2 171/11 legality [1] 115/16 legally [2] 73/9 171/7 legislative [1] 19/13 length [1] 164/3 less [2] 59/6 178/19 lessons [6] 33/2 154/20 155/25 158/22 159/4 177/15 let [5] 47/16 137/23 157/2 169/22 177/10 let's [6] 22/22 54/21 59/10 73/8 138/15 146/13 letter [11] 56/10 58/11 82/8 88/10 107/18 108/7 112/8 161/22 163/2 163/4 163/15 letters [2] 127/13 145/3 leukodeplete [1] 98/25 level [13] 16/3 16/4 18/16 20/7 20/8 20/13 23/23 82/2 101/21 108/17 127/8 168/5 177/21 levelled [1] 35/1 levels [1] 2/4 liabilities [2] 71/5 71/6 liaison [2] 79/21 80/2 Liam [1] 112/9 Life [5] 99/17 101/4 101/19 101/24 102/4 light [5] 44/6 55/8 80/21 150/20 168/20 like [35] 4/1 4/5 13/12 28/13 35/18 36/6 39/4 46/21 49/23 56/9 60/18 61/25 66/19 71/24 76/14 78/10 80/11 81/5 89/9 95/10 95/15 96/16 100/3
July... [7] 43/18 44/24 55/2 59/23 59/25 66/9 101/3 July '99 [1] 43/17 July 1999 [1] 44/24 July 2001 [2] 12/18 55/2 July 2002 [1] 66/9 June [7] 1/1 38/2 41/19 41/22 50/5 112/2 153/20 June 1999 [1] 153/20 June 2000 [1] 50/5 June 2003 [3] 41/19 41/22 112/2 junior [14] 20/6 45/23 126/14 127/5 127/8 135/15 155/24 156/1 158/11 158/13 177/5 177/14 178/4 178/10 just [80] 2/1 7/22 7/25 8/15 10/2 20/22 22/23 23/5 24/11 26/3 28/14 29/2 34/21 35/3 38/18 43/3 43/20 45/18 48/1 49/7 51/9 52/9 52/10 52/13 53/11 53/11 55/17 55/18 55/19 58/3 58/16 64/9 67/14 67/23 68/1 68/2 69/11 77/4 79/24 80/19 85/9 88/1 91/25 93/20 95/8 96/1 96/11 103/22 106/14 109/15 115/5 116/16 118/24 121/16 121/17 121/25 122/1 123/11 128/24 129/25 131/9 134/23 135/16 135/19 135/21 137/23 139/19 139/20 140/13 146/11 151/13 154/11 155/19 164/10 164/21 167/5 169/20 175/14 176/18 181/10 justification [1] 46/7 justified [7] 22/9 31/13 31/23 36/3 36/9 42/25 52/8 justify [3] 46/12 63/16 106/6	K keen [3] 48/9 68/2 91/8 keep [4] 123/20 124/23 125/6 132/20 keeping [1] 126/11 Keith [1] 2/7 Kelly [3] 148/21 148/23 148/24 kept [15] 48/20 66/12 66/19 66/22 107/10 125/23 126/5 126/17 134/9 134/25 142/6 147/3 153/18 175/8 175/10 key [19] 9/15 10/14 14/4 14/9 15/8 16/23 20/14 27/9 34/25 39/12 56/18 80/4 90/9 99/2 100/9 103/21 162/23 165/16 165/18 kind [8] 49/1 49/8 60/18 69/3 76/4 84/2 85/7 91/22 kindly [1] 103/19 kinds [1] 110/7 King [1] 13/1 knew [9] 19/15 81/19 84/7 91/19 91/19 91/21 101/7 147/2 173/24 know [95] 1/18 10/8 16/13 20/14 22/10 30/12 31/5 40/18 47/19 48/8 49/18 64/3 64/7 64/25 65/19 65/22 67/24 75/25 78/16 79/8 79/12 79/16 81/6 83/7 85/23 86/24 87/4 87/19 89/4 89/23 90/2 91/21 93/5 93/16 93/19 95/10	L label [1] 172/6 labile [1] 52/23 Laboratory [2] 99/21 99/25 Labour [1] 96/20 lack [2] 92/25 99/11 lacking [1] 180/10 Lady [1] 43/23 Lady Hayman [1] 43/23 lag [1] 16/19 LANGSTAFF [2] 176/22 183/4 largely [3] 2/15 29/14 120/3 last [11] 3/11 17/6 55/20 68/6 69/11 86/12 92/14 162/2 176/10 179/1 179/9 lastly [1] 160/15 late [1] 172/3 later [19] 10/19 10/21		

(66) July... - like

L	28/1 44/16 47/22 77/16 89/18 99/17 123/7 125/5 163/11 175/9 live [2] 1/11 83/8 lived [1] 32/22 liver [4] 56/23 61/6 62/5 63/18 Liverpool [2] 166/12 166/21 lives [1] 45/22 living [2] 64/23 106/22 lobbied [1] 86/6 lobbying [1] 86/16 local [3] 2/5 83/25 166/22 locate [2] 34/22 41/9 logic [1] 177/12 logical [5] 44/2 44/14 44/20 54/10 59/5 London [4] 2/7 169/23 170/4 171/10 long [15] 2/21 16/21 17/6 21/15 22/2 22/5 23/2 42/17 88/12 108/10 109/21 111/23 126/25 126/25 161/4 long-existing [2] 21/15 22/2 longer [8] 32/21 72/14 83/8 98/24 131/2 146/19 154/4 170/19 longstanding [1] 132/23 look [57] 14/13 22/22 22/23 24/12 26/16 33/8 34/13 36/7 37/2 38/13 38/13 38/18 40/2 40/3 43/15 46/14 55/12 56/25 60/17 60/19 61/2 61/8 61/21 61/25 63/8 63/8 64/17 73/8 76/14 77/7 78/24 84/10 87/7 95/1 96/6 118/11 120/14 124/9 124/14 126/17 128/3 138/21 152/8 152/19 152/20 154/11 154/19 154/24 157/15 159/1 172/5 172/19 174/3	174/13 175/22 180/2 180/7 looked [23] 22/2 49/7 52/10 62/19 73/19 76/20 98/9 100/15 105/12 109/11 109/15 109/25 110/2 110/12 125/7 129/25 141/17 142/24 154/1 159/9 159/23 159/25 170/12 looked at [12] 22/2 52/10 73/19 98/9 105/12 109/15 109/25 110/2 110/12 125/7 141/17 159/9 looking [34] 3/6 10/10 25/8 26/24 27/6 27/13 34/14 37/14 52/1 54/7 54/8 79/3 79/7 91/23 92/23 94/18 98/19 101/12 101/16 102/2 105/8 122/23 123/8 137/25 139/19 140/7 145/13 145/16 153/12 164/2 170/8 172/14 172/16 176/18 looks [8] 28/13 28/18 35/18 46/21 71/24 112/18 152/9 174/11 Lord [32] 33/11 33/13 33/16 33/16 34/2 34/5 34/15 34/16 35/2 46/17 46/25 47/16 47/17 47/21 48/2 48/6 48/12 49/7 50/6 50/8 50/12 52/13 54/8 122/17 122/18 122/20 123/3 123/4 130/2 132/14 133/17 136/4 Lord Hunt [15] 33/11 34/15 34/16 46/17 46/25 47/21 48/2 48/6 49/7 50/6 50/8 50/12 54/8 122/17 123/3 Lord Hunt's [2] 48/12 52/13 Lord Morris [1] 33/16 Lord Owen [8] 33/13 34/2 34/5 35/2 122/18 123/4 130/2 133/17 Lord Owen's [4] 33/16 122/20 132/14	136/4 lose [1] 134/19 losing [2] 17/13 17/15 lost [3] 13/19 144/12 159/3 lot [20] 5/4 13/24 17/13 18/6 18/8 34/3 66/14 97/7 98/17 101/25 102/1 102/8 102/25 114/18 125/23 126/6 128/6 144/6 164/17 167/2 loud [1] 27/20 low [1] 56/18 lower [1] 62/10 lowest [1] 97/2 loyalty [1] 7/20 lump [3] 56/15 56/17 56/20 lunch [3] 95/20 96/15 96/16 Luncheon [1] 95/24 M Macfarlane [27] 5/10 43/10 59/2 61/10 79/25 80/3 81/16 82/15 82/18 82/22 84/6 86/14 87/1 87/23 88/4 88/15 88/23 89/1 89/4 90/13 90/15 90/19 91/1 91/3 94/4 94/22 95/11 Macfarlane Trust [22] 79/25 80/3 81/16 82/15 82/18 82/22 84/6 87/1 87/23 88/4 88/15 88/23 89/1 89/4 90/13 90/15 90/19 91/1 91/3 94/4 94/22 95/11 made [42] 14/19 24/20 25/24 28/21 29/6 33/13 33/20 34/15 39/8 41/5 43/11 43/22 44/5 61/14 63/2 68/14 69/14 72/12 75/22 81/1 85/12 87/13 88/9 99/3 99/14 101/2 106/19 108/19 112/22 123/4 123/21 125/11 128/15 132/9	154/20 157/8 158/16 159/22 160/1 163/25 166/20 171/9 main [9] 24/23 43/21 52/3 56/8 81/2 101/12 107/20 162/6 167/3 maintain [2] 31/1 72/11 maintained [1] 23/24 maintaining [1] 44/23 major [4] 97/3 164/1 166/23 167/6 majority [1] 65/5 make [36] 8/5 17/22 17/24 28/2 31/18 45/10 55/22 60/16 61/10 61/13 66/8 70/13 75/17 79/6 82/6 85/5 87/7 87/9 91/20 91/21 96/12 105/25 115/25 124/3 126/14 133/23 135/12 148/19 149/17 153/3 155/13 157/24 164/19 167/9 167/19 177/13 maker [2] 17/16 59/13 makes [5] 70/22 73/20 114/3 116/2 140/24 making [18] 9/18 10/11 19/20 20/3 27/20 42/16 44/7 51/16 57/3 63/6 75/1 79/2 92/18 127/24 128/17 159/18 162/3 167/23 maladministration [1] 8/14 Malcolm [14] 68/7 68/20 68/22 70/1 70/14 71/20 73/5 168/9 169/1 169/4 169/10 169/10 169/12 170/21 Malcolm Chisholm [8] 68/7 68/20 68/22 169/1 169/10 169/10 169/12 170/21 Malcolm Chisholm's [1] 169/4 manage [2] 16/16 102/6
----------	---	---	--	---

(67) like... - manage

M	112/21 161/25 162/24 163/8 163/18 165/9 165/24	121/16 122/2 124/20 126/24 129/2 130/21 130/22 131/15 131/18 135/25 137/23 147/10 148/7 151/6 155/17 161/2 161/16 169/8 169/11 169/21 173/21 176/18	106/10 107/13 107/19 108/11 108/14 108/18 108/23 108/25 121/5 121/8 121/13 143/18 147/11 162/23 165/1 165/9	Michael Banner [3] 109/24 110/5 111/8 microbiological [1] 3/25 mid [2] 11/22 11/24 mid-'90s [2] 11/22 11/24 middle [4] 11/1 11/11 79/16 128/24 might [38] 38/23 46/9 46/13 53/14 54/10 67/23 76/14 79/11 83/22 89/9 89/11 106/8 106/21 110/25 116/13 119/10 120/10 124/16 124/23 125/1 130/21 130/21 132/4 133/12 134/1 134/19 134/19 135/21 141/3 142/6 151/22 161/5 170/5 170/7 170/8 177/5 180/9 180/11 Mike [11] 11/17 12/3 12/16 13/18 14/9 130/21 137/11 142/12 142/17 142/20 165/9 Mike Fogden [1] 165/9 Mike McGovern [5] 130/21 137/11 142/12 142/17 142/20
manageable [2] 64/13 64/21	Martin Gorham [5] 161/25 162/24 163/8 165/9 165/24	mean [54] 10/25 16/20 27/25 30/19 35/9 40/5 41/1 48/25 55/15 62/17 75/6 76/3 77/12 78/8 78/21 81/23 82/1 82/2 82/21 83/4 83/6 83/6 84/16 85/14 85/22 85/23 88/13 93/2 97/4 101/11 103/7 103/14 116/5 121/23 122/1 124/5 126/13 129/7 135/17 136/18 137/8 140/22 142/15 146/9 147/9 150/21 154/18 163/4 165/3 168/22 169/10 170/16 171/6 175/6	meetings [6] 95/11 103/2 109/7 122/7 127/13 145/7 member [6] 37/25 103/3 143/12 178/4 178/11 179/16 Member States [1] 103/3 members [6] 13/6 107/19 120/23 120/24 127/5 142/7 membership [1] 121/5 memo [12] 34/17 76/20 115/7 148/12 148/17 149/9 151/1 151/11 152/9 152/13 159/23 159/25 memoirs [1] 125/8 memoranda [1] 145/3 memories [1] 32/24 memory [5] 30/19 131/14 143/4 151/25 172/8 mention [1] 66/14 mentioned [7] 22/24 37/10 90/7 91/16 119/11 148/7 150/16 merit [1] 48/14 merited [1] 24/4 message [1] 63/2 messages [1] 88/25 met [5] 32/9 45/18 74/3 80/15 163/7 Metters [9] 142/13 142/17 146/18 147/3 153/24 154/4 155/9 156/5 160/7 Metters' [14] 143/22 143/24 144/1 144/1 146/4 146/10 147/15 149/23 151/7 151/19 151/20 153/21 153/21 159/12 Michael [3] 109/24 110/5 111/8	managed [4] 17/8 128/11 129/13 166/15 management [5] 2/23 5/23 126/23 164/2 165/21 manager [1] 6/3 managers [4] 129/4 129/6 129/14 177/4 managing [5] 3/3 3/9 3/12 102/14 159/16 Manchester [2] 166/12 166/22 manifesto [1] 23/18 manner [1] 107/5 Manor [1] 45/19 manpower [1] 35/17 manufactured [1] 100/11 manufacturer [1] 99/14 manufacturing [2] 100/7 100/14 many [10] 38/22 45/3 63/21 79/17 87/20 97/5 99/10 127/3 157/6 181/13 March [11] 6/15 86/12 112/8 115/8 144/19 145/6 146/16 147/2 148/18 151/5 152/10 Marilynne [14] 148/20 148/22 148/25 149/20 149/22 150/6 150/22 151/1 151/11 152/9 152/20 154/12 157/11 158/16 Marilynne Morgan [5] 152/9 152/20 154/12 157/11 158/16 Marilynne Morgan's [4] 149/22 150/22 151/1 151/11 marked [2] 140/22 140/24 market [4] 100/12 100/22 101/16 118/17 marrying [1] 83/9 Martin [8] 112/9

M	149/22	60/17 82/10 83/2 84/1	12/19 33/1 73/14	143/18 143/23 144/23
Minifie [1] 112/21	minutes [8] 122/21	87/15 89/25 97/15	84/19 89/13 126/9	145/19
minimum [1] 108/7	123/25 125/25 136/9	97/19 97/19 119/13	movement [1] 13/23	Ms Richards [1]
minister [24] 17/25	140/10 145/7 146/20	119/24 130/3	moving [3] 73/12	175/15
18/10 18/24 20/21	146/22	monthly [1] 61/10	166/19 177/17	Ms Scott [2] 1/7 1/13
21/2 23/2 23/4 23/6	mirroring [1] 166/18	months [2] 100/3	Moyle [2] 34/2 130/11	MSBT [2] 142/16
23/7 23/10 30/4 30/20	mislead [1] 8/7	120/7	MPs [1] 38/23	146/22
35/14 40/21 59/15	misleading [1] 180/18	moral [2] 55/24 58/22	Mr [29] 1/3 1/17 20/11	much [24] 3/19 11/10
59/18 88/10 132/21	misled [1] 25/3	more [61] 6/22 11/10	37/2 37/4 37/16 38/18	11/11 14/6 17/4 27/13
133/20 133/22 134/5	mismanaged [1]	14/2 14/2 17/17 18/1	39/4 42/6 49/18 50/13	30/25 31/17 32/19
135/1 167/15 167/16	166/22	20/19 21/11 32/21	66/16 66/17 66/25	36/1 44/3 45/4 62/15
minister's [4] 18/11	missed [3] 16/6	35/6 35/11 38/15	67/8 67/15 73/23	71/15 72/4 75/17
72/18 132/18 134/8	128/21 148/13	41/21 47/24 51/23	73/24 96/4 96/14	83/14 83/17 94/21
ministerial [6] 19/16	missing [20] 27/1	54/23 59/4 64/9 64/22	103/24 160/23 162/3	94/24 94/24 120/21
20/1 21/4 25/22 59/17	33/24 34/11 40/20	72/22 72/25 73/8	171/5 171/14 175/13	126/13 130/6
133/20	40/22 41/16 113/10	77/16 79/17 82/10	175/20 176/20 181/23	multinational [1]
ministers [95] 7/7	122/10 122/14 123/2	83/12 85/12 86/15	Mr Burgin [5] 37/4	100/18
7/19 8/1 8/4 8/6 8/7	128/23 129/18 130/7	87/7 87/10 87/13	37/16 38/18 39/4 42/6	multinationals [1]
9/12 9/14 9/16 9/22	136/13 136/19 137/15	87/15 87/16 88/23	Mr Dunleavy [1]	101/7
9/25 10/11 10/14	141/12 144/7 144/12	89/8 89/18 94/21	103/24	must [8] 43/17 49/20
15/15 17/21 18/15	149/13	107/9 118/19 124/24	Mr Fenwick QC [1]	53/23 71/13 71/14
19/2 19/8 19/11 19/20	mistake [1] 68/17	126/6 126/14 129/11	181/23	131/11 133/18 146/9
19/24 20/2 20/2 20/6	misusing [1] 8/20	134/9 140/1 146/11	Mr Gorham [1] 162/3	my [94] 2/25 3/18
20/18 21/19 21/20	Mm [34] 3/22 5/17	150/24 152/1 152/1	Mr Hutton [2] 73/23	9/13 14/21 14/21 18/5
21/24 22/10 22/15	11/16 13/2 19/22	158/14 158/23 160/6	73/24	18/18 19/14 20/9
22/19 23/15 24/4	21/23 28/23 29/25	163/25 168/6 168/19	Mr Lister [7] 1/3 1/17	20/13 20/18 21/25
24/20 29/9 30/8 30/13	49/10 57/1 57/17	168/20 169/2 176/19	96/4 96/14 160/23	22/1 22/14 23/23
30/17 30/20 30/22	58/18 60/8 67/17 73/2	177/4 177/8 177/21	175/13 175/20	24/19 31/1 31/14 33/4
30/24 33/20 34/1 34/7	75/20 79/22 80/18	Morgan [10] 148/20	Mr Milburn [4] 20/11	34/7 35/12 37/5 37/9
34/8 36/8 38/25 45/16	83/15 86/20 99/16	148/22 148/25 149/20	50/13 67/8 67/15	37/24 37/25 40/12
45/18 45/23 45/23	103/12 115/12 119/5	150/7 152/9 152/20	Mr Moss [1] 176/20	41/1 42/2 42/9 42/16
49/3 57/3 57/18 59/9	120/18 122/15 122/25	154/12 157/11 158/16	Mr Stock [5] 66/16	45/2 45/9 48/17 49/13
63/24 63/25 68/12	132/16 135/5 136/10	Morgan's [4] 149/22	66/17 66/25 171/5	51/1 52/14 55/16
77/11 77/13 77/21	136/18 145/9 152/21	150/22 151/1 151/11	171/14	66/15 66/20 77/17
78/3 79/17 85/6 87/18	174/25	morning [10] 1/3 1/4	Mrs [1] 146/7	79/6 81/23 84/17 85/3
87/19 91/22 96/18	Mm hm [1] 11/16	52/19 53/1 59/13	Mrs James [1] 146/7	86/24 91/16 93/2 93/4
96/21 97/6 97/12	Mm-hm [23] 3/22 5/17	59/22 79/4 94/16	Ms [24] 1/7 1/13 1/16	93/11 94/18 97/20
102/16 115/20 119/1	13/2 19/22 21/23 57/1	132/15 167/14	73/22 136/14 136/25	102/20 108/10 111/8
122/17 124/25 125/5	58/18 79/22 80/18	Morris [1] 33/16	138/23 143/17 143/18	112/3 112/4 113/6
125/6 130/10 130/15	83/15 99/16 103/12	Moss [1] 176/20	143/23 144/23 145/19	116/12 118/24 119/14
131/19 132/25 133/19	115/12 119/5 120/18	most [11] 2/8 3/17	146/7 148/2 149/10	121/14 122/1 126/16
134/1 134/20 167/7	122/15 122/25 132/16	73/11 101/15 124/12	154/13 154/15 159/12	128/21 131/14 132/12
168/5 169/3 169/23	135/5 136/10 136/18	127/7 128/21 128/21	159/21 160/3 160/7	137/20 137/21 138/8
169/23 170/2 170/4	145/9 152/21	131/13 132/2 152/22	175/15 176/11 183/3	139/20 141/3 142/8
170/8 171/12 181/15	MMR [1] 44/10	mostly [2] 16/21	Ms de Sampayo [9]	142/15 143/3 146/22
ministers' [7] 29/11	modest [1] 57/14	143/4	146/7 148/2 149/10	146/23 151/25 152/1
30/3 59/8 89/5 97/18	moment [8] 1/5 51/9	motives [1] 154/16	154/13 159/12 159/21	155/22 158/8 158/12
132/20 168/3	53/12 55/19 65/10	move [10] 13/16	160/3 160/7 176/11	163/6 167/13 168/22
minute [8] 43/23	151/1 151/13 151/14	13/18 14/19 17/1	Ms de Sampayo's [1]	168/22 171/10 171/11
56/25 61/2 103/20	Monday [1] 148/21	20/23 44/14 46/2	154/15	171/23 173/21 175/7
103/22 115/16 148/20	money [18] 3/19 8/18	102/3 161/15 166/21	Ms James [8] 136/14	176/7 177/13 178/8
	19/3 19/5 34/4 60/13	moved [8] 2/11 2/12	136/25 138/23 143/17	178/24

M	needing [1] 57/18 needn't [1] 88/11 needs [16] 35/7 38/15 60/21 60/21 80/13 80/13 80/14 81/10 83/10 85/7 85/7 94/5 152/4 152/4 162/8 177/25 neglected [1] 128/6 neglecting [1] 95/16 negligence [1] 46/6 negligent [5] 46/8 48/23 51/6 51/14 51/17 Negotiating [1] 15/13 negotiation [1] 82/13 negotiations [3] 102/15 102/23 103/1 nerves [1] 106/23 network [1] 92/12 never [11] 21/15 22/2 30/20 39/20 82/2 88/7 88/21 89/23 111/7 128/4 133/16 new [22] 15/13 16/15 22/8 22/21 23/2 23/4 23/6 23/7 23/12 23/15 26/10 33/13 96/20 116/7 117/10 118/8 121/15 121/22 127/18 132/25 165/20 169/17 news [1] 114/21 next [20] 47/5 47/12 84/9 85/2 85/16 89/15 90/2 90/3 103/23 118/24 119/18 129/3 138/24 142/8 149/16 163/8 163/22 165/10 165/15 165/16 NHBT0000193 [1] 157/16 NHS [20] 3/12 3/17 3/20 6/4 6/4 14/23 24/15 24/22 25/14 44/9 55/10 97/3 97/13 97/20 110/5 119/10 120/7 121/2 164/4 167/10 Nigel [4] 92/5 102/16 161/23 163/14 Nigel Crisp [4] 92/5 102/16 161/23 163/14	night [1] 135/24 no [88] 5/5 5/9 5/12 11/21 22/6 24/14 24/21 25/3 25/13 37/1 41/23 44/15 46/5 46/5 46/7 46/12 48/2 52/19 57/7 60/9 61/9 64/8 65/5 65/17 66/23 67/3 67/8 69/7 71/6 72/14 76/15 76/15 76/18 77/8 77/10 77/16 77/18 83/2 86/24 87/3 89/24 93/8 93/10 98/24 99/23 100/5 105/18 105/22 105/23 107/1 111/1 111/8 119/12 121/8 122/7 122/8 125/3 125/16 128/1 132/10 132/12 136/5 137/17 140/22 140/24 142/17 144/13 146/12 146/19 150/21 154/4 154/18 156/18 157/14 159/13 160/4 161/21 163/23 163/24 170/16 170/19 173/10 175/6 176/18 178/19 179/21 181/3 181/6 no-fault [1] 25/13 nobody [2] 41/6 78/12 nodded [5] 6/17 21/21 26/12 82/9 141/8 Nolan [2] 92/15 92/18 nominate [1] 91/2 nominated [1] 90/16 nominating [1] 90/12 nominations [1] 87/25 nominees [1] 90/23 non [12] 39/14 39/14 40/8 40/8 46/8 48/23 51/6 51/14 51/17 61/15 145/2 153/11 non-A [1] 39/14 non-A, non-B [1] 40/8 Non-B hepatitis [1] 39/14 non-haemophiliacs [1] 61/15 non-negligent [5]	46/8 48/23 51/6 51/14 51/17 None [1] 104/10 nonetheless [1] 147/20 nor [3] 24/4 49/21 162/16 norm [1] 115/21 normally [4] 9/24 18/18 88/20 90/18 not [195] note [20] 37/25 44/5 47/9 47/11 47/16 48/17 49/14 50/6 107/6 133/21 134/2 139/20 148/19 150/7 150/14 150/22 152/17 163/7 170/19 174/8 noted [3] 40/20 65/24 152/12 notes [4] 126/1 127/12 127/13 152/11 nothing [12] 24/25 26/18 40/17 56/9 73/15 76/15 77/23 86/9 93/12 127/18 134/24 140/15 nothing' [1] 58/12 notice [1] 100/2 noticed [2] 40/22 130/7 notification [7] 103/7 107/1 107/7 109/15 113/9 114/8 115/1 notified [6] 107/4 108/16 111/21 113/15 113/20 114/15 notify [1] 106/24 November [8] 68/6 68/15 69/4 70/6 73/22 114/6 136/22 161/23 November 1999 [1] 136/22 November 2002 [1] 114/6 now [73] 1/24 15/24 18/16 19/19 21/5 31/11 32/1 32/23 33/7 34/12 34/13 34/16 34/23 37/4 37/6 37/14 41/1 43/1 43/2 43/8 43/16 44/16 49/14	49/17 49/18 50/5 50/18 65/10 65/24 69/5 74/11 76/10 79/20 82/25 83/8 86/19 88/7 89/7 90/15 90/24 92/23 93/15 93/22 94/19 95/1 95/19 97/23 103/6 105/8 114/10 115/7 116/16 117/6 122/9 133/16 136/6 138/12 138/15 141/5 141/6 141/10 144/10 146/4 146/24 167/19 171/17 173/23 174/1 174/1 174/13 175/12 177/10 178/4 nowhere [1] 101/16 number [12] 7/6 19/19 19/24 20/2 38/22 46/22 104/8 104/20 124/8 162/10 162/11 173/5 numbers [9] 1/10 61/19 62/22 64/11 64/13 64/15 64/16 64/21 71/22 Nurses' [1] 120/25 Nursing [1] 120/25 nvCJD [2] 105/20 105/22
N	name [5] 37/10 66/14 141/1 173/24 175/4 names [1] 180/25 narrow [2] 40/5 40/15 narrower [1] 11/9 NAT [1] 19/6 national [15] 14/24 15/3 17/10 76/23 104/4 104/12 112/10 113/2 115/14 116/20 143/15 162/24 164/24 166/19 167/3 natural [1] 122/2 nature [4] 70/13 80/19 86/8 164/3 NBA [17] 103/18 104/21 105/8 106/4 107/19 107/20 107/21 107/23 108/3 108/7 109/1 116/19 117/2 162/5 164/13 165/22 166/5 NBA/CJDSU [1] 107/23 NBS [1] 163/25 necessarily [5] 36/10 87/16 106/2 128/25 176/1 necessary [1] 171/12 need [30] 13/24 18/1 28/4 28/15 47/11 62/15 75/23 76/3 80/5 81/20 83/14 83/16 89/15 96/6 101/18 105/18 116/7 133/14 139/17 149/15 149/20 151/2 160/25 161/5 161/6 161/24 165/10 165/19 171/12 176/1 needed [22] 16/4 18/18 19/10 19/17 24/2 32/19 35/11 37/21 68/21 83/2 84/14 84/15 95/8 95/9 101/20 101/21 101/21 103/4 158/20 164/23 166/20 167/10			

(70) myself - occasion

O	offices [3] 77/2 124/12 132/20 official [8] 8/20 37/5 37/13 40/20 123/9 123/12 123/13 125/10 officials [13] 33/14 39/1 68/25 69/13 123/19 123/20 130/10 132/22 133/19 134/4 134/22 160/19 176/15 often [9] 9/25 23/14 66/6 82/11 91/20 125/6 133/21 134/9 135/17 oh [5] 124/20 127/24 132/5 134/21 165/15 okay [6] 2/3 54/21 138/2 139/21 141/16 161/17 old [4] 92/12 112/19 137/13 142/5 old-fashioned [1] 112/19 older [1] 179/2 omission [1] 105/5 once [11] 42/22 68/13 68/17 85/14 88/20 113/20 114/15 124/6 126/5 126/7 131/23 one [64] 21/16 22/1 24/21 43/8 49/6 51/10 51/11 51/24 56/1 56/4 61/23 64/9 68/4 70/19 72/1 73/1 74/14 80/4 86/14 89/20 90/9 94/7 94/9 94/23 96/15 97/6 100/9 100/10 100/14 100/16 106/23 109/23 110/15 110/16 110/18 110/18 111/17 113/18 115/5 121/4 121/22 139/8 143/1 144/14 146/11 148/13 148/15 151/22 153/7 154/22 158/20 161/16 170/7 172/21 174/8 176/2 177/12 177/19 178/6 178/23 179/19 179/20 179/25 180/2 One-off [1] 61/23 ones [2] 174/17 174/18	ongoing [7] 42/7 42/19 42/21 80/13 89/5 95/14 163/1 only [25] 20/8 29/16 31/25 35/9 40/6 44/14 54/3 55/21 57/12 77/11 89/2 90/2 92/23 101/19 104/8 115/18 117/19 118/11 127/14 129/25 159/9 159/14 169/16 170/16 171/3 onto [1] 173/21 open [6] 23/10 35/24 48/22 63/4 78/1 121/15 operate [1] 117/3 operated [1] 81/4 operating [3] 80/6 80/24 116/19 operational [2] 164/1 164/3 operationally [2] 80/17 121/21 operations [2] 94/6 166/21 opinion [2] 116/12 170/7 opportunity [13] 22/18 32/22 37/23 55/15 59/10 78/3 85/2 85/16 85/17 155/25 159/3 160/25 161/8 opposed [3] 12/3 88/8 99/9 opposite [1] 71/22 option [10] 57/4 57/22 58/1 58/10 58/13 58/17 59/4 100/13 101/12 101/12 Option 5 [2] 58/17 59/4 option v [1] 58/1 options [14] 9/25 10/4 55/10 56/6 56/8 56/9 56/24 58/3 58/5 58/6 58/19 59/6 77/7 101/15 or [158] 1/5 1/11 3/3 4/11 8/5 8/7 8/7 8/14 8/22 9/7 14/4 14/5 16/9 17/25 18/11 18/20 18/21 18/22	18/23 19/5 22/8 22/20 22/21 23/1 24/2 24/15 27/16 27/17 32/23 36/2 36/3 36/8 36/9 36/17 36/19 38/8 40/3 40/4 40/8 40/8 46/4 48/1 48/5 48/11 51/11 52/12 52/13 53/2 53/6 54/8 56/20 56/20 64/25 66/25 67/15 69/5 69/25 70/19 70/22 72/8 73/10 75/7 76/23 78/5 78/6 78/8 79/5 80/25 81/7 81/18 82/3 82/14 83/24 86/3 86/6 86/7 86/16 86/23 88/10 88/12 90/20 91/20 92/25 93/16 97/16 99/15 100/1 100/3 100/5 103/9 103/9 104/16 105/2 105/3 107/2 107/3 108/21 108/22 113/12 114/2 114/13 114/24 116/23 122/10 123/9 123/12 123/13 124/18 124/24 125/8 126/11 126/19 127/4 127/4 131/2 131/10 133/23 135/20 136/7 137/7 137/9 137/15 139/7 139/11 142/1 142/7 143/1 143/22 145/5 148/2 150/18 151/14 152/4 154/6 157/3 159/3 159/4 160/7 167/15 167/22 168/6 168/12 168/19 169/17 170/10 171/14 171/17 172/9 173/23 174/20 175/4 175/23 176/15 177/3 177/12 178/18 178/19 179/22 oral [4] 2/17 4/18 4/21 6/14 order [8] 3/2 33/12 72/7 72/8 73/3 120/11 131/5 145/11 ordered [2] 141/1 173/24 organisation [1] 82/17	Organisations [3] 79/21 90/9 95/6 organs [1] 114/2 orientated [1] 164/18 original [1] 40/22 other [46] 3/3 8/19 12/5 16/22 21/24 36/19 48/22 59/6 60/13 63/1 64/23 66/22 66/25 68/10 74/25 75/8 76/1 77/9 80/6 97/8 100/16 101/13 103/3 105/17 107/15 109/12 110/12 115/22 118/19 119/13 122/23 125/14 132/12 133/23 137/9 145/4 150/23 152/12 158/18 162/25 164/3 168/14 168/17 176/13 176/14 177/13 others [10] 35/2 44/8 50/16 53/15 54/9 63/5 87/21 122/3 131/21 171/14 otherwise [5] 44/14 83/24 97/20 128/3 170/10 ought [2] 119/2 156/25 our [16] 4/6 29/11 30/3 34/21 51/4 52/3 70/21 71/21 81/2 81/20 107/19 111/12 113/23 137/5 143/18 167/8 ourselves [1] 29/11 out [99] 3/20 7/6 7/7 7/13 8/25 10/4 24/6 24/10 24/16 26/14 37/22 41/3 47/11 47/19 51/14 56/6 57/5 58/10 58/14 58/20 59/2 60/19 60/20 61/17 61/19 61/21 61/24 62/15 62/22 62/23 63/11 68/21 69/12 70/7 72/8 74/1 76/18 82/15 87/15 90/3 91/15 92/1 92/3 93/23 96/10 104/2 104/24 105/10 105/14
----------	--	--	---	---

(71) occasion... - out

<p>O</p> <p>out... [50] 106/20 109/5 109/9 109/17 110/4 111/12 111/20 116/10 118/20 119/21 119/25 120/11 120/16 120/19 121/20 122/5 128/19 130/24 135/11 138/1 138/13 139/2 141/6 141/9 143/6 144/11 145/20 146/15 147/11 149/2 149/8 151/3 153/5 153/15 154/6 154/9 155/18 156/1 162/9 163/6 165/12 165/16 165/18 167/8 170/21 173/5 174/8 175/17 179/12 181/5</p> <p>outcome [4] 32/22 36/1 57/9 107/18</p> <p>outcomes [2] 97/8 97/9</p> <p>outgoing [1] 29/3</p> <p>outlay [1] 58/19</p> <p>outline [1] 55/10</p> <p>outside [2] 35/16 36/20</p> <p>outstanding [1] 38/6</p> <p>over [47] 4/7 7/22 8/15 24/20 25/18 28/7 28/9 32/25 41/5 47/18 48/20 50/24 58/9 60/15 63/11 68/5 68/8 70/17 74/15 84/7 85/9 87/19 95/2 96/15 97/4 103/22 105/6 109/4 110/2 114/18 116/4 119/3 137/12 142/12 142/17 142/18 144/18 145/18 149/11 152/10 153/14 153/20 154/25 156/19 165/15 168/21 181/13</p> <p>overall [2] 23/23 111/15</p> <p>overcome [1] 70/11</p> <p>override [1] 106/2</p> <p>overview [2] 1/17 14/14</p> <p>overwhelmed [1]</p>	<p>162/8</p> <p>overwhelming [1] 97/12</p> <p>owe [1] 7/20</p> <p>owed [1] 106/18</p> <p>Owen [8] 33/13 34/2 34/5 35/2 122/18 123/4 130/2 133/17</p> <p>Owen's [4] 33/16 122/20 132/14 136/4</p> <p>own [9] 69/23 74/12 93/2 100/20 111/1 124/23 150/10 167/17 167/20</p> <p>owner [1] 101/7</p> <p>ownership [3] 100/20 101/1 101/6</p> <p>P</p> <p>PA [1] 112/22</p> <p>pack [1] 23/16</p> <p>package [12] 46/17 47/14 47/20 48/19 49/8 49/8 60/17 60/24 61/8 61/22 62/23 74/13</p> <p>page [58] 7/3 7/22 8/15 14/16 23/22 24/12 25/18 26/5 26/16 28/3 28/5 28/7 28/9 28/9 28/16 31/19 32/25 42/11 46/16 46/18 46/23 50/24 55/19 56/6 58/9 58/17 60/15 60/15 61/19 63/10 63/11 67/20 68/5 68/8 70/17 74/15 74/16 103/23 105/6 116/4 138/21 144/18 145/18 146/15 149/11 153/14 154/25 156/19 157/18 161/24 162/3 165/10 165/13 165/13 165/15 165/16 166/3 174/13</p> <p>page 11 [1] 138/21</p> <p>Page 18 [1] 146/15</p> <p>page 2 [4] 28/5 58/9 74/16 165/13</p> <p>page 3 [5] 28/3 46/18 50/24 60/15 157/18</p> <p>page 4 [1] 56/6</p>	<p>page 46 [1] 7/3</p> <p>page 5 [2] 14/16 58/17</p> <p>page 64 [1] 24/12</p> <p>page 66 [1] 23/22</p> <p>page 7 [1] 67/20</p> <p>page 74 [1] 42/11</p> <p>page 77 [1] 31/19</p> <p>page 8 [1] 68/5</p> <p>pages [1] 55/23</p> <p>panel [10] 98/8 109/24 110/21 111/4 111/14 111/18 113/16 113/17 114/4 115/4</p> <p>paper [14] 7/5 55/7 56/24 58/3 59/21 122/19 123/23 123/24 125/15 126/8 129/7 172/2 172/11 175/9</p> <p>papers [73] 33/23 34/23 34/25 35/22 41/16 122/12 122/20 123/1 123/18 123/25 124/4 124/21 124/24 125/2 125/7 125/12 125/14 126/4 126/20 128/11 128/15 129/17 130/1 132/14 132/19 132/22 133/10 133/15 133/17 134/23 134/25 135/12 135/18 136/4 136/7 136/8 136/9 136/13 137/5 137/6 137/13 138/9 140/11 142/5 142/7 142/20 143/5 143/16 143/21 143/24 144/2 145/14 145/16 147/1 147/3 147/6 147/15 147/17 147/22 148/5 148/11 149/23 149/25 151/7 151/15 151/19 151/20 152/2 153/22 154/4 159/12 159/18 173/1</p> <p>paperwork [1] 95/7</p> <p>paragraph [59] 7/8 7/16 7/23 7/25 8/1 8/9 8/16 14/17 28/18 32/12 35/21 42/12 43/21 43/21 43/21 44/17 44/21 50/25 52/2 53/12 60/19</p>	<p>60/20 60/23 61/8 61/13 63/12 64/10 69/11 70/7 70/8 70/18 71/3 71/4 71/10 72/17 74/18 104/3 105/7 106/16 115/15 115/25 116/5 116/11 138/21 138/24 141/24 145/18 146/16 149/3 149/5 149/5 151/4 153/17 153/19 154/25 155/5 162/3 163/22 164/10</p> <p>paragraph 1 [1] 7/8</p> <p>paragraph 1.7 [1] 14/17</p> <p>paragraph 10 [3] 52/2 61/13 71/10</p> <p>paragraph 11 [1] 72/17</p> <p>paragraph 2 [6] 7/16 70/7 104/3 115/15 149/3 153/17</p> <p>paragraph 2.20 [1] 138/21</p> <p>paragraph 2.39 [1] 151/4</p> <p>paragraph 2.40 [1] 146/16</p> <p>paragraph 2.9 [1] 141/24</p> <p>paragraph 3 [5] 7/25 64/10 115/25 149/5 153/19</p> <p>paragraph 4 [2] 70/8 149/5</p> <p>paragraph 4.86 [1] 42/12</p> <p>paragraph 5 [3] 7/23 8/1 145/18</p> <p>paragraph 6 [4] 8/9 63/12 105/7 116/11</p> <p>paragraph 7 [5] 8/16 60/20 70/18 154/25 155/5</p> <p>paragraph 8 [2] 60/19 60/23</p> <p>paragraph 9 [5] 50/25 53/12 61/8 71/3 71/4</p> <p>paragraphs [1] 116/5</p> <p>paragraphs 5 [1] 116/5</p> <p>paraphrasing [1] 86/4</p>	<p>Parliament [9] 8/7 19/14 25/3 27/21 29/9 32/2 33/14 88/9 123/6</p> <p>Parliament's [1] 66/1</p> <p>Parliamentary [4] 20/7 20/15 29/3 29/10</p> <p>part [28] 5/11 9/15 11/12 11/19 11/21 12/2 12/21 35/10 36/13 43/24 46/6 93/8 98/17 111/15 122/24 126/15 130/25 131/19 132/8 133/6 135/8 151/16 155/14 160/8 163/20 171/11 175/7 178/24</p> <p>participants [5] 1/9 161/1 161/9 176/11 176/19</p> <p>particular [21] 9/23 11/3 21/3 23/8 29/15 59/16 80/25 81/1 88/5 98/21 106/21 116/13 122/18 124/10 127/19 133/18 134/18 135/21 140/19 142/5 178/22</p> <p>particularly [4] 5/2 78/12 88/5 118/3</p> <p>parties [1] 54/4</p> <p>partly [1] 177/24</p> <p>parts [1] 26/3</p> <p>party [5] 120/12 121/20 136/17 145/2 153/11</p> <p>pass [1] 131/20</p> <p>passed [4] 45/3 173/21 173/22 178/16</p> <p>passing [3] 115/17 115/19 181/19</p> <p>past [2] 26/11 89/10</p> <p>Pat [10] 12/24 17/2 17/13 110/5 146/5 148/8 148/9 148/9 148/10 148/17</p> <p>Pat Troop [4] 110/5 148/8 148/9 148/17</p> <p>paternalism [1] 106/6</p> <p>patient [11] 62/12 115/17 115/20 115/24 120/11 120/16 120/19 120/21 121/6 121/8 121/12</p>
---	---	---	---	---

(72) out... - patient

P	per [1] 84/20 perception [1] 29/1 performance [2] 165/17 165/18 perhaps [16] 16/7 27/16 32/19 51/10 87/18 112/7 136/24 137/25 138/19 143/16 151/11 177/3 177/4 180/1 181/15 181/18 period [15] 1/20 5/19 13/15 24/20 33/18 84/25 96/20 100/2 109/4 110/3 111/22 111/25 114/19 121/25 145/6 periodic [1] 167/25 periodically [2] 124/14 160/20 periods [1] 111/17 permanent [13] 92/13 92/16 102/17 148/24 149/21 150/7 150/23 151/12 152/14 152/17 154/12 156/25 157/9 Permanent Secretary [1] 149/21 permission [1] 47/23 Perry [1] 143/12 person [14] 13/7 49/21 74/24 106/22 121/4 141/1 155/10 160/10 160/13 172/16 173/24 178/6 179/7 179/17 personal [3] 146/22 149/23 153/22 personally [1] 169/2 perspective [2] 44/7 109/20 persuade [3] 49/3 72/8 170/10 Peter [11] 28/6 28/8 28/9 28/12 28/19 41/12 88/5 91/6 91/9 91/15 92/2 Peter Burgin [1] 41/12 Peter Stevens [3] 88/5 91/6 91/15 Peter Stevens' [2] 91/9 92/2	Peter's [1] 37/10 Peters [1] 91/18 PH [1] 59/25 pharmaceutical [1] 100/18 phased [1] 119/2 Philip [1] 50/8 Philip Hunt [1] 50/8 phones [1] 68/7 pick [9] 7/23 8/15 50/5 50/24 64/9 68/5 77/22 107/2 176/8 picked [2] 9/7 42/2 picking [2] 55/18 154/24 piece [2] 95/7 175/9 pile [1] 135/16 pill [1] 150/24 PL [1] 105/10 place [6] 23/14 44/2 60/10 81/12 109/17 149/24 places [2] 55/21 122/23 plain [1] 179/13 plan [1] 83/13 plank [2] 24/23 52/3 planning [1] 125/7 plasma [21] 15/10 52/22 98/24 98/24 99/6 99/7 99/9 99/10 99/15 99/15 99/20 99/21 99/23 100/6 100/19 101/14 101/17 101/20 103/9 103/15 118/9 plasma-based [1] 52/22 play [1] 132/8 played [2] 42/13 42/22 please [29] 1/14 7/3 7/22 14/17 23/21 26/16 28/3 31/20 42/11 43/15 46/15 50/24 56/6 60/15 68/5 73/7 82/25 103/22 105/6 106/14 107/13 138/21 145/18 146/15 154/25 157/18 161/22 166/3 172/19 pledge [2] 33/14	123/5 plenty [2] 18/4 134/5 plug [1] 87/4 plural [1] 30/9 plus [1] 12/16 pm [8] 50/1 95/23 95/25 138/16 138/18 161/12 161/14 182/1 point [60] 5/1 11/25 11/25 26/17 27/9 45/5 48/19 48/24 49/4 50/19 55/18 55/20 60/14 61/13 63/2 63/3 64/9 65/10 65/18 66/11 67/14 72/1 73/21 75/2 75/22 76/21 77/3 78/16 79/6 81/18 85/4 85/5 85/18 85/18 88/13 88/22 89/3 91/17 94/20 98/22 99/13 101/8 105/1 105/25 106/25 108/19 110/3 114/3 117/15 125/13 129/14 154/24 158/16 159/6 163/22 167/1 167/4 168/22 171/24 178/8 pointed [1] 96/10 pointing [1] 158/24 points [9] 22/20 27/20 27/20 50/25 66/20 70/15 115/25 116/2 130/9 policies [7] 7/13 21/15 22/2 23/5 23/14 23/17 80/24 policy [62] 2/18 3/5 3/25 5/6 5/14 5/19 6/19 10/17 10/18 10/20 11/19 11/20 12/1 12/6 14/14 14/19 14/22 17/5 17/24 19/20 21/7 21/18 22/6 23/2 23/8 23/20 26/23 29/13 31/3 33/1 38/25 39/17 39/18 43/14 53/2 77/5 77/8 79/24 86/7 86/11 89/3 90/24 98/1 98/3 99/13 116/14 117/4 117/9 118/22 124/3 127/15 127/17 134/16 135/21	141/17 161/19 162/5 162/17 163/21 164/2 167/19 180/22 political [8] 7/12 32/10 72/25 73/4 73/10 168/19 169/2 170/18 politics [1] 166/22 pooled [2] 39/16 99/10 pooling [1] 26/3 pools [1] 125/22 poor [3] 97/8 97/9 152/1 poorly [1] 166/8 portfolios [2] 11/3 21/4 position [23] 13/8 22/11 28/20 29/18 30/14 30/25 31/9 36/2 52/11 52/17 54/11 55/7 55/13 70/4 72/12 72/14 72/16 79/15 117/13 117/23 168/20 171/7 171/11 positions [1] 8/20 positive [4] 62/1 62/2 62/12 88/25 possibility [4] 48/18 82/3 88/8 119/13 possible [22] 3/20 12/7 14/1 18/17 48/10 48/18 52/20 53/5 54/16 61/22 62/19 63/16 77/25 102/2 106/19 108/4 119/15 137/21 164/20 170/12 179/6 181/9 possibly [12] 31/6 31/9 40/24 40/25 54/18 67/25 75/7 86/15 105/3 119/9 143/1 158/20 post [2] 43/4 79/23 posts [1] 20/1 potential [6] 10/4 25/13 36/25 107/8 118/7 152/24 potentially [5] 36/19 36/20 98/10 100/5 114/21 power [5] 69/2 69/14
----------	---	---	--	---

(73) patients - power

P	prevalence [1] 5/2 prevent [5] 25/10 69/2 153/4 157/24 158/2 preventative [1] 105/24 prevented [1] 26/1 preventing [1] 74/11 previous [8] 19/7 30/13 59/8 96/25 105/12 133/10 166/3 166/13 previously [6] 26/13 47/19 88/24 153/23 158/18 169/17 price [2] 120/5 120/8 primary [4] 39/4 120/15 120/25 168/10 Prime [1] 72/18 principal [3] 71/8 102/14 116/8 principles [4] 60/20 68/17 92/15 92/18 print [1] 126/8 printed [2] 7/5 172/12 prior [3] 29/2 50/23 166/17 priorities [5] 14/5 96/23 163/10 163/12 166/2 prioritise [2] 16/5 95/4 prioritised [1] 164/14 priority [3] 95/3 95/5 97/12 prism [1] 27/13 private [35] 2/7 2/9 69/10 101/1 101/5 122/20 123/18 124/20 125/12 132/14 132/15 132/19 132/20 133/3 133/17 133/21 134/2 134/3 134/9 134/14 134/17 134/20 134/23 134/25 134/25 135/12 135/19 135/21 135/25 136/4 147/15 151/7 151/19 152/18 159/12 privately [1] 159/18 probable [2] 65/9 65/12 probably [21] 37/7	47/5 51/23 59/7 65/7 68/13 94/20 97/17 107/7 114/17 134/8 134/11 152/22 155/7 158/14 161/6 163/3 165/10 167/24 169/18 175/11 problem [6] 25/4 25/6 25/15 53/16 114/13 152/24 problems [2] 16/2 106/20 procedure [3] 75/19 133/7 158/23 procedures [3] 7/6 156/1 157/22 proceed [1] 146/8 process [32] 3/14 17/23 18/9 23/12 33/21 81/15 82/5 82/22 84/6 92/5 92/14 102/4 103/7 103/7 109/16 115/1 122/4 125/25 126/5 127/2 128/12 128/14 128/17 135/10 146/9 150/12 153/15 154/10 159/15 160/8 166/5 167/23 processing [1] 166/11 produce [2] 33/19 39/24 produced [5] 39/17 68/4 126/22 151/20 171/25 product [10] 51/19 53/19 53/21 54/13 100/13 103/14 110/23 118/13 118/14 118/18 products [41] 5/8 14/23 15/7 15/9 25/25 38/21 38/24 39/11 39/16 39/19 39/22 39/25 50/23 51/5 52/5 52/22 52/24 53/17 55/5 58/7 66/5 68/11 74/1 98/25 99/10 99/20 99/25 100/7 100/11 103/9 103/13 103/14 105/3 108/13 108/15 117/7 117/25 118/6 118/10 118/17	120/4 Professor [4] 17/11 98/9 143/3 143/8 Professor Banner [1] 98/9 Professor Lindsey Davis [1] 17/11 Professor Zuckerman [1] 143/8 Professor Zuckerman's [1] 143/3 profile [1] 25/13 programme [5] 2/23 5/23 5/25 120/11 122/5 progress [2] 46/9 138/23 project [1] 102/13 prolonged [3] 109/4 110/3 114/9 promotion [2] 4/24 5/1 prompted [1] 68/1 promptly [1] 8/13 proof [1] 73/17 proper [5] 8/18 84/13 84/22 92/14 167/3 properly [7] 10/13 37/23 83/13 126/15 155/18 177/9 180/7 proportion [1] 65/1 proposal [1] 101/2 proposals [3] 76/15 162/12 166/11 proposed [1] 83/16 Proprietary [1] 29/23 prospect [1] 118/17 protect [1] 113/24 Protection [2] 51/18 74/8 prove [3] 65/6 75/13 76/7 provide [11] 9/22 17/14 25/6 55/7 85/1 85/8 87/2 118/11 131/5 181/3 181/8 provided [16] 34/5 34/7 37/15 83/24 88/13 114/5 117/17 130/3 130/19 133/1 141/13 162/5 162/6	162/7 163/7 181/1 providers [1] 99/22 provides [1] 57/9 providing [8] 9/24 59/9 83/23 84/1 84/18 113/8 114/7 131/19 provision [6] 9/16 11/6 15/3 113/19 114/14 117/16 provisions [2] 7/19 8/19 PS [1] 59/25 public [60] 7/14 8/8 8/11 8/13 8/18 12/19 12/23 13/16 15/16 17/1 17/12 17/19 19/3 19/10 21/6 21/8 22/6 23/25 24/24 25/2 25/12 25/16 26/20 27/4 27/8 29/5 31/12 31/23 32/1 32/5 32/16 33/5 33/20 36/11 36/11 36/15 36/22 36/25 41/3 42/7 42/14 42/17 42/25 44/4 45/1 52/17 53/6 56/15 71/20 78/7 79/4 79/14 92/9 92/15 96/23 97/1 130/24 146/6 164/25 170/7 public-wide [1] 31/12 publicly [5] 87/7 87/10 87/13 92/10 93/18 publish [1] 68/9 published [5] 7/1 40/14 42/22 66/2 66/9 pulled [1] 87/4 purchase [6] 101/3 101/18 101/23 102/4 102/10 102/15 Purchasing [2] 120/7 121/2 purpose [9] 38/19 40/2 55/12 67/22 69/19 71/8 74/1 107/1 158/2 purposes [2] 70/11 115/23 pursue [1] 39/8 push [3] 61/15 63/25 167/8
----------	---	---	---	--

(74) power... - push

P	167/14 168/7 171/17 173/23 176/19 176/20 176/21 176/22 183/4 quick [1] 157/1 quickly [4] 20/22 52/20 53/4 94/21 quite [20] 13/11 16/18 41/7 46/21 68/2 78/2 78/23 82/11 85/5 101/22 102/13 102/25 110/9 133/16 135/17 136/21 143/4 144/6 146/6 179/11 quote [1] 37/24	156/20 164/10 174/5 174/12 175/14 real [4] 77/7 78/3 83/1 181/12 realise [1] 137/14 really [28] 27/8 27/12 31/8 40/6 44/20 45/9 47/22 48/8 48/12 48/23 49/4 57/24 64/1 72/15 74/15 80/22 127/24 131/21 131/24 151/8 151/19 159/4 163/16 167/24 170/6 176/24 177/4 179/11 reason [17] 25/20 26/6 30/6 31/10 36/13 50/18 51/12 75/12 81/22 82/18 89/24 112/7 125/3 151/15 158/4 163/23 181/3 reasonably [1] 109/13 reasoning [1] 147/9 reasons [11] 19/23 24/12 24/16 33/4 39/20 43/8 57/5 94/13 110/7 119/10 179/24 reassemble [1] 141/11 recall [49] 12/7 12/8 13/21 13/22 23/25 24/4 30/2 36/13 36/24 37/6 37/11 40/10 40/15 41/1 41/10 48/2 48/6 48/11 51/7 62/17 62/20 67/22 68/1 68/3 75/6 75/9 77/1 86/10 90/21 102/18 108/22 112/4 114/13 116/25 117/14 129/9 131/16 135/10 135/22 143/23 145/13 150/13 155/19 162/20 164/14 171/4 171/13 172/2 172/5 receipt [2] 81/7 116/24 receive [2] 107/12 164/4 received [20] 41/18 53/24 64/18 74/10 80/5 84/23 84/25 103/8 104/6 105/3	105/18 106/15 107/24 108/12 108/15 108/24 110/22 138/22 146/17 154/13 receiving [4] 51/24 66/12 117/22 160/18 recent [3] 55/8 62/10 100/24 recently [2] 28/25 139/7 recess [1] 57/19 recipients [2] 107/7 114/8 recognise [1] 50/14 recognised [4] 37/20 45/5 100/4 180/24 recognising [2] 76/3 130/9 recognition [1] 177/24 recollect [1] 178/25 recollected [1] 126/24 recollection [7] 36/16 45/15 49/12 49/13 91/18 121/14 150/18 recombinant [14] 15/4 15/7 19/5 37/22 96/14 117/7 117/9 117/16 117/17 117/24 118/10 118/22 119/2 120/17 recommendation [2] 10/1 153/1 recommendations [4] 66/8 155/13 156/14 157/24 recommended [2] 57/4 177/20 reconsider [1] 30/21 reconsideration [1] 26/10 record [6] 125/10 126/11 129/4 129/14 155/22 175/8 recording [1] 128/19 records [19] 75/12 76/6 97/25 98/1 107/18 124/15 126/1 126/20 127/13 129/6 129/8 129/13 139/25 142/25 146/10 159/17	172/4 172/15 173/16 recover [1] 58/22 redevelopment [1] 162/13 redrafting [1] 111/13 reduce [2] 15/1 61/4 reduced [1] 32/19 reduction [1] 98/21 reductions [1] 120/5 refer [6] 20/15 79/7 149/22 150/15 162/1 165/4 reference [11] 38/7 67/18 73/20 91/9 138/8 139/18 144/3 144/15 152/16 169/21 175/14 referenced [1] 59/22 references [2] 98/1 173/5 referrals [1] 110/8 referred [5] 27/8 40/12 66/7 67/14 91/25 referring [6] 30/12 67/2 75/10 110/10 163/18 165/24 refers [2] 56/24 62/17 reflect [1] 51/9 reflected [4] 44/4 78/4 90/25 163/14 reflecting [2] 77/4 96/15 reflections [2] 24/6 96/17 refusal [1] 51/4 refused [1] 96/18 refusing [3] 43/9 50/21 52/3 regard [2] 107/8 114/8 regarding [1] 113/9 regional [2] 166/17 166/18 register [2] 127/2 139/13 registered [29] 123/9 123/12 123/14 123/15 123/17 124/4 124/5 124/13 125/9 125/12 125/15 125/17 125/18 126/23 129/18 131/5
QC [3] 144/17 181/23 181/24 quality [1] 15/14 quantity [2] 101/17 101/21 question [44] 30/6 31/9 32/10 40/2 51/10 54/21 56/2 56/4 60/11 60/12 63/9 65/12 67/3 67/15 78/15 82/8 86/4 86/7 93/2 98/20 102/5 108/10 108/12 109/2 109/2 112/7 114/23 115/24 118/12 118/14 118/25 130/4 138/3 147/16 164/5 169/6 169/8 176/10 177/2 178/3 178/21 180/6 180/19 181/5 questioned [4] 1/16 91/17 169/12 183/3 questioning [1] 78/15 questions [54] 1/7 5/16 6/18 6/21 7/2 15/6 15/12 15/18 15/23 17/18 20/14 21/5 24/8 24/18 26/22 30/1 32/18 33/7 34/10 34/12 43/1 55/24 60/2 60/6 60/7 63/4 78/12 79/20 90/8 96/13 96/16 97/23 103/6 117/6 122/9 129/2 136/11 137/24 144/10 146/12 160/22 161/1 161/9 161/15 161/25	R raise [2] 25/13 53/13 raised [11] 33/16 63/4 67/8 76/21 106/3 106/12 118/4 164/25 166/10 171/5 171/6 raises [1] 104/20 raising [2] 67/15 148/20 range [11] 3/6 9/21 10/10 10/16 11/3 14/20 15/24 19/12 19/14 20/2 20/2 ranged [1] 62/11 rank [1] 11/11 ranking [2] 11/1 79/16 Rarely [1] 167/21 rate [2] 62/10 117/8 rather [21] 6/23 20/21 25/5 35/6 43/19 47/20 65/25 96/7 100/14 105/5 108/10 109/4 110/3 112/18 112/24 127/10 156/1 164/5 170/2 177/4 178/4 rationale [2] 36/6 59/4 rationalisation [1] 166/7 re [1] 57/7 re-establishes [1] 57/7 reached [3] 41/2 61/24 77/3 reactions [2] 2/15 3/5 read [7] 69/11 127/1			

(75) pushed - registered

R				
registered... [13] 134/16 134/24 135/14 137/8 139/9 147/17 147/18 147/23 150/1 154/7 159/10 159/16 160/18	reluctant [1] 30/18 relying [2] 30/19 120/4 remain [1] 21/22 remained [1] 45/25 remains [1] 35/23 remark [1] 176/25 remember [26] 3/1 17/8 17/12 38/7 38/10 45/4 66/14 67/23 84/17 90/17 119/8 124/17 125/21 127/20 130/20 131/15 133/5 137/19 163/17 164/8 169/15 174/1 174/2 174/22 174/23 179/2 remit [6] 40/5 40/11 40/12 40/15 40/17 159/14 remotely [1] 6/14 remove [1] 27/10 renew [1] 88/21 renewed [1] 29/7 reorganisation [2] 12/22 166/5 reorganisations [1] 168/1 repeat [1] 48/9 repeatedly [1] 179/18 repercussions [1] 171/2 replacement [1] 162/13 replicated [1] 135/13 replied [1] 138/25 reply [1] 112/17 report [24] 32/14 33/8 33/9 36/7 37/2 37/14 38/16 38/19 39/1 39/7 40/1 40/14 41/18 41/22 41/25 42/4 66/2 66/9 68/9 148/5 155/13 157/15 157/19 166/12 reported [4] 11/17 13/1 69/8 69/9 reporting [4] 12/3 12/14 13/6 34/2 reports [1] 145/3 representation [1] 48/17 representations [1]	153/3 representative [2] 121/6 121/12 representatives [5] 45/18 120/21 121/8 161/2 171/14 request [4] 43/5 69/14 85/11 106/13 requested [1] 55/7 requests [1] 173/4 require [2] 83/12 162/17 required [4] 8/21 19/15 39/25 40/4 requirement [1] 92/11 requires [1] 107/7 research [2] 4/15 7/5 reservations [1] 71/3 reserve [4] 80/24 81/17 81/22 81/24 reserved [1] 168/18 resist [2] 29/12 30/4 resistance [1] 165/2 resisted [2] 87/19 87/23 Resolution [1] 32/5 resolve [3] 73/9 73/9 73/10 resolved [3] 32/3 71/21 73/1 resources [7] 16/16 16/18 99/17 101/4 101/19 101/24 102/4 respect [4] 53/19 62/6 116/19 180/21 respect of [1] 62/6 respond [1] 162/16 responding [2] 60/7 163/21 response [14] 4/6 42/16 60/2 60/3 87/10 92/2 92/20 106/15 112/2 114/11 148/10 151/2 163/14 170/7 responses [1] 15/15 responsibilities [5] 3/24 11/10 12/5 14/20 177/18 responsibility [10] 4/4 4/7 8/1 9/13 11/5 31/1 93/7 98/13 124/2 177/11	responsible [10] 7/15 9/17 16/13 20/18 59/15 90/12 98/5 98/8 115/3 160/18 responsive [1] 87/13 rest [1] 71/19 restrict [1] 61/5 result [14] 4/17 26/23 33/19 34/10 39/2 39/7 53/17 55/13 63/20 92/3 94/15 123/4 133/11 161/20 results [2] 34/6 54/12 retain [1] 96/25 retained [2] 146/20 146/24 retire [1] 101/8 retired [7] 6/7 91/2 92/7 92/8 92/24 137/11 154/4 retirement [1] 149/25 retrieve [2] 137/9 154/7 retrieved [1] 124/16 return [2] 73/16 133/22 returned [1] 5/22 returning [1] 133/12 review [35] 10/7 22/9 22/19 23/1 23/5 23/9 32/14 36/14 36/19 37/18 37/23 39/7 40/11 42/13 42/18 42/19 53/1 55/16 84/4 84/5 84/9 85/3 85/15 85/17 85/21 88/14 88/20 119/18 127/3 129/9 158/2 166/10 172/7 172/9 178/16 reviewing [2] 77/7 160/19 reviews [1] 23/14 Richard [1] 42/3 Richard Gutowski [1] 42/3 Richards [1] 175/15 rid [1] 134/18 right [95] 1/22 3/1 3/24 4/1 4/8 4/14 4/24 5/5 6/2 6/6 8/10 8/23 11/13 12/9 13/15 21/6 23/11 26/4 30/7 33/10	33/16 33/24 35/3 35/17 36/5 37/8 37/14 37/18 38/5 39/3 43/3 50/11 52/9 55/14 56/1 62/25 63/1 63/13 64/5 68/24 77/20 79/12 79/25 80/1 80/22 81/15 82/5 90/11 91/5 92/4 92/6 92/21 99/5 101/22 103/25 104/9 110/13 110/19 112/24 117/7 117/23 118/11 119/7 119/21 119/23 121/3 121/4 122/4 123/7 126/3 129/20 130/19 131/4 131/24 136/12 136/24 139/4 140/13 141/18 142/14 144/4 144/5 144/21 145/12 147/2 152/19 156/24 157/7 159/20 165/7 172/22 172/23 174/7 178/11 178/14 right-hand [1] 126/3 rightly [1] 178/25 rights [1] 106/5 ring [3] 138/6 175/1 175/5 rise [2] 33/9 177/6 rising [2] 61/23 120/9 risk [14] 15/1 27/10 74/25 76/1 78/14 78/21 79/1 86/17 98/20 98/21 100/15 101/6 108/16 108/17 risks [4] 39/15 116/15 118/6 118/8 RLIT0001626 [1] 7/2 Roberts [1] 115/7 Robinson [2] 143/14 162/25 Roland [2] 34/2 130/11 Roland Moyle [1] 130/11 role [35] 2/18 3/23 4/7 4/17 4/22 5/6 5/7 5/13 6/10 6/15 6/19 6/22 7/9 9/15 10/17 10/18 10/20 10/21 10/23 11/1 11/2 14/5 14/13 14/21 42/13 42/22

(76) registered... - role

R	79/9 80/19 82/6 84/14 86/14 89/8 110/22 111/11 115/9 119/12 134/5 137/14 141/3 152/19 158/10 160/2 164/12 167/16 169/13 169/22 173/25 177/3 sake [1] 168/2 salmonella [2] 4/1 4/2 same [22] 21/19 21/22 23/12 29/6 53/16 58/19 78/13 87/18 89/1 91/10 97/3 100/23 129/16 133/12 138/25 178/6 179/10 179/17 180/18 180/21 180/22 180/22 Sampayo [11] 146/4 146/7 148/2 148/8 149/10 154/13 159/12 159/21 160/3 160/7 176/11 Sampayo's [1] 154/15 Sandra [1] 143/9 sat [1] 11/20 satisfactory [4] 25/7 82/16 89/20 152/5 satisfied [1] 92/20 satisfy [1] 92/18 save [3] 1/20 26/4 26/8 saved [1] 95/18 saw [1] 179/7 say [87] 10/4 14/18 18/15 20/5 22/20 23/19 23/22 24/13 28/1 28/24 30/3 31/14 31/20 31/22 31/24 32/12 33/4 33/17 37/5 43/23 44/12 45/2 45/6 47/12 49/19 51/25 59/10 60/1 60/23 61/22 62/8 63/14 64/12 64/20 70/17 71/3 71/16 72/1 72/24 74/20 75/16 78/23 80/23 81/20 82/13 83/4 86/8 89/15 90/1 93/18 94/11 94/18 98/15 99/2 99/15 103/14 103/18 104/19	105/1 106/9 107/16 108/5 113/22 114/10 127/3 127/19 131/25 133/23 143/8 147/13 147/20 149/14 150/18 151/6 156/12 156/21 160/13 162/15 165/3 165/17 170/18 171/25 172/24 175/23 180/3 180/25 181/7 saying [23] 21/16 21/24 22/12 38/14 44/18 57/21 57/22 62/14 72/3 73/6 75/24 76/1 78/25 82/10 82/25 87/8 88/7 114/6 130/13 134/4 151/5 163/24 176/24 says [30] 28/9 28/10 34/20 35/21 38/18 46/23 47/8 47/15 55/6 73/20 83/7 111/8 112/11 113/5 113/11 114/5 139/1 145/20 146/18 149/5 151/18 154/25 162/6 162/11 166/4 173/3 174/13 174/14 174/15 174/19 scale [1] 61/23 scheme [58] 3/3 3/4 43/2 43/6 43/9 43/9 46/3 46/12 48/5 51/13 60/10 61/18 62/18 64/2 64/5 64/11 64/14 64/22 65/2 65/3 65/8 65/11 67/5 67/16 69/23 70/12 70/21 70/24 70/25 71/3 71/8 71/17 71/19 72/7 73/12 74/17 74/20 74/20 75/19 75/19 75/24 76/10 76/13 76/23 77/5 77/14 77/17 77/25 78/1 78/7 79/4 96/9 96/19 97/19 161/19 168/10 168/14 169/5 schemes [4] 48/5 48/15 74/23 75/25 school [1] 2/4 science [1] 25/4 scientist [1] 13/2	scientists [1] 162/25 scope [1] 157/18 Scotland [29] 28/20 29/2 29/14 29/16 65/25 66/11 66/18 66/21 67/1 67/1 67/9 67/11 67/12 70/7 73/13 76/22 76/24 117/13 117/15 143/10 143/10 143/11 169/16 170/2 170/5 170/9 170/13 170/16 171/5 Scotland's [3] 67/7 71/1 71/18 Scots [4] 68/23 69/1 69/13 72/12 Scott [4] 1/7 1/13 1/16 183/3 Scottish [16] 28/25 29/4 29/9 29/9 66/1 66/3 68/12 69/21 69/22 70/8 72/7 168/10 169/15 171/3 171/8 171/14 screen [5] 53/13 137/21 138/1 138/19 175/20 screening [5] 40/8 52/7 52/23 53/4 145/5 SEAC [3] 4/11 98/16 98/18 search [2] 35/6 131/17 searched [1] 129/21 second [22] 14/15 26/5 26/17 35/21 36/5 43/21 50/19 58/23 60/12 78/4 79/6 96/13 106/17 116/5 116/5 118/16 118/20 121/12 122/19 153/8 161/24 175/25 secondly [1] 19/25 secretariat [7] 2/14 3/6 3/9 4/10 98/16 142/7 142/13 secretaries [2] 20/9 20/15 secretary [53] 2/6 2/9 3/16 20/7 20/8 20/13 20/16 47/10 49/11 50/6 50/10 59/11	69/10 69/12 70/6 72/13 80/8 92/13 92/16 96/8 96/11 98/18 101/2 102/17 133/21 134/2 134/3 134/20 143/22 143/25 144/1 146/4 147/6 147/14 148/24 149/21 150/8 150/23 151/12 152/14 152/18 153/21 154/3 154/12 155/9 156/6 156/25 157/9 159/22 166/9 166/24 167/4 168/24 Secretary's [1] 152/17 section [6] 94/2 94/4 94/9 94/14 157/19 172/8 section 64 [4] 94/2 94/4 94/9 94/14 secure [1] 100/21 securing [2] 101/14 101/20 security [9] 2/5 2/21 70/11 70/20 70/24 71/2 82/2 82/4 83/24 see [59] 1/8 7/7 14/17 15/24 19/19 22/2 26/5 29/20 32/22 33/5 33/18 33/25 37/24 46/9 49/2 50/7 55/15 58/4 58/9 59/25 61/18 69/17 70/5 72/25 90/25 97/24 98/1 103/16 103/23 105/6 106/15 107/9 107/14 109/5 109/6 112/10 112/20 115/15 120/8 124/14 129/19 131/17 133/1 136/1 141/24 142/20 144/18 144/25 149/11 153/14 157/17 157/18 160/25 161/23 163/10 170/10 173/2 175/22 178/13 seeing [3] 68/2 143/5 151/22 seek [5] 47/23 65/4 146/2 154/22 156/1 seeking [4] 28/19 50/15 138/23 145/11
S	safe [3] 3/25 113/23 115/18 safety [9] 2/14 3/25 14/22 33/1 101/20 113/24 113/25 136/8 153/25 Saharan [1] 5/3 said [36] 6/18 30/21 31/5 36/12 47/10 58/17 62/24 63/5 68/16 68/20 68/22 72/21 73/16 77/11			

(77) role... - seeking

S	sentence [4] 58/23 106/17 116/6 116/6 separate [4] 11/23 98/12 180/19 180/20 separately [1] 12/2 separation [1] 94/10 Sephen [1] 106/3 Sephen Janisch [1] 106/3 September [3] 17/3 74/3 145/6 September 11 [1] 17/3 sequence [4] 68/3 137/19 178/23 179/7 series [5] 2/24 101/13 101/15 124/12 173/6 serious [3] 77/6 111/9 166/14 seriously [1] 68/14 seriousness [1] 39/13 servant [13] 9/11 9/13 9/17 10/8 10/22 12/4 19/15 22/5 22/10 22/15 31/1 48/11 79/16 servants [20] 6/23 6/24 7/17 7/17 7/20 7/24 8/2 8/17 8/20 10/6 17/22 21/16 21/25 22/1 91/2 91/15 91/19 92/7 92/9 92/24 servants' [1] 8/9 service [41] 2/3 7/1 7/4 7/10 8/25 11/8 11/12 15/3 17/11 18/16 64/18 71/6 104/5 104/12 112/10 113/3 113/18 123/5 126/17 129/5 132/18 141/18 143/15 162/4 162/24 163/9 164/1 164/18 164/21 164/23 165/2 165/19 166/15 166/17 166/19 167/2 167/7 167/9 167/17 177/17 181/14 Service's [1] 166/11 services [11] 7/15 11/6 97/14 97/16 97/20 108/13 113/8	114/7 114/18 121/1 166/18 Services' [1] 166/13 set [61] 8/25 10/4 11/6 11/7 11/9 11/10 24/6 24/10 29/16 47/11 47/19 56/6 57/5 58/10 58/19 60/19 60/20 61/18 61/21 63/11 65/18 70/7 74/1 78/11 81/23 84/12 85/19 87/2 90/3 91/15 92/1 92/2 93/13 93/23 104/2 104/12 104/23 105/10 105/14 107/21 109/5 109/9 109/24 110/4 111/20 116/10 118/20 132/25 142/8 143/6 146/15 149/2 149/8 151/3 157/4 163/6 165/12 165/16 165/18 169/6 181/9 sets [17] 7/6 7/7 56/14 58/12 58/14 59/2 61/17 124/23 141/6 153/1 153/5 153/14 154/6 154/9 162/9 173/5 175/17 setting [7] 24/16 40/11 76/23 82/20 98/8 145/20 159/14 settlement [5] 51/2 51/3 51/25 52/8 54/3 settling [3] 50/16 50/20 54/9 several [2] 59/22 131/17 severe [1] 56/23 sexual [2] 4/23 5/1 Shall [1] 37/2 shared [1] 48/12 she [30] 34/20 35/21 59/14 60/6 63/4 98/4 105/2 136/15 137/1 137/1 145/20 146/7 147/7 147/14 147/19 147/22 147/23 147/25 150/21 151/4 151/18 153/5 153/14 153/20 153/22 153/23 154/18 154/21 159/24 163/7 she'd [2] 147/25	158/17 she's [2] 59/14 59/15 sheds [1] 44/6 Sheila [3] 12/11 43/19 43/19 shift [1] 63/23 shoes [1] 97/11 short [9] 2/24 4/12 36/22 50/2 61/9 84/20 115/18 138/17 161/13 short-term [2] 2/24 61/9 shortage [1] 100/12 shortages [2] 100/22 167/5 shortly [5] 17/1 29/24 37/16 43/4 149/24 should [90] 7/24 8/2 8/3 8/6 8/12 8/17 8/21 10/9 10/15 16/7 21/2 21/8 29/9 30/21 32/11 36/1 36/3 36/15 49/8 53/6 67/11 67/13 71/20 78/24 80/15 80/25 84/11 94/24 98/15 98/24 99/15 105/2 106/7 107/21 108/14 108/16 109/1 111/21 111/21 113/18 114/1 115/21 117/24 118/11 120/17 120/19 122/2 124/9 125/10 125/18 126/8 126/17 127/1 128/5 128/6 128/13 128/15 128/18 130/5 131/8 134/14 134/16 137/6 137/7 137/22 139/17 145/2 147/22 147/23 150/9 151/7 151/19 155/7 155/9 155/12 155/12 155/15 156/11 157/13 158/14 159/17 159/19 160/13 163/9 163/12 164/13 177/21 179/13 180/2 180/4 shouldn't [6] 48/3 125/3 125/11 134/13 140/22 155/20 show [3] 112/6 146/11 175/19 showing [4] 69/1	69/13 69/21 69/22 shown [2] 175/13 175/20 shows [3] 20/14 35/13 66/21 shred [1] 135/17 shredded [2] 134/11 135/19 shunt [1] 134/21 sick [1] 57/12 side [5] 2/16 16/22 66/23 126/2 176/25 sides [1] 166/1 sighted [1] 21/3 sign [3] 111/19 127/7 178/1 sign-off [2] 127/7 178/1 signatures [1] 180/15 signed [2] 155/10 160/10 significance [2] 24/25 26/18 significant [7] 21/12 25/23 50/20 73/11 80/23 101/23 141/6 signifies [2] 173/9 173/10 silos [1] 165/21 similar [1] 73/21 similarity [1] 76/17 similarly [2] 87/23 117/18 simple [1] 105/5 simply [8] 18/10 27/4 82/7 89/12 100/13 100/22 158/24 179/13 since [4] 45/4 76/15 97/2 167/18 single [3] 99/9 99/9 156/1 sir [12] 2/7 49/14 95/19 112/9 138/12 160/22 176/21 176/22 180/13 181/6 181/22 183/4 Sir Liam Donaldson [1] 112/9 sit [3] 54/22 90/20 90/20 situation [5] 29/19 90/18 149/7 149/16
----------	---	--	--	--

(78) seem - situation

S	18/6 21/5 21/11 24/6 24/8 26/25 29/4 29/7 33/7 33/23 36/19 37/21 38/11 38/15 42/24 43/1 44/6 47/1 49/8 56/20 59/6 60/16 68/25 69/13 73/3 76/4 76/17 79/20 81/11 82/10 83/21 83/21 87/6 88/24 90/12 90/15 90/16 90/20 92/4 93/23 94/11 94/20 95/18 96/13 96/22 97/23 99/13 109/11 109/12 110/9 111/6 115/25 116/2 117/6 120/7 121/25 122/9 127/10 129/1 132/15 133/23 136/11 137/12 137/24 138/4 139/7 140/15 141/21 142/9 143/16 143/21 144/3 144/7 152/10 153/15 154/6 155/2 156/3 165/1 166/8 166/20 171/1 171/17 173/23 178/10 181/18 somebody [15] 17/9 18/1 29/22 35/16 36/20 103/10 103/15 128/15 130/21 131/10 132/4 152/4 167/18 178/1 178/14 somehow [1] 93/9 someone [3] 34/23 35/11 144/10 something [54] 3/5 9/5 9/7 18/4 18/20 18/22 31/8 31/14 35/12 38/8 46/17 47/24 48/10 49/3 53/5 53/8 57/23 57/25 61/25 68/13 78/3 78/19 78/22 81/23 83/7 88/2 95/16 96/2 97/15 100/3 102/20 114/16 128/9 133/22 139/10 139/11 142/25 147/12 150/16 158/19 162/2 164/24 167/24 170/17 172/12 174/15 174/16 174/21 174/24	176/6 176/25 178/22 178/25 180/3 sometimes [5] 10/8 23/7 89/17 133/25 134/7 somewhat [1] 57/21 soon [7] 24/22 31/6 46/4 52/6 54/16 54/18 78/18 sooner [3] 32/18 33/3 52/12 sorry [9] 13/13 13/13 30/7 142/19 151/25 156/20 163/16 164/11 165/15 sort [23] 5/11 11/1 11/11 60/16 72/15 78/2 94/7 95/1 95/10 101/10 110/8 118/24 126/21 128/23 133/18 137/25 138/13 142/8 163/6 163/11 164/2 167/8 171/10 SoS [3] 47/16 47/18 47/21 sought [3] 92/4 158/1 171/2 sounds [3] 138/14 150/16 156/25 source [1] 98/24 sourced [1] 118/9 sources [1] 99/21 sourcing [1] 15/9 space [1] 84/20 speak [5] 42/21 89/2 142/19 148/2 176/12 speakers [1] 47/5 speaking [1] 9/10 special [2] 43/6 44/13 specific [5] 11/10 67/2 92/11 106/2 106/11 specifically [1] 109/1 specifics [1] 163/17 speculate [1] 53/7 speculating [2] 176/25 179/6 speculation [5] 87/22 177/7 178/24 181/18 181/20 speed [1] 20/19 spending [16] 19/3	84/4 84/5 84/9 84/21 85/3 85/15 85/17 85/21 88/14 88/20 96/23 97/1 97/2 119/15 119/18 spent [8] 3/18 34/5 101/22 101/25 102/2 130/3 130/5 132/15 spoke [2] 142/12 176/15 spoken [1] 160/2 Spongiform [1] 4/11 sponsor [2] 17/10 17/15 sponsorship [2] 14/24 15/20 squirm [1] 95/2 staff [8] 12/14 13/6 127/5 177/14 177/16 178/4 178/11 179/16 stage [24] 4/3 12/14 13/6 13/10 41/20 59/15 61/6 61/11 61/24 62/5 65/14 65/20 71/16 72/5 88/17 88/18 123/8 124/12 136/18 140/25 143/14 162/22 164/21 168/11 stages [3] 109/7 166/7 181/18 stakeholders [1] 9/22 stamp [1] 112/11 stance [3] 53/9 57/7 106/6 standards [2] 4/4 15/14 stands [1] 116/12 start [8] 1/17 20/24 40/6 84/16 96/1 109/19 119/11 144/13 started [7] 2/4 21/7 81/11 98/22 102/24 126/13 142/6 starts [1] 67/20 state [24] 2/9 20/8 20/9 20/13 20/16 25/4 47/10 49/11 50/7 50/10 59/12 59/19 69/12 70/6 72/13 80/9 88/11 96/8 96/11 101/2 166/9 166/24	167/4 168/24 State's [2] 2/7 3/16 statement [62] 1/18 1/25 4/20 12/13 13/5 14/16 16/1 16/25 19/19 23/19 23/20 24/7 24/11 26/3 31/14 33/4 33/22 34/7 35/13 37/6 37/15 37/24 42/10 42/12 47/2 50/12 64/3 65/24 67/20 79/6 80/16 84/17 86/3 86/8 88/9 90/25 91/16 93/23 94/18 102/20 109/6 109/10 111/8 114/10 118/21 130/17 137/20 138/20 140/6 141/3 141/6 141/15 141/25 143/6 144/22 146/13 146/14 151/4 162/1 171/23 175/25 176/15 statements [6] 24/18 24/20 44/5 78/5 106/1 181/9 States [1] 103/3 stating [1] 138/25 statutory [3] 31/25 32/1 32/9 stayed [2] 153/8 155/4 step [1] 44/14 steps [9] 41/15 41/19 70/14 116/23 118/21 141/7 141/11 154/6 154/6 Stevens [3] 88/5 91/6 91/15 Stevens' [2] 91/9 92/2 sticker [1] 175/18 sticking [3] 48/19 48/24 49/4 sticky [2] 152/10 152/13 still [23] 4/2 6/1 13/7 38/16 42/20 54/14 63/6 63/6 64/23 65/17 79/11 99/6 106/1 113/16 127/8 135/23 137/12 144/7 155/11 165/1 167/2 167/5 169/18
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(79) situation... - still

S	122/17 123/25 126/3 129/22 132/22 133/19 133/25 134/15 135/13 135/20 subsequent [2] 32/14 140/17 subsequently [8] 41/25 68/25 69/12 104/7 107/24 109/3 113/13 137/18 substantial [1] 47/4 substantive [1] 24/1 succeed [1] 53/20 success [1] 142/9 successful [2] 16/17 119/19 succession [1] 123/24 successive [3] 30/12 30/17 30/24 successor [3] 34/2 42/2 122/18 such [20] 6/24 22/5 22/6 29/18 40/5 51/2 70/25 71/6 71/17 71/19 78/7 86/16 104/8 105/2 115/19 153/4 155/13 157/24 158/3 168/13 Sue [2] 46/16 46/20 sued [1] 53/14 suffered [4] 53/16 54/12 169/25 170/3 sufferers [3] 46/18 47/7 49/9 suffering [1] 70/23 sufficiency [17] 15/8 25/20 25/24 25/25 26/7 26/24 33/15 34/3 38/24 39/6 39/9 39/18 40/3 123/6 129/20 130/6 130/14 sufficient [1] 48/13 sugar [1] 150/24 suggest [4] 22/9 57/25 89/10 176/1 suggested [13] 31/5 35/5 38/23 62/9 70/21 110/4 119/9 130/21 130/22 132/5 151/14 151/18 179/1 suggesting [4] 44/22	48/18 71/25 163/19 suggestion [3] 82/3 119/8 121/7 suggestions [2] 38/1 157/3 suggests [1] 23/17 sum [3] 56/15 56/17 56/20 summarise [2] 24/19 118/24 summary [1] 165/5 sums [2] 60/18 62/9 supervise [1] 177/8 supervised [1] 158/15 supervision [1] 177/21 supplied [1] 101/17 supplier [1] 101/5 supplies [3] 15/8 100/21 101/20 supply [9] 14/23 15/10 99/23 100/5 104/5 113/24 120/7 121/2 167/5 support [17] 9/14 17/14 29/4 29/8 66/3 68/10 83/11 87/2 89/5 94/8 102/8 111/12 113/19 114/14 162/7 163/24 164/2 supported [1] 17/9 supporting [1] 83/3 suppose [3] 151/23 159/15 177/10 supposition [5] 131/25 132/2 132/4 155/22 158/12 sure [23] 9/18 10/11 22/12 22/12 22/17 46/21 49/19 68/24 73/6 79/9 79/15 85/4 87/16 107/2 124/3 126/14 128/12 135/12 135/22 160/13 165/7 167/9 169/13 surely [1] 107/10 surgical [2] 98/11 110/2 surprises [1] 66/23 surrogate [1] 145/5 Surveillance [2] 4/15	98/7 Surveillance Unit [1] 4/15 surviving [2] 39/7 129/21 suspect [6] 93/17 108/25 126/25 127/9 127/9 130/1 swear [1] 178/9 symbolic [1] 60/16 sympathetically [1] 8/13 system [16] 4/5 44/15 81/9 81/11 83/24 91/19 104/13 107/22 115/13 115/15 116/19 117/2 117/3 175/12 180/14 181/2 systems [1] 162/14 T tackle [1] 97/7 tactical [1] 162/12 take [38] 1/6 10/12 10/14 18/3 19/16 21/19 22/22 23/14 25/16 26/9 26/13 27/1 27/3 27/22 49/16 51/12 52/18 71/22 76/5 78/11 78/11 78/14 96/22 97/15 97/18 101/1 102/25 109/8 110/11 113/18 121/17 131/7 132/11 138/12 138/15 157/1 157/13 179/4 taken [27] 19/7 21/17 26/13 27/10 27/12 29/22 32/13 41/3 41/19 75/23 77/4 78/10 79/17 99/18 99/19 104/25 116/23 118/21 127/6 130/24 137/12 142/12 142/17 154/7 158/9 168/21 178/16 takes [2] 3/21 88/12 taking [9] 17/7 50/18 51/22 65/25 70/15 74/12 100/20 131/4 153/20 talk [8] 22/17 49/23	61/4 64/11 71/2 95/4 134/15 141/9 talking [14] 30/3 30/5 36/10 43/22 60/18 61/20 64/15 67/5 74/19 83/20 114/17 136/19 171/20 172/3 talks [3] 57/15 58/21 166/4 Tanner [1] 91/11 targeting [1] 57/12 tasked [3] 41/12 136/25 137/4 team [37] 4/14 4/22 10/19 11/2 12/13 12/18 13/7 13/10 13/10 17/3 20/25 26/10 29/23 35/16 37/25 55/16 78/17 98/1 98/2 98/2 98/17 102/9 102/13 102/13 112/4 114/24 114/24 115/2 115/9 116/18 128/8 137/5 137/7 137/7 157/5 167/1 173/21 teams [1] 129/10 technologies [2] 39/21 162/21 technology [2] 25/5 52/6 telefax [1] 112/19 telephone [5] 69/6 126/1 127/12 128/20 168/9 telephoned [3] 153/20 174/21 174/23 tell [13] 13/5 93/14 95/3 99/17 105/4 108/3 108/20 110/21 123/11 132/17 149/12 163/5 166/16 telling [2] 94/15 170/21 tells [5] 12/13 33/22 67/20 130/17 140/6 temporary [1] 55/17 ten [1] 181/25 ten o'clock [1] 181/25 tended [1] 128/20 tenure [4] 31/3 46/10 84/23 118/21
----------	--	---	--	---

(80) stink - tenure

T	16/21 21/9 21/13 21/25 33/16 33/25 36/12 37/20 43/7 49/13 50/8 50/9 52/21 54/17 56/12 63/1 63/13 64/6 66/10 66/17 78/21 78/23 79/10 80/1 83/12 86/19 88/19 91/6 92/6 92/22 96/3 97/17 105/11 105/13 111/17 114/22 115/6 115/10 117/12 119/22 120/13 121/4 121/14 122/18 124/24 125/9 125/13 129/23 130/22 131/11 131/11 131/13 131/14 138/11 140/17 144/14 147/16 150/5 150/6 150/18 151/10 152/22 156/24 158/5 158/8 159/6 160/17 160/20 162/9 163/13 163/22 166/23 172/4 172/23 173/19 173/20 174/11 175/10 177/19 177/24 178/14 180/12 181/18 their [57] 7/20 9/15 23/11 25/9 27/20 30/22 30/23 39/22 65/7 69/23 71/22 74/12 75/3 80/13 80/14 84/7 84/10 86/15 86/19 87/8 89/9 93/6 93/6 97/12 97/22 100/20 104/13 104/17 104/21 104/24 106/19 106/20 106/22 107/11 108/4 108/17 108/21 111/1 111/5 113/20 114/15 115/20 124/23 125/8 133/1 147/19 149/19 150/1 154/2 161/1 165/18 165/18 165/19 166/21 167/20 169/18 177/18 them [67] 1/12 20/19 20/20 22/12 23/4 41/7 65/1 65/20 65/21 69/2 72/8 74/12 78/12 79/24 81/9 82/4 84/18 86/9 86/15 88/11 89/8	90/20 93/11 100/20 103/13 104/10 104/15 106/20 108/3 108/8 110/21 110/22 112/1 118/24 121/25 124/18 128/3 131/2 131/3 131/5 131/10 131/12 131/15 131/17 131/18 131/20 134/17 136/21 137/18 139/7 139/14 141/10 143/18 146/24 147/20 147/24 151/16 151/22 152/5 160/20 160/20 161/10 164/23 170/10 171/18 181/2 181/3 themselves [7] 7/24 8/2 17/22 72/10 100/21 104/14 121/10 then [198] theory [1] 124/9 there [254] there'd [3] 76/18 99/23 100/24 there's [21] 35/12 37/24 38/7 72/2 78/21 87/3 88/21 91/9 108/20 113/10 115/5 132/23 138/8 140/2 144/3 148/13 153/6 159/21 160/3 181/2 181/4 thereby [1] 69/2 therefore [14] 29/15 32/10 44/11 46/2 46/5 46/6 70/24 71/9 83/11 83/25 107/6 111/1 146/10 177/16 these [38] 3/11 9/6 21/17 26/9 29/7 63/15 64/13 64/21 64/25 71/21 74/11 74/22 79/3 87/6 88/21 92/18 93/17 106/1 108/2 113/15 113/25 115/21 121/16 129/22 134/4 136/13 138/4 146/23 147/16 149/25 151/25 160/17 161/15 164/16 166/1 167/21 172/8 179/17 they [131] 8/3 8/6	8/12 8/22 10/12 10/15 13/23 23/7 23/11 26/11 26/14 30/14 45/21 51/13 64/1 64/1 65/1 68/12 68/13 74/10 77/14 80/5 80/5 81/4 81/6 81/17 81/19 81/19 81/24 83/1 84/7 84/13 84/14 84/15 84/15 84/21 85/5 86/16 86/22 87/8 87/21 87/22 89/10 89/24 89/25 91/13 93/5 93/9 97/5 97/14 100/21 102/9 106/2 107/9 107/10 108/14 108/15 108/15 108/16 108/21 110/2 110/25 113/7 113/20 114/1 114/20 115/2 117/17 117/21 117/21 122/2 123/12 123/12 125/2 125/3 125/7 125/24 127/1 127/14 127/23 128/6 129/8 130/11 130/23 131/8 131/18 131/25 133/19 133/23 134/1 140/1 140/2 140/22 140/24 141/12 142/8 146/2 147/17 149/2 149/17 151/7 151/18 151/20 151/21 158/4 158/5 158/6 158/6 158/15 159/2 159/2 159/15 160/13 161/2 162/21 163/10 164/19 166/19 166/20 166/22 170/6 170/9 170/10 170/11 175/9 175/10 175/23 177/10 177/14 180/23 181/10 they'd [9] 20/23 41/5 75/13 88/23 89/18 114/15 125/7 131/23 139/16 they're [4] 8/21 131/12 151/23 181/1 thing [9] 20/5 63/1 70/3 95/1 96/13 110/9 111/1 142/22 153/4 things [26] 3/2 3/3 4/1 4/5 13/12 16/6 16/14	19/1 19/14 38/11 73/14 83/23 88/21 91/23 94/24 100/16 127/22 128/19 132/13 135/18 136/1 158/3 163/9 166/1 177/20 180/8 think [210] thinking [8] 63/11 148/17 150/4 150/5 151/9 151/10 179/19 179/19 thinks [2] 134/21 156/25 third [10] 23/20 42/10 78/4 118/17 120/3 121/13 122/20 136/6 138/19 169/11 third-hand [1] 169/11 this [309] Thompson [4] 28/6 28/8 28/12 28/19 thorough [1] 181/9 thoroughly [1] 168/13 those [104] 3/19 4/6 5/9 11/24 15/19 16/19 19/25 22/19 23/13 26/3 27/6 27/9 27/17 27/20 29/6 33/4 40/21 41/9 41/16 43/9 45/12 48/4 48/4 53/14 53/15 54/3 55/22 57/12 58/25 60/7 61/5 61/6 61/20 62/14 62/16 65/15 66/4 70/15 78/11 80/14 83/10 84/2 84/8 88/3 90/22 91/22 93/18 94/13 94/23 97/6 97/13 97/16 99/2 100/1 100/21 102/2 103/8 104/14 108/8 111/11 116/10 117/10 118/6 118/11 118/23 121/14 121/18 122/17 123/21 123/22 125/23 126/4 127/6 128/20 128/23 131/22 134/9 134/10 134/16 135/12 136/11 140/10 140/14 140/20 141/12 144/5 144/11 145/10 145/15 147/22
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(81) term - those

T	time [104] 2/8 2/8 2/16 2/22 5/10 8/24 9/2 14/10 14/21 17/4 17/7 19/21 20/9 21/12 24/1 25/5 25/14 25/16 26/21 26/22 27/19 29/21 30/20 35/10 35/11 35/14 35/15 37/9 37/22 40/24 42/16 42/24 42/24 44/5 44/24 45/2 45/11 45/25 49/14 49/15 53/8 54/1 60/10 72/8 72/9 73/3 74/11 75/8 76/12 77/5 77/18 79/23 81/23 84/4 84/20 85/3 89/1 89/2 89/3 89/21 90/24 95/11 95/19 96/22 97/3 97/12 98/2 99/3 99/13 100/16 101/23 101/25 102/2 102/25 109/13 109/14 110/9 111/10 117/3 117/15 117/19 122/6 128/7 129/5 132/9 132/12 132/15 132/17 139/25 140/4 140/7 140/15 141/4 142/15 143/5 148/9 148/24 161/10 161/18 167/11 172/3 176/7 179/10 181/19	123/7 130/17 130/18 131/10 135/17 146/7 154/12 170/20 176/12 180/14 tomorrow [2] 181/22 181/24 too [5] 32/23 71/15 72/4 75/17 97/5 took [24] 3/23 4/7 4/22 5/13 6/10 10/22 14/5 22/1 41/16 74/4 109/17 109/20 117/8 141/7 141/11 142/18 149/24 155/20 158/5 159/1 159/2 159/24 171/1 175/15 top [15] 3/14 17/15 23/22 26/5 28/13 28/15 38/19 43/17 61/19 74/17 81/7 81/16 81/20 112/11 156/21 top-up [2] 81/7 81/16 topic [4] 39/4 113/7 161/15 161/16 total [2] 74/19 74/20 totally [1] 131/14 touch [4] 66/21 80/21 95/13 171/9 tough [2] 68/21 170/21 towards [5] 34/9 44/14 73/12 81/6 102/21 trace [4] 65/14 65/23 114/11 130/1 traced [2] 64/25 65/16 tracking [1] 98/6 trail [2] 123/21 128/2 train [1] 169/6 trained [1] 9/5 training [2] 126/11 126/19 transcript [7] 4/20 66/5 66/10 91/25 96/2 110/14 175/14 transfer [1] 166/11 transfused [2] 104/6 113/13 transfusion [12] 14/25 54/19 55/10	64/24 65/4 65/6 75/13 76/8 99/1 166/18 167/9 170/1 transfusions [2] 103/8 107/8 transmission [4] 5/7 15/1 25/11 27/10 transmitted [1] 105/21 transpired [1] 154/2 trawl [2] 25/19 26/6 Treasury [1] 3/15 treated [3] 38/20 54/16 164/19 treatment [12] 27/5 44/9 48/14 52/4 65/21 75/3 105/24 106/20 107/3 108/21 110/1 115/24 trend [1] 14/2 tribunal [1] 32/3 tried [2] 66/22 130/1 triggered [2] 53/1 53/6 Troop [16] 12/24 17/2 17/7 107/16 110/5 146/5 148/8 148/9 148/14 148/17 150/9 150/17 150/20 151/2 151/17 159/25 Troop's [1] 17/13 trotted [1] 26/14 true [2] 52/6 106/1 truly [1] 168/17 trust [51] 5/11 43/10 43/10 59/2 61/10 79/25 79/25 80/3 80/3 80/7 81/4 81/16 81/24 82/1 82/4 82/5 82/15 82/18 82/22 83/16 83/22 84/6 86/14 87/1 87/1 87/3 87/8 87/23 88/4 88/10 88/15 88/23 89/1 89/4 89/14 90/13 90/14 90/15 90/18 90/19 90/20 90/21 91/1 91/3 91/24 92/6 94/4 94/5 94/22 95/11 95/12 Trust's [1] 94/8 trustee [2] 6/10 87/24 trustees [14] 80/7	80/7 86/6 86/10 86/13 90/11 90/13 90/14 90/15 90/19 91/3 93/5 93/7 93/11 trusts [3] 81/13 120/15 120/25 try [10] 65/20 72/6 72/8 72/11 73/9 130/4 141/7 141/11 154/7 156/20 trying [19] 3/1 3/19 41/9 63/25 65/14 66/14 67/23 73/3 87/14 90/17 96/19 97/11 120/5 129/14 131/9 136/13 137/19 150/19 150/24 turn [28] 6/25 17/18 21/5 23/19 43/1 55/2 58/3 58/9 59/21 60/15 61/17 63/11 87/24 103/22 105/6 106/14 107/13 117/6 122/9 132/14 136/6 139/17 157/18 161/22 164/21 164/23 167/2 174/3 turned [2] 43/5 76/18 turning [2] 10/17 108/13 turnover [3] 19/25 20/6 20/17 TV [1] 167/11 two [26] 1/5 12/14 19/23 20/8 26/3 45/10 54/11 70/19 75/1 79/24 80/4 80/16 94/7 94/10 96/24 99/2 100/1 110/15 113/12 133/5 143/1 151/14 153/6 163/3 166/1 169/17 two years [1] 96/24 type [1] 83/11 typed [1] 152/9 types [2] 47/23 163/17 typing [1] 125/22 typo [1] 173/18
	U			
	UK [28] 5/3 15/9 25/5 28/21 29/17 31/12			

<p>U</p> <p>UK... [22] 31/22 32/17 38/24 39/18 39/23 45/20 68/20 70/11 71/20 72/11 72/14 98/24 99/6 99/20 100/14 100/25 103/1 103/4 113/8 114/7 168/14 169/24</p> <p>UK's [1] 171/7</p> <p>UK-wide [2] 31/22 72/11</p> <p>UKHCDO [3] 61/21 75/7 120/24</p> <p>ultimately [2] 59/12 119/16</p> <p>Um [5] 51/9 53/25 67/4 67/23 124/23</p> <p>unable [2] 35/24 171/25</p> <p>unacceptable [1] 116/15</p> <p>unclear [3] 36/12 145/24 156/21</p> <p>uncompensated [1] 64/19</p> <p>under [15] 23/12 29/10 32/8 49/19 51/18 70/17 74/12 74/16 86/25 116/12 117/10 117/20 155/1 165/17 166/3</p> <p>underfunded [1] 87/9</p> <p>underlined [1] 174/14</p> <p>underlying [1] 122/21</p> <p>underspend [2] 82/15 89/19</p> <p>understaffed [1] 16/1</p> <p>understaffing [2] 16/11 94/16</p> <p>understand [54] 5/5 6/21 8/23 13/15 17/20 26/4 28/5 31/24 33/10 35/3 36/5 37/15 39/3 43/3 44/16 50/11 52/10 56/1 69/19 77/20 90/11 91/12 96/14 97/24 99/5 101/22 110/19 112/14 113/5 117/2 117/23 122/4 123/8 129/20</p>	<p>131/9 136/12 139/4 144/6 144/21 145/23 149/21 149/24 150/15 151/17 157/7 158/9 159/5 159/9 159/20 171/7 171/11 174/7 177/11 181/16</p> <p>understanding [19] 9/10 9/17 20/23 39/13 39/15 41/1 41/2 41/25 45/13 52/14 75/11 86/22 109/20 140/19 158/4 158/8 178/7 178/8 178/12</p> <p>understands [1] 178/1</p> <p>understood [2] 147/19 170/22</p> <p>undertaken [4] 42/5 42/6 82/23 149/4</p> <p>undesirable [1] 170/11</p> <p>unduly [1] 114/9</p> <p>unfortunately [2] 41/8 158/19</p> <p>unilateral [1] 17/24</p> <p>unit [39] 4/15 5/14 6/19 10/17 11/12 11/19 11/20 12/1 12/2 12/6 12/19 14/14 16/1 17/5 21/7 26/23 34/18 77/6 79/24 90/24 94/17 95/6 98/3 98/7 98/7 98/12 98/15 99/14 116/17 117/4 117/9 118/22 120/5 122/6 124/15 129/8 160/17 161/19 162/5</p> <p>unjustified [2] 89/11 106/8</p> <p>unless [1] 134/20</p> <p>unlikely [5] 25/6 74/21 75/2 105/20 149/19</p> <p>until [13] 3/12 11/21 41/19 49/17 67/7 71/21 76/11 85/16 116/7 119/17 123/22 138/15 182/2</p> <p>unusual [1] 14/3</p> <p>up [75] 3/12 3/23 4/22 5/13 6/10 7/23 8/15</p>	<p>9/7 10/22 11/21 14/5 17/7 17/25 20/15 20/19 29/16 40/6 40/16 42/2 44/3 47/23 48/20 49/4 50/5 50/24 55/18 59/17 61/15 62/20 64/9 65/18 66/12 66/19 67/8 68/5 71/22 76/23 77/14 77/22 81/7 81/16 81/20 82/12 83/13 84/3 84/19 85/9 85/11 87/2 93/2 93/13 98/8 100/19 101/6 101/8 102/25 104/12 107/2 107/21 108/13 109/24 117/8 120/8 126/8 132/6 137/23 138/9 139/17 153/1 154/24 163/2 164/21 164/23 176/8 177/13</p> <p>update [4] 96/17 130/10 130/12 138/23</p> <p>updated [1] 29/1</p> <p>updates [1] 66/12</p> <p>upkeep [1] 9/6</p> <p>upkept [1] 126/15</p> <p>upmost [1] 97/22</p> <p>upon [2] 33/3 75/4</p> <p>urgent [2] 18/4 32/5</p> <p>us [55] 1/24 2/1 3/21 6/21 12/13 13/5 13/18 15/10 15/25 16/2 17/20 33/22 40/1 40/18 41/24 59/13 64/10 66/21 67/20 70/20 74/6 81/6 82/14 85/6 86/21 89/14 94/15 94/23 95/3 96/17 97/24 99/14 99/17 99/22 100/20 101/16 102/6 109/19 111/22 119/16 123/7 123/11 130/17 130/17 132/17 138/7 140/6 140/19 159/8 166/16 176/4 176/12 177/10 181/16 181/19</p> <p>use [8] 8/18 44/10 64/1 71/12 74/25 78/13 84/1 155/24</p> <p>used [6] 4/13 37/9</p>	<p>51/12 78/11 99/6 115/14</p> <p>useful [2] 35/24 70/3</p> <p>using [1] 98/24</p> <p>usual [1] 134/11</p> <p>usually [6] 18/14 126/4 127/3 127/4 133/10 133/20</p> <p>V</p> <p>vacancies [1] 92/24</p> <p>vaccine [1] 44/11</p> <p>valuable [1] 91/24</p> <p>value [4] 33/6 91/13 181/13 181/19</p> <p>variant [5] 98/6 98/10 98/20 118/4 118/7</p> <p>variant CJD [5] 98/6 98/10 98/20 118/4 118/7</p> <p>various [10] 3/24 13/9 24/19 66/20 99/22 107/15 109/6 109/6 165/21 180/15</p> <p>vary [1] 18/8</p> <p>vast [1] 65/5</p> <p>vCJD [16] 15/1 15/7 48/4 48/13 96/14 97/23 98/14 103/11 103/15 104/7 105/19 107/25 113/14 115/6 115/17 162/19</p> <p>vCJD-implicated [1] 105/19</p> <p>Verity [1] 46/21</p> <p>version [2] 40/12 40/13</p> <p>versions [1] 110/15</p> <p>very [50] 2/21 11/11 14/6 16/20 16/21 21/4 27/13 30/22 30/24 31/17 41/10 44/2 44/3 45/9 48/6 62/14 82/16 84/20 87/20 88/24 91/7 92/10 96/22 96/22 107/7 111/10 114/20 120/21 121/24 123/20 125/24 126/25 128/2 134/7 135/15 135/15 135/15 138/14 155/23 156/1 156/21 161/7 164/16 164/22</p>	<p>169/17 169/17 172/16 174/12 175/2 180/17</p> <p>via [3] 5/7 66/4 112/24</p> <p>Vicki [1] 13/1</p> <p>Vicki King [1] 13/1</p> <p>victims [1] 57/13</p> <p>view [53] 19/16 20/16 21/8 21/10 23/8 23/11 23/23 29/21 30/17 30/23 31/11 42/24 44/24 45/2 45/9 45/14 45/15 48/2 48/17 52/13 52/13 52/15 53/3 59/8 73/11 74/5 75/22 77/21 78/17 86/5 86/15 86/19 86/22 86/24 87/9 88/9 89/10 91/10 92/17 104/25 105/1 108/20 115/21 118/2 118/3 155/6 155/14 155/20 158/5 163/6 164/12 168/22 179/13</p> <p>views [5] 48/12 79/16 92/1 106/11 121/18</p> <p>vigour [1] 29/7</p> <p>VIII [2] 117/9 119/3</p> <p>viral [3] 39/10 39/15 39/21</p> <p>virally [1] 54/17</p> <p>Virological [2] 136/8 153/25</p> <p>visited [1] 155/15</p> <p>vital [1] 149/18</p> <p>voicing [1] 24/4</p> <p>Vol [1] 173/8</p> <p>Volume [1] 173/7</p> <p>volumes [2] 39/24 173/18</p> <p>W</p> <p>wait [2] 133/7 133/11</p> <p>waiting [5] 97/4 97/5 110/21 111/4 111/18</p> <p>wake [1] 58/7</p> <p>Walden [2] 34/18 35/19</p> <p>Wales [4] 39/9 117/13 117/18 143/11</p> <p>want [24] 8/15 17/19 21/14 30/14 43/13</p>
--	--	---	--	---

W	we'd [7] 68/17 85/14 89/13 89/13 89/15 111/1 122/7	62/23 77/1 77/11 85/9 89/17 92/16 101/15 128/22 129/11 130/3 170/5	125/25 130/3 146/23 153/11 165/5 166/2 167/1 171/1 172/5	133/13 135/23 137/9 138/5 138/20 140/3 140/14 148/19 149/24
want... [19] 47/6 51/2 57/22 57/25 60/14 65/12 73/16 73/19 74/17 75/17 83/11 93/20 93/24 108/6 115/5 116/16 144/14 145/18 170/6	we'll [7] 22/17 38/13 49/16 59/20 67/14 88/11 95/21	were [270] were parties [1] 54/4	whether [54] 17/19 18/18 18/20 18/21 19/4 19/17 27/23	150/23 151/15 153/8 153/9 153/9 153/22 153/25 155/17 157/22
wanted [27] 22/15 37/12 38/18 43/20 46/19 48/1 52/9 58/16 58/21 64/1 64/9 77/14 81/3 81/12 91/1 92/7 96/11 100/21 101/8 120/21 131/20 137/1 138/3 170/2 170/14 170/14 171/7	we're [7] 5/14 34/16 37/14 73/6 134/15 137/23 172/3	weren't [6] 12/2 16/10 41/8 121/16 131/2 144/8	31/12 32/10 36/2 36/8 36/14 40/3 48/1 48/11 48/20 53/2 67/11 67/15 69/5 71/17 78/5 79/8 80/25 83/22 85/23 86/3 90/22 92/12 92/17 97/15	158/23 159/16 164/20 165/1 166/8 166/23 167/12 168/3 168/23 168/24 169/10 169/12 169/21 170/9 170/12 171/4 171/8 171/24 172/9 172/12 175/17
wanting [3] 46/17 170/4 177/17	we've [25] 16/17 28/6 28/7 49/6 52/10 52/18 58/19 63/9 64/10 75/1 75/21 79/3 93/19 105/11 109/11 110/11 122/13 134/5 144/16 152/8 152/12 156/3 169/15 171/18 171/20	Westminster [1] 168/20	108/21 114/12 114/24 116/23 118/14 124/17 124/18 130/5 131/9 131/11 135/11 138/12 142/20 160/7 160/10 160/15 168/11 168/23 169/4 173/23 175/22 176/14 180/6	178/16 179/8 181/12
wants [1] 71/12	weakness [3] 53/9 165/16 165/19	what [228] what's [7] 14/6 36/12 58/16 74/15 123/13 123/17 152/2	176/14 180/6	while [9] 13/19 33/1 33/10 42/20 75/17 95/16 111/4 144/6 179/8
warranted [1] 30/23	Wednesday [1] 1/1	whatever [10] 7/12 34/22 36/1 72/16 75/12 76/4 82/14 108/16 125/8 127/4	which [144] 1/10 2/23 3/6 3/14 5/12 7/1 7/4 7/5 7/15 8/21 12/2 14/20 16/20 18/5 19/14 21/2 21/3 22/4 22/7 22/8 22/20 23/8 23/14 23/16 23/21 27/4 27/9 30/4 30/25 35/23 37/2 37/14 38/2 42/11 44/10 49/22 51/16 53/12 54/11 54/15 54/19 55/9 56/24 58/17 59/22 59/23 60/24 61/17 62/11 63/18 70/22 72/20 73/20 74/24 75/4 76/17 80/7 81/15 81/19 82/5 82/15 85/3 86/25 88/8 89/9 94/9 100/10 100/11 100/25 101/4 101/5 101/6 101/16 102/23 103/8 103/23 103/24 104/16 104/17 104/21 107/5 107/18 109/3 109/25 110/3 111/2 111/2 111/5 115/23 118/18 119/18 119/19 124/5 126/10 126/23 126/24 127/8 128/15 128/15 130/6 130/10 133/9	Whilst [1] 106/21
was [618]	Wednesday's [1] 106/10	whatsoever [1] 107/2		White [1] 98/4
was headed [1] 98/4	week [4] 34/21 47/5 47/12 149/16	when [84] 1/21 3/15 8/21 10/14 10/21 10/22 11/12 14/5 16/13 16/14 18/3 18/9 21/6 21/18 23/2 23/4 23/7 23/12 23/15 25/14 29/13 30/3 30/20 39/8 39/9 40/13 41/5 42/1 43/9 48/25 74/3 78/17 79/7 80/22 81/17 83/4 86/2 86/10 86/10 86/12 88/3 89/2 91/6 93/4 102/3 102/18 102/21 103/13 107/3 110/22 111/18 117/8 117/21 122/16 123/2 125/21 126/13 126/19 128/8 129/11 131/25 132/19 133/3 133/19 135/10 135/23 136/13 139/15 143/19 145/22 146/2 146/22 153/22 154/3 164/23 167/14 167/25 172/2 172/17 173/1 175/10 176/25 177/1 179/13	Whitehall [2] 29/14 102/7	
wasn't [28] 11/19 34/8 40/14 41/12 42/25 65/20 68/24 76/11 79/9 79/12 79/13 79/14 85/15 95/1 128/4 128/8 128/22 136/17 136/18 140/4 150/24 154/20 159/22 164/20 164/22 169/13 171/24 171/25	weekend [3] 38/8 47/10 47/19	where [28] 3/23 3/23 5/1 28/20 66/21 72/21 76/21 77/11 78/10 79/10 81/6 81/12 84/3 89/14 89/23 91/17 95/3 95/5 99/22		who [87] 11/4 11/7 11/8 12/24 13/2 14/11 17/9 17/11 30/2 32/20 35/11 35/14 37/4 37/8 45/20 46/21 49/11 50/10 52/1 53/14 53/15 53/23 54/4 56/23 61/6 61/11 62/6 64/23 64/24 65/4 65/15 66/11 74/9 83/8 83/8 83/9 88/3 92/9 98/16 102/11 103/10 104/6 104/7 104/9 105/18 107/23 107/24 108/12 109/25 111/21 112/21 113/12 113/13 114/25 115/1 115/7 115/9 120/17 121/18 124/25 128/10 129/8 137/10 137/12 141/1 142/6 142/12 143/12 143/14 145/19 146/4 148/22 148/22 155/10 158/14 159/1 160/10 160/18 164/22 169/25 170/3 174/13 175/4 177/5 177/16 178/1 178/15
watching [1] 1/11	welcome [1] 106/11			whoever [1] 49/21
water [2] 57/24 77/19	well [70] 1/13 2/3 4/13 9/13 12/5 14/8 15/23 21/24 60/19 63/3 65/1 72/1 72/3 72/18 75/25 78/15 78/21 84/2 85/1 87/6 88/7 90/2 90/21 91/10 91/17 93/6 94/12 94/13 97/8 98/7 98/16 100/23 102/12 111/11 112/6 115/22 119/9 120/5 121/2 121/10 122/23 124/23 125/1 126/17 127/1 127/6 127/11 128/5 128/12 129/9 130/12 132/20 133/4 137/23 138/14 143/7 143/11 143/12 148/12 152/3 154/18 154/21 158/19 161/7 164/16 177/3 179/19 180/3 180/17 181/11			whole [12] 11/5 11/5
way [44] 8/21 9/1 9/23 9/25 14/13 24/5 35/19 38/1 49/2 51/10 57/10 68/2 69/1 69/13 69/21 69/22 73/14 82/16 87/3 87/14 87/18 89/19 93/13 96/17 101/19 105/21 111/2 129/13 129/16 137/22 149/7 150/14 150/25 152/22 155/16 162/5 164/18 166/15 168/2 169/19 170/3 170/8 175/19 177/12	wellbeing [1] 25/10			
ways [2] 23/17 170/8	went [18] 2/18 3/1 3/2 3/5 3/11 33/12 33/17			
we [331]				

<p>W</p> <p>whole... [10] 13/24 19/12 19/14 56/4 98/9 98/20 101/13 102/4 110/9 124/12</p> <p>whom [3] 42/1 64/18 155/11</p> <p>whose [2] 128/10 156/14</p> <p>why [56] 12/3 33/5 37/6 39/20 40/1 40/4 40/18 56/5 64/7 65/19 65/19 68/3 83/2 83/17 85/25 86/1 87/7 87/9 91/12 91/13 96/7 96/18 99/18 100/23 104/16 105/7 107/11 108/3 108/22 109/20 111/22 111/22 118/2 120/2 125/3 128/24 129/2 137/4 137/4 140/19 155/19 158/4 158/9 159/2 159/5 159/9 162/21 163/19 163/23 166/23 167/22 178/21 179/16 180/3 180/19 181/3</p> <p>wide [4] 14/20 31/12 31/22 72/11</p> <p>widely [3] 21/11 54/23 135/6</p> <p>wider [7] 1/9 5/9 5/11 19/17 40/17 109/2 168/14</p> <p>will [32] 22/23 29/10 34/25 46/2 46/25 47/5 47/11 47/17 56/25 61/2 65/5 70/15 90/4 93/20 104/5 105/20 107/1 107/6 133/21 133/22 133/25 134/3 143/1 148/20 149/15 149/16 149/20 149/22 150/15 152/17 160/25 161/11</p> <p>Will's [1] 98/6</p> <p>Willins [1] 139/9</p> <p>winter [2] 167/6 167/7</p> <p>Winyard [2] 105/13 105/14</p> <p>wish [4] 44/10 57/3</p>	<p>161/2 175/22</p> <p>witch [4] 154/21 155/12 155/20 177/2</p> <p>with [250]</p> <p>with it [6] 22/13 22/14 94/21 110/6 111/9 139/12</p> <p>withdraw [1] 88/6</p> <p>withdrawal [1] 100/17</p> <p>withdrawing [1] 87/11</p> <p>withdrawn [3] 86/17 87/1 100/2</p> <p>within [22] 7/5 13/23 14/2 16/16 37/10 52/15 64/13 64/21 70/13 71/1 71/17 81/5 81/8 92/14 93/10 119/14 122/22 132/24 147/17 165/22 170/13 176/13</p> <p>without [11] 8/4 8/14 34/25 83/1 109/22 110/24 116/15 121/18 151/22 152/13 179/24</p> <p>WITN4486013 [1] 175/19</p> <p>WITN4505002 [1] 14/16</p> <p>WITN4505025 [1] 61/18</p> <p>WITN4505027 [1] 66/5</p> <p>WITN4505035 [1] 67/19</p> <p>WITN4505036 [1] 69/18</p> <p>WITN4505071 [1] 103/16</p> <p>WITN4505072 [1] 107/14</p> <p>WITN4505126 [1] 110/14</p> <p>WITN4505201 [1] 112/8</p> <p>WITN4505330 [1] 92/2</p> <p>WITN4505331 [1] 92/3</p> <p>WITN4505389 [4] 23/21 42/11 138/20 146/15</p>	<p>WITN4505401 [1] 37/3</p> <p>WITN505389 [1] 31/19</p> <p>WITN5426214 [1] 151/3</p> <p>WITN6955032 [1] 152/8</p> <p>WITN6955040 [1] 172/19</p> <p>WITN6955061 [1] 174/4</p> <p>witness [41] 1/18 1/24 6/17 12/13 13/5 14/15 15/25 19/19 21/21 23/19 23/20 26/12 50/11 64/3 67/20 79/6 82/9 84/17 86/3 86/8 90/25 91/16 109/6 109/10 111/8 114/10 118/20 138/20 140/6 141/3 141/6 141/8 141/15 141/24 143/6 144/21 146/13 146/14 151/4 162/1 175/25</p> <p>witnesses [4] 32/23 87/6 109/12 110/12</p> <p>wonder [6] 2/1 49/14 88/1 95/19 138/12 148/14</p> <p>wonderfully [1] 126/4</p> <p>word [3] 8/10 92/14 113/10</p> <p>words [2] 88/12 168/17</p> <p>work [24] 2/11 5/19 9/20 13/11 14/14 16/5 16/8 16/9 26/8 26/23 37/12 37/21 38/15 47/23 62/22 81/4 84/8 94/8 94/17 94/20 95/4 121/20 121/22 167/2</p> <p>worked [9] 5/4 61/24 62/15 73/4 83/13 85/11 91/19 121/23 135/23</p> <p>workforce [1] 6/4</p> <p>working [20] 2/20 3/12 4/23 5/6 5/12 5/23 12/2 12/6 16/21 89/3 120/6 120/12</p>	<p>120/23 121/20 124/3 128/9 129/4 132/12 148/8 179/12</p> <p>workings [1] 181/14</p> <p>works [1] 146/5</p> <p>worry [2] 88/11 106/8</p> <p>worryingly [1] 64/22</p> <p>would [213]</p> <p>wouldn't [11] 23/5 75/12 77/17 89/25 111/12 127/22 127/23 167/19 170/15 177/15 179/25</p> <p>write [4] 113/6 125/7 133/22 134/1</p> <p>writing [5] 82/8 86/2 130/13 156/14 156/20</p> <p>written [11] 4/18 4/20 6/13 24/17 24/17 74/15 88/10 137/20 150/14 176/15 181/9</p> <p>wrong [3] 86/5 144/15 147/21</p> <p>wrongdoing [3] 24/14 24/21 52/19</p> <p>wrote [9] 37/25 41/9 45/6 45/11 48/17 49/1 77/24 139/13 170/20</p> <p>Y</p> <p>yeah [7] 45/13 59/10 76/3 112/22 136/18 159/6 178/21</p> <p>year [20] 45/7 61/4 82/12 82/15 84/19 84/19 85/9 86/12 88/15 89/6 89/15 89/19 89/20 90/3 119/21 119/24 133/5 163/8 167/13 169/17</p> <p>year 1 [1] 61/4</p> <p>years [18] 5/19 20/18 45/3 84/6 84/8 87/20 88/19 93/16 96/24 119/3 127/4 127/19 127/20 129/25 168/21 179/2 179/9 181/13</p> <p>yellow [2] 3/3 3/4</p> <p>yes [196]</p> <p>yet [3] 49/22 99/4 178/16</p> <p>York [1] 2/5</p>	<p>you [665]</p> <p>you were [1] 176/24</p> <p>you'd [10] 35/4 69/19 75/4 108/24 134/7 149/9 153/11 154/13 174/1 181/7</p> <p>you'll [2] 37/24 161/16</p> <p>you're [29] 1/7 1/11 24/16 28/19 38/14 49/19 60/6 61/20 64/15 71/25 74/19 75/18 75/24 83/20 88/7 103/20 105/7 110/10 128/14 129/2 139/18 148/15 157/2 163/23 165/4 165/17 169/7 178/11 180/25</p> <p>you've [39] 1/24 15/25 16/16 16/25 21/24 22/23 29/22 30/15 43/22 49/19 49/20 59/13 59/21 60/2 61/20 62/14 65/24 67/14 77/19 78/4 80/19 90/2 90/3 91/25 93/23 96/15 109/5 109/9 115/11 118/20 123/6 128/24 143/6 159/8 162/6 163/23 163/24 164/12 165/16</p> <p>your [136] 1/18 1/18 1/24 4/14 4/20 4/21 6/15 6/19 9/2 9/10 9/10 10/17 10/18 10/25 12/13 13/5 14/5 14/7 14/11 14/15 15/25 16/2 16/25 17/15 19/19 19/21 23/19 23/20 24/7 26/3 26/10 26/21 26/22 31/3 31/11 33/22 36/16 37/15 42/10 43/4 43/20 45/14 45/15 45/16 45/25 46/10 46/19 48/11 49/12 50/11 52/13 53/12 58/16 58/21 59/22 62/22 63/11 64/3 65/24 66/11 67/20 73/11 75/10</p>
---	---	--	---	---

Y	Z			
<p>your... [73] 77/5 77/6 77/21 78/4 79/20 80/2 80/16 84/23 86/2 86/8 89/10 90/8 90/24 90/25 93/23 94/17 96/17 98/13 98/13 99/13 101/23 102/25 106/11 106/13 109/5 109/10 109/14 109/20 114/10 114/22 114/24 115/16 116/17 117/3 117/8 117/23 118/20 118/21 122/16 129/5 130/17 131/11 132/17 137/2 137/6 137/7 138/1 138/19 140/6 141/6 141/15 141/18 141/24 144/21 145/19 146/3 146/13 146/14 148/17 151/4 158/4 161/18 162/1 162/2 167/17 167/18 168/10 169/22 171/5 172/5 175/25 178/6 179/13</p> <p>yours [1] 156/17</p> <p>yourself [7] 6/24 18/10 18/22 22/5 46/22 178/13 178/13</p> <p>YouTube [1] 1/11</p> <p>Yvette [22] 35/14 45/7 45/12 48/18 49/1 55/4 59/11 59/23 60/6 62/23 63/2 73/19 76/16 77/10 77/24 91/17 92/1 92/3 92/11 96/5 96/7 96/10</p> <p>Yvette Cooper [20] 35/14 45/7 45/12 48/18 49/1 55/4 59/11 59/23 60/6 62/23 63/2 73/19 76/16 77/10 77/24 91/17 92/11 96/5 96/7 96/10</p> <p>Yvette Cooper's [2] 92/1 92/3</p> <p>Yvonne [2] 146/4 148/8</p> <p>Yvonne de Sampayo [1] 148/8</p>	<p>Zuckerman [1] 143/8</p> <p>Zuckerman's [1] 143/3</p>			

(86) your... - Zuckerman's