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Abbreviation	**Party/Group**
CB	Cross Bench
Con	Conservative
DUP	Democratic Unionist Party
GP	Green Party
Ind Lab	Independent Labour
Ind LD	Independent Liberal Democrat
Ind SD	Independent Social Democrat
Ind UU	Independent Ulster Unionist
Lab	Labour
LD	Liberal Democrat
LD Ind	Liberal Democrat Independent
Non-afl	Non-affiliated
PC	Plaid Cymru
UKIP	UK Independence Party
UUP	Ulster Unionist Party

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House of Lords

Tuesday, 8 December 2015.

2.30 pm

Prayers—read by the Lord Bishop of Bristol.

Introduction: Baroness Fall

2.37 pm

Catherine Susan Fall, having been created Baroness Fall, of Ladbroke Grove in the Royal Borough of Kensington and Chelsea, was introduced and took the oath, supported by Baroness Rawlings and Lord Feldman of Elstree, and signed an undertaking to abide by the Code of Conduct.

Introduction: Baroness Primarolo

2.43 pm

The right honourable Dame Dawn Primarolo, DBE, having been created Baroness Primarolo, of Windmill Hill in the City of Bristol, was introduced and made the solemn affirmation, supported by Baroness Royall of Blaisdon and Lord Monks, and signed an undertaking to abide by the Code of Conduct.

Syria and Iraq: ISIS

Question

2.48 pm

Asked by ***Lord Naseby***

To ask Her Majesty's Government what military action the United Kingdom is undertaking against ISIS in Syria and Iraq.

The Minister of State, Ministry of Defence (Earl Howe) (Con): My Lords, UK forces are striking Daesh targets in Iraq and Syria, including command and control facilities, lines of communication, military equipment and defensive positions. We are also providing intelligence, reconnaissance and surveillance to support coalition operations in both Syria and Iraq. UK military personnel are providing specialist training for Iraqi security forces, including Kurdish Peshmerga.

Lord Naseby (Con): My Lords, given that the war has already lasted five years, does my noble friend recognise that while bombing is important, it will never defeat ISIS unless there is a strong army on the ground? Will he therefore re-read the speeches made last Wednesday by the noble Lords, Lord Wright of Richmond, Lord Ashdown, Lord Owen and Lord Dannatt—and possibly my own—and recognise that the only hope of defeating ISIS is urgently to find a way to deploy the army of Assad and his allies? Otherwise, ISIS will survive and cause mayhem in the rest of the world.

Earl Howe: My Lords, it may encourage my noble friend to know that I have re-read the debate held last week and I fully agree that Daesh has to be defeated on the ground. The most likely way to defeat Daesh on the ground is to bring about an end to the Syrian civil war, which would allow those keen to support a unified, inclusive and peaceful Syria to unite against Daesh. That could include Syrian moderate opposition forces, Syrian Kurds, or an army of internationally supported Syrian government forces. But we believe that such unity will come about only once Bashar al-Assad leaves the scene.

Lord Wright of Richmond (CB): My Lords, when the Minister re-read the debate held last Wednesday, he may have noted that I suggested that if our Tornados and Typhoons are sent into action without adequate co-ordination and consultation, there might be a serious risk of collision with the Russian and Syrian forces. Can he tell the House what clearance has to be sought from what I understand is the joint flight clearance centre in Damascus, and how much co-ordination is there with the Syrian authorities before military action is taken?

Earl Howe: My Lords, all UK and coalition missions are co-ordinated by the US-led Combined Air and Space Operations Centre in Qatar. The coalition has implemented safe separation measures for aircraft operating in Syria which reflect the provisions of the United States/Russia memorandum of understanding to prevent flight safety incidents over Syria. Those measures are kept under constant review, including in the light of the Russian jet incident with Turkey. Our own aircraft operate over Syria as part of the coalition campaign and are covered by those measures.

Lord West of Spithead (Lab): My Lords, the Minister will be aware that in 2008, the only way we stopped the uprising in Iraq and destroyed al-Qaeda there was when General Petraeus got the Sunni tribes fully on side to turn against it. We did that by bribing them and talking to them. Are we doing that now to ensure that they turn against IS, because up until now they have felt that IS is better for them than the Government in Baghdad?

Earl Howe: My Lords, there is no doubt that the Kurds will need to be part of a long-term solution. I believe that they must play an important role in a political settlement for Syria. As part of that, they must recognise the importance of Syria's territorial integrity and the parameters set out in the Geneva communiqué. However, I recognise the force of what the noble Lord has said about the lessons learnt in Iraq, and I am sure those lessons will not be lost as we go forward.

Lord Howell of Guildford (Con): My Lords, although this Question is about Syria and Iraq, has my noble friend noticed that Daesh is forming very strong centres in Sirte and Derna in Libya, and elsewhere in the Maghreb? What attention are we going to pay to those areas, which may well turn out to be even more important than Raqqa as centres of operation for Daesh?

Earl Howe: My Lords, as my noble friend will be aware, we are veering slightly off Iraq and Syria, but I can tell him that the presence of Daesh in Libya is causing us considerable concern and is the focus of attention across the coalition. Beyond that, I cannot say more at this stage.

Baroness Jolly (LD): My Lords, it would help if we could restrict the flow of ammunition to Daesh. We know that it is using ammunition produced by our allies and coalition partners. What steps are the Government taking to ensure that the supply chain is being broken?

Earl Howe: A number of measures are being taken to ensure that smuggling of equipment and ammunition is blocked. The Syrian moderate opposition forces have been quite successful in blocking those routes, particularly between Turkey and Syria. More widely, there is an international effort to close down the sources of finance that Daesh has as its disposal. A lot of that work, I am proud to say, is being led by the United Kingdom.

Lord Touhig (Lab): My Lords, it is right to label ISIL as evil and murderous, because it is those things. But are we asking why it is? What research and studies are we undertaking to get into the mind of ISIL, so that we better understand its motives, and the many structures and layers of operation that enable it to recruit in countries as varied and diverse as Afghanistan and Britain, and to produce a blueprint to create a state? If we are to help rid the world of this ideology, we need first of all to know our enemy as well as he knows himself.

Earl Howe: The noble Lord is absolutely right. The UK is leading international efforts to counter Daesh's poisonous ideology. Our work with the internet industry, for example, has helped to stop the proliferation of Daesh propaganda. We announced at the UN General Assembly in September that the UK would host a new coalition communications cell. That cell helps countries that have previously lacked the means or knowledge necessary to deliver effective communication interventions against Daesh to do so. It is already helping to drive the coalition strategic communications to counter Daesh's extremism and ensure, essentially, that no media space is left uncontested.

Lord Singh of Wimbledon (CB): My Lords, does the Minister agree that we cannot destroy a negative ideology based on a harsh interpretation of medieval Islam by bombs and bullets alone? Is the Minister aware that the Muslim community and Muslim leaders have condemned Daesh, and will the Government work with them to ensure that their message of condemnation is carried to every mosque in the country—preferably in English, which is the language young Muslims best understand?

Earl Howe: My Lords, this is a central theme of the Government's counterextremism strategy, about which I spoke in last week's debate. I fully agree with the noble Lord that to disrupt and defeat Daesh and its ideology requires more than just military action. It requires the disruption of its ideology in the ways that I described, and discrediting it across the world in the way the noble Lord indicated.

Health: Adult Pneumococcal Vaccination

Question

2.57 pm

Asked by ***Baroness Greengross***

To ask Her Majesty's Government what plans they have to improve the efficacy of the adult pneumococcal vaccination programme and to ensure optimal coverage of target populations in the United Kingdom.

The Parliamentary Under-Secretary of State, Department of Health (Lord Prior of Brampton) (Con): My Lords, vaccination of children, adults and risk groups with pneumococcal and influenza vaccines has led to a significant reduction in pneumococcal disease in the UK. The Joint Committee on Vaccination and Immunisation published an interim statement on adult pneumococcal vaccination on 18 November. The JCVI statement is subject to stakeholder consultation before being finalised. The interim statement advises continuation of the existing adult pneumococcal vaccination programmes. The Government will respond fully once the advice is finalised.

Baroness Greengross (CB): I thank the Minister for that reply. As he knows, this disease puts an enormous pressure on the NHS and on patients. The recent report that he mentioned from the ONS showed that pneumonia was the underlying cause in almost a fifth—19%—of the 43,900 excess deaths in England and Wales just last winter. The recent review by the Joint Committee mentioned by the Minister recommended no changes to the adult pneumococcal vaccination programme at this time, which is a bit surprising. The committee is currently consulting, as the Minister mentioned, and it acknowledged that there are weaknesses with the levels of protection offered to at-risk adults. Will the Minister look into this issue and work to make sure that the pneumococcal vaccination programme provides optimal protection for vulnerable adults?

Lord Prior of Brampton: My Lords, the report by the JCVI was very clear in its recommendation that the existing vaccination, PPV, was the most appropriate for those aged over 65 and that PCV 13, which is the vaccination used for young children, because it provides herd protection—that is, young people who are treated with it can no longer carry the disease—offered the best long-term protection for the elderly as well.

Lord Hunt of Kings Heath (Lab): My Lords, this year community pharmacists have been given the opportunity to provide NHS vaccinations. Can the Minister say something about how successful that has been? Does he think that there is much greater potential for community pharmacists to do more work for the NHS in this and other areas?

Lord Prior of Brampton: My Lords, there is a huge and growing role for community pharmacy in delivering services that have traditionally been supplied by the NHS. If we were to discuss this in five years' time, I am sure that we would see a far greater role played by community pharmacy. I am not sure that I can give the noble Lord a specific answer on vaccinations. I can just say that the flu vaccination rate so far this year to date is 66%. Last year, by the end of the winter, it was 72%, so we are roughly on target to do the same as last year.

Baroness Walmsley (LD): My Lords, the service standards say that local authority directors of public health have a key role to play in ensuring good coverage of vulnerable groups in their area. Given that fact, what assessment has the Minister's department made of their ability to carry out that role, given the recent large cuts in public health budgets?

Lord Prior of Brampton: My Lords, the principal role for pneumococcal vaccination—the subject of the Question—lies with GPs. Take-up of the PPV for those aged over 65 is 70%; for those aged over 75, it is 80%. For young children, the rate is more than 95%.

Lord Walton of Detchant (CB): My Lords, one of the great advantages of the pneumococcal vaccination programme is that it is widely believed that a single injection gives lifelong protection—or at least substantially lifelong protection—against pneumococcal pneumonia and pneumococcal meningitis. Is the Minister satisfied that that is still sufficient?

Lord Prior of Brampton: My Lords, the noble Lord knows far more about this than I do. I can tell him that the PCV 13 vaccination for young children provides long-term protection and, as importantly, prevents the disease spreading. The PPV—the polysaccharide vaccination provided to older people—does not have the longevity of PCV 13, but it provides wider protection against 23 of the serotypes, rather than 13. It does not provide the length of protection that PCV 13 does, but it still provides some protection.

Adoption

Question

3.02 pm

Asked by ***Baroness King of Bow***

To ask Her Majesty's Government what assessment they have made of the drop in the number of children being placed for adoption.

The Parliamentary Under-Secretary of State, Department for Education (Lord Nash) (Con): My Lords, adoption decisions have fallen by around 50% since September 2013 following two court judgments that have been misinterpreted as having changed the legal test for adoption. The Prime Minister has been clear about his commitment to ensuring that adoption should be pursued where it is in the child's best interests. The Government are actively considering whether legislative change is necessary to ensure this.

Baroness King of Bow (Lab): I thank the Minister for the clarity of that reply. In the vast majority of cases where children are not being placed for adoption, they are instead being given special guardianship orders or placed in long-term foster care. The problem is that both those arrangements have dramatically higher breakdown rates than adoption. Given these facts, does the Minister share my sadness at hearing what a social worker told me last week? I have heard it from very many other social workers as well. The social worker told me not to advise a white couple to apply for adoption, because:

"In the last year we've stopped putting forward white children without severe complex needs",

for adoption. The DfE warned that it would not hesitate to take action if placement orders fell. How and when will the DfE decide that the time for hesitation is over?

Lord Nash: I share the noble Baroness's concern about this. I know that it is of particular relevance to her own experience. We have announced that we are making changes to the regulations governing how special guardianships are assessed to make it more robust. Our review of special guardianships has shown compelling evidence that they are not always assessed in a way that puts children's interests first. We plan to publish the wider findings of that review before Christmas. As I said, the Prime Minister announced that we are considering legislative change to ensure that decisions are always made in children's best interests, and to take proper account of the timeliness, quality and stability of placements. We will publish our thoughts in the new year and we will engage widely with the sector about this.

Lord Storey (LD): It is vital that all children are in a loving and stable home. Data released from the Minister's own department, the DfE, show that 6,000 children went missing from care in the year to March 2015. What is he going to do about that?

Lord Nash: This is an area that we have great concern about and we are trying to increase our data on it from local authorities. I will be happy to write to the noble Lord in much more detail.

Lord Hylton (CB): My Lords, we can all agree that the most careful checks need to be made before a child is placed for adoption. However, there have been long delays in many cases. What are the Government doing to ensure that those delays are kept to the absolute minimum?

Lord Nash: The Children and Families Act was very much about speeding up the process. The number of placements made within a year has almost doubled and the time children wait for adoption has fallen by several months. I have already alluded to the issues we have in the immediate short term and the possible plans for legislative change to remedy the situation.

The Lord Bishop of St Albans: My Lords, just last night in this Chamber, noble Lords discussed amendments to the Welfare Reform and Work Bill which sought to exclude kinship carers and adoptive parents from the two-child limit in tax credits. Given the worrying decline

[The Lord Bishop of St Albans]
in the number of adoptions, this seems an eminently sensible proposal. If things go through as they are at the moment, this would act as a significant financial disincentive for some families to take on extra children as kinship carers or adoptive parents. This House was told last night that that is not being considered in the present Bill, but no reasons were given. Will the Minister explain why this very helpful suggestion is not being taken up?

Lord Nash: I know this was debated last night, but it is way off my brief. I am sure that Ministers will listen to what was said.

Baroness Lister of Burtersett (Lab): My Lords, following up on the question asked by the right reverend Prelate, what is the Government's assessment of the impact of the Bill to which he was referring on the number of children placed for adoption?

Lord Nash: I have just said that this was discussed in some detail last night.

Lord Geddes (Con): My Lords, I may have misheard my noble friend, but I thought that in his Answer he referred to misinterpretation of court judgments. Misinterpreted by whom?

Lord Nash: We believe this may have been misinterpreted by some social workers with, I am sure, the best interests of children in mind. The president of the Family Division has clarified the meaning, particularly in Re B-S and in Re R, where he made it absolutely clear that the law on adoption had not changed. However, it seems that these decisions have sometimes been misinterpreted as raising the legal test for adoption so that adoption should not be pursued unless there is no other option. We are particularly concerned about this.

Lord Watson of Invergowrie (Lab): My Lords, the Minister will be aware that the greatest shortfall in adoptions is among harder-to-place children. What assurances can he give to people willing to adopt children in that category that they will have full support to enable the adoptions to become permanent?

Lord Nash: We have made £30 million available for the central agency fees, specifically for this category of children. The regional adoption agencies, which the noble Lord will know about because we debated them, will give these harder-to-place children immediate access to a larger pool of potential adopters.

Baroness Afshar (CB): My Lords, is the Minister aware that because of the restrictions, there is an increase in adopting children abroad on the part of many families who wish to adopt but are perhaps considered too old or do not pass various criteria in this country? Those people would be very good parents for children in this country but cannot adopt them.

Lord Nash: I am aware of the point the noble Baroness makes. We are determined to ensure that those parents have the opportunity to adopt in this country.

Baroness Farrington of Ribbleton (Lab): My Lords, will the Minister do me the following courtesy? I am sure he will feel that he needs to add to the answer he gave to the right reverend Prelate. Will he please send copies of that answer to me and other noble Lords with an interest in this area? Merely to say that it is not within his brief does not fully answer the question.

Lord Nash: I will certainly do as the noble Baroness suggests.

Business: Advice Services

Question

3.10 pm

Asked by ***Baroness Burt of Solihull***

To ask Her Majesty's Government what assessment they have made of the impact of the closure of the Business Growth Service, including the Manufacturing Advisory Service, on economic growth and access to advice for businesses.

The Parliamentary Under-Secretary of State, Department for Business, Innovation and Skills and Department for Culture, Media and Sport (Baroness Neville-Rolfe) (Con): My Lords, we do not expect closure of the Business Growth Service to have an impact on economic growth. The most important way we can help small businesses is to continue to secure a strong growing economy by cutting red tape, extending small business rate relief and dealing with late payment. In future, businesses will be able to go to their local growth hub, which will co-ordinate local, national, public and private sector support.

Baroness Burt of Solihull (LD): My Lords, the Business Growth Service has supported more than 28,000 businesses and since 2012 has added £4.8 billion GVA and 100,000 jobs. Manufacturing industry, which began a welcome rejuvenation under the last Government, is reeling from the sudden decision to close these services. Given how fundamental a part of the industrial strategy this service was, will the Minister tell the House how the Government intend to support the industrial strategy and companies' ambitious to grow in the future?

Baroness Neville-Rolfe: My Lords, the Chancellor made it clear in his Autumn Statement that businesses need an active and sustained industrial strategy. We continue to work closely with different industry sectors—I do so with electronics and professional services. A whole series of announcements were made in relation to manufacturing to provide more support for aerospace, automotive, defence and transport.

Lord Hunt of Kings Heath (Lab): My Lords, the noble Baroness mentioned SMEs. Is she aware of the concern that the central government procurement contracts are actually squeezing SMEs out from winning contracts? Is she prepared to look at government procurement policy again?

Baroness Neville-Rolfe: I am concerned to hear what the noble Lord says because we put a lot of work into improving the procurement process for small businesses. I will certainly write to him with the details, including on the payment periods, which have been severely reduced.

Baroness Hooper (Con): Will my noble friend tell us how the Government's future plans intend to help small and medium-sized businesses increase their exports?

Baroness Neville-Rolfe: I am glad that my noble friend mentioned exports because a huge export drive is part of the BIS agenda. UKTI provides tailored help for small businesses on suitable markets, export opportunities and, of course, finance. Having been involved in export in a prior life, I know how very helpful that work is to business.

Baroness Wall of New Barnet (Lab): I am sure the noble Baroness will be aware that the SMEs mentioned by the two previous speakers use the Manufacturing Advisory Service extensively. Is she receiving any information about the effect that not having that facility is having on the way they conduct start-ups and advance their businesses?

Baroness Neville-Rolfe: My Lords, the Manufacturing Advisory Service is, indeed, part of the Business Growth Service. As I have explained, we are doing things differently. In future, businesses will be able to get their support from local growth hubs. We have a strong menu of support through the British Business Bank, start-up loans and in other ways, but the main way to secure success for small businesses is to have the right framework to progress profitable activities. Of course, that means growth, a lesser burden of red tape and of rates and so on.

Lord Stoneham of Droxford (LD): My Lords, three years ago the noble Lord, Lord Heseltine, in his report *No Stone Unturned in Pursuit of Growth*, remarked on the inconsistency of support for small businesses through government policy. With this change, are the Government still on the side of inconsistency, and will they act on his other recommendation to strengthen, through extra resources, local chambers of commerce and LEPs to provide greater support and consistency to allow small businesses to grow?

Baroness Neville-Rolfe: I am delighted that the noble Lord mentioned LEPs because, of course, LEPs bring together chambers of commerce, business interests and local authorities. The growth hubs that I mentioned are indeed part of that LEP network, which already has 31 hubs and will have 39 by next April.

Lord Flight (Con): My Lords, does the Minister agree that the Government's Enterprise Investment Scheme has been a tremendous help to small businesses in providing risk equity capital? Is she aware that the requirements forced on the UK by the EU Competition Commissioner, in order to meet the state aid requirements, are going to severely reduce the likely flows of risk equity money to SMEs under the EIS?

Baroness Neville-Rolfe: My Lords, I, too, am a huge fan of the EIS and of good tax support for small businesses. I am also a huge fan of competition so, although I am not entirely aware of the detail of what the Competition Commissioner said, it is important that we support competition right across the EU.

Lord Campbell-Savours (Lab): My Lords, the Minister will know that many small businesses were actually built on the back of invoice discounting and factoring. What are the Government doing to push that kind of funding?

Baroness Neville-Rolfe: The noble Lord makes a good point. One of the reasons that is necessary is because the bigger companies do not pay the smaller companies quickly enough. That is why, on a cross-party basis, we have been trying to do a lot of things about late payment, and there is a whole series of measures in the pipeline, which I believe are overdue.

Baroness Coussins (CB): My Lords, is the Minister aware of research conducted by Cardiff University's Business School, which estimates that UK businesses are missing out on up to £48 billion every year in lost contracts because of a lack of language skills in the workforce, which prevents them being able to bid for contracts or even to understand the tender documents, which are by no means always written in English?

Baroness Neville-Rolfe: I was not aware of that report but it sounds a very valuable one. Having operated internationally, I am a huge fan of languages, both in the curriculum and being really useful when you are trying to export; getting my own children to speak foreign languages has been a problem.

Lord Cotter (LD): My Lords, the Minister has raised the issue of late payment. There is a tremendous problem within the construction industry, as she may know, and a lot of people are getting together to put the facts forward. Will she address this issue in the new year? Retention of payments, payments after 120 days when they should be within 30 days—these are very live issues, which I and others will be addressing in the new year, and I hope she will start to address them now.

Baroness Neville-Rolfe: Indeed, retentions are an issue in the construction industry. That is why we have set up a review, partly as a result of discussion on the Enterprise Bill, to bring the question of late payment in construction into the piece, which is already tackling business generally and insurance.

Scotland Bill

Committee (1st Day)

3.19 pm

Relevant documents: 6th Report from the Constitution Committee, 15th Report from the Delegated Powers Committee

Clause 1: Permanence of the Scottish Parliament and Scottish Government

Amendment 1

Moved by ***Lord Norton of Louth***

1: Clause 1, page 1, leave out lines 9 and 10

Lord Norton of Louth (Con): My Lords, I shall speak also to Amendment 3, which is also in my name. The purpose of the amendments is to leave out subsections (1) and (2) of the proposed new section. I have tabled them to enable my noble friend the Minister to justify the inclusion of these subsections. I am aware that they derive from the recommendations of the Smith commission. Paragraph 21 of the report states:

"UK legislation will state that the Scottish Parliament and Scottish Government are permanent institutions".

However, there is nothing in that report to justify the recommendation. In his foreword the noble Lord, Lord Smith of Kelvin, said:

"The Scottish Parliament will be made permanent in UK legislation"—

but that exhausts references to the proposal.

During Second Reading, I touched upon my concerns with both subsections. One concern I raised in response to an intervention by the noble and learned Lord, Lord Hope of Craighead. It was that the recommendation falls outside the terms of reference of the Smith commission. The commission was established to make recommendations for further devolution of powers to the Scottish Parliament. These subsections do not provide for the further devolution of powers. We are in something of a double bind. The Smith commission did not produce a reasoned report but, rather, a list of recommendations, and the Government committed themselves in advance to implementing its recommendations. The justification for the provisions of the Bill is thus generic: that they deliver on the commission's recommendations. What we lack is a clear exposition of the reasoning behind each provision. The Government, in effect, offered the commission a blank cheque and I do not think that it is our task to cash it without questioning the transaction.

The other concern I raised was that the provisions fly in the face of the Government's own guidance on making legislation. I quoted the most recent edition of the Cabinet Office's *Guide to Making Legislation*, published in July, which stated at paragraph 10.9:

"Finally, when writing instructions … to keep in mind the general rule that a bill should only contain legislative propositions. These are propositions that change the law—they bring about",

a change in the law,

"that would not exist apart from the bill".

The guide goes on to record:

"It can sometimes be tempting to ask the drafter to prepare a provision that is not intended to change the law but is instead designed to serve some political purpose or to explain or emphasise an existing law".

I have not sought to omit new subsection (3) because that does contain a legislative proposition, albeit one that merits amendment.

The wording of Clause 1 was discussed in Committee in the other place and it was amended on Report. However, the discussions took as given that there should be a provision stipulating that the Scottish Parliament and Government were permanent. The debate itself was somewhat disjointed, given that the amendments were considered with others. There was no sustained debate focused on subsections (1) and (2).

The Scottish Parliament was created under Section 1(1) of the Scotland Act, and there is nothing in that Act that limits its existence. What then do new subsections (1) and (2) add to the statute book? What is the relationship between these subsections and subsection (3)? New subsection (3) establishes that the Parliament and Government of Scotland,

"are not to be abolished except on the basis of a … referendum",

in Scotland. It could be argued that this subsection qualifies subsections (1) and (2), given that it envisages circumstances under which the Parliament and Government cease to be permanent. However, it may also be argued that they confuse rather than clarify.

The Constitution Committee noted in its report on the draft clauses that Clause 1 creates,

"the potential for misunderstanding or conflict over the legal status of the Scottish Parliament which may result in legal friction in the future".

It went on to state:

"If there are different interpretations as to the status of the Scottish Parliament in its present constitutional configuration then it is not implausible that Clause 1 could be interpreted by certain judges to be a form of entrenchment that could not then be repealed by Westminster legislation without the consent either of the Scottish Parliament or the Scottish people voting in a referendum".

The committee returns to the point in its report on the Bill, drawing attention to the problem with the revised wording, which, it says in paragraph 36, risks,

"introducing uncertainty concerning the absolute nature of parliamentary sovereignty where there should be none".

The problem is exacerbated by the removal of the word "recognised".

New Section 63A(1) states that the Parliament and Government are permanent, and subsection (2) may be read as affirming that this section is Parliament's commitment to that. The political reality is that the Scottish Parliament is permanent—that is not in doubt. Why then introduce these new subsections? They raise more questions than they answer. If they are to remain in the Bill, it would be prudent to accept Amendment 9, tabled by my noble friend Lord Forsyth of Drumlean, which would add:

"Nothing in this section alters the sovereignty of the United Kingdom Parliament".

I can anticipate some of the arguments that may be deployed by the Minister against that amendment, but those arguments could be utilised in respect of new subsections (1) and (2). I invite my noble friend the Minister to provide the Government's substantive thinking behind new subsections (1) and (2) and thus get it on the record. I beg to move.

The Lord Speaker (Baroness D'Souza): My Lords, if this amendment is agreed to, I cannot call Amendment 2 by reason of pre-emption.

Lord McCluskey (CB): My Lords, I had not expected to be on my feet just at this moment, but I will speak to Amendments 4 and 5. Amendment 4 asks that the word "only" should be inserted into line 11, so that the new provision would read:

"The only purpose of this section is … to signify the commitment of the Parliament and Government of the United Kingdom to the Scottish Parliament and the Scottish Government".

The first question I have to ask the Minister is: if this is not the only purpose of the section, what other purpose or purposes does the section have? I do not see any value in having the words, "The purpose", unless we make it clear that this is the only purpose.

My Amendment 5 would remove the words,

"with due regard to the other provisions of this Act".

As I understand statutory interpretation, when a court or other body is called upon to understand an Act of Parliament, it may well be necessary, in the case of any kind of ambiguity, to look at any other provisions of the Act which bear upon the same matter. There is a duty in law and in custom for courts and others to have due regard to the other provisions of the Act, so I do not see what purpose this provision serves here. My own general approach is that the shorter legislation is, the better. Legislation is often too wordy and too confused. If the words are not necessary, they should not be there. That is the simple basis on which I speak to both the amendments standing in my name.

Lord Cormack (Con): My Lords, I will speak briefly to Amendment 7, which stands in my name, but before doing so I agree with what the noble and learned Lord, Lord McCluskey, just said about wordy legislation and endorse entirely what my noble friend Lord Norton of Louth said in his crisp, succinct introduction of his own two amendments. This is a very unsatisfactory Bill, brought about by extremely unsatisfactory circumstances. If we in your Lordships' House are going to try to improve a bad Bill—as is for ever our task, and one which was never more needed than in the case of this Bill—we have to address certain very important aspects of it.

I concentrated my amendment on the whole subject of parliamentary sovereignty. Although the Scottish Parliament came about because of the wish of the Scottish people in a referendum, nevertheless it was created by Act of Parliament. If it is to be abolished, that should be done by Act of Parliament, too. I neither forecast nor advocate its abolition but if we are to have such a provision in this Bill—I doubt whether it is needed, and my noble friend Lord Norton of Louth made that position plain in his speech—it should be a parliamentary provision. That is why I suggest that it should be on the basis of a two-thirds majority in a vote of the House of Commons, in which 75% of the Members elected by Scottish constituencies vote for abolition. That provides as strong a parliamentary safeguard as can be envisaged. It is infinitely to be preferred to the referendum route.

3.30 pm

Of course, that does not exclude the possibility of a consultative or confirmatory referendum. I am glad to see my noble friend Lord Norton, who is such a great constitutional expert in these matters, nod at that point. This Parliament in Scotland is the creation of the Parliament of the United Kingdom and it is the Parliament of the United Kingdom that should make the decision, with proper safeguards, if the prospect of abolition should ever appear. None of us can foresee the circumstances in 10, 20 or 30 years' time, but we can say that we have a parliamentary duty and if this Scotland Bill is to become a Scotland Act, it should be as good and as protective of the Parliament to which we all belong as we can make it. I know that I cannot move my amendment at this stage. I leave my remarks there and hope that the Minister will deal with this subject adequately in his response. If not, I hope your Lordships' House will come back to it on Report.

Lord Hope of Craighead (CB): My Lords, it is probably right that I should now speak to Amendment 6, as set out on the Marshalled List, which assumes that subsections (1) and (2) in the new clause remain as printed in the Bill, and then seeks to alter the wording—and, I respectfully suggest, improve it—of subsection (3).

I should explain the origin of the wording of the amendment. I have done my best to keep the Minister informed about my thinking on this matter. As with other amendments on the Marshalled List in my name, the source from which I drew is a series of amendments proposed by the Scottish Government in June, in advance of Committee stage in the House of Commons. However, I tabled these amendments entirely on my own initiative. I am not instructed by anybody and did not table them on behalf of anybody other than me—although they have the support of the noble Lord, Lord Norton of Louth, who may say a word on some of them in due course. It simply seemed to me on reading them, without any political background whatever, that they had some merit in view of their wording and therefore should be discussed. Some of those amendments, which I will come to later, were before the other House but were withdrawn or not moved and therefore have never been discussed. That seemed an unfortunate state of affairs if one is seeking to improve the Bill. This amendment was, I think, tabled on the first day of Committee in the other place and was negatived on a Division. Nevertheless, it is open to this House to look at the wording again and that is what I seek to do.

Before I say more about the wording itself, perhaps I can respond to the point made by the noble Lord, Lord Cormack, about the relationship between the Scottish Parliament and the Parliament of the United Kingdom. The report of the Constitution Committee, chaired expertly by the noble Lord, Lord Lang of Monkton, referred to a passage in a judgment that I wrote in the Supreme Court in a case called AXA General Insurance Ltd v the Lord Advocate in 2011. In the passage referred to, I sought to describe what I understood to be the position between Scotland and the Parliament at Westminster. I made the point that the Scotland Act 1998 provides that the,

"Scottish Parliament takes its place under our constitutional arrangements as a self-standing democratically elected legislature",

with a,

"democratic mandate to make laws for the people of Scotland".

I made the point that it does not, and was not intended to, "enjoy the sovereignty" this Parliament has and went on to say that,

"the sovereignty of the Crown in Parliament … is the bedrock of the British constitution",

and,

"remains with the United Kingdom Parliament".

[Lord Hope of Craighead]

Nothing that I may say in the course of the debate is intended to detract in any way from those propositions. I believe absolutely in the crucial position that this Parliament enjoys. It is well understood that the Scottish Parliament does not have sovereignty in that sense, and that is perfectly clear because its legislation can be reviewed by, among others, the Supreme Court to see that it falls within the parameters set for the powers of the legislature under the Scotland Act. That is all by way of background.

In considering the amendments proposed by the noble Lord, Lord Norton of Louth, one has to recognise that the Smith commission, which discussed the matter in layman's terms, said that the position of the Scottish Parliament should be recognised by legislation. Given that that proposition was made and accepted by all the parties to the discussions before Smith, it seems difficult to avoid having at least a clause that recognises the permanence of the Scottish Parliament. So it is against that background that I do not quarrel with subsections (1) and (2) but direct my attention to the wording of subsection (3), with the aim of improving it to clarify the position.

The amendment would insert a new subsection, which states:

"Subsection (1) may only be repealed if … the Scottish Parliament has consented to the proposed repeal".

That is there simply to recognise that the repeal we are talking about is a repeal of the provisions establishing the Scottish Parliament in the Scotland Act. There seems merit in the proposition that, if that Parliament is to be abolished, it should at least be in a position to express a view as to whether that is desirable. I am not seeking to undermine in any way the sovereignty of this Parliament; I am simply looking at the relationship between the Parliament created by the Scotland Act and a measure that would seek to abolish it. Once it has been created and when it is still in existence, it would seem rather odd that it should be unable to express a view on whether that should or should not happen.

The other part of the amendment simply looks at the proposition that there should be a referendum, which the Government have accepted should be part of the package to support the remaining provisions in Clause 1. The amendment would clarify what the subject matter of the referendum is to be and state in terms that there would have to be,

"a majority of those voting at the referendum",

before it had the effect suggested by the clause. The condition is that a referendum has been held in Scotland on the proposed repeal, and that a majority of those voting in the referendum have consented to it. It may be that that is implied by the wording, but it seemed to me that in the interests of clarity, it would be better to make the matter express, because what we are contemplating is such a major political event that the exact condition that would give rise to authorising the proposed repeal needs to be put beyond doubt.

I shall make submissions later in support of other amendments, but those are the reasons behind this amendment and the background to why I tabled it.

Lord Forsyth of Drumlean (Con): My Lords, I do not often disagree with the noble and learned Lord, Lord Hope, but I think he was walking something of a tightrope there, for obvious reasons.

What is wrong with this first clause is the whole approach to the Bill. The Government, in advance of even knowing what the conclusions of the Smith commission would be, undertook to implement them and expected both Houses of this Parliament to ratify them. In speaking in support of the amendments tabled by my noble friend Lord Norton, I draw the attention of the House to page 7 of our Constitution Committee's sixth report of Session 2015-16 on the Scotland Bill. Paragraph 8 states:

"The Bill contains a number of provisions of the highest constitutional importance. In affirming the permanence of the Scottish Parliament and Scottish Government and declaring that they are not to be abolished except following a referendum in Scotland, and in giving statutory recognition to the Sewel convention, the Bill carries potential implications for Parliament's own sovereignty".

Too right it does.

Paragraph 9 states:

"In our report on the Draft Clauses"—

which were contained in the document which was ironically entitled *Scotland in the United Kingdom: An Enduring Settlement*—

"we expressed concern at 'the failure of the UK Government directly to address the implications of these proposals for the United Kingdom as a whole.' We questioned how any process that did not consider the future of the Union 'could provide for an "enduring" settlement', and recommended that 'the Government give urgent consideration to the consequences of the Draft Clauses for the constitution of the United Kingdom as a whole. This should happen before they are passed into law.' There is little evidence that such consideration has been given to date".

That conclusion is something of an understatement, to put it mildly.

If we look at the Smith commission proposals in respect of these amendments and the clause which we are discussing—a point I made at Second Reading—we see that under the heading, "A More Autonomous Parliament", the Smith commission report stated:

"The Scottish Parliament will be made permanent in UK legislation and given powers over how it is elected and run. The Scottish Government will similarly be made permanent".

It does not say, "We recommend that Parliament considers how it could be made permanent", but that it will be made permanent.

Lord Hope of Craighead: I draw the noble Lord's attention to the fact that the heads of agreement built on what he said by stating:

"UK legislation will state that the Scottish Parliament and Scottish Government are permanent institutions".

Lord Forsyth of Drumlean: Indeed. Perhaps I have missed out on this modernisation process that is going ahead, but I understood that laws are made by Parliament and receive the assent of the Crown. I did not think that they were made up by subcommittees of appointed party politicians meeting in secret and then getting together with the leaders of the parties, who did not in any way consult their parties, with Parliament then being expected to rubber-stamp them. This takes us back to the time of Henry VIII. We could save a great deal of money by getting rid of this whole apparatus

of Parliament and leaving it to the leaders of the parties to get together, decide things and agree that they will be passed into law and leave the monarch with the dubious task of having to give Royal Assent to such matters.

A colleague I was speaking to earlier said, "I'm not coming in for the Scotland Bill. I've really had enough of Scotland". I said, "But it's not about Scotland; it's about the United Kingdom". He said, "Oh, I didn't realise that". It would appear that the Government do not realise that, either, judging by the nature of this clause.

3.45 pm

I hope that the Minister will find it possible to accept the amendments that my noble friend Lord Norton has put forward, if for no other reason than that it will remove the obligation on me to move Amendment 2, which is based on the assumption that the Government will indeed hold to this course, which I believe undermines the sovereignty of Parliament. The noble Lord speaking for the official Opposition shakes his head in disagreement from a sedentary position. If it does not undermine the sovereignty of Parliament—and I suspect that that is what we will hear from the Front Bench—what is the point of having it? This is just legislative graffiti, then; it is stuff written in the Bill with the purpose of giving the impression that the nationalists have won some great victory. Well, graffiti can be very dangerous; it can be very difficult to remove, especially if people believe that it carries words like "permanent" associated with it.

What we see in the Bill, with the inclusion of the words,

> "The Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom's constitutional arrangements",

is people saying things in legislation that are simply not true. No Parliament can bind its successor. Why are they saying this? In order to create an impression that the devolved parliament—I think it was the late Enoch Powell who said that power devolved is power retained—is not a devolved parliament.

I spent a great deal of energy, as did many other people in this House, arguing during the Scottish referendum campaign that we should remain part of the UK and continue to have a sovereign UK Parliament —and 55% of the voters voted for that. What on earth are the Government doing undermining that sovereign United Kingdom Parliament—or at least appearing to give the impression of doing so in order to appease the forces of nationalism?

This is a very dangerous thing indeed. With the Scottish Parliament and the Scottish Government, which used to be called the Scottish Executive, step by step, with grandmother's footsteps, we create the impression of a sovereign independent parliament and play straight into the hands of those nationalists who do not accept the result of the referendum and still seek to break up the UK. We would be very wise to listen to the concerns that have been expressed by the Constitution Committee of this House and to the wise words of my noble friend Lord Norton of Louth, who is the nearest thing that we have on our side of the House to a constitutional expert, and who has great distinction and knowledge. I very much hope that if the Minister is not able to accept these amendments, he will at least take this clause away and rethink it, because it is being used as a kind of political statement and, in doing so, it undermines the quality of our legislation.

In my day as a Minister, you would never have got away with this; you would never have got it past the parliamentary draftsman. What has happened to the parliamentary draftsman's office that it allows this sort of stuff to be written in legislation? What has happened to the machinery of government, of L Committee and others, which used to operate in a way to ensure the integrity of our legislation?

Lord Hunt of Chesterton (Lab): I believe that some of our legislation has now been privatised. Is that not the reason for the noble Lord's problem?

Lord Forsyth of Drumlean: All I can say is that it needs a bit of competition, then. I support my noble friend's amendments.

The Lord Bishop of Chester: My Lords, it is always dodgy for bishops to speak about Scottish matters. The kirk has sometimes considered the possibility of introducing bishops but the one condition it has always applied is that they must not be like English bishops—they must be quite different.

I have some credentials inasmuch as I have had a close association with Scotland for 40 years, since I went to Edinburgh as a student. I have had a house in Scotland for 30 years, I have two Scottish degrees and one Scottish wife, who has kept my feet on the ground over the years. I shall also retire to Scotland shortly, and very much look forward to doing so.

My observation, from my perspective, is that when Parliament, a London-centred body, speaks about Scotland, the Scots always perceive it as being rather patronising and as not taking them seriously. That was the underlying dynamic which led to such a close shave in the referendum. I speak as a unionist through and through, but the Scots felt that they were not taken seriously. When the Scottish Parliament was created, it was not created but reconvened. It was made clear when it first met that it was a reconvening rather than a wholly new event. One has to acknowledge that over the years Scotland, for most of its history, has felt itself to be an independent country, and it participates in the union as an independent country.

When I first saw these clauses, they jarred with me. They remind me of when I go to services and an enthusiastic minister overemphasises the wrong word: I hear, "This IS the word of the Lord", and I think, "Oh, is it?". Sometimes, if you emphasise a word you create an uncertainty by emphasising the wrong part of the sentence. "This IS a permanent part of the UK" almost creates a doubt because the emphasis is in the wrong place. My second reaction when I read this was, "Death and taxes are permanent—we are now to add the Scottish Government".

The absence of a written constitution means that constitutional elements are enshrined in our Acts of Parliament. This is being enshrined in the Bill because we do not have a written constitution. It is a fact of life

[The Lord Bishop of Chester]
that the Scottish Government and Scottish Parliament are a permanent feature, and at the end of the day, it is probably wiser to say that than to raise doubt about it.

To remove this part of the clause from the Bill at this point would be utterly disastrous and give all the wrong signals. For whatever reason it has got here—and it may be that I do not know about the legislative process—to remove it would give all the wrong signals. In the Bill, we must not create the sense—

Lord Forsyth of Drumlean: If the clause is dishonest in the information which it conveys to the public, how can it be wrong to remove it or amend it as such, and how can it be disastrous to amend it in a way which makes it clear what its real meaning is?

The Lord Bishop of Chester: If the people of Scotland are told, "We toyed with the thought of saying that it was a permanent Parliament but we decided that it wasn't", it will simply give the wrong message. Of course I agree that laws can be changed, just as if you have a written constitution it can be changed by some process. However, it corresponds with the reality on the ground.

Lord Maxton (Lab): The fact is that we have a written constitution; we do not have a codified constitution.

The Lord Bishop of Chester: I am not sure that I entirely agree with the point, but I will not argue as it would take me down the highways and byways in a way that would not be helpful. I will end on the following point—and I speak as someone who loves Scotland and who will live there in retirement and no doubt will be buried there. When we talk about Scotland, often a slightly grudging spirit comes into our discussions, which is a great mistake. At the end of the day, this provision is a valuable one.

Lord Crickhowell (Con): My Lords, I have not spoken previously in this debate but am prompted to do so partly because for a long time I was a member of the Constitution Committee and therefore take a good deal of note of what it says. I am also prompted to speak partly because of what has just been said. The trouble is that we do not have a written constitution but we are advancing ad hoc, step by step, and it is a very dangerous process. We will very shortly be debating a Wales Bill and I can just see it happening—we will be told that the Welsh Parliament has to be made permanent and cannot be altered by this British Parliament. This is a matter that affects the United Kingdom as a whole and therefore we should take seriously the clear observations of the Constitution Committee and of my noble friend Lord Forsyth.

Lord Wallace of Tankerness (LD): My Lords, as the noble Lord has just indicated, it is very clear that there are implications for the rest of the United Kingdom. It is just a great pity that the Government will not accede to the request from all sides of the House and all parts of the United Kingdom for a constitutional convention, in which many of these relationships could be properly looked at. The right reverend Prelate reminded me that we have to be careful with the wording here. To say so stridently that the Scottish Parliament and the Scottish Government are permanent will start raising doubts about whether anyone would think anything else. That is why care has to be taken here.

In the 1990s I was part of the Scottish Constitutional Convention. It came up with the blueprint for the Scottish Parliament, which, to its credit, the Labour Party, elected in 1997, faithfully put into legislative form. I remember many discussions in the constitutional convention about how to entrench the Parliament. We kept going round in circles on the issue of parliamentary sovereignty and on whether we should have a referendum. In the end, the convention decided that it could make no such proposal. The Labour Party proposed a two-question referendum. My party and I were opposed to that as it was not what the convention had agreed, but I think that I was wrong. The fact that we had a referendum in 1997 and that the Parliament was established on the basis of a very strong popular vote in Scotland meant that it found its own form of political entrenchment. We could go round in circles here having a highbrow constitutional discussion on the nature of the sovereignty of Parliament.

The noble Lord, Lord Norton of Louth, used the words "political reality" in moving his amendment. At the end of the day, we come back to political reality. I say to the noble Lord, Lord Cormack, that if the people of Scotland voted to abolish the Scottish Parliament, primary legislation in this Parliament would be required for that to happen, but of course if this Parliament chose to ignore what the people of Scotland said, that would bring about a constitutional crisis because political reality would kick in. That is why I also disagree with the amendment in the name of the noble and learned Lord, Lord Hope of Craighead. He is saying that if the Parliament were removed, it would have to be done not only on the vote of the Scottish people but on the vote of the Scottish Parliament. The Scottish Parliament might well vote to get rid of the Parliament because it was not doing a particularly good job. Therefore, you do not give the veto to the people whom you want to get rid of and who have a vested interest in keeping the Parliament.

These things are hypothetical because, quite simply, I do not see them happening. That is why I think that political reality is more relevant to this debate than highbrow discussions on parliamentary sovereignty. As ever, I give way to the noble Lord, Lord Forsyth.

Lord Forsyth of Drumlean: On the subject of political reality, is it not the policy of the noble and learned Lord's party to have a constitutional convention with a view to creating a federal United Kingdom? What happens if we have a provision in law saying that the Scottish Parliament as it stands is permanent and the rest of the United Kingdom wishes to alter the structure and have a federal constitution along the lines that he suggests and that is blocked because of these provisions? Perhaps he thinks the political reality is that what he wishes for will never happen, but surely it is wrong to create inflexibility, given that he and his party accept that the present system is not a stable, lasting settlement.

Lord Wallace of Tankerness: The noble Lord makes a very good point. But under any federal system there would be a Scottish Parliament. I echo again Section 1(1)

of the Scotland Act 1998: there still would be a Scottish Parliament. It may have a different form and different powers, but there still would be a Scottish Parliament. I do not think anyone is suggesting that the Scottish Parliament that we refer to in Clause 1 of this Bill is for ever frozen in aspic or that it would not inherit other powers at some time to come.

The issue is indeed one of political reality. We are also duty bound to have regard to the wording of this part of the clause.

4 pm

Lord Forsyth of Drumlean: Is the noble and learned Lord saying that when the clause heading says:

"Permanence of the Scottish Parliament",

this is not referring to all the powers and privileges of that Parliament but just to the name, and that the powers could be changed? Is he saying that the effect would be that we could take away all its powers but, provided that there was still a building and something called the Scottish Parliament, that would be covered?

Lord Wallace of Tankerness: Let me get back to political reality. I do not believe that that would happen. But I think it is very likely that we will have some measures in the future—probably the not-too-distant future—under which more powers are given to the Scottish Parliament. Therefore, it comes back to the same thing: to the political reality. If there was a move resulting in a constitutional convention or a federal system for the United Kingdom, which my colleagues and I aspire to, the political reality of that would see it delivered.

I have much sympathy for the points made by the noble and learned Lord, Lord McCluskey, because I simply do not know what is meant by,

"with due regard to the other provisions of this Act".

No doubt the noble and learned Lord, Lord Keen, will tell us in his reply what the importance of including those words is.

I also wonder what is meant in subsection (3), which says:

"In view of that commitment it is declared that the Scottish Parliament and the Scottish Government are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum".

I do not think that the "people of Scotland" is anywhere defined in this. Is it the people resident in Scotland, which was the qualification for the referendum in 2014? At that time, many noble Lords received many representations from expatriate Scots living abroad or living in London who consider themselves to be part of the people of Scotland. So would they be part of the referendum that is proposed by the Government with regard to the future of the Scottish Parliament? That is why I think that the wording proposed by the noble and learned Lord, Lord Hope, in the second part of his amendment—

"a majority of those voting at the referendum",

which has been held in Scotland—has greater clarity than the Government's wording of this particular clause.

Just as Parliament could, technically, repeal the Statute of Westminster of 1931 but would never dream of doing it, the constitutional reality of the sovereignty of Parliament is not relevant to this. At the end of the day, what will matter is what the people actually want.

The Marquess of Lothian (Con): My Lords, I support Amendment 1. We have heard a lot of intricate and technical arguments and I do not intend to get involved in them.

I listened to the noble and learned Lord, Lord Wallace of Tankerness. He mentioned Section 1 of the Scotland Act. I remember that Act well because I was leading for the Opposition in the other place at that time. I think we all accepted that the Scottish people had asked for devolution, that there would be a Scottish Parliament and that, for all we knew, it would be there for a long time if not for ever. But the word "permanent" was never introduced into the legislation, partly, I suspect, because, as my noble friend Lord Forsyth has said, the draftsmen would not have allowed it, but also because we all accepted that to enter it into the legislation would set a whole lot of other constitutional hares running. That is really my purpose in rising to talk merely about Amendment 1.

What we are looking at here is part of the problem that we have suffered from constitutionally in the country over the past 20 years: we keep on amending the constitution piecemeal, unintentionally, and without regard to the possible consequences in other areas. When I look at this word "permanent", I see an attempt to say that this Parliament can bind other parliaments by saying that the Scottish Parliament is there for ever.

I said in my speech at Second Reading that, as a young law student in Scotland in the 1960s, I was for ever being taught by various professors about the entrenchment of the Act of Union. Section 1 of the Union with England Act states:

"That the Two Kingdoms of Scotland and England shall … hereof and forever after be United into One Kingdom by the Name of Great Britain".

I was told that that was entrenched and, parliamentary sovereignty aside, we could accept that would never change. But we went into the Scottish referendum last year on the understanding that, if there had been a yes vote, that Act of Union would have been changed. It would not have been for ever because the Scottish people had decided unilaterally that they did not want it to be for ever. What we are looking at here is very important.

The same applies to this clause. If we believe that permanence is permanence, we should say that it is part of our constitution. Or, we should say that the sovereignty of Parliament is supreme, which is what I have always believed, and that one Parliament cannot bind another. If that is the case, we should not indulge in language that dishonestly suggests that we do not believe that to be true. I am not just talking about this Scotland Bill. If we go down the road of saying that whenever we introduce the word "permanent" into legislation, it will bind subsequent Parliaments for ever, we have substantially changed the constitution of this country, and we would have done that without thought, debate or proper consideration. I do not believe that the clause is necessary.

I did not like devolution. I did not like Section 1 of the Scotland Act. I opposed it, but once it was passed I accepted that it was there and that it would always be there. However, I would not have accepted the word "permanent" being introduced if it suggested that the

[The Marquess of Lothian]
United Kingdom Parliament was anything less than sovereign. We must think very carefully about this when we look at the Bill. The right reverend Prelate said that we should not get rid of this clause because that would have all sorts of other consequences. But if we leave this clause in, we are giving permission for future Parliaments to create permanence in other areas. I may be too old, possibly, to suffer the consequences of that, but I hope my children and grandchildren will not find that we have abandoned the sovereignty of Parliament just in the cause of getting this Bill through.

Lord Hope of Craighead: I want to put to the noble Marquess a point that I mentioned to the noble Lord, Lord Forsyth. The problem is created by paragraph 21 of the heads of agreement, which states in terms:

"UK legislation will state that the Scottish Parliament and Scottish Government are permanent institutions".

There may be an answer to the point that he raises. The word "permanent" is lay man's language. After all, this was drafted by people sitting around without consulting lawyers at the time. It could be regarded as lay man's language and there may be some other way of taking away the word "permanent" but nevertheless fitting it into the UK context. The previous paragraph, paragraph 20, says,

"in the context of Scotland remaining within the UK".

I am not suggesting a form of words, but I wonder whether the noble Marquess would accept that the Government have a problem in having to give effect to paragraph 21. Maybe there is a way of softening the word "permanent" to fit it in with the United Kingdom and the well-understood constitutional principles. Perhaps we are being too attached to the word "permanent", which lay men use and was perhaps not very cleverly chosen.

The Marquess of Lothian: I accept the noble and learned Lord's suggestion. The word "permanent" is the one that concerns me. I do not think heads of agreement can change the British constitution—only Parliaments can change the British constitution. We could say something along the lines that we envisage that this will last for a long time or for ever, but we cannot say that it will because that is what transgresses against the sovereignty of Parliament.

Lord Forsyth of Drumlean: I am grateful to my noble friend but I think the noble and learned Lord, Lord Hope, was referring to the heads of agreement in the Smith commission. The Smith commission was simply a group of Scottish politicians or representatives from Scottish politics meeting in secret, having a chat and producing heads of agreement. To argue that the Government somehow have to go along with that because they said in advance that they would accept the Smith commission's recommendations means that the whole object of having a Bill and everything that we are engaging in is a waste of time. That cannot be acceptable.

The Marquess of Lothian: I do not disagree with my noble friend. What I said was that I do not think that heads of agreement can change constitutions, nor do I think that Governments, by heads of agreement, can change them. The constitution can only be changed, Parliament by Parliament, by Parliament itself, and that is what this clause seems to argue against. I would very much like to think that we could withdraw this clause and, if necessary, as the noble and learned Lord, Lord Hope, has said, find another way of expressing our hope that what is being done today may go on for a very long time.

Lord Mackay of Drumadoon (CB): My Lords, perhaps I may do my best to introduce a little reality to what has happened in this case because, to quote the well-known words, I was there. I was in your Lordships' House on 21 July 1998 during a debate on an amendment which I had moved concerning Clause 2 of the then Scotland Bill of that year. I have before me a helpful summary of the history of that event, which may assist noble Lords in deciding the way forward in a real and understandable way.

In one sense, Clause 2 refers to what happened that night when, in the course of appearing in the case, Lord Sewel made a statement which I have had a brief opportunity to look at in *Hansard*. He said,

"we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish parliament".—[*Official Report*, 21/7/98; col. 791.]

That means that the facts of what happened were as follows. I had moved an amendment that did not refer to the convention which would be normally effective. As we all know, the Bill proceeded and, of course, became law. I am informed by the report I have in front of me that,

"Since the establishment of the Scottish Parliament, there appear to have been no significant problems with the operation of the convention. It applies when UK legislation makes provision specifically designed for a devolved purpose",

and also when UK legislation,

"would alter the legislative competence of the Scottish Parliament or the executive competence of the Scottish",

Government. While some years later we can speculate about what people in this House were thinking in July of 1998, one of the phrases that causes some irritation and annoyance, and which there is clearly a wish to get rid of, is the term, "normally legislate". It is quite obvious that that was not discussed in any detail that night.

It may also be of interest to noble Lords to know that the convention has evolved over the years and has been agreed through memoranda of understanding and by the House of Commons Procedure Committee. However, the clause refers to only some of the circumstances in which there is in practice the need for a legislative consent Motion. There is further reference to a document entitled *Devolution Guidance Note 10*, which was used to address some of these issues. What this proves, I would submit, is that the terms that are causing offence were not the result of any detailed debate between the parties to the proceedings before the House, and I trust that this will be of some assistance to noble Lords.

Lord Maxton: My Lords, I shall be brief. I spent 17 years in opposition along the corridor, and there are present at least four or five former Ministers in the Government at the time who were always telling me, whenever I moved an amendment to a Bill, that we

cannot bind a future Parliament with laws we pass in this Parliament. That is a basic rule. In fact I was even taught that in constitutional history at Oxford in the 1950s. You cannot bind one Government.

4.15 pm

I have two other points. The first is to say to the right reverend Prelate the Bishop of Chester that he is wrong. Only one person at the opening of the Scottish Parliament said that it was reconvening the Parliament of 1707. That, of course, was Mrs Winifred Ewing, who was a member of the SNP. No one else believed it and no one else said it at the time because they knew that it was wrong. This was a new Parliament and was not a reconvening of the old Parliament of Scotland. It was a new and totally separate Parliament from what had been there before.

Secondly, let me just say to the noble Lord, Lord Cormack, on the 75% of Members of Parliament, that there was a time when we would have got the 75% of Scottish Members down the corridor because they are all SNP, and the SNP at one time, let us remember, was opposed to devolution. The party has been opposed to devolution in its past—and not that long ago either. It refused to be part of the Scottish convention, of which I was a member, as was, I think, the noble and learned Lord, Lord Wallace. We both remember that the SNP refused to be part of that because it was opposed to devolution, as did the Tory party because it was opposed to devolution, too, but that is a different matter. The fact is we cannot bind, so I am giving some support to the amendments that have been tabled. Politically, when I find myself on the same side as the noble Lords, Lord Norton of Louth and Lord Forsyth of Drumlean, I really am in trouble.

Lord McCluskey: In the light of the debate so far, I should like to add something to what I said before. I remind the House that the purpose of legislation is to effect a change in the law—to state the law. Subsection (1) is a statement:

"The Scottish Parliament and the Scottish Government are a permanent part".

Whether or not that changes the law, I do not know. Given the arguments about sovereignty, it may state the law at present but it cannot change it a week next Tuesday because, as my friend Sir Gerald Gordon, an expert lawyer in Scotland, said, there is no written constitution in Scotland in the United Kingdom, but it can be written in one sentence, and that is: "There shall be a Parliament at Westminster, and it can do what it likes". Another version is: "There shall be a House of Commons at Westminster, and it can do what it likes". Apparently, the Government do not hold to that view because, as the noble Lord, Lord Forsyth, has pointed out, it cannot do what it likes and must do what the Smith commission has decided it will have to do.

The point I want to make is the important one that subsection (1) makes a statement, although I do not know its legal effect at all. But when we look at subsection (2), where I want to add the word "only", it states:

"The purpose"—

which probably means the only purpose—

"of this section is … to signify the commitment of the", UK Parliament et cetera to something or other. In other words, if you interpret subsection (1) by looking at subsection (2), which you have to do, of course, you find that its only purpose—or "the" purpose—is simply to make a statement of fact. I do not see how these things change the law.

The noble Lord, Lord Forsyth, made remarks about the parliamentary draftsmen. They have my deep sympathy because they were given an appalling job to do, given the terms of the report and the whole background to it, including matters discussed at Second Reading. If this is the best they can do, maybe we can try to do better, but we are writing on water here.

Lord Lang of Monkton (Con): My Lords, I had not intended to speak on these amendments because I thought that I would prefer to speak on Clause 1 stand part. However, it might save time if I speak now, not least because the debate has already ranged very widely over a number of more general points.

I also wanted to speak at an early stage to thank those noble Lords—in particular my noble friends Lord Norton of Louth and Lord Forsyth, and the noble and learned Lord, Lord Hope of Craighead—who made polite reference to the report of the Constitution Committee. My noble friend Lord Forsyth's excellent speech in particular, in which he managed, in that wonderful tone of slightly supressed indignation, to quote from the report, reminded me just how strongly the committee felt about it when it prepared that report. Committees tend to present reports in fairly moderated terms, but these are very serious issues. Indeed, we were in a pretty bad mood to start with because we had already produced a report on the draft clauses, which came out some time before this Bill appeared, in which we drew the attention of the Government to some seven major points of constitutional principle that we thought should be replied to. The reply we eventually received was just more than two lines long. We had to express pretty considerable indignation at that.

While I am on the same theme, it is also a matter of regret to us that the Government have not yet been able to reply to our latest report, which we particularly hoped to have had ahead of the start of this Committee. I hope that that response will appear very soon.

In our report, we criticised very strongly the progeny of the Bill and the fact that the Government had committed to accept the Smith commission's terms. I will not dwell on that point any longer; it has been very well covered by other noble Lords. We also placed strong emphasis on the importance of the position of the United Kingdom and, with all this demand-led devolution that has been going on, of stabilising and securing the sovereignty of the United Kingdom for the future. I am glad to say that another instalment of our work is on its way to your Lordships in due course on the union and devolution, which will cover that theme and, I hope, carry it forward.

Reverting to this debate, the clause we are looking at and the amendments to it are about sovereignty, which is a clear, absolute and easy-to-identify concept. All the amendments are about protecting it from potential inroads that arise from all the changes made in the other place that depart from the simple request made by the Smith commission. It is a declaratory

[LORD LANG OF MONKTON]
clause. As my noble friend Lord Norton pointed out at Second Reading, by making a declaratory clause the core of a new parliamentary Bill it has been drawn up in the face of the Government's own guidance on drafting legislation, which deplores such treatment.

Not only is it unwise, but it also compromises the subject by adding specific changes that were not requested by Smith. They are changes that weaken the principle of sovereignty, in particular the requirement under subsection (3) that there should be no abolition of the Scottish Parliament without a referendum for the Scottish people. Smith did not request that. That is not declaratory; it has specific substance. How does it protect the sovereignty of the United Kingdom?

I also ask my noble friend the Minister: why do the Government think that the Scottish National Party wanted that amendment to the Bill? It does not believe in permanence; it wants impermanence. It wants to undermine sovereignty and provoke the United Kingdom Parliament. Ultimately, it wants to break up the United Kingdom. Every extra concession granted makes that more possible.

The noble and learned Lord, Lord Wallace of Tankerness, referred to political reality. Yes, no one believes that the Scottish Parliament will be abolished and no one wants it to be abolished—you cannot put the smoke back in the bottle—but why compromise the position with qualifications of this kind in this important Bill? The Scottish National Party talks a lot about the sovereignty of the people—what one might call the "Braveheart philosophy"—but we have to wonder whether the clause makes the issue justiciable. Might some Scottish judge at some future date rule that the combination of permanence and a Scottish referendum in a statute overpowers the sovereignty of the United Kingdom Parliament? I do not know the answer to that, but I know that at Second Reading a number of my noble and learned friends identified this area as one that needed close attention.

Lord Wallace of Tankerness: The noble Lord has talked much about the sovereignty of the United Kingdom Parliament, as have other noble Lords. In a very recent lecture the right honourable gentleman the former Attorney-General Mr Dominic Grieve said about that:

"Today, at least in theory, this means that any government with a parliamentary majority could pass a Bill requiring us to collectively worship the moon every other Tuesday. Provided the Queen were minded to give royal assent to it … then that would be the law of the land and we could be punished for not complying".

Is he really happy that the sovereignty of Parliament, which he asserts so vigorously and to which he is so wedded, could lead to the kind of outcome that the right honourable gentleman Mr Dominic Grieve said could happen?

Lord Lang of Monkton: As I do not know the context and full detail of what my right honourable friend the former Attorney-General said, I can hardly answer the noble and learned Lord. But I hope that sovereignty can be reconciled with common sense and realism. Certainly that would be my objective.

There is a threat to the sovereignty of the United Kingdom which is potentially raised by the wording of these clauses, and the intrusion of new elements into them which cloud out the specific issues of principle. If a court in Scotland did overrule the power of the United Kingdom and managed to pass a judgment that said that the United Kingdom Parliament was overruled by the view of the Scottish Parliament, it would not be devolution but separation. We must not plant the seeds for such a development in this legislation.

Lord Purvis of Tweed: Does the noble Lord not agree that there is now considerable case law in Scotland which has looked at the competences of the Scottish Parliament and the reach of legislation from this place? So under the existing arrangements, it is perfectly in order for UK legislation to be challenged on the extent of its interaction with devolved legislation. We currently have that practice and it does not seem to have undermined our constitution irrevocably.

Lord Lang of Monkton: That does not surprise me, because I have always taken the view that, ever since we embarked—for all kinds of reasons I will not go into in this debate—on an ill-conceived and unbalanced form of devolution, we were on the slippery slope and sliding towards separation and independence unless we were very careful. As I have said many times, this Bill carries us one step nearer to that.

In his wind-up speech at Second Reading, my noble friend Lord Dunlop said:

"The sovereignty of Parliament remains".—[*Official Report*, 24/11/15; col. 667.]

That is a commendable, clear, concise statement. We also know, and have reminded ourselves today, that no Parliament can bind its successor. But my noble friend also said of this clause that it puts the permanence of the Scottish Parliament and Scottish Government, "beyond all doubt". In conceding the referendum point on Report in the other place, the Secretary of State for Scotland said that it makes clear,

"beyond question that the Scottish Parliament and the Scottish Government are permanent institutions".—[*Official Report*, Commons, 9/11/15; col. 57.]

By putting things beyond doubt, he raises doubts in all of us. The Government's arguments are in deadlock: they hit each other head-on. That is why, at Second Reading and now, so many noble Lords have tabled amendments and why the House badly needs reassurance. I very much hope that the Minister will be able to give it to us when he winds up the debate.

Lord Sanderson of Bowden (Con): My Lords, I am one of the few non-lawyers who are even putting their foot into this particular hole. I stand to be corrected by the Front Bench, but Clause 2, which has been referred to, makes perfect sense if the United Kingdom Parliament remains sovereign and can legally legislate on anything, including devolved matters. But that would contradict Clause 1 if the purpose of that clause is to entrench all provisions that are unalterable. I want our Front Bench to answer that question.

Lord Purvis of Tweed: I do not agree with the mood of the noble Lord, Lord Lang of Monkton, because I do not share his views on Amendment 1. I am happy that the Government inserted further clauses into the Bill. I am pleased that that was the result of cross-party consideration and that the Government responded to the Smith commission—in a difficult context—and

put into proposals what I think most people in Scotland now understand: that they have two Parliaments. This is not an easy thing to do and parliamentary draftsmen have a difficult task because we now operate in a situation where we have more than one sphere of power over primary legislation. That poses considerable difficulties for some because they believe that one should be primary and one subsidiary to it. So far as primary legislation is concerned, most people in Scotland consider themselves as having two legislatures. It is even harder because we do not have a written constitution. In the absence of one, we have to rely on other measures to see how we entrench parts of our governance.

It is not the case that this has simply been dreamt up over the last couple of months, as some noble Lords have indicated. Nor it is the case that it is in response to the referendum. Nor is it the case that it is only to do with political expediency. Some of us have believed for a considerable time that it is right to reflect in statute the permanence of the Scottish Parliament in the context of a new and evolving structure of governance in the United Kingdom. I absolutely believe that that is best in a codified federal relationship, which I hope would be the result of a constitutional convention—others have a different view. However, in the absence of that, I believe that we then have to look at what has been a developing process in the United Kingdom.

4.30 pm

I think that it is broadly unacceptable to say that we still operate under the 19th century Diceyan view of this Parliament. That no longer represents the reality of this place's role in our governance arrangements and is no longer relevant in reflecting the view of the sovereignty of the people. If this was the case and the Diceyan view was so strong, I have been wondering during our hour or so of discussion why we are having a European Union referendum at all. Why does not Parliament simply decide what our future relationship with the European Union will be? However, there is a recognition that the sovereignty of the people is now supreme. Perhaps that has come about because of the European Union. We were all subjects before the advent of the Maastricht treaty. Indeed, some have had considerable difficulty recognising the fact that under that treaty we are citizens and not purely subjects.

Where else do we look? My noble and learned friend Lord Wallace of Tankerness referred to the Statute of Westminster 1931, which ceded powers from this Parliament. It is inconceivable that we would simply now believe that the authority of this place over the dominions can somehow be reconstituted. Why is that the case? It is perfectly clear that we have case law for this. The noble and learned Lord, Lord Hope, referred to one of his judgments when he sat on the Bench. I refer to another one which I referred to in the devo plus report that I authored in 2012, long before the referendum. The noble and learned Lord, Lord Hope, quoted from paragraph 102 of the judgment of the noble and learned Lord, Lord Steyn, in Jackson v the Attorney-General relating to a challenge to the Hunting Act 2004. The noble and learned Lord, Lord Hope, said:

"The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created the principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism".

I think that is a very fair judgment and observation to make. The noble and learned Lord, Lord Hope, continued in relation to paragraph 104 of the same judgment:

"I start where my learned friend Lord Steyn has just ended. Our constitution is dominated by the sovereignty of Parliament. But Parliamentary sovereignty is no longer, if it ever was, absolute. It is not uncontrolled in the sense referred to by Lord Birkenhead LC in McCawley v The King [1920] AC 691, 720. It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified".

Therefore, the question is: how are we qualifying? What is the way forward, taking into consideration the changes to Diceyan theory, changes that have come about from our acceptance that the people are sovereign, and changes from the fact that we now operate under two legislatures and two spheres of primary legislation? So we now have practice. We now have the judicial view not only of Diceyan approach but the standing of institutions—this Parliament and the Scottish Parliament—and we have acceptance of the sovereignty of the people. If that is the characterisation of the institutions themselves—democratic, enduring, their legislation trusted as a result—I have no difficulty with there being a recognition that the Scottish Parliament as an institution, and the Scottish Government formed within it, should be permanent fixtures of our constitution, and their standing recognised. That is consistent with the trend we have been developing.

Is it the end result? I hope that the end result will be a more codified, United Kingdom-wide written constitution and then perhaps a new Act of Union containing a new statement of union. That will be the missing factor, but I find it inconceivable, as my noble and learned friend said, that the Scottish Parliament would not be a permanent part of that factor. So we should go ahead and allow the Bill to stand without Amendment 1.

Lord Kerr of Kinlochard (CB): These are clearly very deep waters, into which a non-lawyer plunges with some concern. I am very glad that I understood part of what the noble Lord, Lord Purvis, said. I agree with him about the need for a convention.

My real worry about all this is that I do not believe in declaratory law. I strongly believe in 2% of GNP on defence; I strongly believe in 0.7% on aid; I strongly believe in emissions controls—but I do not believe in putting these things on the statute book. I do not believe in emissions control targets with no known means of fulfilling them. I do not believe in law that sends a message. A law is not worth having unless it changes something. I subscribe to the doctrine explained by the noble and learned Lord, Lord McCluskey.

At Second Reading, we heard from the noble Lord, Lord Norton of Louth, who is our prophet in these matters. He said:

"The Scottish Parliament is already permanent under the terms of the Scotland Act; it remains in being unless this Parliament legislates otherwise. New subsections (1) and (2), introduced by Clause 1, do not make it any more permanent than it already is".—[*Official Report*, 24/11/15; col. 638.]

[LORD KERR OF KINLOCHARD]
I understand the conundrum about the Smith commission, well explained by the noble and learned Lord, Lord Hope, but it seems to me that the noble and learned Lord's own amendment, with the noble Lord, Lord Norton, goes two-thirds of the way to delivering what he feels we are required to do. Amendment 6 does not require subsection (1). The arguments of the noble Lord, Lord Norton, have demolished subsection (1).

What we need is something that says: "The provisions of the Scotland Act, which established the Scottish Parliament, shall not be repealed unless the Scottish Parliament has consented and"—here I part company with the noble Lord, Lord Lang; I think there is a need for a referendum—"a referendum has been held in Scotland on a proposed repeal and a majority of those voting have supported it". We do not make it any more permanent by stating its permanence, and if a new provision adds nothing, we should not make it. It is permanent because it is on the statute book. I agree that in the real world the Scottish Parliament would not vote for its own abolition, but that gives a meaning to permanence.

Lord Forsyth of Drumlean: What about England? I agree it is not the real world but one can imagine circumstances in which the Scottish Parliament has been given all these powers and has got itself into a right mess and the people of Scotland wish to come back and be part of Westminster. It is entirely conceivable that people in England and Wales will want no part of that. So where is the opportunity for the United Kingdom to look at this as a whole?

Lord Kerr of Kinlochard: I do not think the noble Lord has quite understood my proposal. My proposal is that the language in the amendment in the names of the noble and learned Lord, Lord Hope, and the noble Lord, Lord Norton, should be preceded by the words: "The provisions of the Scotland Act establishing the Scottish Parliament may not be repealed unless"—and then the two conditions laid out in the amendment. It follows that I mean there would need to be a vote of this Parliament as well as of the Scottish Parliament, and the referendum that the noble Lord, Lord Lang, would not want but I think is necessary.

I have to say to the noble Lord, Lord Cormack, that I think the idea of a supermajority in this Parliament is a very bad one. I think supermajorities in general are a bad idea. Just as we should not add to the statute book provisions which add nothing, so we should not complicate our procedures by inventing a supermajority.

Lord Hope of Craighead: Does the noble Lord accept that he has very cleverly been answering the conundrum that I put to the noble Marquess, Lord Lothian, of trying to translate "permanent" into some other language that fits constitutionally with our established principles? I was suggesting that one should not be too tied by the word "permanent", which is used by lay men, and the noble Lord has perhaps cleverly expressed a way of doing that.

Lord Kerr of Kinlochard: I am very grateful to the noble and learned Lord but I refuse to be drawn into a debate among lawyers about how clever I am.

Lord McAvoy (Lab): My Lords, I do not know whether I should have asked for a suit of armour before coming to the Dispatch Box this afternoon, but here we go. First, I thank the noble and learned Lord, Lord Hope of Craighead, for being the only speaker so far in this debate, with the possible exception of the right reverend Prelate the Bishop of Chester, to recognise that the mandate for the Westminster Parliament is held in Scotland at the moment by the Scottish National Party. It clearly won the election and it is a blow to this House—that is, there is something missing from it—when we do not have that voice here to put its point of view. The great defenders of democracy this afternoon have not seen fit to refer to that lack of democracy, so I thank the noble and learned Lord. I know that he was not putting forward the Scottish National Party's point of view but he was putting forward views that it has represented at various times, and there is nothing at all wrong with that.

I also take this point of view. If there is consensus on the changes that the noble and learned Lord, Lord Hope of Craighead, is putting forward—consensus between the UK Government and the Scottish Government that these provisions are technically superior and would improve the legislation—we would be happy to support his amendment. We welcome the noble and learned Lord's initiative in doing this.

Everybody recognises the position of the noble Lord, Lord Norton of Louth, as that of probably the prime constitutional expert, but he does not always get it right. I am sure he is modest enough to recognise that as well. The thing is that these amendments were moved by Labour in the House of Commons and, to the Government's credit, they accepted them.

I have to express a level of disappointment, which the right reverend Prelate identified. It seems that some Members of your Lordships' House are still fighting the devolution battle, which was lost in the referendum of 1998. The danger for your Lordships' House, although I am not saying that this is the case, is in coming across as unconstructive by objecting to the very existence of devolution, and putting forward with negativity amendments that would destroy the whole concept of the Scottish Parliament. Not all the amendments tabled but many of them would destroy that concept. The facts of life are that while I fought on the other side, the people in Scotland—

The Marquess of Lothian: Can the noble Lord explain how the removal of new subsection (1) would affect the existence of the Scottish Parliament?

4.45 pm

Lord McAvoy: To echo the noble Lord, Lord Kerr of Kinlochard, I am not a lawyer and will not get into the detail of that. But as we are getting a wee bit into the nitty-gritty, the noble Marquess, Lord Lothian, and quite a few other Members of this House are in many ways responsible for the attitude in Scotland towards devolution and "getting away from English Tory rule". I condemn that attitude. The onus is on the Labour Party to win a UK election but the language used and the attitude shown by some Members of your Lordships' House only confirm to the Scottish National Party that "The English are hostile to us". I humbly ask that Members of your Lordships' House

be a wee bit more circumspect and not allow the Scottish National Party to portray legitimate concerns as hostility to the existence of a Scottish Parliament. I genuinely urge that.

Several noble Lords have mentioned permanence, which relates directly to what I have attempted to describe—the seeming hostility among many people in England towards Scottish devolution. The permanence issue was agreed in the Smith commission. The commission has been portrayed as politicians deciding things behind closed doors, but there people were behind closed doors with a mandate from the different parties. Getting agreement through the Smith commission was surely an example of delegated democracy at work, because if some things had not been agreed to, there would have been no Smith commission. It is slightly wrong to try to devalue the Smith commission.

The point about permanence is there to reassure the people of Scotland. We can, quite rightly, take the view that it would be impossible or wrong to do, and all the rest of it, but symbolism is important. The clarity of words is important, because we are not all politicians sitting in the House of Lords or even the House of Commons—we are dealing with ordinary folk here. The issue about permanence is completely understandable and gives an assurance. I do not think there is any chance of anybody here in your Lordships' House or the other place doing down Scotland. I do not believe that. Everybody keeps on saying we have to deal with the political reality, but the reality in Scotland is that many people believe that we here are out to do Scotland down in some way.

In short, we oppose all the amendments—

Lord Forsyth of Drumlean: I will just gently point out to the noble Lord, in relation to his point about the use of language, that throughout the 1980s the Labour Party referred to the Conservative Government as not having a mandate in Scotland. That was the language of nationalism. The nationalists were opposed to devolution, and the Labour Party believed that devolution would kill nationalism stone dead. If symbolism and the Smith commission are so important, why was it that, with the Smith commission and the commitment to implement its recommendations, all three unionist parties in Scotland were reduced to one seat?

Lord McAvoy: The emotional state of the Scottish electorate after the Scottish referendum is still to be analysed by a number of people and institutions. I do not know what happened and will be bold enough to say that the noble Lord, Lord Forsyth of Drumlean, does not know exactly what happened. But it certainly happened. He refers to people in the Scottish Labour Party thinking that nationalism would be killed off by a Scottish Parliament, but I am not one of those. It is about showing the Scottish people that we are trying to do our best for them. I agree with the noble and learned Lord, Lord Wallace of Tankerness, that a constitutional convention is required. In the long run, it must be required, because these issues keep cropping up.

Lord Kerr of Kinlochard: We Scots are quite a canny lot. Is the noble Lord quite sure that Scots would not spot that a declaratory law adds nothing? He said he opposed every one of the amendments, but he did not state in terms—no doubt he now will—that he opposed the one I drafted on my feet, which would limit the ability of the Westminster Parliament to change the provisions relating to Scotland by adding conditions such as a referendum and a vote in the Scottish Parliament. Is he quite sure that it would not cut more ice in Scotland if one was defining rather than declaring permanence?

Lord McAvoy: I appreciate what the noble Lord said and apologise for not dealing with his amendment comprehensively. Even as he was saying that, it occurred to me that the reason we object to this is that it is laying down the law—to use that phrase—to the Scottish Parliament as to what they must do. The noble Lord, Lord Forsyth, may be trying to do that but I am not. That would be seen as trying to impose conditions on the Scottish Parliament. I take the point that not every Scot goes about saying, "I need to have this word 'permanence'". I take it that the noble Lord, Lord Kerr of Kinlochard, stays in Scotland.

Lord Kerr of Kinlochard: Is there a residential qualification to take part in these debates?

Lord McAvoy: No, and I am sorry if the noble Lord took that the wrong way. However, I spend my life in Scotland, week in, week out. I listen to people there and am heavily involved in community organisations. I am not trying to devalue the noble Lord's point of view but I can speak only from my experience. There is a suspicion there—justified or not—about Westminster trying to lay down the law. I know I tempt fate saying that in front of the noble Lord, Lord Forsyth, but there we go. We are suspected of laying down the law in a popular way, not in a legal way—once again, there are too many lawyers. We are talking about how this would be seen as being dictated to by Westminster and interference in the mandate. The Smith commission had the agreement and we are pushing that forward. We would be interested in supporting the amendment of the noble and learned Lord, Lord Hope of Craighead, and I look forward to an interesting night.

The Advocate-General for Scotland (Lord Keen of Elie) (Con): First, I thank all noble Lords and the right reverend Prelate for their informative submissions, observations and comments, with regard to both Clause 1 and the proposed amendments to it. I begin by making a number of general observations. First, no one on the Government Benches is in any doubt about the supremacy and sovereignty of the United Kingdom Parliament. In that regard, I take issue with some of the comments of the noble Lord, Lord Purvis. Ultimately, it is for this Parliament to determine the constitutional arrangements of the United Kingdom.

The noble and learned Lord, Lord Hope, alluded to some observations he made in the case of AXA General Insurance and others in 2011. I recall those well. He may in turn recall that my client came second in that case. Reference was also made to some obiter dicta of the noble and learned Lord in the case of Jackson, to which we would not necessarily subscribe. However, they are there and are a helpful insight into the thinking of the court at that time with regard to the issue of sovereignty.

[LORD KEEN OF ELIE]

The purpose of this Bill is to implement the Smith commission agreement. To suggest that there is no mandate for that is, in my respectful submission, quite inaccurate. Each of the five political parties in Scotland went into the Smith commission and negotiated the terms of an agreement. The Government have undertaken to seek to implement that agreement. That is the purpose of this Bill.

Lord Maxton: On that point, all the political parties went into that Smith commission and all of them signed the report. However, the Scottish National Party immediately came out of the Smith commission, John Swinney among them having signed the report, and rejected it.

Lord Keen of Elie: I am aware of the conduct of the Scottish National Party in that regard and do not make any comment at this stage upon that. Perhaps it will be seen by others as extremely unfortunate that it should have lent credence to the agreement and then sought to renege from it. The point that we make is that it was signed—it is an agreement. It is in that context that this Bill is brought forward.

As I say, no one on the government Benches seeks to take issue with the proposition that this Parliament is sovereign and supreme. What we have here is a provision in the Smith commission agreement that we should recognise the permanence of the Scottish Parliament. It has been observed that it is, in a sense, already permanent—so be it—but let us remember that Clause 1 is concerned with a political statement, as much as any legal statement. That is its purpose, and it is not wholly exceptional in that regard. The noble Lord, Lord Norton, made reference to the Cabinet Office provisions on legislation at Chapter 10.9 of the *Guide to Making Legislation.* But when looked at, it expresses a generality—and, where there are generalities, there may of course be exceptions. This is one of those exceptions. I note that my noble friend Lord Forsyth agrees with me on that point.

My noble friend in turn suggested that there was little if any precedent for this form of legislation. I remind him that the Act of Union with Scotland of 1706, under the Gregorian calendar, referred to a Parliament of Great Britain for all time. In saying that, it made a political statement as much as a legislative provision—and that, again, is what we are doing here. We are recognising the political reality reflected in the Smith commission agreement.

Amendments 1 and 3 seek to modify Clause 1 by removing reference to permanence of the Scottish Parliament and the UK Government's commitment to the permanence of that Parliament. We would not consider that appropriate. It appears to us that, in light of the Smith commission agreement, the Government should be prepared to make that political declaration of permanence. It does not take away from the supremacy or sovereignty of this United Kingdom Parliament. That remains.

Lord Cormack: Can my noble and learned friend give any other example of an extra-parliamentary body—the Smith commission in this case—binding Parliament, saying that Parliament will do this or that? Can he give any example of any other outside commission or body making such a declaration and binding Parliament?

Lord Keen of Elie: The proposition is not well founded, with respect. The Smith commission is not binding this Parliament in any sense. Whatever the wording of the Smith commission agreement itself, it does not and could not bind this Parliament; it will be for the Parliament of the United Kingdom to decide whether it passes this Bill into law. So I do not accept the underlying proposition that was relied on by my noble friend Lord Cormack in that context.

On the terms of subsection (2) of new Section 63A, a point was raised about the words,

"with due regard to the other provisions of this Act".

In my submission, those are helpful, because the other provisions of this Act include the cross-references to Section 28 and, in particular, Section 28(7) of the Scotland Act 1998. There again, you have underlined the sovereignty of the United Kingdom Parliament and the right of this Parliament to legislate on all matters, including devolved matters, in respect of Scotland.

5 pm

The noble and learned Lord, Lord McCluskey, suggested an amendment to proposed new Section 63A(2) by inserting the word "only", but as the definite article is already employed in subsection (2) we would adopt the position that the meaning is already clear and the word "only" is not required in that context.

Amendment 6 was based on the SNP amendments tabled to Clause 1 during the Bill's consideration in the other place and seeks to provide that permanence could be repealed only if the people of Scotland voting in a referendum and the Scottish Parliament consented to it.

Lord Forsyth of Drumlean: I am slightly behind my noble and learned friend's speech, but I wanted to check the facts. He has made great play of the importance of including the word "permanence" as a result of the recommendations of the Smith commission. Will he explain why the Bill as originally presented to the House of Commons made no mention of permanence and why Part 1 was headed "Constitutional Arrangements" and "The Scottish Parliament and the Scottish Government"?

Lord Keen of Elie: In the course of the Bill's consideration, steps have been taken to strengthen the political statement contained in Clause 1. Indeed, the noble Lord's proposed Amendment 2 picks up this very point. He noticed that in the other place the words "recognised as" were removed from Clause 1 for the same purpose. Perhaps I anticipate the further contribution that the noble Lord may wish to make to this debate.

Lord Forsyth of Drumlean: Forgive me, but as in the best parliamentary answers, my noble and learned friend is telling me something I already know. My question was: if the Government thought that they were meeting the obligations of the Smith commission

by presenting the Bill as it was originally presented, that they met the terms of the Smith commission and that that is the overriding purpose and the agreement, why was it necessary to add these words which create such difficulty, as is clear from the speeches made in the House? My noble and learned friend has not really answered the point.

Lord Keen of Elie: With respect, I rather thought that I had answered the point made by the noble Lord, but let me reiterate it. The word "permanence" appears in the Smith commission agreement. After further consideration, it was felt that in order to strengthen the political statement contained in Clause 1 that word should feature in the clause itself.

I return to Amendments 6 and 7 which seek to alter the basis upon which any decision would be made with regard to the provisions of Clause 1. As was observed, it is not anticipated that there will at any point in the future be a referendum upon that issue, but nevertheless as this matter proceeded in another place it was again considered that this would strengthen the political statement that is being made here. Let us be clear: the use of a referendum in this context is consistent with precedent. In 1997, the people of Scotland supported the creation of a Scottish Parliament on the basis of a referendum. In 2014, in the independence referendum they reaffirmed their wish to have two Parliaments and two Governments for the purposes of reserved and devolved administration in Scotland. Therefore, it is appropriate that any question about the abolition of the Scottish Parliament and the Scottish Government, which is not envisaged, should be based on the expression of the will of the people of Scotland in a referendum. Let me be clear: that is a theoretical point. There has never been any question that the Scottish Parliament and the Scottish Government are anything other than permanent parts of the United Kingdom's constitutional arrangements. That remains the case.

It is unusual, but not wholly exceptional, for a clause of a Bill such as this to contain a political statement, an affirmation of the status quo, a declarator that it will not change, and that is the fundamental purpose of Clause 1.

Lord Purvis of Tweed: I am grateful to the Minister because I feel that he may well be making my point for me on the subject of new Section 63A(3). If the Government's position, which I support, is that there can be change only if the people of Scotland make it in a referendum, does that not adjust the absolute sovereignty of this place, which can make an unfettered decision?

Lord Keen of Elie: Clearly it is not, because, notwithstanding the outcome of any such referendum, this place might decide not to legislate in accordance with the outcome of the referendum. One cannot use these arguments to undermine the ultimate sovereignty and supremacy of Parliament.

Lord Hope of Craighead: I shall take up the point that the Minister made about Clause 1 as a whole—I think he was referring to the whole clause as it now stands, with all three new subsections—that it was simply a political statement. New Section 63A(3) is not just a political statement; it lays down a condition. If that is the right reading of the new subsection, does the Minister not recognise that it might be better to address some of the possible imperfections in new Section 63A(3) as it stands? The noble and learned Lord, Lord Wallace, among others, made the point that the phrase "the people of Scotland" is a little ambiguous, and it might be better to say "a referendum held in Scotland" to tell you where the referendum is going to be.

It is quite commonplace in Committee debates for Ministers to say, "We'll take this away and look at it and perhaps reconsider whether the wording we have in the Bill is the best that could be used". I wonder whether the Minister would be prepared at least to look at proposed new paragraph (b) in Amendment 6; leaving aside the mention of the Scottish Parliament in its proposed new paragraph (a), it suggests a rewording of new Section 63A(3) to see if it is the best wording that could be adopted. I absolutely accept that it deals with a hypothetical situation but, if one is laying down a condition, would it not be better to use the best possible terms in doing so?

Lord Keen of Elie: I am obliged to the noble and learned Lord for reminding me of the observations made by the noble and learned Lord, Lord Wallace, in that context. At this time the Government consider that we have achieved the best possible wording for the purposes of new Section 63A(3) in Clause 1. I compliment the noble Lord, Lord Forsyth, on his eyesight and his ability to read my notes at such a considerable distance. However, the position of the Government remains that we are satisfied that a relatively open provision in this context with regard to the people of Scotland voting in a referendum is the appropriate way forward.

Lord McAvoy: The Minister said a minute ago that the result of any referendum would not be implemented if the Bill were passed and became an Act. That is the reply that was given, and in the current atmosphere it will set lots of hares running. Would he care to clarify?

Lord Keen of Elie: I would be pleased to clarify. We were speaking theoretically in the context of the supremacy and sovereignty of this Parliament. In the light of the referendum finding that the Scottish Parliament should be abolished, it would be necessary for legislation to be put forward. It would in theory be possible for that legislation to be defeated in this Parliament. That is all that I was saying. However, we are in the realms of extreme speculation here—or it appears to me that we are.

Lord McCluskey: My noble and learned friend Lord Hope has pointed out the possible difficulty in the current wording. I am very fond, as are many Scots, of the well-known tennis player called Andy Murray. Is he one of the "people of Scotland" in new Section 63A(3)?

Lord Keen of Elie: I am not in a position to say whether he or any other individual falls into that category, and at this stage I would not speculate on his status.

Lord Cormack: If my noble and learned friend cannot answer that very simple, straight question, does not that in itself indicate that he must recognise the validity of the comments of the noble and learned Lord, Lord Hope, that the Bill is capable of further improvement? In his eyes—not necessarily in ours—it was improved in the other place. Is he saying that the Government have got it absolutely right and it cannot be improved in this place?

Lord Keen of Elie: On the last point, just to be clear, that is what I am saying.

Lord Wallace of Tankerness: Maybe I can help the Minister. Perhaps he is saying that this is all just declaratory, because after all it does not matter what you put in new subsection (3). That subsection just makes the permanence referred to in new subsection (1) conditional because there are conditions there which, if fulfilled, would not make it permanent.

Lord Keen of Elie: If I can complete the journey around the houses that the noble and learned Lord has begun on that point: it appears that new subsection (3) simply underlines the political structure—the declaratory statement contained in the clause as a whole. The noble and learned Lord, Lord Hope, observed that of course it goes a step further in so far as it introduces conditionality to the abolition of the Scottish Parliament, which I acknowledge. As to it being,

"a decision of the people of Scotland voting in a referendum",

that term is capable of clear and objective definition in due course. Respectfully, however, it appears that that wording is sufficiently clear for these purposes.

Lord Purvis of Tweed: Just to carry on a little around the House: the Minister did not make it clear at the Dispatch Box when he said that the people of Scotland would not necessarily be sovereign if this Parliament did not adhere to the result in that referendum. That is absolutely contrary to the Edinburgh agreement that the Prime Minister signed, which stated that the Government would respect that view. The sovereignty of the people should be absolute, not anything else he may say at the Dispatch Box this evening.

Lord Keen of Elie: I cannot agree with the interpretation of sovereignty the noble Lord, Lord Purvis, puts forward. At the end of the day, if there was a referendum—and we are talking about a theory, not political reality—it would be necessary for there to be legislation to implement the outcome of that referendum if it involved the abolition of the Scottish Parliament. No one in reality is contemplating the abolition of the Scottish Parliament. The whole purpose of Clause 1 is to make clear the permanence and the recognition of the permanence of the Scottish Parliament and the Scottish Government. The noble Lord, Lord Purvis, has to recognise that the outcome of any referendum could be implemented only by way of legislation that went through this, the sovereign Parliament of the United Kingdom. That is the only point I seek to make.

Lord Forsyth of Drumlean: I may be able to help my noble and learned friend to get off this line of argument. I have been reflecting on what he is saying about this clause, which is essentially that the sovereignty of the United Kingdom Parliament remains unaltered, and that what is contained in this clause is simply a declaratory political statement. Can he explain to me what a declaratory political statement is? Is a political statement one that says something but means something else? He appears to be saying that the statement is that the Scottish Parliament is permanent, and at the same time that it is not permanent because this place is sovereign. Is his definition of a political statement one which can mean whatever you want it to mean and which is basically not entirely straightforward?

Lord Keen of Elie: I do not accept that expression of the position. As I said at the outset, the whole purpose of Clause 1 is to make a political statement that reflects the terms of the Smith commission agreement, which determined that there should be an expression to the effect that the Scottish Parliament is permanent. We acknowledge that, and that is the political statement being made. It is a declaration of will. However, we also recognise, as I believe this House will recognise, that the United Kingdom Parliament is ultimately sovereign and supreme. I am seeking to make that point. At the end of the day, this Parliament is sovereign, and it cannot disclaim that sovereignty.

Lord Purvis of Tweed: In that case, can the noble and learned Lord expand on the meaning of the Government's wording in this clause? It states that,

"the Scottish Parliament and the Scottish Government are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum".

Therefore, if the people of Scotland vote in a referendum and make a decision, and the Government or Parliament then disregard the view and the decision of the people of Scotland, does that mean that this clause has no purpose at all in legislation? If that is the case, what is the point of this wording being in the Bill?

5.15 pm

Lord Keen of Elie: It has a purpose inasmuch as it determines that there cannot be abolition without a referendum. I am simply making the point that, as this is a sovereign and supreme Parliament, it could decline to legislate in accordance with the terms of that referendum result. However, politically that just would not happen.

Lord Davidson of Glen Clova (Lab): Perhaps I may intervene. The noble and learned Lord—I was going to say "my noble and learned friend" but he is not in this context—has made it entirely clear, beyond peradventure, that this Parliament may do what it chooses because it is sovereign. When he says that this Parliament makes a declaratory statement, that is within its sovereign power. Surely that is the end of this point. If Parliament decides to make this declaration, then so be it.

Lord Keen of Elie: I am obliged to my noble and learned friend. It seems to me that we make no further progress on this point, notwithstanding the further observations of the noble Lord, Lord Purvis. I simply underline the sovereignty of this Parliament, and nothing

in Clause 1 derogates or takes away from that. That is the bottom line. It is necessary to make progress with this Committee debate rather than to stay in still waters on one sterile point. Therefore, at this point I urge the noble Lord to withdraw his amendment.

Lord Hope of Craighead: Perhaps I may return to new subsection (3), which relates to a separate point from the one that the Minister has been emphasising concerning the sovereignty of Parliament and so on. If we look ahead to the day some time next year when this Bill comes back on Report, it is quite likely that there will be an amendment seeking to reword new subsection (3), perhaps along the lines that have already been discussed. I respectfully suggest to the Minister that he would carry a little more credibility if he were to depart just a fraction from the briefing that he is reading from and were prepared to say that he would look again at this. He does not have to commit himself to any rewording, but sometimes when we have these debates in Committee it softens the atmosphere a lot if one is prepared to say simply, "Well, some interesting points have been made. We'll have another look and perhaps come back with something on Report, or perhaps not". It would ease the atmosphere a little on this point and avoid repetitive interruptions.

Lord Keen of Elie: I notice what the noble and learned Lord says with regard to new subsection (3) in Clause 1.

Lord Wallace of Tankerness: Section 1(1) of the Northern Ireland Act 1998 also refers to the fact that it is a declaration that:

"Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section".

Subsection (2) goes on to say:

"But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland".

Obviously there is a context to that, but does the noble and learned Lord think that it might be helpful to add a further subsection indicating that, if a wish is expressed by a majority in a poll of the people of Scotland that the Scottish Parliament should be repealed, the Secretary of State will bring forward the necessary legislation to give effect to it?

Lord Keen of Elie: With respect, it does not appear to me that the two situations are immediately comparable. In those circumstances, it does not appear to me that that would add to new subsection (3) in Clause 1. I renew my submission that the noble Lord should withdraw the amendment.

Lord Cormack: I ask my noble and learned friend to respond more positively and helpfully to the noble and learned Lord, Lord Hope. It was a very simple point that he made. All he asked was that my noble and learned friend would reflect on what has been said during this debate and come back at a later stage, having reflected. He may be equally adamant, but he really owes it to this House to reflect on what has been said in this debate.

Lord Keen of Elie: With respect to my noble friend, I will reflect upon all observations that have been made in this House, but without commitment.

Lord Norton of Louth: Well, my Lords, this has been a quite fascinating debate. I say to the noble Lord, Lord McAvoy, that I fully accept I am a Lord and not the Lord and therefore am quite capable of getting things wrong. However, on this occasion, I am not sure that I have, given the excellent speeches that we have heard in support of these amendments. I really think it is incumbent to pursue the matter further along the lines that several noble Lords have suggested.

The noble Lord, Lord McAvoy, argues that declaratory statements are appropriate—and indeed they are but, as the guide to legislation makes clear, not necessarily in legislation. Declaratory statements are the sort of thing that should be done at the Dispatch Box. As the Minister pointed out, there have been occasions when declaratory statements have appeared in statute. But what is quite clear from the debate is the unusual context in which we are discussing this, given that it derives from extant legislation and actually complicates, rather than clarifies, what Parliament has already stipulated in legislation.

My starting point in all this is very similar to that of the noble and learned Lord, Lord Hope of Craighead—that the Smith commission heads of agreement said that the Scottish Parliament and Scottish Government will be made permanent. All parties accepted that, as he said, and the debate has proceeded on that basis. It has largely been taken as given.

It strikes me that there are two problems deriving from that. The first is that it has not been properly debated. I really think that the debate this afternoon in your Lordships' House is the first thorough, proper debate on principle in relation to this issue. What it has demonstrated is the need for further consideration of the matter. The second problem is the extent to which the Government appear to have taken almost literally the heads of agreement—they have just taken what was said and plonked it in legislation. We will see that shortly when we discuss the Sewel convention. The Government's line is that this is what Lord Sewel said, so that is the convention and the words go into statute. It is not put on a statutory footing; it is just plonked in statute. I think that the same has happened here. Because the heads of agreement said that it would be made permanent, the Government decided to put in place legislation to make it permanent without thinking through the implications.

Those implications have been well drawn out by the Constitution Committee, as my noble friend Lord Lang has pointed out, and I declare an interest as a member of the committee. In the context of the debate, it is well worth reminding your Lordships of the committee's report on the Bill, especially paragraph 36:

"It is a fundamental principle of the UK constitution that Parliament is sovereign and that no Parliament may bind its successors. There is now a strong argument that Parliament is seeking to limit its own competence in a way that the courts may

[Lord Norton of Louth]
seek to uphold in future given that it rests on a requirement for popular consent. While we recognise that it is extremely unlikely that this will ever be tested in the courts, it is nonetheless symbolically important and we are concerned that these provisions, as currently worded, risk introducing uncertainty concerning the absolute nature of parliamentary sovereignty where there should be none".

This is an extremely serious issue.

I agree with my noble friend Lord Lothian and the noble Lord, Lord Kerr of Kinlochard, who have come up with some very positive suggestions. As the noble and learned Lord, Lord Hope of Craighead, said, I see no reason why the Government could not at least go away and think about the wording of the clause and come back. As the noble and learned Lord, Lord McCluskey, has said, we must try to do better. I hope that between now and Report that is exactly what we will do. In the mean time, I beg leave to withdraw the amendment.

Amendment 1 withdrawn.

Amendment 2

Moved by ***Lord Forsyth of Drumlean***

2: Clause 1, page 1, line 9, after "are" insert "recognised as"

Lord Forsyth of Drumlean: My Lords, we have had quite a good debate already—some two hours or more—on Clause 1, but I would like to move Amendment 2. Anticipating what the noble Lord, Lord McAvoy, would say when he advised us to tread carefully on people's dreams and anticipating that the Front Bench might not be inclined to listen immediately to the wise words of my noble friend Lord Norton of Louth, I tabled Amendment 2, which at least softens the impact of the clause as currently drafted.

The effect would be to introduce after "are" the words "recognised as" so that it would read, "The Scottish Parliament and the Scottish Government are recognised as a permanent part of the United Kingdom's constitutional arrangements". Adding "recognised as" implies that there is another party, which is the sovereign Parliament.

I am looking forward to hearing the Minister explain why he is not prepared to accept the amendment—in the unlikely event that he is not prepared to accept it—because these words were in the original Bill presented to the House of Commons. They were taken out as a result of representations from the Scottish nationalists. The Scottish nationalists may have a mandate in Scotland and they may have a mandate in the House of Commons in that they represent 56 seats—

Lord McAvoy: Fifty-four.

Lord Forsyth of Drumlean: The noble Lord, Lord McAvoy, says under his breath, "54". I do not wish to go into the half-life period of nationalist Members of Parliament and the reasons for their disintegration, but 56 were elected and I will not be tempted down that particular road.

They were elected on a mandate that is destroying the United Kingdom. We had a referendum in which the people of Scotland clearly expressed the view that they wished to remain part of the United Kingdom. I do not buy the argument that we should immediately incorporate into the Bill suggestions from people who do not believe in devolution. The noble Lord, Lord Maxton, was kind enough to point out that the Scottish nationalists were against devolution. I was against devolution. I believed that it would result in a platform for the nationalists that would eventually threaten the existence of the United Kingdom. I am sorry to say that that has proved to be the case. Alex Salmond voted against devolution and was against it because he shared the view of the Labour Party that devolution would kill nationalism stone dead. It is true that we were both against the constitutional convention, but for different reasons. The nationalists, of course, proved to be luckier than their judgment. So the Government have taken out "recognised as" and we now come back to what exactly the Government are doing with their political statements. Are these political statements words that are meant to appease the nationalists, but they do not mean what we say they mean? That was a point made in the previous debate.

I say to my noble and learned friend the Minister that we can vote in Committee. We choose not to vote in Committee so that Ministers have an opportunity to listen to the debate and come back with their thoughts and reflections. They might not necessarily come back with thoughts and reflections in line with the representations that have been made. But if Ministers are not prepared at the Dispatch Box to listen to well-argued arguments and instead say at this stage in Committee that they are not prepared to go away and think about it, perhaps we need to start thinking about dividing the Committee. My noble friend the Chief Whip is not in his place, but it is not unreasonable, in return for not seeking to divide the Committee, that Ministers should listen to the arguments and give a clear undertaking that they are prepared to consider them and come back on reflection.

In moving the amendment, I am simply requesting that the Government put back into the clause the words that they themselves thought necessary when they introduced the Bill to the House of Commons, particularly in the light of the vigorous debate we have had and the concerns that have been expressed. Including the words "recognised as" would at least offer some respite to those of us who feel that we may be pulling the wool over the eyes of the electorate with the clause as it stands.

The right reverend Prelate the Bishop of Chester told us that it would be absolutely disastrous in Scotland to change the clause. I think it would be even more disastrous to present a fraudulent clause that gives a false impression of the position and could be a source of bitterness in future years. After all, we won the referendum campaign as "Better Together"; we do not want to end up as "bitter together".

5.30 pm

The Lord Bishop of Chester: My Lords, perhaps I may clarify a point. I would not want to introduce a question mark over the commitment to permanence. Perhaps I may try an analogy, although it may not work. When I solemnise the marriage of a couple as a permanent union, I do so because of the significance of that, but knowing full well that future circumstances

might make that union untenable. That is the possibility. It is simultaneously true that one is committed to the permanence of something but can recognise that circumstances can change in the future. That is simply the nature of a vow—a word that we have not used this afternoon but has been used in previous debates. A vow is a solemn intention, and the commitment to permanence in the Bill is in a sense a solemn commitment. That is what it is and it is the basis on which it has been included. To withdraw it would simply send the wrong signal. That is not to say that something is then set in stone and Parliament cannot change it; that is clearly not our constitutional arrangement, but it is, as it were, the solemn commitment to the people of Scotland that is enshrined in the use of the word "permanent" in the legislation.

Lord Forsyth of Drumlean: I am most grateful to the right reverend Prelate, but the vow is something that was dreamed up, as I said at Second Reading, by the editor of a tabloid newspaper, the *Daily Record*. The party leaders, some of whom are no longer with us as party leaders, who signed up to it were unaware that it would be presented on the front page of that newspaper as a vow. It is the old story. When you complain to an editor about a newspaper story, they always say, "I am terribly sorry. It was the subeditors who wrote the headlines and they did not really read the text". In this case, that is the status of the vow. I hesitate to intrude on the right reverend Prelate's territory, but I certainly would not confuse it with the marriage vows, which, in my own case, I took as being absolutely permanent and for life. My worry about the Bill is that this marriage of the United Kingdom is being turned into a system where we appear to be living apart from each other, in houses next door to each other with different regimes operating in those houses, but that is for another day. I beg to move.

Lord Lang of Monkton: My Lords, I rise briefly to support my noble friend Lord Forsyth, who is absolutely right. The fact that the Government had the wording as per his amendment in the original Bill represents what must have been their best thought, after careful preparation, on what should be in the Bill. They have succumbed unnecessarily to pressure in another place and now we are faced, as in a number of other areas in the Bill, with what they must consider second best. I do not think that is good enough for an important Bill of this type, and I urge my noble and learned friend to accept the amendment.

Lord Mackay of Clashfern: My Lords, this is an interesting amendment. I wonder by whom the recognition is supposed to be given. "Recognised as" requires that someone does the recognising; who is it? This is a much better clause as it stands than it was originally. The process of improvement in Parliament has in fact worked in this case by missing out a nonsensical requirement and replacing it with one that is reasonably clear.

So far as I am concerned, the purpose of a clause of this kind is to declare the situation as it is and as it will be for this Parliament and for any subsequent Parliament that does not decide to repeal it. As we know, the Act of Union was supposed to be for ever, but we are all mortal, and Members of Parliament, in particular, are mortal. It may well be that a later Parliament has a different idea. The sovereignty of this Parliament is perfectly clear, but that does not mean that it binds a subsequent Parliament, and therefore there could be a change in a subsequent Parliament.

That brings me to a matter that was referred to about the referendum. The point that is made in the clause is that the Parliament is to be permanent, and therefore there is no question of a referendum until someone decides that there should be a question about that permanence. It is quite inappropriate to include detailed provisions about what would happen in the event of a decision that perhaps the Parliament was not permanent after all in the shape of a referendum. That is a matter which, at the very least, would have to be looked at in some detail, just as recently we have been looking in great detail at the referendum Bill about moving out of the European Union. If a Bill was required to alter the status of the Scottish Parliament, I feel certain that it would need some pretty careful consideration. That probably will not occur in my lifetime or, I suspect, in the lifetimes of most noble Lords who are present, except possibly the very young.

Lord Empey (UUP): My Lords, perhaps I may make a brief observation. The noble and learned Lord, Lord Wallace of Tankerness, quoted the 1998 agreement that affected Northern Ireland. I have to say that if you have a political agreement such as the Smith commission which you are trying to implement, you cannot be expected to translate it word for word into legislation. The Belfast agreement contained diplomatic language, political language, and of course there was an international dimension to it which is not present in the current proposals. The phrase that comes to mind when discussing these matters is, "There is nothing as permanent as the temporary". We should not be working within an absolutely rigid framework which says that we have to replicate word for word the particular phrases used by the Smith commission.

It is never intended that a political agreement from a commission which has been established should automatically be transferred verbatim into law. That is not feasible and I urge noble Lords not to put themselves completely on the hook over this because of the fear that if something is changed, it will be seized upon by people who will say that you are running away from the agreement. The fact is that those people will seize on it whether you do or whether you do not. That is because we know that they signed up to it, and now they have walked away from it. The issue is this: is it right and proper legislation or is it not? Is it consistent with the aims and objectives that were set out by the commission to which the parties have agreed? I would have thought that that is a better measure for judging the quality of the legislation rather than putting yourself in a terrible position where if you change a word, a dot or a comma, somehow or other you are committing a political sin. That is not what Parliament is here to do. Everyone has been put into difficulty by getting themselves shackled to this proposal.

Baroness Liddell of Coatdyke (Lab): My Lords, we have spent more than two hours arguing more or less about the number of angels dancing on the head of a needle. Ultimately the power of this Parliament,

[Baroness Liddell of Coatdyke]
and any Parliament, derives from the people. Sovereignty for any Parliament derives from the will of the people. If the will of the people changes then the legislation will change and the future of Parliaments will change.

I do not want to intrude on the personal grief on the government Benches because much of the argument has come from there, but we have to concentrate on trying to move on into how we can make this legislation more relevant to the complex society that we have. There has not been much evidence of that so far. I greatly regret the fact that I never studied law—well, I used to greatly regret that—but I have to say at the end of this afternoon, thank goodness.

Lord Selkirk of Douglas (Con): My Lords, Amendment 2, moved by the noble Lord, Lord Forsyth, can be legitimately accepted by Ministers on the basis that it is a more accurate assessment of the present situation.

When I first became an advocate I was summoned by the Solicitor-General. I went up to him, not knowing what he was going to say, and he said he wanted to know whether I would become a parliamentary counsel. At that time I had not the faintest idea what a parliamentary counsel was so I said I would give him an answer as soon as possible. I then learned that a parliamentary counsel was merely a draftsman, and I fear that if I had given the wrong answer I might still be one of the draftsmen drafting the provisions of this Bill, rather than being given the privilege to comment on the best way forward.

There is no question but that the view generally taken is that the Scottish Parliament is there on a lasting basis and on the basis of permanency. There is no doubt whatever that this Parliament is sovereign and that one Parliament cannot bind future Parliaments. The results of the referendum and the general election both pointed in the direction of the maintenance and security of the United Kingdom, and also of greater powers for the Scottish Parliament. In some ways, we are having to walk a tightrope reconciling those two different aims. However, I believe there is room for manoeuvre, and this is a very small adjustment which the noble Lord, Lord Forsyth, is suggesting. Without losing anything of the political declaratory nature of the first provisions of the Bill, the amendment could legitimately be looked at and acceded to.

Lord McAvoy: My Lords, the Government in their wisdom accepted the Labour amendment in the other place to reflect the Bill as it is. We support that. We think that it was very wise of the Government to do so. It puts the permanency of these institutions beyond any doubt. We all know the law regarding ultimate sovereignty but nevertheless it would be foolish—I am repeating myself—to reject the symbolism of having that in the Bill, so for those reasons we oppose the amendment moved by the noble Lord, Lord Forsyth.

Lord Keen of Elie: My Lords, I begin by making the observation that, without commitment, of course we are listening and of course we reflect upon the terms of this debate. There can be no question about that. We are here for that very purpose. I do not accept the implication that somehow we have come here with our ears closed or our minds closed, because that is not the case. I say that without commitment.

In the context of this amendment, the words "recognised as" appeared in the original drafting of the clause. I cannot accept the observation of the noble Lord, Lord Lang, that by amending a clause of this kind we end up with second best. With great respect, that is to invert the whole process of Parliament. The object of amendment—of adjustment—is to achieve a better result, and that is what the Government believe was achieved by accepting the amendment put forward by the Labour Opposition in the other place.

I note—and with great respect adopt—the observation of the noble and learned Lord, Lord Mackay of Clashfern, that if you go down the route of "recognised as", it opens up the question of recognised by whom, in what circumstances and why? That seems wholly unnecessary in the context of this form of declaratory provision within the clause. In these circumstances I invite the noble Lord, Lord Forsyth, to withdraw his amendment.

5.45 pm

Lord Forsyth of Drumlean: My Lords, that was an interesting response because, first, my noble and learned friend has underlined, quite rightly, the importance of not having declaratory material in legislation. However, we have just spent the best part of two and a half hours trying to persuade him of that. Secondly, he also made the very sensible point that the whole point of these proceedings is that Governments, legislatures and draftsmen are not infallible, and he took it upon himself to remove that original wording from the original Bill, or at least his colleagues in the House of Commons did.

The Marquess of Lothian: My noble friend is being asked to withdraw the words he is trying to insert because we do not know who is recognising? Subsection (3) of the proposed new section contains the words, "it is declared". Do we know who is declaring?

Lord Forsyth of Drumlean: My noble friend has stolen my thunder. He is absolutely right. The whole point and discussion we have had has been about the nature of the declaratory legislation. Of course, it would have been open to my noble and learned friend if he thought that the effect of my amendment, which after all was originally the Government's proposal, was that it would create uncertainty, as my noble and learned friend Lord Mackay indicated. He made the point that there are recognitions and declarations being made when it is not clear who is making them.

We could change the amendment. The Minister could bring back an amendment saying that it is recognised by the UK Parliament, or whatever he thought appropriate. However the truth of the matter is that those words were removed for a purpose, and the purpose was to make the subterfuge which is being presented to the Scottish people that somehow this Scottish Parliament has a degree of independence of its own. That is being done for political reasons. I think that they are foolish political reasons because they are creating a false position as to the reality.

Lord Davidson of Glen Clova: I take the point that issues of politics can intrude into questions of drafting, but if the noble Lord looks at Clause 2 he will see that the words—I hope I am not stealing his thunder in this regard—"it is recognised" are also found there. Does he take exception to that?

Lord Forsyth of Drumlean: I was not taking exception to anything. I was simply suggesting to the Government that they got it right when they added the words, "it is recognised" to the original Bill, and they got it wrong when they took them out. Fortunately I am not a lawyer, but as a layman, removing the words "it is recognised" indicates that no other party is involved in considering the status of the Parliament.

Lord Norton of Louth: Would my noble friend not wish to call in aid Clause 2 where the Government wish to insert the Sewel convention with the words, "But it is recognised"?

Lord Forsyth of Drumlean: That is the same point, and I am trying to get on to Clause 2. I have to say to my noble and learned friend that as ever, and always, I am trying to be helpful to the Government, I thought that perhaps on reflection they might wish to add those words. I hope that the Minister will consider the debate we have had on these matters and perhaps come back with his own wording. The clause, as it stands, is completely unsatisfactory, but I beg leave to withdraw my amendment and give notice that we may return to this at a later stage in the proceedings of the Bill.

Amendment 2 withdrawn.

Amendment 3 not moved.

Amendment 4

Tabled by ***Lord McCluskey***

4: Clause 1, page 1, line 11, after first "The" insert "only"

Lord McCluskey: In light of the answer relating to the word "only", to the effect that it is implied by the use of the definite article, I see no need to pursue this at this stage. I will not move this amendment and I intimate an intention not to move Amendment 5.

Amendments 4 and 5 not moved.

Amendment 6

Tabled by ***Lord Hope of Craighead***

6: Clause 1, page 1, leave out lines 15 to 17 and insert—

"( ) Subsection (1) may only be repealed if—

(a) the Scottish Parliament has consented to the proposed repeal; and

(b) a referendum has been held in Scotland on the proposed repeal and a majority of those voting at the referendum have consented to it."

Lord Hope of Craighead: In the light of what the noble and learned Lord, Lord Keen, said, I understand that he will at least reflect a bit on what was said earlier. We may return to this on Report, but for the time being I will not move the amendment.

Amendment 6 not moved.

Amendment 7 not moved.

Amendment 8

Moved by ***Lord Forsyth of Drumlean***

8: Clause 1, page 1, line 17, leave out "Scotland" and insert "the United Kingdom"

Lord Forsyth of Drumlean: This amendment again relates to an issue that we touched on in our discussion of earlier amendments. The amendment would require that any referendum, as proposed in new Section 63A(3) as inserted by Clause 1, regarding the abolition of the Scottish Parliament, which I must say is highly unlikely, should be a referendum for the whole of the United Kingdom. If there were circumstances where perhaps we had a new Act of Union, or we were establishing a new federal constitution, or—this is hard to imagine—the Scottish Parliament was to be abolished, it would have huge implications for the rest of the United Kingdom.

If there was to be a referendum, it would be, as provided in the Bill,

"on the basis of a decision of the people of Scotland".

We have had some debate as to who the people of Scotland are and whether Mr Andy Murray is in that category. If there was to be a referendum, I accept that proposals would need to be brought forward for its conduct, but at a later stage in the Bill we give the powers to set the rules and nature of referendums to the Scottish Parliament. Would that apply to this particular referendum? It seems to me that if we were making a huge change, where we were bringing back into the United Kingdom a system of government—perhaps into this Parliament or some other system of government—that that would be a matter for the whole of the United Kingdom, not just the people of Scotland. Therefore, my amendment would simply substitute "Scotland" with "the United Kingdom". I beg to move.

Lord Empey: My Lords, the noble Lord, Lord Forsyth, makes a good point in so far as referenda in one part of the United Kingdom clearly have implications for the others, but there would be fairly significant inconsistency. If we look at the Belfast agreement and its proposals for a referendum in Northern Ireland, it is exclusive to the people of Northern Ireland. If the carry-through from his amendment would be that the people of the rest of the United Kingdom would have to vote in that referendum as well, that would mean that there could be two different outcomes. So clearly there are difficulties.

I fear that we are trying to treat the Smith commission and the political issues swirling around it as if they were a treaty rather than a piece of domestic legislation. That is why we are getting ourselves into difficulty here. This amendment would need to be looked at very carefully because of the inconsistencies that could arise. I accept entirely that additional powers to a devolved region would affect everybody else, but, equally, a referendum regarding sovereign status is a very different thing.

Lord McAvoy: My Lords, not to anyone's surprise, we oppose the amendment. It was our amendment in the House of Commons that made it clear that it should be the Scottish people who determine the permanency of their Parliament. It is not a decision for the United Kingdom as a whole.

I believe firmly in the role of this House as a revising Chamber. Therefore, there is no question of having to have a mandate, to be elected or any other method of claiming to represent people. With respect to the noble Lord, Lord Forsyth of Drumlean, it has to be taken into account that he has no mandate for this type of quite dramatic intervention. There is not much of a cry in England, Wales and Northern Ireland for inclusion in such a referendum. It would also pose the additional point made by the noble Lord, Lord Empey, that it would lack consistency and political reality to include the whole of the United Kingdom in a referendum in Northern Ireland, although I accept that there are unique circumstances in Northern Ireland.

I hope that I am not getting too repetitive, but it is my opinion, based on my experience of living and staying in Scotland—I have been in Scotland all my life—that there would be complete outrage if such an amendment were supported by this House. I ask colleagues to reject it.

Lord Keen of Elie: I am obliged to noble Lords. I reiterate that the purpose of the Bill is to implement the recommendations in the Smith commission agreement. I noticed that the noble Lord, Lord Smith, has already observed that the terms of the Bill do that. This provision is consistent with the spirit of the agreement. It is also with precedent, if I can put it in that context. The referendum in 1997 over the matter of devolution was a referendum of the people of Scotland. The referendum on independence in 2014 was a referendum of the Scottish people. It is considered appropriate that we should continue with that model. I note that the noble Lord, Lord Empey, pointed out that the Northern Ireland Act 1998 proceeds in a similar vein. So it is consistent and appropriate that, for the purposes of this Bill, any such referendum—the noble Lord, Lord Forsyth, himself acknowledges how extremely unlikely it is that that would even be contemplated—should be a referendum of the Scottish people. I therefore urge him to withdraw the amendment.

Lord Forsyth of Drumlean: I am most grateful, but before my noble and learned friend sits down, could he tell me where in the Smith commission agreement there is a proposal that there should be a referendum of this kind?

Lord Keen of Elie: There is no express reference in the Smith commission agreement to a referendum. As my noble friend is aware, that provision was brought into the Bill in the belief that it would strengthen the political statement contained in Clause 1 with regard to the permanence of the Scottish Parliament.

Lord Thomas of Gresford (LD): My Lords, I believe that this introduces the Welsh element. There would be a profound disinterestedness in Gresford about whether the Scottish Parliament exists or not, save in so far as the Barnett formula gives them so much more money than we get. On the other hand, we would resent it hugely if the noble Lord, Lord Forsyth, had a vote in a referendum for the abolition of the Welsh Assembly, or, indeed, any successor.

Lord Forsyth of Drumlean: I know that the noble Lord has not been following our proceedings so closely, but the point being made here was not about the status of the Scottish Parliament. In our earlier discussions I made the point that I cannot imagine circumstances in which we would want to abolish the Scottish Parliament, but it might be, for example, that the noble Lord's party's proposals to create a federal constitution and to have a new Act of Union were implemented. That might mean dissolving or altering the Scottish Parliament as it stood.

I do not like Clause 1 and new subsection (3), which provides for this referendum. I tabled the amendment to make the point that the future of the Scottish Parliament were it to be changed, now that we have gone down this road so far—and will have gone further when the Bill becomes an Act of Parliament—must be a matter for the whole United Kingdom. I cannot conceive of any other circumstances in which that would happen. I suppose that it could be that the nationalists had made such a hash of it that people in Scotland were pleading for the thing to be shut down and then come back. However, there would then be issues for the Welsh, the English and the Irish about the funding, the obligations and other matters that would arise. All this is pretty hypothetical and extreme but it has been put there in order to mislead people about the nature of devolution, which is power devolved from this sovereign Parliament. It is important that the legislation should not seek to mislead people.

6 pm

I was impressed by the argument put forward by the noble Lord, Lord Empey. I confess that I had not thought about the Northern Ireland precedent. The problem here is not my amendment, it is new subsection (3), which provides for a referendum on abolition. Throughout the whole period when these proposals have been discussed, Ministers have been at pains to say: "All we are doing is implementing the proposals of the Smith commission". There is no such proposal in the Smith commission, as my noble and learned friend has confirmed. Along with the declaratory words in this clause, the referendum provision is making a political comfort statement to people who wish to destroy the United Kingdom, who are opposed to devolution and see it as a ram or a wedge by which they will split the United Kingdom and achieve their objectives. I am not keen on helping these people in that process and that is why I do not particularly like new subsection (3) but I accept that my amendment will not do the job. However, it has perhaps helped to expose the fact that the Government are putting into the Bill stuff which has nothing to do with the Smith commission but which has another political purpose that is extremely unwise. I beg leave to withdraw the amendment.

Amendment 8 withdrawn.

Amendment 9

Moved by ***Lord Forsyth of Drumlean***

9: Clause 1, page 1, line 17, at end insert—

"( ) Nothing in this section alters the sovereignty of the United Kingdom Parliament."

Lord Forsyth of Drumlean: My Lords, I hope I will get a bit of a break after this one. Having argued earlier that it was completely inappropriate to use legislation to write political graffiti—which is what the Government are doing—I reluctantly came to the conclusion that we would perhaps be unable to persuade the Government to rub it out. This amendment, therefore, adds some graffiti of my own. It does what I have been saying we should not do, which is to use legislation to make declaratory statements. However, the declaratory statements included in the Bill as it stands are so misleading that it is essential to add this amendment which simply adds, after line 17, the words:

"Nothing in this section alters the sovereignty of the United Kingdom Parliament".

I have not been counting, but I have heard my noble and learned friend say that so many times. As he has argued that it is necessary to have declaratory statements in the legislation for a political purpose, that there is nothing wrong with it and that there are precedents for it; and as he has said over and again that nothing in this Bill alters the sovereignty of the United Kingdom Parliament, I am looking forward to him accepting the amendment with enthusiasm.

Lord McAvoy: My Lords, is it not the case that the sovereignty of the UK Parliament is already protected by Section 28 of the Scotland Act 1998, which provides that the UK Parliament can always legislate for Scotland?

Lord Keen of Elie: My Lords, I compliment the noble Lord, Lord Forsyth, on his optimism. The position is clear: we have repeatedly stated, across this House, that the United Kingdom Parliament is a sovereign Parliament. The noble Lord decided to seek a declaratory statement of that. I submit that this is wholly unnecessary: it is beyond doubt that this Parliament is supreme and sovereign. This is restated by Section 28(7) of the Scotland Act 1998. The existing declaratory statements in Clause 1 are not in any sense misleading. They are an expression of a political reality and they are intended to declare that reality as clearly as possible, acknowledging all along the supremacy of this, the United Kingdom Parliament. The proposed amendment is wholly unnecessary and, if anything is misleading it is the necessity for it. I urge the noble Lord to withdraw it.

Lord Cormack: I will not prolong this brief debate unduly, but my noble and learned friend seems to be adopting a fairly intransigent line. If it is permissible to make declaratory statements to appease those who would destroy the United Kingdom, is it not permissible to insert them for those who are dedicated to its future?

Lord Mackay of Clashfern: That may well be so, but there is already a declaratory statement in the Act which the Bill amends. It was pointed out that, under Clause 1, the other provisions of that Act were to be taken into account. One of those is Section 28(7). I will not say anything about the proposed amendments to Clause 2; the situation may be slightly different there.

Lord Tebbit (Con): My Lords, I have tried to follow this. It is not unduly easy but it would help me greatly if my noble and learned friend, in his reply to the noble Lord, Lord Forsyth, could explain where it is set out in the legislation, as a declaratory statement, that nothing in it affects the sovereign power of this Parliament. If he is unable to find that bit, would it not be a good idea to do as my noble friend Lord Forsyth says and put it in?

Lord Forsyth of Drumlean: Perhaps I can help my noble and learned friend. Throughout this afternoon, he has argued that it is essential—for political reasons—to put in Clause 1 words that say the Scottish Parliament is permanent. He has argued that we should understand that no Parliament can bind another and that the sovereignty of the UK Parliament remains. All my amendment seeks to do is to add a few words to the clause which give the reassurance that he has been giving to the Committee. I am not a lawyer, but after Pepper v Hart and all that, what is said at the Dispatch Box does actually matter. For him to say that he could not add it to the clause because it would be redundant or that you can find, buried in the previous Scotland Act—

Lord Mackay of Clashfern: It has to be remembered that this Bill is amending the Scotland Act. This provision, which my noble friend Lord Forsyth of Drumlean wants to put in, happens to be there already in Section 28(7). That is my objection. Repetition may be a good idea, for all I know, but it is there already. The point made by the noble and learned Lord, Lord McCluskey, about unnecessary legislation might come into this. There does not seem to be much need for it, especially when Clause 1 refers to the other provisions of the Scotland Act, into which this is being embedded.

Lord McCluskey: The actual wording of Section 28(7), which I do not suppose many noble Lords will have memorised, reads:

"This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland".

It does not talk about the sovereignty of the United Kingdom Parliament at all. It talks about its continuing power to make laws for Scotland.

Lord Keen of Elie: I hesitate to rise again—

Lord Forsyth of Drumlean: I shall give way to my noble and learned friend in a moment. I wish to deal with the points that have been made and what my noble and learned friend Lord Mackay indicated the section said. I have huge respect for him. You always know that the Government are in difficulty when he has to come to their aid. He said that the relevant provision was already in the Bill. However, as the noble and learned Lord, Lord McCluskey, has pointed out, it says nothing of the sort. If this provision was already in the Scotland Act, my noble and learned friend could have said, "In order to make that clear, we will move that provision into this clause in the new Bill". It is not necessary to duplicate it. The point is that the Scotland Act, as amended by this Bill—if it becomes an Act—will have in it sentences which, to say the least, are very provocative in terms of the

[LORD FORSYTH OF DRUMLEAN]
continuing powers of sovereignty of this Parliament. Therefore, it is not unreasonable to think that any declaration about the sovereignty of this Parliament should be placed alongside the provision in that section of the Act.

I am most grateful to the noble and learned Lord, Lord McCluskey, because I thought that what my noble and learned friend said from the Dispatch Box was a little misleading, to say the least.

The Lord Bishop of Chester: My Lords, I think that nothing in this Bill qualifies the ultimate sovereignty of the UK Parliament. My concern about the proposed insertion reflects what I said earlier—namely, that we need to recognise that devolution is changing the way the United Kingdom is governed. It just is. The Scotland Bill, when enacted, will have a major effect in Scotland in ways that I suspect the Scots have not taken on board. The noble Lord, Lord Forsyth, has made this point before. Normally, I agree with what he says. However, we need to face the fact that although devolution will not change the ultimate sovereignty of this Parliament, it does change the character of governance in this country. We need to accept that, go with it and own it, even if we do not like it.

There has been some discussion about whether or not devolution aids the separatist cause. I suspect that if we had not had devolution, and certainly if we did not have this Bill and the Smith commission, there would be much more of a threat to the union than is the case. The cultural forces of separation are much deeper than whether we draft a Bill this way, that way or the other. Although in one sense I am not bothered whether or not this provision is added to the Bill, it is symptomatic of an attitude which does not face the reality of what devolution is all about.

The Marquess of Lothian: My Lords, I put a question to my noble friend Lord Forsyth. Having listened to this argument, does he agree with me that—perhaps I am being oversuspicious—somehow what this clause is about is trying to say to the people of Scotland, "It is all right. This is for ever", and then saying to this House, "We know that it does not really mean that, because the sovereignty of Parliament means that it might not be for ever in future"? But then my noble friend comes along and says, "Let us put that bit into this provision". The reason why my noble and learned friend the Minister is resisting it is because that would defeat the purpose of trying to persuade—I think dishonestly—the people of Scotland that the permanence means what it says.

Lord Forsyth of Drumlean: My noble friend puts it so succinctly. I wish that I had the ability to put it as concisely as he does. I absolutely agree. My noble and learned friend the Minister wanted to intervene. I will happily give way to him if he still wishes to make his point.

Lord Keen of Elie: I apologise to my noble friend Lord Forsyth. I must confess that I was unclear who was intervening on whom. I add to the point made by my noble and learned friend Lord Mackay of Clashfern. As I understand the point he was making—it was one that I had endeavoured to make before, but obviously had not made clearly—it is simply that Clause 1 is amending and introducing Section 28(8) of the Scotland Act 1998. It is necessary to read that in conjunction with Section 28(7) of the Scotland Act 1998, which refers to the ability of this Parliament to legislate in respect of Scotland on all matters. That is a matter to which the noble Lord, Lord McAvoy, alluded earlier as well. That is why the issue of sovereignty—the supremacy of this Parliament—is already contained in the relevant section of the Scotland Act, as it will be amended by this clause of the Bill.

Lord Hope of Craighead: I am grateful to the noble and learned Lord for giving way, but Clause 2 amends Section 28. We are still talking about Clause 1, which amends a different part of the Scotland Act, so there is a separation there. However, I very much endorse what the noble and learned Lord, Lord Mackay of Clashfern, said—namely, that any reader of the Scotland Act knows perfectly well that you have to look at Section 28 to understand the competence of the Parliament and the relationship between the two Parliaments. The point is simply that Clause 1 does not deal with Section 28.

6.15 pm

Lord Keen of Elie: I accept that correction from the noble and learned Lord. I believe that Section 63 would be amended under Clause 1. However, essentially, the point is that if you read through the whole of Section 28, subsection (7) of that section makes it absolutely clear that this Parliament remains supreme and sovereign in the matter of legislation for Scotland, whether it be reserved or devolved.

Lord Forsyth of Drumlean: My Lords, I think this may be a good moment for me to withdraw my amendment. However, before doing so, I gently point out to my noble and learned friend the very wise words of my noble friend the Earl of Lothian.

The Marquess of Lothian: The Marquess of Lothian!

Lord Forsyth of Drumlean: The Marquess of Lothian. I am sorry. My noble friend has had so many names that I find it difficult to keep up. If we are to take the Government at their word—I always do, of course—they have said that it is necessary to have in the Bill a piece of declaratory legislation that makes it clear that the Scottish Parliament enjoys permanence, but at the same time the sovereignty of this Parliament remains unaffected, then the two should be put together and put in the Bill. For lawyers to argue that if you read a particular section and interpret it in a particular way, it means something else, simply will not do in the context of a view that it is necessary to write graffiti on legislation. I do not think that the Government should be doing that at all. However, if they are doing it, then what is sauce for the goose is sauce for the gander. I am very disappointed that my optimism has proved confounded, but I will certainly want to return to the matter.

Lord McAvoy: The noble Lord is trying to paint a picture of government intransigence. As the Government's Official Opposition, as distinct from the unofficial opposition, I suggest that one cannot complain when

changes are made in the other place thanks to debate, and the Government see the worthiness of that and accept it, and then complain because they do not accept the noble Lord's amendment. I think he is painting a totally unfair picture of the Government.

Lord Forsyth of Drumlean: For a moment, when the noble Lord referred to the Official Opposition and the unofficial opposition, I thought he was referring to the new leader of the Labour Party. I beg leave to withdraw my amendment.

Amendment 9 withdrawn.

Clause 1 agreed.

Clause 2: The Sewel convention

Amendment 10

Moved by ***Lord Forsyth of Drumlean***

10: Clause 2, page 2, line 2, leave out "The Sewel Convention" and insert "Competence of the Scottish Parliament"

Lord Forsyth of Drumlean: My Lords, surely the Government can accept this amendment. The Sewel convention, as its name suggests, was a convention established by Lord Sewel during the passage of the first Scotland Bill. The Government are proposing in Clause 2 of the Bill to incorporate the Sewel convention into statute, so that it will have a statutory effect. Therefore, it will cease to be a convention; it will be part of statute. My amendment seeks to remove the words "The Sewel convention" from the Bill, as the Bill seeks to put the Sewel convention on a statutory basis. Henceforth, the Sewel convention will be a section of the consolidated Bill. Surely my noble and learned friend the Minister has been given some discretion in his brief to accept this amendment. I beg to move.

Lord Norton of Louth: My Lords, I signed this amendment, and support it. I want to reinforce what my noble friend Lord Forsyth has said. In a way, this will lead into a much fuller discussion on the next set of amendments looking at the content of the clause. But my noble friend is absolutely right about the heading. Either you have a convention or you have a statutory provision. You cannot have a convention in statute, although that is what the Government are seeking to do. This would remove doubt on that point and I concur completely with what my noble friend has said. We will be coming back to the actual substance in more detail, but I think this is a necessary change to the clause.

Lord Stephen (LD): My Lords, it is worth giving support to this amendment and pointing out that the original Sewel convention changed over time. In the Scottish Parliament we used to refer to a "Sewel Motion", but as the convention developed we introduced the term "legislative consent Motion" and dropped the other term. The Sewel convention was also changed and widened, which we will debate in subsequent amendments. It does seem something of an anomaly.

An interesting point is whether a Member of this House can make an amendment to the title of a clause in this way. It is an interesting point which I hope might be commented on by the Minister. In the past, other Members of this House have been told that that would not be appropriate and it would perhaps be possible for the Government to introduce such a change at a later stage. But it is interesting to see that it is on the Marshalled List today and is being debated. I also note that the noble and learned Lord, Lord Mackay, who is very wise on these matters, is nodding his head, so I think there is an issue there that needs to be explored.

Lord Steel of Aikwood (LD): My Lords, I back up what my noble friend has said. I was in the House when we passed the Scotland Bill and I was never, ever happy with having the Sewel convention translated into law. So I am very glad to support the amendment and it is high time that this was put right.

Lord Keen of Elie: My Lords, first, there is the question of whether the heading is a matter for the parliamentary draftsmen rather than this House, and that is an issue, in my respectful submission. But let us turn to the substance of the—

Lord Forsyth of Drumlean: I did take advice on this. The amendment has been tabled so the amendment is in order, surely.

Lord Keen of Elie: I was going to continue by saying that, the amendment having been tabled, I would look to its substance, which is that the heading should be, "Competence of the Scottish Parliament". I am reminded of Voltaire's observation about the Holy Roman Empire, that it was,

"neither holy, nor Roman, nor an empire".

Clause 2 is not about competence; nor is it about the Scottish Parliament. It restates in statutory terms the procedural convention of the United Kingdom Parliament with respect to its legislation for devolved matters. If we were to have a heading, "Competence of the Scottish Parliament" when in fact we are dealing with a matter that concerns the legislative competence of the United Kingdom Parliament, in my respectful submission, we would not only puzzle historians but confuse everyone else with regard to the content of the relevant clause.

I note what has been said about the present heading. I will reflect upon the observations made about that heading. But given that it is strictly a matter for the draftsmen, I go no further at this time. I hope that my noble friend will see fit to withdraw the amendment.

Lord Purvis of Tweed: I am neither a lawyer nor a historian so I wonder if the noble and learned Lord can help me with his interpretation of this. As this is an amendment Bill to the 1998 Act, once this clause takes effect, if Parliament approves it, will this title actually exist in the amended 1998 Act? If it does not, is this not all rather academic?

Lord Keen of Elie: As I understand it, the title will not exist in the amended 1998 Act. The title is a matter for the parliamentary draftsmen but, as my noble friend Lord Forsyth observed, the amendment was put on the Marshalled List and therefore it is addressed. As I say, I will reflect upon his observations, but at this stage I urge him to withdraw the amendment.

Lord Forsyth of Drumlean: My Lords, I am very happy to withdraw it. I am grateful to my noble and learned friend for relieving me of the responsibility for adding to the statute book the words, "Competence of the Scottish Parliament". But the point remains that it would be ridiculous to put the Sewel convention into statute and to retain a reference to the Sewel convention. If he is saying, as the noble Lord, Lord Purvis, has very helpfully indicated, that in the consolidated Bill the words "the Sewel convention" will disappear from statute and that the Sewel convention will cease to exist as such because it will now be incorporated in statute, I am absolutely delighted. I am happy to withdraw the amendment with that reassurance. Perhaps he could just give us that assurance and then there will be less for him to reflect on.

Lord Keen of Elie: The term "the Sewel convention" will remain in this Act but will not appear in the amended Scotland Act 1998, which is going to be the relevant amended legislation.

Lord Forsyth of Drumlean: Right, well, I beg leave to withdraw the amendment but give notice that we will return to this at a later stage in the Bill.

Amendment 10 withdrawn.

Amendment 11

Moved by ***Lord Stephen***

11: Clause 2, page 2, line 3, after "Parliament)" insert "in subsection (7) at the beginning insert "Except as provided for in subsection (8),""

Lord Stephen: My Lords, in moving Amendment 11, I will speak also to Amendments 15 and 16, which are in my name and that of my noble and learned friend Lord Wallace of Tankerness. We have also signed Amendment 14 in the name of the noble Lord, Lord Cormack, which leaves out the word "normally" in Clause 2.

As background, and to develop what I was saying earlier, Amendments 15 and 16 provide for the consent of the Scottish Parliament to be sought in the event of any alteration to,

"the legislative competence of the Scottish Parliament or the executive competence of the Scottish Government".

I acknowledge the support that has been given by the Law Society of Scotland in terms of the background and the drafting of these amendments, which reflect normal working practice—the normal arrangements that exist currently and have developed, as my noble friend Lord Steel of Aikwood identified, over the period of the existence of the Scottish Parliament; that is, since 1999.

The Sewel convention applies when UK legislation makes provision specifically designed for a devolved purpose. The convention has been agreed in memoranda of understanding and by the House of Commons Procedure Committee, and its practical usage is explained in *Devolution Guidance Note 10*. *DGN10* does not apply to incidental or consequential provisions in relation to a reserved matter. It does apply to draft Bills and Private Members' Bills. It will also apparently continue to apply to any statutory formulation of the convention. It is significant that *DGN10* also requires the consent of the Scottish Parliament in respect of provisions of a Bill before the UK Parliament which would alter the legislative competence of the Scottish Parliament or the executive competence of Scottish Ministers. It seems, however, that Clause 2 would not apply to this latter category of provision so Amendment 16 is intended to remedy that deficiency.

The Secretary of State for Scotland in the other place rejected the arguments in relation to this. When these matters were considered in Committee on 15 June, David Mundell stated:

"On amendments 19 and 20 … as I have said, the Bill adopts the language that formed the basis of the Sewel convention … We have established that the Bill clearly states that the UK Parliament 'will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.' That is what the well-established Sewel convention does, and it has been consistently adhered to by successive UK Governments. We have had more than 15 years of good practice of the convention. It has not been breached. In the context of my earlier remarks, I do not accept that it could be. I believe that that current good practice will continue".—[*Official Report*, Commons, 15/6/15; col. 107.]

Unfortunately, Clause 2 deals with only part of the Sewel convention—the part declared by Lord Sewel in the Scotland Bill back in 1998—and does not cover the point in *DGN10* about changes to the legislative competence of the Parliament or the executive competence of the Scottish Government. This deficiency may indicate that the good practice which the Secretary of State wishes to preserve will not apply to these types of issue. My simple question would be: why leave the doubt?

Amendment 11 would qualify Section 28(7) of the Scotland Act 1998 to allow for the possibility of circumstances where the power of the UK Parliament to make laws for Scotland is constrained. Taken together with Amendments 15 and 16, Amendment 11 would allow the Scottish Parliament to withhold its consent from UK legislation which relates to devolved matters. Yes, that would impinge on the sovereignty of the UK Parliament but, as someone who supports a federal settlement, I have no problem with restricting the sovereignty of this Parliament. For those who support a constitutional convention—there are many around this Chamber—and those who would support a federal settlement arising from this, we all have to recognise that the sovereignty of the UK Parliament would change.

6.30 pm

Lord Gordon of Strathblane (Lab): In the light of what the noble Lord has said, would it not be logical that legislative consent from the Scottish Parliament should have preceded the legislation that the Committee is discussing today? The Bill is, after all, affecting Scotland yet we do not have the legislative consent of the Scottish Parliament in advance.

Lord Stephen: I agree that there is an issue there. I wonder whether the discussions that will take place in coming weeks, and perhaps even months, behind closed doors between the Scottish Government and the UK Government would be greatly assisted if there was a clear statement on the record from the Scottish Parliament that it supported this legislation. While I believe that both Houses will eventually indicate their support for this legislation, it would be helpful to have that clear support on the record now.

A lot has been said today about the monolithic, unassailable sovereignty of the UK Parliament but I ask the Committee to consider this point: the UK Government have introduced a concept called English votes for English laws. Perhaps the Minister would care to comment on this: the Government are pursuing a course whereby legislation passed by the House of Lords and the House of Commons can be vetoed by a subset of the House of Commons, so this Government have already conceded the point of a limitation on the sovereignty of the UK Parliament. If it is sauce for the English goose for elected English MPs to veto legislation for England on devolved matters, it must be sauce for the Scottish gander for properly and democratically elected Members of the Scottish Parliament to be able to veto Westminster legislation affecting Scotland on devolved matters.

Lord Hope of Craighead: My Lords, perhaps it would be helpful for me to speak to my Amendment 12, which in effect restates in combination the points just made in support of Amendments 11, 15 and 16. I will also refer to Amendment 20, which deals with a related issue.

I think I saw that the noble Lord, Lord Lang, was about to rise to his feet and the background to my Amendment 12 is paragraph 38 of the Constitution Committee's report, which draws attention to problems with the Sewel convention as his committee saw them. One problem was the use of "normally", which gives rise to doubt as to what exactly that means. There was also the need to clarify the reach of the convention, which was the point just made in support of Amendment 11 and its related amendments. My Amendment 12 puts together in a package the same point that was referred to on those other amendments.

Amendment 20, however, deals with an issue which is closely related to existing practice. It refers to a:

"Duty to consult the Scottish Government on Bills applying to Scotland".

It says, shortly, that:

"A Minister of the Crown must not introduce a Bill into the Parliament of the United Kingdom … that would make provision applying to Scotland unless a Minister of the Crown has consulted the Scottish Ministers".

It is intended to reflect what I understand to be the existing practice and to follow on the points made in relation to restating Clause 2 in appropriate statutory language.

I should make it clear, as I did earlier on this afternoon, that the amendments to which I am speaking are in words that were in effect provided for me by the Scottish Government because they were tabled in June this year, in advance of Committee in the House of Commons. But I restate that I do not speak to these amendments on behalf of anybody other than myself; I simply see them as sensible amendments which have merit on their own wording. It is with that in mind that I speak to these two amendments.

Lord Davidson of Glen Clova: Could the noble and learned Lord indicate what the Scottish Government see as particularly virtuous about the formula that he suggests in this amendment?

Lord Hope of Craighead: I am obliged to the noble and learned Lord. There are really two points. First, Clause 2 as worded uses "normally"; secondly, it does not set out in full the way that the convention is applied in practice. These points were made very effectively by the noble Lord, Lord Stephen, a moment ago in moving Amendment 11, which is read together with Amendments 15 and 16. There are two points which needed to be added to Clause 2, one being to alter the legislative competence of the Scottish Parliament and the other being to alter the executive competence of the Scottish Government. These matters are in practice the subject of a consent resolution or a Sewel convention Motion and should be referred to expressly in the clause to cover the reach of the convention. That is the point which the committee of the noble Lord, Lord Lang, was talking about.

Lord Lang of Monkton: I am grateful to the noble and learned Lord, Lord Hope of Craighead, for his comments about the word "normally". It is not a word that alarmed me particularly, as a non-lawyer, but the clause as a whole certainly alarmed and concerned the Constitution Committee. I shall say something about that in a moment but "normally" in its location there seemed to strike the balance between permitting the Scottish Parliament to legislate on devolved matters without intervention from the United Kingdom Government while, at the same time, giving the Government of the United Kingdom the clear right and entitlement in special circumstances to intervene. I will be interested to hear what my noble and learned friend at the Dispatch Box will have to say about it.

My own Amendment 13 simply seeks to strengthen new subsection (8) of Section 28 of the 1998 Act by reasserting the supremacy of the United Kingdom Parliament to reinforce the terms of subsection (7), which subsection (8) might otherwise seem to contradict. Having heard the treatment given by the Front Bench to my noble friend Lord Forsyth's amendments, I suspect that I may not be on an ideal wicket. But I want to say a word or two about this clause because the Sewel convention is a dangerous situation in which to legislate.

The Sewel convention is as slippery as a fish. It has changed throughout the years since it came into being quite considerably and may yet change again. When I was first asked about it, I was told informally by my late lamented noble friend Lord MacKay of Ardbrecknish, who was at that time our Front-Bench spokesman on the Bill, that it was really just a courtesy to the Scottish Parliament for the United Kingdom Parliament to offer to legislate on its behalf, if it was an issue devolved to it on which it would plan to legislate. It would thus save time, expense and duplication. I do not think it was ever quite thus but that was the flavour of how I first understood it. It has now turned into something quite different and I see it as a weapon that seems to allow the Scottish Parliament to intrude into United Kingdom legislation to an unsafe extent, possibly even to the extent of a veto.

What is clear is that the Sewel convention is still so fluid and unsettled as not to deserve the name of convention. I do not think, in its present form, it is fit to be converted into law. It may be that those who have

[LORD LANG OF MONKTON]
drafted the Bill have found, in the form of words they have used, a more stable and secure base for the long term, but the convention has changed a lot over the years and may again. Initially, the United Kingdom Government seemed to maintain that it applied only to powers already devolved or to restricting or diminishing such a power. That was certainly the original intention as I understood it, but in 2005, *Devolution Guidance Note 10* was published, which suggested:

"The convention applies when legislation makes provisions specifically for a devolved purpose".

I see that as something much broader.

Since then, the Scottish Parliament has claimed it applies to devolved areas rather than devolved matters, so that it also applies to legislation increasing devolved powers, which the UK Government seem at times to have accepted. The Scotland Act 2012 bore this out, as it was almost entirely an empowering measure and was taken to require legislative consent Motions. Astonishingly to me, the Labour Opposition supported an SNP amendment in the Commons and tried to enshrine devolved areas into the legislation. That could have given the Scottish Government a veto on UK legislation, which is what prompted my question to my noble friend on the Front Bench at Second Reading. This one-way degeneration of the original purpose of the convention is potentially damaging to the sovereignty of the United Kingdom Parliament, and we have to exercise great care in handling this.

The Smith commission asked only that it be put on a statutory footing. Even if we can be confident of a clear, unambiguous wording, the potential troubles do not end there. My noble and learned friend Lord Hope indicated at Second Reading, as he will recall, that it could become challengeable in the courts. My noble friend Lord Norton had serious concerns also, pointing out:

"Clause 2 does not transpose the Sewel convention into statute. It simply states the convention".—[*Official Report*, 24/11/15; col. 639.]

I am completely out of my depth in reacting to that and I look forward to his speech a little later in the debate.

My amendment echoes the concerns of others to counter the uncertainties generated by the present wording of the clause. We have all felt the need to reiterate, in every possible way, the need to reassert the sovereignty of the United Kingdom Parliament. My amendment is the simplest and shortest—it may not be the best but at least it has a different wording from that rejected by my noble friend on the Front Bench. We must have a wording that is clear and unambiguous and able to withstand challenge in the courts, where I suspect it will probably end up.

Lord Cormack: My Lords, I will speak briefly to the two amendments in my name, Amendments 14 and 18. I thank the noble and learned Lord, Lord Wallace of Tankerness, the noble Lord, Lord Stephen, and the noble and learned Lord, Lord McCluskey, for adding their names to Amendment 14.

I think we are all aiming for the same thing: clarity and the removal of ambiguity. The one thing that struck me when I was looking at the Bill for the first time was the use of the word "normally". It is not a very good legal word; indeed it is a word that could, as those who know far more about the law than I do have said repeatedly, be challenged in the courts. In these two amendments, I have sought to remove that word entirely and to give, in Amendment 18, a specific exception. I do not suggest that this is the only answer or necessarily the best one. I listened carefully to what my noble friend Lord Lang said a moment or two ago, but I would delete "normally" and insert at the end,

"save in times of war or national emergency".

It is accepted in the Bill that there could be occasions when the United Kingdom Parliament, which has absolute sovereignty, would need to override the Scottish Parliament. None of us wants that to happen—and certainly not often—but if we recognise that that can or could happen, we have to be a little clearer with our definitions. I believe that by removing "normally" and inserting a couple of specifics, we are moving in the right direction. It is in that spirit that I commend these amendments to your Lordships' House.

6.45 pm

Lord Norton of Louth: My Lords, these amendments, on the whole, move us forward. They are an improvement on what is presently an unsatisfactory provision in the Bill. I drew attention to this at Second Reading, but in doing so I was hardly doing anything novel. Attention was drawn to the problem in the last Parliament by the Political and Constitutional Reform Committee in the other place and by the Constitution Committee of this House. The point was made that this did not even put the Smith commission recommendation in statute. The commission recommended putting the convention on a statutory footing, but the clause as drafted does not do that; it merely takes the words of Lord Sewel and puts them into the clause. It does not provide legal certainty. We are in an unusual position; indeed, this has not happened before. Conventions have been transposed into statute previously, but once in statute, the convention is dead and the statute provides legal certainty.

What we have here is an attempt to provide something in statute while retaining the flexibility of the convention —which basically carries on as a convention. We have to make a decision: either it is a convention, in which case it is not in statute and we just carry on as before—the convention is widely accepted for what it is and is not really in doubt—or we actually put it in statute so that we have legal certainty and clarity, and it is not then likely to come before the courts. The problem with the wording at the moment is that there is that possibility. One could remove "normally", which would be a major step forward; or we could go with Amendment 12, which the noble and learned Lord, Lord Hope of Craighead, has put forward and which I have put my name to, because it provides legal certainty.

If the Government want to retain the flexibility of a convention, there would have to be some additional provision stipulating quite clearly any exceptional circumstances. That could be, for example, through Amendment 18, in the name of my noble friend Lord Cormack, which does stipulate those circumstances. One might have to take that further in defining what constitutes a national emergency, but it does refine the provision. Either the Government accept an amendment

like that or they have to come up with their own. They could accept Amendment 12 and, if they wish, qualify it, but the onus is on the Government. However, I am quite clear that we really cannot proceed with Clause 2 as presently worded. As I say, either we have a convention or we have legal certainty in statute. I do not think we can try to have both.

Lord McCluskey: My Lords, I was happy to add my name to Amendment 14 in the name of the noble Lord, Lord Cormack. People keep apologising for not being lawyers, but I think it is time a lawyer apologised for being a lawyer. I am a lawyer and I want to say this. It is commonly said by judges up and down the country that words in a statute should be like a piece of crystal—absolutely clear and unambiguous. They should be clear, unambiguous and definitive, but the word "normally" has no fixed meaning at all. I looked it up in a number of dictionaries. In one, the first definition of "normally" was "rectangular"—I do not know where that takes us.

We use a lot of elastic words from time to time, such as "reasonable", "appropriate", "usually" or "a piece of string". There is no clear meaning or definition to these words, but the difference between a word in a statute and a convention is that, as the noble Lord, Lord Lang, said, a convention is fluid and flexible. You can develop it all the time in the light of experience—qualify it, extend it and so on—but you cannot do that with the words of a statute. My problem is that I do not know what a court would make of the word "normally".

Lord Foulkes of Cumnock (Lab): Could the noble and learned Lord tell me what "normally" normally means?

Lord McCluskey: That depends on the context in which it is used. Normally, "normally" means "usually"—but "norm" means a standard and the main definition in some dictionaries is of conforming to a standard. I cannot understand with regard to devolved matters of legislation what the standard would be. That is why I tabled Amendment 19. If you leave in "normally", in effect the decision on whether the circumstances are such as to allow the Parliament of the UK to legislate is one for that Parliament to take. That is the first point. In other words, I do not care who decides it, but someone must decide it.

If you do not decide it in this sort of way—namely, by giving the job to a Parliament—you will leave the job to a court. I have no idea what a court would make of the word "normally". How would a court judge what is normal in the context of devolved and other legislation without hearing evidence? Must a court then hear a lot of evidence from constitutional experts, who are unlikely to be unanimous if today's proceedings are anything to go by? They are not unanimous and I do not think a court would be able to rule on the matter without hearing evidence. I would hate to see the courts having to deal with this kind of matter, albeit that it would be a bonanza for lawyers—of whom I confess to being one.

The Duke of Montrose (Con): My Lords, I support my noble friend Lord Lang in what he said. The wording of this clause reflects what I understood that Lord Sewel said in this House at the time of the passing of the Bill. It says that,

"the Parliament of the United Kingdom will not normally legislate with regard to devolved matters".

When that was said before, I think that all of us here—my noble friend Lord Lang reinforced this—thought that it referred to Schedule 5, non-devolved matters, so that a Sewel Motion would be needed for anything discussed in this House outwith Schedule 5.

I have watched over the years as this matter has gradually crept out. The noble Lord, Lord Stephen, mentioned the various steps along which the Civil Service has progressed in making this convention. It was always a fairly constitutional matter and they were chipping away at what we understood could or could not be discussed. To just leave the wording as it is tells only half the story. We must find out what exactly the convention has developed into and what wording would describe it if we want to have it as either a convention or whatever it is. At least we have it on the Floor of the House now and can begin to look at what it should be.

Having seen the wording when the Bill was published, I asked a Written Question of my noble friend the Minister. I asked,

"how many times the Scottish Parliament has passed a legislative consent motion … regarding matters that were not at that time devolved under Schedule 5 to the Scotland Act … and in each case what reason was given".

The Minister kindly replied with one example, but I think there must be many more. His example was that,

"section 10 of the Scotland Act 2012 made provision for certain elements in relation to air weapons to be within the legislative competence of the Scottish Parliament",

the argument being that things that were about to be devolved should be subject to a legislative consent Motion. We need to know exactly how far this goes and what its meaning will be.

Lord Forsyth of Drumlean: My Lords, I will speak briefly to support my noble friend Lord Norton's remarks and the amendment of my noble friend Lord Lang. I will not go through all the arguments about sovereignty again because we have done them to death. I will also speak to Amendment 17, which for some reason was put in an earlier group. I tabled it as a probing amendment but having listened to the debate I really think my noble friend needs to go back to the drawing board on this. It surely makes sense to put into statute the Sewel convention and then abandon it as a convention, as we discussed earlier. Of course, when we discussed English votes for English laws, I predicted that by giving the Westminster Parliament an English veto on legislation it would be only a matter of time before people argued that there ought to be a Scottish veto, as the noble Lord, Lord Stephen, did in the context of the Sewel convention.

What my noble friend Lord Norton said was very wise. We need to work out what this convention means and we need to put that in the Bill in a way that is apparent. To reassure the noble Lord, Lord McAvoy, who worries about how this will be seen by nationalists north of the border and that some people are trying to refight the battles of 1997, I see no reason why we should not just cut this Gordian knot and leave the Scottish Parliament to legislate on all devolved matters.

[LORD FORSYTH OF DRUMLEAN]
What happens is that it piggy-backs on legislation that is carried down here and then finds it very convenient to blame Westminster for passing the legislation to which of course it was a party.

This Bill hands a huge new set of powers to the Scottish Parliament, with huge new responsibilities. The whole purpose of the Bill is apparently about making the Parliament accountable to the Scottish people. Well, why not let them get on with passing the legislation necessary to meet their responsibilities? I think that the Sewel convention should be toughened up. It should be made stronger and should basically provide that the Parliament of the United Kingdom will not legislate with regard to devolved matters. It is up to the Scottish Parliament. Why would we wish to do so?

Lord Maxton: I am trying to follow the noble Lord's arguments carefully but it seems that, even with the new powers that we should be or are giving under this legislation, there will still be matters for instance in transport where we might pass legislation that will affect Scotland. I travel on a train from Euston up to Glasgow every week and back down every Monday. That is partly covered by transport legislation from this House. Is the noble Lord saying that once it crosses the border it should then be covered by legislation for Scotland?

Lord Forsyth of Drumlean: Well, devolution was not my idea but that seems to be what it means. You cannot have it both ways. Presumably, if we were bringing in legislation that would affect the noble Lord's travel across the border there would be the normal consultation process. My argument is: what is wrong with letting the Scottish Parliament get on with passing the necessary legislation? If it is a devolved matter, it is a matter for the Scottish Parliament. Then we do not have a problem with the Sewel convention. Provided we retain the sovereignty of this Parliament, there is nothing whatever to stop us passing legislation in times of emergency, war or whatever else that could apply. In the Bill as presently constituted, this word "normally" is fine for a convention but ridiculous for a statute.

Having argued that this should be set down properly in the Bill, explaining how it will work as a matter of statute and not as a convention, if we were to retain the convention and were looking at what the convention would be that we sought to enshrine in statute, I would say that it is recognised that the Parliament of the United Kingdom will not legislate with regard to devolved matters. It is entirely up to the Scottish Parliament, if it wishes us to legislate, to argue for the contrary.

Of course, the great irony in this—as the noble Lord, Lord Gordon of Strathblane, indicated—is that we are legislating on a monumental scale now in this Bill without the consent of the Scottish Parliament. There is the distinct possibility, as we still do not have the fiscal framework, that the consent of the Scottish Parliament might not be forthcoming and that we might have to do it all over again. So there is a thought.

My noble and learned friend needs to look at these amendments and think about them and come back with a clause in statute that actually defines what the Government believe that the Scottish Parliament and the Westminster Parliament should do with—in the words of the noble and learned Lord, Lord McCluskey—absolute crystal clarity, so that we do not have this business of blaming Westminster any longer for legislation that was covertly supported by the Scottish Parliament. If it has that responsibility, it may very well find, as the Westminster Parliament does, that it has to be discriminatory about what it wants to put on the statute book—and it may very well find that it is no longer able to get away with sitting for a mere one and a half days a week.

7 pm

Lord Davidson of Glen Clova: My Lords, there has been a widespread and interesting debate on this very important area of legislation. The noble Lord, Lord Norton, said that the debate had been useful to move matters forward, and I respectfully agree. It has provided the Minister with a smorgasbord of possibility.

The noble Lord, Lord Stephen, is correct in identifying the utility in having clarity where the UK Government may or may not have power where legislative consent Motions may come into being. That is quite clear. The alternative that is proposed by the noble and learned Lord, Lord Hope of Craighead, is a carefully laid out analysis of what the actual problem has been and how it may be converted into statute. If one is going down the route of statute rather than maintaining convention in place, this appears a helpful and clear way forward.

The fact that the executive competence of the Scottish Parliament comes into play is a matter that has troubled people from time to time. One example might be the position of Scottish law officers. In Scotland, Ministers are in charge of day-to-day management of prosecution. Some people might think that that was anomalous. In fact, had the noble and learned Lord, Lord Wallace of Tankerness, been here this evening—he is in a more illustrious place—he would recollect saying many years ago that the position of the Scottish law officers in being prosecutors and Ministers was anomalous. Those are the sort of issues that with this approach are clearly put back into the Scottish Parliament to be dealt with by either the Parliament or the Scottish courts.

As for the problems that have arisen when legislative consent Motions have been deployed, they have in fact worked extremely well over 15 years. The notion that in some way they have subverted the sovereignty of the United Kingdom and this Parliament is, I would suggest, somewhat of a chimera. As the Minister has already indicated on a number of occasions, the sovereignty of this Parliament has not been subverted, and is not subverted. So on the notion in the amendment proposed by the noble Lord, Lord Lang of Monkton, that sovereignty should be made absolutely clear, on this side of the House we would accept what the Minister has said repeatedly—and we have that before us, if we look at Pepper v Hart—that this Parliament remains sovereign.

On the vexing question of the word "normally", we support its deletion. We appreciate that the word, despite the helpful guidance from the noble and learned Lord, Lord McCluskey, is not easily understood in applying matters of statutory interpretation. The noble and learned Lord, Lord Mackay of Drumadoon, was a witness and saw the uttering of the legislative consent

words, and he very helpfully set out that words can appear without necessarily having the fully considered import that a draftsman might bring to bear. The noble Lord, Lord Empey, made the point very clearly in the context of Northern Ireland. So although it may be thought by some, possibly, that deletion of "normally" is in fact an extension of legislative consent, we on this side would support it. If it is seen as in some way increasing a fetter on Ministers, so be it in order that clarity might be produced.

We oppose Amendment 18 advanced by the noble Lord, Lord Cormack, on the basis that we see that the UK remains the UK. If there is war or a national emergency, the constituent parts of the United Kingdom can be relied on to pull together. We also oppose Amendment 17, proposed by the noble Lord, Lord Forsyth of Drumlean, perhaps unsurprisingly. The legislative consent Motion procedure has been successful over 15 years; either of the amendments proposed, setting out the statutory basis of the legislative consent Motion, would resolve the issue but there has not been a debate about this being an unsuccessful mechanism. It has worked not as a way in which to pose the Scottish Government against Her Majesty's Government but, most of the time, has resulted in co-operation, with the Scottish Government bringing issues to Her Majesty's Government for discussion.

Lord Forsyth of Drumlean: Has the noble and learned Lord not seen the statements made by senior Ministers in the Scottish Government to the effect that, if they do not get what they want out of the fiscal framework, they will veto the legislation and prevent it coming on to the statute book. I am not sure how, given the importance of this legislation and the background to it, the noble and learned Lord can say that the system is working perfectly well.

Lord Davidson of Glen Clova: The noble Lord will of course be aware that I have seen those statements and have been interested in what they in fact mean. But he will also recollect that we say, from this side of the House, that given the discussion about the fiscal framework and possible use of legislative consent Motions in that regard, we see the co-operation that has taken place between the Scottish Government and Her Majesty's Government in the past as something in which we can repose a good deal of trust that it will continue in relation to this process with the fiscal framework. Our trust may be misplaced, but we conceive otherwise. The noble Lord, Lord Forsyth, cannot see any more than I can into the future, but we are in a position where we repose trust in the process, at least from this side.

In relation to the various amendments before the House, we accept that a number of them are useful. None the less, we oppose Amendments 13 and 18.

Lord Hope of Craighead: I hoped that the noble and learned Lord might say something about Amendment 20. Perhaps I was not sufficiently clear when I introduced these amendments, but Amendment 12 deals with the stage of passing a Bill and says that,

"the Parliament of the United Kingdom may not pass Acts … without the consent of the Scottish Parliament".

Amendment 20 intercepts the matter at the earlier stage. It says:

"A Minister of the Crown must not introduce a Bill into the Parliament of the United Kingdom … that would make provision applying to Scotland unless a Minister of the Crown has consulted the Scottish Ministers".

That amendment, as in the case of Amendment 12, was drafted in Edinburgh by people who know how the system is working. In giving his support to Amendment 12, I wonder whether the noble and learned Lord meant to give his support also to Amendment 20.

Lord Davidson of Glen Clova: I apologise for not confirming that we support Amendment 20. I took that as being the overall approach—this smorgasbord—between the approach of the noble Lord, Lord Stephen, and the approach of the noble and learned Lord, Lord Hope. I hope that clarifies the point.

Lord Mackay of Clashfern: What is the noble and learned Lord's view about the provisions in Amendment 12, which was tabled by the noble and learned Lord, Lord Hope? It contains paragraphs (a), (b) and (c). Paragraph (a) applies to Scotland and does not relate to reserved matters. I would have thought that is what is meant by devolved matters, but paragraphs (b) and (c) considerably add to that. As far as I can understand them, particularly paragraph (b), they would apply to this legislation.

Lord Davidson of Glen Clova: Perhaps I can try to explain the proposition put forward by the noble and learned Lord, Lord Hope, in his amendment. As we see this, it reflects the reality of the way in which legislative consent Motions have been used over the 15 years, beyond the original.

Lord Keen of Elie: I am obliged for the contributions that have been made with regard to Clause 2 and the proposed amendments thereto. I shall begin by making an observation on a point made by the noble Lord, Lord Stephen, with regard to English votes. The provision with regard to English votes does not limit the sovereignty of this Parliament in any sense. English votes introduces the principle of English consent for English measures. The new procedures maintain the important principle of Members of Parliament from all parts of the United Kingdom being able to deliberate and vote on all legislation. Members of Parliament are not excluded from the legislative process. I would not accept the proposition that these provisions somehow derogate from the sovereignty of this Parliament.

Lord Stephen: Does the Minister accept that the House of Commons could pass something and the House of Lords could agree with that proposal but it could then be vetoed by the subgroup of the House of Commons who are defined as English Members of Parliament?

Lord Keen of Elie: I am not quite sure about the use of the term "veto".

Lord Stephen: Would the Minister prefer "block" or "prevent being enacted"?

Lord Keen of Elie: It merely means that in respect of matters that are English measures, there must be an element of English consent, but I do not accept that that derogates from the sovereignty of this Parliament. In due course, this Parliament might decide to legislate contrary to those provisions.

Lord Forsyth of Drumlean: While it is true that legislation still requires the consent of both Houses, EVEL gives a group of Members of the House of Commons who are English MPs the ability to veto a provision so that it proceeds no further. I think that is the point that the noble Lord is making.

Lord Keen of Elie: The term "veto", if you wish to employ it, is there. It means that English measures require the consent of English Members, but it does not derogate from the sovereignty of this Parliament.

Clause 2 delivers paragraph 22 of the Smith agreement which sets out quite clearly that the Sewel convention will be put on a statutory footing. As with Clause 1 on permanence, the Smith commission agreement did not intend that the constitutional position should be changed, but that legislation should accurately reflect the position that already exists and has existed for 15 years.

I shall put this into context. Section 28(7) of the Scotland Act 1998 makes it perfectly clear that this Parliament can legislate in respect of Scotland in all matters, including devolved matters. It preserves the sovereignty of this Parliament.

The Duke of Montrose: When the Minister talks about the Sewel convention as it has been for 15 years, that does not include the various modifications that have been introduced in the 15 years. The Government will have to be careful about how they describe it.

7.15 pm

Lord Keen of Elie: I am obliged to his Grace. That does not, and that is why the convention is expressed as it is in Clause 2. There has been *Devolution Guidance Note 10* with regard to how from time to time the convention may operate, but those are working arrangements which may alter from time to time and should not be enshrined in statute. That is not considered appropriate. That is why Clause 2 is in the terms in which it is found—because it reflects paragraph 22 of the Smith commission agreement.

My understanding of why the Sewel convention came to be expressed as it was is that Section 28(7) of the Scotland Act allows this sovereign Parliament to legislate, notwithstanding the terms of the 1998 Act, in respect of all matters pertaining to Scotland. There was, I apprehend, concern that if, for example, in a devolved area of competence, such as education or health, the Scottish Government got into serious difficulty, this Parliament might be open to the criticism that it had done nothing about it, even though it reserved to itself the power to legislate for Scotland on devolved matters in terms of Section 28(7). Therefore, the convention was expressed that normally this Parliament will not legislate for Scotland in devolved areas. That was expressed in those terms in order that this Parliament would not face criticism that it had done nothing as the health or education service in Scotland had deteriorated in the face of legislation from the devolved Parliament. That is the background to the introduction, as I understand it, of the Sewel convention. It works both ways.

Lord Forsyth of Drumlean: I am most grateful to my noble and learned friend. Does that mean that as the number of passes being achieved by school leavers since I left office back in 1997 has fallen by 20% compared with England, there is still the possibility that we might intervene in the hash that is being made of the education services by the present Government in Scotland? I assumed that the answer to that question would be absolutely not, so what is my noble and learned friend getting at?

Lord Keen of Elie: The point is that in terms of Section 28(7) we in this Parliament could, on the face of it, intervene in such a matter. That was the whole point of the convention: to make it clear that normally we would not do so. I may have misunderstood the intervention of my noble friend Lord Forsyth but, with respect, it seems to me that that is precisely why the Sewel convention was expressed in the terms in which we find it—so that if educational attainment in Scotland was failing we would not be faced with the criticism that the United Kingdom Parliament had done nothing about it because conventionally we would not normally intervene in a devolved matter, but we retain sovereignty and we have the right to do so. That is why the Sewel convention is expressed in the manner in which it is. The intention is not that Clause 2 should give rise to any justiciable issue. It is a political expression of the convention in statutory form. That is why the term "normally" appears within Clause 2. It makes it clear that this is not a justiciable issue. It is quite clear that in terms of the Smith commission agreement the Sewel convention will be expressed in statutory terms. It is there, but whether this Parliament would consider it appropriate to legislate for Scotland in a devolved area, which it can do pursuant to Section 28(7) of the Scotland Act 1998, is a political issue. It would not be for a court to decide what "normally" meant in that context. It would be a political issue. If it could be litigated in court and made justiciable, the question would be: what possible remedy could the court provide other than a political one? That is why it takes us back to the simple proposition that Clause 2, as set out, would not give rise to a justiciable issue. I give way to the noble and learned Lord, Lord Hope.

Lord Hope of Craighead: The problem is that paragraph 22 of the Smith commission report states that the Sewel convention will be put on a statutory footing. Rather like the noble and learned Lord, Lord McCluskey, I wondered what "statutory footing" meant, and I went to various sources to find out. A translation of it is fairly obvious: it means being put on a firm footing by being written into statute. That raises the question of what the effect is of writing something into statute.

The problem is that, whatever the Minister may say, someone seeing it written into statute is going to say, "Here is something which I can use to challenge a piece of legislation that is apparently being passed

without the Sewel convention being observed according to its current usage". With great respect, it does not do for a Minister to say to the court, "This is just a political matter", because the judges will say, "It's a matter for us". The judge may look at the normal rules to see what the legislation was designed to do, and with a bit of research they will find that it was designed to give effect to the Sewel convention to put it on a statutory footing. The judge will then say, "Well, it's a matter for me to construe what this means". I am not at all impressed by the Minister saying that it is all a political matter, because it is now in the hands of the court to adjudicate upon.

The Minister asks, "What remedy does that give rise to?". It creates uncertainty about the effectiveness of legislation. One of the things that we have to be very careful about is that the legislative process is well founded and not open to challenges, except those that are already subject to legislation in the Scotland Act. So, with great respect, it is necessary to warn the Minister that he cannot get away with assuming that the judges will accept that it is simply a political issue; it is not that at all, once it is written into statute.

Lord Keen of Elie: The noble and learned Lord acknowledges that there would be no remedy other than a political remedy in that context, or appears to do so. He shakes his head; nevertheless, there is no remedy except a political remedy. This underlines the importance of the words "recognised as" and "normally" where they appear in Clause 2.

However, the noble and learned Lord, Lord McCluskey, spoke to his Amendment 19, a proposal that it should be expressly stated that the clause is not justiciable and does not give rise to justiciable rights. That is a matter that I would be pleased to discuss with him, albeit that the Government's position at present is that there is no requirement to expressly state that in the context of a clause that, on the face of it, is implicitly not justiciable. That would be my position on Amendment 19.

Lord McCluskey: On that point, this provision can be put in to render the matter not justiciable, but that is in the context that the decision would in fact be taken by the UK Parliament and that decision could not be challenged in court. The point about the Sewel convention, which the Minister says is being enshrined in legislation, is that the effect changes entirely because the Sewel convention was not justiciable at all, as I understand it, whereas the statute is always justiciable. The court cannot say, "We don't want to give it a meaning"; the court has to find a meaning because it always has to answer the question before it.

Lord Keen of Elie: In that context, it would be declaring that this is a clause that gives rise to only a political remedy, and that it was not for the court to intervene and determine whether a particular piece of legislation was normal or abnormal. That would not be an issue for the court, and that is the position of the Government with regard to the clause. That could be made clearer, or could be made express, but, as I say, I would be happy to discuss that in the light of the noble and learned Lord's proposed amendment.

Lord Cormack: If the Minister is prepared to have those discussions, which are welcome, would he also be prepared to have a discussion with those of us who have signed the amendments to delete the word "normally"? I say very gently to him—echoing someone who should not be echoed in this Chamber, Cromwell—conceive it, "possible you may be mistaken".

Lord Keen of Elie: I would respond to my noble friend by saying that anything is possible.

Lord Scott of Foscote: The debate at the moment seems to be concerned exclusively with primary legislation. Clause 2 is concerned with primary legislation made by Parliament, but the bulk of legislation these days is made by statutory instrument—made under powers that are granted by Parliament, of course, and many of these are existing powers—but I cannot see anything in the Bill that really grapples with the position of statutory legislation as opposed to primary. I wonder if that is an oversight or whether it is intended.

Lord Keen of Elie: If I may, I shall respond to the observations from the noble and learned Lord, Lord Scott, after the dinner break. I confess it is not immediately apparent to me what the thrust of his point was, and maybe I am missing it, but I shall give it some consideration.

Lord Lawson of Blaby: If the Minister will allow me, those of us who are not as expert as he is are getting a little puzzled. Can he help the House by giving practical examples of the sort of circumstances in which the UK Parliament would legislate on devolved matters? A few such examples would be helpful for us to understand precisely what this is getting at.

Lord Keen of Elie: In a sense, this is connected to my earlier observation that at the end of the day the clause is not justiciable. It will be for Parliament at the time to decide that it is or is not going to legislate for Scotland in a devolved matter. The term "normally" means "usually" or "generally", but Parliament at the time may decide that it is going to legislate for Scotland in respect of a devolved matter. There is no limit on that power, as is expressly provided by Section 28(7) of the Scotland Act 1998. There is no limit on this Parliament's sovereignty and supremacy in respect of that matter. The Sewel convention merely says that normally it will not do so; that is all.

Lord McCluskey: Does the Minister realise that if the UK Government decide that the situation is abnormal and therefore decide to legislate, and the Scottish Government go to a Scottish court and say, "We don't agree with the judgment about normality", the court will have to make a judgment about that if the word "normally" remains in the wording. There is no mechanism for that other than the court having to sit down and decide what it thinks Parliament intended when it used the word "normally".

Lord Keen of Elie: With respect to the noble and learned Lord, Lord McCluskey, I do not accept that proposition. It would be for the court to say that

[Lord Keen of Elie]
Parliament decides whether it is normal to legislate for Scotland in a devolved matter. It is not for us to interrogate that decision by Parliament. "Normally" means just that—no more, no less. It is not for the courts to say, "We don't think the situation was abnormal". That is a political decision.

Lord McCluskey: My Lords—

Lord Keen of Elie: I will not accept an intervention at this stage.

Lord Foulkes of Cumnock: Then get on with it.

Lord Keen of Elie: I am obliged to the noble Lord, Lord Foulkes.

Lord Purvis of Tweed: Will the Minister give way?

Lord Keen of Elie: In view of the time, no.

Amendment 11 would clearly impact on the ability of the United Kingdom Parliament to make laws for Scotland. To that extent, it would modify Section 28(7) of the 1998 Act. The effect of that amendment could be interpreted as an attempt to limit the sovereignty of this Parliament, a point that I believe the noble Lord, Lord Stephen, acknowledged, and the Government would not be prepared to accept such an amendment.

Amendment 13, conversely, seeks to state in the Bill that Clause 2 places no limits on the sovereignty of Parliament. We would say that if you say that expressly in one part of the Bill, you have to take care as to the impact that it will have on other parts of the Bill, and that it is appropriate to acknowledge that nothing in the Bill impinges on the sovereignty of Parliament.

7.30 pm

I have mentioned the issue of justiciability and the express provision proposed by the noble and learned Lord, Lord McCluskey. As I indicated, I will be prepared to discuss that matter with him. With regard to Amendments 12, 15, 16 and 20, I will make the following short point. They go well beyond the Smith commission agreement, and the intention of the Bill is to deliver the Smith commission agreement—no more, and most certainly no less. Therefore, we will not accept those at this time.

With respect to Amendments 12 and 20, which were originally put forward by the SNP, again, we do not accept those for the reasons I have already commented upon. We submit that the word "normally" is very material in the context of the justiciability or otherwise of this clause. So far as the further amendment is concerned, it would have the effect of limiting the ability of the United Kingdom Parliament to make provisions applying to Scotland, even in reserved areas, therefore it cannot be accepted.

Finally, I will touch upon Amendment 17, tabled by the noble Lord, Lord Forsyth. I simply say that if that amendment was accepted, it would not be possible, as he indicated himself, for this Parliament to make legislation for Scotland in devolved areas, even with the consent of the Scottish Parliament. Over the last 15 years, the mode of working between the two Parliaments has been such that they have collaborated repeatedly on the matter of legislation promoted in this Parliament and extending to Scotland in devolved issues. Indeed, it happened as recently as the Serious Crime Act 2015. It is therefore of benefit to both Parliaments that this should happen. I cannot comment upon the observations that some Ministers of the Scottish Government have made with regard to the working of that operation but I urge your Lordships not to press these amendments.

Lord Forsyth of Drumlean: My Lords, before my noble friend withdraws his amendment, can I ask my noble and learned friend a question, as he would not accept an intervention? We are in Committee. I am not a lawyer, but earlier in our discussions I gave the example of where the Scottish Government have fallen down on education in the context of his remarks that we retain the right to pass legislation on education, health or other matters where we feel that they are falling down. I put that forward as a debating point, but in circumstances where a Government, perhaps led by me, decided to do this, it would be outrageous if it was a political decision to intervene on an education matter based on a belief that the Scottish Government —an elected Government—were not doing their job. Therefore, if I were on the other side, leading the Scottish Government, I would go straight to the courts and say, "This word 'normally' does not provide for the kind of intervention which is being provided". I do not understand why my noble and learned friend says that the courts would not take a view of what "normally" meant, and in fact, in this case, if I were the judge I would say, "Actually, 'normally' means 'exceptional'", but they may take a different view. That is what is causing the concern among the lawyers. However, in common sense terms, to have a word such as "normally" and to argue that there would not be judicial challenge and that, if there was, the courts would just walk away from it, cannot be right. Can my noble and learned friend explain why I am wrong?

Lord Keen of Elie: I do not accept the proposition that my noble friend Lord Forsyth advances. The position is that this Parliament is sovereign; in terms of Section 28(7) of the 1998 Act it may legislate for Scotland in all and any matters, including devolved matters. The Sewel convention simply expresses the view that this Parliament will not normally do so. However, that does not fix some black-line test to be applied by the courts as to what is normal and abnormal; it will be a matter for Parliament going forward to decide if or when it would ever legislate for Scotland in respect of a devolved matter.

Lord Norton of Louth: My noble and learned friend's argument was that the Bill puts into statute the recommendations of the Smith commission, and in this case, recommendation 22:

"The Sewel Convention will be put on a statutory footing".

Surely on his own argument the Government will have to withdraw Clause 2, not only on the grounds of what constitutes a statutory footing but because it embodies the words of Lord Sewel, which he spoke when the

Scotland Bill was before Parliament, and not the convention as understood at the time the commission produced its report.

Lord Keen of Elie: I do not accept that, because it appears that what is understood by the Sewel convention is the expression of that convention by Lord Sewel during the passage of the Scotland Act 1998 through Parliament. I indicated before the sundry working arrangements that developed and changed over the passage of the 15 years after that convention came into place, such as *DGN10*, which is why there is no attempt, and properly so, to express those working arrangements in statutory terms within the Bill.

The Duke of Montrose: Can the Minister say whether that means that there will be a new convention that includes those elements?

Lord Keen of Elie: It may be that further working arrangements will develop as between the two Parliaments with respect to legislation that touches upon devolved matters. However, the provision as expressed in the Bill is simply that as expressed by Lord Sewel at the time the Scotland Act passed through Parliament in 1998. It merely says that while in terms of Section 28 we have the power to legislate for Scotland in all matters, including devolved matters, we will not normally do so.

Lord Stephen: As noble Lords will know, the Liberal Democrats are very supportive of the Bill, but the explanation just given by the Minister of the Sewel convention and the issues around it worries me greatly. From the outset, I say that I strongly support the amendment in the name of the noble Lord, Lord Cormack, which would leave out "normally". It seems that much of the Minister's argument about protecting the sovereignty of the UK Parliament hangs on retaining the word "normally", because that then gives the UK Parliament very wide discretion, as I read it, to legislate, as the Minister explains it, in areas that could include education, transport, housing, health and all the issues that are the very stuff of the Scottish Parliament. If that is the Minister's intention, that is hugely controversial. I will say no more than that, because I do not want to develop this issue into a major argument on these points.

However, let me be clear. Back in 1998, when the Sewel convention was introduced, it was not in any circumstances with a view to this Parliament stepping in to legislate in the areas of transport, health and education if the Scottish Parliament was to make a mess of it. That was absolutely not the reason why it was introduced. Its wording and the reasons for its introduction are quite clear; they are here in Clause 2, which says that,

"it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament".

Therefore, even by the Minister's own explanation, the consent of the Scottish Parliament to legislate in these potentially controversial areas would be required, and it would not happen. There is no way that the Scottish Parliament, in terms of the Sewel Motion as it went back to 1998, would cover legislation in health and education—

Lord Davidson of Glen Clova: I have a feeling that the Committee is going down the wrong line here. The Minister has made it entirely clear that he has been talking about something that would never happen. It is just a logical construct. He is looking into the reality, and the notion that one should feel that somehow the UK Parliament is asserting a power to intervene in the affairs of the Scottish Government is a flight of fancy—it is not real.

Lord Stephen: I will readily grab that escape route, and I thank the noble and learned Lord for that assistance. I hope that that is the case, although much has been repeatedly made of the absolute sovereignty of the UK Parliament. If noble Lords check the record, they will find that the Minister has mentioned it many times.

However, moving away from that issue, I strongly agree with the noble Lord, Lord Norton. You either keep the convention or you enshrine it in statute—I think that the wording from the Smith commission was "put it on a statutory footing". It was not the Sewel convention of 1998 that was expected to be put on a statutory footing; it was the Sewel convention as it exists today, as the Smith commission knows it and as it has been working in the Scottish Parliament and between the UK Government and the Scottish Government. All aspects of the Sewel convention should be on a statutory footing, not just one narrow aspect that started in 1998 and has now gone. If we were forced to go in that direction, then, as the noble Lord, Lord Norton, pointed out, one tiny but important element of the Sewel convention would be in statute but not all the rest. To me, that would be ridiculous.

As ever, the noble Lord, Lord Forsyth, is logically correct: any Sewel Motions and legislative consent Motions could absolutely be prevented, with everything in devolved areas having to be dealt with by the Scottish Parliament. The UK Parliament—the House of Commons and the House of Lords—would stop legislating in these areas. However, I conclude by saying that the whole process of legislative consent Motions has been accepted and they have been commonplace. Some people have asked how often they have been used. They are used all the time in the Scottish Parliament. There must have been dozens, if not hundreds, of legislative consent Motions. They work well. Why try to stop or change something that has been accepted and works well? Let us simply put it on a statutory footing and get on with it. I beg leave to withdraw the amendment.

Amendment 11 withdrawn.

Amendment 12

Tabled by ***Lord Hope of Craighead***

12: Clause 2, page 2, leave out lines 5 to 7 and insert—

"(8) But the Parliament of the United Kingdom may not pass Acts applying to Scotland that make provision about a devolved matter without the consent of the Scottish Parliament.

(9) A provision is about a devolved matter if the provision—

(a) applies to Scotland and does not relate to reserved matters,

(b) modifies the legislative competence of the Scottish Parliament, or

(c) modifies the functions of any member of the Scottish Government.

(10) In subsection (8), "Acts" includes any Act, whether a public general Act, a local and personal Act or a private Act."

Lord Hope of Craighead: I am bound to say that I am very troubled by this whole matter and we will have to return to it on Report. Leaving the clause in its present form is bound to create instability—for reasons that I need not expand on further. Having given notice that I will come back to this on Report, I do not intend to move the amendment.

Amendment 12 not moved.

Lord Scott of Foscote (CB): My Lords, I wanted to say a word about Amendment 12.

The Earl of Courtown (Con): My Lords, we had the opportunity to speak to this amendment in a previous grouping.

Amendment 13 not moved.

Amendment 14

Tabled by ***Lord Cormack***

14: Clause 2, page 2, line 6, leave out "normally"

Lord Cormack: I give notice that I will return to this on Report.

Amendment 14 not moved.

Amendments 15 to 20 not moved.

Clause 2 agreed.

House resumed. Committee to begin again not before 8.45 pm.

Vulnerable Children: Kinship Care

Question for Short Debate

7.43 pm

Asked by ***Baroness Armstrong of Hill Top***

To ask Her Majesty's Government what assessment they have made of kinship care as a means of support for vulnerable children.

Baroness Armstrong of Hill Top (Lab): My Lords, I welcome and appreciate the opportunity to have this debate. I thank all noble Lords who are interested in this issue and have indicated that they want to speak tonight. During our deliberations on the Welfare Reform and Work Bill last night, we had a useful debate on the challenges for kinship care that will arise from some of that legislation. I hope that the Minister has had the opportunity to read the comments in that debate, because I am not sure that tonight we will manage to get in all the points that we want to make.

I am very grateful to the Kinship Care Alliance for its briefings and, in particular, to the Family Rights Group, which I know and have worked with for several years and for whose knowledge and commitment in this area I have immense respect and regard.

There are an estimated 200,000 kinship carers across the United Kingdom. They are grandparents, older siblings, other relatives and friends who step in to care for children when usually the only alternative is the care system or for them to become what we now call looked-after children. In England, kinship care remains the most prevalent form of non-parental care for children who are unable to live with their parents—and that may well be the case for the whole of the United Kingdom. The most recent figures that we have come from a report from Bristol University published earlier this year.

Despite kinship care still being the predominant option for children in England who are unable to live with their parents, and despite research evidence that children living in kinship care have better outcomes—certainly than those fostered by non-relatives and, it seems from the evidence, than any other form of looked-after child—the results of the University of Bristol study show that a large number of children in kinship care are affected by poverty and deprivation. More than three-quarters of the children in the study lived in a deprived household. As I said last night, we may have arguments across the Floor about what deprivation is and what levels of poverty are and so on, but from this work we know that many of these children are in families that do not have the resources, or access to the resources, that many of us take for granted.

Compared with children growing up with at least one parent, children in kinship care were nearly twice as likely to have a long-term health problem or a disability that limited their day-to-day activities. We know that a kinship carer often takes on far greater challenges than they would if they were simply about to give birth to their own child. Someone else's child is likely to be older and will bring with him or her much of the trauma of whatever has gone wrong or whatever has happened in their early life.

So we know that the outcomes for children are better than the alternatives in the looked-after system, but we also know that life is still very tough for the vast majority of families where kinship care is the reality. The challenge to the Government is to see what they can do to encourage kinship carers to come forward when children in their family need care for whatever reason. The challenge is also to ensure that they are properly supported so that they can improve even more the outcomes for the children they are caring for.

Earlier this year, the Family Rights Group, along with others in the Kinship Care Alliance, carried out the largest survey of kinship carers that has ever been done. The survey showed that almost half of kinship carers had to give up work in order to fulfil their caring responsibilities, and a further 18% had to give up work temporarily. Sometimes the social worker would demand that they gave up work because the needs of the children were so great. I do not criticise anyone for that; it is simply the reality. Twenty-two per cent of kinship carer households had three or more children aged 18 or under, which is particularly relevant to what we were discussing last night regarding the proposed two-child limit for child tax credits and the reduction in the benefit cap. That is an issue that I know the House will return to.

In the recent survey, 80% of kinship carers felt that when they took on the child they did not know enough about the legal options and the consequences for getting support to make an informed decision. In the light of this survey, what can the Government do to improve the situation and meet the objectives that I earlier suggested should be the Government's objectives? How could the Government respond?

First, they could move to a presumption of kinship care. That would involve exploring the wider family as a first port of call. I understand and appreciate that that would mean a new duty on local authorities to ensure that potential kinship placements are explored and assessed for suitability before a child becomes looked-after—except, I accept, in emergencies. It may also mean a new duty on local authorities to offer all families the opportunity of a family group conference prior to a child entering the looked-after system, except in emergencies. That would allow kinship carers to come forward and family members themselves to work together in the best interests of the children.

I know that this is something that kinship carers feel very strongly about. They do not want to come in at a stage where the rest of the family think that they are pre-empting breakdown, but, on the other hand, if they hang back for too long, they are not considered and another placement for the child will be made and the opportunity for them to become kinship carers will have gone. It also means that there must be minimum standards for viability assessments with which local authorities would need to comply in order to fairly assess whether a family member is potentially a realistic option to care for the child.

The second thing that needs to change and that the Government need to be concerned about is how to recognise and meet the needs of children in kinship care. To put this briefly, kinship carers need to be viewed in exactly the same way as adopters are viewed. Kinship carers do not, for example, get what adopters get, including maternity and paternity leave. It is that sort of thing that the Government need to think about. There are various other suggestions that the Government could look to, and these are referred to by the Family Rights Group. Like adopters, kinship carers need to know that they will get access to support services, if necessary. As I have said, very many of these children have long-term health problems or a disability. Certainly, mental health issues are often very prevalent because of the trauma that the children have suffered. They really do need access to services.

But kinship carers also need access to information and advice. Of those who responded to the survey, 80% said that they did not have sufficient information about their options and the implications of these when taking on the child. They thought that independent advice was vital. The advice line that the Government and the Minister's department have supported so far for the Family Rights Group is where kinship carers get the very best legal advice. Indeed, Justice Munby told me that he had great confidence in the quality of legal advice given by the Family Rights Group. It needs that in order to continue to give independent advice.

I can see that the Whip is getting anxious because my time is up. All I want to say is that I have enormous admiration for kinship carers. There are some really inspirational stories, which we do not have time to go through tonight. But this is an opportunity for the Government to recognise the value of kinship carers and make sure that they get the support they need.

7.55 pm

Baroness Bottomley of Nettlestone (Con): My Lords, let me congratulate the noble Baroness on introducing this very important topic. I share her endorsement of the excellent work done by the Kinship Care Alliance and the Family Rights Group.

I do not want to cover again many of the areas that the noble Baroness has addressed, except to say that the framework within which we are debating this subject goes back to that landmark piece of social legislation, the Children Act 1989. It was a quite remarkable piece of legislation, to which reference is made around the world. It clarified the paramount interests of the child. In the words of the noble and learned Baroness, Lady Butler-Sloss, the child is always to be treated as a person, not just as an object of concern. It clarified the role of the local authority and the rights and the role of the parents. Having myself been chairman of a juvenile court for several years before I entered this House, primarily in Lambeth but also in other parts of London, as well as working with the CPAG, for Frank Field, in a child guidance unit and as a trustee of the Children's Society, I was only too aware, as I know the noble Baroness was, of the chaotic and fragmented nature of the legislation concerning children. Local authorities then had a new duty to promote the upbringing of such children in need by their families, in so far as this can fit in with their welfare and the duty to the child themselves. That was a very new statement, and is very compatible with what we are discussing this evening. Local authorities had an absolute duty to safeguard and promote the welfare of any child looked after by them, for reviews promoting contact between the child and his family, and to consult the family on decisions. There was also specific mention of grandparents. At that time, as the noble Baroness will remember, there was a great deal of discussion of how grandparents were overlooked.

I want to make a particular comment about the debate around the Children Act 1989. I remember the wonderful work of the then Lord Chancellor, James Mackay—now my noble and learned friend Lord Mackay of Clashfern—and the remarkable work of a very talented and dedicated civil servant Rupert Hughes, who died this year. He worked with all political parties and all interests, including the law, the voluntary sector and local authorities, not only to take the consultation and legislation through but then—so unusual in legislation—to oversee its implementation. I arrived in the Department of Health three weeks before the Act received Royal Assent, so my job was its implementation. It was a component of our framework for protecting children, of which we should justly proud. The briefing goes back, time and again, to that 1989 Act. However, in that debate, there was a particularly impressive speech by the leader of the Opposition in another place, who gave a very strong endorsement of the impossible

[Baroness Bottomley of Nettlestone]
decisions made by social workers: if they intervene too much, they get it wrong; if they intervene too little, they get it wrong. I commend to noble Lords the words of the leader of the Opposition during that debate.

Recently, I talked to a very talented woman I know who has taken on responsibility for her nephew as a kinship carer. She is like many others: she is quite affluent, but her problems are no different from anybody else's. The sister has mental health problems and the whole family has become involved in the turmoil, the complications, the ambiguity, the anger, the loss and the mourning. I touched base with her today and she said that she has had help of an unimpeachable standard from social workers in Essex, one working with the child, who is 13, and one working with her. As the noble Baroness said, nobody expects adoptions to be easy, and neither are kinship care arrangements easy. There may be a complicated relationship; there may be gratitude from the mother but there may also be resentment. Many people suffer from mental illness or addiction problems, and this makes for great complications and tension within families.

There is one particular group I want to mention, and which this House discusses fairly frequently: the 4,000 women in prison, three-quarters of them mothers of dependent children. These families have a double punishment. The women go to prison—about half of them for theft or handling stolen goods and hardly any for violent offences. Over half have or had emotional, physical and abuse problems, either currently or in childhood. Of their children, only 9% are cared for by the father and the vast majority of the others go to kinship carers. Some 4,000 move in with their grandmothers each year because their mothers have been sent to jail, 5,000 are taken in by other family members or friends, and 2,000 others are adopted or fostered. These children are then likely to suffer greatly and repeat the problems of anti-social or delinquent behaviour. In our work supporting kinship carers, I have particularly identified this group of children who are all too easily overlooked.

In the 1960s, a remarkable woman called Mary Webster started a charity called the National Council for the Single Woman and Her Dependants. I became involved in the early 1970s and about eight years later, the noble Baroness, Lady Pitkeathley, became chief executive of what is now Carers UK. During those early years, nobody knew what a carer was. They used to say, "This is Mrs Bottomley from the careers organisation". It was not a familiar term. It is the same with kinship carers. The work of recent years, since the Children Act, has begun to give kinship carers the priority and the recognition that they rightly deserve.

It cannot be said that simply because a child is with another member of the family that it is fine—it is the natural model and has happened for ever and a day. These are individuals and families with special needs. I commend the Minister for Children and Families for recently reporting back on the number of local authorities which have put in place guidance on what they are prepared to do for kinship carers dating back to *Family and Friends Care: Statutory Guidance for Local Authorities*. That number is up to 83% now—maybe the Minister will have further information for us. I congratulate the noble Baroness and look forward to hearing what the Minister has to say about how we can all work harder to make this an even better service for children.

8.02 pm

Baroness Drake (Lab): My Lords, in previous debates in this House, the Government have recognised the contribution that kinship carers make to the well-being of some 200,000 children. The reasons are indeed compelling and my noble friend Lady Armstrong and the noble Baroness, Lady Bottomley, have set them out persuasively. Kinship care is the most common permanency option for children who cannot live with birth parents. The carers provide vital support for vulnerable children when parents are unable to care for them, often in urgent circumstances such as domestic violence, drug abuse and parental illness. The only notice that they may have is when the social worker arrives on the doorstep with the children late at night. The children frequently have emotional difficulties, often because they have been living with parents who are drug-dependent or who have abused them. The kinship carers save the taxpayer considerable expenditure and a number of studies demonstrate that most children in kinship care are doing significantly better than children in the care system.

However, kinship carers who voluntarily embrace vulnerable children continue to face many barriers. I cannot list them all, but they certainly include that, unlike birth parents and adopters, the vast majority of kinship carers raising children are not entitled to even one day of statutory paid leave from employment when they take on the care of the child. They care at their own cost. Some 49% give up work permanently and others reduce their earnings because they need to take that time to settle the child. As my noble friend said, a requirement is often imposed by the social worker that they do that—for good reason, because the children can be traumatised and insecure.

Kinship carers do not receive the financial support that foster parents receive. Many still get little help from their local authority, but face a considerable increase in costs. A recent Family Rights Group survey revealed that only 13% of local authorities have a dedicated worker or team supporting kinship carers. The Family Rights Group has identified areas of improvement in both the assessment of and support for kinship carers, recognising that many kinship care placements will be under huge financial strain due to inadequate support. Some may well now break down as a result of the benefit cuts, to the detriment of both the child and the taxpayer.

The Family Rights Group advice service advises more than 2,000 kinship carers a year. My noble friend Lady Armstrong gave a compelling explanation of the Rolls-Royce service that it gives. But funding constraints mean that it can answer only four in 10 of its callers, so the needs of six in 10 remain unmet. Funding has been cut two years in succession and there is no commitment to fund beyond March 2016. That cannot be right.

I congratulate my noble friend Lady Armstrong on securing this debate, particularly at this time, because we now see, in the Welfare Reform and Work Bill, direct withdrawal of support for kinship carers by the

Government, with no coherent reasoning for that withdrawal of support. It is unfair to kinship-caring families, directly undermines the interest of vulnerable children and does not stack up in public expenditure terms. The Bill removes eligibility to the child element of child tax credits for the third and subsequent children born and introduces a two-child limit for receipt of the child element of universal credit for families making a new claim. Kinship care families with three or more children could lose up to £2,780 per year for each additional child, yet some 29,000 kinship carer families have three or more children in their households. The impact of the two-child limit on their family income will be further compounded by the biting of the benefit cap as it is set at an ever-lower level, precisely when these carers are voluntarily taking on vulnerable children and bearing the additional cost. It will be particularly harsh in its impact on kinship carers who already have their own children living with them.

I repeat the figures that I deployed in Committee yesterday because they are worthy of endless repetition. Exempting kinship carers from the two-child limit would cost £30 million. But these carers already save the taxpayer the considerable cost of placing these children in care. The cost of a child in care for a year is £40,000. The cost of care proceedings is £25,000. The savings that these 132,000 kinship families deliver by voluntarily caring for these 200,000 children runs into billions of pounds. The two-child limit needs to deter only 200 kinship carers from caring for three or more children, and that £30 million saving would be wiped out. That is without taking into consideration the human cost to the child or additional pressure on the local authorities when these children need to go into care. No reasoning has been given in any policy document for the withdrawal of support from kinship carers in these reforms.

The noble Lord, Lord Freud, for whom I have the greatest respect and who has previously shown a sensitive and considered understanding of the contribution of kinship carers, had considerable difficulty yesterday in persuading the House that there was a coherent line of reasoning in this withdrawal of support. The impact assessments gave no assessment of the disincentive effect, no assessment of the cost to the other areas of public expenditure from this effect and no assessment of the outcomes for the children. The withdrawal of this support will impact on some of the most vulnerable children. It is not explained, it is not defended and it is not assessed.

8.09 pm

Baroness Massey of Darwen (Lab): My Lords, I thank my noble friend for again giving us an opportunity to discuss and examine the issue of kinship care. I hope that, as the Minister for education is answering the debate, it is an indication that education will work alongside other government departments to consider and make recommendations on kinship care and vulnerable children. Their health, education and welfare is a cross-government matter.

Of course, children being taken into care of any kind are vulnerable. They are all suffering loss. Those being looked after by relatives or friends have often lost a parent or parents through death, imprisonment, drug or alcohol misuse, domestic violence, mental health issues or other trauma. Kinship carers accept these children, some of whom may be very young, because they do not want the child or children to be fostered or adopted outside the family. It is worth remembering that many such carers also become vulnerable at the same time as the child, for reasons I shall discuss.

For about 10 years, I was the chair of the National Treatment Agency for Substance Misuse. In that time, I became aware of the issues facing kinship carers, and I met many of them. They were mainly women and they were mainly grandparents. Some of them had had to give up work to become carers and all had financial difficulties, or were grieving for a son or a daughter who had been lost to them for one reason or another. One grandparent I met, or "midnight granny" as they call themselves, suddenly had to take on three children aged between one and seven when her daughter died of a drug overdose—and yes, it did happen at midnight. This woman, who was widowed, lived in a one-bedroom flat and worked. Her life was turned upside down. She gave up her job and fought to be rehoused. The rehousing from that one-bedroom flat took two years, although there were three children. She reported having no help from social services and spent hours every week filling in forms. This is not an untypical case. The woman became vulnerable as her health suffered, and she became poor. She struggled to pay for food, clothing and toys for the children. She unselfishly cared for those vulnerable children lovingly, as so many kinship carers do.

It is perhaps not so astonishing to learn that children in kinship care often do better socially, emotionally and academically than children in other forms of care. I, too, was pleased to become acquainted with Grandparents Plus and the Family Rights Group, which are both part of the Kinship Care Alliance. These organisations have been stalwart in seeking a good deal for kinship carers and the children they look after. Much has been achieved, but there is much to do, and I hope that the Government will be sympathetic to this cause.

A report from the Family Rights Group and Kinship Care Alliance, which has already been mentioned, points out, interestingly, that 40% of children living in care in England live in the 20% most income-deprived areas, while 95% of children being raised in kinship care are not "looked after" by the local authority. Local authority support to kinship carers is largely at the council's discretion. Only 5% of children in kinship care are "looked after", so that they qualify for financial support; the rest suffer. Surely there is an anomaly here. Kinship carers save the Government billions of pounds a year in care costs, but are often treated appallingly by local authorities. When I was working in the substance misuse field, I came across only two local authorities which had dedicated support for family and friends carers, and only around 40% of kinship carers receive regular support from a social worker.

So, along with the Kinship Care Alliance, I would plead with the Government to do three or four things. They should require local authorities to publish a kinship policy, set up a dedicated post to oversee it, particularly in terms of monitoring the progression of children in such care. Kinship carers should be given

[Baroness Massey of Darwen]
the same support that is available to adopters, as my noble friend mentioned. Kinship carers should be entitled to free childcare, the pupil premium and priority school admissions. They should be exempt from the limiting of child tax credit to two children, the benefit cap, and the work conditionality rules that have been extended to the carers of under-five year-olds.

In answer to an Oral Question in the House of Commons on 26 October, Edward Timpson, the Minister of State for Children and Families, for whom I have enormous respect, stated that a special guardianship review and social work reform is under way to better support children. He also stated that parental leave, providing greater choice for families trying to balance childcare and work, will help. I am not sure how this latter provision would benefit the kinships carers that I am talking about, so I will need to examine that. But I would like to know when the guardianship review will be finished. Perhaps the Minister could let me know about that later. I look forward to his reply and to his comments on the issues raised in the debate today. Again, I thank my noble friend for introducing it.

8.15 pm

Lord Storey (LD): Perhaps I, too, may start by thanking the noble Baroness, Lady Armstrong, for initiating the debate, the Kinship Care Alliance for providing briefing by my noble friend Lady Tyler of Enfield, and indeed the House of Lords Library. I said at Question Time earlier today that it is vital that every child is in a loving and stable family or environment. We have made huge progress over the past few years and, like the noble Baroness, Lady Bottomley, we should congratulate the Government on what has been achieved. However, we heard during the Question on adoption about the fall in the number of children being adopted, and we saw from DfE figures for up to March of this year that some 6,000 children have gone missing from care. We still have quite a lot of work to do and we need to understand why these things happen. We need to understand the impact that family courts can have on local authorities and how they respond to adoption. So there is always work that needs to be done.

We know that kinship children have often been maltreated so they have greater challenges for us to deal with, yet they have better outcomes, as we heard, than those who are looked-after children. The noble Baronesses, Lady Armstrong and Lady Massey, have already mentioned the figures—200,000 children raised by kinship carers across the UK and 49% of carers had to give up work permanently to do so.

I shall preface my remarks by saying that it is important that children do not just drift into kinship care that might be wholly unsuitable for them. In my professional life, I know of children who have been brought up by a family relative who at best is well-meaning but unsuitable, and at worst a real danger to that child. I agree with the Kinship Care Alliance that the wider family should be explored as the first port of call for a child entering care, taking into account the child's wishes and feelings, and also placing a duty on local authorities to ensure that potential places are explored and assessed for suitability before a child becomes looked after.

There is a long history in the UK of children being cared for by relatives and friends when their parents, for whatever reason, are unable to care for the children themselves. Research and knowledge about kinship care is mostly limited to formal kinship care—commonly meaning placements that are made by child welfare agencies where carers have been approved as kinship foster carers. Much less is known about children who live informally with kin where the arrangements are made outside the responsibility of the child welfare agencies. There is considerable concern, since many more children are likely to live in informal arrangements than formal ones.

The policy on kinship care is developing in the UK but perhaps not in a joined-up way. In 2007, for example, the Scottish Government published a strategy for children living in kinship and foster care. Similarly, the Welsh Government agreed that grandparents and other kinship carers should be included in the delivery of parenting programmes in Wales. In Northern Ireland, minimum kinship standards which were introduced in 2012, specifying the requirements which health and social care trusts have to meet when placing looked-after children in kinship care arrangements, and clarifying the level of service that children and families can expect to receive. These relate only to looked-after children in kinship care.

While the rate of change in our four UK countries is variable, it is important to note that the message from children and kinship carers in each country was the same. For all the carers the greatest difficulty was lack of financial support. This added to their burden and made all aspects of their lives much more difficult. The way in which we deal with kinship care and how it has developed is fragmented and piecemeal. We have a complex and wholly unjust situation. Providing kinship care must be a crucial service to the community—a society caring for its own—but it sometimes pushes carers into poverty. Chance dictates whether kinship carers are supported financially or otherwise. As a result, whether kinship carers receive help financially or in kind is not related to the children's needs or to the financial situation of the carer. Do we not need to ensure that assistance is related to need?

If we look at other countries, for example, we can learn a lot. In Spain, an allowance is paid to carers on the basis that they have enough money to bring up the child or children in care. This would be a much more equitable way of providing financial support than exists at present and would enable more relatives and friends to take on this role. It would also help in the overall problem. At present, there is considerable variation in whether allowances are paid when private law orders are made. The current discretionary system for providing financial allowances to private law orders needs to be completely overhauled and support for flexible working might enable kinship carers of working age to retain their jobs when children come to live with them. Change is needed to replace the current unjust arrangements for kinship care. We should move towards a national kinship allowance to cover the costs of bringing up the children. We need to support flexible working in the hope that it will enable more kinship carers of working age to retain their jobs when children come to live with them

A duty should be placed on local authorities to conduct a children's need assessment. Would it not be good if we had a cultural shift in attitude for the major contribution of informal and formal kinship care as a good option for children? We know that kinship carers are under huge pressures and yet, despite taking on a huge burden from the state by looking after children who would otherwise end up in the care system, kinship carers and the children they look after are still an overlooked group who experience high levels of poverty with little or no statutory support.

8.22 pm

Lord Watson of Invergowrie (Lab): I, too, congratulate my noble friend Lady Armstrong on securing this debate on a most important topic.

Kinship carers include every kind of relative, as well as friends who are raising children unable to live with their parents. They provide a crucial web of support for children who have often suffered in ways that most of us, I suspect, could not imagine. Yet it seems they are undervalued by the organisation that ought to be most indebted to them—the Government.

We know that 95% of children living under kinship care arrangements are not "looked after" by the local authority. Therefore, by keeping vulnerable children out of the care system, these kinship carers save the taxpayer billions of pounds each year in care costs, as noble Lords have already said. The financial cost of raising the child typically falls directly on the kinship carers themselves, yet they are treated as the poor relation in terms of parents looking after children who are not their own.

Kinship carers get less support than those who undertake straight fostering, so it may be in a local authority's financial interest to place a child under a special guardianship order rather than to remove them from that environment and place them into a foster placement or a children's home. As my noble friend Lady Armstrong outlined, taking on someone else's child is much more demanding than just adding a child to your family. The Government should acknowledge this important fact.

By contrast, adoption has been the main focus for the Government recently. The Education and Adoption Bill makes provision for regional adoption agencies, which are a welcome development, and recently we heard from no less an authority than the Prime Minister that further legislation on adoption is apparently in the pipeline. The question that has to be asked is why the same attention has not been given to the 95% of children who are in other forms of care, including those who cannot live with their parents and who are being raised by kinship carers. We might also ask why the same rationale for supporting adoption—not least in terms of post-adoption support—has not been applied to kinship care. Unfortunately, the Education and Adoption Bill was drafted so tightly that the adoption provisions could not be amended in favour of kinship care—or, indeed, any other form of care.

Various noble Lords referred to the survey carried out by the charity Family Rights Group. I will not repeat the figures here, but I pay tribute to the group and to the Kinship Care Alliance for the very thorough briefing that it kindly provided.

We know that a review of special guardianship orders is under way and will report next year. It would be hugely encouraging for the estimated 130,000 families raising children in kinship care across the country—often, as we have heard, at cost to themselves and their own children—if a similar review was announced into kinship care.

My noble friend Lady Drake referred to last night's refusal by the Government during the welfare reform Bill to exempt parents of adopted children from the two-plus children tax credits limit. That point bears repeating because it makes no sense at all. I know that the Minister will say, "It's not my department". Of course, as far as that Bill is concerned he is correct, but it is his responsibility. That mean-spirited decision by his colleague, the noble Lord, Lord Freud, will impact on his department to a considerable extent. At a time when more parents are needed for all looked-after children, the cost of taking a child under a family's wing is considerable. Parents who already have their own children will now be deterred for financial reasons from becoming involved, which means it will become even more difficult to find sufficient parents for looked-after children. For kinship care, the decision will make it even more difficult to place sibling groups.

I hope that the Minister is fully aware of the implications of the denial of exemption to parents prepared to take on the care of children from troubled backgrounds and that, as a result, he will speak to his colleague and even echo the case made so eloquently by many noble Lords in this Chamber 24 hours ago. It is not too late to have that important exemption inserted in the welfare reform Bill. The Minister would be failing in his duty of service to the Department for Education and many of the children who rely on it for their care if he does not highlight the damage that will be done to children in kinship care and others as a result of the Government's, at least current, intransigence.

Finally, why should kinship carers be valued less highly than adoptive parents? My noble friend Lady Massey and the noble Lord, Lord Storey, outlined changes that they advocated to the support that could be supplied to kinship carers. I would add to that a positive step the Government could take: to extend the adoption support fund and the adoption passport to children subject to a special guardianship order. If a child is in the care system the parents looking after them are entitled to foster parent or adoptive parent payments. It is fair to ask why those should not be available to and apply to kinship carers.

Often, an older sibling or grandparent steps in to prevent a child being formally taken into care, but if they do that the support given to them is much less. In effect, they are punished financially for relieving the system of the need to look after that child, which means that both the family and the child lose out. That is surely neither logical nor fair. Typically they are the same children with the same range of needs. The legal route taken on how the child gets the care they need should not matter; it is surely first and foremost about meeting the needs of the child and properly supporting those who take on the role of carer.

I have a huge amount of admiration and respect for anyone willing to look after a child who is not their own and provide them with something they may never have known—a loving home in which the child can

[Lord Watson of Invergowrie]
flourish and reach their potential. I believe that the Minister shares that view, but he needs to use the influence that comes with his office to demonstrate that kinship carers are valued as highly as any other person acting in loco parentis. I hope he will indicate that that is indeed what he intends to do.

8.28 pm

The Parliamentary Under-Secretary of State, Department for Education (Lord Nash) (Con): My Lords, I join other noble Lords in thanking the noble Baroness, Lady Armstrong, for calling a debate on this important subject. I am sure that the whole House would agree that kinship carers, many of whom are grandparents, play a pivotal role in caring for children who cannot live with their parents. I welcome the opportunity to answer for the Government in this short debate.

First, I make it clear that the Government do not see a hierarchy between adoption, fostering, residential care or kinship care. We are interested not in favouring one type of care over another, but in what is right for each individual child. Over the last five years we have made significant strides in this regard. I am grateful for the supportive remarks made by the noble Lord, Lord Storey, my noble friend Lady Bottomley and the noble Baroness, Lady Massey.

For a majority of children, kinship care will be the first and best option. This is not just because it is what the law requires, but because we know kinship care offers children a vitally important bond of familial love and belonging. That is why we applaud kinship carers who step in, often in a crisis or emergency, to take on the care of a child, as my noble friend Lady Bottomley and the noble Baroness, Lady Drake, said. There will, of course, be many children being looked after by relatives where care proceedings are not an issue but where the primary carers are ill or in distress and cannot easily care for the child. However, the Government recognise that kinship carers take on a role that might otherwise have to be performed by the state. Kinship carers enable vulnerable children and young people to remain with their families, with people they know and trust who can provide the right commitment, security and stability they need to thrive.

We know, through voluntary sector research, that children benefit from living with their extended family and that placement stability is a factor in children's later achievement. Children in placements with relatives are likely to be more stable than ones in unrelated fostering or residential care. In particular, research indicates that children in these arrangements have fewer emotional and behaviour problems and achieve more academically. As the noble Baroness, Lady Armstrong, said, an analysis carried out by researchers at the universities of Oxford and Bristol and published only last week found that, among the cohort of looked-after children who were eligible for GCSEs in 2013, children in kinship care had higher GCSE point scores on average than children in other types of care. That is why, through the discretionary housing fund and through funding the advice line provided by the Family Rights Group, we are trying to help kinship carers to safeguard children's futures by keeping them within the wider family and community.

I welcome the chance, through this debate, to consider the support available to kinship carers and what we are doing to improve this. We know they need better information and support. That is why, during the previous Parliament, we issued family and friends care statutory guidance for local authorities. This makes clear that every council should publish a family and friends care policy, setting out how it will support the needs of children living with kinship carers, whether or not they are looked after. In particular, we made a commitment to increase the number of local authorities that have published their policies for supporting family and friend carers. Following national sector learning days organised by the DfE with local authorities, 83% of English local authorities have now published a policy, compared with 42% in 2012. We intend to write again to councils on this issue.

We recognise that kinship carers are not always accessing the support they should have. Although most authorities have policies in place, we now have to focus on the quality of the support they offer to family and friends carers. To this end, the department has been funding the voluntary sector organisation Grandparents Plus to develop models of best practice in early help and to identify how to overcome the barriers to providing good, well-structured services and early support for kinship carers. Also, we have seen the use of special guardianship orders increase year on year since their inception in 2005. Special guardians are mainly family members, often grandparents, who provide loving, permanent homes for children. This has largely been a positive development and we welcome it. My department has recently completed a review of special guardianship. Evidence from this suggests that special guardianships are, in the main, positive relationships which protect children's welfare and improve their outcomes into adulthood. We are currently considering the results of the review, including looking at how we might improve appropriate support to special guardians.

We have been working closely with the key voluntary sector organisations, the Family Rights Group and the Kinship Care Alliance. In answer to the noble Baroness, Lady Massey, I can say that we plan to publish the report of the review before Christmas. The noble Baroness, Lady Armstrong, referred to the important work done by the Family Rights Group, and we are providing financial support to it for its work with kinship carers through, for instance, its helpline and promoting the use of family group conferences. My department has been funding them for more than seven years. That clearly demonstrates our commitment to the valuable work that they do for kinship carers.

We are currently reviewing our grant payments to voluntary and community-based organisations beyond the end of this financial year in the light of the spending review. We will have more information on this in the new year. In the mean time, I express my thanks to the Family Rights Group for its support to families and emphasise that the Government recognise the important work that it does.

The noble Baroness, Lady Armstrong, mentioned the concept of a presumption of kinship care. The law already states that children should be looked after by their families wherever possible. She also mentioned

mental health. Improving access to CAMHS for vulnerable children is a priority of this Government. We have committed £1.4 billion to improve mental health services for children and young people over the next five years and we are working closely with the DoH and NHS England. The transformation to services we expect is set out in the *Future in Mind* report, which makes suggestions about what more can be done to improve access, develop better partnership working with parents and carers and provide the right support for children who have suffered trauma.

Many family members make great sacrifices in order to care for children. Local authorities have a legal duty to support children who leave care under other legal orders, and carers should discuss any needs with their local authorities. Children who have left care for a friends and family placement underpinned by a special guardianship or relevant child arrangement order have access to priority school admissions, pupil premium and free early education for two year-olds.

In relation to support for adopters and whether this should be extended, mentioned by the noble Baroness, Lady Massey, and the noble Lord, Lord Watson, the Adoption Support Fund has been set up to address the serious gaps in specialist services for adopted children. It is still in its infancy. If it proves successful, we will look to apply the learning in other areas. We are considering how to improve support for special guardianship as part of the special guardianship review, which, as I said, will be published before Christmas. However, given the wide range of needs and circumstances of family carers, it would be inappropriate as well as complex to provide a national allowance which is both equitable and simple to administer. Children placed in a kinship care arrangement by a local authority are looked-after children, in which case their carer must be approved as a foster carer. In these circumstances, kinship carers must receive the same support as all other foster carers, including financial support. However, the majority of kinship carers will be caring for children who are not looked after. Relatives caring for a child in these circumstances are entitled to support such as child benefit and other benefits available to parents, subject to the usual eligibility criteria. It would be difficult to require local authorities to provide a dedicated support service solely for relative carers, as most of the services required will be the same as those needed by other families.

The noble Lord, Lord Watson, mentioned that our recent focus had been on adoption; our recent focus has indeed been on improving one area in relation to it. As we have mentioned in other debates, we have done a great deal of work over the last five years on improving the provision for all children in care. The Children and Families Act was a substantial piece of legislation which has substantially improved the fostering arrangements and introduced early placements. Long-term foster care has been recognised as a distinct placement. We have invested £100 million in Pupil Premium Plus. We have virtual school heads and we are currently conducting a review of children's homes.

Lord Watson of Invergowrie: The Minister mentioned other pieces of legislation that have recently gone on to the statute book. I do not expect him to comment specifically on the Welfare Reform and Work Bill, but I wonder if he and his department are considering the impact of the decision not to exempt adoptive parents from the two-plus children tax credit limit, because there will undoubtedly be an effect on his department, and indeed on the ability of the number of adopters and kinship carers to be extended in the future.

Lord Nash: Noble Lords will be aware that this was discussed last night. I know that my noble friend Lord Freud will have listened carefully to those arguments and will be considering the response. I will discuss it with him.

Finally, I know that the House recognises the crucial role that working grandparents play in providing childcare and supporting working families, as my noble friend Lady Bottomley mentioned. That is why we have announced plans to extend the current system of shared parental pay and leave to cover working grandparents, thereby providing much greater choice for families trying to balance childcare and work. We will bring forward legislation to enable the change to be implemented by 2018.

I am sure the whole House agrees that kinship carers —grandparents, aunts, uncles, cousins, siblings and friends—fulfil a vital role in the care system and deserve the continued support of the Government. I am grateful to all noble Lords who have spoken in this debate.

8.39 pm

Sitting suspended.

Scotland Bill

Committee (1st Day) (Continued)

8.45 pm

Relevant documents: 6th Report from the Constitution Committee, 15th Report from the Delegated Powers Committee

Amendment 21

Moved by ***Lord Foulkes of Cumnock***

21: After Clause 2, insert the following new Clause—

"Scottish Senate

(1) There shall be a Scottish Senate which shall be the second chamber of the Scottish Parliament.

(2) The Scottish Senate shall consist of 46 members, to be elected using the Single Transferable Vote system in each region of Scotland, in elections to be held on the same day as the elections for the Scottish Parliament.

(3) Each electoral region shall return the following number of Members—

(a) Central Region: 5 members;

(b) Glasgow: 6 members;

(c) Highlands and Islands: 4 members;

(d) Lothian: 7 members;

(e) Mid Scotland & Fife: 5 members;

(f) North East Scotland: 7 members;

(g) South of Scotland: 6 members;

(h) West of Scotland: 6 members.

(4) The Boundary Commission for Scotland must keep under review the regions and the number of Members to be returned for each region, and if appropriate make a report to the Secretary of State recommending changes.

(5) Any reports by the Boundary Commission for Scotland under subsection (4) are subject to the requirements, and to the provision for the implementation of recommendations by Order in Council, contained in Schedule 1 to the Scotland Act 1998.

(6) The proceedings of the Scottish Senate shall be regulated by Standing Orders agreed by the Senate.

(7) Standing Orders agreed by the Senate shall include provision for the Senate to—

(a) undertake pre-legislative scrutiny of proposed Bills;

(b) consider and propose amendments to legislation agreed by the Scottish Parliament for future consideration by the Scottish Parliament before it is submitted for Royal Assent;

(c) debate and pass resolutions on devolved matters; and

(d) establish committees with the power to call or require Scottish Ministers to give evidence on any devolved matter."

Lord Foulkes of Cumnock (Lab): My Lords, if I may plagiarise Monty Python:

"And now for something completely different".

I am going to be positive and come up with some new ideas, and try not to be repetitive. Many people here will recall that at the opening of the Scottish Parliament in 1999 the late, great Donald Dewar read the first words from the then Scotland Act:

"There shall be a Scottish Parliament".

He went on to say, "I like that"—and we all felt much the same. But even then, with only one chamber in the Scottish Parliament, questions arose about whether there would be sufficient checks and balances.

The people who raised these questions were reassured by many other people, including from my own party and my own side, and told not to worry about it. First, we were told that that the electoral system they had devised would ensure that no party would have an overall majority—well, we know what happened to that. Secondly, we were told that the committees would have a new role and that they would be the checks to control the overweening and overpowerful Executive. But that has not been the case, as many people here will know. In fact, the irony is that in this Parliament at Westminster, the committees in both Houses have been far more powerful in controlling the Executive, challenging and questioning them, whichever Government are in power, than they have been at Holyrood. It was also agreed at the time that the electoral system would be reviewed after two elections if it did not appear to be working in the right way—but that review has not happened.

After the last election, we have effectively in Scotland a one-party state. That controversial comment has been made by a number of people and challenged by the SNP, because of course there are other parties in the Scottish Parliament, but it has an overall majority which it uses powerfully, coherently and effectively. It has decided to choose one of its number as the Presiding Officer but could have chosen someone from another party. There has never been a Labour Presiding Officer, for example, in the Scottish Parliament. When we were the largest party at first in 1999, we allowed—in fact, we encouraged and moved—the noble Lord, Lord Steel, to become Presiding Officer in the Scottish Parliament, much to the chagrin of my good and noble friend Lord Maxton.

The majority on committees is exercised powerfully. I do not know of one committee report that has been critical of the Scottish Government. The Justice Committee got nearest but was still far away.

Civil society—I had better not mention the Law Society of Scotland on this occasion—is increasingly in thrall to the one party in control at Holyrood, using, alternately, the carrot and the stick. As a result of that, there have been a number of mistakes, and the Scottish Parliament has legislated in ways that have caused tremendous problems, which I would argue would not have happened if there had been either pre-legislative scrutiny or a second look by a second chamber. Police reform is one example, and there are several examples in education, for example in the current universities Bill, which is creating huge problems already.

I will mention two specific examples, since, as we saw in the last few debates, we have so many lawyers in the House. One was the misguided attempt to abandon corroboration in Scots law—my noble and learned friend Lord McCluskey played a large part in raising concerns about this issue—which would not have happened if there had been either pre-legislative scrutiny or checks by a second chamber.

The other is the Act that is supposed to deal with sectarianism in Scottish football. As a number of Members will know, I am a great enthusiast for a particular football team, Heart of Midlothian Football Club. Unfortunately, there has been sectarianism in Scotland over time. The Government brought in the Offensive Behaviour at Football and Threatening Communications (Scotland) Act, which has been criticised not just by Celtic and Rangers but by a number of people. I read in today's *Daily Record* that even Phil Boswell, an SNP MP—who is under a bit of criticism for other things at the moment—said his own party's law on this was a "major blunder". I would argue that that major blunder would not have happened if we had had the second chamber that I am proposing.

The second Chamber here has asked the other Chamber—the House of Commons—the government majority in it and, thereby, the Government to think again on a number of things. We asked them to think again on onshore wind after they arbitrarily cut the grants a year early. We are currently looking at votes at 16 and 17 and asking them to think again—today they were doing that and thinking again about it. Most notably, we asked them to think again about tax credit cuts, and thankfully the Chancellor did think again and decided to abandon the proposals. He would not have done that if we had not challenged the measure in the House of Lords.

This brings me to my proposals. Some people, including some of my own friends, have suggested that this is yet another ad hoc change to our constitution. I agree with that and am only doing it because that is the way we do things at the moment. I repeat what I have said on so many occasions in this House: I am in favour of a UK constitutional convention to look at things in a comprehensive way. But we are not at that position yet, as the Government have not accepted it. Everyone else—every other party and much of civil

society—has accepted it but the Government have not yet been persuaded to accept it, so we have to look at this bit by bit.

I am suggesting a senate of modest size, with 46 members. I have given the number of members that would be elected in each of the eight regions of Scotland, based on the current electorate, which brings us to a total of 46. I am grateful to the Legislation Office for help in drafting this amendment. One of its suggestions was that the Boundary Commission for Scotland should be included and be given the power to look at the regions and the number of members returned from each region. I think that is right.

I suggest that it should be elected by a different system from the present Scottish Parliament, and I suggest single transferable vote. That is not to get the support of the Liberal Democrats—I have the support of the noble Baroness, Lady Suttie, who sends her apologies for not being able to be here today—but because it is the right thing to do, not in every case but in this particular one.

Also, I suggest the election should take place at the same time as that for the Scottish Parliament. One of the other criticisms I have had about my proposal is the cost of it. The cost would be reduced if the elections were carried out at the same time. There have been suggestions from my noble friend Lord Maxton and others that it might be better to have it in between elections to the Scottish Parliament, and that is something I would be willing to look at.

The senate I propose would be able to carry out pre-legislative scrutiny and review legislation. It would have debates as we do on topics of particular interest and committees with the power to call Ministers to give evidence. As I say, the one criticism I have had is that of cost. That is why the size is relatively modest. I do not necessarily think that its members need to be full-time, although that is something again that can be looked at.

We can find an existing building in which they could meet. I suggest that a wonderful place for them to meet would be the Old Royal High School, which was converted for our use as a Scottish Parliament had we voted for that in 1979. Many Members here who were Members of the other place will have been at meetings of the Scottish Grand Committee there and it worked extremely well. It looks like a parliament and senate. One noble friend who apologises for having to leave early—he expected this debate to take place a bit earlier but reckoned without some of the fights that took place opposite—suggested that there is a suitable building in Glasgow that might be used for this purpose. Certainly, that could be looked at.

In coming forward with this proposal, I looked at other countries—

Lord Forsyth of Drumlean (Con): The noble Lord twice mentioned cost but has not told us how much this would cost.

Lord Foulkes of Cumnock: The noble Lord knows the price of everything but the value of nothing. The value of this is that it would be an extension of democracy. It would be a very small price to pay for that.

I have looked at other countries. In Ireland, all the main political parties two years ago proposed to get rid of their Senate. The Members of the Dáil wanted complete control and they held a referendum.

Lord Forsyth of Drumlean: Does the noble Lord not know the cost?

Lord Foulkes of Cumnock: This is the moving of an amendment in Committee. We have Report and later stages coming up, and by that time, if the noble Lord is still here and able to ask a question, I am sure he will get an answer. The cost depends on a whole variety of things and at this stage he can shake his head and put his finger up—we all know what a cynic he is. The new Minister has found out what a damned nuisance he is, as well. He is a thorn in the flesh of the Government but I will certainly not let him be a thorn in my flesh. He will get his answer in good time. As I said earlier, he wants to know the price of everything but knows the value of very little.

I looked at other countries. I looked at Ireland and in the referendum there two years ago all the main parties wanted rid of the Senate. Incidentally, all the opinion polls in the run-up to the referendum said that it would be abolished. The opinion polls in Ireland are no more accurate than they are in the United Kingdom or in Scotland. The people of Ireland decided to keep their senate; they wanted to have control over the powerful Executive of the Government in Ireland, which I was very pleased to see.

I was talking to the noble Lord, Lord Alderdice, yesterday, and he told me that in Northern Ireland from 1921 to 1975 a senate operated very effectively at Stormont, which is something that can be looked at as well. The other interesting thing, on which I conclude, because I am trying not to take up too much time after a lot of time was taken up earlier, are the other areas of devolved legislatures. Every state of the United States has two Chambers; in Australia, all of them except for Queensland have two Chambers. If it is good enough for New South Wales and Massachusetts to have that kind of democracy, and be able to pay for it, it is good enough for Scotland. This will be a great extension of democracy in Scotland; it will make sure that the kind of decisions that I mentioned, which have caused real problems because they have not been thought through, are unlikely to happen again, and I hope that it will be given sympathetic consideration by Members on all sides of this House today.

9 pm

The Earl of Kinnoull (CB): My Lords, I rise to make a few brief comments on a very thought-provoking summary from the noble Lord, Lord Foulkes of Cumnock. In my speech on Second Reading, I mentioned the issue of scrutiny, as it is a great concern to me. As I said, what concerns me is the very heavy constituency load that members of the existing Parliament have, which means that they simply do not have time to perform proper scrutiny of the legislation, of which there is an awful lot in the Scottish Parliament. I would further develop the argument to say that, if we are lumping a whole lot more powers into the Scottish

[The Earl of Kinnoull]
Parliament, that problem is going to be exacerbated. Therefore, the quality of legislation—and I speak as a resident of Scotland—will inevitably go down.

I make a further point on the skill set required for scrutiny. I had the great benefit of watching the noble and learned Lord, Lord Hope of Craighead, prepare for today by just by chance being in and out of his office a few times. The care and precision with which he prepared today and the great scholarship that he has—reflected also by the noble Lord, Lord Norton—do not necessarily exist in the constituency MPs in the current Holyrood Parliament, but they are very necessary for the proper scrutiny of legislation, as we are doing today.

There is also an old adage about absolute power. It disappoints me that the Scottish Parliament has an absolute power today and is in many ways a more powerful Parliament and executive than this Parliament, where at least the mirror can be held up, and the Lords can say no—as they have several times already—which makes the Government reconsider things, which drives change for the better.

I want to address cost and perhaps answer the question posed by the noble Lord, Lord Forsyth of Drumlean. If it costs £200,000 per member, it would be £9.2 million; if it cost £400,000 per member, depending on what sort of Parliament you had, it would be double that, at just under £20 million. I think that the cost is likely to be in that area, but it would be small compared to the loss of things such as foreign direct investment or the economic damage inflicted by badly drafted and badly thought-through legislation. However, I have one concern: I am not sure that this Bill is the proper place for this set of thoughts, but it is certainly a very valid set of thoughts, and I thank the noble Lord, Lord Foulkes, for raising them.

Lord Lyell (Con): I am fascinated by the marvellous remarks of the noble Lord, Lord Foulkes. I was interested that he mentioned one of my great passions, which has occupied a good bit of the Scottish Parliament and is about sectarianism at the football. Indeed, a leading sheriff in Dundee pointed out that he regarded the legislation as "mince"—I hope that is not an abusive term. It came down to the fact of lip-reading whether a supporter was singing the correct words of "The sash my father wore" or other terms which might be abusive. Leaving that aside, I commend the noble Lord, Lord Foulkes, for trying to get a revising chamber for the Scottish Parliament.

The noble Lord, Lord Foulkes, was kind enough to refer to the superb Second Reading speech of the noble and learned Lord, Lord McCluskey. The noble Lord was quite tactful not to mention that the noble and learned Lord referred to sheep—that was one of the more moderate aspects. I appreciated what the noble and learned Lord had to say. One of the points he made in that the proposal is relevant to the amendment before us. It was about the standard of pre-legislative scrutiny by the committees of existing Members of the Scottish Parliament. If the noble Lord, Lord Foulkes, believes that there is a field of 92 people in Scotland who can provide a higher standard of scrutiny—quite apart from the cost and the time involved—I salute him for his optimism, but I wonder whether, with all the guidance that many of these so-called amateurs might need, he will be able to find them.

On the other hand, I look around your Lordships' House this evening and find my noble friend Lord Dundee. When it comes to cost, I am tempted to think of the chant "Up with the wallets of bonnie Dundee". He might be paying, or some of us might be thought to be rich enough to pay ourselves, but I am not too sure. If your Lordships would care to glance at the Second Reading speech and comments of the noble and learned Lord, Lord McCluskey, if I were a Member of the Scottish Parliament, I would repeat the wise words of the Vietnamese gentleman Do Duck Low and stay well out of the criticisms that have been quite justifiably directed in that area. I commend the noble Lord, Lord Foulkes, for his imagination and thought, but on the other hand I dread to think what the cost might be.

Lord Maxton (Lab): My Lords, I remember that "Monty Python" always finished with the words, "And now for something completely different". It used to throw my late father-in-law into a paroxysm because he could not stand "Money Python", but we all insisted on watching it. He would think it was the end and give a great big sigh of relief, and then they would go, "And now for something completely different", and end with exactly the same thing that they had been doing for the rest of the programme.

I have three points on this amendment. First, I support it. I did not support a second Chamber in the first place when we set up the Scottish Parliament because I felt that the powers we were giving it did not warrant a second one. Now that we are giving it extra powers, that warrants having a second Chamber as a balance to the first Chamber. Secondly, I do not believe, as my noble friend said, that the elections ought to be on the same day because there is a grave danger of the political make-up of the senate being exactly the same as the Scottish Parliament and that raises problems about what it will do and how it will be a counterbalance to the main Chamber if it is of the same political complexion. It would perhaps be more expensive to have the elections in between, but they could be on a day when other elections were taking place and, of course, if it were done my way electronically with an ID card, the cost would eventually be considerably less than at present.

Thirdly, if you elect people to a position, they will insist on having more power than my noble friend is prepared to give this senate. That is what happened in the United States. Believe it or not, the original Senate in the States was appointed and had little power; it had the same sort of powers that we have here. Once it moved to an elected system, though, it became increasingly powerful, and in the end was more powerful than the House of Representatives. That, I fear, is the danger with the senate that my noble friend is proposing: eventually you will have elections and they will insist on taking more power than the major body, which is elected by a different system.

I am a first past the post man first and foremost so obviously I would like the senate to be elected that way, along with the Scottish Parliament itself; we would not be in the fix that we are now if we had had first past the post in 2007.

Baroness Adams of Craigielea (Lab): On the point about the Scottish Parliament: if there were to be a senate, does my noble friend envisage that we would still have to retain the same numbers in the Scottish Parliament?

Lord Maxton: That is a very good point. I look forward to my noble friend Lady Adams tabling an amendment to my noble friend's amendment on Report. It is an interesting question: why should you have the same numbers in the Scottish Parliament if you have a senate as well?

I support what my noble friend is proposing but we have to look very carefully at it. I hope to be able to move amendments on Report.

Lord Forsyth of Drumlean (Con): I have to say I am astonished that the noble Lord, Lord Foulkes, should move this amendment at this stage of the Bill. He has spent the past two years arguing against piecemeal constitutional reform and has sat uncharacteristically silent throughout these proceedings, no doubt because he believes in what the Bill is trying to do, which is to allow the Scottish Parliament to determine its own rules and provisions, including on composition and the rest. But here he is, wanting to impose an entirely new body upon it as a second Chamber, ignoring the difficulties that this House has had with the other place in resolving the issue of what you do, if you have two elected Houses, to avoid gridlock and squabbles over powers. Quite frankly, if one were going to create a second Chamber for the Scottish Parliament, which I would have thought was entirely a matter for the Scottish Parliament, it would need to be done in a way that addressed these problems. On the basis of the performance of this House, I should think that that would take at least 100 years and still not be resolved. I find it extraordinary that, with so much to do in the Bill, we should be discussing an issue of this kind.

Also, if the answer to a problem is more politicians, you have certainly asked the wrong question, particularly in the current climate. In Scotland we are overrun with politicians: we have 129 in the Scottish Parliament and 59 MPs, and our constituents have no idea who is responsible for what or who their representatives are. Add to that some people called senators, and I think that the noble Lord will complete the task, already pretty well achieved, of having the electorate treat Members of Parliament with a certain degree of contempt and as a laughing stock.

Lord Maxton: I have to ask the Lord whether he actually believed in being a politician, democratically elected by his constituents. At the end of the day, that is what a politician is: a democratically elected representative of the people. I would not say that more is always better, but it does not necessarily follow that more is necessarily bad.

9.15 pm

Lord Forsyth of Drumlean: To deal with the point about politicians, after I left the House of Commons in 1997—or was asked to leave by the electorate—I went to work for Flemings as a banker, and was very proud to call myself a banker. Then, when the financial crisis came along, things got so bad that I started calling myself a politician again. Then we had the expenses scandal so I decided to call myself a company director. Perhaps the noble Lord does not realise that there is a problem, not just in Scotland or in Britain but in France, America and elsewhere—you can see that in some of the eccentric choices that are being made now by the electorate—which comes from a complete contempt for the political class. At this time of all times, when money is short—and by the way, we have not seen the fiscal framework, but when the Bill goes through, money will be very short indeed in the Scottish Parliament, when it substitutes a Barnett grant for a tax base—the notion that they could find money to have an extra 40-plus politicians plus all the attendant special advisers, the machinery and the rest, is utterly ridiculous. Therefore I hope that we will not spend very much time discussing this amendment, which is a complete distraction and totally wrong.

However, the noble Lord is perfectly correct to say that there is a problem with the governance of the Scottish Parliament. Can I just gently point out who was responsible for this? When the noble Lord cited all these examples of failures of policy—I could add considerably more—where was the Labour Party? Where was the opposition in the Scottish Parliament standing up to all of this? Therefore the fault did not lie in the lack of a second Chamber but in the opposition to the SNP and in the case of my own party, which gave it the ability to be in government by supporting it in government, some criticism could be made. However, this is not an argument for a second Chamber but for having vigorous Members of the Scottish Parliament, who I hope will be elected in May, doing the job they are required to do.

As regards numbers in the proposals there is already great confusion—we will come on to this later in the Bill—about the boundaries of constituencies and responsibilities. I was very struck by a poll by ITN, when it discovered that some huge number of the Scottish electorate—90%, I think—had absolutely no idea what powers were going to be conveyed by the Scotland Bill on the Scottish Parliament. When asked, a similarly higher percentage—well over 50%—were of the opinion that whatever the powers were, they did not go far enough. Therefore there is a job to do for the Scottish Parliament in engaging with the electorate and a job for the opposition. It is true that they are failing in a wide range of policy matters, but a House of lairds—a bunch of people calling themselves senators—will not resolve this problem. Fortunately, however, it is not a problem for this House but for the Scottish Parliament.

Lord McCluskey (CB): My Lords, I may be brief. I made points in my Second Reading speech which the noble Lord, Lord Lyell, has referred to. We are all agreed about one thing: there is a problem. Whether the unelected House of Lords is the right place to start giving a lead in that matter is something entirely different. I would not fashion the problem in precisely the words that the noble Lord, Lord Foulkes, has mentioned—the one-party state. I think I have previously used the expression that was made well known by Lord Hailsham, "an elective dictatorship", because in substance that is what you have in the Scottish Parliament at the moment. The Scottish National Party, for its

[LORD MCCLUSKEY]
own reasons, whips its MPs so effectively that there is no dissent, and for reasons that I mentioned at Second Reading, the weakness of the opposition is palpable. There are good people and, by the way, one or two good committees as well, but the committees of which I have experience, which are largely to do with justice, are not satisfactory.

I therefore agree with the noble Lord, Lord Maxton, that there is a problem with having an elected House. The great thing about the House of Lords is that it is not elected, therefore we are not answerable to constituents, and because very few of us are left with ambition, having reached an age and a state in our careers when ambition is no longer available to us, we can say what we think. However, that is not a popular idea in the country generally.

I am not sure that I am totally committed to the idea of an elected second Chamber but there must be some system. One forgets that many of the institutions that are extremely powerful in shaping the political debate and the political results in this country are not elected at all. I mention, for example, the press, which is said to be free and independent. It may be free, and it is independent of government, but in no sense is it elected by anyone. I get no say in who appoints the editors of the *Times* or the *Sun* or, for that matter, the *Daily Mail*, and they have considerably more influence than this House over what happens in this country, but they are not elected either.

This may be just a start but I feel that there is a duty on those of us who share the idea that there is a real problem to publicise that problem in Scotland and to try to persuade the Scottish electorate and the people generally that it has to be tackled, although perhaps not in this way. However, I certainly support the idea that "something must be done"—an expression which I hesitate to use because of its antecedents.

Lord Purvis of Tweed (LD): My Lords, it was fairly dispiriting to come back into the Chamber and to see our archaic language—which, as a Member of this House compared with being a Member of the Scottish Parliament, it has taken me a while to adjust to—on the annunciator. It announced that the House was "Adjourned during pleasure", and it was dispiriting when the "pleasure" ended and the Scotland Bill was brought back to us. When I first saw that announcement on joining this House, I asked the Clerk of the Parliaments was it was. He asked me, "Didn't you have any pleasure in the Scottish Parliament?". I replied, "No, not very much at all".

It was a pleasure to hear the noble Lord, Lord Foulkes. His persuasive skills are renowned but I am afraid that I am not persuaded by the case that he made. When I was a constituency Member of the Scottish Parliament, I considered it to be absolutely my duty to be as effective in that role as anyone else, but I was also aware of the pressures on constituency and regional Members of the Scottish Parliament. At one time, I was a member of three parliamentary committees: two were legislative and one—the Finance Committee—was both a scrutiny and a legislative committee. There was most certainly a strain on the number of Members.

It is worth reflecting that it was not designed to be like that. When the Parliament was established and the consultative steering group looked at the fundamental principles of how the Scottish Parliament should operate, it was designed to be a very different type of institution from the one here. There was going to be much stronger pre-legislative scrutiny and that element has been successful. This Parliament has learnt from that approach to pre-legislative scrutiny, with draft Bills now becoming the norm.

The committees in the Scottish Parliament, because of its nature, are both legislative and scrutiny committees. They were designed to be the strength of the Parliament. In a previous element, the noble Lord, Lord Forsyth, said that the Scottish Parliament sits for only one and a half days. When I was a Member of that Parliament, that was a frustrating misconception reinforced by some of the press, which I felt had an agenda against the Parliament. There were plenary sessions but, unlike in this place, the committees in the Scottish Parliament had precedence. They met on Tuesday mornings, Tuesday afternoons and Wednesday mornings because of their distinct role.

The feeling was that the convenors of committees were going to be equal to Ministers and that their parliamentary strength was going to be in balancing the Executive's authority. There was to be a shadow civic Parliament, with a much stronger civic input into the way that the Parliament operated. It is disappointing—there is a mea culpa from my party, which was part of the Administration early on, but it has most certainly been accelerated since 2007—that the Scottish Parliament has become remarkably like the Westminster Parliament. It has an absolutely dominant Executive and the committees have gradually become weaker. Their convenors are not even elected by the whole Parliament—an innovation of the House of Commons. The procedures of the Parliament have become weak in relation to power over the Executive when it comes to money. If there is anything that the Scottish Parliament can learn from our experience now, it is that Parliaments that reduce the ability to hold government to account for the money that it spends on behalf of the people are weakened Parliaments.

Ultimately, that has meant that there have been some examples where there has been less scrutiny than I, as a former Member of the Parliament, would have liked—whether that is on police reform, where mine was the only party to vote against what has happened because there was a large majority and the Executive were able to take it through; criminal justice reform; two areas that are currently being challenged by Brussels, on the Scottish Futures Trust and the delivery of infrastructure; minimum unit pricing, which has been challenged; or the quality. Fundamentally, these are my observations as a former Member who loves that institution, wishes it well and was a very proud Member of it.

However, I agree with the noble Lord, Lord Forsyth: it is not for this place to tell that institution what to do. If this place is to have a role—I know that members of the major party in Scotland will never accept that, and I understand the reasons for it—it is sometimes for former Members of the institutions with deep respect

say to that institution that it is worth it considering its own procedures. I live in the area that I used to represent as a Member of the Scottish Parliament, and so I maintain a vested interest in that Parliament working well.

There is a case for some form of much heightened, strengthened pre-legislative scrutiny. Sir David Edward, whose qualifications I do not need to rehearse, argued in a very good lecture for a council of state, using the existing organisations that we currently have set up in Scotland—for example, the ombudsman—to be a much stronger check on the proposals being put forward. Corroboration is one area where there should have been stronger pre-legislative scrutiny.

Equally, I believe that there will increasingly be an argument for some form of check before the final stages of Scottish Parliament legislation. If there is a reformed House of Lords, it could be that we have a mandate from the Scottish people directly, or indirectly through the Scottish Parliament for senators in this place, and may well have some joint capacity with both the UK and Scottish Parliaments—I will not need to address the next amendment, which deals with the working relationships, because this is my point. Noble Lords may not be entirely surprised to hear me say that, ultimately, that should be one area that we consider in a constitutional convention: to look at the proper functioning and continued strengthening of how the Scottish Parliament operates and the areas where this institution should rightly have a relationship with it. Ultimately, we should seek a better, stronger Scottish Parliament, able to do its job.

Therefore, I am not persuaded by the solution that the noble Lord has brought forward, but I hope, with the deepest of respect to the institution that I love, that it takes it very seriously, especially in the context of the successful passage of this Bill, in which the Scottish Government's powers over budget and taxation will be greatly enhanced.

Lord Hope of Craighead (CB): My Lords, I do not want to take up any more time on this issue. However, I remind the noble Lord, Lord Dunlop, that when I followed the noble Earl, Lord Kinnoull, at Second Reading I asked him a question. The question was whether, having regard to what we see in the Bill, he felt that the Scottish Parliament was able to cope with the additional powers that we are passing to it. Of course it is a matter for that Parliament to work its own procedures; I absolutely understand that. However, we do have an interest, since we are devolving these additional powers. It would be very unfortunate if the Parliament as presently constructed, and designed for a totally different situation, was so overloaded that it could not fulfil its function.

Lord Norton of Louth (Con): My Lords, for similar reasons, I will keep my comments brief, not least since I see that the target is to reach Amendment 42 this evening.

There is general agreement that the noble Lord, Lord Foulkes, has done us a service, because he has identified a problem. The question is how we address that problem, and there are two facets to it. One is how to ensure that there is a review of the present Chamber, but the problem has also been identified as to how, as responsibilities grow, it is going to cope with the demands made on it.

9.30 pm

As noble Lords have agreed, the noble Lord, Lord Foulkes, has identified the problem but not actually come up with the most appropriate answer. I very much share the view of the noble Lord, Lord Maxton. On the one hand, you have an elected Chamber and on the other hand you are just giving it the power to review, to propose and pass resolutions but no power to say no to the other Chamber. That is a recipe for instability because elected Members will start saying that they are as legitimate as the Members of the other place and demanding more powers. How we then look at the problem has been the conundrum. Noble Lords have said that there is a problem but we are not sure what the answer is.

I recommend that we look at legislatures elsewhere. The noble Lord, Lord Foulkes, said that there were a lot of bicameral legislatures. Indeed, there are, but they are in the minority. Most legislatures are actually unicameral. We could look at them and see how they go about addressing what we have identified today. One possibility is having an elected body that splits itself into two chambers. There are different things to look at.

There is a problem and I accept the point that this is not the Bill on which to start engaging in significant but piecemeal change. But this gives us an opportunity to stand back, recognise the problems and think through the consequences, which we are very bad at doing. I accept that the ideal would be to look at all the problems in the round and how they relate to one another, and stop doing things in this rather piecemeal basis.

Lord McAvoy (Lab): My Lords, I thank my noble friend Lord Foulkes of Cumnock for bringing this forward. I cannot help but make the point that it is a pity that we are dealing with this at this time of night and that noble Lords are curtailing their contributions in this most significant period of the evening. Quite frankly, we have been treated to two or three hours of negativity and continual attacks on the Bill and the Ministers bringing forward the Bill, and it is refreshing to have an extremely positive contribution from my noble friend to address a problem—and there is a problem.

Saying that there is a one-party state is overstating it, but we miss the experience of having Scottish nationalist party Members in this House contributing to this debate. It is mirrored in some ways in the Scottish Parliament where the committee system was supposed to balance things. However, I understand that one party controls the committee chairs and members of committees. They are not operating as a check and balance on the Executive. That is to be regretted.

My noble friend Lord Foulkes has no great expectation —although you never know—of this amendment being incorporated into the Bill, but he has sparked a debate about a real issue that we need to address, which the people of Scotland, the Scottish nationalist party and the other Scottish political parties have to look at as

[LORD MCAVOY]
well. I take the point from the noble Lord, Lord Forsyth, that this is probably not the Bill to do that in, but by moving the amendment my noble friend has raised the issue, highlighted it and received some very thoughtful contributions from noble Lords. They had elements of negativity, but they nevertheless addressed the problem. I will not mention anyone in particular who has been negative all night, but he knows who is.

My noble friend has done us all a service by bringing this forward. The details are in the amendment and noble Lords will understand the amount of work that has been put in by my noble friend in assembling it. It is a first-class amendment and we are not opposed to it. We congratulate our noble friend on bringing it forward and hope that it sparks a debate not just in this Chamber but with our Scottish National Party colleagues in Scotland so that they can turn their mind to this. That would be the real bonus to come from my noble friend's contribution. If we can spark a debate in Scotland so that the situation is looked at, my noble friend will have done a commendable service. I therefore appeal to our colleagues in Scotland to give this proposal particular attention.

We can be proud of the example we set. Most of us here, although not all, are determined not to destroy the place by what could be called irresponsible behaviour. Most of us are committed to the positive side of this House and the revising job that it does. I would like to see something like that in Scotland and I hope that we can take our Scottish National Party colleagues along with us. I think that the people of Scotland would be better served by that. I close by again thanking my noble friend for his extremely thoughtful contribution.

The Advocate-General for Scotland (Lord Keen of Elie) (Con): As the noble Lord, Lord Foulkes, might appreciate, I am increasingly conscious that the robust scrutiny of this Chamber could be seen as an elegant example of how a second Chamber can operate. Be that as it may, the proposal he has put forward by way of his amendment is not a reflection of what was contained in the Smith commission agreement. The establishment of a second Chamber did not feature. However, as noble Lords will be aware, the noble Lord, Lord Smith, in his personal recommendations observed that the transfer of these substantial new powers would mean that the Scottish Parliament's oversight of the Scottish Government would need to be strengthened. I recognise the noble Lord's desire to see that the exercise of these substantial new powers should be properly and effectively scrutinised.

This Government fully endorse the recommendation made by the noble Lord, Lord Smith, that the Scottish Parliament's oversight of the Scottish Government needs to be strengthened, but as the noble Lord set out, it is in the first instance the responsibility of the Presiding Officer and the Scottish Parliament to take forward this important work. I thank the noble Lord, Lord Foulkes, for his contribution to this debate and for putting before us what was noted by the noble Lord, Lord McAvoy, to be a real issue. Nevertheless, I say on behalf of the Government that this is not the place for such an amendment. This is not a place to bring in such a proposal when it was not addressed in the Smith commission agreement, and I therefore invite the noble Lord to withdraw his amendment.

Lord Foulkes of Cumnock: My Lords, I start with an apology to the noble and learned Lord, Lord Keen, for my irritation earlier. As my noble friend Lord Kirkhill pointed out to me, the Minister has not been a Member of this House for very long and we should be more tolerant, which is something that perhaps some on his own side ought to reflect on as well. I hope he will accept my sincere apologies.

However, I think he is wrong: just because this proposal was not in Smith, that does not mean it cannot be in the Bill. The Bill states:

"To amend the Scotland Act 1998 and make provision about the functions of the Scottish Ministers; and for connected purposes".

It does not say that it is simply to implement the Smith commission work. So my amendment is entirely in order. Indeed, the Public Bill Office would not have allowed me to get away with tabling it if it was not.

Perhaps I may say how much I welcome the fairly widespread support for the amendment. As the noble Lord, Lord Norton, said, I think everyone recognises that there is a problem. I thought the noble and learned Lord, Lord McCluskey, had a better description of it when he quoted Lord Hailsham talking about an elected dictatorship rather than the effective one-party state that I have described. There are different ways of dealing with it and I have put forward one suggestion. It has been suggested by some in certain quarters, astonishingly, that this is not our responsibility. Notwithstanding that, the same people are trying to impose all sorts of things on the Scottish Parliament. The noble Lord, Lord Norton, is right to say that the Presiding Officer, along with her colleagues, has the principal responsibility for this, but there is nothing to stop us, as we saw earlier, making recommendations and indeed legislating.

The only two people who have been Members of the Scottish Parliament who have spoken are the noble Lord, Lord Purvis, and me, and we both have respect. I do not think the noble Lord, Lord Stephen, spoke in this debate although he did in previous ones and, of course—he keeps changing his name so I can never remember James's latest title—

A noble Lord: Lord Selkirk of Douglas.

Lord Foulkes of Cumnock: Thank you. The noble Lord, Lord Selkirk of Douglas, was also a Member of the Scottish Parliament.

I have the same respect as the noble Lord, Lord Purvis, and I understand why he may not be as convinced as I am of the need for change. I served on the audit committee and we did some good work with Hugh Henry in the chair, but that was a time when the SNP did not have an overall majority. I do not know whether the noble Lord fully realises and appreciates the change that has taken place since the SNP has had a total overall majority. We know of PMQs, but even worse are FMQs when the First Minister has the last word. Look at the size of the Executive. What Willie Ross and three junior Ministers used to do is now being done by 13 Cabinet Ministers, each paid over £100,000, and 11 other Ministers. It is really quite astonishing the way in which that has grown.

I accept from the noble Lord, Lord Purvis—I do not accept it from others—that this matter would be best dealt with in an overall way through a constitutional convention. The noble Lord and I have been active in that. It is difficult on this occasion, but to be fair to the noble Lord, Lord Forsyth, he also supports the idea of a constitutional convention. However, he has so far been unable to persuade his Government that that is the right thing to do. To some extent it would be useful if he spent some energy trying to persuade his Government to accept the wisdom of that.

I really welcome the support from the noble Earl, Lord Kinnoull. His point about constituency Members being very busy dealing with case loads is a really important one, which added to the case that I made. I am also grateful for the support of the noble Lord, Lord Lyell, who, like me, is a football fan. He knows that it is astonishing that some people can be put in prison for up to five years for one of these offences. That is now being criticised by some on that side in the Scottish National Party, but nothing seems to be able to be done about it. I am grateful for the qualified support of my noble friend Lord Maxton. As the noble Lord, Lord Norton, said, there is a danger that an elected House will want to accrue power. That is something that we must take account of as well.

So, there is a problem; I think everyone recognises that. It is not something to which there is an easy solution. That is why any solution that is brought forward by anyone will be open to criticism of one kind or another. However, it is about time we talked about these things. It is even more important that the issues are addressed in Scotland by Scottish civil society, as well as by the Scottish Parliament. After all, the Scottish Parliament itself says that it is the people of Scotland who ultimately have sovereignty. I am one of those people; I speak not just as a Member of this House. I have been getting quite a lot of support on Twitter for this proposal—I do not often get support on Twitter as some noble Lords will know—and quite a lot of support from other quarters, so it is about time that we started looking at the issue in a sensible, coherent and systematic way. If I have contributed just a little to that, I will feel it was worth while to move the amendment. Nevertheless, I withdraw it.

Amendment 21 withdrawn.

Amendment 22

Moved by ***The Earl of Dundee***

22: After Clause 2, insert the following new Clause—

"Cooperation between the Scottish and United Kingdom institutions

Cooperation between the Scottish and United Kingdom institutions: reporting

(1) Within a year of the passing of this Act, the Secretary of State must review the impact of the provisions in this Act on cooperation between the Scottish institutions and United Kingdom institutions and prepare a report.

(2) In the review under subsection (1), the Secretary of State must consult such persons as the Secretary of State considers appropriate, and must consider the impact of the provisions in this Act on—

(a) the level of transparency and sharing of information between the United Kingdom institutions and the Scottish institutions;

(b) the level of cooperation between the United Kingdom institutions and the Scottish institutions;

(c) the sharing of examples of best practice between the United Kingdom institutions and the Scottish institutions; and

(d) the appropriateness of devolution arrangements in Scotland.

(3) The Secretary of State must lay a copy of the report prepared under subsection (1) before Parliament.

(4) In this section, "Scottish institutions" means—

(a) the Scottish Government,

(b) the Scottish Parliament, and

(c) Scottish authorities to which power is transferred under this Act.

(5) In this section "United Kingdom institutions" means—

(a) the Parliament of the United Kingdom;

(b) the Government of the United Kingdom; and

(c) United Kingdom authorities from which power is transferred under this Act."

The Earl of Dundee (Con): My Lords, this amendment, if adopted, would enable the Secretary of State to prepare a report within a year of enacting the Bill. The subject would cover four aspects: the level of co-operation between Scottish and United Kingdom institutions; transparency and information sharing between them; the sharing of examples of best practice between them; and, as supported by their joint endeavours, an assessment of how successful and appropriate the journey of devolution itself may have become.

Such a report by the Secretary of State could well begin with this fourth aspect. For, to be effective at all, the journey of devolution must go beyond the administrative centre in Edinburgh. Otherwise, Scotland's different regions and localities would not sufficiently benefit. Equally important, therefore, are the resolve and actions of the Scottish and United Kingdom Governments together to ensure that they do.

9.45 pm

Towards this end, both Governments have already started to pave the way. The Scottish Government has done so by facilitating the seven Scottish Cities Alliance as an independent affiliation; yet one which, through collective focus and effort, can help each city member the better to serve its citizens and communities. The United Kingdom Government have done so by delivering what is called the city deal and thus, through disbursement and loan, invest directly into the economies and infrastructures of a number of Scottish cities and regions. Glasgow was funded in this way last year. The Chancellor of the Exchequer's recent statement confirms that Aberdeen and Inverness are planned to come next.

We therefore begin with heartening evidence that the Scottish and United Kingdom Governments together have started out in the right way. For, as indicated, their combined actions to assist Scottish cities and regions already correspond to the reference of this amendment: co-operation, transparency and building up good practice, not least through devolution extended beyond Scotland's administrative centre in Edinburgh.

However, within extended devolution some further considerations should also be assessed: how the role of Scottish cities and regions may best evolve nationally

[The Earl of Dundee]
and internationally; how their achievements can usefully set standards for adoption elsewhere; and how their improved quality of life can do the same.

My noble and learned friend the Minister may concur that, in any case, no conflict of interest is presented by ever-competent and independent regions, since, through good results, they contribute both nationally and internationally. For that reason, the more successful they are, the more successful Scotland and the United Kingdom will have also become.

Where it promotes localism, one great benefit of devolution is more accurate readings of national performance, and hence a far better understanding of how national accomplishment should be defined in the first place. Hitherto for the latter we have tended to use the measures of gross domestic product only. Yet on its own, GDP does not tell the whole story. Now, as a result, we refer not just to GDP but to a combination of it and other indicators, such as those of the satisfaction or well-being of people where they live and their communities. The criteria for those assessments are currently detailed by the OECD and are increasingly addressed in the United Kingdom, as well as by our 47 Council of Europe states and their Strasbourg Parliament, where I have the honour to serve.

Does my noble and learned friend agree that it is exactly within devolution or localism that these improved measures and priorities can be best followed up and encouraged by the Scottish and United Kingdom Governments together; now not least through the well-being What Works Network in Scotland?

Through this amendment there is equally the focus upon the need for co-operation and transparency between Scottish and UK institutions; and upon the context within which the Secretary of State might review the impact of devolving matters from the Westminster administration—yet, in this case, devolution which goes no further than to that in Edinburgh. Bilateral government work will clearly help the implementation of more devolved tax and welfare. Both Parliaments and Governments must receive regular updates on funding plans and fiscal changes—and on all matters at all times we should seek improved transparency and public awareness arising from proper levels of co-operation between the two Parliaments and Governments.

In his very useful report, these procedures are strongly advocated by the noble Lord, Lord Smith, who also stresses the importance of transparency, building good practice and extending devolution to Scotland's regions and localities. The purpose of the amendment is to link those exhortations to the Bill. I beg to move.

The Earl of Kinnoull: My Lords, I am attracted by the thinking behind this amendment. I remind your Lordships of a few lines from the Smith commission report, headed, "Inter-governmental working":

"Throughout the course of the Commission, the issue of weak inter-governmental working was repeatedly raised as a problem".

It went on:

"Both Governments need to work together to create a more productive, robust, visible and transparent relationship".

Then, later on:

"I would encourage them to find solutions".

This amendment, and the thinking behind it, drives at that area and, therefore, has my total support.

Following on from the point made by the noble and learned Lord, Lord Hope, and the noble Lord, Lord McAvoy, it is a pity that the SNP are not here to talk to this issue. Thanks purely to their party political policy, they, as the self-styled voice of Scotland, are not here voicing their opinions or advancing amendments. Indeed, we would have none of its amendments were it not for the work of the noble and learned Lord, Lord Hope. I regret this self-inflicted state of affairs.

Anything which promotes co-operation, co-ordination and communication is part of the business of good government. I thought it would be helpful for your Lordships to have one real example of the problems associated with devolution. I am the chairman of the Red Squirrel Survival Trust, a UK-wide charity which is doing pretty well what it says on the tin. Red squirrels run backwards and forwards across the border between England and Scotland with no barrier. In the autumn of 2013, I had a meeting with two senior officials from Scottish National Heritage; men of great calibre and enthusiasm. During the meeting, it came out that they did not know their opposite numbers in England or their telephone numbers. A red squirrel is a UK-wide mammal which is severely endangered, but communication totally broke down at the point of devolution. Being the men they were, they instantly began working at a solution and something called the United Kingdom Squirrel Accord, which covers problems for both red and grey squirrels and for broadleaved trees, grew up. I am, in fact, the chairman of that as well and I salute its work. That is an excellent example of where, if communication, co-ordination and co-operation break down, you get bad government, not good.

Lord Foulkes of Cumnock: I will just intervene, rather than make a speech. I agree absolutely with the noble Earl and with the amendment. I do not know whether the noble Earl has heard but at Question Time I regularly ask UK Ministers, again and again, what discussions they have had with their Scottish counterparts. Invariably, it is none. They ought to meet with them more often. The trouble with Westminster, and Whitehall in particular, is that they do not pay enough attention to the devolved Administrations where there are the kind of issues, such as the red squirrels, which the noble Earl mentioned.

The Earl of Kinnoull: I am grateful to the noble Lord: I had heard that. It is an endemic issue. With the squirrel accord, various governmental bodies from the Welsh, Northern Ireland, English and Scottish Governments now actually sit together once a quarter. If they cannot do so, they are on the telephone. They know each other and have to meet face to face once a year. I feel a bit like a schoolmaster there, but it is extremely effective in this one tiny area. The amendment, and the thinking behind it, could be very effective because the nature of this report will be to find out where there are weaknesses. We have very high-quality officials north and south of the border and, once a problem is identified, they have the ability to sort it out. Therefore, the thinking behind the amendment deserves consideration, if not, perhaps, its precise

wording. It is very much within the scope of the Bill, given the quote that I read out. I commend it to the Committee.

The Earl of Lindsay (Con): My Lords, I, too, strongly support this amendment. If I have a quarrel with it, it is that I do not think it goes far enough. If I have read the amendment correctly, it focuses simply on the provisions of the Bill when it becomes an Act. The focus on the quality and quantity of co-operation that does or does not exist should go beyond just what this Bill is seeking to achieve; its scope should include all the provisions and measures that have led to the devolved constitution we now have.

For a similar reason I wonder why this amendment seeks just a single report on the level of co-operation that is being achieved. That co-operation is such an important continuing ingredient of a successful devolved constitution that it should not simply be subject to a single one-off review and report.

The perspective that I bring to this precedes the wisdom that the Smith commission added in this area and goes back to the Calman commission, of which I was a member. Noble Lords may remember that the longest chapter in the Calman commission report turned out to be chapter four. We came up with 25 recommendations under just that chapter, which concerned strengthening co-operation. The evidence that we took on the need for co-operation was compelling. The evidence from other countries with stable and successful devolved constitutions was especially compelling. It was quite clear from that evidence that the ability of different Governments and Parliaments to co-operate and work together in a constructive and structured manner is an absolutely fundamental ingredient of a resilient, flexible and successful devolved constitution. There was nothing ambiguous about the evidence that we took.

We also took evidence on the extent to which people in Scotland and interests in Scotland expected there to be constructive co-operation between the Governments and Parliaments of the United Kingdom and Scotland. They expected it to be a norm, not an exception. However, the depressing conclusion that we came to when we reported was that, apart from a few bright spots, good, constructive co-operation between the United Kingdom and Scotland was an exception, not a norm. Therefore, I very much support the direction of travel of this amendment. However, as I said, I would go very much further and widen its scope to include all the measures that comprise the devolved constitution, and I would make it a continuing or regular discipline rather than a one-off one.

Lord Lang of Monkton (Con): My Lords, I congratulate my noble friend Lord Dundee on the very attractive sentiments that he expressed in moving his amendment. I also congratulate my noble friends Lord Kinnoull and Lord Lindsay on their contributions, both of which were extremely attractive. That shows how well the elected Members of this House are performing their duties.

I would like to broaden the subject slightly—as, indeed, did the noble Lord, Lord Foulkes, and one or two others—to intergovernmental relations, as it is a very important area. The noble Lord, Lord Smith, was absolutely right to draw attention to it in one of his four points in his preface to the Smith commission report. During the Second Reading debate, I and others made reference to it.

Your Lordships might like to know that the Constitution Committee undertook a report on this subject in 2002. As it happened, my noble friend Lord Norton of Louth and I were both on the committee at that time. We then left the committee and, having rejoined it, we discovered that nothing at all had been done during the intervening 13 years. We have undertaken another report, which we published earlier this year and submitted to the Government.

We have not had a response to that report, and I make no complaint about that because I know that the Government are thinking very deeply about this subject and a lot of back-room work is going on. I hope very much that once the joint ministerial understanding work has been completed, they will feel able to produce the outcome of their deliberations and include with that a response to our report. This is a subject that your Lordships' House will want to return to, I am quite certain.

I have only one qualification about my noble friend's amendment, which is that this is probably not the right time or place to move it. On the other hand, if he thinks it will stand freely on its own, entirely separate from the broader subject of intergovernmental relations, he may wish to press it, and that is a matter for him.

10 pm

Lord Sanderson of Bowden (Con): My Lords, I, too, support the noble Earl's amendment but I agree that it does not go nearly far enough. At Second Reading, as the Minister knows, I took a particular interest in scrutiny. When we come to the financial part of the Bill, scrutiny is going to be even more important.

The Office for Budget Responsibility has done a tremendous job in the United Kingdom since our Government brought it into being. That cannot be allowed to fail when we get to the terms of what goes on in Scotland. What we must see in Scotland is a similar fiscal commissioner, or whatever you like to call it, but if it does not work closely with the Office for Budget Responsibility it is not going to carry much weight at all.

Those of us who are very concerned about the financial provisions of this settlement will be really very interested to see how the Government are going to get agreement with the Scottish Government on this vital issue. While I support very much the terms of what the noble Earl is proposing, it does not go nearly far enough.

Lord McAvoy: My Lords, I, too, thank the noble Earl and congratulate him on his amendment. I will be relatively brief as well. We support much of what is suggested, other than proposed new paragraph (2)(d), as we do not believe that the "appropriateness" of devolution needs to be reviewed. We will be proposing similar arrangements with regard to the transfer of the welfare provisions, so the amendment is extremely useful.

[LORD MCAVOY]

I think the noble Earl would accept that such arrangements are founded on mutual respect and co-operation between the two Governments. We all have to be careful with the sensitivity of language but we cannot have it portrayed—I know the noble Earl has not done this—as Westminster talking down to Holyrood. But conducted in an atmosphere of co-operation, friendship and mutual respect, I think there can be a great service done to the Scottish people and the rest of the United Kingdom.

Lord Keen of Elie: My Lords, I am obliged to the noble Earl for putting forward this amendment. As your Lordships are aware, the matter of intergovernmental working was addressed by the noble Lord, Lord Smith, in his introduction to the Smith commission agreement, in which he emphasised its importance in achieving the aims of devolution.

A considerable degree of very positive co-operation between the Scottish and United Kingdom institutions takes place on a daily basis, from routine dialogue on matters such as planning for civil contingencies to supporting business and exports. It would be difficult to report on each and every one of these interactions. Nevertheless, it is important to recognise that they should be as transparent as possible.

Specific steps have been taken recently in encouraging more regular collaboration between the United Kingdom and Scottish Governments in areas of joint interest. One example of such work is the cross-Administration "Devolution and You" Civil Service capability campaign, which the Cabinet Secretary launched in June 2015. In addition, there is now the Joint Ministerial Working Group on Welfare, which was established to provide a forum for discussion and decision-making on implementation of the welfare-related aspects of the Smith commission agreement.

I also welcome the work of the Constitution Committee on behalf of this Chamber and note its recommendations regarding increased cross-parliamentary scrutiny of intergovernmental relations. This was also recommended by the Scottish Parliament's Devolution (Further Powers) Committee. It will be important to see how Parliament responds to these recommendations. Furthermore, my noble friend Lord Dunlop set out during Second Reading details of how we are working with the three devolved Administrations to review intergovernmental arrangements and ensure effective working relationships with those Administrations.

There is a concern that a statutory duty to report on these interactions could prove burdensome and might prove unnecessary. However, we—the Government—are happy to take away and consider what the noble Earl has suggested, and explore how we may incorporate these suggestions into the work which is going on with regard to intergovernmental relations. I would be happy to discuss this with him. However, having regard to the present terms of the Bill and the comments that have been made, I invite my noble friend to withdraw this amendment.

The Earl of Dundee: My Lords, I thank all of your Lordships for your kind support for this amendment, starting with the noble Earl, Lord Kinnoull, and the noble Lords, Lord Foulkes and Lord McAvoy. The noble Lord, Lord McAvoy, emphasised and drew to our attention the vital importance of the two Parliaments and Governments being on equal terms. That must be key to success.

The noble Earl, Lord Kinnoull, gave us an example from his own experience, which started off in an intransigent way with people not talking to each other. As he said, that can be converted to something constructive when people do otherwise.

I take the point made by my noble friends Lord Lang, Lord Sanderson and Lord Lindsay, who commented that the amendment might go further than it does. My noble friend also suggested that it should apply to all parts of the Bill and instanced, from his past committee work, evidence from other institutions and Parliaments in other parts of the world which proves beyond doubt that successful government comes from proper co-operation between the parties concerned.

I am extremely grateful to my noble and learned friend for what he has just said—namely, that he will take this amendment away. Meanwhile, I now beg leave to withdraw the amendment.

Amendment 22 withdrawn.

Clause 3: Elections

Amendment 23 not moved.

Clause 3 agreed.

Clause 4: Power to make provision about elections

Amendment 24

Moved by ***Lord Keen of Elie***

24: Clause 4, page 4, leave out lines 18 to 20

Lord Keen of Elie: My Lords, Clauses 3 to 10 devolve full powers to the Scottish Parliament in respect of the registration, franchise, administration and conduct of Scottish parliamentary elections, with the exception of certain specified subject matters which are reflected in the Smith commission agreement.

Government Amendment 24 removes what is now a redundant provision in respect of the Scottish Ministers' order-making powers under new Section 12 of the Scotland Act 1998, which is to be inserted by Clause 4. Following amendment on Report in the Commons, new Section 12(1) allows the Scottish Ministers to make provision under that section if it,

"would be within the legislative competence of",

the Scottish Parliament,

"if included in an Act of the Scottish Parliament".

Since the digital service is reserved under new Section B3(B) of Schedule 5 to the Scotland Act 1998, as inserted by Clause 3, the order-making power of the Scottish Ministers under the new Section 12 cannot extend to making provision about the digital service. In Clause 6, additional powers are transferred to Scottish Ministers to make provision about the digital service in relation to Scottish parliamentary elections and to local government elections in Scotland, with

the agreement of UK Ministers. Amendment 24 is essentially a technical amendment which arises out of the amendment on Report in the Commons to new Section 12(1).

Amendment 24 agreed.

Amendment 25 not moved.

Clause 4, as amended, agreed.

Clause 5 agreed.

Amendment 26

Moved by ***Lord Forsyth of Drumlean***

26: After Clause 5, insert the following new Clause—

"Interval between elections

The Scottish Parliament may not make provision to extend the interval between ordinary general elections as specified in section 2 of the Scotland Act 1998 (ordinary general elections)."

Lord Forsyth of Drumlean: My Lords, I am conscious of the late hour but I would like to move Amendment 26. As we have already discussed during the course of the evening, there is no second Chamber in the Scottish Parliament. This House has an important constitutional role in preventing the House of Commons from extending its own life. Although the circumstances in which that might happen are hard to consider, it is an important check and balance.

This amendment seeks to make it quite clear that the Scottish Parliament cannot extend the interval between ordinary general elections and therefore prolong its own life under any circumstances. It would have been possible of course to make that subject to the agreement of the Westminster Parliament—the British Parliament—but I think that an absolute prohibition on extending the life is the most appropriate way to proceed. I beg to move.

Lord Keen of Elie: My Lords, I note the reasoning behind the amendment proposed by the noble Lord, Lord Forsyth. At present, Section 2 of the Scotland Act 1998 provides that general elections are to be held every four years. That power is to be devolved to the Scottish Parliament, but it will not be without limitation. The Scottish Parliament cannot pass legislation that is not compliant with the European Convention on Human Rights. Pursuant to Article 3 of the First Protocol to the Convention, there is a requirement for free and fair elections at reasonable intervals. The Smith commission agreement proposes that it should be for the Scottish Parliament to determine those reasonable intervals. We consider that that is appropriate and in accordance with the recommendations of the agreement, which the Bill seeks to implement. In these circumstances, I invite the noble Lord to withdraw his amendment.

Lord Forsyth of Drumlean: I have to say to my noble and learned friend that I do not think that that is a very satisfactory response. There was talk earlier in the evening about a one-party state and the dominance of the Parliament by one party. The precedent is long established that it is not possible for the other place to extend the life of a Parliament. Were it to try to do so, this House has an important role, which would prevent that from happening except in the most exceptional circumstances. Perhaps I have misunderstood what my noble and learned friend said, but he appeared to say that it is a matter for the Scottish Parliament to decide what the timing is between elections, and that cannot be right.

I am not suggesting for a moment that the Scottish Parliament might decide to do this under its current regime and Administration but I rather anticipated in putting down this amendment that my noble and learned friend would tell me that there was some other protection. Frankly, for this Government of all Governments to say that we should rely on the European Convention on Human Rights is ironic—to put it mildly. I hope that my noble friend will at least undertake to give this further consideration before we return to later stages of the Bill.

10.15 pm

Lord McAvoy: My Lords, on this occasion we cannot support the proposal in the amendment of the noble Lord, Lord Forsyth. Elections to the Scottish Parliament will not be able to be held on the same day as the UK general election or a European parliamentary election. Under the Scotland Act 1998, an election must take place on the first Thursday in May in the fourth calendar year. However, Scottish elections are fully devolved matters. When elections are held is a decision for the Scottish Government, other than the restrictions I highlighted. Unfortunately for the noble Lord—

Lord Forsyth of Drumlean: Is the noble Lord really saying that it could possibly be acceptable for a devolved legislature, perhaps dominated by one party, to have the power, having won an election, to decide that the next election would not be for seven years? That would be a completely unacceptable use of the powers of a devolved Administration. Why is he so opposed to having an amendment to the legislation to eliminate that possibility?

Lord McAvoy: My Lords, when you have devolution, you have devolution. The noble Lord poses a potential situation that is totally unrealistic. I do not think it would happen. Any behaviour like that from a devolved Assembly anywhere in the United Kingdom would be punished by that electorate. Devolution is devolution. I do not want to get contentious at this time of night but I think the noble Lord's attitude is coloured by a continuing non-acceptance of the principle of devolution. You cannot devolve power and then try to dictate to that Parliament what to do—it is not feasible. I do not see it happening anywhere in the United Kingdom, through any devolved Assembly.

Lord Forsyth of Drumlean: The noble Lord will recall that we already extended the life of the Scottish Parliament from four to five years, I think on one or even two occasions.

Lord McAvoy: I really do not think that is a fair comparison.

Lord Keen of Elie: I first apologise to the noble Lord, Lord McAvoy. I had not appreciated that he intended to speak in the context of this proposed amendment and intervened too early. For that I apologise.

I will just add that the Smith commission agreement determined, on the basis of the consensus of five political parties, that elections to the Scottish Parliament should be devolved, and that the timing of those elections should be devolved to the Scottish Parliament. We must regard the Smith commission agreement as the product of a responsible negotiation by responsible political parties, and we must regard the Scottish Parliament as a responsible devolved body. We have no right to do otherwise, if I might respectfully say so. Given the existing backstop in terms of convention law pursuant to which, under Article 3 of Protocol 1, there is a requirement for free and fair elections at reasonable intervals, in my submission that appears an appropriate way forward.

On the matter of extending the life of the Parliament, as raised by my noble friend Lord Forsyth, an Order in Council under Section 30 in October 2015 allowed the Scottish Parliament to set the 2016 election at more than four years, extending it to five years. I am not aware of another occasion.

Lord Forsyth of Drumlean: On my noble and learned friend's reference to the European convention, what constitutes a reasonable interval? Would five or six years constitute a reasonable interval?

Lord Keen of Elie: That would be a matter for the Scottish Parliament to determine, and is subject to review. If it gets that wrong, any legislation that it passes is not law, pursuant to Section 29 of the Scotland Act 1998.

Lord Forsyth of Drumlean: I beg leave to withdraw my amendment.

Amendment 26 withdrawn.

Clauses 6 and 7 agreed.

Clause 8: Review of electoral boundaries by the Local Government Boundary Commission for Scotland

Amendment 27

Moved by ***Lord Keen of Elie***

27: Clause 8, page 10, line 33, leave out "In paragraphs 3, 4, 7 to 10, 12 and 14"

Amendment 27 agreed.

Clause 8, as amended, agreed.

Clauses 9 and 10 agreed.

Amendment 28 not moved.

Clause 11: Super-majority requirement for certain legislation

Amendment 29

Tabled by ***Lord McCluskey***

29: Clause 11, page 12, line 5, leave out from "heading" to end of line 6 and insert ", omit "before introduction"."

Lord McCluskey (CB): This is a technical matter, and it is not worth taking up time on it at this time of night. Accordingly, it is not moved.

Amendment 29 not moved.

Amendment 30

Moved by ***Lord Hope of Craighead***

30: Clause 11, page 12, line 9, leave out "decision whether to pass or reject it," and insert "motion that the Bill be passed is debated,"

Lord Hope of Craighead: This is one of a group of amendments running through to Amendment 40. Although Amendments 31 and 32 are not in my name, they duplicate ones that are.

This is another group of amendments that I have taken from the group proposed or suggested by the Scottish Ministers in June this year. The interesting feature of these amendments is that they were tabled on 15 June but were either not called or withdrawn. So they were never considered by the other House, and I thought it right to bring them back so that at least they could be considered in this place and not be lost sight of entirely. Their aim is simply to improve the working of Clause 11, which deals with the supermajority system in the event of certain measures coming before the Scottish Parliament. Reading between the lines, I think what has happened is that draftsmen in Edinburgh have worked through the clause, with their knowledge of how the Scottish Parliament works and in the light of provisions in the relevant parts of the Scotland Act 1998, and made suggestions as to how the clauses could be improved.

Because of the lateness of the hour, I do not want to go through the amendments in any detail. However, the first amendment alters the timing of the decision of the Presiding Officer from the decision that the Bill be passed to putting the Motion. There may be some merit in that alteration of timing. In Clause 11(5), two matters are inserted which are reproduced by Amendments 31 and 32, and which are sufficiently important to be included in the list of protected subject matters. I suggest that there is some merit in those. Clause 11(6) inserts passing without a Division as an event which should have the same status as the passing of a Bill by a two-thirds majority. It is conceivable that that could happen, and it is as well to provide for it. If passed without a Division, there would be a consensus that would meet the broad requirements for a supermajority, ensuring that the Presiding Officer would not have to go through the drill of making a statement in that situation as to whether the provision relates to a protected subject matter.

In Clause 11(10) two situations are inserted which, given what appears above, should not trigger a reference. Importantly, a provision is inserted that would enable the Parliament to take the matter back for further consideration, in which event consideration of the issue by the Supreme Court would not be necessary. That type of treatment is already to be found in Section 36 of the Scotland Act, which deals with stages of Bills. Section 36(4) provides that standing orders shall provide for an opportunity for the reconsideration of a Bill after its passing if the judicial committee decides that a provision would not be within legislative competence. The same mechanism is thought to be appropriate for the supermajority solution. All these amendments are very technical. I do not think there is any political angle to them. There is simply a desire to improve the working of the Bill and to make sure that this rather complicated provision, which I imagine will very rarely, if ever, be triggered, makes proper sense.

I shall make one brief final comment in relation to the position of the noble Lord, Lord Smith of Kelvin, in relation to this Bill. The noble and learned Lord said, if I understood him correctly, that he was of the view that the terms of the Bill meet the requirements of the Smith commission report. I happened to meet the noble Lord on Sunday, and he said that if that is the impression that Ministers have, he has been misunderstood. His attitude is the attitude of a lay man, and he says that, as far as he is concerned, he has not looked at the Bill from the point of view of a lawyer. If there are matters in which it could be improved, given study by lawyers and legislative draftsmen, he is all in favour of it because his aim is to have a Bill that is as good as possible. He authorised me to say that if Ministers doubt my word, they should speak to him directly. I do not think that the noble Lord, Lord Smith, if he were here, would object to these amendments, whatever he may say about the others.

Lord Stephen (LD): I rise to speak to Amendments 31 and 34, which are in my name and that of my noble and learned friend Lord Wallace of Tankerness. This is back to the future, back to the debate we had just a few minutes ago about the extension of the length of the term of the Scottish Parliament. The issue is still grouped with these amendments, and our proposed approach is to include the extension of the term of the Parliament in the list of special majority or supermajority issues, except for what will be the second extension of the term of the Scottish Parliament, which the noble Lord, Lord Forsyth, mentioned earlier. That is happening right here, right now because the proposal is for the term which ran from 2011 to 2016, a five-year term, to be followed by another five-year term from 2016 to 2021.

The Bill in the Scottish Parliament to achieve that extension was introduced on 17 November. It is called the Scottish Elections (Dates) Bill. We believe that to make it clear and to avoid any uncertainty or confusion, that Bill should be excluded from the requirement to have a special majority. Otherwise, we agree with the noble Lord, Lord Forsyth, that this is an important issue. I think there could well be some sort of cap on the number of years for which you can extend. For example, extending by one year is perhaps the maximum that any of us would envisage, but if we have an extension of the term of the Parliament, it seems entirely appropriate that, alongside the other issues listed here, it should be by special majority of the Scottish Parliament.

10.30 pm

Lord Forsyth of Drumlean: Before the noble Lord sits down, could he deal with the reasons why he is not content to rest on the European Convention on Human Rights?

Lord Stephen: I was as interested as the noble Lord, Lord Forsyth, to hear that that was the justification for his amendment being rejected. I would say that he has a case for his amendment, but there have been times when a limited and appropriate extension of the term of the Scottish Parliament has been useful. However, if that happens in future, I do not see why it should not be by a special majority to show that there is solid and widespread support for the proposal from all Members of the Scottish Parliament, or as many as make up a supermajority.

Lord Forsyth of Drumlean: Again, before he sits down, could the noble Lord confirm that it is not because he has always been opposed to devolution that he is taking this view?

Lord Stephen: At this late hour, I am happy to confirm almost anything to the noble Lord.

Lord McCluskey: My Lords, in view of the terms of Amendment 33, I shall not be moving Amendment 32.

Lord Davidson of Glen Clova: My Lords, this has been a brief and helpful debate about the question of the supermajority. We do not oppose the various amendments that have been tabled.

We agree that the amendments tabled by the noble and learned Lord, Lord Hope, are technical and doubtless useful in taking matters forward. It would be useful to know why he is in the position of having to advance notions that the Scottish Government would wish this Chamber to advance. We were hearing not so long ago about the good relations that were breaking out at intergovernmental level, which might suggest that these various amendments would have been brought forward by the Scottish Government to Her Majesty's Government and that, as a result of intergovernmental discussion, one would have been able to achieve some consensus on these points. We look forward to seeing if the improvement in intergovernmental relations takes us that far.

The noble Lord, Lord Stephen, introduces two amendments in relation to parliamentary terms and the supermajority. We support those additions. On the question of the deployment of the European Convention on Human Rights, where the Scottish Government transgress in this regard there will be the protection of the Advocate-General for Scotland raising proceedings before the Supreme Court, but also the Lord Advocate—a Minister of the Scottish Government, as I have already alluded to—as well as the Attorney-General. We certainly do not oppose these amendments; we support them.

Lord Keen of Elie: I am obliged to noble Lords. Clearly I cannot comment on any dialogue that the noble and learned Lord, Lord Hope, has had recently with the noble Lord, Lord Smith. I merely observe that there is a distinction between improving the Bill in order to implement the Smith commission agreement and, on the other hand, extending the Bill so that it goes beyond the terms of the agreement, or in fact retreating so that the Bill does not implement it. We would of course be happy to pursue further dialogue ourselves with the noble Lord, Lord Smith, if he felt that that would be useful.

These amendments seem to fall into two broad categories: on the one hand, amendments to the current clauses that are intended to improve the drafting of the Bill, and, on the other, a second theme extending the scope of the supermajority clause to matters that were not included in the Smith commission agreement. I shall deal with these in turn. I turn first to those amendments put forward as a means of improving the operation of Clause 11 as and when it is implemented. Amendment 35 would allow for a Bill to be passed without a Division. Our considered position is that a Division is the most straightforward way of verifying that a two-thirds majority in the Scottish Parliament has been achieved. For this reason, we cannot agree with the proposal in Amendment 35, which provides for a Bill to be passed by consensus.

In addition, we do not agree with the proposal in Amendment 39 that the Scottish Parliament should be able to "reconsider" a Bill if the Presiding Officer decides that a supermajority is required and the Supreme Court later affirms this. Nor do we agree with Amendment 40, which appears to provide that the Scottish Parliament should be able to reconsider a Bill if the Presiding Officer decides that a supermajority is required and the Bill receives only a simple majority. We consider that in both these situations there should be careful consideration and no short-cut to a final vote which requires the supermajority in the context of such legislation.

While we agree with the rationale behind Amendments 30 and 38 and parts of Amendments 37 and 40, we believe that the Bill as drafted provides for these considerations and that therefore such amendment is unnecessary. We would of course be happy to discuss this further with the proposers of the amendments.

I will address those amendments which seek to extend the scope of the supermajority provision, particularly Amendments 31 and 33, and I think a part of Amendment 34. Amendments 31, 33 and 34 seek to ensure that legislation brought forward by the Scottish Parliament concerning the period of time between ordinary general elections to the Scottish Parliament should also be covered by the requirement for a two-thirds majority. The second part of Amendment 33 seeks to ensure that Bills concerning the alteration of boundaries of constituencies, regions or any equivalent electoral area for the Scottish Parliament should also be covered by the two-thirds majority. The simple response of the Government is that the Smith commission agreement specifically outlined the subject matter, which it considered should be subject to the supermajority requirement. It did not propose that legislation concerning the term length of the Scottish Parliament, the date of any Scottish Parliament elections or the alteration of boundaries should be subject to a two-thirds majority of the Scottish Parliament. In these circumstances, we would not be content with the proposed amendments. I therefore invite the noble and learned Lord to withdraw his amendment.

Lord Hope of Craighead: My Lords, I beg leave to withdraw the amendment in view of the points that have been made by the noble and learned Lord.

Amendment 30 withdrawn.

Amendments 31 to 35 not moved.

Amendment 36

Moved by ***Lord Forsyth of Drumlean***

36: Clause 11, page 12, line 29, leave out from "unless" to end of line 31 and insert ", having been approved at the final stage by the Scottish Parliament, it is then approved by a resolution of each House of the Parliament of the United Kingdom"

Lord Forsyth of Drumlean: My Lords, the hour is late, but I will say just a few words in respect of this amendment, which, basically, ensures that changes to the franchise, the constituencies and the number of MSPs—which under the provisions of the Bill require a two-thirds majority—have also to be approved at Westminster. I am not a great believer in opinion polls; as we discovered at the general election, they can be quite wrong. However, it is not inconceivable that two-thirds of the Scottish Parliament at the forthcoming elections could be composed of people who believe that Scotland would be better off independent. If that were to happen, and this Parliament, which is the United Kingdom Parliament, had created circumstances in which it was possible for fundamental changes to be made to the franchise, the constituencies and the number of MSPs, that would be a matter of very considerable concern. Personally, I do not like the idea of two-thirds supermajorities; it is an unfortunate intrusion into our constitutional affairs. It has knock-on implications for other devolved institutions and for Westminster, but of course the Smith commission has recommended it, so it would appear that we have to go along with it. The amendment would provide a belt-and-braces safeguard to ensure that key issues such as the franchise, the constituencies and the number of MSPs were approved at Westminster, having also had a two-thirds majority in the Scottish Parliament. I beg to move.

Lord Keen of Elie: My Lords, Clause 11 requires certain types of electoral legislation to be passed by a two-thirds majority, or supermajority, of the Scottish Parliament. Paragraph 27 of the Smith commission agreement states in terms that this is:

"To provide an adequate check on Scottish Parliament legislation",

in these areas. An "adequate check" was the consensus of the five political parties which took part in the Smith commission and which arrived at the Smith Commission agreement.

The Government consider that the supermajority requirement provides an appropriate check on this type of Scottish Parliament legislation. Indeed, to approve this amendment would be to give with one hand and then take away with the other so far as the Scottish Parliament is concerned. It would not be in accordance with the spirit of the Smith commission agreement, let alone with the terms of paragraph 27. In these circumstances, I urge my noble friend to withdraw his amendment.

Lord Forsyth of Drumlean: My noble and learned friend's only argument has been, once again, to rest on the Smith commission. He keeps saying that it had the support of all five political parties. I am not aware of the members of the Conservative Party being consulted at all on the Smith commission proposals; nor am I aware of any discussion on those matters in the other place or in this place. What happened was that people nominated by the political parties got together and produced a report. It really is quite misleading to keep saying that this was endorsed by all the political parties. That may have been true of the Liberal Democrats or other parties but it certainly was not true of the Conservative Party. Furthermore, this was all done at an enormous pace—it was all agreed in eight weeks. As we have heard from the noble and learned Lord, Lord Hope, the noble Lord, Lord Smith, himself has not sought to argue that he has endorsed this Bill in terms of the provisions of the Smith commission.

Lord Hope of Craighead: The noble Lord said that he is not to be taken as approving the precise terms of the Bill as a lawyer. He is not a lawyer. He emphasised that he is a layman, and he speaks as a layman when he endorses what is in the Bill. If it were possible to find ways in which the Bill could be improved in relation to constitutional principles or whatever else, he would be in favour of that because that is not his field and he is aware that there could be room for improvement in those areas. What he emphasised was, "Don't confuse me with a lawyer. I am a layman and I give it support as a layman". However, if there were respectable arguments from lawyers, he would give way to them and improve the Bill if that was a way of making better progress.

Lord Forsyth of Drumlean: I am most grateful to the noble and learned Lord for making that clarification. It is important that effective checks are in place. This whole process has been carried out swiftly and without much in the way of discussion either among the membership of the political parties or indeed within the House of Commons. Although four days were allocated to Committee, many of these issues were not considered because of the process by which amendments are dealt with. However, I can sense that folk do not wish me to detain the Committee on this matter and there will be further opportunities to come back to it, so I beg leave to withdraw the amendment.

Amendment 36 withdrawn.

Amendments 37 to 40 not moved.

Clause 11 agreed.

Clause 12: Scope to modify the Scotland Act 1998

Amendment 41

Tabled by ***Lord Hope of Craighead***

41: Clause 12, page 14, line 6, at end insert—

"( ) In paragraph 1(2)(f) of Schedule 4 (protection of Scotland Act 1998 from modification), after "Human Rights Act 1998" insert "except the Convention rights set out in Schedule 1 to that Act"."

Lord Hope of Craighead: My Lords, I do not propose to develop this amendment. Without going into the reasons for it, it arose in relation to the Sewel convention. I would have developed the point more fully if there had been time to explain why, but, in view of the lateness of the hour and the fact that we have already discussed the particular aspects of the Sewel convention that we sought to explain more fully, I think the best thing for me to do is not to move the amendment.

Amendment 41 not moved.

Clause 12 agreed.

Amendment 42 not moved.

House resumed.

Cities and Local Government Devolution Bill

Message from the Commons

The Bill was returned from the Commons with amendments and with a privilege amendment. It was ordered that the amendments be printed.

European Union Referendum Bill

Message from the Commons

The Bill was returned from the Commons with certain of the Lords amendments agreed to and with the remaining amendment disagreed to, with a reason. The Commons reason was ordered to be printed.

House adjourned at 10.46 pm.

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