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Public Bill Committee

HEALTH AND CARE BILL

Fourteenth Sitting

Tuesday 19 October 2021

(Afternoon)

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Saturday 23 October 2021

The Committee consisted of the following Members:

Chairs: Mr Peter Bone, † Julie Elliott, Steve McCabe, Mrs Sheryll Murray

† Argar, Edward *(Minister for Health)*
† Crosbie, Virginia *(Ynys Môn)* (Con)
† Davies, Gareth *(Grantham and Stamford)* (Con)
† Davies, Dr James *(Vale of Clwyd)* (Con)
† Double, Steve *(St Austell and Newquay)* (Con)
† Foy, Mary Kelly *(City of Durham)* (Lab)
† Gideon, Jo *(Stoke-on-Trent Central)* (Con)
† Higginbotham, Antony *(Burnley)* (Con)
† Madders, Justin *(Ellesmere Port and Neston)* (Lab)
† Norris, Alex *(Nottingham North)* (Lab/Co-op)
† Owen, Sarah *(Luton North)* (Lab)
† Robinson, Mary *(Cheadle)* (Con)
† Skidmore, Chris *(Kingswood)* (Con)
† Smyth, Karin *(Bristol South)* (Lab)
† Timpson, Edward *(Eddisbury)* (Con)
† Whitford, Dr Philippa *(Central Ayrshire)* (SNP)
Williams, Hywel *(Arfon)* (PC)

Huw Yardley, Sarah Ioannou, *Committee Clerks*

† attended the Committee

Public Bill Committee

Tuesday 19 October 2021

(Afternoon)

[Julie Elliott *in the Chair*]

Health and Care Bill

Clause 86

Relevant bodies

2 pm

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss the following:

Amendment 69, in clause 87, page 80, line 7, at end insert—

"(2A) Regulations under this section which make provision affecting the functions of Scottish Ministers may not be made unless the Secretary of State has consulted the Scottish Ministers on that provision."

This amendment would put a duty on UK Ministers to consult Scottish Ministers on regulations making provisions on conferring of functions on the Scottish Ministers or amending or removing functions from them in reserved areas before these regulation making powers are exercised.

Amendment 68, in clause 87, page 80, line 33, at end insert—

"(5A) Regulations under this section to which subsection (5) applies may not be made without the consent of—

(a) the Scottish Ministers, if they contain provision for a body to exercise a function that is exercisable in relation to Scotland,

(b) the Welsh Ministers, if they contain provision for a body to exercise a function that is exercisable in relation to Wales, or

(c) the Northern Ireland Ministers, if they contain provision for a body to exercise a function that is exercisable in relation to Northern Ireland."

This amendment would require the Secretary of State for Health and Social Care to obtain the legislative consent of the devolved governments before powers in this clause are exercised.

Clause 87 stand part.

Amendment 70, in clause 88, page 81, line 17, at end insert—

'(4A) Regulations under this section to which subsection (4) applies may not be made without the consent of the—

(a) Scottish Ministers, if they contain provision for a body to exercise a function that is exercisable in relation to Scotland,

(b) Welsh Ministers, if they contain provision for a body to exercise a function that is exercisable in relation to Wales, or

(c) Northern Ireland Ministers, if they contain provision for a body to exercise a function that is exercisable in relation to Northern Ireland."

This amendment would require the Secretary of State for Health and Social Care to obtain the legislative consent of the devolved governments before powers in this clause are exercised.

Clause 88 stand part.

Amendment 71, in clause 89, page 82, line 13, at beginning insert "Subject to subsection (6A),"

This amendment, together with Amendment 72, would require the Secretary of State for Health and Social Care to obtain the legislative consent of the devolved governments before powers in this clause are exercised.

Amendment 72, in clause 89, page 82, line 19, at end insert—

"(6A) Regulations under section 87 or 88 containing provision by virtue of section 131(1)(a) and repealing, revoking or amending provision made by or under—

(a) an Act of the Scottish Parliament may only be made with the consent of the Scottish Ministers,

(b) a Measure or Act of Senedd Cymru may only be made with the consent of the Welsh Ministers, and

(c) Northern Ireland legislation may only be made with the consent of the Northern Ireland Ministers."

See explanatory statement to Amendment 71.

Clauses 89 to 92 stand part.

The Minister for Health (Edward Argar): It is a pleasure, as ever, to see you in the Chair, Ms Elliott. The existing arm's length body landscape has remained largely unchanged since the Health and Social Care Act 2012 reforms. As the health service has evolved, this structure has led to a fragmentation of roles between different organisations, and sometimes competing priorities being disseminated to providers. We have seen ALBs, with all their differing functions and operations, responding as rapidly as possible during the pandemic. Building on this recent energy and innovation, and the value of working flexibly, this power provides a mechanism to support a more responsive and adaptive system than the current structure allows. Using these powers—to transfer functions to and from ALBs—the system will be able to respond to differing challenges more swiftly.

Clause 86 sets out the definition of "relevant bodies" that is used in part 3 of the Bill. This definition is relevant to clause 87, which provides the Secretary of State with a power to transfer functions between relevant bodies, and to clause 88, which provides a power to delegate functions of the Secretary of State to relevant bodies. The bodies covered by this definition are all public, sponsored by the Department and operating in the health sector. In many instances they have complementary functions where there could be material benefit to elements of joint delivery.

This definition does not include a number of health and care-related bodies, including the National Institute for Health and Care Excellence and the Care Quality Commission, which we have determined should not be covered by the powers in part 3 of the Bill due to the nature of their advisory, regulatory and/or public health functions. The clause therefore establishes the non-departmental public bodies in scope of the power to transfer functions set out in clauses 87 to 92.

I am grateful to the hon. Member for Central Ayrshire for tabling amendment 69, which seeks to ensure that Scottish Ministers are consulted before a transfer of functions in reserved areas is carried out. Clause 92 sets out the Secretary of State's duty to consult any body to which the proposed change relates, as well as the devolved Administrations if the draft regulations apply in their jurisdictions and relate to matters that are within the legislative competence of their legislatures, or in respect of which their Ministers exercise functions.

If functions exercisable by Scottish Ministers are impacted, Scottish Ministers would, in our view, already be consulted under the current wording. We do not consider it appropriate, therefore, to consult a devolved Administration on reserved issues where it can be shown that they do not impact on it in any way. We have

committed to setting out further detail in the memorandum of understanding, both in terms of early engagement and the formal consultation process, when it is appropriate.

Amendment 68 seeks to introduce a requirement for devolved Administration ministerial consent if a proposed transfer of a function includes a function exercisable in relation to a devolved Administration and involves a body with a requirement for representation of Wales, Scotland or Northern Ireland on its board. Clause 87 confers a power on the Secretary of State, through secondary legislation, to transfer functions between the relevant bodies listed in clause 86.

That is not a power to take away services that are currently provided by the relevant arm's length bodies that are in scope; the power allows only for moving the existing functions around within the current landscape in order to provide greater flexibility. If it is used, it will be to make necessary and helpful changes to the ALB landscape, such as enabling professionals with complementary expertise to work more closely together, as they have in many areas in response to the ongoing pandemic.

Many functions relate to England only, and when bodies do operate in devolved areas it is often through mutual agreement. We fear that it would be disproportionate to require consent each time the power is used. We consider this to be primarily about improving administrative effectiveness.

We recognise that there are arrangements to ensure that devolved Administrations' interests are recognised and represented at board level. Clause 87 makes explicit provision for the continuation of any existing board representation for devolved Administrations on the body to which relevant functions are transferred. We believe that that provision, alongside the current commitment to consult that is set out in the Bill, and underpinned by a detailed memorandum of understanding between the UK Government and the devolved Administrations, provides the opportunity to engage in a thorough and meaningful way throughout the entire process. However, as I alluded in my response to the hon. Lady's previous amendments, I will continue to engage with Ministers in each of the devolved Administrations to further explore whether—to build on what I have already said—there is anything more we can do to provide reassurance ahead of Report.

Clause 87 confers on the Secretary of State the power to transfer functions between the relevant bodies listed in clause 86 using secondary legislation. Clause 87 sets out the conditions that would need to be met for the Secretary of State to use that power—namely, to improve the exercise of those functions with regard to efficiency, effectiveness, economy and securing appropriate accountability to Ministers, with the aim of improving patient outcomes.

The Secretary of State can, through regulations, modify the functions and constitutional or funding arrangements of the affected bodies, and, with the exception of NHS England, abolish a body if it has become redundant as a consequence of the transfer of functions. That will be done by way of a statutory instrument laid before the House under the affirmative procedure. The Secretary of State must also make provision for maintaining representation of the interests of the devolved nations where there is the pre-existing requirement in the constitution of the body from which the function is transferred. That provision, together with clause 88, ensures a more agile and flexible framework for key health bodies that can adapt over time.

Our arm's length bodies want to work together more closely, and the covid-19 pandemic has demonstrated the value of working flexibly. Building on that recent energy and innovation, the clause provides a mechanism to support a more responsive and adaptive system than the current structure allows. Amendment 70 would introduce a requirement for devolved Administration ministerial consent if a proposal to transfer a function involves the transfer of a function exercisable in a devolved Administration and a transferring body with devolved representation on its board.

Clause 88 confers a power on the Secretary of State, through secondary legislation, to delegate functions that may be delegated to special health authorities to any of the relevant non-departmental public bodies listed in clause 86 instead. The clause gives the Secretary of State the power only to delegate the Secretary of State's functions. It does not create any power for him or her to do anything in respect of the functions that devolved Administration Ministers direct those special health authorities to perform in the devolved nations. As with clause 87, clause 88 makes explicit provision for the continuation of any existing board representation for DAs on the body to which its functions are transferred.

I set out in our debate on amendment 68 the Government's reasons for opposing the imposition of a consent requirement on the use of the power in clause 87. We oppose a consent requirement in clause 88 for the same reasons. A further reason for opposing a requirement for the consent of the devolved Administrations to the power in clause 88 is that the clause simply allows the delegation of functions of the Secretary of State. The Secretary of State already has the power, in effect, to move any of his or her functions between different special health authorities. That does not require the consent of the DAs. Clause 88 merely extends that provision, so that the Secretary of State may delegate their functions to one of the NDPBs. For that reason, I encourage the hon. Member for Central Ayrshire not to press her amendments, but I will wait to hear what she says when she speaks to them shortly.

As we have already discussed, clause 88 gives the Secretary of State the power to make regulations providing for a relevant body to exercise some of their functions. As with clause 87, that would be done by way of a statutory instrument laid under the affirmative procedure. Since special health authorities exercise functions of, and are subject to, direction by the Secretary of State, the Secretary of State already has the power to provide for a function currently exercised by one special health authority to be exercised instead by another. The special health authorities that currently exercise functions on behalf of the Secretary of State are the NHS Business Services Authority, NHS Blood and Transplant, the NHS Litigation Authority, now known as NHS Resolution, the NHS Counter Fraud Authority and the NHS Trust Development Authority, which is merging with NHS England as part of this Bill.

As outlined in clause 87, this clause sets out that, by virtue of clause 131, the Secretary of State can use that power to make consequential, transitional or saving provision to modify the functions, constitution or funding of either affected body. The Secretary of State must

[Edward Argar]

also make provision for maintaining representation of the interests of the devolved Administrations where there is the pre-existing requirement in the constitution of the body from which the function is transferred. This clause, together with clause 87, provides vitally needed flexibility for the health system.

I am grateful to the hon. Member for Central Ayrshire for tabling amendments 71 and 72 and thereby bringing these issues before the Committee for debate. These amendments seek to ensure that devolved Administrations have the power of veto over any consequential changes that may be needed to devolved legislation. I note that in her evidence to the Committee Baroness Morgan, the Welsh Minister for Health and Social Services, also expressed concern about this power, as well as the general power to make consequential amendments in clause 130, which she linked it to.

During my discussions with Lady Morgan about the Bill, I have set out why I believe these powers are necessary and appropriate. I hope I have been able to provide some reassurance to this Committee; it is my intention to provide further reassurances on this matter throughout the Bill's passage, and I continue to talk to the relevant Ministers in the devolved Administrations.

The power to make consequential amendments to devolved legislation provided for by clause 89(6) is entirely limited to matters that are genuinely consequential upon regulations and will be largely technical in nature, such as name changes post transfer. The substantive power is to make the transfer of functions, and the consequential amendments flow directly from that. For the statute to work, those consequential changes should not be subject to consent requirements in their own right.

There are precedents for this type of power to make consequential amendments to devolved legislation in many other Acts, and indeed reciprocal powers for devolved Administrations to make consequential amendments to UK Acts of Parliament. It is worth noting, in the context of the ALBs that we are concerned with in these clauses, that Welsh legislation in 2013 made consequential amendments to the Human Tissue Act 2004 of this place. We fear that seeking to introduce new consent requirements on consequential amendments to devolved legislation would be unnecessary and could risk unbalancing current delicate constitutional relationships.

Clause 89 details the scope of those powers referenced in clauses 87 and 88, namely the powers for the Secretary of State to transfer functions to and from relevant bodies and to delegate the Secretary of State's functions to them. Clause 89 sets out the detail of what may be done when using these powers, which gives useful clarity as to the powers' scope. Subsections (1) to (3) set out what may be included in regulations when modifying the functions of a body, the constitutional arrangements or the funding arrangements.

The clause also sets out certain types of powers that may be repealed and re-enacted, but not created, at subsection (4). For example, the power cannot be used to create a new criminal offence, but can be used to repeal or re-enact an existing one so that it moves with a relevant function if appropriate.

As the functions of the relevant bodies are set out in primary legislation, it will be necessary to amend, repeal or revoke such primary legislation when providing for a transfer of functions. The power to do this is provided at subsection (5). Future legislation that relates or refers to the relevant bodies in question may also need to be amended.

It is also necessary for there to be powers to amend devolved legislation—I suspect this is where the hon. Lady and I may have a slight divergence of interpretation or of view, but we will see. There are references to the relevant bodies in devolved legislation, which may need to be amended in order to refer to a new body to which a function is transferred to ensure the effective operation in law of that transfer.

Regulations made under these powers will be subject to the affirmative procedure. That ensures that Parliament can scrutinise the use of the power, including any necessary amendments made to primary legislation, following consultation with the relevant parties, as set out in clause 92. It is an important provision that will allow transfers and delegations of functions to be made effectively.

2.15 pm

When the powers provided for in clauses 87 and 88 to transfer and delegate functions are used, it is likely that assets, rights and liabilities previously held by the original body will need to be transferred to the receiving body. Clause 90 sets out that the Secretary of State may make schemes for the transfer of property, rights or liabilities, and the terms under which the transfers may be carried out. Such a power is a standard provision in legislation that provides for public sector reorganisations. The transfer schemes made be made on the transfer of functions between relevant NDPBs, or the delegation of functions of the Secretary of State to an NDPB. Schemes may be made for the transfer of property, rights of liabilities from the relevant NDPB, a special health authority or the Secretary of State, to any of the appropriate persons listed in subsection (10).

Clause 90 sets out examples of assets, rights and liabilities, as well as the types of provision the transfer scheme may make. For example, a transfer scheme may create rights or impose liabilities in relation to property or rights transferred. It may make provision for shared ownership or use of property, or provide for modifications by agreement. The transfer schemes can be used to move the rights and liabilities relating to a contract of employment; this ensures that employees can be moved without losing any continuity of employment, should staff transfers be appropriate. It is an important provision that ensures that transfers and delegation of functions may take place effectively and without undue disruption.

When exercising the power to transfer functions in clauses 87 and 88, it will be necessary to ensure that no taxes or changes in tax position arise for any arm's length body affected, or any other appropriate persons to whom transfers are made. Clause 91 therefore sets out that the Treasury may make provision to vary a relevant tax in the way it has effect in relation to assets and liabilities that are transferred. That might include a tax exemption or a modification of a tax provision, and will be specified in the scheme. In this clause, "relevant tax" means income tax, corporation tax, capital gains tax, stamp duty or stamp duty reserve tax.

Clause 92 places a requirement on the Secretary of State to carry out a consultation when proposing to use the power to transfer or delegate functions in clauses 87 and 88. The Secretary of State must, at a minimum, consult the ALBs to which the transfer relates. In addition, the relevant devolved authorities should be consulted if regulations would apply in a devolved nation and either would be within the legislative competence of a devolved legislature if contained in an Act of the devolved legislature, or relate to functions exercised by the devolved authority.

The stakeholders whom it may be appropriate to consult will vary, depending on the nature of the transfer of functions contemplated. The Bill therefore provides that such other persons as the Secretary of State considers appropriate should also be consulted, in line with the Department's and the Government's commitment to engaging with stakeholders. The ALB landscape is clearly complex, so we must ensure that there is a transparent process throughout, including formal consultation. In that way, any relevant ALBs and devolved Administrations, the wider health and care system, and Parliament will have the opportunity to scrutinise any plans for its use.

For those reasons, I am tempted to encourage the hon. Member for Central Ayrshire not to press her amendment to a vote. I commend clauses 86 to 92 to the Committee.

Dr Philippa Whitford (Central Ayrshire) (SNP): A lot of this covers the issues that we discussed in relation to data, consultation and consent. I respect that these are UK-wide bodies, whereas data is within the devolved systems, so that was an even bigger issue, but there must be recognition that although health is devolved, the regulation, licensing and registration of staff for bodies of this sort affect the devolved health services. There should at the very least be proper, genuine consultation, rather than changes simply being made.

As we discussed this morning, we saw how NHS Digital—in essence, an England-only service within NHS England—is now being turned into the Health and Social Care Information Centre, which is UK-wide. We already have the information and statistics division in Scotland, so changing the ability of the Secretary of State to change arm's length bodies may indeed affect what happens in the devolved health systems. Reference is made to the Human Fertilisation and Embryology Authority and the Human Tissue Authority simply to respect that those health services are under the control of the Welsh and Scottish Parliaments and the Northern Ireland Executive, but decisions made here will have an impact on them.

I welcome the Minister saying that NICE would not be forced on Scotland—we have the Scottish Medicines Consortium, and the Care Inspectorate rather than the Care Quality Commission. However, that is people's fear because it is not explicit here—either through consultation or consent—that bodies that have been set up for almost two decades, that are integrated with our health system and functioning well, could suddenly be rolled over. It is important that the Minister points out that clause 89(6) is merely consequential. It increases anxiety that the Minister here can, simply through regulations, revoke, repeal and amend Acts of the Scottish and Welsh Parliaments without consent or even consultation.

I do not see an issue with a name change, but there is an issue with a Bill of this size and complexity being published and Ministers in the devolved Administrations seeing it only the day before. That does not show respect between the Governments. That is something that I hope, as the provision is taken into regulations, will change. I do not plan to push the amendment to a vote because the Minister said that he is consulting the Scottish and Welsh Cabinet Secretaries, but it should not have come to this. Respect for devolution should have been implicit in the Bill from the start.

Alex Norris (Nottingham North) (Lab/Co-op): It is a pleasure to resume with you in the Chair, Ms Elliott, and to move on to part 3. Of the various parts, it has possibly had the least impact on my mailbag, but it is important. I am a little troubled by some of the provisions and want to probe them a bit.

The Minister gave a good and characteristically cogent explanation of what is in the Bill, but not of why it is there. That explanation was much shorter, so I want to come back to that because I do not think it is clear what problem the Government are seeking to solve. Has a significant risk to the health and wellbeing of the nation been caused by the Secretary of Secretary's inability to remove functions from one organisation to another more quickly? I do not think that is the case. The Minister made the point about a rather fractured service and the need to be able to act more swiftly. I will revisit those points shortly.

Clause 86 specifies the organisations that the Secretary of State can delegate or transfer functions to: Health Education England, the Health and Social Care Information Centre, the Health Research Authority, the Human Fertilisation and Embryology Authority, the Human Tissue Authority and NHS England. I was surprised not to see the UK Health Security Agency in that list and I hope the Minister will come back to that.

Clause 87 allows the Secretary of State to move functions between the organisations, and clause 88 provides for the Secretary of State to permit them to exercise functions on the Secretary of State's behalf. Are we really saying that there are not decent, appropriate and effective ways to do that already? For example, the UK Health Security Agency is a relatively new body and it will take time for it to settle in and find its level. Do we really believe that there are no mechanisms to ensure that it can exercise functions on the Department's behalf, or that there might be a public health information function currently exercised by NHS England that the agency might be better able to deliver in the future, but cannot because it is not covered by this legislation? I find that hard to believe. Are we saying that there will be an alternative route for that? I cannot understand why there would be a different way of doing that.

If that is really necessary, why is the Government's instinct to do it by regulation? If there are problems today that perhaps the past challenging 18 months have revealed, we have got primary legislation here, so we could make whatever changes the Secretary of State wishes to make to the organisations on the face of the Bill. Obviously, that would not help with new and emerging problems, but what are they? What examples have happened recently? It feels as though we have a solution in search of a problem to solve.

[Alex Norris]

Clause 87(3) basically prevents the Secretary of State from abolishing NHS England. Well, we would hope so—that seems wise—but what of the other agencies? The Health and Social Care Information Centre was formed by the Health and Social Care Act 2012; the Health Research Authority and Health Education England were created by the Care Act 2014; the Human Fertilisation and Embryology Authority was formed by its own Act in 1990; and the Human Tissue Authority was created by the Human Tissue Act 2004. Are we really saying that we need a more direct ministerial route to dissolve or amend these bodies?

We have recent precedent for this: over the course of the past couple of weeks, or certainly over the past few months, the Government have taken Public Health England apart, taking some functions for themselves and creating a new organisation with the remaining ones. They were perfectly able to do it in that case, which would seem to me to be a very drastic case. Now, we think that was a very bad thing to do—I will continue to make that argument—but what I cannot understand is why, if the Government were able to do that then, they would not pursue the same routes in the future.

I would not argue the case against clauses 88 to 91, which form the blueprint for these powers, but I would argue against the rationale for them existing at all. Amendments 68 to 72 again seek to protect the devolved settlement: as the Minister has said, clause 92 provides for devolved nations to be consulted on changes that are within their legislative competence, but I am concerned that that consultation might not go far enough. If we consider a policy area as a devolved matter, that surely requires consent. I have heard some response to that point from the Minister, but we may well hear a little bit more.

Clause 92 lists who the Secretary of State "must consult". As well as devolved nations, it includes the organisation in question and then anyone else the Secretary of State wishes to consult. That list does not expressly include the public or experts in the relevant discipline, for example, and I do not think that is sufficient. In reality, the decision over Public Health England was a rash one, made in its early stages by individuals who are not really involved anymore. In all honesty, nobody would have made the decision that was made: it was a situation in which, despite our desperate attempts to give the Government room to do so, they never quite managed to climb down. However, talking to the public and to experts would have helped the Government make a much better decision in that case, and I am surprised not to see those groups included on the face of the Bill. I hope that we will get an assurance that at least in the Minister's mind, "anyone else the Secretary of State wishes to consult" would involve some experts, if not the public. I very much hope it would.

To conclude, we have gone back and forth on this topic in recent days, and we cannot support the provisions in this part of the Bill. They are Executive overreach, and there are recent examples of why these powers are unnecessary, because the Government can already do these things. During the proceedings on the Bill, the Minister has frequently told us that our amendments are not necessary because they are already covered elsewhere. I am going to gently turn the tables and suggest that these powers exist elsewhere, and therefore these provisions are not necessary.

Edward Argar: I am grateful to colleagues for their comments and contributions. The short answer to the shadow Minister, the hon. Member for Nottingham North, is that comparing the UK Health Security Agency, for example, to what we are discussing here is in a sense comparing apples with pears. This is about non-departmental public bodies. UKHSA is an Executive agency, so it is already directly under the power of the Secretary of State, hence why the Secretary of State was able to make those changes. This is about the different categorisation of two subordinate bodies of the Department—NDPB versus Executive agency—which is why this section of the Bill deals with NDPBs, for which that power is currently not the same as it is for an Executive agency such as UKHSA. It is a technical point, but hopefully that gives the hon. Gentleman some explanation of the difference in approach.

Karin Smyth (Bristol South) (Lab): I am grateful for that clarification, but I believe—perhaps the Minister will comment—that that makes the comments from my hon. Friend the Member for Nottingham North about Executive overreach even more pertinent and well made than they were in the first place. The fact that these are public bodies that are subject to the Commissioner for Public Appointments, which is something the Minister might come on to later, means that their quasi-independence is more significant, not less, and that they are governed accordingly.

2.30 pm

Edward Argar: I will turn to that issue, but before I do I will address the question of why I think this is a proportionate and necessary change in the powers. As we have seen during the pandemic, there can be rapid changes and moves in the functions of those NDPBs, and we therefore cannot have a process that preserves in aspic a particular set of functions in primary legislation. I believe this is a proportionate measure that allows for flexibility around those functions around NDPBs, although in my view it does not encroach on the way they operate, hence the non-departmental public body point that the hon. Lady made. It strikes an appropriate balance.

The other point the hon. Member for Nottingham North made, which shades into the points from the hon. Member for Central Ayrshire, is that where a policy area is devolved, it should be that devolution settlement that takes primacy. The challenge is that, in a number of areas here, we see almost a hybrid of reserve powers and devolved powers.

We will come on to this after we have debated the Health Service Safety Investigations Body part, but it is a good illustration, so I will use it as an example here: if we look at reciprocal healthcare arrangements, which we will come to, the implementation or impact on the ground is to a degree devolved; it is about the organisation of health services in a particular area. However, the power to make international agreements is reserved.

Therefore, in spaces such as this, we come across complex challenges where there is no clear delineation for how to respect the devolution settlement and not intervene in aspects that are clearly devolved, while also

striking a balance such that the devolved Administrations do not have a power of veto over a reserved matter. Those are the complexities we are wrestling with in a number of areas here, and I think that goes to the heart of the issues that the hon. Member for Central Ayrshire has been raising.

Dr Whitford: The Minister mentions the UK Health Security Agency, which was suddenly created in the middle of the pandemic—supposedly out of Public Health England, so I am not quite sure whether Public Health England still exists. There were comments made at the time by the then Secretary of State that this would now be a UK-wide body and would therefore override Public Health Scotland. Since the Minister raised this matter, I would be grateful if he could clarify, because that is exactly the nub of the issue, whether they are executive agencies or arm's length bodies: it is suddenly enforcing a change in structure on the devolved Governments, when our Public Health Scotland is totally integrated with our health service.

Edward Argar: The hon. Lady makes a couple of points there. First, on the transition with Public Health England, to avoid a cliff edge—in the context of some of my conversations with the hon. Member for Nottingham North about different aspects of policy, that is perhaps not the best word—in the transition between two organisations, we have had for some months parallel running of the two. I believe, relying on my memory, that Public Health England finally transfers all its functions and ceases at the end of this month, and then we will see that transition. We have both in being for the time being, to ensure smooth operation of the actual functions they perform.

My understanding of the hon. Lady's specific point about the public health arrangements that work in Scotland and that are a matter for the Scottish Government is that those relationships and that way of working will be able to continue. However, we saw in the European Union (Withdrawal Agreement) Act 2020 and the withdrawal agreement a way of working regarding the health security provisions that has a UK approach to working but fully involves each of the devolved Administrations, because we recognise that the threats are national—as in four nations—and we have seen that diseases and public health threats do not stop just before they get to Berwick, and vice versa. Therefore, we are keen to look at this in a four-nations way, and we have just been looking with the Scottish Government at the public health framework and how we work with it.

I am trying to reassure the hon. Lady that there is no intention to undo what works, but there is a recognition of the need for us to continue to work as four nations together on this. I hope she will be reassured that that helps to respect the devolution settlement; I suspect she may wish to probe me further in future debates, but that, of course, is what we are here for. I encourage hon. Members not to press their amendments to a Division.

Question put, That the clause stand part of the Bill.

The Committee divided: Ayes 10, Noes 5.

Division No. 19]

AYES

Argar, Edward	Davies, Gareth
Crosbie, Virginia	Davies, Dr James
Double, Steve	Robinson, Mary
Gideon, Jo	Skidmore, rh Chris
Higginbotham, Antony	Timpson, Edward

NOES

Foy, Mary Kelly	Smyth, Karin
Madders, Justin	
Norris, Alex	Whitford, Dr Philippa

Question accordingly agreed to.

Clause 86 ordered to stand part of the Bill.

Clause 87

POWER TO TRANSFER FUNCTIONS BETWEEN BODIES

Question put, That the clause stand part of the Bill.

The Committee divided: Ayes 10, Noes 5.

Division No. 20]

AYES

Argar, Edward	Gideon, Jo
Crosbie, Virginia	Higginbotham, Antony
Davies, Gareth	Robinson, Mary
Davies, Dr James	Skidmore, rh Chris
Double, Steve	Timpson, Edward

NOES

Foy, Mary Kelly	Smyth, Karin
Madders, Justin	
Norris, Alex	Whitford, Dr Philippa

Question accordingly agreed to.

Clause 87 ordered to stand part of the Bill.

Clause 88

POWER TO PROVIDE FOR EXERCISE OF FUNCTIONS OF SECRETARY OF STATE

Question put, That the clause stand part of the Bill.

The Committee divided: Ayes 10, Noes 5.

Division No. 21]

AYES

Argar, Edward	Gideon, Jo
Crosbie, Virginia	Higginbotham, Antony
Davies, Gareth	Robinson, Mary
Davies, Dr James	Skidmore, rh Chris
Double, Steve	Timpson, Edward

NOES

Foy, Mary Kelly	Smyth, Karin
Madders, Justin	
Norris, Alex	Whitford, Dr Philippa

Question accordingly agreed to.

Clause 88 ordered to stand part of the Bill.

The Chair: We now come to the Question that clause 89 stand part of the Bill, which has already been debated. With the leave of the Committee, I will put the question on clause 89 as a single question with clauses 90 to 92,

[The Chair]

which have also already been debated. The question is that clauses 89 to 92 stand part of the Bill. As many as are of that opinion say Aye.

Several hon. Members: Aye.

The Chair: Of the contrary No.

Several hon. Members: No.

Clause 89

SCOPE OF POWERS

The Committee divided: Ayes 10, Noes 5.

Division No. 22]

AYES

Argar, Edward	Gideon, Jo
Crosbie, Virginia	Higginbotham, Antony
Davies, Gareth	Robinson, Mary
Davies, Dr James	Skidmore, rh Chris
Double, Steve	Timpson, Edward

NOES

Foy, Mary Kelly	Smyth, Karin
Madders, Justin	
Norris, Alex	Whitford, Dr Philippa

Question accordingly agreed to.

Clause 89 ordered to stand part of the Bill.

Clause 93

ESTABLISHMENT OF THE HSSIB

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss the following:

Amendment 127, in schedule 13, page 204, line 7, leave out "Secretary of State" and insert

"Chief Executive of NHS England".

This amendment would give the Chief Executive of NHS England the power to appoint members and the chair of HSSIB.

Amendment 128, in schedule 13, page 204, line 18, leave out

"with the consent of the Secretary of State".

Amendment 129, in schedule 13, page 204, line 21, after "HSSIB" insert

", one of whom is to be the Chief Finance Officer,".

Amendment 130, in schedule 13, page 204, line 32, leave out "The Secretary of State" and insert

"A majority of non-executive members following a vote".

This amendment would give a majority of non-executive members the power to remove a person from office following a vote.

Amendment 131, in schedule 13, page 204, line 37, leave out sub-paragraph (4).

This amendment would remove sub-paragraph 4 from schedule 13 of the Bill, which confers powers on the Secretary of State to remove a person from office in HSSIB.

Amendment 132, in schedule 13, page 206, line 12, leave out "Secretary of State" and insert

"Chief Finance Officer of HSSIB".

This amendment, together with amendments 133, 134, 135 and 136, would give the Chief Finance Officer of HSSIB power over remuneration for non-executive members of HSSIB.

Amendment 133, in schedule 13, page 206, line 14, leave out "Secretary of State" and insert

"Chief Finance Officer of HSSIB".

See explanatory statement to Amendment 132.

Amendment 134, in schedule 13, page 206, line 16, leave out "Secretary of State" and insert

"Chief Finance Officer of HSSIB".

See explanatory statement to Amendment 132.

Amendment 135, in schedule 13, page 206, line 19, leave out "Secretary of State" and insert

"Chief Finance Officer of HSSIB".

See explanatory statement to Amendment 132.

That schedule 13 be the Thirteenth schedule to the Bill.

Edward Argar: I will endeavour to make progress before the Division in the House. Clause 93 is the first clause in part 4, which establishes the health services safety investigations body. This new body will build on the work of the Healthcare Safety Investigation Branch, which became operational in 2017 as part of NHS Improvement. Part 4 makes provision to establish an independent statutory body to investigate qualifying incidents that occur in England during the provision of healthcare services that have or may have patient safety implications.

Crucially, HSSIB's investigations and reports are about learning from incidents across the healthcare landscape and will help to foster a strong learning culture. We want to ensure that we learn from what has gone wrong before, which ultimately will ensure that patients get the best care, which they rightly deserve. HSSIB's investigations will not assess or determine blame, civil or criminal liability, or whether action needs to be taken in respect of an individual by a regulatory body. Instead, its investigations will identify risks to the safety of patients and address these by facilitating the improvement of systems and practices in the provision of healthcare services in England.

There have been calls for some time to put the Healthcare Safety Investigation Branch on an independent statutory footing. We previously introduced proposals to do that in the Health Service Safety Investigations Bill, which was introduced in the other place in October 2019. Unfortunately, that Bill did not progress past Second Reading because Parliament was dissolved for the general election. However, the Government are committed to reducing patient harm by improving the quality of health investigations and developing a culture of real learning. We are using this Bill to deliver that world-leading innovation in patient safety. I will take this opportunity to pay tribute to my right hon. Friend the Member for Mid Bedfordshire (Ms Dorries) for all the work she did on this when she was Minister of State for patient safety.

Clause 93 specifically establishes HSSIB as the body to take forward systemic patient safety investigations. It also gives effect to schedule 13, which sets out arrangements for HSSIB's constitution and governance, and provides details of its membership and its financial and reporting obligations. I am proud that this will be one of the first

independent healthcare bodies of its kind in the world carrying out systemic investigations. The independence of the new body's investigations will give the public full confidence in its investigation processes and its ability to deliver impartial conclusions and recommendations. The aim will be to learn and not to blame.

On the practical side, schedule 13 also allows the making of transfer schemes to ensure a smooth transition when HSSIB is set up. The intention is that following the NHS England and NHS Improvement merger, which we have discussed earlier, the functions of the current Healthcare Safety Investigation Branch will sit with NHS England until such time as HSSIB is established as a separate statutory body, so the transfer scheme provisions in the schedule provide for a transition from NHS England to HSSIB.

The amendments that have been tabled focus largely on the membership and responsibilities of, and the appointments process relating to, HSSIB's board. Amendment 127 would remove the responsibility of the Secretary of State to appoint the chair and non-executive members to the board, and would instead give that responsibility to the chief executive of NHS England.

HSSIB will be a non-departmental public body and will therefore meet the criteria to be added to the Public Appointments Order in Council, which lists those bodies whereby the non-executive member appointments are bound by the Cabinet Office's governance code on public appointments, which are regulated by the Commissioner for Public Appointments. It is standard practice to have the Secretary of State appoint non-executive board members to a public body. Making that the responsibility of the chief executive of NHS England could bring into question HSSIB's independence, especially when it is investigating issues that might involve or lead to recommendations for NHS England. That would risk reducing public trust in HSSIB, which I think we all agree will be paramount in gaining public support for the work it does, and it could undermine the acceptance of its recommendations.

2.45 pm

In a similar area, amendment 128 would remove the need for the Secretary of State to consent to the appointment of the chief investigator of HSSIB. It is the Secretary of State who is responsible to Parliament for NDPBs. It is therefore standard practice for executive positions to be approved by the Secretary of State, to ensure that there is ministerial and democratic oversight. Having the appointment of the chief investigator approved by the Secretary of State gives Parliament the ability to hold the Secretary of State to account. Removing it could weaken parliamentary accountability.

However, an important balance has been achieved with the current drafting. We have not provided for the Secretary of State simply to appoint the chief investigator. The non-executive members will appoint the chief investigator with the consent of the Secretary of State. That approach will ensure that HSSIB's board is content with the appointment and can use its expertise in such an appointment decision, while we still ensure that there is ministerial oversight and, ultimately, accountability to Parliament.

Amendments 130 and 131 seek to limit the involvement of the Secretary of State in the appointment of non-executive members. Amendment 130 would eliminate the Secretary of State's ability to remove from office a non-executive member and would give that responsibility to the non-executive members, following a majority decision through a vote. Amendment 131 would eliminate the Secretary of State's ability to suspend from office a non-executive member.

The Secretary of State is responsible and accountable to Parliament for public appointments. As part of these responsibilities, it is standard practice that the Secretary of State is able to remove or suspend non-executive members from office because of incapacity, misbehaviour, or if they are failing to carry out their duties, as set out in the Bill. It would therefore not be appropriate for non-executive members to have that power, especially as all the non-executive members will have been appointed by the Secretary of State.

2.47 pm

Sitting suspended for a Division in the House.

3.3 pm

On resuming—

The Chair: We are now going to go backwards, because it has come to our attention that some of the clauses were not actually voted on. We are going to vote on clauses 90, 91 and 92.

Clause 90

TRANSFER SCHEMES IN CONNECTION WITH REGULATIONS

Question put, That the clause stand part of the Bill.

The Committee divided: Ayes 10, Noes 6.

Division No. 23]

AYES

Argar, Edward	Gideon, Jo
Crosbie, Virginia	Higginbotham, Antony
Davies, Gareth	Robinson, Mary
Davies, Dr James	Skidmore, rh Chris
Double, Steve	Timpson, Edward

NOES

Foy, Mary Kelly	Owen, Sarah
Madders, Justin	Smyth, Karin
Norris, Alex	Whitford, Dr Philippa

Question accordingly agreed to.

Clause 90 ordered to stand part of the Bill.

Clause 91

TRANSFER SCHEMES: TAXATION

Question put, That the clause stand part of the Bill.

The Committee divided: Ayes 10, Noes 6.

Division No. 24]

AYES

Argar, Edward	Davies, Dr James
Crosbie, Virginia	Double, Steve
Davies, Gareth	Gideon, Jo

Higginbotham, Antony	Skidmore, rh Chris
Robinson, Mary	Timpson, Edward

NOES

Foy, Mary Kelly	Owen, Sarah
Madders, Justin	Smyth, Karin
Norris, Alex	Whitford, Dr Philippa

Question accordingly agreed to.

Clause 91 ordered to stand part of the Bill.

Clause 92

CONSULTATION ON DRAFT REGULATIONS

Question put, That the clause stand part of the Bill.

The Committee divided: Ayes 11, Noes 5.

Division No. 25]

AYES

Argar, Edward	Higginbotham, Antony
Crosbie, Virginia	Robinson, Mary
Davies, Gareth	Skidmore, rh Chris
Davies, Dr James	Timpson, Edward
Double, Steve	Whitford, Dr Philippa
Gideon, Jo	

NOES

Foy, Mary Kelly	Owen, Sarah
Madders, Justin	
Norris, Alex	Smyth, Karin

Question accordingly agreed to.

Clause 92 ordered to stand part of the Bill.

Clause 93

ESTABLISHMENT OF THE HSSIB

Question again proposed, That the clause stand part of the Bill.

The Chair: I remind hon. Members that with this we are considering amendments 127 to 135 and schedule 13. I call the Minister to carry on from where he left off.

Edward Argar: I am grateful to you, Ms Elliott, and I challenge colleagues to remember what I was saying just before the Division.

On amendment 130, having the non-executive members remove one of their own members—essentially, their colleague—could very likely create a conflict between board members, because I would not expect that to be an easy decision for any of them. Of course, we want an effective, cohesive and united board with the Secretary of State stepping in only when a real issue needs to be addressed.

We would not expect those powers to be used very often, and ideally they would never need to be used. However, it is important to have those safeguards, which would allow action to be taken quickly should there be concerns about a non-executive member of the board.

Finally, I will speak about amendments 129 and 132 to 135, which look to mandate the creation and role of a chief finance officer for HSSIB. If I have understood the wording of amendment 129 correctly, the intention is to ensure that the chief finance officer of HSSIB is one of the executive members. As HSSIB is an independent NDPB, the recruitment of the executive members will be led by the non-executive members. It will be for them to take decisions about the composition of the executive members of the board, taking into account the balance of skills and experience required to lead the organisation in its vital work.

If the non-executive members were of the view that a chief financial officer's skills would help the board's work and complement the knowledge, skills and experience held by the existing non-executive and executive members, this would be a board role. There is nothing in the Bill, as it is currently drafted, to prevent the non-executive members from doing that.

It will be important for HSSIB, as an independent body, to be fully on top of finance and accounting decisions, and that is already reflected in the Bill. The constitution, which is set out in part 1 of schedule 13, includes a number of requirements in relation to funding and finance to ensure that that is managed correctly by HSSIB. For example, paragraph 12(1) of schedule 13 expressly states that HSSIB must exercise its functions economically, as well as effectively and efficiently. Paragraph 16 relates to the use of income from charges, and paragraphs 18 and 19 relate to the accounts of HSSIB. It is for HSSIB to decide how best to ensure it fulfils these duties, but I hope it is reassuring that the constitution underlines the importance of running HSSIB economically and the requirements for annual accounts, as would be expected of a public body.

Amendments 132 to 135 look to remove from the Secretary of State the responsibility to set the remuneration for non-executive members of HSSIB, and to give that power to the chief finance officer instead. The amendments present some challenges, which I will outline here.

In respect of public appointments, the governance code for public appointments states that

"Ministers must be consulted before a competition opens to agree the job description for the role, the length of tenure and remuneration."

A number of non-departmental public bodies follow this code, such as the Care Quality Commission, the Human Tissue Authority and the Human Fertilisation and Embryology Authority, to name a few. There is no reason why the arrangements for HSSIB should differ from those of other non-departmental public bodies.

We wish to ensure the independence of HSSIB's board, and I know that hon. Members feel strongly about that, too. Giving a chief finance officer control over the remuneration of non-executive members means that the Secretary of State and, via the Secretary of State, Parliament would not have full oversight of how public money is spent. Although I am sure that the non-executive board members would act with the utmost integrity, we must ensure that the legislation supports them to do so as far as possible, and that we do not deviate from standard practice in public appointments. For those reasons, I ask hon. Members not to press their amendments, and I commend this clause and schedule to the Committee.

Justin Madders (Ellesmere Port and Neston) (Lab): It is a pleasure to see you in the Chair this afternoon, Ms Elliot. I am grateful to the Minister for setting out the Department's position on the clause and the

accompanying schedule. The proposed amendments relate to the establishment of HSSIB. As he has said, it builds on the work carried out by the Healthcare Safety Investigation Branch, which was established without statutory basis in 2016 and became operational in April 2017.

The Public Administration and Constitutional Affairs Committee identified in April 2016—more than five and a half years ago—that this legislation was necessary, and I am pleased to see that it is finally being brought forward. The Health Service Safety Investigations Bill, which was introduced in the House of Lords in 2019, did not proceed because of the calling of a general election, on which the Opposition do not wish to linger.

As other members of the Committee may have done, I have raised with the Healthcare Safety Investigation Branch both system-wide issues and individual matters on behalf of constituents. My experience has suggested that there are wider issues that need investigating, so we welcome this opportunity to discuss and set out in legislation the powers and remit of the body.

Unfortunately, some details are lacking from part 4 of the Bill, which we think represents a missed opportunity to set them out a bit more precisely. We should not miss the opportunity to ensure that this body can truly improve healthcare, as we will demonstrate with our amendments, notwithstanding what the Minster has said. We are trying to do our utmost to ensure that HSSIB has the independence, the resources and the influence it requires to operate at its maximum potential. Lessons must be learned from the experience of the Healthcare Safety Investigation Branch, which has undoubtedly had some impact. However, in many ways, its work has not had the impact it might have had, because its reach has been limited for a variety of reasons that are entirely out of its control.

Keith Conradi, the chief investigator of the Healthcare Safety Investigation Branch, touched on that during the second sitting of this Committee, when he commented on how the branch had been operating in shadow form, without any real powers. We have discussed the powers of HSSIB, especially in terms of access to information and compelling people to co-operate with investigations. However, it is what happens after the final report, and ensuring that those recommendations are acted on, that will have the largest impact on patient safety and driving through improvements.

A recent example of the work of the Healthcare Safety Investigation Branch is its investigation into wrong site surgery, through the wrong patients being identified in outpatient departments. The reference for the investigation was evidence from the NHS national reporting and learning system that the incorrect identification of patients is a contributing factor in patients receiving the wrong procedure. The safety recommendation to NHS England was to lead a review of risks relating to patient identification in out-patient settings, and to assess the feasibility to enhance or implement systematic controls such as technological options or the use of the NHS unique identification number. NHS England responded by stating that the work would require an understanding of the true scale and impact of the risks through observational study, which would be resource heavy. It said that, without evidence of the risk, that would did not justify the cost. Hence, the recommendation was considered but not acted on.

3.15 pm

NHS England's response highlights the cost of following the recommendations in the context of funding pressures and large waiting lists throughout the NHS. Many recommendations made by HSSIB may well not be acted on in the future for the same reason. We need to hear from the Minister how cost pressures can be alleviated, so that systemic failings can be acted on when they are identified and we will not see trusts being asked to deliver unrealistic transformations if the finance and personnel are not there to ensure that that happens. We do not want important recommendations in HSSIB reports gathering dust on shelves, marked as too expensive or difficult to implement.

A further concern, on the safety of maternity services in England, was raised by the Health and Social Care Committee on 6 July. The Committee recommended that

"HSIB investigations continue, but that HSIB reviews how it engages with trusts to ensure that the investigation process works in a timely and collaborative manner which optimally supports local learning and development. That review should include processes to ensure that healthcare professionals at all levels and across multidisciplinary team are able to engage with HSIB investigations… In addition, we recommend that HSIB shares the learning from its maternity reports in a more systematic and accessible manner. A top level summary of individual cases together with the key learnings derived from them should be shared rapidly across the NHS."

I appreciate that there is a lack of clarity on what will happen with the maternity investigation programme, and no decision that I am aware of has yet been made on how the service will be delivered once HSSIB is set up, but these recommendations must still be acted on if HSSIB is to achieve its function. Engagement is essential, as is the way that learning is disseminated across trusts.

Across the Bill there is a focus on the role that the Secretary of State plays, but there is too little on how HSSIB will actually engage with trusts. We must remember that HSSIB's creation is for the improvement of the national health service; it is not the Secretary of State's personal investigation body. It is essential that systemic failings are investigated, and that learning takes place in a safe space. Indeed, that was the founding principle of Healthcare Safety Investigation Branch. I am pleased that those principles are to some extent maintained. In due course we will no doubt get on to whether that safe space is actually sacrosanct. There are also concerning aspects throughout part 4 of the Bill that suggest that HSSIB might not be quite as independent as we would want it to be.

Schedule 13 covers the provisions of HSSIB's formation. It is worth taking a few moments to reflect on paragraph 1, which sets out very clearly that HSSIB is not to be regarded

"as the servant or agent of the Crown".

That is a clear statement about the need for HSSIB to be an independent body, and we can all see why that is necessary. However, the Bill has repeated provisions in it that could cast doubt on, or impede, that independence.

Indeed, as soon as paragraph 1 is out of the way, we see the first issue where the stated aim of independence comes into conflict with reality. The provisions in paragraphs 2, 3 and 4 are strangely laid out. Paragraph 2 says there will be

"a Chief Investigator appointed in accordance with paragraph 3".

I do not know what that statement adds to the Bill. However, paragraph 3 then says:

"The Chief Investigator is to be appointed by the non-executive members with the consent of the Secretary of State."

Why does the Secretary of State have to give his consent? Does that not go against the notion of independence? When we add paragraph 2(1)(c), which states that not only the chair but all the non-executive members are appointed by the Secretary of State, it begins to look like HSSIB is a long way from the independent body we believe it should be.

The NHS has raised concerns regarding this provision, and it sought an amendment that would have introduced some pre-appointment scrutiny by the Health and Social Care Committee to ensure the independence of this body. That view was also held by the Joint Committee on the draft Health Service Safety Investigations Bill, which recommended that both the chair and chief investigator be subject to pre-appointment scrutiny by the Health and Social Care Committee. The Government's agreed and stated that they would work with the Committee on the best way to achieve that. It is therefore a bit surprising that the necessary provisions are absent from the Bill and that the powers lie directly with the Secretary of State, which is why we tabled amendment 127. I am hoping to hear from the Minister that there will be an appointments process, because although it does not appear in the Bill, it is important.

In the appointment process for Keith Conradi as the chief investigator of the Healthcare Safety Investigation Branch, an open competition approach was taken in the selection panel, which included personnel from the NHS, the Department of Health and Social Care, the ombudsman and the HSIB expert advisory group. The pre-appointment process included a hearing with PACAC after the Secretary of State made it known who the preferred candidate was. A pre-appointment hearing then took place, and the Committee endorsed Mr Conradi. It would be helpful if the Minister could confirm that that is the kind of process he envisages taking place for the chair, and whether that would also apply to the non-executive members who will be appointed by the Secretary of State. In that situation, there is at least some independent scrutiny. Although we can probably all think of examples of where even that process has looked little more than a rubber-stamping exercise, it is certainly an improvement on what lies on the face of the Bill.

By contrast, amendment 128 is much simpler. It simply removes the requirement for the chief investigator's appointment to be approved by the Secretary of State. I have not yet heard anything from the Minister as to why such approval needs to be in place. He said it is standard practice, but this is not a standard body, in the sense that it has to be seen to be independent of the NHS and the Department. Our view is that the requirement is superfluous and actually does damage and erodes the concept of independence, which we want to see with this body.

From the provisions in paragraph 3 of schedule 13, it is also unclear on what basis the Secretary of State may withdraw consent for the appointment of the chief investigator. If those circumstances arose, how would the chief investigator be appointed? Will the Minister set out the circumstances in which he would envisage consent being withdrawn? In that situation, what procedure would be in place, or is it the case, as we assume, that the non-executive members would have to continue to put forward suggestions until those were agreed by the Secretary of State? In a sense, they would keep asking the same question or a different question until they got a positive response, which does not really bode well for the concept of independence.

I would also be interested to know why the Secretary of State must appoint at least four members of the body. I do not think there has been a set number for executive and non-executive members outlined in the Bill. In the absence of that, I question why a set figure has been placed on the number of members the Secretary of State should appoint. Of course, we say that the number should be zero, but I do not think we will get the Minister's endorsement on that.

On paragraph 4, it is not entirely clear why the Bill seeks to restrict the number of executive members to five, and why the Secretary of State needs to give his consent if it exceeds that number. At best, I can hazard a guess that it might be to ensure that his appointments are in the majority, which again does not sound particularly independent to me. It may be something to do with keeping a lid on costs, as all these people will presumably be remunerated. However, it seems rather odd that we have a body that is supposed to be independent, when the Secretary of State is looking not only to determine who holds many of the key positions but to restrict the total number of people who can work for the organisation.

It does not end there. Concerns relating to the undue influence of the Secretary of State continue in the provisions on the tenure of the non-executive members in paragraph 5(3) to (7). Sub-paragraph (3) states:

"The Secretary of State may at any time remove a person from office as a non-executive member on any of the following grounds…incapacity…misbehaviour, or…failure to carry out the person's duties as a non-executive member."

The same provisions also allow the Secretary of State to suspend a person from office and enables them to be reinstated if the Secretary of State

"decides that there are no grounds to remove"

the said member, or decides not to remove them under the provision. As the Committee might have noted, there is much talk throughout about the Secretary of State's decision, with no explanation as to what may constitute misbehaviour. Given the events of the past year, I am not sure that a Secretary of State for Health and Social Care is always best placed to judge what might constitute misbehaviour, but I do not think any of us want to linger on that, so I will move on to the wider point.

Why would we as parliamentarians engaged in an important piece of legislation setting up what is supposed to be an independent body want to give the Secretary of State such broad and opaque powers over members of that body when he ought to steer clear of it? We should not be in the business of handing him such powers without making any attempt to define what constitutes misbehaviour or what procedures would be adopted to form such a judgment. What is the evidential threshold? Is there a burden of proof? Is there an appeals process, or can the Secretary of State simply wake up one morning and say that he is removing someone from office for one of the three reasons set out in paragraph 5(3), without having to produce a single scrap of paper in support of such action?

I hope Members can see that placing the power to remove or reinstate solely with the Secretary of State could not only leave him open to accusations of seeking to manipulate the make-up of HSSIB, but could see non-executive members reluctant to conduct themselves with free will owing to concerns that the Secretary of State might remove them. As Keith Conradi told the Bill Committee,

"Ultimately, we end up making recommendations to the Department of Health and Social Care, and in the future I would like to ensure that we have…freedom to be able to make recommendations wherever we think that they most fit."—[*Official Report, Health and Care Public Bill Committee,* 7 September 2021; c. 60, Q78.]

The Minister will no doubt be taking my concerns very seriously, but I am pleased to report that I have a solution in the guise of our amendment, which gives the powers to non-executive members, who may exercise them if a majority of them do so after a casting vote. It is important that non-executive members can be removed if circumstances justify it, but we consider the best people to ascertain that are fellow non-executive members. That ensures that there is a clear signal that HSSIB will be required to manage its own affairs, thus ensuring its independence. The Minister referred to wanting the non-executive members to behave in a harmonious manner and not trying to remove each of them from office. I am sure that will not happen most of the time, but if we are talking about a body that is truly independent, it should be up to it to make the judgments, not the Secretary of State.

Likewise, amendment 131 would remove paragraph 5(4), which would give the Secretary of State the power to suspend someone on the grounds set out. It stands to reason that if one accepts that, in order to ensure independence, the Secretary of State should not have the power to remove someone from office, that principle should also apply to the power to suspend.

On payments to non-executive members, as set out in paragraph (8), the Secretary of State is named as the person who determines the remuneration for non-executive members and the compensation payable to those who cease to be non-executive members in exceptional circumstances, but those are not quantified in the Bill. We face a situation where the Secretary of State can remove a non-executive member and then decide to compensate them. It remains to be seen why a Secretary of State must decide on the remuneration and within what parameters remuneration will be considered appropriate.

The provision leads to concerns about transparency and fails to clarify whether the remuneration for each member will be the same. If the Secretary of State chooses at least four of the non-executive members and decides whether members can be suspended or removed and how much remuneration they will receive, that calls into question how it can be argued that the Secretary of State has anything other than undue influence over a body that by its very nature should be an independent non-departmental public body. I do not see why the Secretary of State would want such powers, particularly when he already has enough on his plate: covid, record waiting lists, and the integration plans that have not been covered by the Bill but that we expect more on shortly.

However, concern for the Minister's workload is of course secondary. Independence is undermined by having these powers in the hands of the Secretary of State. I gently suggest to the Minister that the solution again manifests itself in our amendments 129, 132, 133, 134 and 135, which provide for the chief finance officer to undertake the responsibility set out in paragraph 8 as part of their statutory role.

On matters of pay to members of staff, the ability to appoint and set remuneration sits with HSSIB, aside from pensions, allowances or gratuities, where approval of the Secretary of State is required. Will there be input from trade unions or the Health and Social Care Committee, or will such agreements will be private matters between HSSIB and the Secretary of State? Again, there is the possibility of a conflict of interest because of the undue influence the Secretary of State may hold over the body.

Paragraph 10, on procedure, states:

"HSSIB may regulate its own procedure."

I agree that, in principle, procedural matters should sit with this body, but it seems odd that Parliament should legislate for that without having any view on how HSSIB should run itself, given that it has already been operating for a number of years. It is probably a moot point but if there were procedural changes in the future we would like a commitment that they would be made following consultation with Parliament, patient groups and, of course, workforce representatives.

Paragraph 14 places full funding decisions in the hands of the Secretary of State in the absence of a timescale for such funding agreements, with conditions that the Secretary of State can impose if they consider it appropriate. I share the NHS's concerns that any funding should be set for a specified time period, which may be increased after consultation if, for example, costs are likely to increase, depending on the nature of the investigations or the committees and assistance required in cases where expert assistance is needed. I am aware of a suggestion that there might initially be a three-year deal, but any funding deal in line with the review period of HSSIB should ensure that HSSIB can function as intended.

I would also welcome clarity on what conditions the Secretary of State can impose on payments made to HSSIB, which again are set out in the Bill and could bring the independence of the body into question. On the face of it, this is a rather broad power. If we were to subscribe to the maxim "Follow the money", it would not be too difficult to see how problems could arise under those circumstances.

Finally, paragraph 16 concerns HSSIB's ability to raise income from non-NHS bodies. I presume—I am sure the Minister can confirm this—that that power is not something that can be visited on NHS bodies. We need to ensure that that power does not become more of a priority than it should be, in terms of funding restrictions, that the body's primary aim is still followed, and that this power does not lead to conflicts of interest.

Karin Smyth: It is a pleasure to see you in the Chair, Ms Elliott. I would like to address some comments to schedule 13, following on from my hon. Friend the Member for Ellesmere Port and Neston. It is not an interest, but I am a member of the Public Administration and Constitutional Affairs Committee, and much of the appointment issue is within our purview.

HSSIB is a really important new body and, as the Minister outlined, it must be of the highest integrity. It must absolutely be built on the highest standards of

[Karin Smyth]

trust when it comes to the wider system and the general public. We will discuss how that will happen over the forthcoming clauses.

As the Committee knows, the issue of accountability is close to my heart. HSSIB being a public body, and I am afraid to say that the Government's record in the last couple of years does not fill me and many others with great confidence in terms of how this body is being set up. Its leadership merits due consideration both by the Committee and when the Bill goes to the Lords and then returns to the Commons.

3.30 pm

The Government's recent record in pre-appointment scrutiny hearings is not good. We discussed that back in October with the then Commissioner for Public Appointments, and I will come back to some of the comments made then. The appointment of the chair of NHS Improvement in 2017 was unusual. The Health and Social Care Committee approved the appointment of Baroness Harding with some clear recommendations, one of which was that she should

"relinquish the Conservative whip in the House of Lords".

It is unusual for a member of these bodies and maintain a party allegiance, let alone to vote for that party in this place. Further, given Baroness Harding's

"own admission of a lack of professional experience in health and social care"

the Committee recommended that she should undertake to gain "the widest possible experience" of learning about the service before taking up the post. Finally, the Committee said that she needed to

"show her full commitment to the NHS while in this role in her own personal decision-making."

That is fairly strong talk to the Government from our colleagues on that Select Committee. Did the Government act on this advice? Did Baroness Harding? The answer is a very loud, resounding—and terribly expensive, as it turned out—no. She did not and the Government did not. Not only that, but they went on to increase responsibilities throughout the pandemic by creating not another public body but Executive agencies—we have discussed the difference between public bodies and Executive agencies—thereby putting the appointment out of the purview of the Commissioner for Public Appointments.

We talked about that in Committee last October. I asked Mr Riddell, the chair at the time, about the pre-appointment reports. It is not just the one from the Health and Social Care Committee; there is a bit of a pattern in the Government's regard for the scrutiny work done by Members of Parliament and in Select Committees, and there are a number of examples, which I will not detain the Committee with now. If Members are interested, they can read the reports of Public Administration and Constitutional Affairs Committee itself. A number of Committees and individuals have not been put through that due and proper process.

In fact, the Public Administration and Constitutional Affairs Committee discussed how we can make sure that the Commissioner for Public Appointments looks at where the gaps are. With the Executive agency, we fell into the ridiculous conversation about whether Baroness Harding was a civil servant and subject to civil service code or subject to the Commissioner for Public Appointments. The answer was neither, really, because she was not technically in charge of the Executive agency as chair or a civil servant either. Especially when talking about the spending of £37 billion of taxpayers' money, that is completely unacceptable. There is a gap between these effective agencies. Whether NHS England itself as a public body is the best arbiter or not is another cause for discussion. I would partly agree with testing the waters with some of these questions here today.

Clearly, something better needs to be done, and the behaviour of the Government in the last couple of years and under the previous Secretary of State does not fill us with confidence, though it may be that this Secretary of State is different. It is no way to make legislation. It is certainly no way to start off this new and important body, which we are all desperate to ensure works well. There will be a lot of trust and good work from people involved in safety in the NHS who are looking to it to achieve great things, so it must start off at the highest possible standard and with the most assurance that the process by which the person appointed is of a high standard.

Basically, we are left to trust the Government and the individual to abide by the codes, and we have to trust the Cabinet Office to make sure that code is implemented, but we have no evidence to suggest that that will be the case. I am not sure what the Government will do about that, apart from maybe try to be a bit better and abide by their own codes and standards, laid down two decades ago, about how people should behave. The Minister is an honourable man; we cannot always choose who we work with, but he needs to take those points particularly seriously. I am sure that he will be subject to more scrutiny in the Lords and elsewhere about standards and this appointment. I hope that he can give us some assurance that the Department of Health will be abiding by the principles of the Cabinet Office codes far more strongly in the future than it has in the past.

Edward Argar: We have had the opportunity in this clause and these amendments to range more broadly in setting out the landscape and issues relevant to our debates on the forthcoming clauses. A number of questions were raised in the context of this debate, and I will aim to answer as many as I can.

The shadow Minister, the hon. Member for Ellesmere Port and Neston, talked about budgets and resourcing in his opening remarks. As he will be aware, schedule 13 provides for funding to be given as the Secretary of State thinks appropriate. We are clear that we want HSSIB to be adequately resourced to exercise its functions, but it is right that when a public body is spending public money, there is democratic oversight, because that money comes from the public purse. We are determined to ensure that it has adequate resourcing, but I believe it is right that the Secretary of State plays a key role.

The hon. Gentleman also asked, I think—he can shake his head if I misunderstood what he said—about the impact of any recommendations or decisions on individual trusts or the NHS, and their ability to act on them without it disproportionately affecting their resourcing and their plans. We are confident that, as we have seen with previously identified failings—not necessarily through this process, but in the past—trusts are able to address those recommendations. However, in cases where there

is a major incident leading to significant reform, as has happened—I suspect we all hope that it does not happen again—resources can be made available to address a particular systemic failing across a much broader landscape. I cannot pre-empt decisions made by the Secretary of State or the Chancellor of the Exchequer in those circumstances, but I hope that the principle of adequate resourcing is established, as we all want.

The shadow Minister also expressed concerns that, at their heart, were about the organisation either not being, or being perceived to not be, sufficiently independent of the Secretary of State, because of the nature of the governance arrangements put in place around it. I do not think that is the case. We are adopting a standard approach to managing public appointments to a body of this sort. I would be more concerned if the NHS were responsible for appointments or funding, because although I do not want to pre-judge its work, I expect that HSSIB will more frequently be looking into and reporting on NHS bodies.

On some of the specific points on the role of the Secretary of State and the appointment of non-executive members and the chair of the board, I can give reassurance that that will be managed in line with the Government's code for public appointments, regulated by the Commissioner for Public Appointments. I hear what the hon. Member for Bristol South says; she will not be surprised that I will avoid being drawn on individuals, but she made her point and made it clearly.

Regarding the chief investigator particularly, it would be normal for boards to have more non-executive than executive members—we see that in both the private and public sectors—and that ensures that one-step removal from the executive operation the ability to challenge within that board. That is reasonable. The chief investigator is a key figure in this body, and I do not believe that the approval by the Secretary of State can call into question the independence of the HSSIB. The Secretary of State will not appoint the chief investigator—that is the responsibility of the non-executive board—but it is right that the Secretary of State approves that appointment, ensuring the route of accountability. I can go a little further and offer some reassurance to the shadow Minister, in that I envisage the chief investigator appearing before the Health and Social Care Committee—the most appropriate Select Committee—before the appointment is made.

3.45 pm

To respond to the point made by the hon. Member for Bristol South, the first pre-appointment hearings in Select Committees took place in, I believe, 2008, under the Government headed by Gordon Brown, to give credit where it is due. That has since been strengthened, and we had the Grimstone review on appointments in 2015, so work on the subject has continued. With her Select Committee hat on, I suspect the hon. Lady would acknowledge that but say more needs to be done, which is a perfectly legitimate position to hold.

In terms of removal of board members, the shadow Minister mentioned the three grounds on which a Secretary of State can remove board members and highlighted misbehaviour, suggesting it is a wide term and could mean the Secretary of State can just say, "Well, that's misbehaviour." Although I am not a lawyer, my understanding is that misbehaviour is a defined or well-understood legal term that has case law and precedent sitting behind it that would be expected to inform a decision, so that decision could not itself be then subject to challenge for unreasonableness. I may be wrong, but I think the Wednesbury ruling defined unreasonableness. I hope the shadow Minister is reassured that while the term may look opaque or broad, it is understood within the legal profession in that context.

The shadow Minister also made a point about the chief financial officer and remuneration. The governance code for public appointments states:

> "Ministers must be consulted before a competition opens to agree the job description for the role, the length of tenure and remuneration."

It is standard practice for the remuneration policy for non-executive members of NDPBs to be decided by the Secretary of State, with advice going to Ministers on including information on the make-up and diversity of the board. I do not think there is anything in these provisions that goes beyond or moves away from the current practices for the appointment of members to similar NDPBs.

I do not believe there is anything here that would call into question the independence or integrity of those who were appointed. The key figure is the chief investigator, in terms of bringing public trust to bear on the findings of this organisation. That appointment would be carefully considered, made by the board and approved by the Secretary of State, with the key check in this place of the appointment going through a pre-appointment scrutiny hearing.

I hope that gives the hon. Gentleman some reassurance. I fear I have more work to do over the coming clauses to offer reassurance on a number of aspects of this, but I hope that addresses as many of his points as I could remember. If I have missed some, I suspect he will come back to me in future clauses, because these clauses are all interlinked.

Question put and agreed to.

Clause 93 accordingly ordered to stand part of the Bill.

The Chair: We now come to amendments 127 to 135, which have just been debated. Does the hon. Gentleman wish to move any of these amendments?

Justin Madders: The Committee will be relieved to know that I will not move every single one of them. What the Minister said about the pre-appointment process is helpful. As my hon. Friend the Member for Bristol South said, it is not a perfect solution—

The Chair: Mr Madders, the opportunity to debate was before. You just need to indicate which amendments you wish to move.

Justin Madders: I wish to move amendments 130 and 131, and I will not press amendments 127 to 129 and amendments 132 to 135.

Amendment proposed: 130, page 204, line 32, leave out "The Secretary of State" and insert

"A majority of non-executive members following a vote".—*(Justin Madders.)*

This amendment would give a majority of non-executive members the power to remove a person from office following a vote.

The Committee divided: Ayes 5, Noes 10.

Division No. 26]

AYES

Foy, Mary Kelly	Owen, Sarah
Madders, Justin	
Norris, Alex	Smyth, Karin

NOES

Argar, Edward	Gideon, Jo
Crosbie, Virginia	Higginbotham, Antony
Davies, Gareth	Robinson, Mary
Davies, Dr James	Skidmore, rh Chris
Double, Steve	Timpson, Edward

Question accordingly negatived.

Justin Madders: I beg to move amendment 131, in schedule 13, page 204, line 37, leave out sub-paragraph (4).—*(Justin Madders.)*

This amendment would remove sub-paragraph 4 from schedule 13 of the Bill, which confers powers on the Secretary of State to remove a person from office in HSSIB.

The Committee divided: Ayes 5, Noes 10.

Division No. 27]

AYES

Foy, Mary Kelly	Owen, Sarah
Madders, Justin	
Norris, Alex	Smyth, Karin

NOES

Argar, Edward	Gideon, Jo
Crosbie, Virginia	Higginbotham, Antony
Davies, Gareth	Robinson, Mary
Davies, Dr James	Skidmore, rh Chris
Double, Steve	Timpson, Edward

Question accordingly negatived.

Schedule 13 agreed to.

Clause 94

Investigation of incidents with safety implications

Question proposed: That the clause stand part of the Bill.

Edward Argar: This clause sets out what HSSIB will be doing. Its remit will be to investigate qualifying incidents in England occurring in the NHS and also in the independent sector. Its aim is to improve learning from events of harm and reduce the risk of reoccurrence for future patients across the whole health system. The Bill defines qualifying incidents as incidents that occur in England during the provision of healthcare services and that have or may have implications for the safety of patients. Based on its findings, it will be for HSSIB to recommend improvements to systems and practices.

I want to come on to an important point about the role of investigations. The aim of the investigations will not be to apportion blame but to foster a strong learning culture and make sure that, ultimately, patients get the best care they rightly deserve, wherever they are patients. For that reason, we have specified that HSSIB's investigative function is not for the purposes of assessing or determining blame, civil or criminal liability or action to be taken by a professional regulator in respect of an individual. That important point is reflected throughout the HSSIB provisions, including in respect of the requirements and admissibility of HSSIB reports. I will expand on those points when we reach those specific provisions. I hope that being clear on those points in legislation will foster a culture of openness and continuous improvement and learning, so that the whole of society benefits.

Justin Madders: As we have heard, the clause covers investigations of incidents with safety implications, confirming that qualifying incidents must take place in England during the provision of healthcare services, with the investigations identifying and addressing risks by

"facilitating the improvement of systems and practices".

I do not know whether the Minister can neatly sum up what "facilitating" actually means in this context, but as we will cover in other clauses, there are certainly some concerns about how exactly improvements will be delivered—some have been touched on already.

Keith Conradi confirmed during his appearance before the Committee that currently, recommendations are monitored "informally" by NHS Improvement, and he suggested that a "pan-regulation-type body" might be needed to consider

"whether the outcome…mitigated the patient safety risk."—[*Official Report, Health and Care Public Bill Committee,* 7 September 2021; c. 61, Q79.]

That sounds like a suggestion that needs consideration, because it would ensure that recommendations made by HSSIB and the responses from NHS England, or whichever appropriate body is required to respond, are acted on and assessed.

If we are to improve patient safety, it seems unusual not to have any provision or mechanism to follow up on recommendations. Earlier, I referred to the recent investigation into the identification of outpatients, where, sadly, the recommendation was not acted on, largely because of the cost of complying with it. The Bill does nothing to clarify how funding will be made available to act on recommendations from HSSIB on improving patient safety. What mechanism will be in place for when recommendations are not followed, or for when they are followed but do not have the desired effect?

We must avoid the scenario in which HSSIB is essentially a toothless body whose well-intentioned recommendations are simply kicked into the long grass. In response to the Select Committee's investigation into the safety of maternity services in England, the Healthcare Safety Investigation Branch stated that

"for various reasons, some trusts have struggled to recognise the information we are presenting to them or to prioritise the actions necessary to address the risks. We understand the many pressures on trusts and that maternity services are a product of systems not all within the full control of individual organisations; sometimes solutions do not appear easily achievable."

In a nutshell, the Bill fails to set out how that very real problem will be addressed under HSSIB, which demonstrates why we have been arguing for further consideration of how monitoring and assessment of recommendations is to be delivered.

Edward Argar: I am grateful to the shadow Minister for his comments, at the heart of which was the question of who is responsible for implementing HSSIB's recommendations, and how we can ensure that the wish for learning and improvement, which is the fundamental reason why we are doing this, has the desired effect.

We are clear that taking on the recommendations and implementing the recommended changes will be the responsibility of the organisation to which they are addressed. The Bill sets out what should happen when a report from HSSIB makes recommendations for future action. The addressees of the report must generally provide a response to the recommendations within the timeframe specified by HSSIB. That is not dissimilar to the way we are required to respond to reports by Select Committees, although occasionally we probably need to be a little bit more timely with one or two of those. The principle is the same: the recommendations are there and the body to which they apply will respond to them.

That response should set out the action that the addressee will take in relation to the recommendations. HSSIB may publish the responses to its recommendations. It is it right that HSSIB, as the independent body, may make that decision, because there may be reasons why it determines not to in a particular case. Without wishing to influence HSSIB, I hope that there will be transparency, where possible, in the recommendations and in the responses to them. I think that will foster learning across the system, rather than simply in the organisation within the scope of the recommendations.

I believe that is the appropriate approach and that it will see improvements, not least because I think those public bodies wish to improve. I hope that the culture created around HSSIB will continue to foster a willingness to learn and improve. I hope that offers some reassurance.

Question put and agreed to.

Clause 94 accordingly ordered to stand part of the Bill.

Clause 95

Deciding which incidents to investigate

4 pm

Justin Madders: I beg to move amendment 101, in clause 95, page 86, line 37, at end insert—

"(10) Following any direction under subsection (2) the HSSIB may—

(a) request additional funding in order to carry out the investigation; and

(b) at the discretion of the chief investigator, decline to carry out the investigation.

(11) Following any direction under subsection (2) the Secretary of State—

(a) must have no further involvement with how the investigation is pursued;

(b) may not give a direction which directs the outcome of an investigation; and

(c) must have no involvement in the formulation of the investigation's recommendations.".

This amendment would ensure that HSSIB would maintain its independence following any direction from the Secretary of State to carry out an investigation and can request additional funding in order to carry out the investigation.

I hope my voice holds out, although I hope I will not be speaking for quite as long on this amendment. It addresses a familiar theme. It seeks to preserve the independence of HSSIB's decision making, with particular reference to clause 95 (2), which gives the Secretary of State the power to direct HSSIB to carry out investigations.

The Joint Committee on the Draft Health Service Safety Investigations Bill raised concerns about the role of the Secretary of State in making representations about investigating an incident. The Government agreed to remove the mention of the Secretary of State to make it clear that the role would not amount to a direction by a Minister. In that light, it is difficult to understand why the Government have now decided to install a power on the Secretary of State to direct investigations. It is questionable whether such a power is even needed, if HSSIB falls into line with the practice of the Healthcare Safety Investigation Branch, which can accept referrals from anyone. If the Secretary of State has concerns relating to patients, he should surely be able to put those matters to HSSIB anyway, as anyone who has safety concerns can. HSSIB can then reach a decision based on the criteria that it has set out on whether to investigate, which we will return to later.

If HSSIB becomes the investigatory body for the Secretary of State, depending on how often the power is used, that could downgrade other safety concerns and also erode public, patient and staff confidence that HSSIB is a truly independent body. The Joint Committee on the Draft Health Service Safety Investigations Bill commented:

"Our witnesses were united in stating that HSSIB will be neither trusted nor effective unless it is, and is seen to be, independent of both health service bodies…and the Department of Health and Social Care. Only this will provide confidence that HSSIB will neither cover up failures by clinicians and trusts nor conceal issues that might cause political embarrassment."

By allowing the Secretary of State the power to direct the investigations, trust in HSSIB is brought into question. The amendment would make it clear that if the power is needed—the Minister can try to convince us that it is—HSSIB could request additional funding in order to carry out that investigation, and the chief investigator would have the power to decline to carry out the investigation. It would also ensure that if the investigation does proceed, the Secretary of State has no further role once it has started. If this power is needed, we think the amendment would create sufficient safeguards to ensure the independence of HSSIB, by ensuring that the chief investigator cannot have its own judgment and decisions superseded by the Secretary of State.

Edward Argar: I am grateful to the shadow Minister for bringing this discussion before the Committee today. *[Interruption.]* I will talk for a little while to allow him enough time to have a glass of water to try to preserve his voice and mine for another few hours at least. As he set out, the amendment seeks to ensure that HSSIB would be able to make its own decision on whether to pursue an investigation requested by the Secretary of State and ask for funding; it would also ensure that if an investigation went ahead, the Secretary of State would have no influence on the detail of that investigation.

I reassure the hon. Gentleman that, as I said earlier, we remain fully committed to the independence of HSSIB, which is of course the reason why we want to establish it as a non-departmental public body with its

[Edward Argar]

own statutory powers. Under our approach, the Secretary of State would be able to direct HSSIB to carry out an investigation, but only if there has been an incident that has caused particular concern. The power to direct at subsection (2) is only in relation to carrying out an investigation; it is not about directing the outcome for an individual. That is an important distinction—we can ask them to do it, but it is not about directing the outcome. I believe that is right for the Secretary of State with responsibility for the health of the nation to have a power to direct the carrying-out of an investigation, so that he is able to respond to emergent or ongoing safety priorities or issues of concern, asking that they be considered.

The measure will ensure effective and proportionate accountability between the Department and its arm's-length bodies, and between the Department and the House and the other place. However, while the Secretary of State may request an investigation, as I have said, he cannot direct the body on how to conduct any particular investigation and will have no role in it, as he does not have any such power. I hope that offers some reassurance to the shadow Minister. The measure therefore does not encroach on the independence of HSSIB's findings, which are one of the key concerns that the amendments seek to draw out or shine a light on, so I hope I have provided some reassurance.

In addition, should HSSIB wish to discontinue an investigation, it may determine to do so, setting out the reason why it will not be investigating an incident. That would include any investigation, including one requested by the Secretary of State. HSSIB could discontinue an investigation, but would have to explain its thinking, which is not an unreasonable balance to seek to strike.

To turn to the question of funding, the amendment seeks to ensure that, in the case of a request by the Secretary of State to carry out an investigation, HSSIB may ask for additional funding. We have estimated, in our current analysis of workloads, HSSIB is likely to carry out up to 30 investigations a year, which allows sufficient flexibility to ensure that in the event that an investigation requested by the Secretary of State goes ahead, adequate resources remain.

On the process for the Secretary of State requesting an investigation, the limitations on the Secretary of State's ability to be involved in the investigation, and the ability of HSSIB to determine whether it will pursue an investigation further, I hope that I have offered sufficient reassurance to the Committee. Therefore, I hope that the shadow Minister will consider withdrawing his amendment.

Dr Whitford: I want to raise with the Minister subsection (5), which calls on HSSIB to put out a statement on the issues that it is investigating with regards to an incident. However, that is right at the start of an investigation. Is he not concerned that, putting out a public statement of what the issue is at a point when no one has yet got to the bottom of that issue might be putting the cart before the horse? HSSIB might therefore twist the whole investigation into what its initial preconceptions are, instead of finding out the underlying cause.

Edward Argar: I take the hon. Lady's point. That is not the intention, to prejudge or predetermine. It is what is sought with the investigation. I take the point about the language, which is important. The measure in essence requires HSSIB to notify the public that it is looking into a particular circumstance or complaint. I think "issues" still works, but I take her point that we cannot prejudge, and nor should HSSIB, where its investigation is going, which rabbit hole it will take it down, what it might find, but that is a point of language. I hope that I have reassured her, but I accept that we always need to be careful about the language.

Justin Madders: I am grateful for the Minister's investigation, but I am still not clear why an additional power needs to be set out in the Bill. My understanding is that anyone can make a referral anyway, so why this has to be set out in black and white is a mystery to me. Despite what the Minister has said, it is important to have the amendment in the Bill, because it will give patients and the public confidence that there will not be interference or challenges that undermine the notion of independence. We will press the amendment to a vote.

Question put, That the amendment be made.

The Committee divided: Ayes 5, Noes 10.

Division No. 28]

AYES

Foy, Mary Kelly	Owen, Sarah
Madders, Justin	
Norris, Alex	Smyth, Karin

NOES

Argar, Edward	Gideon, Jo
Crosbie, Virginia	Higginbotham, Antony
Davies, Gareth	Robinson, Mary
Davies, Dr James	Skidmore, rh Chris
Double, Steve	Timpson, Edward

Question accordingly negatived.

Justin Madders: I beg to move amendment 122, in clause 95, page 86, line 37, at end insert—

'(10) The Secretary of State must by regulations lay out a process to challenge a decision made by HSSIB not to investigate a qualifying incident."

This amendment would require the Secretary of State to put in place a mechanism through which any decision by HSSIB not to investigate a qualifying incident could be challenged.

We have had some discussion about the matters that may be chosen by HSSIB to be investigated, but it is probably more pertinent for the purposes of considering this amendment that we discuss what happens when HSSIB decides not to investigate. Amendment 122 would require a mechanism to be put in place so that any decision by HSSIB not to investigate a qualifying incident could be challenged. If the independence of the body and faith in its purpose are to be protected, it is essential that there is a mechanism whereby HSSIB decision making can be challenged. That is especially true when we consider the role of families in the investigation process.

My experience with HSSIB came when a patient safety concern was raised by a constituent, and after that concern was not investigated it brought home to me the distress and feeling of being let down by a

refusal to investigate. Without a mechanism to challenge such a refusal, faith in HSSIB could be damaged by effectively creating a dead end to further inquiries.

I should point out that in the particular circumstances that I have just referred to HSSIB agreed to a meeting and it set out in more detail its reasons for not investigating, but that might not be possible in all situations. That meeting aided my constituent's understanding of why their request was refused, but it did not actually mean that they agreed with HSSIB's decision. Consequently, our view is that there needs to be some sort of process—we do not intend to set out today what it should be—set out in regulations to ensure that those who make a referral have the opportunity to articulate their concerns if that referral should not go on to be investigated. In conclusion, if the purpose of HSSIB is to improve patient safety, we should ensure that collaborative approaches are enshrined in legislation, and we believe that a mechanism along the lines of what we have set out in the amendment would go some way towards achieving that.

Edward Argar: I am grateful to the shadow Minister for setting out the background to his amendment, with which he seeks to ensure that a process is set out in regulations to allow the challenging of a decision by HSSIB when it has decided not to investigate a qualifying incident. However, I have to say that I do not think that this measure would necessarily be proportionate. The Bill already sets out, in clause 95 (8) and (9), that where HSSIB makes a decision not to pursue an investigation, it may explain the reasons behind that decision and communicate those reasons to those people with an interest.

It may be that the Government or others want to understand more about how HSSIB reached a decision, but setting out within regulations a fixed process to challenge HSSIB's decisions would again risk being disproportionate. If HSSIB discontinues an investigation that it has started, then it must publish a statement that reports that it has discontinued the investigation and give its reasons for doing so. I believe that gives a high level of transparency in that circumstance.

I do not believe that it would be proportionate to take the same approach when an investigation has not even been commenced. The key theme running through these discussions, which we have heard about in our consideration of previous clauses, is the independence of HSSIB, and its ability to determine these matters and make its decisions in an independent way. I fear that this amendment sits slightly uneasily with that principle.

As I said, we intend HSSIB to carry out an estimated 30 investigations a year, so there is not the intention, even at the outset, that HSSIB should investigate all qualifying incidents. It is for HSSIB to determine that, so I do not think it would be the best use of HSSIB and its expertise to go through a formal process to explain why it has determined not to investigate incidents. We want HSSIB's resource to go into investigating the qualifying incidents that it has determined to investigate.

I suspect we will return to this theme again in the course of our discussions, but I believe it is important that, as the expert body, HSSIB is given the autonomy to make its own decisions about what to investigate. Any such decision would of course need to stand up to scrutiny, and of course, as part of our own arrangements, we will need to ensure consistency, while at the same time ensuring that HSSIB's autonomy is respected as it should be. That is a difficult balance, but it is one we need to ensure we strike. I therefore encourage the shadow Minister to not press his amendment to a Division.

4.15 pm

Justin Madders: I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Question proposed, That the clause stand part of the Bill.

Edward Argar: During our debate on amendments 101 and 122, we discussed a number of the key themes that run through clause 95. This clause sets out that, as an independent body, HSSIB will be able to decide its own priorities and determine which qualifying incidents it investigates. We would expect this to be the result of referrals it receives, but also its own intelligence. The clause also gives the Secretary of State powers to direct HSSIB to carry out an investigation when, for example, there has been an incident that has caused a particular concern, and it allows the Secretary of State to request a report to be produced by a specified date.

I appreciate that, as we have heard today, some could argue that the clause could be perceived to encroach on the independence of HSSIB. I hope I set out in my earlier remarks why I do not take that view, and why I believe it is right that the Secretary of State, who has responsibility for the health of the nation, has such a power and is able to respond to emerging, ongoing safety priorities or issues of concern. I believe that this measure strikes the right balance, providing the Secretary of State with that flexibility while ensuring effective and proportionate accountability. HSSIB is not bound to follow the instruction, but it is bound to explain why it deems it unnecessary, or why it has determined it should not pursue a particular investigation request.

Edward Timpson (Eddisbury) (Con): As a point of clarification, I notice that clause 95(2) gives the Secretary of State the power to direct both an individual investigation and

"qualifying incidents that have occurred and are of a particular description",

but I wonder whether HSSIB, off its own bat and as part of its independent investigation, is able—as we were when I chaired the national Child Safeguarding Practice Review Panel—to look at a number of incidents in which there is a theme that it would want to investigate. For example, we looked at a number of cases of co-sleeping with babies, which gave us an opportunity to look at that issue in the round, rather than individual cases. Is that something that HSSIB will also be able to do?

Edward Argar: I am very grateful to my hon. Friend for making that point, and I put on record my gratitude—our gratitude—to him for his work, which he alluded to. He is right: one of the key things we would hope HSSIB would seek to do, where it was supported by the evidence, is to join the dots where there is a systemic issue—not just in an individual trust, for example, but an underlying issue for the Department or the NHS as a whole—and

[Edward Argar]

be able to reflect that in its decisions on what to work on and how to broaden the scope if it deemed that to be necessary.

Clause 95 provides that whenever HSSIB decides to undertake an investigation, it is required to make a public announcement, setting out briefly what it will be investigating and what it expects to consider during the investigation. I take the point made by the hon. Member for Central Ayrshire: that announcement should give the public an indication of the fact that something is being looked at, but it should not limit which leads—for want of a better way of putting it—HSSIB decides are worthy of investigation and of following. HSSIB will also be able to get in contact in advance with anyone who it thinks may be affected by the investigation. This may, for example, include patients, families or any individual who has referred the incidents to HSSIB, a trust or other healthcare provider.

Finally, there may be occasions when HSSIB decides not to investigate an issue or to discontinue with an investigation. Clause 95 covers those scenarios. If HSSIB decides to discontinue the investigation of an issue, we have set out that it should make a public statement explaining the reasons for doing so. If HSSIB decides not to investigate a qualifying incident, it will be able to give notice of the decision to those who it considers might be affected by it and to explain the reasons to those who have an interest in it.

I hope colleagues on the Committee will agree that the provisions are necessary for HSSIB to be in control of the qualifying incidents and to investigate and to ensure transparency about what investigations are being carried out or discontinued by the agency. We expect that the Secretary of State's power of direction will be exercised extremely sparingly but it can ensure that crucial patient safety issues can always be focused on where appropriate. I therefore commend the clause to the Committee.

Justin Madders: These processes will be critical if HSSIB is to function properly. The Minister has had three or four attempts to explain why the Secretary the State needs the power to direct when he can make referrals anyway, but we are still to understand why that power needs to be there. If the Secretary of State asked HSSIB to undertake an investigation, it would jolly well get on and do it. That aside, we will not be voting against the clause.

Question put and agreed to.

Clause 95 accordingly ordered to stand part of the Bill.

Clause 96

CRITERIA, PRINCIPLES AND PROCESSES

Justin Madders: I beg to move amendment 123, in clause 96, page 87, line 22, after "State," insert—

"(aa) trade unions,

(ab) patients,"

This returns to the issue of the criteria for investigations. If they were set out in the Bill, that would perhaps allow the power to direct to be mitigated in some way. We would then at least know whether the directions given by the Secretary of State were reasonable, judged against HSSIB's own criteria. There is a void in the clause because it should set out unambiguously what criteria are applied when decisions are made. It is silent on that, and the response might be that that is deliberately so in order that HSSIB be truly independent. That might be a slightly stronger argument if the Secretary of State were not hand-picking most of the main positions in the body.

We have been asked to give HSSIB a blank cheque, but clause 96 says:

"The HSSIB must determine and publish—

(a) the criteria it will use in determining which incidents it investigates,

(b) the principles which are to govern investigations,

(c) the processes to be followed in carrying out investigations".

We think it not inconsistent with the body's independence for Parliament to have a role in setting out what those processes will be, particularly if they result from consultations with stakeholders, patient groups, trade unions and so on.

Although I appreciate that subsection (7) requires consultation with the Secretary of State and

"any other persons the HSSIB considers appropriate"

for there to be any revision to criteria, principles and processes, it does not set out a statutory requirement for wider involvement to take place. During consideration of the draft Health Service Safety Investigations Bill, the Royal College of Nursing recommended that consultation on criteria take place with healthcare professionals, patients and families to ensure that any investigation remained patient focused. Given the importance of the criteria in HSSIB's function and the reach it will actually have, establishing the body without any such framework does not allow it to be scrutinised in the way that we would like.

To return to the point made by the RCN on investigations being patient focused, subsection (1)(d) does allow some limited focus to ensure that patients' families are involved in investigations

"so far as reasonable and practical"

and that anything published is easily accessible and understood. That is welcome, and it enshrines the recommendations made by individuals, Healthwatch and the Nursing and Midwifery Council to the Joint Committee on the Draft Health Service Safety Investigations Bill. Matthew McClelland, the NMC's director of fitness to practise, said it was critical to do that to

"put patient voices right at the centre of investigations".

We wholeheartedly agree. That position is also supported by Healthwatch England, which commented that

"you can learn only if you really engage people properly in that process."

However, we can see no set role for patient groups in establishing criteria, principles and processes. The Opposition think that side-lining such groups in the legislation sets the wrong precedent for their future involvement. Our amendment would change subsection (7) to create a safety net, ensuring that the patient voice and staff views are at the heart of any further consultations on changes considered by the branch.

Edward Argar: Clause 96 outlines that HSSIB must determine and publish certain criteria, principles and processes, including the criteria that it will use when deciding which qualifying incidents to investigate. The hon. Gentleman's amendment would require HSSIB specifically to consult trade unions and patients when considering or reviewing criteria, principles and processes. I am not convinced that that is the most appropriate approach.

The clause, which I suspect we will turn to immediately after the debate, includes a number of references to "patients and their families". HSSIB will need to set out how it will involve them in investigations as far as is reasonably practicable. It will also need to ensure that such processes are easily accessible and understood by families and patients.

I am sure that families and patients will be very much part of HSSIB's considerations, as they are for the current Healthcare Safety Investigation Branch. However, the decision about who is consulted is best left to HSSIB, which will be best placed to determine who is appropriate. Again, that goes to the point of independence and flexibility to follow the evidence and determine where it thinks is the most appropriate place to go.

Similarly, on trade unions, as I have said in the Committee, while on occasion I suspect I may not agree with them, I recognise the vital role that they play in our country's democracy. Again, it is important that HSSIB can judge when or whether to consult with them, depending on the issue involved. An approach where some groups are specified in legislation as needing to be consulted but not others may give the impression that some organisations or groups carry greater weight. It is important that, as HSSIB looks at each qualifying incident, it can judge what is the most appropriate balance for consultation.

The amendment would also mean that specific groups would always need to be consulted when it may not be appropriate in each case, dependent on the circumstances under consideration. I therefore think it is right that it will be for HSSIB to make decisions as to who it considers appropriate to consult. I hope that, in the spirit of striking the right balance in preserving HSSIB's independence, the hon. Gentleman might consider withdrawing his amendment.

Justin Madders: The Minister is right; it should be up to HSSIB to decide who it consults. That is why it is seems superfluous to have a requirement in the clause that it must consult the Secretary of State. However, I cannot imagine a circumstance in which HSSIB would not want to consult him or her. Indeed, I cannot imagine patient groups and trade unions not being part of the conversation in most circumstances. We think we will need to keep an eye on this as matters progress. However, we have made our point and will not press the amendment to a vote, so I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Question proposed, That the clause stand part of the Bill.

Edward Argar: Clause 96 provides that HSSIB determines and publishes the criteria it will use when deciding which qualifying incidents to investigate, as well as the timescales by which investigations will be completed. The clause therefore ensures that HSSIB will be transparent in how it will work and will have the flexibility to determine the most appropriate investigation methods depending on the type of inquiry. The current body, the Healthcare Safety Investigation Branch, has a wealth of experience and has been conducting investigations since 2017, so it already has a solid base to build on to inform the criteria, principles and processes for its future investigations.

4.30 pm

In designing the legislation, we have been mindful of the role of families. Family engagement is really important—indeed, vital—and it is right that the clause sets out that the relevant processes need to be easily accessible and understood by families. I hope that being explicit about the involvement of families demonstrates our commitment that HSSIB, in its new form, will continue to put patients and families at the heart of investigations, so far as possible. My hon. Friend the Member for Eddisbury has highlighted that focus on families and patients in debates on other aspects of the Bill.

In determining the criteria, HSSIB must consult the Secretary of State and any other person it considers appropriate. HSSIB must review the criteria, principles and processes within three years of first publishing them and then at least once every five years thereafter. It must consult the Secretary of State and other persons it considers appropriate as and when determining and revising such criteria, principles and processes. The overall aim of the clause is to encourage continuous improvement in how investigations are carried out, using any important learning to inform the new criteria, principles and processes that will be followed, and ensuring that HSSIB is at all times accessible to patients and their families. I commend the clause to the Committee.

Justin Madders: As the Minister said, this is an important clause as it will ensure some transparency in HSSIB's operation. Like him, Opposition Members welcome the emphasis on patients and their families and on making sure that the body's processes are accessible and easily understood by them, because that is at the heart of making sure that HSSIB is a success. It will not be successful unless people can see and understand exactly how things have changed. As we know from many tragic cases in the NHS, one of the most important things that families want is to know that things have changed, so that whatever terrible incident happened to them and their loved ones does not happen to someone else in the future.

Question put and agreed to.

Clause 96 accordingly ordered to stand part of the Bill.

Clause 97

Final reports

Justin Madders: I beg to move amendment 124, in clause 97, page 88, line 15, leave out subsection (7) and insert—

"(7) The final report must be sent to the Secretary of State.

(8) Within 12 months of each final report being sent to the Secretary of State under subsection (7), a report must be laid before Parliament setting out the steps the Secretary of State has taken as a result.".

[Justin Madders]

The amendment seeks to ensure that each investigation report produced by the HSSIB is sent to the Secretary of State, who must report to Parliament on what steps have been taken as a result.

The clause deals with the final reports of HSSIB, which essentially will be about the manner in which improvements to systems and practices can be facilitated by the body. While the provision requires a final report to be published, only in subsection (7) is there a requirement for the report to be sent to the Secretary of State, and only in those cases where a direction has been given by the Secretary of State to investigate. Given the role of HSSIB, and to ensure that its functions are met, the amendment would require all final reports to be sent to the Secretary of State, who must present them to Parliament within 12 months outlining what steps had been taken. That would offer a safeguard and ensure some oversight from Parliament in considering HSSIB's effectiveness and the improvements being made on patient safety.

As the Joint Committee on the Draft Health Service Safety Investigations Bill commented:

"There was widespread agreement among our witnesses that there would be more confidence in HSSIB's independence were it to be accountable to Parliament rather than to the Secretary of State. When asked whether accountability to Parliament might not also be seen as political influence, Professor Toft responded that accountability through a cross-party committee was more likely to inspire confidence than to a single Minister, and that a committee was more likely to scrutinise and not to give directions."

If there is to be faith in HSSIB, we must heed the Joint Committee's warnings and ensure that the reporting mechanism is sufficient to ensure confidence in the body and to prevent reports from simply being filed away without scrutiny. I hope that the Minister will agree that confidence in HSSIB and its effectiveness to improve patient safety are integral and that he will support the amendment. There has been a little concern about placing requirements on the Secretary of State throughout proceedings on the Bill, so I hope that a requirement for him to present a report once every 12 months would not be too onerous but will be considered an appropriate and acceptable measure.

Edward Argar: Clause 97 deals with HSSIB's final report following an investigation and sets out what a report should include, such as the overall findings, with analysis of what has happened. If the report concerns an investigation that the Secretary of State directed HSSIB to undertake, HSSIB will be required to send a copy of the report to the Secretary of State. I understand that the purpose of amendment 124 is to require the Secretary of State to consider the report and then report to Parliament within 12 months on what action has been taken as a result. Although I can certainly see that the purpose of the amendment is to ensure transparency, accountability and follow-up, I am not convinced that it is the right way to achieve that understandable and legitimate aim.

We expect HSSIB to conduct about 30 investigations a year, which means that the Secretary of State would need to report on 30 separate reports. I worry that that would be unnecessarily burdensome without delivering significant improvements in patient safety. The final HSSIB report will be published, and we expect that the recommendations will most likely be directed at and actioned by others. Organisations are required to respond to HSSIB's recommendations, and HSSIB may publish those responses. Therefore, it is not necessary for the Secretary of State to publish an additional report, particularly if there is no action for the Secretary of State to take following HSSIB's recommendations.

Parliament will be able to use its normal routes to hold Ministers to account and ask what progress has been made following these reports, which of course will be published by HSSIB and open to public scrutiny. I do not consider it necessary for HSSIB to send the Secretary of State a copy of the report, as this will be available to everybody without that additional step. I will therefore encourage the shadow Minister to consider withdrawing his amendment.

Justin Madders: The Minister makes some fair points, and we are aware that there are other channels to pursue these matters. However, it did seem a bit incongruous that the Secretary of State would have certain requirements on him if he directed a report but not otherwise. Again, we will see, as the body moves forward over the next few years, whether the scrutiny arrangements in place are indeed effective, so we will not press the amendment to a vote. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Question proposed, That the clause stand part of the Bill.

Edward Argar: Clause 97 deals with HSSIB's final report following an investigation. It sets out that a report should include the overall findings, with analysis of what has happened. It is important that the emphasis of any such report is put on identifying risks to the safety of patients and addressing those risks by facilitating the improvement of systems and practices in the provision of NHS services or other healthcare services in England. Therefore, HSSIB should include recommendations about how any risks should be addressed. If an investigation has been commissioned by the Secretary of State, HSSIB will be required to send a copy of the report to the Secretary of State.

As I have mentioned previously, we are clear that the purpose of any investigation is to address issues so that we improve patient safety. We want to ensure that the NHS gains as much as it can from all investigations, even if they may not always relate to the NHS. The clause therefore sets out that if the investigation relates to an incident that has not occurred during the provision of NHS services, HSSIB must consider whether the systems and practices in the provision of NHS services could be improved.

The clause also sets out that there should be no assessment of blame, civil or criminal liability, or whether regulatory action should be taken against an individual in the report. That is not the role of HSSIB investigations, and any such assessment would discourage individuals from speaking candidly to HSSIB and could result in lessons not being learned. HSSIB plays a complementary but very different role from the police and regulators. Finally, the clause allows HSSIB to release protected material as part of the report if certain criteria are met.

The purpose of this clause is to set out the expectations on reporting from HSSIB following an investigation. I therefore commend it to the Committee.

Question put and agreed to.

Clause 97 accordingly ordered to stand part of the Bill.

Clause 98

INTERIM REPORTS

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss clauses 99 to 101 stand part.

Edward Argar: These clauses continue on the same theme as clause 97 and focus on HSSIB's reports. I turn first to clause 98, which essentially allows HSSIB to publish an interim report with findings, recommendations and conclusions before the final report. The aim of the interim report is to address urgent risks to the safety of patients or issues that are known early in an investigation, so that swift action can be taken and lessons can be learned across healthcare systems as findings emerge.

Clause 99 requires HSSIB to share a draft of an interim report or a final report with those who are likely to be adversely affected by it, and to seek their comments—that might be NHS staff or other participants. HSSIB may also share a draft report with any other person who they believe should be sent a copy, which might include patients and families. That is to ensure that the interim and final reports are robust and an accurate reflection of what has happened, adding to the rigour of the investigation. It also gives individuals an opportunity to respond to adverse findings in advance of publication of the report.

Clause 100 describes what needs to happen once an interim report or a final report is published by HSSIB. It requires the addressees of the report to provide a response to the recommendations within the timeframe specified by HSSIB, and HSSIB may publish the response. The clause will ensure that it is clear and transparent what actions will be taken to address the recommendations. The clause is drafted to ensure that it does not encroach on the devolved competence of Wales. For example, the duty to respond to recommendations would not apply to any body that is or could be established by the Welsh Parliament. HSSIB may still make recommendations to persons in Wales, and certain types of organisations would be required to respond—for example, a private sector organisation in the health sector. The clause will ensure that there is follow-up to the recommendations in the report from HSSIB.

Finally, clause 101 sets out that unless the High Court makes an order to the contrary, final and interim reports prepared by HSSIB following an investigation, including drafts of the reports, are not admissible in proceedings to determine civil or criminal liability, proceedings before any employment tribunal, proceedings before a regulatory body—including proceedings for the purpose of investigating an allegation—and proceedings to determine an appeal against a decision made in any of the above types of proceedings. That is a demonstration of our commitment, as mentioned before, that we want the investigations to provide useful learning and foster a continuous improvement mindset for the benefit of all patients, rather than apportion blame.

There may be circumstances whereby a person involved in the above proceedings applies to the High Court for the report to be admissible. In that case, it will be for the High Court to determine whether it is in the interests of justice for such information to be made admissible, using the test set out in the Bill: whether the interests of justice are served by admitting the report and outweigh any adverse impact on investigations by deterring people from giving information to inform an investigation and any adverse impact on securing the improvement of the safety of healthcare services provided to patients in England. I suspect this is a theme that we will explore when we debate subsequent clauses and amendments. I know that the hon. Member for Central Ayrshire will wish to explore it further when we reach those clauses.

Clause 101 clarifies the circumstances under which a report can be used in legal proceedings. It is an important element of ensuring that safe space works in the way we intend, strikes an appropriate balance and encourages individuals to speak to HSSIB in a candid way. However, we rightly also provide the High Court order safeguard, so that the interests of justice can also be taken into account where appropriate. We believe that strikes an appropriate balance in this particular context, and that these clauses set out important provisions regarding HSSIB's reports. I therefore commend the clauses to the Committee.

Justin Madders: I am grateful to the Minister for setting out the provisions here, and the ability to produce interim reports under clause 98 is welcome. We can all envisage circumstances in which such action would be of benefit. I note that the requirement to circulate the report to all interested parties in draft form also applies to interim reports. On clause 99, which is about draft reports, I agree that it is right that HSSIB should be able to judge for itself to whom it is appropriate for the draft report to be made available. Under clause 99(4), however, is there a need for comments that are not accepted in the draft stage to be published alongside HSSIB's response, explaining why those comments have not been accepted at the same time as the final report is published? I do not think that is something that needs to be prescribed in legislation, but it may be something that HSSIB considers doing in some form, and I would be grateful for the Minister's comments on the desirability or otherwise of such a move.

4.45 pm

Clause 100 and the response to any report that is produced is really the nub of it all. Clauses 103 and 104 provide that the recipient of any report should set out in writing what they intend to do in response to the report. I refer again to the evidence of Keith Conradi to the Committee that,

"I think that there needs to be a separate, probably pan-regulation-type body that looks at whether the outcome at the end of the day mitigated the patient safety risk that we first went out to investigate."—[*Official Report, Health and Care Public Bill Committee,* 7 September 2021; c. 61, Q79.]

That is a matter that we need to put on the record.

Clause 100(5) states:

"The HSSIB may publish the response."

While we do want to prescribe actions that it should take in those circumstances, I want to put on record our hope that it would be the norm for such a response to be published. The importance of transparency on delivering change cannot be overstated in these circumstances.

The recommendations made by the Health and Social Care Committee on the safety of maternity services in England on 6 July 2021 stated that the learning from reports should be shared

"in a more systematic and accessible manner."

That is something we hope the Bill would encourage.

Finally, I will say a few words on clause 101. As the Minister said, it sets out very clearly that such reports will not be admissible in proceedings laid out in subsection (2). The only exceptions are the power of the High Court, as set out in subsections (3) and (5), to order that such reports be admissible in proceedings. We will no doubt come on to exceptions to that later and whether they are desirable or indeed necessary, but the ability of the High Court to intervene in exceptional circumstances, having considered all the competing interests, is probably the right balance to strike.

The occasions when the exception is used will be extremely limited. I refer the Committee to the reasons set out by Mr Justice Singh in the case of Chief Constable of Sussex Police *v*. Secretary of State for Transport and British Airline Pilots Association, which related to the disclosure of evidence obtained during the course of the investigation into the Shoreham air disaster, which was conducted by the air accidents investigation branch. In his judgment, Mr Justice Singh referred to what he described as

"a serious and obvious 'chilling effect' which would tend to deter people from answering questions by the AAIB with the candour which is necessary when accidents of this sort have to be investigated by it. This would seriously hamper future accident investigations and the protection of public safety by the learning of lessons which may help to prevent similar accidents."

That sets out very well why we would not expect or indeed want the High Court to become a regular adjudicator on the matters set out in clause 101.

Dr Whitford: In clause 100 there is discussion about the response to the report, and that is crucial. If this ends up just being a job creation scheme within HSSIB, it will have failed utterly. Having spent more than three decades in the NHS and been involved in multiple designs, redesigns, stakeholder events and so on, a lot of things get filed in that little round filing cabinet in the corner. Therefore, the response to recommendations and their coming into effect is critical.

I was on the Joint Committee on the Draft Health Service Safety Investigations Bill under the hon. Member for Harwich and North Essex (Sir Bernard Jenkin), and we went through this in detail over months. In Scotland, our approach is the opposite. We start at the other end, which is trying to prevent. The Scottish patient safety programme has been working on that since 2007—reducing not just hospital deaths, cutting post-op mortality by 37% within two years of introduction, but expensive morbidity such as pressure sores or wound infections that have an impact on patients and on the NHS.

HSSIB is looking at the other end. Obviously, it does not apply in Scotland, but it is something that I really welcome, and that we will watch with interest. I will not go into disclosure now. That will come later, but not seeing action, as the hon. Member for Ellesmere Port and Neston referred to, with recommendations that have already been made, simply demotivates people to engage in it all. It is critical that we see a response, and that there is a mechanism to see an answer.

The admissibility of the report is also critical if we want staff to be candid, particularly where they may be admitting an error or something that they regret, and there has been a systematic failure of its being prevented. It is often said that we can design safety nets so that an error that someone makes at 2 o'clock in the morning because they are tired can be prevented. We therefore need people to be willing to admit that, and we need those reports not to result in action against them. As we will see when we come on to disclosure, that does not pertain if illegal action has been taken, but I think the two clauses are critical. I do not see in clause 100, or anywhere, what will happen after the reports come out, and how we ensure that it results in an increase in patient safety.

Edward Argar: I take the hon. Lady's point. As I set out in response to earlier amendments and preceding clauses, I believe that we have struck the right balance on the obligation to respond and act, but I acknowledge, as I frequently do in these Committees, her expertise, particularly in this area, having sat on the Committee that previously considered the matter. I think that we have struck the right balance, but I am always happy to reflect further.

I can give the hon. Member for Ellesmere Port and Neston, within bounds, the reassurance, or agreement with what he is saying, that he seeks, with a caveat: I would hope that transparency and publication should be at the fore, but in doing that, and determining the other points that he raised, as he acknowledged that is for HSSIB to reflect on and consider within the context of its independence. I would hope, and expect, that it would consider extremely carefully exactly such points as those that he made, because they sounded like sensible points, as is often the case with him.

Question put and agreed to.

Clause 98 accordingly ordered to stand part of the Bill.

Clauses 99 to 101 ordered to stand part of the Bill.

Clause 102

POWERS OF ENTRY, INSPECTION AND SEIZURE

Justin Madders: I beg to move amendment 125, in clause 102, page 90, line 21, leave out subsection (6).

The Chair: With this it will be convenient to discuss the following:

Clause stand part.

Clauses 103 to 105 stand part.

Justin Madders: Clause 102 deals with power of entry, which amendment 125 seeks to qualify somewhat. There is no doubt that these powers are necessary. The evidence that Keith Conradi gave to the Committee was that HSIB would have liked to have had the powers already, so it welcomes their inclusion in the Bill. One would hope that the need for compulsion and the use of force, as set out in the clause, will be rarely needed, but time will tell. Of course, we would expect such powers to be exercised proportionately and reasonably in any event.

Our amendment would delete clause 102(6), which once again appears to place significant powers in the hands of the Secretary of State, effectively enabling them to block any investigations or inspections that HSSIB might want to undertake under the clause on the grounds of national security. Of course, we are not suggesting for a minute that national security issues are

not a legitimate issue for the Secretary of State to be concerned about, but I really am struggling to think of a situation where investigations in the NHS on issues of patient safety could also properly be considered matters of national security. If the Minister can provide me with a list of patient safety incidents in recent times in which investigations have not been concluded because national security implications have intervened, we will reconsider our objections to subsection (6). On the face of it, however, it just looks like another unnecessary power grab by the Secretary of State that again risks compromising the independence of HSSIB.

It is also a concern that there appears to be only one person who can decide whether something is a matter of national security. That person is the Secretary of State. He and he alone decides what is a national security issue and members of the Committee will see how that means that we have to place a lot of trust in someone who should not really get involved in these investigations. Why is it this Secretary of State and not the Home Secretary or the Defence Secretary who might be better placed to judge matters of national security? Why have this power at all? We are asking what the real or imaginary problem is that this power is attempting to solve.

Clauses 103 to 105 provide a power to compel individuals to co-operate. We hope that, as time moves on, we see the need for that power to be used less and less. I hope that we all want to see over time a shift away from the defensive culture that sometimes pervades the NHS. The adage that one volunteer is better than 10 pressed men applies here. Some of the softer issues that may arise around the organisation may come out more easily in the context of someone being able to talk candidly and voluntarily about their experiences. I accept that not everyone will feel comfortable doing that, which is why the powers may be necessary, but the key is not the power to compel people to give evidence but the power to instil confidence that there is a safe space for discussions on patient safety.

Dr Whitford: Does the shadow Minister agree that this relates to the whole issue, which we will come on to shortly, of protecting the safe space and the protective materials that go along with that? Some of the discussions may involve someone revealing their own errors or weaknesses or talking about interpersonal relationships. They are very sensitive issues that we cannot compel someone to talk about. We can make someone turn up, but we simply cannot compel them to discuss things that make them feel more vulnerable.

Justin Madders: The Scottish National party spokesperson sets out very well why we do not want the power to have to be used any more than is necessary. The quality of the investigations would not be as good as we would want and lessons may not be learned that could otherwise have been learned.

I have a few questions for the Minister on some of the specifics in the clause. Under clause 103(1)(a), the requirement is that a person must attend

"at a specified time and place".

I would expect such a request to be given with reasonable notice and to take place at a reasonable time. It does not state that in the Bill, but one would hope that that is a given. Anything that the Minister can say on that would be helpful. It also raises the question about whether such a request could be blocked by an employer requiring a person to be in work at the same time. Clearly in those circumstances, the employer may have an interest in the investigation as well. Will the Minister say something about guidance being issued on the importance of ensuring that individuals who receive such requests are in fact supported by their employers to comply with them?

If someone attends an interview, do they do so alone or do they have the right to be accompanied by a work colleague, a trade union rep or even a lawyer? They may not want any of those people there but, given that one of the grounds for refusing to comply with a request under subsection (3)(c) is that documents are protected by legal professional privilege, I suggest there might be a role for the legal profession. I am not trying to generate more work for my former colleagues when I say that.

Is there a reason to challenge such a request? If we are in the realms of compulsion, the person will probably be not the most useful person from which to obtain information. They may have health issues or other legitimate grounds for declining the request, so what do they do in such circumstances? If the Minister could provide any insight on that, it would be useful.

Finally, I want to ask questions about the criminal offences set out in clause 105. It is probably right that there should be a sanction on those who obstruct and those who refuse to comply or, indeed, provide false or misleading information. Subsection (5) says there will be a fine, but what level of fine does the Minister envisage it will be? Does he have a view on whether an act that leads to a fine might also constitute professional misconduct if the individual were a member of a royal college, for example? A referral to the regulator might have a more powerful effect than a fine. Those are a few matters for the Minister to consider and I hope that he will address them in his response.

5 pm

Edward Argar: Clauses 102 to 105 all relate to HSSIB's powers when conducting investigations. Clause 102 sets out HSSIB's powers of entry, inspection and seizure. They are important powers for any investigatory body. It is expected, however, that in most cases staff and organisations will co-operate willingly with the HSSIB investigators, and that includes giving consent to the investigators to enter premises and providing them with the relevant documents. Where consent is not given, clause 102(1)(a) gives HSSIB the powers to enter and inspect premises in England. They are similar powers to those held by other investigatory bodies in safety-critical industries, such as the air accidents investigation branch. To use a phrase that I have used far too many times in these debates with the hon. Member for Nottingham North, they could almost be described as a backstop for the body when that is deemed necessary. If the investigator considers it necessary for the purpose of furthering the investigation, it may enter and inspect premises in England, inspect and take copies of the documents at the premises, inspect equipment or other items at the premises, and seize and remove documents, equipment or items unless doing so would put patient safety at risk. The current investigation branch has no power of entry or ability to seize or require information from individuals or other bodies. It has, in some situations, therefore been hampered in its ability to investigate incidents, so we want to

[Edward Argar]

ensure that the new body has such powers that it will be able to use in a proportionate manner were it to need them.

The clause also sets out that the power of entry does not apply to premises that are used wholly or mainly as a private dwelling. An investigator can therefore enter a private dwelling only with consent. This could apply, for example, where domiciliary care is provided to a patient and would mean that an investigator would need to obtain consent from the resident before entering their home. It is an important and proportionate limitation of the power. The Government are committed to ensuring that private and family life is respected, including in relation to the exercise of the powers of entry, by ensuring that premises consisting wholly or mainly of private dwellings are protected from unnecessary intrusion. The power of entry contained in the Bill aligns with that important principle.

The Secretary of State can also restrict the powers if he or she believes that it is appropriate and, as the shadow Minister alluded to, in the interests of national security. On this point, I will deal briefly with amendment 125. As discussed, the powers in clause 102 allow HSSIB to enter premises in which there is a Crown interest. This is to ensure that the new body can inspect premises where NHS services may be provided on Crown land, such as in a prison or on land owned by the Ministry of Defence. To ensure that this power of entry does not interfere with the safe running of such premises, HSSIB must give reasonable notice to the occupier of the premises of its intention to enter and inspect the premises. As discussed, that ensures that the national security elements of any provision at those premises—whether a Ministry of Defence facility or base—are not compromised. This provision allows the Secretary of State to issue a certificate that may limit HSSIB's powers of entry, inspection and seizure. Such a certificate may also cover premises in which there is not a Crown interest.

We do not envisage that such certificate would often be issued. Indeed, they would be issued very rarely, but they may be necessary to restrict entry in certain circumstances and we think it might be appropriate in the context of a high-security prison or laboratory. Here restrictions could be placed on HSSIB, such as preventing it from taking copies of sensitive or restricted documents if their reproduction or removal could pose a national security risk. We believe we have struck an appropriate balance and that it is right to do this, so it can be debated by parliamentarians during the passage of the Bill. It is not a new approach. Section 96(5) of the Health and Social Care Act 2008 introduced similar provisions in relation to the Care Quality Commission's powers of entry and inspection. If the amendment were accepted, it could cause significant operational difficulties and risks to HSSIB staff and potentially, in very narrow circumstances, to national security more widely. We do not envisage the power being used frequently, but it is important that the there is no concomitant risk to national security from the powers being used. It is important that we keep the provision in the Bill as drafted.

What clause 102 sets out by way of powers of entry, inspection and seizure can only benefit HSSIB as the current investigation branch is hampered by the lack of such powers. These powers will greatly improve the way investigations are conducted, but we also consider them to be proportionate and justified, given the aim of improving patient safety. Importantly, HSSIB investigators will operate in accordance with the Home Office code of practice on powers of entry under section 48 of the Protection of Freedoms Act 2012.

As I have said, while we expect most organisations and staff in most cases to co-operative voluntarily with HSSIB, it is important that in the course of its investigations, it collects all the information that it needs. Clause 103 sets out its powers to require such information. Specifically, it gives powers to HSSIB to require a person to attend an interview and to provide, by a specified deadline, documents, equipment or other information needed to help with the investigation. HSSIB must also give an explanation of the consequences of failure to comply with the notice. For example, it could be a criminal offence as set out in clause 105. On receipt of the information, HSSIB may retain information and if the safety of the patient is at risk, it can share this information. The clause specifies, however, that the person is not required to provide anything on the risk to the safety of the patient if that would incriminate them or if the information is normally covered by legal professional privilege.

Clause 104 is a short clause that allows a person to disclose information, documents, equipment or other items to HSSIB without being asked if they reasonably believe disclosure is necessary to enable HSSIB to carry out its investigation function. This could, for example, enable a member of hospital staff to provide information to the new body when they had concerns about a patient safety incident. It is exactly the kind of co-operative behaviour that we would want to encourage so that improvements can be made promptly. As such, it is important that the clause is included in the Bill.

Finally, clause 105 sets out offences relating to investigations. The hon. Member for Ellesmere Port and Neston raised a couple of specific points and I will deal with them before I conclude. First, my understanding is that the fines are potentially unlimited in scale. He asked about the process in carrying out investigations and whether the person could be accompanied by a legal or trade union representative or someone of that ilk. The Bill does not preclude an individual from being accompanied at an interview. Although it is important to note that HSSIB will set out in more detail what its processes will be to ensure that they are transparent, the aim of the interviews will be to encourage free and open discussion. Therefore, I would be cautious about individuals feeling that they always have a need to be accompanied by a legal or trade union representative. The Bill does not specifically prohibit that, but I hope that HSSIB will develop its processes and will be transparent about how they will work.

On the hon. Gentleman's point about reasonableness, I very much hope that were the powers to be needed, we would see all that all avenues of co-operation had been exhausted and that they were, to coin a phrase, the backstop. I hope that meetings, conversations and interviews would be by consent and co-operation at a mutually agreed time that reflects the individual's circumstances.

Clause 105 sets out that it would be an offence intentionally to obstruct an investigator when exercising their powers of entry, inspection and seizure or for

someone to fail without reasonable excuse to comply with a notice to provide information. It would also be an offence to provide false or misleading information to an investigator. While we very much hope that the powers and the associated offences will never need to be used—as I have said, we expect voluntary co-operation to occur in most cases—it is important that the Bill includes such powers and sanctions. That will ensure that HSSIB can fully carry out its important investigation functions with the full co-operation from the necessary parties at all times. The clauses are all important to ensure that HSSIB can effectively conduct its investigations. I therefore commend them to the Committee.

Justin Madders: In the light of the Minister's comments and his expectation that the powers will rarely be used—we will hold him to that—I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 102 ordered to stand part of the Bill.

Clauses 103 to 105 ordered to stand part of the Bill.

Ordered, That further consideration be now adjourned—*(Steve Double.)*

5.11 pm

Adjourned till Thursday 21 October at half-past Eleven o'clock.

Written evidence reported to the House

HCB84 Roger Fiskin

HCB85 Janice Bray

HCB86 Royal College of Nursing

HCB87 Independent Advisory Panel of the Healthcare Safety Investigation Branch

HCB88 Ferrero

HCB89 Eat Natural

HCB90 Kellogg's

HCB91 Lee Irving

HCB92 Colin and Ann Wills

HCB93 Professor Martin Green OBE, Chief Executive, Care England

HCB94 Mark E Thomas, Founder, The 99% Organisation, and Visiting Professor, IE Business School

HCB95 Barnardo's

HCB96 Mrs Lisa Crombleholme

HCB97 Adam Dimond

HCB98 Cynthia Bagchi

HCB99 Finn McAleer

HCB100 Obesity Health Alliance (re: Schedule 16 of Part 5 of the Bill)

HCB101 Nursing and Midwifery Council

HCB102 Information Commissioner

HCB103 Christopher Farley

HCB104 Jan Brears

HCB105 Ifé Mbiada

HCB106 Dr M Tallerman