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PARLIAMENTARY DEBATES  
(HANSARD)

HOUSE OF LORDS  
OFFICIAL REPORT

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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

*Wednesday 24 February 2016*

3 pm

*Prayers—read by the Lord Bishop of Bristol.*

### Pensions: British Citizens Overseas

#### *Question*

3.07 pm

*Asked by Baroness Benjamin*

To ask Her Majesty's Government what assessment they have made of the impact of the frozen pensions policy on the choices of people who would like to move abroad or stay overseas during their retirement years.

**The Minister of State, Department for Work and Pensions (Baroness Altmann) (Con):** My Lords, the Government have a clear position which has remained consistent for around 70 years: UK state pensions are payable worldwide and uprated abroad only where we have a legal requirement to do so. The Government have made no assessment of the impact of this policy on pensioners' choices of residence.

**Baroness Benjamin (LD):** My Lords, I thank the Minister for that Answer. Last November, the right honourable Oliver Letwin met with an international consortium of British pensioners and the chair of the All-Party Group on Frozen British Pensions and he committed that the Government would examine the case for partial uprating by commissioning cross-departmental research into the likely costs and savings—which was great news. Will the Minister please give an update on that work? Will we see the outcome before the Government bring in partial uprating regulations that freeze overseas pensions yet again for another year, continuing this injustice?

**Baroness Altmann:** My Lords, the Department for Work and Pensions has not made any estimates of the costs of this uprating. External sources have suggested that the costs of partial uprating are estimated at around £200 million a year by 2020.

**Baroness Hooper (Con):** My Lords, can my noble friend tell us what will happen to the some 400,000 pensioners living in European Union countries should the UK vote to leave the European Union? Will their pensions be frozen, either partially or totally?

**Baroness Altmann:** The issue of what will happen if this country leaves the European Union has not yet been decided, but if there are reciprocal agreements and legal obligations to uprate, pensions will be uprated.

**Lord Morris of Handsworth (Lab):** My Lords, will the Minister assure the House that those members of the Gurkha regiment who are entitled to a pension are in receipt of their entitlement?

**Baroness Altmann:** My Lords, I have no information at this point on specific measures for the Gurkhas, but I will write to the noble Lord on that matter.

**Lord Swinfen (Con):** My Lords, what is the estimated saving to Her Majesty's Government of pensioners living abroad not using the National Health Service and other government services?

**Baroness Altmann:** The speculated potential savings, were people to move back to this country, have not been costed, but the costs of full uprating for the state pension in countries where it is currently not uprated would be more than £500 million a year.

**Baroness Smith of Basildon (Lab):** My Lords, because of accelerated equalisation, many women who had, "made careful financial plans to ensure their small savings could last them until state pension age ... now find that they will be left for up to two years with nothing to live on - despite doing what the Government urges everyone to do and plan ahead for their future".

Those are not my words. Does the Minister still agree with the comments that I took off her personal website today, and can she tell the House what she and other Ministers are doing to alleviate that situation?

**Baroness Altmann:** My Lords, the maximum increase that any woman will face as a result of the 2011 Act changes was reduced from two years to 18 months.

**Lord Howell of Guildford (Con):** My Lords, I see that the International Consortium of British Pensioners estimates the partial uprating—uprating from the present rates received—as £31.5 million. The Minister just gave a figure of £200 million. Can she explain the difference between the two?

**Baroness Altmann:** The figures that I have been given from outside estimates are that the cost would be around £200 million a year by 2020. It is possible that the noble Lord is citing something for one year only.

**Lord Harris of Haringey (Lab):** My Lords, I do not think that the Minister has fully answered two questions that have been put to her. The first was by the noble Baroness, Lady Benjamin, who specifically asked about a commitment made on behalf of the Government by Oliver Letwin. Will she tell us the status of that commitment now? The second question was from my noble friend the Leader of the Opposition, who specifically asked about statements on the Minister's own personal website. Does she resile from the statements on her own website?

**Baroness Altmann:** I have no information about any work that is going on in other departments. I can only report that in the Department for Work and Pensions no estimates are being made about the costs of uprating frozen pensions.

**Baroness Gardner of Parkes (Con):** Is the Minister able to tell us how many countries pay from their own funds? For example, I understand that Australia ups the pension of anyone from the UK living in Australia, and the Australian people pay whatever would have been the extra. I think the same thing applies in the United States. Can she tell us how many countries adopt that policy and also say whether there has been any estimate of what it would cost if all those pensioners living overseas came back and used everything here instead of abroad?

**Baroness Altmann:** My noble friend referred to Australia, which is an interesting example of one of the potential issues with uprating. The Australian pension system is means tested. Therefore, the estimate is that over 25% of any payment made to uprate overseas state pensions in Australia would merely go to the Australian Treasury.

**Lord Kinnoch (Lab):** “Three times for a Welshman”, my Lords. May I ask for a third time: does the Minister resile from the statements that she made on her own website?

**Baroness Altmann:** My Lords, the statement on my website referred to the position before the 2011 Act when women were facing up to two extra years. That was brought down during the 2011 Act to 18 months.

## National Health Service: Workforce Race Equality Standard

### Question

3.13 pm

Asked by **Baroness Hussein-Ece**

To ask Her Majesty's Government what progress has been made to improve race equality at senior management and board level in the National Health Service since the introduction of the National Health Service Workforce Race Equality Standard.

**The Parliamentary Under-Secretary of State, Department of Health (Lord Prior of Brampton) (Con):** My Lords, It is outrageous that we have so few people from BME backgrounds in senior management and on NHS boards. We need to take action to improve the experiences of BME staff and their representation.

NHS trusts submitted their baseline data against the workforce race equality standard indicators in July 2015, and NHS England will publish an analysis of those data in April. Reports will then be published annually, outlining the progress that NHS organisations are making.

**Baroness Hussein-Ece (LD):** I thank the noble Lord for that reply. Can he say why, since the report by Roger Kline on the, “snowy white peaks of the NHS”, progress in ensuring that senior management and trust boards are more equal has been so disappointing? It does not reflect the diverse workforce and local

populations. Will he ensure that trusts walk the walk and use NHS Executive Search rather than commercial recruitment agencies which all too often, apart from a few exceptions, present all-white shortlists, normally with no people with disabilities, drawn from a very narrow pool for senior positions at enormous financial cost to the health service?

**Lord Prior of Brampton:** My Lords, I shall give the House a few figures. Some 22% of all staff in the NHS are from BME or minority ethnic backgrounds, 28% of all doctors and 40% of hospital doctors. Yet only 3% of medical directors are from BME backgrounds and 7% are in senior management roles. We have two chief executives and six chairmen from BME backgrounds out of 250 trusts. So the performance across the NHS is, as the noble Baroness has mentioned, absolutely terrible and we have to take some serious action to change it. The noble Baroness has given one example but I think that there are many others. The NHS workforce race equality standard is a new initiative which, by introducing some transparency into the health service, will improve matters.

**Lord Patel of Bradford (Lab):** My Lords, I congratulate the noble Lord because I know that, as chair of the WRES committee, he is very committed to this issue. But does he agree that the targets set will be incredibly difficult to meet in the space of a couple of years? It will mean making changes to tackle the huge inequality that has existed in the NHS for a number of years. I suggest that one way of achieving this is to ask CQC inspectors, when they carry out their inspections, to target specifically the WRES and look for action plans that show improvement year on year. If the improvement is not there, no trust should be getting a “good” on the CQC’s well-led domain without addressing this specific issue.

**Lord Prior of Brampton:** My Lords, the whole purpose of the WRES is to shine a light on the performance of each trust in the country. The CQC will be including it in its well-led domain from March of this year and has already begun to incorporate it into its inspection processes. As the noble Lord knows, in Bradford where he is the chairman of a trust, we have a huge amount of progress to make.

**Baroness Walmsley (LD):** My Lords, what is being done to ensure fair career progression further down the ladder? Unless we get people moving up, we will never have BME medical directors. Further, is he prepared to comment on diversity among the personnel in the recruitment agencies themselves that work for the NHS?

**Lord Prior of Brampton:** My Lords, the noble Baroness makes a good point. In a way the WRES focuses very much on the more senior grades in the NHS, but we need to focus on progression from band 4 into 5 and 6 as well. It is an important point that needs to be taken on board. As far as recruitment is concerned, it is very important that we have people from BME backgrounds on the recruitment panels. Getting the

right people is crucial, and if that means going to external recruitment agencies when we have to, we should not rule that out.

**Lord Tebbit (Con):** My Lords, can my noble friend say whether or not appointments in the National Health Service will continue to be made on the basis of the ability to undertake the duties of that post?

**Lord Prior of Brampton:** My Lords, the ability to undertake the duties of a post is absolutely fundamental. The tragedy is that so few people from BME backgrounds are encouraged to put their names forward. It is more important that we get the actual recruitment process right.

**Lord Hunt of Kings Heath (Lab):** My Lords, the Minister should be commended on his approach to this issue. Has he seen the survey undertaken in 2015 which shows that when looking at the national bodies of the NHS such as NHS Executive Search, Monitor and the NHS Trust Development Authority, none of their boards had any BME representation at all? Given that those appointments are made by Ministers, can the Minister tell us what they are doing to rectify that?

**Lord Prior of Brampton:** My Lords, I am not sure that the noble Lord is quite right. I can certainly think of two people from BME backgrounds on the board of NHS England. We can influence this, but it is important that the appointment process is independent of political bias. We have to rely on the chairs and the boards of these arm's-length bodies to make those appointments.

**The Earl of Listowel (CB):** My Lords, I am stretching the point rather, but given the increasing awareness that not only the education needs but the health needs of looked-after children and care leavers have been neglected in the past, might the Minister consider looking at how many care leavers and care-experienced adults are represented at senior levels of governance in the health service to ensure that these young people and adults get better support in the future?

**Lord Prior of Brampton:** I think we are probably straying quite a long way from the Question, but I will certainly consider what the noble Earl said.

**Baroness Howells of St Davids (Lab):** My Lords, I would like to put this on record so that some of the answers to the Question do not keep coming up. No self-respecting person, black or white, will accept a job that they are not capable of. No person who served the National Health Service from any Caribbean country has ever been sacked because of lack of ability. They have suffered racism, but they contributed immeasurably in the days when there were very few white people entering the service. When the Queen gave out her medals to mark the 60th year of her reign, the black community was left out. I appealed on their behalf and they were given medals. There were articles in the newspapers that showed that most of the women who went into the health service as nurses were overqualified.

**Lord Prior of Brampton:** My Lords, I agree entirely with the noble Baroness's sentiments. If it was not for the huge number of people with black and minority ethnic backgrounds, the NHS would fall over tomorrow.

## Sport: Doping and Illegal Gambling Question

3.22 pm

*Asked by Lord Addington*

To ask Her Majesty's Government what steps they are taking to protect the integrity of sporting events from both doping and illegal gambling domestically and internationally.

**The Earl of Courtown (Con):** My Lords, the Government are fully committed to protecting the integrity of sporting events at all levels. This was reflected in the Government's recently published sport strategy. By working closely with bodies such as UK Anti-Doping and the Gambling Commission, not only are we taking steps to protect integrity within the United Kingdom, we are playing our part in tackling these threats through co-ordinated international efforts.

**Lord Addington (LD):** I thank the noble Earl for that Answer. Will he give me a commitment that, in the light of the recent sports policy, which suggests that the whole of government should come behind sport, all the British sporting bodies, particularly those that receive government funds, will make sure that they internally have the highest levels of integrity possible? Without a good example, our hand to correct these problems in the wider world will be greatly weakened.

**The Earl of Courtown:** My Lords, the noble Lord makes a very good point, but, through the different sport groups' respective international federations, our national governing bodies of sport are required to be compliant with the *World Anti-Doping Code*. In addition, UK Anti-Doping is responsible for ensuring that all the UK governing bodies are compliant with the code and Her Majesty's Government's national anti-doping policy.

**Lord Stevenson of Balmacara (Lab):** My Lords, cheating, by whatever means, has no place in sport, partly because the casualties are mainly the clean sportsmen and sportswomen. Cheating is inimical to the very essence of sport and its philosophy of team spirit, honesty and loyalty. However, cheating is not illegal in the UK. Why is this the case? Last year the Government said that they would consider and review the situation. What is the current position?

**The Earl of Courtown:** My Lords, the noble Lord refers to criminalisation of doping in sport. As he mentioned, a review has been in progress and it has just been finally put together. One must also remember, however, that criminalisation of doping is not a panacea

[THE EARL OF COURTOWN]

that will suddenly make all doping disappear. The noble Lord will no doubt be aware that France, for example, where criminalisation does take place, is on the watch list of countries that have had problems in the past.

**Lord Holmes of Richmond (Con):** Does my noble friend agree that UK Anti-Doping is doing excellent work to ensure that the Great British teams that compete in this summer's Olympic and Paralympic Games in Rio will be not just successful teams but clean teams?

**The Earl of Courtown:** My Lords, I could not agree more. My noble friend makes a very good point. UK Anti-Doping's "100% me" education programme has just celebrated its 10th anniversary. This has had workshops tailored to each stage of an athlete's pathway, right from grass roots up to the top professional level.

**Lord Foster of Bath (LD):** My Lords, our country's *Sport and Sports Betting Integrity Action Plan* calls for international co-operation. Only last night, Transparency International published its excellent report, *Global Corruption Report: Sport*. Among its many recommendations, it says that one way forward would be for countries to sign up to the Council of Europe's Convention on the Manipulation of Sports Competitions. Many other European countries have already signed. Will the Minister explain why this country has not and when it is likely to do so?

**The Earl of Courtown:** My Lords, I am grateful to the noble Lord for raising this point. Her Majesty's Government are committed to combating match fixing. The recently published sports strategy set this out. We will sign and ratify the Council of Europe's match-fixing convention and, in so doing, will review the existing legislation framework. My right honourable friend the Prime Minister is hosting an international anti-corruption summit later this year, at which sport will play a key part.

**Lord Naseby (Con):** Is my noble friend aware that many of the leading clubs in the United Kingdom, such as the All England club for tennis and the MCC for cricket—I declare a hurried interest in both—have worked on this for years and continue to do so, but the change in the market is the increase in betting on specific, very short-term instances? Has the time not come for Her Majesty's Government to call in the betting industry to make sure that these are absolutely genuine bets and not, frankly, fixed bets?

**The Earl of Courtown:** My Lords, my noble friend makes a good point, especially relating to gambling. We keep this situation under continual review. There have been questions over whether Section 42 of the Gambling Act is sufficient for our needs. A review by the last Government found it to be effective. Only two months ago, somebody was prosecuted under Section 42.

**Lord Lea of Crondall (Lab):** My Lords, is it not obvious that this is a global question that needs a solution on a global basis by some sort of global regulatory body?

**The Earl of Courtown:** My Lords, there is a global body: WADA. The noble Lord will be very glad to hear that it pays a lot of attention to what we do over here.

**Lord Smith of Hindhead (Con):** My Lords, the illegal gambling industry was estimated in 2013 to be worth upwards of £320 billion worldwide. Last year, receipts to Her Majesty's Treasury from betting and gaming in the UK just exceeded £2 billion. Has an estimate ever been made of how much revenue is lost to the Treasury each year from illegal gambling in the UK?

**The Earl of Courtown:** My noble friend makes a very good point relating to illegal gambling. I missed the first part of his question, but I will write to him about the second part, in particular, because I do not have that information to hand.

## Local Authorities: Fossil Fuel Holdings *Question*

3.29 pm

*Asked by Baroness Miller of Chilthorne Domer*

To ask Her Majesty's Government why on 17 February they changed the guidance to local authorities regarding procurement of, and investment in, fossil fuel holdings.

**The Parliamentary Under-Secretary of State, Department for Communities and Local Government (Baroness Williams of Trafford) (Con):** My Lords, on 17 February the Government published new procurement guidance for public authorities reminding them of the existing policy that has been in place for many years under successive Governments. The guidance makes it clear that boycotts in public procurement are inappropriate, other than where formal legal sanctions, embargoes and restrictions have been put in place by the UK Government. It does not mention procurement of, or investment in, fossil fuels or any other specific type of holding. Guidance on local government pension investments is a separate matter. The Government will be issuing guidance in due course on social, environmental and ethical considerations in council pension investment decisions.

**Baroness Miller of Chilthorne Domer (LD):** I thank the Minister for making that plain, but the diktat—or should I say the reminder?—from the Cabinet Office on 17 February has made local authorities very nervous about the new regulations coming into force. Will she champion the role of local democracy in investment and confirm that—subject to the administering authorities publishing their social, environmental and corporate governance policies, and subject to a decent

return on investment for the people whose pensions they are responsible for—they will be free to divest or invest as they see fit?

**Baroness Williams of Trafford:** My Lords, there may have been some confusion in the press over the difference between the pension investment guidance and the procurement guidance. There will shortly be guidance on pension investment, but I think what has made local authorities slightly uneasy is the slight confusion in the press. On divestment from pension funds, it is the first duty of a pension fund to provide the best returns for investors, as I said yesterday at the Dispatch Box.

**Lord Beecham (Lab):** My Lords, is the Minister aware that the Government have long since abandoned their pretensions to be the greenest Government ever? What business do a Government of self-proclaimed localists—for whom ethics appears to be a county in the south-east of England—have in instructing local authorities or their pension funds as to what fuel they should buy or invest in? Is there any area of local government responsibility that they are prepared to leave to the discretion of democratically elected councils?

**Baroness Williams of Trafford:** My Lords, this is subject to consultation. The Government are not directing local authorities to do anything other than maximise the returns on investments and provide best value from procurement.

**Baroness Jones of Moulsecoomb (GP):** My Lords, is the Minister aware that, in the past five years, the value of four of the biggest coal companies in the United States has fallen by 99.6% and that many firms have gone out of business? Is it perhaps time for the Government to give local authorities constructive advice on how to divest themselves of fossil fuel holdings that could well crash in the next few years?

**Baroness Williams of Trafford:** My Lords, at the risk of repeating myself—I have said this several times over the last couple of days—if a local authority invests in a company whose share price is dropping significantly, it might be wise, in order to maximise the return for its investors, to invest in another company whose share price is increasing. That is a decision for it to make about its pension funds.

**Baroness Kramer (LD):** My Lords, is the Minister aware that many pension funds regard it as their responsibility to have the best long-term returns, and therefore see sustainability of investments as absolutely key? She seems to be recommending that they go with short-term behaviour in the marketplace—behaviour that the Chancellor is frantically trying to change and which responsible pension funds have long since rejected, which is why many have ethical standards in their investment decisions.

**Baroness Williams of Trafford:** My Lords, local authorities should make decisions based on long-term and short-term investments in their portfolio and should keep an eye on both to ensure the best performance of those pension funds.

**Lord Lawson of Blaby (Con):** My Lords, may I thank my noble friend for saying quite clearly that trustees of pension funds have a single duty, which is to do what is best for the pensioners for whom they are responsible? The political considerations paraded today are neither here nor there. This is a complicated issue and scene, and it is for the pension fund trustees to do what is best for their pensioners.

**Baroness Williams of Trafford:** My noble friend is absolutely right. I am glad that he said it is complicated because, as a humble junior Minister, I find it quite complicated. Maximising the returns for the investors is the prime responsibility of any pension fund.

**Baroness Janke (LD):** My Lords, is the Minister aware that many local authorities, while getting a good return on pension funds, disinvest from industries such as the tobacco industry where they have policies on pursuing smoking cessation and good health, which smoking clearly threatens? If she is clarifying what she says is a confusing situation, will she make it clear what counts as being political? Is it investing in renewables? Is it disinvesting from tobacco? Is it in fact obeying government instructions, or is the local authority given some licence to make its own judgments?

**Baroness Williams of Trafford:** My Lords, what is confusing is to confuse the issue of procurement with that of pension fund investment. I think that is where the confusion started. It has not been helped by the media. That is why I was trying to clarify the two aspects of the Question. Local authorities will have all sorts of things to consider when making their pension investments. They will have an obligation to public health. They will have an obligation to help people cut down on excessive alcohol consumption, take more exercise, use less petrol and perhaps walk their children to school, but that does not take away from the prime purpose for which pension funds are designed, which is to maximise the returns for their investors.

**Baroness McIntosh of Pickering (Con):** My Lords, does my noble friend agree that nothing could be less complicated but more important than maintaining the beauty of North Yorkshire, including the moors, for future generations to enjoy? Should it not be for the people of North Yorkshire, rather than pension funds based in London, to decide on the future of that beautiful county?

**Baroness Williams of Trafford:** My Lords, the people of North Yorkshire elect the local authorities of North Yorkshire, which will then make decisions on the pension funds of North Yorkshire. Actually, from start to finish, it is a democratic process.

## European Union Referendum (Conduct) Regulations 2016 *Motion to Approve*

3.37 pm

*Moved by Lord Bridges of Headley*

That the draft regulations laid before the House on 25 January be approved.

*Relevant document: 24th Report from the Secondary Legislation Scrutiny Committee. Considered in Grand Committee on 22 February.*

*Motion agreed.*

**National Assembly for Wales  
(Representation of the People)  
(Amendment) Order 2016**

**Police and Crime Commissioner Elections  
(Amendment) Order 2016**

**National Assembly for Wales  
(Representation of the People)  
(Amendment) (No. 2) Order 2016**  
*Motions to Approve*

3.37 pm

*Moved by Baroness Chisholm of Owlpen*

That the draft orders laid before the House on 17 December 2015 and 27 January be approved.

*Considered in Grand Committee on 22 February.*

*Motions agreed.*

**Pharmacy (Premises Standards,  
Information Obligations, etc.) Order 2016**  
*Motion to Approve*

3.37 pm

*Moved by Lord Prior of Brampton*

That the draft order laid before the House on 21 January be approved.

*Considered in Grand Committee on 22 February.*

*Motion agreed.*

**State Pension (Amendment) Regulations  
2016**

**Social Security Benefits Up-rating Order  
2016**

*Motions to Approve*

3.38 pm

*Moved by Baroness Altmann*

That the draft regulations and draft order laid before the House on 18 and 25 January be approved.

*Considered in Grand Committee on 22 February.*

*Motions agreed.*

**Scotland's Fiscal Framework  
Statement**

3.38 pm

**The Parliamentary Under-Secretary of State, Scotland Office (Lord Dunlop) (Con):** My Lords, with the leave of the House I will now repeat a Statement made in the other place by my right honourable friend the Secretary of State for Scotland. The Statement is as follows.

“Mr Speaker, with permission I would like to make a Statement about the new fiscal framework for Scotland, which was agreed yesterday by the United Kingdom and Scottish Governments.

I begin by paying tribute to everyone who has worked so hard to arrive at this point: my right honourable friend the Chief Secretary and the Deputy First Minister, John Swinney, who have led these negotiations with skill, and the dedicated teams of officials from Her Majesty's Treasury and the Scottish Government who have worked tirelessly on behalf of their respective Governments. They can all be proud of what has been achieved and the service they have given.

This is a truly historic deal that will pave the way for the Scottish Parliament to become one of the most powerful and accountable devolved parliaments in the world. We have respected all the principles set out in the cross-party Smith agreement and delivered a deal that is fair for Scotland and fair for the whole United Kingdom. As the noble Lord, Lord Smith, himself said yesterday evening:

“When the Smith Agreement was passed to the Prime Minister and First Minister, both gave their word that they would deliver it into law - they have met that promise in full”.

Scotland's two Governments will give more details in the coming days, but I would like to set out a few key elements of the deal.

The Scottish Government will retain all the revenue from the taxes that are being devolved or assigned, including around £12 billion of income tax and around £5 billion of VAT. The block grant to the Scottish Government will be adjusted to reflect the devolution and assignment of further taxes and the devolution of further spending responsibilities. We have kept our commitment to retain the Barnett formula, extending this to cover areas of devolved welfare. For tax, we will use the UK Government's preferred funding model. Under this model, the Scottish Government hold all Scotland-specific risks in relation to devolved and assigned taxes, just like they do for devolved spending under the Barnett formula. That is fair to Scotland and fair to the rest of the UK.

However, for a transitional period covering the next Scottish Parliament, the Governments have agreed to share these Scotland-specific risks as the powers are implemented. Specifically, the Scottish Government will hold the economic risks while the UK Government will hold the population risks. So the Scottish Government will not receive a penny less than Barnett funding over the course of the spending review simply due to different population growth. By the end of 2021, a review of the framework will be informed by an independent report so that we can ensure we are continuing to deliver

Smith in full, with the Scottish Government responsible for the full range of opportunities and risks associated with their new responsibilities.

We have also agreed that the Scottish Government will have additional new borrowing powers. This will ensure that the Scottish Government can manage their budget effectively and invest up to £3 billion in vital infrastructure. In line with the recommendation of the Smith agreement, we will provide the Scottish Government with a £200 million share to set up the new powers that they will control.

The Government have delivered more powers to the Scottish people, ensuring that they will have one of the most powerful devolved parliaments in the world and the economic and national security that comes with being part of our United Kingdom. That is what we have agreed and what we have delivered in full. Now that we have agreed this historic devolution deal, the conversation must move on to how these new powers are to be used.

The Scottish Government will have extensive powers over tax, welfare and spending. They will have control over income tax and be able to change the rates and thresholds. They will be able to create new benefits. The permanence of the Scottish Parliament is also put beyond any doubt.

The people of Scotland voted for these new powers and deserve to hear how parties in Scotland will use them—new powers that, if used well, can grow Scotland's economy and population, and bring greater opportunity and prosperity. Now that we have agreed this fiscal framework, I hope and trust that this House and the other place will welcome it while of course subjecting it to full scrutiny. I commend this Statement to the House”.

3.43 pm

**Lord McAvoy (Lab):** My Lords, I thank the Minister for repeating the Statement on the fiscal framework and for the pivotal role that he has played in bringing about yesterday's arrangement. First, we welcome unequivocally the news that an agreement has been reached on the fiscal framework. Thanks should rightly be extended to both Governments, the Deputy First Minister, the Chief Secretary to the Treasury and the Secretary of State for Scotland, as well as for a late intervention by the Chancellor. We congratulate and thank them all on working so hard to secure an arrangement, along with the officials of both Governments.

Yesterday's agreement marks the removal of the final obstacle to the transfer of significant and substantial new powers to Scotland. As the Minister has already indicated, the noble Lord, Lord Smith, has said that the agreement,

“sees the recommendations of the Smith Commission delivered in full”.

In his Statement, the Secretary of State committed himself to publishing details of the agreement by the end of the week. Given that your Lordships' House will be debating the fiscal and welfare elements of the Scotland Bill on Monday, we very much welcome this commitment. On that point, can the Minister briefly say whether he has an update on whether Committee rules will be applied for the final day on Report, as was suggested in Committee on Monday?

My honourable friend the shadow Secretary of State has, from the outset, called for greater transparency on the way these deals are negotiated. What this process highlights is that future intergovernmental relationships must be improved to make these powers work for Scotland. We all know that the major stumbling block was the indexation method used for the block grant adjustment. Under the compromise reached, there will be a five-year transitional period, which will cover the full term of a Scottish Parliament. Towards the end of this period, an independent review and recommendation will be published that will form the basis of a more permanent solution. We all hope and demand that agreement is reached. We would also welcome any further clarity that the Minister can provide on the transitional period. The Secretary of State has said that the new income tax powers will be available by April 2017, but the Deputy First Minister seems to have cast some doubt on that.

In the remainder of my reply, I will focus on the review. I welcome the fact that it will be fully independent, but can the Minister answer some very specific questions at this stage? How will the review body be chosen? Can he confirm that it will be done in a spirit of consensus with the full agreement of both Governments? What criteria will be used to determine its independence? This independent review is a guarantor for the United Kingdom and Scotland of the fairness of the final agreement and should assuage any doubts or problems about accepting it.

I close by saying once again how welcome this agreement is, and I hope that Monday will give us an opportunity to look at the issues in more detail. The priority for us now is to facilitate the passage of the Scotland Bill. It will be a historic date, and I believe it is now up to your Lordships' House to deliver the Scotland Bill without delay.

**Lord Stephen (LD):** My Lords, I thank the Minister for his Statement. It is certainly very good news that an agreement has been reached between the UK Government and Scottish Government on the fiscal framework. This agreement should allow the Scotland Bill to reach the statute book ahead of the Scottish Parliament elections and will introduce a very powerful range of new policy-making and tax powers to Scotland, which have been long supported by the Liberal Democrats on the journey to home rule. All of this delivers on the vow made by the UK party leaders and implements in full the recommendations of the all-party Smith commission.

However, I am sure there will be concern from all sides of this Chamber that we have not yet seen the full, detailed fiscal framework. Some of the arguments from the negotiations—which were of course all conducted very firmly behind closed doors, underneath the veil of secrecy—are still being repeated, most notably by the Scottish First Minister and others on her side of the argument. Nicola Sturgeon claims to have been fighting to defend the Scottish Government from cuts over a five-year period—first, she said of £10 billion, then £7 billion, then £3 billion and then, finally, £2.5 billion. She now claims that this threat—we will never know how real and present a threat it ever was—no longer exists.

[LORD STEPHEN]

What is certain is that under an independent Scotland, or if there was full fiscal autonomy, the cuts that Scotland would now be facing would be £10 billion—not over a five-year period, but each and every year. There would be no safety net or protection from the UK Government under independence. That would mean a cut over five years not of £10 billion, £7 billion, £3 billion or £2.5 billion, but of £50 billion under independence or full fiscal autonomy. What is also certain is that the Scottish Government have accepted the Treasury model for calculating the grant adjustment for each of the first five years.

It is worth quoting Brian Taylor, the BBC's political editor in Scotland. He asks "who has given ground" in the negotiations and states:

"The Scottish government has had to compromise. They have gained less than they wanted in terms of cash to assist the implementation of the new powers, including welfare powers. They have been obliged to concede that there will be independent scrutiny of Scotland's fiscal position in the run up to the proposed review which will take place in six years time ... the Scottish government has accepted that it will be, technically, the Treasury model which is used for operating the fiscal framework ... Already Liberal Democrats are saying that is an error by Scottish ministers - that it will be difficult to escape the Treasury model, even the reformed version, once it is in place. That it might, in short, prove costly in the longer term".

So it is clear that this is not the beginning of the end, nor even the end of the beginning. Rather, it all remains to be fought once again in 2021. It is inconceivable that the SNP will not use the opportunity for further grievance and battling with the UK Government.

The political editor of the *Courier* wrote this morning:

"One dampener to put on this otherwise joyous occasion is the question of what happens in five years when we revisit the terms of the deal? Will we be locked in some kind of 2016 battle re-enactment? Will it be even bloodier if one side decides it doesn't like the now-agreed system? It's possible the battles have just begun".

I trust that the Minister agrees that we should now grasp the opportunity to establish a federal fiscal commission to look independently and objectively at the issues of financing not only Scotland but other parts of the United Kingdom in a fair and well-informed way. We do not have to wait until 2021.

The spin of one Government against the other in these negotiations has not been helpful, and it will, I predict, be repeated in 2021. However, the Minister is right: the big issue is now delivering the new powers and for Scotland to make proper use of them.

In conclusion, and crucial to this Chamber, I hope that the Minister can give us a cast-iron assurance that the detail of the fiscal framework will be published in time for proper scrutiny ahead of Report next Monday. I suspect that he will readily give us such a reassurance, as he is acutely aware of the strength of feeling on this issue on all sides of the Chamber. He has also been very directly involved in the negotiations and has put a considerable amount of his own acumen and effort into reaching resolution. He has also put a great deal of effort into dealing with the representations and frustrations of the Members of this House, which have also been considerable. For all of that, he should be considerably thanked.

**Lord Dunlop:** My Lords, I thank the noble Lords, Lord McAvoy and Lord Stephen, for their support and their response to the Statement. This deal provides an opportunity to move the debate in Scotland on from process to policy, as the Secretary of State for Scotland said in the House of Commons earlier. The noble Lord, Lord McAvoy, talked about the rules for Report, and that is a matter to be discussed through the usual channels.

Turning directly to the point about time to scrutinise the deal, again, as the Secretary of State made clear to the House of Commons, my strong expectation is that the agreement will be published tomorrow and available to noble Lords. I will write to all Peers making it available to them. I also take this opportunity to offer an all-Peers briefing tomorrow with the Treasury.

The issue of intergovernmental relations was raised. I know that this is a matter of great interest; the Constitution Committee has issued a report on it. The noble Lord, Lord Smith, said:

"There should be no doubt that this was a highly complex package of measures to agree. It is difficult to imagine a bigger test of inter-governmental relationships ... This provides an excellent basis for constructive engagement between the governments long into the future".

That is what gives me hope that it will be possible to reach agreement when we come to the review in five years' time. We must use the time in between to build those intergovernmental working relationships. The fact that this review will be informed by an independent report will help in that process. To address directly what the noble Lord, Lord McAvoy, asked, this will be a review without prejudice and a review by agreement, and it will not be imposed.

The noble Lord, Lord Stephen, talked about full fiscal autonomy, and I have to say that I look forward to the day when the SNP tries to reconcile the no-detriment principle with separation.

3.55 pm

**Lord Forsyth of Drumlean (Con):** My Lords, I thank the Minister for enabling us to have the fiscal framework before we complete consideration of the Bill. To paraphrase Robert Burns, now that the First Minister, Nicola Sturgeon, has been bought and sold with English gold, could my noble friend give an assurance that the same generosity that has been given to Scotland will be applied to England, to the English regions, to Northern Ireland and to Wales? In particular, could he confirm the briefing that was given to the *Times* by a "Treasury insider" that, had this settlement been in place since 1999, Scotland would have got all the money from Barnett—that is, 20% more per head than in England—plus an additional £6 billion? If so, surely the rest of the United Kingdom is entitled to be treated with similar generosity.

When the Minister says that this is a transitional arrangement for five years that will be subject to agreement, is not another way of putting that there will be a veto on the part of the Scottish Government to prevent any change? Does he really think that this delivers a deal that is fair to all parts of the United Kingdom?

**Lord Dunlop:** On that last point, absolutely I believe that this is a deal that is fair to all parts of the United Kingdom. That is what the Smith agreement was all about—being fair to Scotland and fair to the UK as a whole. That is what this deal delivers.

To address directly the first of the two points that the noble Lord raises—and this was a point that came up in the House of Commons—on the cost of the deal to England, Wales and Northern Ireland, there is no additional cost to the taxpayers of England, Wales and Northern Ireland. This deal produces the same outcome as Barnett set out in the comprehensive spending review. There is no adverse impact on UK taxpayers.

On the noble Lord's other issue—I forget what it was; oh yes, it was the point about transition—the Scotland Bill, that delivers the Smith agreement, is a significant act of devolution. It represents a new world and an opportunity for a new politics in Scotland, one in which blame can no longer be heaped at Westminster's door. It is absolutely right to have a review on how the far-reaching arrangements are working in practice to ensure that, as my right honourable friend says, they are fair, transparent and effective in line with the Smith agreement.

**Lord Foulkes of Cumnock (Lab):** While I join in the welcome given to the Statement and the agreement, is the Minister aware that at this very moment HMRC offices in Scotland are being closed and thousands of people put on the dole? Is not this a stupid thing to do at a time when there are going to be more responsibilities on revenue and customs in Scotland?

**Lord Dunlop:** I assure the noble Lord that we are very confident that the delivery of these powers will go ahead as intended.

**Lord Selkirk of Douglas (Con):** In view of the fact that I asked the second Question yesterday, I feel entitled to give the Minister warm congratulations on his part in securing this agreement on the fiscal framework. Does not this pave the way for the debate in Scotland to move forwards and focus fully on how the new and extensive powers should be used?

**Lord Dunlop:** I thank my noble friend for his words. We are months away from elections to the Holyrood Parliament and, as I said earlier, the deal opens the way to make sure that that debate is on the right terms—about how each of the political parties competing in that election will use those powers, and not the perpetual debate about what those powers are.

**Lord McCluskey (CB):** At the risk of mixing my metaphors, although they will be well understood by all Members of this House, have we not, for the duration of this Bill, been burying our heads, ostrich-like, in the sand, while turning a blind eye to the elephant in the room? Did we awaken yesterday from our slumber to kick a hornets' nest into the long grass where we hope that the English will not notice it and the Welsh will be ignored? I shall translate that for those who have not followed this debate. The elephant in the

room is, of course, the Barnett formula. The hornets' nest is also the Barnett formula because if anyone disturbs the Barnett formula, the hornets will fly out. The blind eye is the decision by tame Scottish politicians, supported by the UK Government, to continue Barnett without discussion of its inequities or its notorious unfairness, particularly to Wales. The long grass is the five or six-year period. The question simply is this: will the documents to be published now or in the next five years show clearly the extent to which the rest of the UK is contributing towards this expenditure by the Scottish Government?

**Lord Dunlop:** As I said earlier in answer to another question, there is no additional cost to taxpayers in other parts of the United Kingdom. We have had many debates in this House about the Barnett formula. There are many former Secretaries of State who, when they had the opportunity to get rid of the Barnett formula, did not do so. Indeed, some of those Secretaries of State take great pride in arguing for more resources for Scotland. They were very effective at doing it, and I pay tribute to them for that. However, when proposing a move away from the Barnett formula, with the idea that there is some easy solution that would do away with the hard negotiation that is required with the Scottish Government, I am at a loss to know why we would expect the SNP to fight Scotland's corner any less strongly than former Secretaries of State did.

**Lord McConnell of Glenscorrodale (Lab):** My Lords, given that the Prime Minister was able to publish the details of a far more complicated deal with the European Union when he made his Statement to the House of Commons on Monday, why is the full fiscal framework not in front of this House this afternoon? I do not understand why in the light of that the Government cannot be more specific about what will happen in five years' time if agreement is not reached on this independent review. What will be the status quo at that time should an agreement not be reached?

**Lord Dunlop:** As I said, today is the final day of the Scottish Budget. That is why we do not have the fully published document today. There are a few minor technical and implementation issues from the agreement that need to be finalised. However, I have given a commitment to the House, and my strong expectation is that that agreement will be published tomorrow.

**Lord Tebbit (Con):** My Lords, will there be anywhere a cash limit upon the amount of money which English taxpayers will be required by this agreement to pass across the border for the benefit of Scottish consumers?

**Lord Dunlop:** I can only repeat what I said earlier: there is no additional cost to the taxpayers of England, Wales and Northern Ireland.

**Lord Beith (LD):** My Lords, while there is general support in the north-east of England for Scottish devolution and its progress to date, does the Minister recognise that there will be real resentment if it becomes apparent over time that there is substantially more

[LORD BEITH]

money available for public services on the Scottish side of the border than on the English side and that that resentment will undermine English support for the maintenance of the United Kingdom, which would be very unwelcome if it happened?

**Lord Dunlop:** I absolutely understand what the noble Lord is saying. That is why we have sought a deal that is fair to Scotland and to the rest of the UK.

**Lord Lang of Monkton (Con):** My Lords, I compliment my noble friend on his modesty on leaving out of the Statement the one line in which the Secretary of State for Scotland in another place complimented him on his invaluable contribution to these matters. I welcome the fact that the conclusion of the negotiations has been reached, at least to the extent that it now enables the legislation to pass into law once it has finished its progress through this House and, at long last, bring the Scottish Government to a degree of accountability for their actions before the Scottish people. My noble friend referred to the review to take place in five years' time. Can he confirm that when that review is produced by this independent body, it will be implemented without any further interruption or interference by either the Scottish Government or the UK Government?

**Lord Dunlop:** Once the review is complete, it will be for the two Governments to reach an agreement. However, I need to say to my noble friend that this is a very significant act of devolution. In future, more than 50% of the Scottish budget will be financed from taxes that are raised in Scotland, and that is a major development.

**Lord Anderson of Swansea (Lab):** My Lords, with the current concentration on Scotland, there is a danger that Wales will be sidelined. Perhaps we too should have had a referendum. Is the Minister aware that Cardiff University has just produced research for the Welsh Government suggesting that Wales will lose out massively as a result of the Chancellor's personal tax allowance changes? Will we be compensated for that?

**Lord Dunlop:** Obviously discussions are going on between the UK Government and the Welsh Government about the fiscal arrangements for Wales. I am sure, as this deal has been successfully concluded, that they will be successfully concluded as well.

**Lord Higgins (Con):** My Lords, the Statement concludes by saying that the fiscal framework should be subject to full scrutiny. How is that to be achieved in your Lordships' House when the Scotland Bill has already reached Report stage and we will be operating under the restrictions that we always do on Report and at Third Reading? Should those restrictions not be removed, given the situation that we are now in? Secondly, the perpetuation of the Barnett formula means that the injustice between England and Scotland is going to be perpetuated as well. That cannot possibly be regarded as fair.

**Lord Dunlop:** I think I have covered the rules of Report in an earlier answer. As I say, with the funding arrangements we have sought to strike a balance that enables these powers to be transferred to the Scottish Parliament while respecting the "taxpayer fairness" principle that applies across the rest of the UK.

**Baroness Janke (LD):** My Lords, in the light of what others have said, along with the fact that the Barnett formula is seen to be extremely unjust and unfair to other parts of the UK, will an analysis be produced of the impact of the new fiscal arrangements in Scotland on the other parts of the UK? Many local authorities are now suffering such dire cuts that public services are in severe danger of being lost in many parts of England, to my knowledge. With this announcement, there ought to be a proper analysis of what impact it will have on local services in England and the rest of the UK.

**Lord Dunlop:** The review will look at how the funding arrangement is operating against the Smith agreement. I remind the House, because this is often forgotten, that the Smith agreement says that it should, "aim to bring about a durable but responsive democratic constitutional settlement, which maintains Scotland's place in the UK and enhances mutual cooperation and partnership working", and should,

"not cause detriment to the UK as a whole nor to any of its constituent parts".

That is something that the review in five years' time is going to have to take into account.

**Baroness O'Neill of Bengarve (CB):** My Lords—

**Baroness Goldie (Con):** My Lords—

**The Lord Privy Seal (Baroness Stowell of Beeston) (Con):** My Lords, it is the turn of the Cross-Benches, and then I suggest that we go to my noble friend Lady Goldie.

**Baroness O'Neill of Bengarve (CB):** My Lords, is the implication of this agreement that the Barnett formula is, as it were, the *acquis communautaire* which provides the baseline against which fairness is judged?

**Lord Dunlop:** During this transitional period, the protection that is put in place ensures that what was the case with regard to the numbers in the comprehensive spending review will be delivered over this period.

**Baroness Goldie (Con):** My Lords, I, too, commend my noble friend Lord Dunlop for his perseverance, stoicism and patience in bringing these important negotiations to a conclusion. Does he consider that the real clout to be delivered to Scottish politics by the Bill and this fiscal framework agreement is to relish the prospect of a very reluctant SNP Government being compelled to accept fiscal and economic responsibility for their political decision-making, and that one of the most important components of any review will not be what happens in this place, the other

place or in the Scottish Parliament but will be the views and expressions of the Scottish electorate, who may be suffering from the impost of some of the Scottish Government's policies?

**Lord Dunlop:** I very much agree with my noble friend. The whole purpose behind this is that the Scottish Government should be held fiscally accountable for the decisions they take so that they should be able to reap the rewards of the good decisions they take and bear the risks and costs of their bad decisions.

**Lord Elder (Lab):** My Lords, on that last point, the Calman commission, of which I was a member, tried to find a way to ensure that the success of the economy in Scotland led to an increase of government funds and tried to tie in revenue for the Scottish Government to the success of the Scottish economy. The Statement appears to be saying that whatever goes on in the background, it is all down to Barnett and that however the numbers are made up, it ends up being Barnett. In what substantive terms is that a change?

**Lord Dunlop:** As the Statement made clear, if the Scottish economy grows more slowly than the UK economy as a whole, that risk will be borne by the Scottish Government.

**Lord Kirkwood of Kirkhope (LD):** My Lords, can the Minister help us by expanding a little on set-up costs; he mentioned a figure of £200 million. Would that apply to the departmental expenditure limit from the DWP on the costs of the administration of the new social security powers that will be available to the Scottish Government in the future?

**Lord Dunlop:** The figure I mentioned is a one-off implementation cost to transfer the powers over and the systems that go with them. It is not an ongoing cost.

**Lord Elton (Con):** My Lords, I leave policy to others better qualified than myself, but process is important. So that my noble friend shall not forget the intense interest on this and other sides of the House in that process and the ability of this House to scrutinise what will be put before it, I remind him that a simple procedure and a way of satisfying that would be to take parts of the Bill in the same order as they were in Committee, and that when we get to Parts 2 and 3, the Bill should be recommitted to Committee for those two parts.

**Lord Dunlop:** I thank my noble friend but I cannot commit to what he asks. We have already moved a Motion to consider on Report the Bill in the same order in which we considered it in Committee, which was precisely to allow time for this agreement to be reached and published, and to allow your Lordships' House to scrutinise it.

**Lord Berkeley (Lab):** My Lords, in answer to a previous question the Minister rather proudly announced that 50% of the revenue under the new arrangement

would come from the Scottish taxpayer. Does that mean that the rest of the revenue will come as a subsidy from the UK Government?

**Lord Dunlop:** No. It has always been the case—right from the start of these discussions—that a block grant would continue. However, we are providing for more of the budget to be financed from the tax revenues raised in Scotland.

**Lord Sutherland of Houndwood (CB):** My Lords, I live on the other side of the border from my noble colleague Lord Beith but not far from the border. I share his perception from that side of the border of the impact of not talking about Barnett. Will the review's terms of reference include looking at the consequences of retaining the Barnett formula?

**Lord Dunlop:** As I said earlier, this is an open review and it does not establish a default position. It will be for the Governments to set the terms of reference and the remit, and those will be decided in due course.

## Scotland Bill

### *Report (1st Day)*

4.15 pm

#### *Clause 1: Permanence of the Scottish Parliament and Scottish Government*

##### *Amendment 1*

*Moved by Lord Forsyth of Drumlean*

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

**Lord Forsyth of Drumlean (Con):** My Lords, we had quite a good discussion about this in Committee. This amendment, together with Amendments 4 and 5 in my name, is centred on the question of the extent to which we wish to maintain the sovereignty of this United Kingdom Parliament and the extent to which we wish to litter our legislation with declaratory statements that have no meaning whatever in order to make political capital on the part of the Government or someone else.

Regarding the Statement delivered a few moments ago, at first I thought that my noble friend had misread it when he referred to "Scotland's two Governments". Scotland has a United Kingdom Government and a devolved Scottish Government, but this use of language, which is designed to appease the separatists, is now being included in our legislation. Amendment 1 would simply put back into the Bill the original drafting that the Government presented to the House of Commons. The wording proposed in my amendment was perfectly satisfactory to the Government because it reflected the Government's position, but the wording was changed to meet an amendment put forward by, I think, the Scottish nationalists.

[LORD FORSYTH OF DRUMLEAN]

There is a great irony here. My amendment is about the authority and nature of the United Kingdom's constitutional arrangements. I—perhaps rather naively—thought that the Scottish nationalists were in favour of breaking up those arrangements, and I did not really understand why a Conservative and unionist Government would wish to help them in that process. At present, line 9 on page 1 of the Bill reads:

“The Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom's constitutional arrangements”.

My amendment would simply put back the words “recognised as” so that the Bill read, “The Scottish Parliament and the Scottish Government are recognised as a permanent part of the United Kingdom's constitutional arrangements”. If the words “recognised as” are included, that implies that there is another body that recognises that—that body being the United Kingdom Parliament. However, the statement currently in the Bill as amended by the nationalists in the other place flies in the face of our constitutional tradition that no Parliament can bind its successors. It also flies in the face of the Government's own rule that legislation should not be used for declaratory purposes.

We had indeed a very long debate about this in Committee, but I have looked in vain for any amendments from the Government to address any of the arguments that were put forward. The Constitution Committee produced a very serious report. The noble and learned Lord, Lord Hope of Craighead, spoke at great length. There were a number of contributions, but all of them have been ignored. They have all been ignored because the Government's mantra is, “We have to implement what the Smith commission report indicated and there can be no departure from it”. But, of course, this clause is a departure from the commission's proposals.

My Amendment 4 provides that, on page 1, line 17, we should leave out “Scotland” and insert “the United Kingdom”. As currently drafted, the Bill provides:

“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”.

My amendment would make it a decision of the people of the United Kingdom voting in a referendum, because we are still a United Kingdom and, indeed, the Scottish people have only very recently voted overwhelmingly to achieve that.

I thought that my noble friend would accept my amendment in Committee—I realised that he would have to go away and think about it—but perhaps he will now accept my Amendment 5, which provides:

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

What has become of us that a Conservative and unionist Government are making declaratory legislation on the face of a Bill but are not prepared to accept as an amendment the words:

“Nothing in this section alters the sovereignty of the United Kingdom Parliament”?

No doubt there will be an opportunity for us to discuss the fiscal framework when we get the fiscal framework, but, looking at the Statement that has

been made, where we have given the Scottish Parliament a veto on the terms by which it is financed—we have given that away—I have to say to my noble friend that we appear to be engaged in a long-term process of appeasement which undermines the authority of the United Kingdom Parliament. These amendments are an attempt, in at least a declaratory form, to set the record straight. I beg to move.

**Lord Hope of Craighead (CB):** My Lords, I am as disappointed as the noble Lord, Lord Forsyth, that some of the points that were raised—indeed, all the points that were raised—in Committee on Clause 1 have met with no response from the Government by way of amendment. My amendment in this group is Amendment 2, which is directed to the wording of the new Section 63A(3). I am repeating points that I made in Committee which were designed to achieve greater clarity. In some respects, the need for greater clarity is revealed by the amendment that the noble Lord, Lord Cormack, has tabled and, indeed, by the comments of the noble Lord, Lord Forsyth, just a moment ago.

There were two particular points in new subsection (3) to which I drew attention last time and to which I draw attention yet again. The first is the phrase,

“a decision of the people of Scotland”.

The first question is: what kind of decision? What majority, if any? Is it to be by simple majority or something else? Merely to use the phrase “a decision” does not tell us what the mechanism is to be to record that decision in a way that would have effect. The second is the phrase, “the people of Scotland”. Is the referendum to be confined to people who are in Scotland, or are any people who can claim they are of Scotland to be allowed to participate in the referendum?

My amendment seeks to clarify those matters by saying that the,

“referendum has been held in Scotland”;

and, secondly, that the decision is to be that of,

“a majority of those voting”—

in other words, a simple majority only.

Unless those points are tidied up and greater clarity is achieved, the uncertainty which I suggested lurked within the current wording of the subsection will remain. I hope very much that the Minister will feel able to reflect yet again on the need for clarity. It is a feature in various parts of the Bill that a great deal of clarity has been achieved. It is disappointing that, in the constitutional part of the Bill—Part 1, which has very great significance—the clarity which is present in other parts of the Bill is not being achieved. It is for that reason that I have come back yet again on Report with the points that I made earlier, in the hope that they will still receive attention.

**Lord Cormack (Con):** My Lords, Amendment 3 is in my name. I moved a similar amendment in Committee and expressed the hope, as did the noble and learned Lord, Lord Hope, and my noble friend Lord Forsyth of Drumlean, that there would be some response from the Government. I do not think any one of us is suggesting that our individual solutions are perfect, but clarity is certainly needed. We need to reflect,

particularly this afternoon, having heard a Statement, to which we will doubtless return on Monday, that is fraught with danger for the future of the United Kingdom. It is tremendously important in that context that the supremacy of the United Kingdom Parliament should be specifically acknowledged in one way or another.

Where I differ from the noble and learned Lord, Lord Hope, is that I do not want the ultimate decision to be made in a referendum, if it comes—I hope it will not, but it might—to the abolition of the Scottish Parliament. The Scottish Parliament was the creation of the United Kingdom Parliament. If it is to be abolished at any time—I reiterate my hope and belief that it will not be—it is crucial that the final word should be with the United Kingdom Parliament.

It may well be that part of such a process would be a referendum. I do not particularly like referenda, but they are now part of our constitutional system and, like them or not, we all have to accept that. But I believe fundamentally in parliamentary democracy. Therefore, it is crucial that the ultimate decision should be made in Parliament and should be made in the elected House. Of course your Lordships' House should have a constructive part to play. Of course it should scrutinise any legislation that is placed before Parliament. But ultimately, this should be the decision of the elected House.

I am conscious that small majorities can sometimes provoke great wrath and dissension, so I have made a suggestion in my amendment and it is here for noble Lords to see. There would have to be,

“a two-thirds majority in a vote of the House of Commons in which 75 per cent of the members elected by Scottish constituencies voted for abolition”.

I do not put that before noble Lords as the ultimate panacea, but something along those lines would go a long way to reassure those of us who are concerned for the long-term future of the United Kingdom. I am sure that everyone in your Lordships' House at least shares that concern. I made similar points in Committee and expressed the hope that the Minister would reflect and that we would see the results of his reflection when we came to Report, but there is no sign of that. It is a great pity, because if we truly believe in the United Kingdom, it follows, as night follows day, that we believe in the supremacy of the United Kingdom Parliament. There has to be something in this Bill, either along the lines of the amendment moved by my noble friend Lord Forsyth or of mine, as well as taking up some of the points made by the noble and learned Lord, Lord Hope. It is just not good enough to leave the Bill as it is.

In all that has been going on over the past few months, there is an element of the paying of Danegeld. Those who pay Danegeld rarely get value for money, and I think we should bear that carefully in mind.

4.30 pm

**Lord Norton of Louth (Con):** My Lords, I have added my name to Amendment 2, with that of the noble and learned Lord, Lord Hope of Craighead. It seeks to amend the clause without affecting subsections (1) and (2). I have also tabled Amendment 6, which goes

further and replaces the existing clause with a new clause. This seeks to address concerns raised not only by me but by other noble Lords in Committee.

The justification for Clause 1, reiterated by my noble and learned friend Lord Keen in Committee, as we have heard again this afternoon, is that it delivers on the terms of the Smith commission report. That, I submit, is not a solid defence for two reasons. First, I suggest that it is ultra vires. It falls outside the terms of reference of the commission and does not devolve further powers to the Scottish Parliament. Is my noble and learned friend arguing that the Government's commitment to implement the commission recommendations encompassed whatever it recommended, regardless of the commission's terms of reference? If we are to proceed with this clause, we have to do so on the basis of the Minister conceding that the Government, in making such a commitment, were acting irresponsibly.

Secondly, the recommendation does not lend itself to a legislative proposition and therefore should not find embodiment in a Bill. There are other ways to achieve it. As I have emphasised, the Cabinet Office *Guide to Making Legislation* states that Bills should contain only legislative propositions. Subsection (1), as the Minister has conceded, is a political statement. In respect of the guidance, he argued in Committee that one could have exceptions to such generalities. He offered an example that could be described as germane to the issue, but it is more than 300 years old and thus predates Cabinet Office guidance.

The defence that the Government are following precisely the Smith commission recommendations is undermined by subsection (3), which qualifies subsection (1)—the Minister conceded in Committee that it injects an element of conditionality—and is the product of the Government's own thinking on the matter. The Minister thinks that subsection (3) reinforces rather than undermines the commitment in subsection (1), but the key point is that the Government are prepared to depart from the precise recommendations of the Smith commission.

The clause is inherently problematic. There are two fundamental problems, one raised by several noble Lords in Committee and the other touched on, especially by my noble friend Lord Lothian. The clause states that the Scottish Parliament is permanent and will not be abolished unless there is a referendum in Scotland. In so doing, as was made clear in Committee, it raises questions about sovereignty. Does the clause provide an element of entrenchment? If not, and the Minister emphasised in Committee that,

“this Parliament is sovereign, and it cannot disclaim that sovereignty”,—[*Official Report*, 8/12/15; col. 1470.]

what is the point of the exercise? In effect, my noble and learned friend was saying that it is a political statement and the provision can be changed by Parliament. In other words, permanence cannot be guaranteed. If that is the case, the clause offers a misleading statement. If it is not the case, it undermines or calls into question the doctrine of parliamentary sovereignty. That point was made strongly in Committee by my noble friends Lord Lothian and Lord Forsyth of Drumlean.

[LORD NORTON OF LOUTH]

The other core problem was embodied in the comments of my noble friend Lord Lothian when he said that, “the legislation would set a whole lot of other constitutional hares running”.—[*Official Report*, 8/12/15; col. 1452.]

What are the implications for other legislative or quasi-legislative bodies established by statute? If not declared to be permanent, what is their status? Are they to be deemed any less permanent than the Scottish Parliament? My noble and learned friend did not address this in Committee. We cannot view the clause in isolation.

If we are to proceed with this clause, as the Government appear determined to do, we should at least seek to render it less problematic than it is with the present wording. The noble and learned Lord, Lord Hope of Craighead, made the point that the word “permanent” was, as he put it, perhaps not very cleverly chosen. There may be a way to soften it to render it compatible with well-understood constitutional principles.

The way to achieve this was suggested by the noble Lord, Lord Kerr of Kinlochard. I took his suggestion in framing my proposed new clause. Section 1(1) of the Scotland Act 1998 established the Scottish Parliament and Section 44 established the Scottish Executive. My amendment would provide that those provisions shall not be repealed without a referendum of electors in Scotland, with the electorate being the same as that provided in the Referendums (Scotland and Wales) Act 1997. Given that there was a referendum in 1998 on establishing the Scottish Parliament, this would provide that another referendum would be necessary before it is abolished.

The advantage of the proposed new clause is that it avoids the constitutional problems generated by the existing clause. It embodies no political statement but is confined to a provision of law—this does change the law—and is based on the continued existence and permanence of the Scottish Parliament. I made the point before that no one doubts that the Scottish Parliament is permanent. I noticed when my noble friend Lord Dunlop repeated the Statement that his words at the Dispatch Box were to the effect that the permanence of the Scottish Parliament will be put beyond doubt. I noted that in the copy of the Statement from the Printed Paper Office the words appear:

“And the permanence of the Scottish Parliament is beyond doubt”.

There is an important point there. What I put forward in my new clause achieves what the Government seek to achieve, but without the problems identified by Members across the House in Committee.

As the noble and learned Lord, Lord Wallace of Tankerness, said in Committee, we are dealing with hypothetical issues. We understand the political reality. I recall the occasion when the late noble and learned Lord Simon of Glaisdale opposed a provision designed for the avoidance of doubt on the grounds that there was no doubt in the first place to be avoided. I feel that we are in a similar situation: there is no doubt that the Scottish Parliament is permanent. The Smith commission has gone beyond its terms of reference to propose something that causes more problems than it solves. The Government may have issued a blank cheque to a third party, but, as I said at an earlier stage, it is not our job to cash it without question.

**Lord Wallace of Tankerness (LD):** My Lords, as the noble and learned Lord, Lord Hope of Craighead, indicated, we had a very lengthy debate on the issues in Clause 1 in Committee. He is right to point out that the wording in the Bill, as amended in the House of Commons, is not particularly felicitous and leaves open some questions of interpretation. But, as the noble Lord, Lord Norton of Louth, indicated, as I said in Committee we are to some extent dealing with a hypothetical position. The real situation is that it is a political reality.

Of the various amendments, I find the amendment in the name of the noble Lord, Lord Norton of Louth, probably the most logical. The problem I have with Amendment 2, in the name of the noble and learned Lord, Lord Hope of Craighead, is that there are two conditions for a repeal: that,

“the Scottish Parliament has consented to the proposed repeal; and ... a referendum ... in Scotland on the proposed repeal”,

has a majority voting for it. The problem there is that you get the majority voting for it, then you ask the people in the body that you are about to repeal to consent to it, too. It may have received the majority among the people of Scotland because they want to get rid of it, but the people already there have a vested interest in hanging on to it. Therefore, I do not think that that is a particularly satisfactory situation.

I say to the noble Lord, Lord Forsyth, on his amendment that states:

“Nothing in this section alters the sovereignty of the United Kingdom Parliament”,

that that position is made perfectly clear in Section 28(7) of the Scotland Act 1998.

As I said, at the end of the day this is a matter of political reality. The Smith commission gave the parliamentary draftsmen a rather daunting challenge. Paragraph 21 of the commission’s report said:

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

Therefore, it is almost necessary that there is some element of a declaratory nature in here. The sovereignty of Parliament is such that the Bill could be repealed, as any other Bill could be. That is why, at the end of the day, it does boil down to political reality.

As I said in Committee, in the Scottish Constitutional Convention that sat in the early 1990s we wrestled at great length with how to entrench any Scottish Parliament that was established. We looked at various possibilities, including some declaratory statements, but never quite managed to work out how we could do it. In the end, it was a referendum. My party opposed it at the time, but in retrospect the 1997 referendum gave the Scottish Parliament that legitimacy and has made it, *de facto*, a permanent part of our constitution. That is why, in the political situation we now have, it will be a political reality.

If the circumstances were such that the people of Scotland no longer wished for a Scottish Parliament then the political reality would kick in, and no matter what we put in this statute, that political reality would come to pass. That is why it is important that we try to get clarity in legislation as best we can. At the end of the day, this is a political matter, and I do not believe that it ever will arise, but if it did arise, a political solution would be found.

**Lord McCluskey (CB):** My Lords, I have simply one question to ask the Minister at this stage. Given the failure of the Government to respond positively to the submissions that were cogently advanced both in Committee and here today—the same, by the way, applies to many of the other amendments we discussed in Committee—is there some kind of agreement or understanding between the UK Government and the Scottish Government, perhaps as part of the fiscal agreement deal, to the effect that the Government will not allow any material amendment of the Bill in the course of these or subsequent proceedings? If not, I fail to understand how the Government have not advanced certain amendments which reflect the debate and the Government's response in Committee to those amendments. I will refer to those particularly when we come to them.

**Lord Empey (UUP):** My Lords, if I may follow the point just made by the noble and learned Lord, Lord McCluskey, I said in Committee that I believed the outcome of the Smith commission had the status of a treaty. I did not say that in any negative fashion, but I have seen all this before. Once these deals are done, we are going through the motions here. There is a political imperative: all the Front Benches signed up to whatever happened a week or 10 days before the referendum. What we have before us is the same procedure that flows from Europe, goes into the mixer in Whitehall and comes out as Smith-plus. That is where we are. It does not matter what the merits are of the amendments of the noble Lords, Lord Norton of Louth, and Lord Forsyth, or of any other noble Lord. The political decision has been taken and the Front Benches are paralysed, because they have reached a position, for political reasons. We know it, all noble Lords know it; the dogs in the street know it. That is where we are.

**Lord Forsyth of Drumlean:** Is the noble Lord suggesting that we are all wasting our time?

**Lord Empey:** Perish the thought of such an outrageous consideration, but I suspect that the Government will be impervious to our arguments, if I might put it that way. The reason is that a political decision has been taken. We all know that. I happen to think that the Front Benches are wrong. I have had many years of experience of dealing with nationalism. It is a perfectly legitimate aspiration, in Wales, in Scotland, in Ireland or anywhere. There is nothing wrong with it. It is part of our national life. However, it is a fundamental mistake to believe that if you give folk the power, they will make such a mess of it that the people will be relieved to get rid of it when the time comes. That is not going to happen.

I think the noble Lord, Lord Cormack, referred to the Danegeld. We have been doing this in Ireland for years—decades—and all it has done is grow, sustain and feed the forces that are anti-British. We will have later amendments where the very word “British” is the issue, irrespective of the substance of the matter we are debating. Therefore, I understand where the Minister is at. He is a very articulate and capable Minister but he has a concrete block and there is nothing he can do with it except present it to us and, sooner or later, it will be nodded through.

4.45 pm

I understand the politics of this. I understand that an arrangement was entered into by the three main party leaders in September 2014. I regret that that happened, but it has happened. I also recall receiving an answer from the noble and learned Lord, Lord Wallace of Tankerness, in his role as Advocate-General, when I asked him about the sovereignty issue and which Parliament was superior. Of course, he said that ultimately, the United Kingdom Parliament was the superior body.

We have already heard that an agreement on the fiscal framework will have to be reached between the two Administrations, as we call them. Nomenclature is a big deal because the phrase “UK Government” now has to be used in everything. That creeps in and we have had it in our part of the world for many years. All these things are a creeping barrage, and they go on. We have decided to allow them to go on in the hope that the fire will pass over, and we will come out of our bunkers and hope that nationalism will have burnt itself out and destroyed itself. However, I argue that we are feeding the flames. However meritorious and important it is to draw attention to these things and to put them on the record, I argue that the status of the Smith commission report is not that of just any report; it has the status, effectively, of a treaty. That is a very dangerous position for us to be in, but it is where I believe we are. I hope the Minister will be able to shoot down my arguments one by one and convince us all that this is a complete mirage and a misunderstanding.

**Lord Lang of Monkton (Con):** My Lords, I certainly agree with the noble Lord, Lord Empey, that there is a lot of imperviousness in the air today. He talks of feeding the flames. That is a phrase I and a number of colleagues have used many times over the last few years, certainly every time legislation affecting Scotland has come before the House. However, I make no apology for speaking very briefly in support of Amendment 1. Indeed, I support all the amendments in this group, with the possible exception of Amendment 3, proposed by my noble friend Lord Cormack. I sympathise with his sentiments but it is so palpably obvious that what he would like to achieve is outwith the terms of the Smith commission report, which is our sacred text, that it is highly unlikely it would make any progress.

In constitutional terms we should not forget that this is a shameful piece of legislation and has a shameful origin. The Constitution Committee was deeply critical of that fact. It was born out of panic and its contents decided by an arbitrary political cabal. Parliament's role was blindly and blandly simply to pass it through into law. Clearly, my noble friends on the Front Bench have been given instructions not to yield an inch on any matter—not even a willingness to take things away and consider. “Get it through on all counts, unamended; don't give anything away”. That is the sort of thing the Treasury says to other people, although in the last 24 hours we have noticed that it is sometimes a little bit inclined to breach its own rules—not always in the right way. Therefore, I think it is right to revisit this issue, however briefly, particularly because when we debated it very fully in Committee, I was pleasantly

[LORD LANG OF MONKTON]

surprised to find that the noble and learned Lords, Lord Mackay of Clashfern, Lord Hope of Craighead, and Lord McCluskey, and other distinguished lawyers and constitutional experts, including my noble friend Lord Norton of Louth, all came in behind the proposition that it was dangerous to legislate in a meaningless and declaratory way; indeed, that goes against the Government's own guidelines on drafting legislation.

The point is that Clauses 1 and 2, which we are debating amendments to, change nothing in law. They are essentially meaningless. They are declaratory. But they could sow a seed and some Scottish judge at some time in the future could build a case over these now justiciable matters. The implications for Scotland, and indeed for parliamentary sovereignty, would be very considerable indeed.

My noble friend Lord Dunlop and my noble and learned friend Lord Keen of Elie are curiously reluctant even to consider what was said then. At one level, the clauses change nothing because they are declaratory. In a sense they are meaningless, but their very meaninglessness carries a meaning of sorts and carries implications and uncertainties. Indeed, I wonder why the Scottish Government were so keen to have the changes made to which our Government gave way so readily in another place. It is still not too late to think again, and I remain ever hopeful that the Front Bench will relent.

**Lord McAvoy (Lab):** My Lords, for the removal of any doubt, I do not support any amendments in this group. But I am pleased to be given the chance to try again to pronounce the name of the noble Lord, Lord Louth of Norton—I have done it again—the noble Lord, Lord Norton of Louth, because he is a profound constitutional expert and he has my total admiration and respect, and I apologise for the mix-up.

The original draft of Clause 1 conveyed the permanency of the Scottish Parliament and the Scottish Government as institutions but our amendments put their permanency beyond any doubt and put the decision of whether they should be permanent in the hands of the Scottish people. We do not want any change to this aspect of the Bill. It is with some trepidation that I enter this debate, with so many constitutional experts, lawyers and esteemed legal people, but there we are; I might bring the perspective of an ordinary Scottish person without having all those grand titles—which are all deserved, I hasten to add.

I do not think we should spend too long on this aspect of the Bill. We support the Scottish people having the final say on any of these matters. Without going too much into the history of things, in 1707 Scotland entered the United Kingdom as a full country. It did not sacrifice totally its right to have its own say. We entered as an equal partner. I think we have played our part, pro rata, on an equal basis. I believe strongly that that should be the case. The sovereignty of the Scottish people should be recognised. It is not a coincidence that one of our monarchs in Scotland, Mary, Queen of Scots, was not known as the Queen of Scotland. Of course, her final legacy was that every monarch of Scotland and the United Kingdom since her death has been her direct descendant. That is

totally in tune with the Scottish people. The Scottish people should have the say. I am sorry to say it but particularly the amendment tabled by the noble Lord, Lord Cormack, to take everything away from the Scottish people is just not acceptable or realistic. Realpolitik has been mentioned and that is absolutely right.

I do not want to feed the flames but I say to the noble Lord, Lord Empey, that he could have been a bit more careful with his words, bearing in mind the history of Northern Ireland. My party and I—and, I believe, the Government—are not feeding any flames. I believe in the merits of what we have here, not just as expediency or something passed down from on high. I believe firmly in it and if any of these amendments are pressed, we will be voting against them.

**The Advocate-General for Scotland (Lord Keen of Elie) (Con):** My Lords, perhaps I may begin with a material concession. When the noble Lord, Lord Empey, referred to a capable Minister on the Front Bench he was clearly referring to my noble friend Lord Dunlop.

I thank noble Lords for their careful and detailed consideration of Clause 1, which expresses in law the understood position that the Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom's constitutional arrangements. I will endeavour to respond to each of the points made and, in doing so, I thought that it would be helpful to reflect on the adjustments made to this clause during the Bill's passage through Parliament.

The Smith commission said that the United Kingdom's legislation,

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

In the draft legislation which the Government published in January 2015, the Scottish Parliament and the Scottish Government were recognised as permanent parts of the United Kingdom's constitutional arrangements. At that stage, the clause did not contain a provision on a referendum. This drafting was retained when the Bill was introduced to Parliament in May 2015. Detailed feedback was then received on the clause during the Bill's passage through the other place and from others such as the Scottish Parliament's Devolution (Further Powers) Committee. The Government reflected carefully on this feedback and on 18 September, the Prime Minister announced the Government's intention to include a referendum provision in the clause to strengthen the provision and underline our commitment to the Scottish Parliament and the Scottish Government. Following refinement of the drafting, the clause as it now appears was inserted into the Bill on Report in the other place.

I pause to observe in response to the observations of the noble and learned Lord, Lord McCluskey, that I am not aware of any understanding between the United Kingdom Government and the Scottish Government to the effect that no amendment will be allowed to the provisions of Clause 1 or to any other part of the Bill. The clause was also subject to substantial debate during our Committee in December.

I turn to Amendment 2, tabled by the noble and learned Lord, Lord Hope of Craighead, and the noble Lord, Lord Norton of Louth. This amendment considers the specific wording of subsection (3) of the new

section in Clause 1. Following our deliberations in Committee we have reflected carefully on this amendment, which I believe seeks to clarify details of the operation of such a referendum. None the less, our view remains that the current wording of the clause delivers the outcome needed effectively, as it reflects that in 2014 the people of Scotland voted to remain in the United Kingdom and that that would mean a commitment to two Parliaments. New subsection (3) ensures that if the Scottish Parliament and Scottish Government were ever to be abolished, which of course is a scenario that no one is envisaging, the people of Scotland would need to vote in a referendum to that effect.

The noble Lord, Lord Cormack, spoke to Amendment 3, which would replace the requirement for a decision of the people of Scotland in a referendum with a requirement for a two-thirds majority in a vote of the House of Commons, in which 75% of Scottish Members of Parliament voted in favour. I am grateful to the noble Lord for the points he has made and recognise his desire to underline the centrality of this Parliament in determining the constitutional arrangements of the United Kingdom. However, it remains our view that it is right to include provision for a referendum of the people of Scotland in the clause to strengthen the political statement, and to underline the commitment of this Parliament and this Government to the Scottish Parliament and the Scottish Government.

The referendum provision rightly reflects the importance of the people of Scotland in determining Scotland's constitutional future. In the referendum in 1997, the people of Scotland overwhelmingly supported the creation of a Scottish Parliament. In the independence referendum in 2014, they reaffirmed that they wanted to have two Parliaments by voting to remain within the United Kingdom.

5 pm

Although the abolition of the Scottish Parliament and Government has never been envisaged, it is right that if it were ever to be, it should be on the basis of a decision of the people of Scotland. It is important to be clear there are no circumstances in which the abolition of the Scottish Parliament and Scottish Government is envisaged. People in Scotland voted for two Parliaments, and that is what they shall have. However, in responding to these points, I would state that, in this entirely hypothetical circumstance, this Parliament would of course play its full and proper role, just as it did in the establishment of the Scottish Parliament in 1998. That was of course a matter that we addressed in some detail in Committee.

Amendment 6, tabled by the noble Lord, Lord Norton of Louth, would replace Clause 1 in the Bill with a new clause which would provide for a referendum before the Scottish Parliament and Government could be abolished and define those eligible to vote in such a referendum as those entitled to vote in local government elections in Scotland. As a number of noble Lords noted during our debate in Committee, we are dealing in entirely hypothetical circumstances. Such a referendum is not envisaged, but in those hypothetical circumstances, the precise detail of such a referendum would of course have to be determined, as is the case with any referendum, if such a scenario were ever to occur.

The proposed new clause also seeks to acknowledge concerns raised by some noble Lords in Committee with regard to the wording and effect of the clause. It states that the sections of the Scotland Act 1998 establishing the Scottish Parliament and Scottish Government will not be repealed unless electors in Scotland vote for this in a referendum, and does not directly reference the permanence of the Scottish Parliament. We have carefully reflected on these points since Committee, and our view remains that the clause as drafted is appropriate. The Smith commission said:

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

We consider it important that the clause reflects the language of the Smith agreement, in order to underline the political statement being made. I emphasise, as has been acknowledged by your Lordships, that it is a political statement. The purpose of the clause is to reflect in legislation the political understanding which already exists. It is our view that Clause 1, as drafted, benefits from this straightforward, unambiguous statement, in keeping with Section 1 of the Scotland Act 1998, which states:

“There shall be a Scottish Parliament.”

**Lord McCluskey:** Before the Minister moves on, may I ask just one question? In the earlier debate, I asked whether the words “the people of Scotland” included Andy Murray, the tennis player, and he could not answer. The noble Lord, Lord Norton of Louth, has suggested a simple amendment that would make it clear that the persons entitled to vote are not the people of Scotland—which is a slightly meaningless phrase—but those entitled to vote as electors in a local government election in Scotland. What is wrong with accepting that?

**Lord Keen of Elie:** As I indicated, we are dealing with an entirely hypothetical situation. Should that situation ever materialise, the terms of the referendum to be held would be determined according to the circumstances in place at that time. It would not be appropriate to anticipate the circumstances of such a referendum, which might be many millennia in the future. It is therefore left open in these terms.

I turn to the amendments moved by my noble friend Lord Forsyth of Drumlean. The points he has raised in them are those he made in Committee in December, and I assure him that we have continued to reflect carefully on the points made at that time. My noble friend has focused on whether Clause 1 impinges on the sovereignty of this Parliament. I thank him for his consideration of this point but must respectfully disagree that there is any question that it does. Constitutionally, the United Kingdom Parliament cannot bind a successor Parliament: the sovereignty of Parliament remains. The purpose of paragraph 21 of the Smith commission agreement, and of Clause 1 in the Bill, is not to change the constitutional position but to reflect in legislation the political understanding that already exists. The clause thus delivers the Smith commission agreement while respecting the United Kingdom's constitutional arrangements.

Amendment 1 would reinsert the words “recognised as”, which were removed from Clause 1 by government amendment on Report in the other place. The Government

[LORD KEEN OF ELIE]

have been quite clear throughout that there has never been any question that the Scottish Parliament and Scottish Government are anything other than permanent. However, we have listened to feedback on the clause, and it was felt appropriate to amend the clause to take account of the observations made. The criticism levelled at the clause was that the provision was weak. The Government have strengthened the provision to demonstrate the commitment of the United Kingdom Parliament and Government to the Scottish Parliament and to the Scottish Government.

Amendment 4, tabled by my noble friend, provides that the abolition of the Scottish Parliament and Government would have to be agreed by United Kingdom-wide referendum. The referendum provision in Clause 1 rightly reflects the importance of the people of Scotland in determining the existence of the Scottish Parliament. It is important to be clear that there are no circumstances under which the abolition of the Scottish Parliament and Scottish Government is envisaged. However, in responding to the points raised by my noble friend, I state that, in that entirely hypothetical circumstance, this Parliament would of course play its full and proper role, as I mentioned previously.

Amendment 5 would state in the Bill that Clause 1 does not limit the sovereignty of the United Kingdom Parliament. Again, I hope I have already sufficiently addressed that point. Clearly, the sovereignty of this Parliament remains, and is unhindered by the provisions. I therefore urge noble Lords not to press their amendments.

**Lord Hope of Craighead:** Before the Minister sits down, I wonder whether he can help me on one point. I made it clear in Committee that the amendments I proposed to this part of the Bill were based on recommendations of the Scottish Government, which were made plain in June last year. The wording of the amendments is not my creation; it comes from Edinburgh, from people who were studying the Bill and trying as best they could to clarify the points they thought needed clarification.

The noble and learned Lord, Lord McCluskey, has drawn attention yet again to the obscurity of the phrase, “the people of Scotland”. One of the virtues—it may be small, but it is there—of my amendment is that it makes clear that it is a referendum of the people in Scotland. I simply cannot understand why the Minister is not prepared to make some concession to clarify that matter. To go back to what the noble Lord, Lord Empey, said, I should have thought that the Government would take on board collaboration between the two Governments to try to improve the Bill and achieve as much clarity as possible. I really am mystified why the Minister is so stubborn and will not accept the need for some further clarity.

**Lord Keen of Elie:** I am obliged to the noble and learned Lord, Lord Hope of Craighead. It determines clearly and unambiguously that there can be no question of any unseen, secret understanding between the United Kingdom Government and the Scottish Government

when his proposals in the amendments have their source in Scotland, with the Scottish Government. That perhaps puts that in its place.

On the question of the referendum, I reiterate the point that I made earlier: this is a wholly hypothetical situation.

**Lord Forsyth of Drumlean:** Will my noble and learned friend deal with the point about the people of Scotland, as opposed to the people in Scotland?

**Lord Keen of Elie:** I am obliged to my noble friend for reminding me of the question. As I said earlier, we are dealing with a wholly hypothetical situation. It is not envisaged that this will ever arise, but in the event that it does, the question of who will be engaged in the referendum and the manner in which it will be conducted will be determined at that time according to the circumstances that exist at that time, rather than by some predetermination, perhaps millennia earlier. That remains the Government’s position on that point.

**Lord Forsyth of Drumlean:** My Lords, I have come to the view that the noble Lord, Lord Empey, tactfully suggested—that we are actually wasting our time. I beg leave to withdraw the amendment.

*Amendment 1 withdrawn.*

*Amendments 2 to 6 not moved.*

### *Clause 2: The Sewel convention*

#### *Amendment 7*

#### *Moved by Lord Hope of Craighead*

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

“(8) But the Parliament of the United Kingdom may not pass any measure applying to Scotland that makes 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), “measure” includes any Act, whether a public general Act, a local and personal Act or a private Act, and any statutory or other instrument made under an enactment.”

**Lord Hope of Craighead:** We return to Clause 2, and to a problem that cannot be dismissed as purely hypothetical. We are dealing with something of day-to-day significance—the Sewel convention, and what should be done about it, in view of what was said about it by the Smith commission. The amendment that I propose is virtually the same as that which I proposed in Committee, though somewhat simplified. As I said a moment or two ago, its source is a paper provided by the Scottish Government last June. Therefore, it is something that I would have thought that the Minister would wish to take seriously.

I go back to what the noble Lord, Lord Lang of Monkton, described as a sacred text. What one finds as a source for this discussion is in the heading to Pillar 1 in the Smith commission report:

“Providing for a durable but responsive constitutional settlement for the governance of Scotland”.

Paragraph 22, as I think we all know, says:

“The Sewel Convention will be put on a statutory footing”.

The adjective “statutory” is the foundation for the point that I made last time and seek to make again.

I reiterate the point that I made in Committee about the dangers of lack of clarity and certainty in responding to the recommendation of the Smith commission. We are talking about legislation—not hypothetical legislation but something that may occur in reality, relatively early, in the near future. One problem with legislation that may be open to scrutiny or criticism on its failure to be compatible with some standard or another is that, so long as that argument hangs in the air, it gives rise to uncertainty. It is right to remind the noble and learned Lord that, when the Scotland Act 1998 was being framed, it made special provision for what was to be done in the event of a challenge being made on the possible incompatibility of the legislation with convention rights. The mechanism was to allow these matters to be referred to the Privy Council for scrutiny before the measure became an enactment. I do not think that we have ever seen that happen with regard to Scots legislation, but there have been two or possibly three cases from the National Assembly for Wales, where challenges have been made, and been referred to the Privy Council for resolution. That has the great advantage of putting beyond doubt the uncertainty that was created by the challenge, because one then has a decision of the Supreme Court to resolve the issue.

The problem with the Sewel convention, if it is put into statute at all, is that it raises the question of what it is—how far it reaches and what it covers—and, of course, there is the question of whether it will always apply or, as we find in the clause as it is at the moment, will apply “normally”, which begs the question of what is or is not normal. The virtue of the wording that the Scottish Government put forward is that it attempted to put the Smith commission recommendation into the form of a statutory provision that could then stand on its own feet and, it was hoped, resolve these issues. The formula that we see in Amendment 7 does not include the word “normally”; it also attempts to explain the reach of the Sewel convention as it is now, which is no doubt wider than Lord Sewel thought it was when he devised the reach of it in 1998. As it has grown, it now covers the legislative competence of the Scottish Parliament and the functions of members of the Scottish Government, as Amendment 10, in the name of the noble and learned Lord, Lord Wallace, appears to recognise as well.

5.15 pm

Without going over in great detail the ground I covered in my speech in Committee, the defect of the present wording is that it does not address the Smith commission in the way in which it was asked to address it by putting the convention on to a statutory

footing. It seeks to retain the convention as a convention and by introducing the word “normally” it creates uncertainty about when it should and should not apply and does not really attempt to address what the Sewel convention really means.

The formula I am putting forward, which I repeat, yet again, is the product of thinking in Edinburgh, does not use the word “convention” or mention the name of Lord Sewel, because that is no longer necessary, but simply reproduces what is currently understood to be the reach of the convention in statutory language. That is its great virtue. There is an enormous advantage in adopting that language and avoiding the uncertainties to which I referred which will hang over legislation and be extremely unfortunate if one is seeking to give effect to legislation, particularly that which may involve the expenditure of money, which possibly might have to be recovered if the legislation is struck down.

Of course, that raises the question of whether the provision in Clause 2 is justiciable. There is great virtue in Amendment 12 which the noble and learned Lord, Lord McCluskey, is putting forward. Indeed, the noble and learned Lord, Lord Wallace of Tankerness, is making the same point in Amendment 13 which at least states that the issue is not to be questioned in a court of law. As it is, that question is unanswered in the Bill. The answer might be that the Minister can say that it is not justiciable, but I respectfully suggest that that is not a sufficient answer. The court will be asked to examine this if it remains in its present state, the judges will have to consider what it means and what its effect is, and there will be people who, for all sorts of reasons, may wish to take advantage of the uncertainty that the present clause demonstrates.

There are great dangers here. They cannot be dismissed as hypothesis—they are a reality that the Government have to face up to. In the interests of responsible government and, if I may say so, harmony between Edinburgh and this House, it would be wise to give further very serious consideration to the formula which I am putting forward in order to resolve these problems. I beg to move.

**The Deputy Speaker (Baroness Fookes) (Con):** My Lords, if Amendment 7 is agreed, I cannot call Amendments 8 to 12 inclusive by reason of pre-emption.

**Lord Cormack:** My Lords, I hope the occupant of the Woolsack will not have to do that because I very much hope that the Minister will accept the irrefutable logic of the amendment moved by the noble and learned Lord, Lord Hope. My amendment 8 is very simple. I am most grateful to the noble and learned Lord, Lord McCluskey, for adding his name to it. When we debated similar issues in Committee the noble Lord, Lord Stephen, indicated that he supported this amendment. He has now got a rather ingenious substitute; he just puts quotation marks around “normally”.

It is very important that the Minister should heed the wise words of the noble and learned Lord, Lord Hope. We want clarity in this measure. In the previous debate, the noble Lord, Lord Empey, made an extraordinarily effective but rather cynical speech. I was tempted to

[LORD CORMACK]

get up, as my noble friend Lord Forsyth of Drumlean did, and say we are wasting our time. It really is a very unsatisfactory way to legislate that an extra-parliamentary body, with a prior commitment from leaders of parties to give it a blank cheque, then in effect tells Parliament what to do. From a constitutional point of view, it is an outrage that that should happen. In saying that, I am not making any personal political criticism of the noble Lord who presided over the commission or of any members of it, but for it to be given that unfettered power and then to come to Parliament with a Bill that is not really going to be changed at all is deeply unsatisfactory.

If the Minister cannot accept the admirable amendment from the noble and learned Lord, Lord Hope, I hope that at the very least he will accept that the word “normally” is fraught with all sorts of dangers. The question of what is normal and what is abnormal is justiciable and will be taken to the courts, so why have it in at all? Taking out that word and perhaps coming back at Third Reading with a slight extra clarification—even to substitute such words as “in the most exceptional circumstances”—would be better than just having “normally”. I honestly do not think that by accepting this amendment, or undertaking to come back at Third Reading with something similar, the Minister would be selling anyone down the river at all. It would not alter the thrust or the purpose of the Bill. Many of us find the Bill troubling and unsatisfactory but we in your Lordships’ House have a duty to try to improve, and this would be a very modest improvement. I commend it to the Minister.

**Lord McCluskey:** My Lords, I need not repeat the arguments that the noble Lord, Lord Cormack, has put forward again so clearly. We need say nothing more about “normally” except that we were anxious to help to improve the Bill. This was not anti the Government or anti the Scottish Administration.

My second point relates to Amendment 12 in this group, which is to do with the question of justiciability. For the reasons that have been advanced at some length, so I need not repeat them, the noble and learned Lord, Lord Hope, and I are agreed that this word is justiciable. It would be very foolish of the Minister to reject the advice of a man as distinguished in the law as the noble and learned Lord. The word “normally” is bound to appear before a court. If the UK Government decide to legislate on a matter that is devolved and say, “This is not a normal situation”, and some person, whether in the Scottish Government or affected by the legislation, says, “No, it is not”, and it goes to court, the court cannot say, “We’re not going to resolve this matter”—it must answer the question. So to say that it is justiciable is exactly right, and it is wrong for the Minister to ignore that. The Minister kindly suggested that he and I should meet, and we did, but I am afraid that we simply agreed to differ on the issue of justiciability.

I should mention one other point that does not arise out of these two amendments precisely, which is that this is to do with the Sewel convention. I hope that the noble Lord, Lord Norton of Louth, will permit me to quote what he said in Committee on

8 December. In response to the argument that the Smith commission stated that:

“The Sewel Convention will be put on a statutory footing”, he said, referring to the noble and learned Lord speaking from the Front Bench:

“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”.

The noble and learned Lord rejected that, saying:

“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”.—[*Official Report*, 8/12/15; cols. 1506-07.]

I must confess that it astonished me to hear that. Can the Minister make it clear whether the Government stick by that statement at col. 1507, which was repeated in response to the noble Duke, the Duke of Montrose? In due course I hope to move Amendment 12.

**Lord Stephen (LD):** My Lords, I make it clear at the outset that we support the wording provided in his amendment by the noble and learned Lord, Lord Hope. Indeed, we agree very much with the noble Lord, Lord Cormack, that the word “normally” seems at best unhelpful in legislation.

Our first two amendments, Amendments 9 and 10, provide for the consent of the Scottish Parliament to be required when UK legislation makes or attempts to make any alteration to the legislative competence of the Scottish Parliament or the executive competence of the Scottish Government—Scottish Ministers. The amendments would ensure that the current convention is fully reflected in the way it has been understood and applied in practice.

The part of the convention currently covered by Clause 2 is effectively only half of the convention. It is to apply when UK legislation makes provision for issues which are within the legislative of the Scottish Parliament. As has been stated, Clause 2 reflects almost exactly the words used by Lord Sewel in the House of Lords during the passage of the Scotland Act on 21 July 1998, when he said that,

“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*, 21/7/1998; col. 791.]

These comments in this Chamber effectively recommended the establishment of a convention but it has operated more widely than he indicated or anticipated. We should not blindly follow his words in 1998 rather than the convention as it works now. The constitutional practice of putting forward a legislative consent Motion where the legislative competence is being affected, amended or altered was applied, for example, to the Scotland Act 2012, and there are good constitutional reasons for both elements of the convention to be safeguarded. That should be the correct constitutional approach to the Scottish Parliament. Legislation which without consent reduced the scope of the Scottish Parliament’s legislative competence, would be just as controversial, and perhaps more so, than UK legislation which encroached on matters within its competence.

How long has the convention operated in this way? Since 1999, the convention has been understood to require the consent of the Scottish Parliament when UK legislation will alter the legislative competence of the Scottish Parliament or the executive competence of Scottish Ministers. This was exactly how it was expressed in the memorandum of understanding that was agreed between the UK Government and Scottish Ministers back in 1999. It is also reflected in Devolution Guidance Note 10, which was issued by the Department of Constitutional Affairs back in 1999 and gives information as to how the UK Government operate the convention in practice—and that is how it has been operated.

5.30 pm

The Smith commission recommended that the convention should be put on a statutory footing. Do we think that the Smith commission had in mind the words of Lord Sewel in 1998 in this Chamber, or do we think it had in mind the convention as it has operated every day of every month of every year between the Scottish Parliament and Scottish Ministers and the UK Government and UK Ministers since 1999? I think the answer is very obvious, and it is bizarre that the approach taken in the legislation by Ministers in Committee has been supported and defended in the way that it has. It would be so easy to make this change and to introduce the amendment put forward by the noble and learned Lord, Lord Hope. It would change nothing; it would simply reinforce and strengthen the convention as has been requested by the Smith commission.

The other amendment that we have put forward, Amendment 13, is designed to prevent Clause 2 being subject to litigation in the courts, which has also been touched upon. During the debate on 8 December last year there was a very healthy and informative exchange between the noble and learned Lords, Lord McCluskey, Lord Hope and the Advocate-General—all of them learned, so I will not try to rank them—as to the extent that Clause 2 could give rise to court action concerning UK Parliament legislation that had been passed with or without the consent of the Scottish Parliament. Clause 2 creates uncertainty as to whether or not it is justiciable. There would be a real risk of an attempt to challenge the validity of future UK legislation on the basis that the legislation does not comply with Clause 2, and we recognise that risk. There may be a variety of views as to how the courts would answer any such challenges that might be made. However, the advice that we received from the Law Society of Scotland is clear: first, that it is undesirable that Clause 2 should give rise to legal uncertainty of this kind from the outset; and secondly, that to avoid legal uncertainty it is important that an express provision be made, to put beyond doubt that the provision currently inserted by Clause 2 is not intended to have its application subjected to the jurisdiction of the courts.

Our amendment follows exactly the wording of the Parliament Act 1911. I believe it is worthy of careful consideration and, indeed, of implementation. I hope that the Minister will on this occasion respond positively to these constructive suggestions on these matters.

**Lord Forsyth of Drumlean:** My Lords, I would like to speak briefly to my Amendment 11, which would delete the words,

“without the consent of the Scottish Parliament”.

The noble and learned Lord, Lord Hope of Craighead, has, in Amendment 7, tabled an amendment which I think came from the Scottish Government. I have to say that I do not particularly like that amendment, which is supported by my noble friend Lord Norton of Louth, because what it sets out is what has actually happened by grandmother’s footsteps over the years, as the noble Lord has just pointed out.

The original basis of the Sewel convention was as a kind of courtesy. It was a convention that we would not normally do something without telling, asking or consulting the Scottish Parliament first. However, it has been turned into a veto for the Scottish Parliament on legislation that affects devolved matters. That is a huge change from what was intended at the time of the passage of the original Scotland Bill in 1998. I am clinging to the past with my amendment. I thought that the convention had gradually been changed into something far greater and therefore my amendment seeks to take out,

“without the consent of the Scottish Parliament”.

I also support the amendment in the name of my noble friend Lord Cormack, which would leave out “normally”. I know that the Minister is a very successful advocate and a very important Scottish lawyer but perhaps I may give him a little bit of advice based on my experience as Secretary of State. When the noble and learned Lord, Lord Hope of Craighead, was the Lord President of the Court of Session and the noble and learned Lord, Lord McCluskey, had a distinguished career as a Scottish judge, both of them gave me quite a hammering on occasion. I discovered that if I got into a fight with them, I usually lost. I am not a lawyer but it seems as clear as night follows day that the word “normally” is going to be a problem. We had a long debate about this in Committee and I cannot for the life of me understand why the Minister has not brought forward amendments to deal with it.

**Lord McCluskey:** Has the noble Lord thought of suggesting to the Minister that perhaps he could take an informal word from the noble and learned Lord, Lord Mackay of Clashfern, who also had a rather distinguished career in the law?

**Lord Forsyth of Drumlean:** Indeed, and there is another voice in support of the amendment tabled in the name of my noble friend Lord Cormack and supported by the noble and learned Lord, Lord McCluskey. It is incomprehensible why the word “normally” should be included.

The noble Lord, Lord Stephen, is quite right. What was the Sewel convention has changed into something else. It is a veto, and that is almost certainly what the Smith commission was thinking of. The noble Lord is absolutely right about that. Amendment 7, moved by the noble and learned Lord, Lord Hope, would in effect give legislative effect to what has come to be the practice. Putting into statute what Lord Sewel, back in 1998, said by way of explanation of how the relationship

[LORD FORSYTH OF DRUMLEAN]

between the two Parliaments would operate is a complete nonsense—a point made over and over again in Committee.

I am hoping to cast a fly here and catch those on the Opposition Front Bench. The great mantra that we have had from them over and over again is that we absolutely have to be true to the Smith commission and make sure that its recommendations are implemented. Amendment 7 would provide for that. So are the Opposition Front Bench going to speak against an amendment whose effect would be to deliver the Smith commission proposals—something that the noble Lord, Lord McAvoy, said he would never do? I look forward to hearing the response from that Bench. It is clear that Amendment 7 would deliver what the Smith commission is proposing. I do not like it because I would prefer this Parliament to be free to pass legislation, consulting the Scottish Parliament in a courteous way but not giving it a veto, which is what I think the Smith commission was seeking to do. I am utterly opposed to leaving in the Bill the word “normally”, which would almost certainly result in the courts being dragged into a dispute between this Parliament and the Scottish Parliament, and that would be thoroughly undesirable.

For all those reasons, I think I am inclined not to press my Amendment 11 when the time comes, but to switch sides and support the noble and learned Lord, Lord Hope of Craighead, and my noble friend Lord Norton of Louth—who is undoubtedly constitutionally correct—and to support my noble friend Lord Cormack in taking out this word “normally”. There are two words that I would like to take out of the Bill: one is “normally”, and the other is “Sewel”. I tried to do that in Committee and actually got past the clerks an amendment which deleted “Sewel”; but unfortunately, due to the intervention of noble Lords opposite, who argued that it was not really terribly good to alter the name of a clause in that way, I was not able to press it again at this stage in the consideration of the Bill. I think it was the noble Lord, Lord Stephen, who was responsible for that.

I say to my noble friend that the great advantage of accepting Amendment 7 is that we would get rid of “normally” and we would get rid of “Sewel”; and we would have something that is absolutely clear in statute and delivers the Smith commission proposals—which, we keep being told, is what this Bill is all about.

**Lord Norton of Louth:** My Lords, I have added my name to Amendment 7 in the name of the noble and learned Lord, Lord Hope of Craighead, as has already been mentioned.

As has been stressed, this clause is supposed to embody the Sewel convention. Let us be clear as to what a convention is. We are talking about a convention of the constitution. A convention is a non-legal rule of behaviour that is considered binding by those who are covered by it and is justified by being, as David Feldman put it, “right behaviour”. There is a moral imperative, and compliance with the rule is invariable. Invariable practice, lacking a moral base, does not establish a convention. Usual practice, as distinct from invariable practice, does not establish a convention.

Conventions develop: a precedent is set and followed and a practice is established from which there is no deviation. In addressing this House in 1998, Lord Sewel recognised that a convention is something that developed. However, his use of the word “normally” meant that what he had in mind was not and could not be a convention. What has developed is a practice, and one that has extended beyond what he said.

Clause 2, as it stands, makes no sense. Conventions may be transposed into statute, but once in statute the convention has gone; it has been superseded by statute. We saw a recent example with the convention governing votes of confidence in the House of Commons. That has been superseded by Section 2 of the Fixed-term Parliaments Act. There is no longer a convention. What we have with Clause 2 is the inclusion of the words of Lord Sewel in a form that does not constitute a convention but with the Government believing that it is a convention and seeking to maintain it as a convention even though enshrined in statute. I was going to say that I hope that that makes sense, but of course it does not make sense. This clause is nonsense.

The Government cannot justify it on the grounds that it implements a recommendation of the Smith commission, because it does not—that point has already been stressed. The Smith commission recommended putting the Sewel convention on a statutory basis. There is a Sewel convention, as we have heard, but it is different from what Lord Sewel enunciated in 1998. Putting the words of Lord Sewel on the face of the Bill does not put the Sewel convention in statute. Indeed, the clause as it stands narrows and undermines the convention. It narrows it by omitting a practice that has developed and been pursued on a continuous basis, and it undermines it by removing the essential feature that established it as a convention. A convention, by definition, establishes the rule of behaviour that is taken as binding by those who engage in that behaviour. Clause 2 permits, in effect, the Government to say, “We are bound by, this except when we decide not to be bound by this”. What is in the clause is not a convention: it is a declaration of good behaviour.

5.45 pm

The problems with this clause have been recognised by the Scottish Government. When the Constitution Committee visited Holyrood as part of its current inquiry it was told by the Scottish Minister, Fiona Hyslop, that the provisions of the Bill may weaken what has been the operation of the Sewel convention. She was accompanied by an official, Ken Thomson, who said, “You need to enact the convention rather than the quotation”. In short, they were clearly alert to the failings of this clause. They recognised that the clause does not encompass measures that alter the legislative competence of the Scottish Parliament or the executive competence of Scottish Ministers. The Sewel convention does encompass such measures. As the Law Society of Scotland put it in its briefing to us:

“Far from implementing what the Smith commission recommended, this clause would shrink what is currently meant by the Sewel convention”.

If the Government are serious about putting the recommendations of the Smith commission into statute, let them do so. There is at present a Sewel convention,

which appears to be working without controversy, but if there is a commitment to transpose it to statute, let us make sure that it is done properly and that we are not left with a ridiculous clause that is neither fish nor fowl. You cannot have a convention and a statute. You can have one or the other. Either Clause 2 is replaced or it is dropped. If left as it is, it will be a public demonstration of how not to legislate.

**Lord Thomas of Gresford (LD):** My Lords, I may be the only person present in the Chamber who was here when Lord Sewel issued these words. Maybe the noble and learned Lord, Lord Mackay of Drumadoon, and the noble Duke, the Duke of Montrose, were there at the same time. As I recall, we were debating these matters late into the night, and at 1 am or 2 am, when we came to Scottish and Welsh matters, there was a blockage. The words that Lord Sewel spoke were a very welcome resolution of a particular problem that had arisen. I recall afterwards that when it was referred to as the Sewel convention we used to rib Lord Sewel that he had unwittingly added his name to something that seemed to have become a great constitutional principle.

I intervene in this debate to refer to the problems in Wales as illustrative of the problems that your Lordships face. We have had three trips to the Supreme Court between the Welsh Assembly and the Wales Office in a very short period of time because we have not had the ability to pass primary legislation until quite recently. Legislative competence is always at our fingertips in Wales. We talk about it all the time. Indeed, the Welsh Labour Government talk about it all the time in holding up the consideration of the current draft Wales Bill. This issue seems to require either a mechanism that resolves the problems or something that is absolutely solid and certain in this particular piece of legislation.

Those who served as my colleagues during the coalition Government in the Wales Office tell me that legislative competence was a weekly discussion and deals were done between the Wales Office and Cardiff in order to solve where the parameters were. Of course we do not have reserve powers devolution in Wales; it is rather different from Scotland. We have been rather envious that Scotland has not so far had to go to the Supreme Court to sort things out in this way. It seems to me, in following my noble friends, that the way it is expressed in the Bill is such that Scottish lawyers will become very wealthy in their trips to the Supreme Court to sort things out. At the moment I am trying to work on a mechanism in Wales that will resolve these difficulties if that cannot be done between Governments in a simple way, not the way that has been arrived at so far. So, go carefully: canny down the brae, as they say, when it comes to consideration of this particular part.

**Lord Mackay of Clashfern (Con):** My Lords, some time ago I indicated to the noble and learned Lord, Lord McCluskey, that I support his approach to this clause. It is vitally important to consider the question of whether it is intended that the clause, whatever its terms, should be subject to decision by a court of law. The situation so far as Wales is concerned—and I think it would be true for the Scottish Parliament—is that in

some cases its powers are subject to judicial scrutiny. The Parliament of the United Kingdom is not of that kind. It has never had its principal functions subject to judicial scrutiny. If a term is put into this Bill, which will then become an Act, that determines when the United Kingdom Parliament can act, that will be a complete innovation. It does not matter what the terms are, however precise and well drafted, I cannot see how that could be excluded unless provision is made in the Bill which states that the decision on this point is to be a matter for the United Kingdom Parliament. This I regard as an extremely serious point which the Government have to decide.

It is not a question of agreeing with the Scottish nationalists. The amendment tabled by the noble and learned Lord, Lord Hope, seems to be in accordance with what they would like to see; that is, the furthest stretch of the convention, which is called the Sewel convention for various reasons, amounting to what is really a complete ban. That is what I think the amendment of the noble and learned Lord, Lord Hope, does, but that does not cut out by itself the idea that a court of law could determine whether the United Kingdom Parliament had acted lawfully in making an Act which could affect Scotland. That is why I strongly support Amendment 12 tabled by the noble and learned Lord, Lord McCluskey. That concept must be put into this clause at some point in order that the matter be not justiciable.

**Lord Forsyth of Drumlean:** Does my noble and learned friend think that Amendment 7, which he says stretches the convention as far it goes, sets out what has actually become the convention now or does he think it has gone beyond that?

**Lord Mackay of Clashfern:** What has become the convention now seems to be government papers. As far as I am concerned, I had not heard of them until this discussion. It is certainly not a convention of the Houses of Parliament in the sense that they are narrated in that context. But I am not so concerned about the precise terms in which this finishes up. What I am very concerned about is that it should not be subject to a judicial decision. The Parliament of the United Kingdom has never been subject, certainly in the present situation, to the courts of law and I think that it would be a tremendous mistake to make provision in a Bill which could only have that effect.

**Lord McCluskey:** Do I understand the noble and learned Lord correctly that, without choosing between them, there are two ways to solve the problem he considers to be so important? One is to do what the noble Lord, Lord Cormack, has suggested—delete the word “normally”—and the other would be to adopt either Amendment 12 or Amendment 13, which provide specifically that the matter shall not be justiciable.

**Lord Mackay of Clashfern:** I do not regard them as alternatives; rather that Amendment 12 tabled by the noble and learned Lord, Lord McCluskey, is absolutely essential. The other form of wording, that it, “shall not be questioned in any court of law”,

[LORD MACKAY OF CLASHFERN]

comes from the noble and learned Lord, Lord Wallace of Tankerness, and the noble Lord, Lord Stephen, would be a possible alternative. But something of this kind is in my view absolutely essential if we are setting out in statute a restriction on the power of the United Kingdom Parliament to legislate.

**Lord Hope of Craighead:** My Lords, the problem with the term “Sewel convention” itself seems to beg a question as to exactly what it covers. The word “normally” is not the only problem in that respect.

**The Duke of Montrose (Con):** My Lords, I should say that if we get to the stage of putting this to a vote, I would like to support the amendment of the noble and learned Lord, Lord Hope of Craighead. In Committee, I drew out the question about the progression from the wording that Lord Sewel set out at that stage of the 1998 Bill and what it had become. It seems to me that the beauty of creating the legislation in statute rather than in a convention is that we know exactly what we have got. It may be that the Government are arguing that we never want to pin things down and that they should be free to do whatever they like at all times, but I think we in this House prefer to have things clearly stated so that people know where they are. Of course, my noble friend Lord Norton of Louth has also made this point—that you cannot have a convention and a statute—so the Government have to make a choice as to which road they will go down. At the moment there seems to be a lack of clarity on many levels, so to have an amendment which has been drafted by the Scottish Parliament and recommended by the noble and learned Lord, Lord Hope of Craighead, is not a bad beginning.

**Lord Empey:** My Lords, can the Advocate-General tell us whether the use of the word “normally” is to allow the Government sufficient flexibility in the event that a devolved Parliament actually breaks the rules of an international treaty obligation? The United Kingdom is signed up to a number of international treaties, and it is possible that the actions of a devolved legislature could break one of those conventions. Indeed, we are on the cusp of that at this very time over certain issues concerning rights in Northern Ireland, and it could happen on other occasions. Is it therefore the Government’s view that because they want that flexibility, they have chosen to use this language so that if, for instance, the Scottish Parliament does something which breaks our international obligations in terms of legislation, this Parliament would have the ability to correct it?

It is a bit unfortunate that the Constitution Committee, chaired by the noble Lord, Lord Lang, is currently looking at a range of issues which include whether there are any countrywide values or other rights that we believe any United Kingdom citizen should be entitled to. The noble Lord, Lord Lester, who is not in his place, has advocated something approaching this on a number of occasions. I therefore wonder whether the Minister considers that the provision as it stands allows for that or could allow for it, or whether that was the intention behind the language. I have to say that I do not agree with the Sewel convention. In my

home circumstances, the practice was that from 1921, Parliament effectively ignored what Stormont did, and we all know where that led.

I agree that there is not much point in having devolution if you continuously intervene over the heads of the devolved legislature, but at the same time there is a rational argument for saying that you cannot allow things just to drift on without having regard to the wider issue and to our international obligations. Therefore, I wonder whether that is what is at the back of the Government’s mind. If so, it would be most helpful to have an explanation.

6 pm

**Lord Kerr of Kinlochard (CB):** My Lords, I will touch on a rather similar point to the one that the noble Lord, Lord Empey, just made. I was very surprised by the way the Minister reacted at the end of our discussion in Committee on this point, when the noble and learned Lord, Lord Hope, made a very convincing case and explained the status of the amendment he put forward, as he has done again today. We clearly have two duties: first, to put the Sewel convention, as it operates today, on a statutory basis; and secondly, not to make a defective statute. It seems to me absolutely clear that the inclusion of the vague word “normally” makes this statute defective and a cause of continued dispute. We cannot do that.

I looked at how the Minister reacted when this point was made in Committee. I wonder whether he was not saying something: like the noble Lord, Lord Empey, I wonder whether there is a reason why the Government wish to retain the possibility of acting in breach of the convention as it operates. I wonder whether, for example, he was thinking about the Defence of the Realm Act or the Emergency Powers Act, which almost certainly would go into areas in a national emergency or a state of war where the Scottish Government would normally have fully devolved power. This seems fanciful, but I find it very difficult to think of a logical explanation for the Government’s position that we must write “normally” into the law and thus guarantee dispute in courts of law.

If there are circumstances in which the Government envisage that they would want to act in breach of what has been the convention and what is about to become law, they need to spell out in the Bill what they are. They need to replace the word “normally” with a subsection that defines those circumstances. It seems very unlikely that this is their thinking, but if it is, I hope that the Minister will explain it to us. Otherwise, I can think of absolutely no reason for not supporting the amendment in the names of the noble and learned Lord, Lord Hope of Craighead, and the noble Lord, Lord Norton of Louth.

**Lord McCluskey:** Would the noble Lord support this possible solution? There is quite some time between now and Third Reading. If the Minister, with the support of others—he would certainly have the support of the Liberal party—could approach his new friends in Edinburgh in the Scottish National Party, and the noble Lord, Lord McAvoy, and say, “This is a mess agreed by Smith. It’s been demonstrated that it can’t be done. Would you agree that we simply drop this

clause?” he might well find that they would be happy to let it be dropped and the Government could renew a statement that we will do what the Smith commission envisaged.

**Lord Kerr of Kinlochard:** I very much hope that the Government will give a serious, considered reply to the noble and learned Lord, Lord Hope. If it involved suggesting coming back at Third Reading with some variant of his wording, I would want to listen to that. But, it seems to me that we simply cannot do what the noble and learned Lord, Lord McCluskey, is asking for, which is to drop this altogether. It is an important point in the Smith report that the House of Commons has gone along with, and on which all the political parties agree. The idea of just dropping the clause is not possible, but we need to write one that is not defective.

**Lord Davidson of Glen Clova (Lab):** My Lords, normally when the loyal Opposition hear valid and powerful arguments from many noble Lords and noble and learned Lords, they listen acutely and seek to put their weight behind those observations, particularly when they are put into an articulate amendment. However, in this case we will not support these amendments.

I suspect that the question “Why?” might come from the lips of certain noble Lords. It is our judgment that the political imperative suggests this position: if any of these amendments are passed by this House, they will be overturned in another place. It will be immediately accepted that that would be wholly undesirable. I notice the unfortunate distortion of the normally calm features of the noble Lord, Lord Forsyth, but he will fully understand, as one of the United Kingdom’s most able politicians over many years, that political imperative can be of considerable importance.

**Lord Forsyth of Drumlean:** I was puzzled by the noble and learned Lord’s assertion that he would be unable to support this because throughout endless hours of consideration of this matter, we have been told repeatedly that the Opposition are here to ensure that the letter of the Smith commission is delivered. The amendment in the name of the noble and learned Lord, Lord Hope, would do precisely that. We have been correctly advised that the clause is defective and does not do that. So the Labour Party will actually prevent the implementation of the Smith commission proposals. I venture to suggest that that is an albatross that some people may hang around its neck.

**Lord Davidson of Glen Clova:** I appreciate that the ornithological reference might necessarily be unhelpful to the party that I represent at this particular moment in time. However, the wording of the Smith commission is not to be treated as if every single word has been precisely defined. One of the great traditions of the British approach to such matters is to retain a certain flexibility in the way one deals with issues as and when they arise. When they arise, one occasionally notices other constitutional observations.

**Lord Cormack:** I am extremely grateful to the genial noble and learned Lord, but is he really saying that if this House exercises its constitutional right and sends

something back to the other place it is acting in some way ultra vires? Surely if the other place decides that it does not want to accept the advice of your Lordships’ House we can reflect on that. The noble and learned Lord knows my constitutional position there. But for this House not to use the very limited authority that it has and pass a clause that is totally unsatisfactory and, in the opinions of many noble and learned Lords, nonsensical—can he advise us on what he is doing?

**Lord Davidson of Glen Clova:** The noble Lord raises a matter that goes well beyond what I hoped we were going to be discussing. He is opening up the entire relationship between this House and the other place.

**Noble Lords:** Oh.

**Lord Davidson of Glen Clova:** Oh, yes, he is. I hear observations that I am mischaracterising him, but no doubt the noble Lord, Lord Cormack, will be able to look after himself in due course. If he is suggesting that I am proposing that the House of Lords should never do anything that would go against the other place, then that is an entirely incorrect assessment of what I am saying. What I am trying to get across is a recognition that we are dealing here with something that is very much sui generis. This is terrain in which we have not normally been operating. This is an area of legislation which goes well beyond the situation that underlies the observations of the noble Lord, Lord Cormack, about the relationship between the two Houses of Parliament.

**Lord Wallace of Tankerness:** The noble Lord is basically saying that, albeit various people, not least the noble Lord, Lord Norton of Louth, have said that Clause 2 does not actually deliver the Smith commission, the Labour Party is prepared to live with the situation whereby the Smith commission proposals are not delivered, for some political imperative. I am not quite sure what that political imperative is. If it is a question of time, ping-pong would not take weeks. It is still perfectly possible to get the Bill delivered by the Easter Recess. I am not quite sure what that political imperative is, particularly if it is not going to deliver what, up until now, we thought the Labour Party wanted to deliver.

**Lord Davidson of Glen Clova:** The noble and learned Lord wants to know whether I am correct in identifying a political imperative. These are matters of judgment and in judgment, one can be right and one can be wrong as matters go by. There is an assessment made in this judgment and when one makes a judgment and comes to a particular conclusion, if that conclusion is one that one wishes to live with and follow through, well, one does that. I think that that is something that the noble and learned Lord will appreciate, because he has spent many years in politics and has had to realise that these political judgments have to be made. These political judgments can sometimes be right and sometimes be wrong, but this is the judgment that we have made. It would be most unfortunate, on this of all areas, were this to involve tension, difficulty, a contest, friction

[LORD DAVIDSON OF GLEN CLOVA]

between this House and the other place. On this point, therefore, we adhere to the position we have thus far asserted.

Let me make another point. Clause 2 states:

“But 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”.

That is language that is, at least, redolent of what a convention might be. It is the type of language that has been seen in the past in legislation in Northern Ireland and elsewhere—it is not a complete innovation. It is language that can be understood, and understood by courts. However, the amendment in the name of the noble and learned Lord, Lord Hope of Craighead, for example, states:

“But the Parliament of the United Kingdom may not pass any measure applying to Scotland that makes provision about a devolved matter without the consent of the Scottish Parliament”.

We have heard much in this House on the extent of this Parliament’s sovereignty. Might it not possibly be seen—I would be very interested to hear the views of the noble Lord, Lord Norton of Louth, on this—that this language, saying what the Parliament of the United Kingdom may and may not do, is itself an attempt to trench on the sovereignty of the UK Parliament? Therefore, if one is going to find tremendous support for such an amendment, one has to be conscious of what one is doing constitutionally, because this would appear to be another innovation.

The Opposition are not against innovation. Some innovations can be good, some innovations can be bad; people adopt positions here and there depending on their assessment of those various innovations. However, this innovation is one we are disinclined to immediately jump into and support.

6.15 pm

**Lord Forsyth of Drumlean:** I appreciate that we are on Report, but when the noble Lord describes this as an innovation which is undesirable, is it not one that was recommended by the Smith commission?

**Lord Davidson of Glen Clova:** I am slightly surprised that the noble Lord offers such support for this amendment. I will explain my surprise. I do not see this as an exact simulacrum of what Smith proposes. This is an attempt to change the sovereignty of this Parliament. I do not understand that the Smith commission was quite so ambitious in the way it wished to proceed. I hope that that answers that question.

**Lord Thomas of Gresford:** I am attempting to follow the noble Lord down the tortuous passes of his philosophical musings, but does he not realise that there is conflict and tension today between the Welsh Labour Government and the Conservative Welsh Office because the areas of legislative competence are frayed, or overlap, or whatever? We must have something that is certain and he is defending something that is clearly utterly uncertain and ripe for the Supreme Court.

**Lord Davidson of Glen Clova:** There is a view, of course, that the Supreme Court is developing a constitutional role and that that is a matter that might

be an adornment to the developing UK constitution. The noble Lord, Lord Thomas, suggests that these are philosophical musings, but the philosophical musing comes entirely from the other side. I am looking at the political reality of how this can be dealt with in relation to Scotland. There may be many interesting and complicated issues in Wales, and I would be fascinated to hear more about these in due course, but at the moment I am trying to put forward our position on these amendments.

Considerations of political imperative, therefore, are very much to the fore and we will accordingly not support these amendments. I hope I have dealt with the various issues that have been raised, but I see the noble Lord, Lord Tebbit, shaking his head. If there is a particular point he wishes me to address, or there is any issue that troubles him, I would be happy to do so.

**Lord Tebbit (Con):** I am grateful to the noble and learned Lord. Will he just come to the point and meet the point that has been ably expressed by a number of noble and learned Lords? He is just waffling. Is he trying to talk it out until 11 pm?

**Lord Davidson of Glen Clova:** The suggestion that I am waffling is one that I do not find wholly offensive.

**Lord Wallace of Tankerness:** The noble and learned Lord asked whether he had dealt with all the issues. He has not dealt with the issue, raised by the noble and learned Lord, Lord McCluskey, and by my noble friend Lord Stephen, of the importance we attach to having some subsection in here which would make the matters non-justiciable. We would welcome the view on that of my predecessor as Advocate-General for Scotland.

**Lord Davidson of Glen Clova:** I shall finish answering the noble Lord, Lord Tebbit, before I come to the interesting point made by the noble and learned Lord, Lord Wallace. I thank him for the name check.

The noble Lord, Lord Tebbit, wanted to know what I was getting at, what my point was and why I was waffling, to use his word. I am trying to deal with various issues that seem to trouble many noble Lords and many noble and learned Lords. The point I am trying to make—the simple nub—which he will readily understand, is that we perceive, and our judgment is, that the political imperative suggests that these amendments be not passed in this House. It is as simple as that.

To deal with the point raised by the noble and learned Lord, Lord Wallace of Tankerness, about whether the matter may be looked at from the point of view of the purely legal analysis, in looking at this clause now—we have not always looked at it this way—we see that there is considerable virtue in having the support of the Minister’s statement on how this clause will be perceived by this House, and why this House is putting it forward in these terms. That statement by the Minister will, of course, feature were this matter to come before the courts, where it would be of some consequence in how the court would decide whether this language suggested that the issue was justiciable. I hope that offers a measure of response.

**Lord Wallace of Tankerness:** My Lords, to pick up the noble and learned Lord on that point, I think he is suggesting that a *Pepper v Hart* statement by the present Advocate-General would put the matter beyond doubt if it came before the courts. But surely the point is that we do not want it to come to the courts at all because that is when uncertainty comes in. Very important matters, such as people's investment decisions, may be involved and they will not know the outcome until the courts have decided the matter. Our measure, which has stood the test of time since the Parliament Act 1911, would mean that the issue would never come to the courts at all, because, if it does, the genie is out of the bottle.

**Lord Davidson of Glen Clova:** I feel that genies should not come out of their bottles; they should probably stay in their lamps. However, the point here is that, when one looks at this clause, no matter how one seeks to alter it, there is the potential—such are the fertile minds of our legal colleagues—to find one way or another in which any issue can be brought into court. My noble and learned friend the Advocate-General for Scotland, his predecessor and even his predecessor have frequently had to deal with issues by saying at no stage was this ever intended to go before a court, and yet we found that it did come before the courts, and in those areas the court had to make a decision whether it was a matter that was before the court or not. This is just the way our constitutional arrangements work. That has stood the test of time and it enables the finest minds of the Supreme Court to consider these types of issue. At this point, I will perhaps draw to a close, but if—

**Lord Stephen:** The noble and learned Lord has made many points but I think he would accept that there is very wide cross-party support for the amendments being submitted today on this matter. After the 18 minutes for which he has been on his feet, I think none of us is any the wiser as to what the political imperative to which he refers is.

**Lord Davidson of Glen Clova:** I consider that it has never been the role of the loyal Opposition to increase the wisdom of Members of this House but we often attempt to leave them better informed. If I have wearied noble Lords over these 18 minutes, I apologise, but I offer this one little candle of comfort—I will weary them no more.

**Lord Forsyth of Drumlean:** Before the noble and learned Lord sits down, could it be that the political imperative is that he has been told by the Chief Whip down at the other end of the building, “Under no circumstance accept any amendment, however sensible it be”?

**Lord Davidson of Glen Clova:** Sorry, who is the Chief Whip in the other place? I am afraid it is not a man or woman I have ever met, so if there is some suggestion that I have been “nobbled” and my arm pushed up my back by some person wholly unknown to me, I think I would have noticed. The suggestion that my noble friend Lord McAvoyn would in any way try to persuade me of anything—

**Lord Wallace of Tankerness:** Perhaps I can help the noble and learned Lord because his Whips' Office told my party's Whips' Office that is exactly what happened. They have been told by the other end not to support any amendment, however sensible, which would lead to a situation that could result in ping-pong.

**Lord Davidson of Glen Clova:** As every Member of this House—every noble Lord, every noble Baroness—who has spent any time in the other place and has been involved in the political toings and froings will know, what is said between Whips of different parties is normally regarded as confidential. Therefore, while the noble and learned Lord, Lord Wallace, may have an observation that somebody has told him, that is simply a matter for his Whip, I guess. I will try to sit down now unless anyone—

**Viscount Younger of Leckie (Con):** My Lords, I believe that the House is ready to hear from the Minister.

**Lord Keen of Elie:** I can say that the Whip did not consult me on that proposition.

I am grateful for the detailed consideration that has been given to this clause and, indeed, for the time that has been given up by a number of noble Lords in meeting both me and my noble friend Lord Dunlop to discuss aspects of the clause.

I begin by considering the extent or scope of the provision with which we are dealing. It touches on amendments moved by the noble and learned Lords, Lord Hope, Lord McCluskey, Lord Wallace and Lord Mackay of Clashfern, and the noble Lords, Lord Norton and Lord Stephen.

**Noble Lords:** What about Lord Cormack?

**Lord Keen of Elie:** I will come to that in a moment because normally I would come to “normally” when I am addressing “normally”, and that is when I will address the noble Lord, Lord Cormack. I would not want him to feel out of this.

The Smith commission agreement stated:

“The Sewel Convention will be put on a statutory footing”.

That is precisely what Clause 2 achieves. Let us step back for a moment to the Sewel convention. What did Lord Sewel say? He said that,

“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.]

Of course, the word “normally” was important. I will come back to that because it is a word that respects the sovereignty of the United Kingdom Parliament. Without it, you might have had a provision that intruded very materially on the sovereignty of that Parliament. That was what was said at the time in 1998.

The noble Lord, Lord Norton, observes that that is not a convention in the conventional sense; and, of course, he is right because a convention is something that grows up and is invariably applied or employed. Where you have the word “normally”, you are saying that there can be a qualification or an exception, so,

[LORD KEEN OF ELIE]

strictly speaking, in constitutional terms, the Sewel convention is not a convention. But, you know, by convention it became a convention. And that is where we are. Over a period of years, what was referred to as the Sewel convention was understood not only by the United Kingdom Parliament but also by the Scottish Government and by the Civil Service. They understood and applied the Sewel convention, albeit that in strict constitutional terms it was not a convention. They operated it successfully and without difficulty until now. Then the Smith commission decided that the Sewel convention should be put on a statutory footing. Of course, the technical difficulty is this: if you express a convention in statutory terms, it ceases to be a convention.

6.30 pm

In a sense, we do not have that problem here because, as the noble Lord, Lord Norton, pointed out, it was not a convention in the first place. But let us avoid those technicalities and potential difficulties. It was understood to be a convention and it was decided that it would be expressed in statutory terms and put on a statutory footing. Therefore, it would in a strict sense cease to be a convention. But what was understood to be the Sewel convention when the Smith commission was meeting and determining this matter was the convention that the United Kingdom Parliament would not normally legislate in respect of devolved matters. That was the beginning and end of what was understood by the convention.

Is there any difficulty about that? Not really. The noble Lord, Lord Stephen, referred to various working documents employed by the Civil Service, such as Devolution Guidance Note 10, which is not a document that was ever approved by any House of this Parliament but was developed by the Civil Service for the application and operation of what was understood by the Civil Service and everyone else to be the Sewel convention. Behind that stood a memorandum of understanding. The noble Lord, Lord Stephen, referred to a memorandum of understanding being entered into in 1999. The memorandum of understanding was entered into between the United Kingdom Government and the Scottish Ministers. It also included the Welsh Ministers and the Northern Ireland Executive Committee, as it then was. But it was not entered into just in 1999; it went through seven different iterations or editions. Indeed, the memorandum of understanding was last agreed to by these parties in October 2013.

What did the United Kingdom Government and the Scottish Ministers understand was meant by the Sewel convention? Paragraph 14 of the memorandum of understanding says:

“The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not”.

That is important, of course, because it restates the sovereignty of our Parliament. It goes on:

“It is ultimately for Parliament to decide what use to make of that power”.

Again, it restates the sovereignty of our Parliament. It continues:

“However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature”.

That is what the parties understood in October 2013, as well as in 1999. Indeed, it goes on to say:

“The United Kingdom Parliament retains the absolute right to debate, enquire into or make representations about devolved matters. It is ultimately for Parliament to decide what use to make of that power, but the UK Government will encourage the UK Parliament to bear in mind the primary responsibility of devolved legislatures and administrations in these fields”, and so it goes on.

There is no difficulty in understanding what the United Kingdom Government, the Scottish Ministers and everyone else understood was meant by the Sewel convention, not only in October 2013 but when the Smith commission report was issued in 2015. That was the scope of the convention that the Smith commission recommended should be put on a statutory footing—not Civil Service working notes, not DGN 10 and not further requirements.

**Lord Stephen:** Does the Minister accept that since 1999 the practice has been that if there is a proposal to alter the legislative competence of the Scottish Parliament or the executive competence of the Scottish Ministers, the convention is that a Motion should go before the Scottish Parliament in relation to that matter? In other words, the convention on these separate issues has been that there would be a decision of the Scottish Parliament on that issue.

**Lord Keen of Elie:** I cannot accept that because of the language employed. It was not the convention that dictated that; it was a practice that grew up as a consequence of the convention having been entered into. It reflected, for example, working note DGN 10. That is why I say there was a clear understanding by the parties not only in 1999 but in October 2013 of what was meant strictly by the Sewel convention. I also commend to the noble Lord the heading to paragraph 22 of the Smith commission report, which was also agreed to by the parties to the Smith commission. It makes it abundantly clear what the parties understood was meant in this context by the Sewel convention.

I quite appreciate that over the years practice has developed and no doubt practice will continue to develop, which is one reason you do not want to freeze practice in statutory form. What you want to express in statutory form is the strict requirement of the Sewel convention and its scope. It is important to remember that by doing that we preserve not only the convention as it is understood and has been understood but the sovereignty of this Parliament. For this Parliament is sovereign and can legislate for devolved matters, just as the Scottish Parliament can legislate for devolved matters.

The matter that Lord Sewel was addressing when setting out the principle that this Parliament would not normally legislate with regard to devolved matters without the consent of the Scottish Parliament was this: to make it clear that, despite Parliament's sovereignty, the devolved legislature would be left to get on with the business of legislating in devolved areas. No one wanted the prospect of legislative ping-pong between the two Parliaments. That is also set out—as I say, quite clearly—in the memorandum of understanding, as it has been revised on seven occasions and agreed to by the United Kingdom Government and the Scottish Ministers.

The question of the words “not normally” was raised. The noble and learned Lord, Lord McCluskey, among others, pointed out that the word would be justiciable. Of course, all the words of a statute are justiciable in the sense that you can go to a court and ask the court what it believes they mean. But it is not the word that is not justiciable, it is the issue. The question of whether the United Kingdom Parliament can legislate in devolved areas is not justiciable. It is for the United Kingdom Parliament to decide whether on some occasion it will do what it normally, usually or generally does, or will not do so, for it is a sovereign and supreme Parliament. That underlines the importance of the words “not normally” and to remove them from this clause would be to impinge on the sovereignty of this Parliament in a most unprecedented and extraordinary manner.

**Lord Forsyth of Drumlean:** I am listening very carefully to my noble and learned friend and basically he is saying that the Sewel convention is working perfectly well; everybody understands what it is. We are hearing from very expert opinion that the clause as it stands is rubbish and is subject to judicial challenge, so why does he not just drop the clause and stick with what is working, which is the convention as it exists?

**Lord Keen of Elie:** I am obliged to my noble friend for his invitation. I refer to the recommendation of the Smith commission report, which was that it should be put on a statutory footing, and this Government are determined that it will be put on a statutory footing. I hope that answers my noble friend's inquiry.

That brings me to my noble friend's Amendment 11, which he spoke to but followed up with the comment, “You can ignore my amendment”. I would like to treat that as a precedent in the case of my noble friend but not on this occasion. If he has spoken to his amendment, I have to respond to it.

**Lord Forsyth of Drumlean:** That is a novelty.

**Lord Keen of Elie:** Given the noble Lord's invitation to ignore it, it is more than a novelty; it is rather generous. Be that as it may, I come back for a moment to the question of justiciability. The noble and learned Lord, Lord McCluskey, and others of your Lordships have sought to ensure that the provisions of Clause 2 will not create a justiciable right. I understand and appreciate the reasoning behind that amendment, but our position remains that it is not necessary because Clause 2 cannot and does not create a justiciable right. I emphasise that it is not a question of whether the word “normally” is justiciable, as every word of a statute is in that sense capable of being interpreted by a court. It is the issue that is not justiciable. I return to a point that I mentioned briefly—

**Lord Lester of Herne Hill (LD):** I had not intended to interrupt until I heard the noble and learned Lord just now. Since the doctrine of parliamentary sovereignty is simply a rule of recognition by the Queen's courts that Parliament should be sovereign, is it not also a matter for the Queen's courts and not for Ministers or government, or even Parliament, as to what is or is not justiciable?

**Lord Keen of Elie:** I am obliged to the noble Lord. I would suggest that it is a moot issue because there have been occasions where this Parliament has expressly stated that an issue will not be justiciable, but of course the courts themselves will then look at that exception to see whether it is enforceable and lawful. There is that further point, so it is a further layer placed upon the issue by this Parliament but it is not conclusive. I believe there have been occasions where the courts have looked at statutory provisions in which Parliament has purported to say, “This is not a matter for the courts”.

**Lord McCluskey:** Then why does the Minister not simply accept Amendment 12, which says that,

“the decision as to whether or not the circumstances are such as to allow the Parliament of the United Kingdom to legislate with regard to any devolved matter shall be a decision for that Parliament to take, and shall not be justiciable in any court of law”?

**Lord Keen of Elie:** I am obliged to the noble and learned Lord and I can express it only in these terms. It is the Government's considered position that the clause implicitly determines that point in any event. It would therefore not be necessary to express it in the terms proposed in the amendment.

**Lord Wallace of Tankerness:** The Minister says that the Government think that it is implicit in the clause. What is the problem in making it explicit? It would be interesting to consider whether their view is that there is a problem in making it explicit, because if there is not it would be very much to their advantage to accept the amendment of the noble and learned Lord, Lord McCluskey.

**Lord Keen of Elie:** I note the observations of the noble and learned Lord, Lord Wallace, but I can observe only that it is not appropriate to layer legislation with unnecessary detail and that if the matter is to be regarded as implicit in the present clause, it would be inappropriate to add a further clause. I cannot elaborate upon the point at this stage.

The concluded position of the Government is that Clause 2 as drafted delivers what was required by the Smith commission agreement by placing the Sewel convention, as it is properly understood, on a statutory footing. It is in these circumstances that I invite your Lordships to withdraw or not move their amendments.

**Lord Hope of Craighead:** My Lords, I am extremely grateful to all those noble and learned and noble Lords who have supported my Amendment 7. I am also extremely grateful to the noble and learned Lords, Lord Mackay of Clashfern and Lord McCluskey, for the points they made in support of Amendment 12, which in a way hangs together with it, because they have identified a crucial issue before us.

With all due respect to the Minister, he cannot get away with simply declaring that the “issue” is not justiciable. He has chosen the word “issue” as meaning something different, but the same point arises. The noble Lord, Lord Lester of Herne Hill, identified the point precisely: there is a crucial difference between

[LORD HOPE OF CRAIGHEAD]

the position of Parliament legislating—and Ministers declaring what words mean when they legislate—and the position of the courts. The courts will assert their right to interpret legislation according to the meaning of the words as they judge them to be. As the noble and learned Lord, Lord McCluskey, has said, the courts cannot close their door to arguments. People will bring arguments before the court, and when an argument is before the court it has to decide on it. The Minister simply cannot get away with the idea that we can be assured that this issue will never be before the courts and require determination.

6.45 pm

That identifies a point of great difficulty before the House this evening. We are being invited to accept legislation which has uncertainty built into it, with all that that means. As the noble and learned Lord, Lord Mackay of Clashfern, said earlier, one of the great strengths of legislation passed in the Westminster Parliament is that it has never been doubted that the courts cannot question that legislation. Their duty is to give effect to it. But once one writes in a clause such as Clause 2, it opens the door to the kind of challenges which give rise to uncertainty and all the difficulties that an Executive face in giving effect to legislation.

Although the Opposition have not really expressed it in quite these terms, hanging over this whole debate is the question of timing. As most of us know, on 23 March the Holyrood Parliament goes into Recess before the Scottish elections and at some date before then, or maybe on 23 March, it will have to pass a legislative consent Motion to give effect to the Bill we are discussing. Time is slipping past rapidly—there is less than four weeks to go.

I can understand the concern of both Front Benches that legislation should not be held up by any risk of ping-pong between the two Houses. There is of course one way to solve this. It is for the Government, who have a majority in the other place, to accept an amendment or move a government amendment which seeks to resolve the problem we have been discussing. I can see that there are dangers in a Government being asked to support an amendment which has come through against their wishes in this House. They would no doubt seek to overturn it in the House of Commons. However, the responsibility ultimately rests entirely on the shoulders of Ministers to give effect to the points that have been made so carefully and fully by various noble and learned Lords in all parts of the House. It is their responsibility to avoid the risk of uncertainty which hangs over this clause.

I have thought very carefully on whether I should seek to divide the House and I have decided that it would be better to give the Government further time to consider this issue. I give notice that I will come back to it at Third Reading because it is so important. We really cannot allow it to slip by without further consideration. I stress that the responsibility is on Ministers' shoulders; they control this issue. There is of course the question of whether the Scottish Parliament will accept a measure which does not give effect to paragraph 22 of the Smith commission agreement. It may judge that the clause does not meet the terms of the agreement.

In a way, that is not the really crucial point: it is whether we can accept a measure which will have a cloud of uncertainty hanging over it for all sorts of constitutional reasons. It is surely the Government's responsibility to solve that problem one way or the other. I am sure that many Members of this House would be willing to discuss this further with the Government to see whether it can be solved. I will not therefore press my amendment to a vote this evening—but on the basis that we have not left the argument, which is still there to be addressed. It is for the Ministers to face up to that and, I suggest, to come back to the House at Third Reading with an appropriate amendment to remove the uncertainty in the interests of everybody. For these reasons, I beg leave to withdraw the amendment, subject to the caveat which I have made as clear as I possibly can.

*Amendment 7 withdrawn.*

*Amendments 8 to 12 not moved.*

#### *Amendment 13*

*Tabled by Lord Wallace of Tankerness*

**13:** Clause 2, page 2, line 7, at end insert—

“(9) The application of subsection (8) shall not be questioned in any court of law.”

**Lord Wallace of Tankerness:** My Lords, with the same observation that the noble and learned Lord, Lord Hope of Craighead, made about reserving the right to come back to this issue at Third Reading, I will not move this amendment.

*Amendment 13 not moved.*

#### *Amendment 14*

*Moved by The Earl of Dundee*

**14:** After Clause 2, insert the following new Clause—

“Cooperation between the Scottish and United Kingdom institutions: reporting

(1) Within a year of the passing of this Act, and annually thereafter, Scottish Ministers and the Secretary of State must review the level of cooperation between the Scottish institutions and the United Kingdom institutions following devolution, and prepare a report.

(2) In the review under subsection (1), Scottish Ministers and the Secretary of State must consult such persons as they consider appropriate, taking into account—

- (a) the level of transparency and sharing of information between the Scottish institutions and the United Kingdom institutions;
- (b) the level of cooperation between the Scottish institutions and the United Kingdom institutions; and
- (c) the sharing of examples of best practice between the Scottish institutions and the United Kingdom institutions.

(3) Scottish Ministers and the Secretary of State must lay a copy of the report prepared under subsection (1) before the Scottish Parliament and the United Kingdom 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 Government of the United Kingdom,
  - (b) the Parliament 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 would enable annual reports after the enactment of the Bill. These would be produced by Scottish Ministers and the Secretary of State. The subject would cover three aspects: following devolution, the level of co-operation between Scottish and United Kingdom institutions; transparency and information sharing between them; and the sharing of best practice between them.

An agreed aim is to build up good practice to benefit Scotland as well as other parts of the United Kingdom. In this respect, while addressing a similar proposal during Committee stage of the Bill, we noted that both Governments have already paved the way in Scotland. The Scottish Government have done so by facilitating the seven-city Scottish Cities Alliance as an independent affiliation, yet one which, through collective focus and effort, can help each of those cities the better to serve its families 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 regions and cities. Glasgow has been funded in this way, and the Chancellor of the Exchequer has announced that Aberdeen and Inverness are due to come next.

Therefore, we begin with heartening evidence that the Scottish and United Kingdom Governments together have started out in the right way. As indicated, their combined actions to advantage Scottish cities and regions already correspond to the reference of this amendment: co-operation, transparency and building up good practice to benefit citizens.

Equally, the amendment presents co-operation and transparency as essential precursors in the first place for engendering good practice. They are also necessary to an efficient process of devolution. If achieved, such in turn will have derived from constructive bilateral government work, covering many areas including the implementation of more devolved tax and welfare.

Both Parliaments and Governments must, of course, receive regular updates on funding plans and fiscal changes. 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, of building good practice and, through devolution, of benefiting all regions and communities. The purpose of the amendment is to connect those exhortations to the Bill. I beg to move.

**Viscount Younger of Leckie:** My Lords, as we move on to this next amendment, I hope your Lordships will agree that it is appropriate, as we are on Report, just to

remind the House that the *Companion* sets out that a speaker other than a mover, a Minister or a noble Lord in charge of the Bill can speak twice only if granted the leave of the House, to explain a material point of his own speech that may have been misunderstood or misquoted. If we are to make progress, I would be grateful if the House would adhere to the guidelines in the *Companion*.

**Lord Foulkes of Cumnock (Lab):** I thank the Minister for giving way. I am really glad that I was in when he said that, because I am quite shocked. My understanding of what the noble Lord, Lord Dunlop, said the other day is that, because of the truncated nature of the proceedings, which we agreed to, and because a lot of these things were not able to be dealt with in Committee, we would treat this as if it was in Committee, to allow proper debate and discussion. The noble Lord, Lord Dunlop, clearly gave us that assurance, and I am afraid that what the noble Viscount, Lord Younger, is suggesting goes completely against that. I hope everyone will pay no attention whatever to what the noble Viscount has said.

**Viscount Younger of Leckie:** My Lords, my clear understanding is that no undertaking was given whatever on that basis. We remain on Report and I suggest that the House adheres to the guidelines within the *Companion*.

**Lord Elton (Con):** Perhaps I could clarify the situation. As I understood it, when those remarks were made, we were discussing Parts 2 and 3 of the Bill. That is when any new regulations might apply; they do not apply this evening.

**Lord Forsyth of Drumlean:** Further to that point, perhaps the noble Viscount could confirm that that is the position. To be fair to my noble friend, he said that it was a matter for the usual channels, but we were led to believe that the usual channels would accede to this. It would be completely unacceptable if we did not have that flexibility for Parts 2 and 3, particularly as all the Statement today said was, “Haven’t we done a great job?”. It did not tell us what this was about: we are not getting that until tomorrow, which is Thursday. Although the House is sitting on Friday, there is not a great deal of time for people to absorb it.

**Viscount Younger of Leckie:** My noble friend Lord Dunlop did indeed refer to discussions that might be taking place among the usual channels, but my clear understanding is that no decision was made for Report today.

**Lord Forsyth of Drumlean:** I did actually ask my noble friend to give us an assurance that, as far as Monday is concerned, that will be the case.

**Viscount Younger of Leckie:** I cannot as yet give an assurance on that. The rules on Report remain in place for today.

**Lord Higgins (Con):** My Lords, whether or not any undertaking has been given up to now, it is painfully obvious that we ought not to proceed with Report given that we have had no debate at all on the financial framework in Committee under Committee conditions. It would be quite wrong for us to go all the way through the Bill when we are not able to have adequate discussion. Indeed, the Statement we heard this afternoon said there would be adequate discussion. My noble friend need not reply to this now, but I suggest to him that we really ought to have, in the course of this evening's debate, a clear statement from the Front Bench that the proceedings on the latter part of Bill will be such that we can debate it fully.

**Lord Foulkes of Cumnock:** This is duplicity by the Government, and it really needs to be sorted out. I have been sitting quietly saying almost nothing—

**Lord Taylor of Holbeach (Con):** Will the noble Lord give way? I had hoped to be able to discuss this in an orderly fashion, and I apologise if it has taken longer than the House would expect. I fully realise the pressure under which the House has been dealing with this Bill in general. Although we started the Bill an awfully long time ago—I think it was November when we had Second Reading—we have been in an expectant state for some days. Such is the situation that I recognise that noble Lords will want a little more time on Monday on those groups of amendments that deal with the fiscal framework. I understand that. I think it is the agreement of all in the usual channels that this would be a satisfactory way of dealing with it. It will be an informal agreement, with no resolution of the House, but I can announce it to those here today who I know are interested in this matter.

I thank my noble friend Lord Younger for holding the fort, but I happened to see the situation in which he was placed and I thought it would help matters if I made the position of the Government clear in this respect now. Many noble Lords involved in this debate are used to absorbing complex documents very quickly—that is why they are here—and I hope they will take the opportunity of the weekend to swot up, so that when we meet on Monday to discuss those aspects of the Bill, they will be in a position to add to our debate in a constructive way.

**Lord Higgins:** I do not think my noble friend was in the Chamber when this discussion began. The issue was not whether we would have more time next week, it was simply whether the rules which normally apply at Report—on speaking more than once, for example—should apply on the financial provisions, where we have had no discussion yet.

7 pm

**Lord Taylor of Holbeach:** I am sorry: did I not make that clear? Although there will be no formal resolution to this effect, on those groups of amendments to which the fiscal framework applies, we will adopt those rules which we normally have in Committee. If that is agreed across the House, I am quite happy with

that. My noble friend must have misheard what I was saying. I may not have been in the Chamber, but I was listening to the debate.

**Lord Foulkes of Cumnock:** As the person who initially raised it, and as one of the usual troublemakers, I fully accept what the Chief Whip has said. That is what we all understood was to be the case. As long as the discussion on the fiscal framework and related matters can be, informally, treated as if it were Committee rather than Report, I am sure that that is the way forward.

**The Earl of Kinnoull (CB):** That is very good news.

I thank the noble Earl, Lord Dundee, for allowing me to add my name behind his on the amendment. I must thank both Ministers for a very generous slice of their time when we discussed the thinking behind the amendment in their offices a week or so ago. The amendment concerns intergovernmental relationships, and I remind the House what the noble Lord, Lord Smith, wrote in his foreword:

“Both Governments need to work together to create a more productive, robust, visible and transparent relationship”.

I was very encouraged to hear, when the noble Lord, Lord Dunlop, repeated the Statement, that the noble Lord, Lord Smith, had again talked about how important intergovernmental relationships were. The noble Lord, Lord Dunlop, talked about there being a basis for constructive engagement and how he was keen on building intergovernmental relationships.

The amendment concerns what I would call, in commercial terms, a feedback loop. When we are building a heavily devolved United Kingdom, it is very important that there is a structured, formal feedback loop between the Westminster Parliament and each of the devolved Administrations. I had the benefit of a visit to Canada in November, when, by sheer chance, I was able to sit down with a friend of mine who is a well-respected and very senior constitutional lawyer there. We talked about how the feedback loop exists and has been working in Canada. He confirmed that the loop went up and down; it consisted of a frank and honest interaction, and he regarded it as being open and constructive. That is not to say that he thought it was a total panacea—he identified one or two areas where there were weaknesses—but he said that through the creation of that feedback loop, an enormous number of poisonous things had been drawn from the lion's paw in Canada. The amendment should be seen as something that begins to create a feedback loop. After all, we have a lot of devolution to come in the United Kingdom, and we will have to create a standardised approach to the feedback loop. The clear drafting of the amendment, which has developed since Committee, could be a valuable tool to kick it off.

We will have to have a feedback loop sometime. I feel that it is entirely consistent with the Smith commission agreement to include in the Bill something which starts a successful feedback loop. It will be interesting to hear from the Minister, if not now, when we actually have a Scotland Bill before us, when we can begin to put in place a formal structure that will help relationships between the two Governments.

Finally, I observe that if we go without a feedback loop, eventually there will be some form of car crash. A great dispute will grow up which may not have arisen with the feedback loop, and we will then be trying to retrofit such arrangements.

**The Earl of Lindsay (Con):** My Lords, I support the amendment in the names of my noble friend the Earl of Dundee and the noble Earl, Lord Kinnoull. I remind the House that, quite apart from what the noble Lord, Lord Smith, said when reporting on his commission's work, the Government, in their reply to the Smith commission, also accepted the call for greater co-operation and respect. They said:

"Effective inter-governmental working is essential to guarantee the best possible provision of services and representation for the people of the UK; a renewed commitment to build these relationships and explore better ways of working, as recommended by the Smith Commission Agreement, will require close collaboration between the UK Government and Devolved Administrations".

The noble Lord, Lord Smith, and his commission, were absolutely right in endorsing that strong, unambiguous message.

It is perhaps a source of regret that in 2013, the recommendations of the Calman commission, which reported in 2009 in this very important area of intergovernmental co-operation, have to a large extent been either ignored or progressed in a way that has not been wholly effective. The noble and learned Lord, Lord Wallace of Tankerness, and I, as members of the Calman commission, were largely responsible for what became the largest section of the report, with 23 recommendations that dealt with intergovernmental co-operation, interparliamentary co-operation and inter-institutional co-operation. We on the Calman commission were very clear that this was a very important ingredient of achieving a stable, devolved constitution.

In coming to those 23 recommendations in 2009, we were acting on the evidence that we had heard from countries such as Canada, Australia, Germany and Spain—from memory—where the message was very clear. That was that the mortar between the bricks that delivered a stable and resilient devolved constitution came from relationships, not just primary legislation that determined which powers were devolved and which were reserved.

I encourage the Government, who have had both the Calman and the Smith commission recommendations, and now have this worthy amendment in the name of the noble Earls, Lord Dundee and Lord Kinnoull, to take seriously the message that it contains.

**Lord Wallace of Tankerness:** My Lords, I shall speak briefly to support the spirit of the amendment in the names of the noble Earls, Lord Dundee and Lord Kinnoull, and to endorse what the noble Earl, Lord Lindsay, said. The noble Earl referred to the Calman commission, on which he and I served and were charged specifically with looking at intergovernmental and interparliamentary co-operation. We found that there was much to be done. It came down to simple things such as passes for Members of the Scottish Parliament to access the Palace of Westminster and MPs to access the Scottish Parliament. There is much more that can be done.

I make only two further points, because there is a lot in the amendment that should give us impetus. Legislation cannot do it on its own; a culture requires to be built up as well. First, I wanted to pick up on, "the sharing of examples of best practice between the Scottish institutions and United Kingdom institutions", in subsection (2)(c) of the proposed new clause. I have always believed that it is one of the potential strengths of the devolution settlement that we have in the United Kingdom that we not only have a United Kingdom Parliament that deals with England and in some cases England and Wales on otherwise devolved matters but we have Welsh, Scottish and Northern Ireland legislation. There is much that we can do to learn from each other. There are things that might have been tried that did not work which there is no point in repeating elsewhere. For example, the Scottish Parliament took the lead on the ban on smoking in public places, which other devolved institutions then followed. But the sharing of best practice has probably been patchy at best.

Secondly, the Bill does not allow this proposal to go beyond the terms of the amendment, but clearly it is not just about interchange and exchange between the United Kingdom institutions and the Scottish institutions—it is something that we will want to do for the Welsh and Northern Ireland institutions as well. We can all learn from each other, but I hope that the House will endorse the spirit of the amendments that have been tabled.

**Lord Norton of Louth:** My Lords, I very much support the amendment introduced and moved so ably by my noble friend. It is over a dozen years ago now that the Constitution Committee of your Lordships' House undertook an inquiry into devolution and inter-institutional relationships within the United Kingdom. We found exactly what the Calman commission found later—that what should be in place to encourage inter-institutional relationships was not there. Had the recommendations of the Constitution Committee report been implemented, we would be in a much stronger position now than we are.

There is a tremendous amount to support in this amendment, because it injects a useful discipline. It focuses the mind, because if consideration must be given to this each year it encourages reflection, as has been mentioned, addressing such things as best practice. That is wholly for the good; I see no real arguments against it, and I very much hope that my noble friend's amendment will get a positive response from the Front Bench.

**Lord Lang of Monkton:** My Lords, I repeat briefly the support that I gave these proposals in Committee. The noble Earls, Lord Dundee and Lord Kinnoull, are to be congratulated on persevering on this issue. Like my noble friend Lord Norton of Louth, I, too, served on the Constitution Committee when, 14 years ago, we drew attention to the inadequacy of intergovernmental relations. They have got worse, not better, since then. We produced a report a year ago in the committee drawing attention to intergovernmental relations across the board, and we are still awaiting a response on it from the Government. I know that they are thinking about it, but they are thinking very slowly or, perhaps, very thoroughly.

[LORD LANG OF MONKTON]

I hope that this amendment will trigger further thought from them. I do not know whether the proposed new clause covers the whole comprehensive gamut, but it certainly looks like a very good effort to me. I reassure my noble friends that, if they do not prosper with this clause in this Bill, we have another report coming out from the Constitution Committee shortly, and I dare say that it is possible that we will return to the matter then.

**Lord McAvoy:** My Lords, I, too, on behalf of the Labour Party, would like to record our support for the principles of the amendment moved by the noble Earl. This is a good, positive amendment and way ahead and a more positive discussion than some that we have had previously. We have to develop these links and prove that there is a better way ahead than just conflict, narking away at each other and coming to a conclusion. I am reasonably sure that the Government will resist the amendment, but I hope that its wording and, more importantly, the spirit behind it, form a template for further discussions and proposals coming from the UK and Scottish Governments.

7.15 pm

**Lord Dunlop:** I am grateful to all noble Lords who have spoken, and in particular to my noble friend Lord Dundee and the noble Earl, Lord Kinnoull. We had a very useful discussion, and we all agreed that it is an important principle that we improve intergovernmental relations. While it is the differences of opinion between Governments that attract the headlines, behind the headlines a lot of very good co-operation is going on between Ministers and the officials of the Governments of all the devolved Administrations. A very good example of that was referred to by my noble friend Lord Dundee, who highlighted the recent co-operation between the two Governments to deliver an Aberdeen region city deal. That is a very good example of good practice, and how the political differences of the Governments can be set aside and people can come together and work together to deliver for the people of Scotland.

As noble Lords are aware, are aware, intergovernmental working is an important element of the Smith commission agreement, and one that this Government take very seriously. As I set out on the first day in Committee, the Government are working collectively with all three devolved Administrations to review the intergovernmental arrangements that we have in place and ensure that they make for effective working relationships. As part of the quadrilateral review, we are jointly considering options for improving parliamentary scrutiny and wider transparency of intergovernmental relations. However, this must be considered in a way that ensures we reach a lasting agreement suitable not just for Scotland but for all four Administrations of the United Kingdom. I shall update the House as that work progresses. I understand that this House and, in particular, the House of Lords Constitution Committee is anxious to see the results of that thinking, and I assure my noble friend Lord Lang that we are thinking very thoroughly. My hope is that a review will conclude shortly. However, final agreement will not be reached

until the recommendations can be considered by the heads of each Administration at the next JMC(P). A date for that has yet to be agreed.

The Government recognise the desire of noble Lords and the UK public to understand the relationships between the four Administrations, and we note the importance of ensuring that appropriate processes are in place to do so. None the less, it is sometimes necessary to allow for private space, in which open and honest policy discussions can take place. As part of the ongoing review, we are jointly considering options to ensure that the appropriate balance is struck to meet both those needs.

As noble Lords will appreciate, it would not be possible to report on every aspect of intergovernmental relations. However, regular reports are already made to Parliament, including under the Scotland Act 2012—in particular, on the implementation of the tax provisions. More generally, the Scotland Office and the office of the Advocate-General outline engagement, both routine and exceptional, that they have with the Scottish Government in their annual report, which is of course laid in Parliament. I note the ambition and sentiments expressed by noble Lords, and will take that very much into account when producing these reports. I undertake to the House tonight to look at how we can further improve what information we provide to Parliament.

On the third day in Committee, we had a very interesting debate about welfare, which is obviously a key aspect of the Smith agreement. We are breaking new ground in that area, where there will be concurrent powers. I was somewhat surprised that noble Lords were not aware of the joint ministerial group on welfare, but I take that very much to heart. It is our responsibility to make sure we look at how we can make the process of how these groups work more transparent.

I hope I have given some indication of the Government's commitment to transparency and co-operation within intergovernmental relations. A statutory duty to report on or implement such measures is unnecessary and would be too prescriptive. For example, the memorandum of understanding has been amended on six occasions. There is a need for flexibility here. I accept the spirit behind this amendment, but I urge the noble Earl to withdraw it.

**The Earl of Dundee:** My Lords, I am very grateful to all those who have contributed to this debate. To summarise, there are three aspects which colleagues have picked up. First, there is the strong support and recommendations of commissions, not least the Smith commission and the Calman commission, to which my noble friend Lord Lindsay referred. It is almost a *sine qua non* that intergovernmental support should always be canvassed to make things work properly. Indeed, my noble friend Lord Norton pointed out that there is the extra benefit of the discipline that this inculcates so that there can be an efficient focus. Secondly, we have the precedent to which the noble Earl, Lord Kinnoull, referred when he pointed out that in Canada intergovernmental approaches and feedback are most productive. The noble and learned Lord, Lord Wallace of Tankerness, mentioned the third aspect, which is building up good practice, and

that the culture of so doing can be part of the proceedings, quite obviously for the better. I am very grateful to the Minister for his undertaking, in the context of the way in which things are moving; in the light of that, I beg leave to withdraw the amendment.

*Amendment 14 withdrawn.*

### **Clause 3: Elections**

#### *Amendment 15*

*Moved by Lord Keen of Elie*

**15:** Clause 3, page 2, leave out lines 17 and 18 and insert—

“( ) Omit the words from “The franchise at local government elections” to the end of the Exceptions and insert—”

**Lord Keen of Elie:** My Lords, I shall first address Amendments 15 to 21. Under the Bill, and in line with the Smith commission agreement, the timing of Scottish parliamentary elections is devolved to the Scottish Parliament, subject to the provision in the Bill that Scottish parliamentary ordinary general elections may not be held on the same day as UK parliamentary general elections, European parliamentary general elections or local government elections in Scotland.

Following a request from the Presiding Officer of the Scottish Parliament, the UK Government agreed to bring forward an order under Section 30 of the Scotland Act, rather than use the Bill, to give the current Scottish Parliament the power to determine the length of the next Scottish Parliament following the poll in 2016. The order devolved to the Scottish Parliament power to legislate on the date of the first Scottish parliamentary ordinary general election after the 2016 poll. Following approval in the Westminster Parliament and the Scottish Parliament, the order was made by Her Majesty in Council on 8 October and came into force the following day. The Scottish Elections (Dates) Bill, currently before the Scottish Parliament, provides for the Scottish Parliament ordinary general election scheduled for 7 May 2020 to be moved to 6 May 2021.

We have tabled a number of technical amendments to make changes to a number of clauses in the Bill that are required as a result of the Section 30 order. Essentially, these amendments revoke the Section 30 order and remove provisions from the Scotland Act inserted by the order, which will be unnecessary as they overlap with provision made by the Bill. The area of legislative competence being devolved to the Scottish Parliament by the Bill is such that the Scottish Elections (Dates) Bill will still be within the legislative competence of the Scottish Parliament following the revocation of the Section 30 order. Additionally, we have tabled an amendment to Clause 5(2) to improve the drafting of this provision in order to ensure that it operates as intended.

We have also tabled an amendment that removes a reference in Clause 10 to a provision of the Scottish Parliament (Elections etc.) Order 2010 which is now unnecessary as this instrument has been revoked by the Scottish Parliament (Elections etc.) Order 2015 that was made by Scottish Ministers and which came into force in December 2015.

In addition, I wish to give notice that the Government consider that drafting improvements are required to the reservation of the timing of ordinary local government elections in Scotland where the poll would otherwise be held on the same day as an ordinary general election for the Scottish Parliament, and to some provisions in Clause 5 relating to this reservation, to provide clarification and ensure that the drafting of these provisions operates as intended. As a result, the Government intend to table amendments to clarify and improve the drafting of these provisions at Third Reading.

Amendments 15 to 21 are technical amendments which will ensure that the clauses in the Bill relating to elections operate as intended.

I now turn to Clause 11, which contains the supermajority requirements and acknowledge the input and assistance of the noble and learned Lord, Lord Hope of Craighead, on this matter. I thank him for his willingness to discuss this matter and to propose improvements to the provisions, which are reflected in government Amendments 23 to 26.

Clause 11 requires that the Scottish Parliament must pass certain legislation by a two-thirds majority. Government Amendments 23 to 26 to this clause will enable a Bill in the Scottish Parliament to pass to Royal Assent if the Presiding Officer of the Scottish Parliament decides that a simple majority is required, the Bill is passed with a simple majority but is referred to the Supreme Court, and the Supreme Court agrees that only a simple majority was required. The measure currently provides that in those circumstances, the Bill must be reconsidered by the Scottish Parliament before it can be passed for Royal Assent. We have taken account of the observations of the noble and learned Lord, Lord Hope, in order to make a little more sense—if I can put it that way—of the provisions of Clause 11 on the application of the supermajority. I beg to move.

**Lord Hope of Craighead:** My Lords, I think I should thank the noble and learned Lord the Advocate-General for Scotland for his kind words. The amendments improve the intelligibility of these provisions. It is important that the system work as smoothly as possible, so I am extremely grateful.

**Lord Mackay of Clashfern:** My Lords, I am glad that these amendments have been made. Of course, I understand that they will require approval by the House of Commons in due course.

**Lord McFall of Alcluith:** My Lords, we agree with the Government on this very sensible measure. We appreciate the minor and technical amendments and fully agree with them. We thank the Minister.

**Lord Keen of Elie:** I am obliged to noble and learned Lords for their contributions.

*Amendment 15 agreed.*

*Amendment 16**Moved by Lord Keen of Elie***16:** Clause 3, page 3, leave out line 35 and insert—

“( ) In the Interpretation provision, omit the definitions of “Digital service” and “Ordinary local election” and insert—”

*Amendment 16 agreed.**Clause 5: Timing of elections**Amendments 17 and 18**Moved by Lord Dunlop***17:** Clause 5, page 5, line 27, leave out “from the words” and insert “for the words from”**18:** Clause 5, page 6, line 4, at end insert—

“( ) Omit subsections (5A) to (5C).”

*Amendments 17 and 18 agreed.**Clause 10: Minor and consequential amendments: elections etc**Amendments 19 to 21**Moved by Lord Dunlop***19:** Clause 10, page 11, line 29, at end insert “and (2C) (date of elections to the Parliament).”**20:** Clause 10, page 11, line 32, leave out subsection (7)**21:** Clause 10, page 11, line 35, leave out “is revoked” and insert “and the Scotland Act 1998 (Modification of Schedules 4 and 5) Order 2015 (S.I. 2015/1764) are revoked.”*Amendments 19 to 21 agreed.**Clause 11: Super-majority requirement for certain legislation**Amendment 22 not moved.**Amendments 23 to 26**Moved by Lord Dunlop***23:** Clause 11, page 12, line 33, after “decided” insert “on”**24:** Clause 11, page 12, line 34, after “32A(2)(b)” insert “that any provision of the Bill relates to a protected subject-matter”**25:** Clause 11, page 13, line 25, after “decides” insert “on”**26:** Clause 11, page 13, line 26, after “32A(2)(b)” insert “that any provision of the Bill relates to a protected subject-matter”*Amendments 23 to 26 agreed.**Amendment 27 not moved.***Viscount Younger of Leckie (Con):** My Lords, I beg to move that further consideration on Report be now adjourned. In doing so, I suggest that the House do now adjourn until 7.40 pm.**Lord Newby (LD):** My Lords, it would be to the benefit of the House in the conduct and progress of business if we move to the next amendment on the Scotland Bill.**Viscount Younger of Leckie:** I believe that it is right that we should adjourn the House, with the agreement of the House, until 7.40 pm.**Lord McFall of Alcluith:** My Lords, I think we should just keep going since we are in the swing.**Viscount Younger of Leckie:** With the agreement of the House, let us move on to the next amendment.

7.30 pm

*Amendment 28**Moved by Lord Wallace of Tankerness***28:** Clause 34, page 35, line 29, at end insert—

“90C The Crown Estate—Island Authorities

(1) The scheme under section 90B of the Scotland Act 1998 shall make provision for the Scottish Ministers to transfer to the management of each of Shetland Islands Council, Orkney Islands Council and Comhairle nan Eilean Siar (“the island authorities”) on the islands transfer date all the existing Scottish functions of the Commissioners relating to those parts of the Scottish zone surrounding each of the island authorities.

(2) The exact extent of the parts of the Scottish zone to be transferred under subsection (1) will be agreed by the Treasury and Scottish Ministers in consultation with the island authorities and in accordance with the general principles contained within the United Nations Convention on the Law of the Sea as they applied for the delineation of boundaries between States.

(3) In this section, “the islands transfer date” means a date no later than one year after the transfer date referred to in section 90B of the Scotland Act 1998.”

**Lord Wallace of Tankerness:** My Lords, I am grateful to the House for allowing us to keep going. This amendment relates to the Crown Estate in relation to the islands authorities. It is an amendment that I moved in Committee, and I am very grateful for the support that it received from many parts of your Lordships’ House.

The Smith commission basically argued that the management of the Crown Estate should be devolved to, I think it said, the Scottish Parliament but, for reasons that the Government explained, that was not technically possible so it was devolved instead to Scottish Ministers. The commission also recommended that there should be onward devolution of the management of the Crown Estate to the three islands authorities of Orkney, Shetland and the Western Isles. The purpose of the amendment is to give some substance to that recommendation.

Since we debated this matter in Committee, the noble Lord, Lord Dunlop, has met representatives of the islands authorities, the chief executive and the leader of the Western Isles Council, who came on behalf of the other two islands councils; I am very grateful to him for giving us his time. A number of noble Lords also met the representatives while they were here. I was very grateful to the noble Lord, Lord McAvoy, who was willing to meet them and hear the very compelling case that they put.

As I said, the commission said that there should be devolution of the management of the Crown Estate to Scottish Ministers and then on to the islands authorities.

What we are principally talking about here is the management of the marine estate, an estate that has substantial resources, not least in aquaculture but increasingly, as we look to the future, in the development of renewable energy. We are talking about a substantial area of activity.

Why would I seek to put this into statutory form? There is a suspicion about whether Scottish Ministers would fully deliver what the Smith commission actually proposed. It has been widely recognised that there is a considerable amount of centralisation in the present Scottish Administration. There is a concern that the Scottish Government have indicated that they intend to bring forward only a single consultation on how they might manage the Crown Estate, whereas those in the islands authorities believe, with the recommendation of the Smith commission, that by this stage they should be going further and having a separate consultation on how that particular recommendation would be taken forward. The fact that that has not happened makes them suspicious.

The islands forum, the Islands Area Ministerial Working Group, took place in Lerwick on Monday this week. It was chaired by the Minister for Transport and Islands in the Scottish Government, Derek Mackay, who was accompanied by Marco Biagi, the Minister for Local Government and Community Empowerment. The communiqué that was issued after the meeting said:

“There were also positive discussions on the potential for increasing local accountability for decisions on Crown Estate assets in the three council areas, ahead of a Scottish Bill on the future management framework for Crown Estate assets in Scotland after devolution. Scottish Ministers’ current priority is to secure the devolution of management and revenue of the Crown Estate so that Scotland and its communities can benefit from the Scottish assets. Ministers have already confirmed that island and coastal councils will receive the net income from Crown Estate marine assets out to 12 nautical miles after”,

devolution. That sounds fine so far as it goes, but this guaranteeing of net income—the question of course is what will constitute net income—falls short of management. Again, I think that is because the commitment from Scottish Ministers up until now has been to net income rather than to management, and again there is a concern that what would happen after devolution to the Scottish Ministers would still fall short of what the Smith commission recommended.

Those who met the representatives from the councils will know that the leader of the Western Isles Council, Angus Campbell, effectively and forcefully made the point that management really means the communities taking responsibility themselves for how these assets should be developed. There is a sense of community empowerment. He pointed out the problems that many of the islands communities are facing, particularly the Western Isles, with warnings of high levels of unemployment, particularly youth unemployment, or youth migration. The idea that they might be able to manage the assets of the Crown Estate within their communities gives them some opportunity to be able to do positive things for their communities and tackle issues such as youth migration. That is why it is important that there is the opportunity to manage the Crown Estate marine assets, not simply to receive net income from them.

We have already seen the way in which Orkney Islands Council and Shetland Islands Council, under the Orkney County Council Act and the Zetland County Council Act, have been able over the years to manage the works licence regime regarding the development of aquaculture. They have been able to undertake that very successfully—in fact, sufficiently successfully that what they have been doing for many years in planning in the marine environment has now been extended to the rest of Scotland.

The noble Lord, Lord Gordon of Strathblane, made the point when we debated this in Committee that there is an understandable concern that we are second-guessing Scottish Ministers and doing double devolution without giving them a chance to take it forward. To that I say that there is a distinction between the responsibility that currently rests with Westminster and Westminster deciding that that should go to the islands, compared to a situation where a responsibility has already been devolved and this Parliament tries to suggest how an already devolved responsibility might be exercised. Indeed, I received representations that we might take the opportunity of the Bill to impose upon Scottish Ministers an obligation of, for example, proportionality and subsidiarity when they were dealing with local authorities. That would be wrong; it would lead to trying to put a responsibility on them for subjects already devolved. This is not a devolved subject, and therefore it is not inappropriate that we should devolve.

A better argument is to look at the scheme in the amendment that we propose. I am very grateful to the noble Earl, Lord Kinnoull, who has added his name to it. The amendment says that the scheme under Section 90B of the Scotland Act will make provision. Under proposed new subsection 90B(13), inserted by this Bill, the Treasury may make a scheme only with the agreement of Scottish Ministers. So in fact Scottish Ministers would be very much involved in making the scheme, which would lead to the onward devolution of the Crown Estate management to the islands community. Far from being cut out, they would actually be actively involved in the scheme; indeed, it would require their consent. Our amendment itself says that the actual transfer would be done by the Scottish Ministers to the islands.

In his foreword, the noble Lord, Lord Smith of Kelvin, talks about the,

“strong desire to see the principle of devolution extended further, with the transfer of powers from Holyrood to local communities”.

All sides of the House have previously noted that with approval. It is very easy to pay lip service to the aspiration, but this amendment seeks to give it real substance. I beg to move.

**Lord MacKenzie of Culkein (Lab):** My Lords, I support much, though not all, of what the noble and learned Lord, Lord Wallace of Tankerness, has said. My only slight worry is the issue of double devolution and whether the amendment is competent, but that is not to say that the debate is unimportant. We in the Highlands are sick of the centralisation that has been happening in Scotland—I certainly am.

[LORD MACKENZIE OF CULKEIN]

To allow the management of the Crown Estate to be taken over by the northern islands councils and the Western Isles Council would be a good step forward, because migration has always been a particular problem in the northern and Western Isles.

I recently visited the Isle of Lewis and the school I used to go to as a child when my father was principal lighthouse keeper in Lewis. It has closed, as have a number of other junior and secondary schools because of falling school populations. We need to bring some wealth back into that part of the world. There are always difficulties about the yard at Arnish, which was involved and perhaps still may be in manufacturing for wind farms. There has been a fall-away in fishing, which used to be the mainstay of that island, the potential, as we have heard, aquaculture and wind energy, and the difficulties with the interconnector to the Western Isles. Therefore we need something to bring some certainty to these islands. They are so much forgotten about in Edinburgh; historically, the highlands have always been the poor relation of Edinburgh, and many highlanders like me always tended to think that we did better out of Westminster than Edinburgh.

There is now a Government in Edinburgh who have the opportunity to devolve the management of the Crown Estate to the Northern and Western Isles. I am suspicious of the Scottish National Party's plans here—I agree with the noble and learned Lord that there is no certainty whatever that anything other than the net proceeds will be given to these islands. I hope that this debate will at least help to put pressure on those who will have the ability in the future to further devolve, as the Smith commission said.

**The Earl of Kinnoull:** My Lords, I am very grateful to the noble and learned Lord, Lord Wallace of Tankerness, for allowing him to put my name beneath his on this very cleverly drafted and interesting amendment. As I mentioned in Committee, I have a particular interest in and a special love for those assets that make up the Crown Estate today. I am very worried about the Crown Estate, and feel that it needs to go into hands that will look after it. I am therefore extremely attracted by this amendment, because the local councils concerned will fulfil my test of looking after things.

I was most interested in what the noble and learned Lord, Lord Wallace, had to say about net income versus management. I thought I had to find one example of why it was important to send things down to the local level and I found one by talking to a householder outside Oban. He reflected that in the area outside Oban there are a number of fish farms, one of which had gone bust—of course, they need to have an arrangement with the Crown Estate—and no moneys were available to clear up the fish farm, which then created a pollution problem which affected a number of neighbouring fish farms. These businesses are quite small, but they employ significant percentages of people in the area around Oban. The solution was of course to get hold of the Crown Estate and ask it to take some simple decisions—essentially, to pay someone to clear up the mess. It took a very long time, because

no one in London quite understood the urgency of the fact that pollution was killing off the fish. The householder told me that they were jolly glad that the Crown Estate would move to be more local. It was interesting that the same householder knew exactly what was taking place—I am using “double devolution” but I do not think it is that—and that in future, if a similar thing happened, it would be possible for someone to go directly to the appropriate person, because they would know the individual within the council who would look after it and could have the matter sorted out so that it would not cause the economic damage to the community which it did.

There is also of course the extraordinary thing we have been hearing today about the holy status of the Smith commission agreement document. However, in fact of course we have two holy documents, because it turns out that the Scotland Bill itself has a holy status. There is a conflict of holiness—

**A noble Lord:** Sacredness.

**The Earl of Kinnoull:** —or sacredness between these two documents, and it seems that it is incumbent on the House to try to find some way to resolve that. Given the very eloquent words of the noble and learned Lord, Lord Wallace of Tankerness, and my story of the householder from outside Oban, I am sure that the correct way for the House to consider the holiness is to go with the Smith commission agreement and to make the amendment that is being proposed here. I hope that other noble Lords feel the same way that I do.

7.45 pm

**Lord McFall of Alcluith (Lab):** My Lords, I endorse the comments of the noble and learned Lord, Lord Wallace, the noble Earl, Lord Kinnoull, and my noble friend Lord MacKenzie. I also pay tribute to the work of the noble and learned Lord, Lord Wallace of Tankerness, on that over the years, and to the local knowledge—the boyhood experience—of my noble friend Lord MacKenzie of Culkein on that.

I remember that at the time of the Scottish referendum there was an interview with a farmer from Shetland. The BBC interviewer asked him if he liked Westminster, to which the answer was, “No, I’ve not much time for Westminster”. He was then asked, “What about Edinburgh?”. He said, “Oh, we hate them. Our wrath is reserved for Edinburgh”. Therefore that makes a point on that quite eloquently, although in common language. It is no surprise that we support the principles behind these amendments and sincerely hope that the Scottish Government are listening. In fact, in the 2014 Scottish Labour Devolution Commission we were very clear that:

“Devolution is not just about powers for the Scottish Parliament. It is about the distribution of powers within Scotland to bring them closer to people”.

If I have any quibble about what has happened in Scotland, it is that we have provided devolution to Edinburgh but we ain’t done very much to disseminate that devolution outwith Edinburgh. Therefore it is time that we did this, and this is quite a timely amendment on that.

In the 1990s, when I was on the Opposition Front Bench for the Labour Party, one of my responsibilities was the Highlands and Islands. I developed a great affection for the isles and for the communities in that area. The point that was made by the noble and learned Lord, Lord Wallace, the noble Earl, Lord Kinnoull, and others, is that these communities are very fragile, and the support we need to give them is essential if we are to generate that community spirit.

In the Labour Party devolution commission that I mentioned we also made reference to local authorities, which,

“should have increased scope to influence economic development”.

When I was an MP along the Corridor I chaired a commission on the closure of the J&B bottling plant in Dumbarton, in my area. I did not want it to be exclusively local authority but wanted it to be public/private. I chaired the task force, and eventually it developed into what was called Lomondgate. Now, 15 years later, it has the BBC and Aggreko, which is a small generator company that was started in Dumbarton, but which is now a FTSE 100 company. We did that with local people and local involvement. I used to say to people in Scottish Enterprise in Glasgow that they did not understand my area even though it was 20 miles away. Therefore that need for that economic development and the need to have those powers in those hands is extremely important. Not only have I been a proponent of that but I have been a practitioner and have seen its success. Therefore with that spirit in mind I support these amendments so that we give the power to the communities and give the support to the Western Isles and others. If there is a lesson and a message here tonight, it is that the Scottish Government must deliver on their promises.

Finally, can the Minister clarify a point that was raised in Committee and which was also raised with him in writing, regarding the timescale of the transfer process of the Scottish Crown Estate to the Scottish Parliament? At the time, the Minister was unable to answer when or how long he anticipated the transfer scheme would take. Perhaps he has an update for the House today. At the very least, I hope he will be able to say when the detailed discussions which he referred to in the correspondence to us are likely to commence. With that in mind, I am delighted to support the principles of these amendments and I look forward to a positive response from the Minister.

**The Parliamentary Under-Secretary of State, Scotland Office (Lord Dunlop) (Con):** My Lords, I thank the noble and learned Lord, Lord Wallace, the noble Lords, Lord MacKenzie and Lord McFall, and the noble Earl, Lord Kinnoull, for their contributions. Let me begin by saying that I understand and sympathise with the intention of this amendment and with the island authorities. I also commend the noble and learned Lord, Lord Wallace, the noble Lord, Lord Stephen, the noble Earl, Lord Kinnoull, and my noble friend Lord Dundee, who have shown such resolute commitment to this important issue.

As the noble and learned Lord, Lord Wallace, has said already, I had the opportunity to meet the island authorities and other stakeholders. I found it an enlightening and informative experience to talk through

this issue with them. I hope that I have further opportunities to meet them, and I certainly encourage others to do so. When he and I met the representatives of the Western Isles Council recently, it was clear how much appetite they had for the management responsibilities of the Crown Estate to be devolved with as little delay as possible. However, the Smith commission agreement was absolutely clear that:

“Responsibility for the management of the Crown Estate’s economic assets in Scotland, and the revenue generated from these assets, will be transferred to the Scottish Parliament ... Following this transfer, responsibility for the management of those assets will be further devolved to local authority areas”,

such as Orkney, Shetland and the Western Isles or other areas that seek such responsibilities. The Smith commission chose these words with good reason. I believe that the devolution of management responsibilities will be quicker, simpler and come with fewer practical difficulties if the UK Government devolve these responsibilities in a single transfer to Scottish Ministers. A consultation can then take place in Scotland to determine the best way to further devolve these assets. I stress that the UK Government’s view is that this should be a consultation about how, not whether, the management of those assets will be further devolved to the island councils.

I note that the Scottish Government are never shy of saying how they will hold the UK Government’s feet to the fire on how they live up to the commitments under the Smith agreement. I assure noble Lords that the UK Government will take every opportunity to press Scottish government Ministers to deliver on the commitments made by the SNP as part of the Smith process. I was glad to note, and to hear the noble and learned Lord, Lord Wallace, repeat today, that the island councils met the Scottish Government on Monday and that some progress, although not complete progress, was made in those talks.

However, the Government do not believe it would be in keeping with the principle or spirit of devolution for the UK Government to determine how the management of the Crown Estate in Scotland should be further devolved. But I take this opportunity to assure noble Lords that the UK Government take this issue seriously. The Exchequer Secretary to the Treasury, who has policy responsibility for the Crown Estate, will make a Written Ministerial Statement to Parliament six months after the transfer of Crown Estate assets. This statement will outline the progress that the Scottish Government have made on the onward devolution of these assets. This is a new commitment which the Government are prepared to make, having been persuaded by the arguments in this House and having met and listened to the group Our Islands Our Future and other passionate voices. I hope that this commitment gives noble Lords comfort. As I have said, we will continue to press the Scottish Government to deliver what was promised to the island communities and other communities in the Smith agreement. I have no reason to suspect that the Scottish Government will not deliver the onward devolution of these assets.

The noble Lord, Lord McFall, asked about timing. Conversations between officials are ongoing, and it is envisaged that Ministers of the UK and Scottish

[LORD DUNLOP]

Governments will commence further detailed discussions after the Scottish Parliament elections about the precise timing.

In conclusion, I reiterate that although I respect and understand the intention of this amendment, the Government cannot support it. I ask the noble and learned Lord to withdraw this amendment.

**Lord Wallace of Tankerness:** My Lords, I am grateful to all noble Lords who have taken part in this relatively short debate. I particularly thank the noble Lord, Lord MacKenzie of Culkein, who speaks with personal experience and knowledge about the challenges that face many of our islands communities and about the opportunities that those communities wish to have to be masters or mistresses of their own destiny.

The noble Earl, Lord Kinnoull, made an important point. Oban would certainly be outwith the immediate scope of the provision, but of course, as the Smith commission said, the measure could then go on to cover other coastal communities. He made the important point that in such circumstances, you have officials who know the individual concerned. Also, if you are a developer, you will then have to deal with only one regulatory body and will not have to get planning permission from an islands council and separate permission from the Crown Estate or the body that the Scottish Ministers set up after devolution.

I am grateful, too, for the very constructive and positive response from the noble Lord, Lord McFall. I think it was Lomondgate that he and I went to together during the referendum campaign. It was a very impressive set-up that he had had a considerable hand in developing and promoting.

I welcome the very understanding and sympathetic views of the Minister. He quoted the Smith commission quite properly, saying that following the transfer there would then be a transfer to the islands. That is precisely what our amendment says—that there would be a transfer and, following that, another transfer. However, the significant point is that he said that he would not hesitate to hold the Scottish Government's feet to the fire, and that it was a question of how rather than whether. I fear that at the moment the Scottish Government have not taken that step. They are still talking about net revenues and not about management. Therefore, it might be helpful in holding the Scottish Government's feet further to the fire if your Lordships were to agree to the amendment.

If the Minister was able to hold the Scottish Government's feet to the fire and was able to tell us that they are now committed to the management and not just the transfer of assets, giving some indication of a timetable, no one would be happier than me to accept that positive outcome from the Minister's efforts. In those circumstances, I think it would be helpful to test the opinion of the House.

7.57 pm

*Division on Amendment 28*

*Contents 68; Not-Contents 189.*

*Amendment 28 disagreed.*

## Division No. 1

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*Relevant document: 22nd Report from the Secondary  
 Legislation Scrutiny Committee*

**Baroness Hamwee (LD):** My Lords, when the requirements to check immigration status were introduced into what became the last Immigration Act, they were known as the tenant's right to rent. Initially our concerns were about issues such as the potential for racial discrimination and a dislike of using legislation to send a message. However, tonight I will talk also about the landlord's right to rent in the sense of hurdles to letting, which we see in these regulations and in the Act with provisions that require landlords to be part of our border enforcement.

It is no secret that the requirements were included in the 2014 Act. Following negotiations between the coalition partners, the Liberal Democrats agreed to their inclusion in that legislation on the basis that there would be a pilot—

“a carefully phased approach to implementation”—[*Official Report*, 3/4/14; col. 1089.],

to quote the then Minister. He said that the rollout would allow proper evaluation to ensure that the scheme delivered its objectives without unintended consequences. I am sure that it was not intended to have such an impact on legal immigrants and British citizens. Whether one calls it a pilot, phasing, a rollout or a pathfinder, it is common sense to evaluate and assess experience and, where necessary, to adjust provisions.

However, the Prime Minister announced a nationwide rollout from the West Midlands pilot immediately on winning the 2015 election while the pilot was still in progress. Indeed, the Home Office's evaluation was published only on the same day as the Public Bill Committee in the Commons took evidence on the current Immigration Bill, which extends the provisions from civil sanctions to criminal penalties. So, noble Lords may understand why we regard this as about using legislation to send a message.

My Motion would stop the rollout. Labour has a Motion to Regret calling for more consultation. I do not believe that it is more consultation that is needed—it is more evidence and more experience of a limited scheme. I cannot hide my disappointment that the Labour Front Bench will apparently not support us in our Motion, particularly given that the Labour Front Bench in the Commons was keen to support Tim Farron's equivalent Motion to Annul. One aspect of scrutiny—this House's job—is to consider the workability of the Government's policies. To quote again from the Minister's assurances in 2014: “Checks”—that is checks on prospective tenants—

“should be light touch in nature and workable, without creating additional burdens and costs”.—[*Official Report*, 10/3/14; col. 1651].

He also said that the scheme need not “introduce excessive bureaucracy”. I do not think that that would resonate with the letting agent whom I heard interviewed on Radio 4's “You and Yours” programme. What he said was: “I have become an immigration officer”. Indeed, he has become an immigration officer who is liable to civil penalties and who, under the current Bill, will face criminal sanctions.

*Consideration on Report adjourned until not before 9.09 pm.*

**Immigration Act 2014 (Commencement  
 No. 6) Order 2016**  
*Motion to Annul*

8.09 pm

*Moved by Baroness Hamwee*

That a Humble Address be presented to Her Majesty praying that the Immigration Act 2014 (Commencement No. 6) Order 2016, laid before the House on 11 January, be annulled (SI 2016/11).

[BARONESS HAMWEE]

Landlords have to make reasonable inquiries as to the immigration status of all the occupants before letting a property. Well, it is not actually that easy. I have been through the material on the Home Office website. The user guide is 39 pages long and there are 12 hyperlinks—there may be more; I may have miscounted—plus a code of practice plus a short guide. There are 25 types of document which may show immigration status, more if there has been a name change. These have to be examined and copied. And not all of them are invalid if the expiry date has lapsed.

A checking agent on the same programme said that there are 400 documents in the EU that would support the right to rent. Leaving aside unfamiliar documents, how easy is it to spot fakes? Last week, the court to which Ryanair successfully appealed against a fine for not spotting forged Greek passports—neither had the Spanish border force, as it happens—said that the way that regime was operated by the Home Office,

“offends fairly basic concepts of justice and indeed the rule of law”.

Landlords are not trained to spot forgeries. Indeed, the Residential Landlords Association found that more than 90% of landlords who were surveyed had not received information from the Government about rent checks, and 72% did not understand their obligations. All this from a Government who are keen on deregulation.

Yes, a Home Office inquiry line is available during office hours. But no messages can be left out of hours—I know because I phoned it out of hours. Most tenanted property is let by landlords with only one or a very few properties, and I dare say that many viewings are outside office hours in what is a very fast-moving market.

8.15 pm

This is a problem for tenants, too, and not just because landlords will be passing on the costs of this exercise; and it is a problem not only for those with a right to be here but for those who are here through less traditional routes. Last week I had an email from the mother of a student who is on a year abroad as part of her studies and who is trying to arrange accommodation for the next academic year. She has to show her passport. She and her friends have already lost one apartment because of the requirements. The passport and the person have to be in the same place, or virtually so via videolink. But if you are abroad and you are doing it by videolink you would have to have sent your passport—your original documents—in advance. Which of us would be confident about sending a passport into the wide blue yonder? I asked this lady how she knew about the Motion. She said: “It is the talk of the staff room”. This is not just an issue for the Westminster bubble; it is something that is understood to be affecting the whole of our society.

The letting agent to whom I have referred was concerned that vulnerable people are being turned away. These were real prospective tenants. He mentioned people who could not afford passports. I believe that 17% of UK nationals do not have a passport. He mentioned Travelling people wanting to rent for their elderly relatives and the difficulties they had in proving their status. He also mentioned people who are abroad at the relevant time.

Of course I am aware of the consultative panel established to oversee the scheme, although I note that its minutes are not published. However, I have confidence that nobody could be more capable than the noble Lord, Lord Best, who co-chairs the panel, of making a silk purse out of a sow's ear.

The Home Office's evaluation of the first six months in the pilot area itself reports that,

“sample sizes are low which means the findings should be seen as indicative, rather than definitive”.

They are not only low—I would say extremely low—but not representative. Most tenants have not moved since the scheme started and so have no experience of it. The majority of the tenants in question were students, for whom the evidence of immigration status might be easier, although I have to say that the NUS tells me that this is not as straightforward as we had understood it. Only 62 landlords had taken on a new tenant, of whom only 26 had conducted checks. There is so little experience of the impact.

Two-thirds of the tenants described themselves as white, with only 23 as coming from an ethnic minority group. The potential for discrimination was, and is, a major concern. Indeed, actual discrimination has been reported. One also cannot ignore the preference for tenants who do not appear foreign or whose right to rent is easy to check. That was also shown in an independent evaluation for the Joint Council for the Welfare of Immigrants, by a YouGov poll for Shelter and in a survey by the property information website PIMS. But even if there is no blatant racism, in a sellers' market—and renting is a sellers' market—discrimination is the outcome of landlords taking the easiest decisions. Six of the local charities surveyed by the Home Office said their clients had become homeless as a result of the scheme. Seven reported people entitled to rent, but not with the right documentation, who were struggling to find accommodation. The stated aims of the scheme are to reduce the availability of accommodation for people illegally in the UK, to make it more difficult for them to establish a settled lifestyle through stable housing and to reinforce action against rogue landlords who target vulnerable tenants by putting them in substandard accommodation. The Government should tackle that problem anyway and they have the means to do it.

What evidence is there that these aims are met? A large proportion of undocumented migrants live with family or friends, sofa-surf or are homeless or destitute. They do not seek to access the private rented sector. We know that in the labour market immigrants who have every right to be here and every right to work often do not realise that they have those rights and so are more vulnerable to exploitation. I suspect the same might be true in the tenancy sector. Of the 109 irregular migrants who came to the attention of the Home Office during the pilot, only 26 were related to the scheme. The others were identified through normal enforcement activity.

The Secondary Legislation Scrutiny Committee of this House took the view that,

“the Home Office needs to do more to publicise the checks, in particular to the majority of small landlords”,

and,

“clarify the consequential impact on local authorities”,

which deal with homeless people who have been refused accommodation—we all know that local authorities face a great demand for housing. This is a scheme which in our view is unworkable, disproportionate, discriminatory, affects our reputation internationally among international students, and has a narrow focus on immigrants that badly affects the UK's own citizens. This needs far longer testing and more and better evaluation and adjustment. I beg to move.

**The Deputy Chairman of Committees (Baroness Andrews)**

**(Lab):** My Lords, if this Motion is agreed to, the Motion in the name of the noble Lord, Lord Rosser, may not be called by reason of pre-emption.

**Earl Cathcart (Con):** My Lords, in Committee on the Immigration Bill on 20 January, I said that I supported delaying the roll out of the pilot scheme. I said:

"I thought that the whole point of a pilot scheme was to ensure that what was being put forward was actually working as intended. However, as mentioned by the noble Baroness, Lady Hamwee, the Joint Council for the Welfare of Immigrants found that two-thirds of landlords had not fully understood the code of practice on preventing illegal immigration or indeed the code of practice on avoiding discrimination, and that 50% of those who had been refused a tenancy felt discriminated against while 40% of tenants in the pilot area had not been asked for any identity documents. That is hardly a resounding success for the pilot scheme, yet the Government want to roll out this contentious scheme across the country next month. That cannot be the right answer".—[*Official Report*, 20/1/16; cols.873-874.]

I still hold that view. I have great reservations about rolling out the scheme before the work has been properly done. The Residential Landlords Association recently surveyed almost 1,500 landlords across the country and showed that the vast majority of landlords simply do not have the information they need to undertake the checks properly. I am one of over 90% of landlords who said that they had not received any information from the Government about the right-to-rent checks by mail, email, from an advert or leaflet or from the internet, while 72% of landlords said that they did not understand their obligations under the policy. I only know about the right-to-rent checks because I am a Member of your Lordships' House. I have received no other information.

Since Committee on the Bill on 20 January, the Minister has held a number of meetings with noble Lords, for which I thank him. My noble friend Lord Howard of Rising and I had one such meeting on not criminalising landlords who had done their best not to rent to illegals. We discussed whether immigration enforcement officers should be issued with clear guidance about when not to prosecute landlords who had done their best, so that only the deliberate flouters of the law could be pursued and prosecuted. I know that other such meetings with the Minister have also taken place on this subject. I do not know what the Minister has managed to achieve as a result of those meetings, so I will listen with great interest to what my noble friend says.

**Lord Rosser (Lab):** We will not support the Motion in the name of the noble Baroness, Lady Hamwee, if it is put to a vote. I believe that this is the fifth or sixth such Motion moved by the noble Baroness's party in

respect of a statutory instrument in this Session. There appears to be a difference of view between us on the role of this House—the unelected House—in relation to such Motions on statutory instruments and the very exceptional circumstances in which voting on such a Motion might be justified in this House. I may be wrong, but I believe that we voted on just two such Motions in relation to statutory instruments during the five-year period of the coalition Government.

The terms of our Motion express regret that the Immigration Act 2014 (Commencement No. 6) Order 2016 was laid following inadequate consultation, and asks the Government to undertake a further consultation before the terms of the order are implemented. This order extends the right-to-rent scheme to the whole of England, and the scheme restricts the access of illegal migrants to privately rented accommodation. The first phase of the scheme has been in operation in certain local authority areas in the West Midlands.

The Immigration Act 2014 was passed by the then coalition Government. Under it, landlords who failed to undertake the required checks whether prospective tenants had the necessary immigration status were liable to payment of a civil penalty. During the passage of that Bill, the then Government said in respect of the first phase of the scheme that they understood,

"the desire of noble Lords to ensure that the landlords scheme is 'workable' and that the provisions are tested and carefully evaluated".

They said that it was their intention,

"to adopt a carefully phased approach to implementation and to ensure that we get the guidance and support services absolutely right before considering wider implementation beyond the first phase".—[*Official Report*, 3/4/14; col.1089.]

The Government also said that,

"one of the reasons why the rollout is important is that we need to check to see if there are any adverse implications in this policy".—[*Official Report*, 12/3/14; col.1800.]

The Secondary Legislation Scrutiny Committee commented in its recent report on this statutory instrument that:

"The Home Office ... needs to clarify the consequential impact on local authorities",

and whether the demand for local authority housing would increase as a result. The committee also said that,

"it appears to us that the Home Office needs to do more to publicise the checks, in particular to the majority of small landlords who do not belong to a professional association".

In the light of just those two observations by the Secondary Legislation Scrutiny Committee, there must be doubts as to whether the commitment given by the Government during the passage of the Immigration Bill 2014 to ensure that the guidance and support services were absolutely right before considering wider implementation beyond the first phase has been met. Likewise, there must be doubts about whether the commitment given to check if there were any adverse implications of the policy has been met in the light of the committee's comment that the Home Office needed to be clear about the consequential effects of this legislation on local authorities and whether the demand for local authority housing would increase as a result.

8.30 pm

Further doubts about whether there has been adequate consultation or discussion on the outcome of the pilot or first phase of the scheme in the West Midlands have been created by the comment of the Prime Minister last May, before the Home Office's official valuation had been completed, that now that his party had a majority, the Government would roll out the scheme nationwide. The Home Office evaluation was not published, as the noble Baroness, Lady Hamwee, has said, until five months later, in October last year. Publication then was also after the new 2015 Immigration Bill was laid before Parliament with the Government's reference to it building on the national rollout of the landlord scheme established under the Immigration Act 2014.

The new Bill, of course, takes things further and provides for criminal sanctions, including imprisonment, against landlords and agents who are found to have rented to someone who does not have the right to rent. The reality is that, despite a statement by the current Minister for Immigration during the passage of the Immigration Act 2014 that a clear assessment would need to be made at the end of the first phase in the West Midlands to inform the subsequent rollout, and that no further decision would be made before then, the Prime Minister in particular and the Government in general have done precisely that, since they made their decisions months before the Home Office evaluation of the scheme in the West Midlands was published, let alone consulted upon or discussed. As the Government will be aware from the report of the Secondary Legislation Scrutiny Committee, both the Joint Council for the Welfare of Immigrants and the Immigration Law Practitioners Association have raised serious doubts about the right-to-rent policy and the evaluation that was undertaken of the scheme in the West Midlands.

The risk of discrimination under the right-to-rent scheme has been a major concern, and those concerns were expressed during the passage of the 2014 Act. The JCWI and ILPA have argued that the Home Office evaluation of the scheme in the West Midlands looked at discrimination only on the grounds of race based primarily on a mystery shopper exercise, but the Home Office report does refer to verbatim comments which suggest that there were a small number of instances of potentially discriminatory behaviour and that the Home Office Minister had stated that no "hard evidence" of discrimination had been found when the evaluation found clear evidence that it had taken place. The JCWI has listed evidence of discrimination found by the Home Office evaluation—and it is on a number of fronts—which includes evidence that British citizens without documentation have been adversely affected, and evidence reported by charities and voluntary organisations of increased homelessness as a result of the scheme, and difficulties finding accommodation among those with the right to rent but complicated documentation, and discrimination on the basis of nationality.

A YouGov poll conducted by Shelter in July last year found that one third of landlords were less likely to consider letting to people who do not hold a British passport, and 35% were less likely to consider someone whom they perceived to be a migrant. A survey

of 300 landlords in September last year by a property information website asked who they would prefer to rent to when the new right-to-rent checks became compulsory in their area. Some 44% stated that they would rent to anyone with the required documents, but 47% stated that they would rent to British passport holders only. The JCWI says that the Home Office evaluation does not provide definitive evidence of the impact of the right-to-rent scheme on landlords, tenants and local communities, and that the Home Office report itself states that sample sizes are small and findings must be seen as indicative rather than definitive. The council also comments that the Home Office evaluation does not demonstrate that the right-to-rent scheme has or will achieve its stated aims of reducing the availability of accommodation for those residing illegally in the UK, discouraging those who stay illegally, encouraging those who are resident in the UK illegally to leave by making it more difficult to establish a settled lifestyle through stable housing, or reinforcing action against rogue landlords who target vulnerable tenants. The Home Office report itself states that just 26 referrals of irregular migrants were specifically related to the right-to-rent scheme.

I repeat the commitments the Government made during the passage of the Immigration Act 2014 that there would be a proper evaluation and clear assessment at the end of the first phase and that no further decisions would be taken before then, that it was essential to get as clear a level of detail as possible of the impact of the scheme in the West Midlands because the outcome would inform subsequent phases, that guidance and support services would have to be absolutely right before consideration could be given to wider implementation, and that the rollout was needed to see if there were any adverse implications of the policy. By no stretch of the imagination have those undertakings been delivered.

The Prime Minister's statement last May that he would roll the scheme out nationwide before the Home Office evaluation had even been completed, let alone published, set out very clearly the Government's attitude to the undertakings that had been given during the passage of the 2014 Act. Clearly, there is no consensus at all over either the thoroughness or the interpretation of the findings of the Home Office evaluation of the West Midlands scheme. The Government now have the opportunity to consult properly on their evaluation and take into account the views of others on the outcome of the scheme in the West Midlands, including what actions now need to be taken before any final conclusions are reached on whether to proceed to roll out the scheme nationwide, as well as before making it a criminal offence to rent property to someone without the required immigration status. I hope that that is an opportunity that the Government will now take.

**Baroness Sheehan (LD):** My Lords, during the passage of the Immigration Act 2014 through both your Lordships' House and the other place, considerable disquiet was expressed about the right-to-rent clause.

The Liberal Democrats in the coalition Government were particularly unhappy about its ramifications. Eventually, a compromise was reached whereby a rigorous

pilot scheme would take place in the West Midlands and only on its conclusion and satisfactory evaluation would a scheme be rolled out nationally. All previous speakers referred to this, but it is so important to reiterate and is the underlying reason behind my noble friend Lady Hamwee's Motion.

Let me quote the Prime Minister's speech on immigration in May 2015:

"The Liberal Democrats only wanted us to run a pilot ... But now we've got a majority, we will roll it out nationwide".

This statement contradicted assurances given to Parliament that any decision on a further rollout would take place only after a transparent and public evaluation that would allow Parliament sufficient time to debate, scrutinise and ultimately decide on any further stages of the scheme. This patently did not transpire. Thus, I am grateful to my noble friend Lady Hamwee for giving us the opportunity to put on record our thoughts on the inadequacy of the evaluation.

I start by examining the title of the proposal: "right to rent". What does this mean, and what does it mean if the right to rent is not open to you? People who wish to rent a private home or a room in a house are looking for a roof over their heads. That is all. Let us put to one side for the moment the rights and wrongs of those without the necessary documentation being able to rent a home and think of them as people, rather than illegal immigrants. Are we saying that anybody—including British citizens, usually vulnerable ones—who fails to produce the paperwork set out by the Government will legitimately be put out on the streets, destitute, and that if you or I take pity on that individual, we, too, will suffer the consequences? That is morally repugnant. Will the Minister please tell me what will happen to people who cannot evidence their right to a roof over their heads?

Now let us think of them as illegal immigrants—as though they somehow cease to be human. Let us go along with it for a bit, because the Government's argument is that these measures are acceptable because the prize at the end is worth it. I believe that the Government's view is that creating a hostile environment that will make it difficult for illegal immigrants to have a settled life will, in time, be a deterrent, and that rogue landlords will be put out of business in the process. The Government may be right about that, but this then throws up a number of questions. Does the end then justify the means? More importantly, does the evaluation of the pilot scheme show us that there is evidence to support that the ends have indeed been met?

What are the means? They are, first, to deny a roof over the heads of those unable to produce the right papers; secondly, to get landlords to police it by forcing them to take on duties of immigration officers; and thirdly, to make sure that landlords do what is required of them by putting in place more and more draconian penalties if they get it wrong. However, I believe that the Government are playing with fire here, because creating that hostile environment to act as a deterrent risks enflaming community tensions, as people with foreign-sounding names and foreign accents without the necessary documentation, whether they are here legally or not, will be put to the back of the queue. It will be not only those with foreign characteristics but

those vulnerable British people whose circumstances are such that they are unable immediately to produce the paperwork required. This includes the homeless, victims of domestic violence, victims of modern-day slavery and those caught in the mangles of the Home Office's systems—something of which I have some knowledge, having handled immigration casework.

So far I have addressed only one half of the equation—the impact on tenants. What about the impact on landlords? Some 78% of rental properties belong to landlords who let only one or two properties. Buy-to-let landlords had not bargained on becoming an arm of the UK's border agency. They, quite rightly in my opinion, do not feel qualified to pass judgment on the validity of documents arrayed before them. Indeed, the recent court case involving Ryanair, cited by my noble friend Lady Hamwee, illustrates perfectly the weakness of the Government's policy of fining airlines for flying illegal immigrants into Britain. If airline staff are deemed ill equipped to scrutinise and identify forged documents, how on earth are ordinary citizens supposed to do so? The answer is: they will not. They will opt for the path of least resistance and let only to tenants who represent the least risk of them falling foul of the law.

Organisations such as Crisis, Shelter, St Mungo's Broadway and the Joint Council for the Welfare of Immigrants have all documented their concerns on these issues eloquently. Indeed, the JCWI went to the trouble of commissioning its own evaluation of the West Midlands pilot. I wonder whether the Minister has had a look at it. It is rather a good piece of work and ought to be given serious consideration.

The Home Office's own evaluation of this pilot is flawed on a number of counts. Noble Lords have already cited some examples, but I shall give a few as a flavour of the lack of rigour displayed. The report states that sample sizes are small—some online surveys were completed by as few as five respondents; only four voluntary and charity sector organisations and five housing associations were interviewed for research, and the majority of tenants had not moved properties since the start of the pilot and would not, therefore, have any experience of the scheme. The list goes on. Nor does the pilot definitively conclude that it has met the aims set out by the Government.

I shall finish by reading from the website of the Equality and Human Rights Commission:

"The importance of housing is recognised in the United Nations Covenant on Economic, Social and Cultural Rights, which includes 'the right of everyone to an adequate standard of living for himself and his family, including adequate ... housing'. The United Kingdom is legally bound by this treaty. Protecting people's human rights in housing is therefore important in its own right".

I hope that the Government will take that statement on board and I am very sorry that Labour will not join us in voting down this order, especially since it did so in the other place.

8.45 pm

**Lord Best (CB):** My Lords, I declare my interest as joint chair of the right-to-rent private landlords consultative panel at the Home Office. I jointly chair this panel with the Minister for Immigration, James

[LORD BEST]

Brokenshire. We have been meeting to discuss the right-to-rent measure every month or two since September 2014, with sub-groups meeting between the main panel meetings.

I was very critical of the right-to-rent proposals in your Lordships' House before they became part of the Immigration Act 2014. I tabled nine amendments, all relating to the practicalities of requiring landlords to check the immigration status of their tenants. The House received a number of reassurances from the then Minister, the noble Lord, Lord Taylor of Holbeach, for which I was grateful, including arrangements for a pilot scheme in the West Midlands.

The panel, which continues to meet, includes representatives of landlords, tenants, property agents, all the relevant local authorities, three government departments and the Equalities and Human Rights Commission. From this perspective, I hope, therefore, that I can provide some answers to the questions arising on this issue.

First, has the Home Office taken the whole process seriously? I can say definitively that this exercise has been taken very seriously by the Minister and the army of civil servants working on its implementation. I cannot claim technical knowledge of research methodologies, but I have been impressed by the Home Office team responsible for the evaluation of the West Midlands pilot, led by Andrew Zurawan. As far as I can tell, the different techniques deployed by the in-house and external researchers—surveys, focus groups, mystery shopping, comparisons with a control area where the right to rent was not in force—have all been conscientiously carried out. I fully recognise the limitations of any pilot evaluation process: it may take years, not months, for effects to work through; larger-scale surveys or surveys at different times of the year could produce fuller results; and so on. However, within the obvious constraints of this exercise, I think the team did a pretty good job.

Secondly, what has been the outcome of these efforts to date? It was never to be expected that the critics of this measure would reverse their opinions and accept the right to rent as a good idea. Nevertheless, I detected that the arrangements, even in the pilot, were not proving massively onerous for landlords or property agents. With the subsequent improvements to the approach—revision to the guidance, clarification and simplification of requirements for documents—the position for the rollout from 1 February certainly seems to be generally, if somewhat grudgingly, accepted. I am simply not convinced that the right to rent is causing huge anxieties for landlords; I have talked to landlords and agents who are far more concerned about tax changes and other regulatory measures affecting them.

No respectable landlord would wish to be letting to someone who is here illegally, not least since that tenant might be apprehended and removed and leave suddenly with unpaid rent, so already, of course, there are referencing procedures for those applying for a tenancy. Now that it is possible to view the pictures of the required documents for those who do not have a passport, their legal status should actually be easier to check.

I raised the question at the panel with those representing managing and letting agents: would it be best to use a professional specialist company to handle this aspect of the vetting of your potential tenants? The response was that this would be a waste of money and quite unnecessary as the whole exercise was now straightforward enough. I wonder how many landlords do not seek proper references or carry out checks on the identity of people to whom they grant tenancies. I strongly suspect that the landlords who will be affected by this measure know very well the illegal status of the tenants and are taking advantage of them in extracting exorbitant rents for abysmal conditions. The great benefit of the Home Office's interest in enforcing the right to rent in the West Midlands was shown to be in bolstering the efforts of local authorities to weed out some pretty unpleasant elements in the private rented sector. I make no secret of the fact that my own interest in this matter is based on the increased opportunities for prosecuting those who exploit people in overcrowded slum conditions.

Thirdly, what about the continuing anxieties that innocent landlords may unwittingly, through ignorance rather than malicious intent, still fail to identify an illegal migrant before allocating a tenancy to them, and, as a result, end up with a hefty fine? The panel has received a very clear message on the ongoing role of the Home Office in advising and supporting landlords and agents. Mostly people will go online and should now find the necessary information relatively easy to access. However, sometimes landlords or agents could encounter a lack of any documentation or have queries about the documents they do see. They will want a definitive decision from the Home Office itself. It is important to note that when Home Office officials are asked to check the identity of a potential tenant, they must respond within 48 hours. If the landlord or agent is not told that the individual has no right to rent within this period, the letting can go ahead. Based on experience from the pilot, the Home Office has geared up its staffing to meet its extended commitments. In addition to this checking service, everyday inquiries about the whole arrangement can be discussed with trained operators on an expert helpline.

Ministers have constantly reiterated the point that any prosecution requires a high standard of proof, demonstrating that a landlord actually knows, or has good reason to believe, that they are indeed letting to an illegal immigrant. Ministers have underlined the point that no one will be prosecuted for failing to identify a cleverly forged document or false passport, let alone be held liable if an illegal migrant moves in with a legitimate tenant unbeknown to the landlord. The Home Office will ensure that the CPS is fully aware of the policy intent. The object is to target the real rogues, the criminal landlords who knowingly and repeatedly flout the law. Nevertheless, if the Minister wishes to offer additional reassurances tonight to this effect, I am sure that would be appreciated.

Fourthly, is the Home Office investing enough in communications to ensure that landlords and tenants are alerted to the new requirement on them? The panel has received very regular reports on the many efforts being made to get the message across and I am confident

that there can be no managing and letting agents who are still in the dark. Whether every one of the 1.8 million landlords in the UK is yet aware of the arrangement, I would not be so sure. However, I fear that some of these landlords are ignorant of a good many other responsibilities they should understand. This problem may be more to do with the way we organise rented housing in this country, with such huge numbers of “amateur landlords” who may have no expertise in property matters, rather than a problem with the Home Office. Of more concern is the issue of communicating with tenants who sub-let or owners who take in lodgers. These may well be harder to reach, despite the Home Office’s efforts, and it may take time for word to get around that checks are needed. In the early stages of the right to rent, tolerance will be needed if mistakes are made, and I note that the fine for a first offence, if it goes all the way to being prosecuted, is set at £80.

I fully accept that once the communications efforts have succeeded and most people are aware of the right-to-rent arrangements, there is the danger of discrimination against those who are in this country perfectly legitimately but might be thought to be illegal immigrants. Sadly, discrimination on grounds of race and ethnicity has not been stamped out in the private rented sector. It was discerned as much among landlords in the control area, where right to rent was not an issue, as in the pilot area. Whether the problem will get worse or whether the raising in the right-to-rent procedures of the profile of discrimination as an issue will counterbalance it, I cannot tell. Right to rent could get the blame for suspected discrimination when in reality the problem lies elsewhere.

Today I hosted the launch by Crisis of an excellent report on the obstacles to renting privately for people who are on low incomes or have been homeless. We heard how few landlords now accept anyone in receipt of housing benefit. Indeed, 82% of landlords said they were not willing to house those who are homeless or about to become homeless. Many people face enormous difficulties in getting a rented home, quite outside the considerations of right to rent. Ministers have promised to continue to monitor the position in relation to discrimination in particular.

Bearing in mind that the right to rent was introduced in 2014 and that, after evaluating a pilot that did not demonstrate any insuperable problems, negative impacts from this measure have been addressed by Home Office Ministers and officials as conscientiously as could be hoped for, I cannot conclude that the rollout of the right to rent should be the subject of that most draconian of measures possible in your Lordships’ House, a fatal Motion of annulment.

**Baroness Lister of Burtersett (Lab):** My Lords, I have opposed these provisions from the outset, primarily because of the potential to increase discrimination in the housing market, but what is at issue now is whether full rollout of the scheme at this stage is consistent with the commitments made in both your Lordships’ House and the other place during the passage of the Immigration Act 2014. Like many other noble Lords who have spoken, I believe it is not.

The noble Lord, Lord Taylor of Holbeach, said then that the Government’s intention was that the provision would be,

“subject to a phased implementation on a geographical basis. This will allow a proper evaluation of the scheme to ensure that it delivers its objectives without unintended consequences such as discrimination”.—[*Official Report*, 10/3/14; col. 1648.]

Later, he promised a “carefully phased” approach to the implementation. I am sure I am not the only Member of your Lordships’ House who understood that to mean that there would be a series of pilots in different geographical areas and of different kinds to get a representative picture of its effects—not that it would forge ahead, after a single phase in a single geographical area, involving a quick and not completely representative pilot, with no proper public debate about what we have learned from it and just some changes to the code of practice, which ILPA argues,

“do not appear to constitute a substantive response to the concerns identified in the evaluation”.

I believe that sufficient concerns were raised to cause us to pause rather than steam ahead regardless, as urged also by the Residential Landlords Association on the basis of research that it has carried out. The only reason that we are having this debate is because of the Motions in front of us.

I have the greatest respect for the noble Lord, Lord Best, so what I am about to say is in no way casting aspersions on his role. I am sure that he will have brought the greatest integrity and expertise to overseeing the pilot scheme, but forgive me if I am cynical. A number of noble Lords have referred to this already but when the Prime Minister declared in May, five months before publication of the conclusions of all the hard work that went into the pilot,

“now we’ve got a majority, we will roll it out nationwide”,

surely it rather gave the game away. It suggested that the pilot would turn into something of a charade. It was as if all that important and serious work did not matter because a decision had already been made that it should be rolled out. All right, there have been some improvements to the code of practice but they do not amount to an awful lot.

9 pm

Perhaps what is happening is not quite as incomprehensible as the noble Lord, Lord Deben, argued in his powerful demolition of the policy in Committee on the current immigration Bill which, as my noble friend has said, makes matters worse by introducing criminal sanctions. During our debate in Committee, I asked the Minister what view the Government take of the evaluation carried out by the Joint Council for the Welfare of Immigrants, which we have already heard about and which,

“uncovered a number of worrying direct and indirect impacts of”,

the right to rent checks on tenants and landlords. For example, two-thirds of landlords in the survey stated that,

“they would be less likely to rent to someone who required a little time to provide documentation”,

while more than a quarter said that,

“they would be less likely to open discussions with someone who ‘had a name which doesn’t sound British’ or ‘had a foreign accent’”.

[BARONESS LISTER OF BURTERSETT]

I accept that it was quite late then but as the Minister did not respond, I would appreciate it if he could do so now.

Would the Minister also care to comment on the Residential Landlords Association's survey of nearly 1,500 landlords, which found that 45% said that they would rent out properties only to those who could provide the required documentation immediately when asking for a new tenancy and found that the great majority, as we have already heard, were totally unprepared?

Another issue raised in Committee by the noble Lord, Lord Deben, was that of the impact on lodgers. The noble Lord, Lord Best, referred to this. The noble Lord, Lord Deben, pointed to the lack of evidence about how the right to rent is working with this group. I raised this issue during the passage of the Immigration Act 2014, with specific reference to those taking in lodgers as a means of trying to cope with the bedroom tax. I know that these are few in number but as people become more aware of their responsibilities under this legislation, I cannot think of a greater disincentive to take in a lodger.

Of particular concern here are asylum seekers who rent a room in a private house rather than Home Office accommodation. This issue was raised during the passage of the 2014 Bill by the late Lord Avebury. I pay tribute to him as an indefatigable champion of the human rights of the most marginalised groups in our society. He is sadly missed when it comes to debates such as these, so all that I can do is to quote from him. He asked then:

"Can my noble friend elucidate what provisions are being made for documents to be produced by those who are occupying rooms in private houses because they are not covered by the provisions of Schedule 3, to which he has referred? They deal only with the accommodation that is provided to most asylum seekers under the 1999 Act when they cannot afford to pay for accommodation of their own. However, there is still an important residual group of people who find space in private houses. They will need documentary proof that they are allowed to live in those houses and thus ensure that landlords are not breaching the conditions by taking them in".—[*Official Report*, 12/3/14, col. 1800.]

As ILPA explained, the problem arises because the definitions in the Act work on the basis of having leave whereas most asylum seekers are on temporary admission. The then Minister said that the Home Office will provide the necessary documentation to show that they have a right to accommodation but, according to ILPA, the Home Office subsequently declined to do so, requiring landlords and landladies to phone a helpline. Given that on the face of it the evidence will suggest that there is no right to rent, why would they bother?

The JCWI has already been made aware of an asylum-seeking family with a young child who have been unable to access private rented accommodation because of confusion over the right to rent. They were forced in the end to live in a hotel instead. The JCWI argues that a clear policy is vital in order to ensure that these individuals, who cannot be removed from the UK and who may, in some instances, have the right to rent, are not disadvantaged and rendered homeless as a result.

I make a plea to the Minister to look into this issue, involving a small group, but a particularly vulnerable one. Could he come back to us, on Report on the current Bill, with what steps the Home Office will take to provide the safeguards promised by James Brokenshire in the Commons on the last immigration Bill for those who fall through the cracks of the right to rent scheme in this way? It is already being rolled out, but we must have this sorted.

Much as I dislike this scheme and would like to see the back of it, I do not believe we have sufficient evidence yet from piloting either to abandon it now or to roll it out nationally. As the Residential Landlords Association argues, on the basis of a whole lot of evidence, a pause would be the sensible and responsible approach at this stage. I believe the Government should stick to their promise of a phased, geographical evaluation, and there should be a proper debate in both Houses as to what the lessons are in terms of its effectiveness in meeting the Government's objectives and any unintended consequences, particularly as regards discrimination. As it is, we can only conclude that despite the serious efforts put into the pilot by the noble Lord, Lord Best, and others, the Government are determined to roll it out nationwide regardless, as the Prime Minister made clear in his immigration speech in May.

**Viscount Hailsham (Con):** My Lords, I am not going to support the fatal Motion, but I have a great deal of sympathy with the underlying thoughts behind it. I begin by declaring an interest: I am a small landlord and have rented property—in fact, three properties—for some 20 years, and therefore come with a degree of personal experience of the problems that landlords face when confronted by prospective tenants. I want to make only four points.

First, I endorse what the noble Earl, Lord Cathcart, said with regard to the lack of knowledge. My knowledge of these requirements has come from being a Member of this House. I have not received, from the Home Office or from anywhere else for that matter, any detailed information regarding a landlord's obligations, and I share the reservations expressed by the noble Earl.

Secondly, it is very difficult for landlords—and, incidentally, for people employing dailies as well—to interpret the documents that prospective tenants or employees produce. Very often we are told that the relevant documents are with solicitors; very often, the prospective tenant or employee has very limited language skills. It is often very difficult to determine whether or not somebody has a residential entitlement of the kind contemplated by the Home Office.

Thirdly, landlords like rapid reletting. They do not like voids; they like certainty. If they have any doubt about when or whom, or about the identity or legitimacy of a tenant, they will go for the safe option. Surprise, surprise—that will have a discriminatory consequence; that is a certainty.

Fourthly, and with utmost deference to the noble Lord, Lord Best, should we trust the discretion of the CPS? There is one fundamental rule that this House and the other place need to bear in mind: if you give a discretion to an official, it will be abused. My general

principle is to give as little discretion to officials as possible. The CPS can come along and say, “We will exercise our discretion; we will be moderate and careful”. Some of them will, but many will not. I have a great deal of sympathy with the views expressed by the noble Baroness.

**Baroness Ludford (LD):** My Lords, I agree with everything that the noble Viscount, Lord Hailsham, said. I also agreed with everything that the noble Lord, Lord Rosser, said. He delivered forcefully and vigorously his strong objections to the scheme going ahead without fuller evaluation. I have to say that I felt that his outrage is synthetic if Labour will not join the Liberal Democrats in voting for my noble friend’s fatal Motion. It has no effect; it is just outrage without action.

The checking requirement is not expected to be onerous—that was a comment in the Government’s Explanatory Memorandum or some guidance document. Elsewhere, they state that a landlord or agent can carry out simple document checks—simple document checks. We have already heard that in fact they will have to refer to the Home Office and wait a couple of days. As the noble Viscount pointed out, landlords do not want to wait: they do not want voids. Tenants will lose the chance of the property. It is a particularly unfair responsibility on small landlords to have to check documents. The noble Lord, Lord Best, said that it was straightforward to do that checking, but that is absolutely not the case.

The judgment in the recent Ryanair case has been mentioned. The judge who found in favour of the airline said that its staff could not be expected to spot cleverly forged passports that even trained immigration officers found hard to detect.

Interesting evidence was given to the committee in the other place by Tony Smith, former director-general of the UK Border Force. He said that when he was regional director of UKBA, his enforcement teams,

“uncovered a significant number of ‘forgery factories’ in London who were manufacturing fake EEA identity cards ... mainly being sold to migrants from non EEA countries who were working illegally in the UK. Although these documents would likely be identified as fraudulent at the border”—

there is no guarantee—

“they are usually sufficient to pass the ‘reasonably apparent’ test to an employer. The same is likely to apply to the implementation of landlord sanctions”.

So a former Border Force director says that the number of forgeries in circulation makes it extremely difficult, even for immigration officers. He wrote:

“Although the EU Council has called on all Member States to adopt common designs and security features”,

for identity cards for a decade,

“not all EEA countries have done so”.

Of course, the UK does not have a permanent resident card for foreign nationals with indefinite leave to remain, equivalent to the US green card, so there is no one document.

Even as a Member of the European Parliament, I was dealing with quite a lot of immigration cases, and people would often turn up with a whole batch of letters from the Home Office which apparently attested

to their immigration status. I was completely unequipped to work out what they all meant. There was a set of different stamps and letters, instead of one simple document. To put this onus on landlords is not appropriate.

I also do not understand what is apparently regarded as the concession of allowing expired biometric residence documents and immigration status documents to be recognised. How is a landlord to know which expired documents can be relied on and which cannot? Perhaps the Minister can give us an answer to that.

I noticed something in the *Financial Times* a few months ago that reminded me that a landlord must identify all adult occupiers who will use the property as their main home, whether or not they are named in the tenancy agreement. The columnist wrote that, “Nosiness may be necessary”, to inquire who else is going to live in the property who is not in the tenancy agreement. The column also recommended that you may,

“need to pay for a professional opinion”,

which all raises the cost that will no doubt be passed on in the rent. Noble Lords opposite have made the point about how they only know about these requirements from being Members of this House. Obviously, not all landlords are Members of this House. There has been a suggestion that the dissemination of information will largely rely on electronic media and people knowing where to seek out the information. The Residential Landlords Association made the point that 90% said that they had not received any information from the Government either by email, from an advert, from a leaflet or from the internet, and 72% did not understand their obligations under the policy.

9.15 pm

It seems entirely clear that this is not ready to roll, and that the impact on landlords and local authorities who might have to pick up homelessness cases, as well as on tenants—with the very obvious point about the potential for discrimination—makes a much fuller evaluation essential. I therefore strongly support the Motion put forward by my noble friend.

I would just add that, if this proposal had come from the European Union, there would have been uproar, at the idea that this amount of bureaucracy and red tape was being put on landlords, with the potential for discrimination. Everybody in this House would have fallen on it, torn it apart and, hopefully, voted against it.

**Baroness Gardner of Parkes (Con):** My Lords, my interest as a small landlord is on the register. Like the noble Viscount, Lord Hailsham, I have let properties in a small way for a very long time, probably 40 to 50 years, starting with the basement of a house that I lived in. It is unfortunate that this clause comes in an immigration rather than a housing Bill, where so many of these issues are addressed and more is known about the real problems involved.

A pilot evaluation as proposed by the noble Baroness, Lady Hamwee, is at least desirable and even essential. Like others on this side of the House, I shall not vote in favour of her Motion, but I want to make an input

[BARONESS GARDNER OF PARKES]

on the subject. Checks on tenants all sound very desirable, and I have always had checks on them, but I cannot tell noble Lords how difficult it is becoming. Nowadays people either want to hide their identity for some illegal reason of their own or they simply do not even know how to produce identification. I have had a very charming and completely reliable girl take a small flat that I had. The previous tenants were expecting a child and needed more space, so they moved out. She wanted to come, but to try to get any suitable identification and proof that she was actually going to the university here that she claimed to be going to took over six weeks. As the noble Viscount, Lord Hailsham, said, six weeks' loss of rent to a landlord is quite a lot of money and certainly pushes the rent up for the next person who comes along, because you have to compensate for the money that you have lost in that period. In the end, we had to get a letter from her embassy to prove that she really was legitimate.

I was quite fussy about this because we had at least six people presenting themselves to take that flat who were definitely not what they said they were and wanted it for illegal purposes. Other flats in the block have been let out on an Airbnb basis; the council used to be able at least to find out who was living in those flats. They were bussing in 10 people at a time for two weeks' holiday. They came into a one-bedroom flat, which was not allowed to be sublet. In the end, the whole thing was sorted out in terms of those units, but the same people who had successfully run that—the court demanded that they give up that illegal subletting—were putting up front men to ask for my flat so they could do the same thing there. It is so very hard to detect these cases, and it takes a lot of time and consideration.

When residential landlords are given the responsibility to check immigration things, it will be a bit like the National Health Service. We are meant to check on who is entitled to national health treatment, but people do not have the time or ability to access the information and a tremendous lot of health tourists come here for that reason.

What are reasonable requirements? I can understand that it would be easy if we had national identity cards, although I have never really been in favour of them. Then, at least we would know whether someone was genuinely in the country, and that would cover one little thing, but that is not enough. For us to have passed the Deregulation Act, taking away the controls on people subletting or letting on short tenancies, at a time when New York and Paris were introducing such regulations was insane, but there is nothing we can do about it.

The point that this does not address at all is illegal landlords. Legal landlords are doing their best to abide by whatever the law is, but I know so many people who have a room in a house that is divided into six or eight rooms. You are meant to have a certificate if it is a house in multiple occupation and to know who is in it. Instead, these people are let rooms with no rent book or security, with nothing at all. In one case, someone has asked me to help. She is very concerned because someone has a key to her door and comes in and steals her things, yet she is told by the

landlord that if she goes to the police, he will put her out instantly. That sounds unbelievable, but it is absolutely true. There will be at least six people living in a house where the landlord does not declare that he has anyone. I do not think he pays any income tax or anything else. The more we put greater and greater demands on legitimate landlords which are almost impossible to satisfy, the more we are going to push the enterprise underground. That is a very undesirable situation, and we do not want to see it.

I understand that the question of discrimination might be why this provision has been put into the Immigration Bill, but I am not involved in that Bill and I had not realised that it had housing implications. I am very impressed by the work being done by a lot of people, such as the noble Lord, Lord Best, who is a real expert on this matter. The noble Lord, Lord Rosser, said that there should be no further action before there has been a full consultation and evaluation, and the Liberal Members said the same thing.

It must be remembered that this is making it a criminal offence for landlords. It is not turning it into some light-hearted thing that will be dismissed. They say that you will be able to ring a helpline but, from my national health experience, I do not have a huge amount of faith in helplines. Every day in the paper there is a story about something that has gone wrong with a helpline. Why do we think a helpline would be any better manned or more efficient in this field than in other fields? Human nature is able to copewith only a certain amount, and most people staffing helplines have a list of questions and answers beside them. If you do not fit into that pattern, they might not be able to give you the appropriate answer because the question is not one that they have been given an answer to.

The Government need to make the situation much clearer to landlords. I think it is true that people have not had any notice about this—I certainly have not. The same applied over carbon monoxide monitors; the measure was introduced with two weeks' notice and no one was told anything about it. It is no good asking people to follow a law without them having any idea that it is coming in. It is only through the National Landlords Association that I have come about this knowledge at all.

This is an important issue. I feel that it could go disastrously wrong, and it would be far better for it to be fully evaluated and dealt with perhaps in the housing Bill rather than in the Immigration Bill.

**The Minister of State, Home Office (Lord Bates)**  
(Con): My Lords, I thank all those who have spoken in this debate. I begin by putting on record that my wife is a small-scale private sector landlord; I want to draw that to the attention of the House.

In considering these matters, I draw your Lordships' attention to the fact that we had a substantial debate on this issue on 20 January on Amendment 148 to Clause 13, which was from, as I recall, the noble Baroness, Lady Hamwee. That went on for some time and raised many of the issues that have been raised today. If, because of the hour, I touch on a number of the issues lightly as we go through, I think it will be

helpful for those who have genuine concerns about this to look again at the *Official Report* for the second day of Committee, and I am sure we will have the opportunity to revisit this on day one of Report on 9 March. For those reasons, I trust that the House will bear with me if I try to deal with some of the headline issues that perhaps have not been raised before.

First, I shall deal with the context of this measure. The context to legislation is very important. This is a commencement order, Commencement Order No. 6, for a piece of legislation that was passed by the coalition Government. The changes about which many concerns have been raised relate to the Immigration Bill currently going through your Lordships' House but this relates firmly to the Act that was passed by the coalition Government.

It has to be said that the notion that landlords should have a duty to check that those to whom they rent properties are legally entitled to be here was first introduced by the then Labour Government in the Immigration and Asylum Act 1999, which introduced a duty on social landlords to undertake checks to ensure that they were letting properties only to people who had a legal right to be here. This measure simply extends that further across.

We are of course talking here about human beings and I think that we all recognise the humanity of this, but we are also talking about real problems that are faced in this country. We talk constantly about pressures in the housing market, and it could be that part of that pressure is because a number of properties in the private rented sector are currently rented out to people who have no legal right to be here, which means that they are here illegally and therefore breaking our laws. The question is: should we as a Government, and indeed as a Parliament, be endorsing and basically offering protection to people with no legal right to be here, who are breaking our laws and abusing our hospitality and should leave, to the potential disadvantage of people who are legally here and entitled to rent a property? That is the first point.

The second point, to which a number of issues relate, is on the timing, and I recognise that that is a key point. The original announcement about the pilot exercise was in September 2014—I am looking at the noble Lord, Lord Best—and the original pilot or phased introduction was undertaken some time ago. I readily accept that it was undertaken as a concession to arguments made, not least by the noble Lord, Lord Best, at various stages during the passage of the Immigration Bill through your Lordships' House. The pilot was set up in the West Midlands, which is the second largest conurbation in the UK and quite an ethnically diverse area. It was therefore deemed to be an appropriate setting in which to test out how this would work. On top of that, an independent panel was set up, which of course the noble Lord, Lord Best, co-chairs. The panel includes representatives from the British Property Federation, the Residential Landlords Association, which has been referred to, the National Approved Letting Scheme, the UK Association of Letting Agents, the Association of Residential Letting Agents, the Royal Institution of Chartered Surveyors and the National Housing Federation. It also includes

Shelter, Crisis, Universities UK and, crucially, on the element of discrimination, the Equality and Human Rights Commission.

Why, then, was the decision taken to do this—a point which the noble Lord, Lord Rosser, rightly sought clarification on? The answer is that it was in the Conservative Party manifesto. We stood at the election and our manifesto said that we would clamp down on people who are here illegally to stop them being able to work, rent properties, open bank accounts and obtain driving licences. We said that we would do all those things. Therefore, when we were elected by the people to do that, we announced that we would get on and do it. This is not happening across the country, to take the point made by the noble Baroness, Lady Lister. We introduced it in the West Midlands and that pilot has now been running for over a year, during which we have been gathering the evidence of how it has been operating and evaluating it. This order will enable it to be rolled out to the rest of England but of course further orders will be required for it to be rolled out into Scotland, Wales and Northern Ireland.

On the timing, I took on board the points that were made by my noble friends Lady Gardiner, Lord Hailsham and Lord Cathcart, among others, who were concerned about the time it takes to get documents. That is why a lot of this information can be checked online: there is an online checking service, which is not a premium service, as we said the previous time we discussed this, but a local-rate number that people can ring up. At the moment, that government service delivers 100% as regards its target time, turning work around in 48 hours. When people obtain references at present when a landlord lets out a property, surely they want to establish whom they are letting out the property to. They require some identification and may require proof of employment, with a reference from the employer or from previous landlords. All of that takes time. This part simply checks that the person who is there is legally entitled to be in the UK, and I would have thought that that would be a standard part of due diligence that should be happening in most cases. Therefore that element is there.

I recognise that we all have a deep concern about discrimination in the housing market. That was one of the reasons why the mystery shopping exercise happened there. That sounds like a trivial thing, but it is an established procedure used by all retailers around the country. We used an external firm to undertake the exercise and half the visits were undertaken by BME couples, who were seeking accommodation. What they identified was, sadly, that there is still discrimination—that we know—but that the discrimination levels experienced in the West Midlands control area or pilot area were similar to those in the other areas being used as a comparator. We have to make sure that landlords are more aware of the duties that they already have under the Equalities Act 2010 and the racial discrimination Act of 1965 to ensure that there is no discrimination.

The discrimination point is a key area. We are determined to go much further on this and I know that the independent panel is keen to do that as well.

[LORD BATES]

We are updating the code of practice to ensure that landlords know their duties and obligations to ensure that properties are fairly let to people, irrespective of their background. We have done that with great assistance from the Equality and Human Rights Commission, which of course is part of that panel.

A number of noble Lords referred to asylum seekers and refugees. The legislation exempts refugees, hostels and student accommodation, and, where there are vulnerable people who may have lost documents and what have you, there are special procedures to ensure that they are protected.

The target of this legislation is two groups of people. The first group is those who have no right to be here and should leave, and therefore should not be occupying premises that should be made available to people who have a legal right to be here. The second group, as the noble Lord, Lord Best, was right to point out, are the unscrupulous landlords who charge extortionate rents for appalling accommodation—I have seen reports on that type of accommodation that people are actually living in. These are the people we have in our sights. All a landlord needs to do is undertake a basic check of the documents and keep a copy of them. They then have a statutory defence that they have complied with the law.

A number of very specific points were raised. Perhaps, if the House will allow me, I can undertake to cover those in communications. We are having ongoing conversations about this: we have had several meetings at the Home Office and other meetings. We are going to come back to this. There are some areas where I think we can get some movement to make sure that there is greater reassurance. However, this particular element relates to legislation from 2014 for which there has been a pilot and a phased introduction. We are confident that the safeguards are in place, but it will continue to be kept under review. Therefore, I commend the commencement order to the House and urge the noble Baroness to reconsider pressing her fatal Motion.

**Baroness Hamwee:** My Lords, I am conscious of time. I hope that in my opening speech I managed to anticipate many of the points that have been made in the debate, and I shall not seek to repeat them. What I had not anticipated was hearing the real-life experiences of three landlords on the Benches opposite. I thought it was very telling when they shared with the House that they became aware of the requirements through their membership of the House. Their talk of real experiences reminded us of the concern of landlords about voids and losing rents, and the inevitable and unintended discrimination that may occur because of the situation.

It is right that I respond briefly to the noble Lord, Lord Best. No one could doubt the work that he has put in to this or that the panel that he co-chairs takes the issue very seriously. However, the Home Office evaluation, which took place some time ago, demonstrated many of the problems. The panel continues to work but we do not know publicly what its conclusions are and what its continuing work is. Perhaps I may summarise the noble Lord's view as being that the burden on

landlords was exaggerated. The Residential Landlords Association has made its views quite clear and it supports the Motion.

The pilot was introduced as a result of negotiations between the partners in the coalition Government in 2014. That negotiation was the basis of the inclusion of the provisions in the Bill at that time. Several noble Lords have quoted the assurances that were given about the evaluation. We were told that there would be a proper one based on a big enough trial. The then Minister said:

“Any decisions on a wider rollout will be taken in the light of the evaluation after the general election during the next Parliament”.—[*Official Report*, 3/4/14; col. 1090.]

However, the decision was taken immediately after the election before the pilot had even been completed.

I agree that immigration legislation should not be used to crack down on bad landlords. We should use other means for that. Nor do I think that we should lay problems in the housing market at the door of illegal immigrants. Hardly a cigarette paper can be put between the points that I made and those made by the noble Lord, Lord Rosser, who I think used even stronger language than I did, but I think that his argument is, “We shouldn't behave badly. We should accept that this is policy but ask the Government to think about it all again”. However, if we cannot ask the Government to think about it on the basis of a pilot on which there has been a report, and if we cannot amend the order, how do we do our job? I think that our job is to show our view of the position so far, which is, as I said, that the requirements should not have been rolled out beyond an inadequate pilot. I wish to test the opinion of the House.

9.42 pm

*Division on Baroness Hamwee's Motion*

*Contents 54; Not-Contents 139.*

*Motion disagreed.*

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Trimble, L.  
True, L.  
Tugendhat, L.  
Ullswater, V.  
Warsi, B.  
Wasserman, L.  
Wheatcroft, B.

### Immigration Act 2014 (Commencement No. 6) Order 2016

#### *Motion to Regret*

*Tabled by Lord Rosser*

That this House regrets that the Immigration Act 2014 (Commencement No. 6) Order 2016, laid before the House on 11 January, was laid following inadequate consultation, and asks the Government to undertake a further consultation before the commencement order comes into force (SI 2016/11).

*Relevant document: 22nd Report from the Secondary Legislation Scrutiny Committee*

*Motion not moved.*

### Scotland Bill

#### *Report (1st Day) (Continued)*

9.53 pm

#### *Amendment 29*

*Moved by Lord Stephen*

**29:** Clause 35, page 37, leave out lines 17 to 33 and insert—

“Equal opportunities in relation to the Scottish functions of any Scottish public authority or cross-border public authority, including appointments to non-executive posts on boards of Scottish public authorities with mixed functions or no reserved functions. The provision falling within this exception includes provision that reproduces or applies an enactment made in or under the Equality Act 2010, with or without modification, without affecting the enactment as it applies for the purposes of that Act. It does not include any modification of that Act, or of any subordinate legislation made under it, except—

- (a) provision that supplements or is otherwise additional to provision made by that Act that enhances, but does not diminish, the protection and promotion of equal opportunities afforded by the provision made by that Act;
- (b) in particular, provision imposing a requirement to take action that the Act does not prohibit.”

**Lord Stephen (LD):** My Lords, I spoke to Clause 35 in Committee. Protection from discrimination and the promotion of equality of opportunity are fundamental markers of any fair and decent society. As Clause 35 sets out how these issues will be dealt with in the context of the Scotland Bill, it is essential that the meaning of the clause is clear. Despite the Minister's assurances in Committee, the Equality and Human Rights Commission and other key stakeholders remain concerned that this is still not the case. I am therefore moving Amendment 29, which is intended to make absolutely clear the extent of the Scottish Parliament's legislative competence in relation to changes to the Equality Act 2010. I very much welcome the support of the noble Lord, Lord McAvoy, and the noble and

[LORD STEPHEN]

learned Lord, Lord Davidson, and look forward to their support on this amendment in the Division Lobby shortly. We shall see.

As drafted, Clause 35 prohibits modification of the Equality Act 2010 but allows some limited addition. Whether a change to the Act is a modification or an addition will be difficult to assess. This lack of clarity will lead to confusion and potential legal challenge. However, Amendment 29 would make it clear that the important protections in the Equality Act will be maintained and can be enhanced. It would clarify that limited modification is permitted by the Scottish Parliament only where it is additional to and an enhancement of the present legislation. It would therefore become clear that the Scottish Parliament had powers to increase protection from discrimination, harassment and victimisation in the functions of Scottish public bodies by, for example, adding new protected characteristics prohibiting dual or multiple discrimination or enhancing remedies. In doing so, the amendment would ensure that the fundamental right to be free from discrimination and harassment is protected across Great Britain, but it also enables the Scottish Parliament to provide greater protections in relation to the Scottish functions of devolved public services. It would provide clarity that this could be done and ensure that the Smith commission commitment to devolve,

“the introduction of gender quotas in respect of Scottish public bodies”,

is delivered, while providing clarity that any such provision made by the Scottish Parliament could not go beyond the positive action permitted by EU law and reflected in the Equality Act 2010. In supporting greater efforts to ensure that women have fair representation on public boards, we want to ensure that this is not achieved through unlawfully discriminating against men or at the expense of other under-represented groups such as those from ethnic minorities and the disabled.

Amendment 33 relates specifically to diversity on public boards. As drafted, Clause 35 would limit the ability of the Scottish Parliament to encourage diversity on public boards in relation to any protected characteristics not within the present meaning of “protected characteristic” in the Equality Act 2010. This means that the Scottish Parliament would not be able to legislate to encourage diversity on public boards in respect of any new protected characteristics for which it might otherwise introduce protection. It would, for example, restrict moves to address under-representation on public boards of people who are intersex, should the Scottish Parliament decide to introduce this as a new protected characteristic.

Amendment 32 relates to the public sector equality duty, which is a potentially powerful tool contained in the Equality Act 2010. It requires public authorities and those exercising public functions to give proper consideration to proactively eliminating discrimination and advancing equality of opportunity. It is known as the general duty. The amendment, by devolving legislative competence for the general PSED, would enable the Scottish Parliament to impose stronger requirements on Scottish public bodies to eliminate discrimination, advance equality of opportunity and foster good relations between different groups. Scottish Ministers already

have legislative competence in respect of the specific equality duties, which are duties in secondary legislation that tell public authorities how to implement the general duty. We have already seen how the stronger specific duties in Scotland under the existing devolved power have driven more transparency in relation, for example, to the gender pay gap in Scottish public authorities. Devolving legislative competence for the general equality duty would give the Scottish Parliament greater freedom to require its public services to do even more.

Amendments 31 and 34 relate to equality in political representation and therefore will be of great interest to all Members of the Committee. They would enable the Scottish Parliament to permit political parties to take stronger action in their arrangements for selecting candidates in order to reduce the under-representation of people with certain protected characteristics in the Scottish Parliament and Scottish local government, extend the period in which all-women candidate shortlists are permitted, and require political parties to publish diversity information in relation to candidate selection. I note that the Minister’s response in Committee referred to the Smith commission’s position that the Scottish Parliament will have no powers over the regulation of political parties. However, I argue that the provisions that could and should be devolved under these amendments relate to equality of opportunity for election candidates, not to issues of political party regulation.

10 pm

Part 1 of the Bill devolves to the Scottish Parliament all powers relating to the conduct of elections to the Scottish Parliament and local government elections in Scotland. Taken together, the provisions of the Scotland Bill represent a very significant shift in how Scotland will be governed. As such, the devolved institutions will have responsibility for and be accountable for a significantly wider range of areas affecting people’s lives in Scotland. Therefore, the Equality Act provisions relating to increasing diversity through these elections should also be devolved, so that the Scottish Parliament can encourage stronger action to tackle under-representation in devolved institutions.

These amendments would not permit the Scottish Parliament to legislate to allow shortlists made entirely of people with a particular protected characteristic other than sex. While this tool is appropriate for women—a group making up more than 50% of the population—it would seem disproportionate if it were used for far smaller groups, thereby excluding very large sections of the population from shortlists.

These amendments reflect the position in the Equality Act 2010, which was widely debated and agreed by all parties at the time of its passing into legislation to be a proportionate and appropriate position. I therefore hope that they will receive support in the Chamber this evening. I beg to move.

#### *Amendment 30 (to Amendment 29)*

*Moved by Lord McFall of Alcluith*

30: Clause 35, line 17, at end insert—

“( ) provisions in relation to candidates at an election for membership of the Scottish Parliament or a local government election in Scotland.”

**Lord McFall of Alcluith (Lab):** My Lords, I thank the noble Lord, Lord Stephen, for speaking to the amendments. We are generally supportive of a number of them but, as my noble friend Lord McAvoy said earlier, the Labour Party's aim is to ensure that the Bill gets on the statute book. It is with that realistic element in mind that we debate these issues. The noble Lord, Lord Forsyth, shakes his head, but he has been shaking his head all night—and for years—on this issue. It is important that we are constructive. I am proud that we have been constructive on this side in helping the Bill to become an Act, therefore ensuring that the relationship between the Scottish Parliament and the UK Parliament gets off on the best foot. I am sure that government Ministers will be on the same level as us on that sentiment.

We support Amendment 29, tabled by the noble and learned Lord, Lord Wallace, the noble Lord, Lord Stephen, my noble and learned friend Lord Davidson and my noble friend Lord McAvoy. The amendment would give the Scottish Parliament legislative competence for equality of opportunity relating to the Scottish functions of Scottish and cross-border public authorities, including non-executive appointments to public boards. It also clarifies that the Scottish Parliament's power to modify the Equality Act 2010 is limited to making provision that enhances the protection and promotion of equal opportunities. Our Amendment 30 would amend Amendment 29 and give the Scottish Parliament the ability to set quotas for candidates at Scottish parliamentary and local elections. I also speak in support of Amendments 31 and 33, which we have co-signed with the noble and learned Lord, Lord Wallace, and the noble Lord, Lord Stephen.

I start by addressing Amendments 29, 31 and 33, which have been drafted by the Equality and Human Rights Commission. First, we place on record our thanks to the EHRC for its work and its continued support throughout the passage of the Bill. Taken together, these amendments have a significant impact on the Scottish Government's ability to tackle inequality. As the noble Lord, Lord Stephen, has just said, the amendments will give the Scottish Parliament legislative competence in respect of equality of opportunity in Scottish and cross-border public authorities, including non-executive appointments to public boards. They clarify that changes to the Equality Act can only enhance the protection and promotion of equal opportunities, which at present is insufficiently clear.

They also ensure that the Scottish Parliament is not limited in its capacity to act in relation to non-executive appointments to public boards. Finally, they give the Scottish Parliament legislative competence over the public sector equality duty. The Minister stated in Committee that,

"devolving the duty itself is a step too far". —[*Official Report*, 19/1/15; col. 674.]

However, he seemed to be arguing that this was more for bureaucratic reasons than anything else. If that is the case, I submit that the Government should look carefully at these amendments to see what can be done.

**Lord Forsyth of Drumlean:** The noble Lord is making a case for these amendments but, as I understand the Labour Party's position, it is committed to ensuring

that no amendments are made to the Bill. So why are we sitting here at 10.06 pm listening to advocacy for amendments which his party is determined should not actually get on to the statute book?

**Lord McFall of Alcluith:** Actually, I remember, at the beginning of the day, the noble Lord being very robust about Clause 1 and threatening to bring the house down; then he did not press his amendment. Why is he so vigorous at one stage and then so weak and wobbly-kneed? He should stay by his conviction and put the vote to the House, so that he can find out what their measure is. What is sauce for the goose—I will let him finish it.

The Minister mentioned in Committee that devolving the competence to the public sector itself would be a step too far. The Government should look at these amendments to see what can be done. We would like to think that the measured reason we have at this Dispatch Box could influence the Minister before the end of the day. That is why we are standing here, doing our public duty after 10 pm, and I am sure that I will get acclamation from all sides of the House for that.

I agree with the Minister that we must be cautious about creating excessive burdens on private and voluntary groups. I urge the Government not to simply dismiss the idea out of hand. There will clearly be challenges—we accept that—but these have to be weighed against the outcome of fundamentally altering our society's approach to equality. Our Amendment 30, which takes the somewhat unusual step of amending an amendment, increases the scope of Amendment 29. As I have made clear, we support Amendment 29, but we believe it could go further. Indeed, it needs to go further to ensure that the Scottish Parliament reflects the society it represents.

Amendments 31 and 34 would require political parties to publish diversity information in relation to Scottish elections. Of course, transparency is important and we expect the Minister to agree with us in mentioning the initiative when it comes to pay. However, from experience we are aware that, despite this action, the problem remains a negative feature of our culture and society. Indeed, when it comes to pay, at the current rate of progress it will take nearly half a century for women to be paid the same as men. This demonstrates that we need to go further than Her Majesty's Government are apparently prepared to go. The Scotland Bill provides a vehicle to do just that.

More can be done to promote gender equality in politics. In fact, the intent of Amendment 30 is to give the Scottish Parliament the ability to set quotas for candidates at Scottish parliamentary and local elections. Under the leadership of Kezia Dugdale, Labour has made substantial progress on this issue. Research from Women 50:50, which I thank for its continued support and guidance, revealed that 52% of the constituency Labour candidates and 50% of the Labour list candidates in the upcoming elections are women, compared with just 15% and 14% respectively for the Conservatives. So a determined and committed leadership shows what can be achieved by introducing candidate quotas. I hope that we can make this the norm across Scotland. It is an extension of the principles of the Smith commission since Smith advocated that the Scottish

[LORD McFALL OF ALCLUTH]

Parliament should have more autonomy over equality provisions in society. If they are good enough for the public bodies in Scotland, it is surely illogical to argue that we would not want the same for the Government who represent Scotland. Indeed, as Women 50:50 says:

“We need a fair number of women in parliament so that women’s lived experiences exist in policy-making. The system and the policies it creates disadvantage women if there are not enough women round the table to actually represent their views. It is crucial to democracy and to women across Scotland to be represented fully”.

This amendment, combined with amendments already referred to, would help to continue to challenge this fundamental disparity which we have in our political structures. With these amendments we invite Scottish society to play its part in bringing about the more equal, fair and inclusive society that everyone wishes for Scotland. We should hold our elected representatives to those same high standards. In accepting these amendments, the Government would bring about such parity. I hope that, even at this late hour, debating these issues can stimulate the Government to think differently and perhaps result in a changed outcome before we next meet next week. With that, I beg to move.

**The Parliamentary Under-Secretary of State, Scotland Office (Lord Dunlop) (Con):** I thank noble Lords who have spoken—the noble Lords, Lord Stephen and Lord McFall. These provisions and amendments were also debated in Committee. The Government are committed to safeguarding equality, tackling discrimination where it arises and promoting transparency. However, that is, of course, not to say that initiatives and protections in addition to those offered by the Equality Act do not have a part to play, as the Smith commission saw.

The purpose of Clause 35 is to devolve greater equal opportunities powers to the Scottish Parliament. The Scottish Parliament can introduce new equality protections and requirements on Scottish public authorities and cross-border authorities exercising devolved functions, provided these do not conflict with or change the existing provisions of the Equality Act 2010.

The Scottish Parliament can, however, amend the 2010 Act in regard to appointments to the boards of Scottish public authorities by, for example, enabling the imposition of quotas on grounds of gender or other protected characteristics, but this does not apply to cross-border bodies.

In delivering Smith, the equal opportunities clauses strike the right balance between the need to confer greater competence on the Scottish Parliament for safeguarding and promoting equalities in public bodies—a key concern of the Scottish Government—and the importance of preserving a GB-wide legal framework.

The Government’s interpretation of paragraph 60 of the commission report ensures that we continue to reserve the subject matter of the 2010 Act, while providing the Scottish Parliament with the ability to legislate for specific provisions such as gender quotas in line with the Smith agreement. Through the general exception we are providing, the Scottish Parliament will be able only to supplement the 2010 Act. The Scottish Parliament will not be able to subtract any protections but will instead be limited to increasing and promoting protections.

10.15 pm

In relation to board appointments, the Scottish Parliament will be able to modify the 2010 Act if necessary; for example, to introduce gender quotas. The Government believe that applying the exceptions only to non-executive directors strikes the right balance between increasing diversity on boards and the need to minimise intervention in the day-to-day management of an authority, which would not be the case if the scope of the exceptions were to include salaried employees, such as CEOs and finance directors, rather than simply those subject to public appointments.

The provisions have undergone revision as a result of wide-ranging engagement and reflection on comments from the Scottish Government on the drafting. The clause as drafted delivers the necessary devolution of powers and the Government are confident that this delivers the Smith agreement. Therefore, the drafting approach in Amendments 29 and 33 does not need to be revised or expanded. To do so would risk the integrity of the provision, which we have worked to ensure gives the Scottish Parliament the scope to introduce gender quotas, for example, while retaining necessary protections.

Turning to the equality requirements on political parties and candidates, shortlisting electoral candidates on the basis of sex and diversity reporting are provisions in the Equality Act 2010. This is remaining reserved, as agreed by the Smith commission. The Smith commission was also explicit in stating that the regulation of political parties would not be devolved. Whichever way you look at it, the agreement clearly points to this aspect of equality remaining reserved. Amendments 30, 31 and 34 would go beyond this and the Government cannot support them. I accept that Section 106 of the Equality Act, requiring the publishing of diversity data on party candidates, has not been commenced. However, there is nothing to prevent political parties in Scotland or elsewhere in Great Britain reporting on the diversity of their candidates on a voluntary basis.

Turning finally to the public sector equality duty, the Smith commission did not call for further devolution of the duty and indeed was specific that the Equality Act 2010 should remain reserved. Scottish Ministers already have wide-ranging devolved powers under the PSED, which enable them, through the setting of specific duties for enabling the better performance of their obligations under the general equality duty, to require Scottish public authorities to update and publish equality statements, and report on their performance in relation to equalities, among other requirements.

**Lord Stephen:** I very much welcome the information that the Minister has had consultation with the Scottish Government on these issues but I wonder what consultation and discussion have taken place with the Equality and Human Rights Commission on all these matters.

**Lord Dunlop:** The Government consult the Equality and Human Rights Commission on an ongoing basis and I am happy to write to the noble Lord to address the specific point about what consultation there has been on this.

Scottish Ministers may specify Scottish public authorities which are to be subject to the PSED; for example, under their devolved powers in relation to

the PSED they can require gender pay gap information to be published by Scottish public authorities, something that the Government are now also planning to implement for larger private employers across Great Britain. To devolve the duty risks the creation of additional burdens for private and voluntary sector bodies that provide some public services, through excessive contractual requirements imposed by Scottish public bodies on their suppliers; for example, requiring Scottish public bodies to ensure that private sector providers report on their gender pay gaps or carry out gender pay audits as a contractual condition would be burdensome, especially to smaller employers. It would also alter the careful balance we have struck between delivering a package of measures to implement the Smith commission and maintaining a coherent, GB-wide framework for the duty as a whole. I therefore urge noble Lords to withdraw their amendments.

**Lord Stephen:** My Lords, I thank the Minister for his response and the Labour Party for supporting these amendments. I welcome the support of the noble Lord, Lord McFall, alongside his colleagues, the noble Lord, Lord McAvoy, and the noble and learned Lord, Lord Davidson. The important point here is that these are good, detailed and well-argued amendments that were submitted with the advice and support of the Equality and Human Rights Commission. They were notified in Committee and it seems disappointing that there has not been consultation between the Government and the commission, which is the body given statutory responsibility for these matters. The idea here is not to be controversial or difficult but to be entirely constructive on matters of detail. These good amendments are very much in keeping with the spirit of the Smith commission. I am not minded to divide the House on the matter this evening. I do not think that much divides us and what the Minister said has been extremely helpful. However, on balance, the Equality and Human Rights Commission has indicated that there was a need for greater clarity in these areas. These amendments would have strengthened the Bill and it is disappointing that they will, it seems, not now appear on its face. I beg leave to withdraw Amendment 29.

**The Deputy Speaker (Lord Geddes) (Con):** My Lords, this is a slight technicality but we are in fact discussing Amendment 30 and not Amendment 29. The noble Lord, Lord McFall, may wish to press or withdraw his amendment.

**Lord McFall of Alcluith:** I beg leave to withdraw Amendment 30.

*Amendment 30 (to Amendment 29) withdrawn.*

*Amendment 29 withdrawn.*

*Amendments 31 to 34 not moved.*

### **Clause 38: Roads**

#### *Amendment 35*

*Moved by Lord Dunlop*

**35:** Clause 38, page 41, line 28, leave out from “relating” to “to” in line 29

**Lord Dunlop:** My Lords, I am pleased to move Amendment 35 and to speak to Amendments 36 to 40. In Committee in the other place, the Labour Party brought forward an amendment on responsible parking which was also raised in Committee in this House. At that stage, I committed to updating the House on Report. I am therefore pleased to bring forward Amendments 36 and 37 to the Bill to address this long-standing issue.

These amendments seek to address an issue that is of interest to many people in Scotland: the irresponsible parking of motor vehicles. This issue has particular impact on people with disabilities, parents with pushchairs and the elderly, especially when vehicles have been badly parked on pavements. A number of attempts have been made to bring forward legislation in the Scottish Parliament to regulate this area, but they have failed due to questions of that Parliament’s legal competence in this area. As the debate on this issue in Committee on 19 January demonstrated, there is widespread confusion as to why the Scottish Parliament cannot regulate in this area when it otherwise has the competence to deal with much transport-related policy.

The Secretary of State for Scotland has been committed to seeking a solution to this constitutional question for some time and, as I told this House on 19 January, UK and Scottish Government officials have been discussing the detail of how this can be achieved. We have been mindful of the need to take on the Scottish Government’s views to ensure that the way forward is workable and appropriate. As a consequence of those discussions we have tabled these amendments, which will clear up the constitutional questions on this matter. These amendments will make it clear that the Scottish Parliament has the powers to regulate the parking of vehicles. Amendments 36 and 37 amend the Bill to except the subject matter of the Road Traffic Act that relates to the parking of vehicles on roads from the roads reservation. Consequently, the Scottish Parliament will have the power to regulate the parking of vehicles but driving remains reserved.

For what appears a relatively straightforward policy aim, I am aware that there have been a number of complex considerations. To that end, I am grateful to the officials in both the Scottish Government and this Government for their contribution and input. It is possible that a small number of minor and technical amendments may need to be made at Third Reading to ensure that any associated executive functions are transferred to the Scottish Ministers. This is being explored by officials. Nevertheless, today’s amendments have addressed the key issue at stake.

The amendments make it clear that the Scottish Parliament has the competence to bring forward legislation to regulate parking in Scotland. I believe that this move will be welcomed by people across Scotland who wish to see the Scottish Parliament take steps to address inconsiderate and irresponsible parking. I beg to move.

**Lord McFall of Alcluith:** My Lords, I very much welcome the government amendments on pavement parking. As the Minister just said, the amendments to Clauses 38 and 41 and to Schedule 2 relate to road

[LORD MCFALL OF ALCLUITH]

provisions. They alter the timing of when regulations come into force to give vehicles used for various purposes connected with devolved matters exemptions from both speed limits and certain road signs, and remove references to exemptions from speed limits for vehicles used in connection with reserved matters.

The Government have finally tabled amendments relating to parking on pavements, an issue which we raised in Committee. We support these amendments, in particular Amendments 37 and 38, which reflect those we tabled in the other place and in your Lordships' House in Committee. We are obliged to the Secretary of State for Scotland and the Ministers for their work on this matter. We also thank the Secretary of State for graciously noting that this initiative was started by Mark Lazarowicz, former Member of Parliament for Edinburgh North and Leith.

Although we are very grateful that the Government have moved these amendments, we understand that there may be some outstanding amendments to be tabled at a later stage, and I would be grateful if the Minister outlined that in more detail. We also put on record our thanks to both Living Streets and Guide Dogs Scotland for their support and briefing on this matter. They made it very clear to us why these amendments were needed. Pavement parking can be and is dangerous for pedestrians, especially people with sight loss, parents with pushchairs, wheelchair users and other disabled people. Those with sight loss are particularly affected, as they can be forced into oncoming traffic which they cannot see.

One of my close boyhood friends has become blind in the past seven or eight years. He has shown me the dangers of parked cars at a very practical level and the limitations he has. One of his pleasures now—a simple one—is leaving his house and going down to the British Legion club for his lunch. However, there are certain days, particularly on weekends, when he cannot move and is on his own, simply because of the cars that are parked there. The quality of one's life is very much affected by that. I know, from my own family having a disabled child, the impediments there are to living a life like ordinary people if there is this lack of consideration with parking. This measure is not before time.

On the issue of blind people and people with sight loss being forced into oncoming traffic, a survey by Guide Dogs showed that 90% of blind or partially sighted people encounter problems with street obstructions and 90% of those had experienced trouble with cars parked on pavements. Everyone should know that pavements are not designed to take the weight of vehicles, which can cause paving to crack and the tarmac to subside—and cracked and subsiding pavements are a further danger to blind people walking on them. It causes trip hazards for pedestrians and has a particular impact on blind and partially sighted people. The cost of repairing pavements is a burden for local authorities.

In the light of the previous remarks of the noble Lord, Lord Forsyth, this is a great example of the Government and Opposition working together, taking up issues in Committee, the Government going back, engaging in further consultation and, without a vote or any chagrin, agreeing amendments which are for

the better for society, particularly people who are disadvantaged. I congratulate the Secretary of State and Ministers on listening to us on this issue.

10.30 pm

**Lord Lyell (Con):** Perhaps my noble friend can give me some guidance. I think Amendment 40 is in this group. Reference is made in new Clause 33(1)(a) to a puffin pedestrian crossing regulation. We do not have puffin crossings in Kirriemuir. Do the regulations apply to Scotland? The amendment refers to revoking English and Welsh legislation on puffin crossings. Will my noble friend write to me to tell me what a puffin crossing is and what it is about?

**Lord Dunlop:** I am very happy to respond in writing to my noble friend.

I thank the noble Lord, Lord McFall, for his contribution. Before I respond to his remarks, when I spoke previously, I inadvertently omitted to speak to some technical amendments. With the leave of the House, I shall do so briefly now.

The amendment to Clause 38 removes the words, “vehicles used in connection with any reserved matter”, as they are unnecessary. Even without these words, exempting vehicles used for reserved purposes would still be reserved. The deletion of these words will help to avoid any potential for misunderstanding arising from their unnecessary inclusion.

The amendment to the interpretation provision in Clause 38 is designed to devolve to the Scottish Parliament the subject matter of Section 87 of the Road Traffic Regulation Act 1984 as amended by Section 19 of the Road Safety Act 2006.

The other amendments relate to work being done by the UK Government to prepare, as part of a long-standing project, a new set of regulations which will prescribe speed limit exemptions for vehicles used in a variety of circumstances which require a fast response. These amendments are designed to ensure that, with Scottish Ministers' consent, the new secondary legislation includes exemptions from speed limits for vehicles used in connection with non-reserved matters and that those exemptions apply GB-wide. A considerable amount of work has already taken place to develop those regulations. If they are to be truly effective, change to relevant traffic signs will also be needed. The amendments will enable the Secretary of State, with Scottish Ministers' consent, to make regulations which are GB-wide in their application and allow vehicles used for various purposes connected with devolved matters to have exemptions from road signs and general directions such as “keep left” and red traffic lights. The aim is to assist stakeholders and avoid duplication of the work already carried out by the Department for Transport. As with the amendments on parking, it is possible that there may need to be a small number of minor and technical amendments at Third Reading in this area. This is being explored by officials.

The Department for Transport will work closely with Transport Scotland on these regulations, so there is input from Transport Scotland. It would be unhelpful

if they could not take advantage of the work already carried out due to a timing issue. The amendments are intended to resolve this, and allow Scotland to benefit from the new regulations as a starting point for speed limit and road traffic sign law post-devolution. I commend those amendments.

In conclusion, the amendments address an important issue which has been on our radar for some time, and I am grateful to the noble Lord, Members of the other place and stakeholders who have brought this issue to a head. As I said, I am also grateful to the officials in both Governments, who have worked in discussion to pursue a drafting solution to this issue. These provisions will clarify the competence of the Scottish Parliament to legislate to regulate parking in Scotland. I also note the organisations Living Streets and Guide Dogs Scotland, who have recognised the amendments as bringing to a close the question of the Scottish Parliament's competence in this area.

The Living Streets director said:

"The last minute amendment to the Scotland Bill removes the final barrier to outlawing pavement parking. Finally, the Scottish Parliament will have the power to protect older, disabled and vulnerable pedestrians from inconsiderate parking, which is fantastic news".

Guide Dogs Scotland said:

"This is great news for people with sight loss, guide dog owners, wheelchair or mobility scooter users, and families with pushchairs. People with reduced mobility have been waiting a long time for legislation that can take inconsiderate parking off our streets, and allow them to get out and about safely in our communities".

The response to these amendments reinforces the importance of this issue to the people of Scotland, and I am glad that the Scottish Parliament can now take steps to address inconsiderate and irresponsible parking.

*Amendment 35 agreed.*

#### *Amendments 36 to 38*

*Moved by Lord Dunlop*

**36:** Clause 38, page 41, line 30, after first "the" insert "first"

**37:** Clause 38, page 41, line 32, at end insert—

"The subject-matter of the Road Traffic Act 1988 so far as relating to the parking of vehicles on roads."

( ) At the end insert—

**38:** Clause 38, page 41, line 35, leave out from second "as" to "(and)" in line 36 and insert "substituted by section 19 of the Road Safety Act 2006 as at the date when section 38 of the Scotland Act 2016 comes into force, treating section 19 and any amendment affecting it at that date as if they were in force"

*Amendments 36 to 38 agreed.*

#### *Clause 41: Roads: consequential provision etc*

#### *Amendment 39*

*Moved by Lord Dunlop*

**39:** Clause 41, page 45, line 27, leave out subsections (3) to (6)

*Amendment 39 agreed.*

#### *Schedule 2: Roads: consequential and related amendments*

#### *Amendment 40*

*Moved by Lord Dunlop*

**40:** Schedule 2, page 85, line 20, at end insert—

**40:** Schedule 2,

""Part 2

*Exercise of powers by agreement*

*Traffic signs powers*

33 (1) Sub-paragraph (2) applies if the Secretary of State makes a statutory instrument revoking the following instruments in relation to England and Wales—

- (a) the Zebra, Pelican and Puffin Pedestrian Crossing Regulations and General Directions 1997 (S.I. 1997/2400);
- (b) the Traffic Signs (Temporary Obstructions) Regulations 1997 (S.I. 1997/3053);
- (c) the Traffic Signs Regulations and General Directions 2002 (S.I. 2002/3113).

(2) Despite anything in section 39 or 40 or Part 1 of this Schedule, the Secretary of State may by that instrument exercise one or more of the traffic signs powers to make provision in relation to roads in Scotland (including provision revoking one or more of the instruments mentioned in sub-paragraph (1) in relation to Scotland), with the consent of the Scottish Ministers.

(3) The traffic signs powers are—

- (a) the power to make regulations under section 25 of the Road Traffic Regulation Act 1984 (pedestrian crossings);
- (b) the power to make regulations under section 64 of that Act (traffic signs);
- (c) the power to give general directions under section 65(1) of that Act (placing of traffic signs);
- (d) the power to give general directions under section 85(2) of that Act (traffic signs for indicating speed restrictions);
- (e) the power to make regulations under section 36(5) of the Road Traffic Act 1988 (traffic signs: discretionary disqualification for failure to comply).

(4) The Secretary of State may exercise a power in any way by virtue of this paragraph only if the Secretary of State could have exercised it in that way but for the amendments made by sections 39 and 40 and Part 1 of this Schedule.

*Powers to exempt from speed limits*

34 (1) Sub-paragraph (2) applies in relation to the first statutory instrument made by the Secretary of State containing regulations under section 87(1)(b) of the Road Traffic Regulation Act 1984 as substituted by section 19 of the Road Safety Act 2006 (exemptions from speed limits: prescribed purposes and circumstances) in relation to vehicles used on roads in England.

(2) Despite anything in section 39 or 40 or Part 1 of this Schedule, the Secretary of State may by that instrument, with the consent of the Scottish Ministers—

- (a) exercise the power under section 87(1)(b) of the Road Traffic Regulation Act 1984 to make provision in relation to vehicles used on roads in Scotland otherwise than in connection with reserved matters, and
- (b) in connection with any provision made by virtue of paragraph (a), exercise one or more of the traffic signs powers mentioned in paragraph 33(3) to make provision in relation to roads in Scotland.

(3) The Secretary of State may exercise a power in any way by virtue of this paragraph only if the Secretary of State could have exercised it in that way but for the amendments made by sections 39 and 40 and Part 1 of this Schedule."

*Amendment 40 agreed.*

## Clause 42: Policing of railways and railway property

### Amendment 41

Moved by **Lord Faulkner of Worcester**

41: Clause 42, page 46, line 17, at end insert—

“( ) There shall be an agreement between the British Transport Police Authority and the Scottish Government to ensure that the British Transport Police continues to police railways and railway property in Scotland.”

**Lord Faulkner of Worcester (Lab):** My Lords, in moving Amendment 41, I shall speak also to Amendments 42, 43 and 44. I express my appreciation to noble Lords in all parts of the House who have supported Amendments 41 and 42, and I am happy to support my noble friend's Amendment 43 and Amendment 44 proposed by the noble Lord, Lord Empey. These amendments give the Government a sensible way out of the dilemma that became very clear in relation to the role of the British Transport Police in Scotland when these difficulties were identified by noble Lords in Committee. I was interested in what my noble friend Lord McFall said about the previous amendment—that the Government had listened carefully to the points made in Committee. It is a great pity that on the British Transport Police issue the same understanding does not appear to have manifested itself. Following that debate, the Minister wrote to all of us who participated in Committee and yesterday he convened a meeting on this subject. I am very grateful to him for taking such trouble, but I am afraid that the letter that he wrote falls short of what is required to safeguard the future of transport policing in Scotland, not least because it contained this sentence:

“As policing of railways is to be devolved, it will be a matter for the Scottish Parliament to decide whether the policing of railways should continue to be carried out by the British Transport Police Bodies, or whether these functions should be carried out under a different operating model”.

The Government's position was made rather clearer by the three officials from the Department for Transport whom the Minister brought to yesterday's meeting. They told us that they have been in discussions with the Scottish Government for some time about how Police Scotland will take over the responsibilities for policing the railways in Scotland from the British Transport Police.

What has been happening is that the Government have interpreted the report of the Smith commission in one way, and one way only, in respect of transport policing in Scotland. They appear to have given no consideration to the views of the British Transport Police Authority which have been expressed in documents sent to the Scottish Government, and also to its Public Audit Committee. I do not know how much those documents have been considered by UK Ministers. In particular, I would draw the House's attention to the BTPA paper headed *Options for the Devolution of Transport Policing in Scotland*. The first option introduced a non-statutory devolved model of governance and accountability for specialist transport policing in Scotland. The second option dealt with a statutorily devolved model of governance and accountability, and the third one described what would happen if BTP's Scottish division was fully integrated within Police Scotland.

Let me deal first with option three, and particularly with the operational considerations, because this appears to be the course the Government are adopting. This section in the BTPA statement starts with this sentence:

“There is an accepted argument for Britain's railways to be policed in a manner that is not constrained by the geographic boundaries of other police forces or legal frameworks that the rail industry cuts across. Currently, BTP's boundaries cover the total policing environment of the British rail network, and the structure of BTP provides a single point of contact and consistency in policing standards across the Scottish, English and Welsh railways. This includes working across two legal systems, which is important in day-to-day terms. For example when a crime or disorder occurs, often the exact location of the incident cannot be pinpointed. As BTP is responsible for policing the whole network, it currently does not matter a great deal at what exact point of a rail journey the crime took place. If the policing of the railway network were to be carried out by two bodies, there is a risk for confusion to arise over who would record and investigate crimes, which would be highly distressing for victims and cause unnecessary delay”.

A little later on, under the heading “Specialist Operational response”, there is a paragraph which reads:

“Fatality management, counter-terrorism, cable theft, dealing with people in precarious positions on the railway are examples of areas where BTP's approach to policing on the railway has ensured that passengers are kept safe and are faced with the minimum of disruption to their journeys and has saved the industry billions of pounds over ten last ten years”.

There is a great deal more in the same vein in the authority's options paper, which at this late time of night I do not have time to cover.

I shall just mention one other paragraph:

“Terrorism remains a high security concern for the UK as a whole, and the long-standing threat to transport infrastructure is very real. By raising the threat level in August 2014 to ‘severe’, the Home Secretary confirmed the increased risk to the public owing to the conflicts in Syria and Iraq, where terrorist groups are known to be planning attacks against the West. In addition to that, the nature of the threat is changing, with a heightened risk of ‘lone-wolf’ attacks in crowded places including railway stations. These developments have underlined the need for a more coordinated and integrated approach to counter-terrorism. The efforts to combat terrorism and extremism must be cross-border – an attack on Scottish soil may well be stopped in England. Equally, any perceived vulnerability arising from fragmented jurisdiction will be exploited by those planning an attack, and jeopardising the ability to police the network as a whole could well result in greater risks to passengers”.

I stress that these are not my assertions, but the views of seasoned policing professionals whose work is widely admired not just across Great Britain but abroad as well. These are men and women who know what they are talking about. We would be ill-advised to ignore them. We should heed their concerns and rule out what the BTPA describes as option 3, the complete integration of the British Transport Police into Police Scotland.

Its options 1 and 2 are consistent with the findings of the Smith commission, as are our Amendments 41 and 42 for they accept the devolution of transport policing in Scotland to the Scottish Government, but make it clear that it is a function that should still be carried out by the BTP reporting to Scottish Ministers. They also make the point that if our friends in Scotland do not like the word “British” applied to any organisation that operates north of the border, the force could easily be renamed “Transport Police Scotland”.

Option 3, which the Government are adopting, files in the face of every objective assessment of the role, functions and effectiveness of the BTP over the past 15 years. The reports in 2001, 2003 and 2004, the report from the Transport Select Committee in another place, the Government's White Paper *The Future of Rail* and the BTP's triennial review all stressed the need for a dedicated national railway police force.

Our amendments are not inconsistent with a desire to achieve further devolution in Scotland as set out in the Smith commission report and enshrined in the Bill. Indeed, the amendments make it clear that in future Scottish Ministers and the Scottish Government may have the same relationship with the BTP and its chief constable as Ministers have in England and Wales now. All that we seek to do is ensure that arrangements to police our railways that have worked well for nearly 200 years through the operation of a dedicated and unified transport force, which has kept passengers and railway staff safe north and south of the Scottish border, are not put at risk through action that is hasty and ill considered. I beg to move.

10.45 pm

**Lord McAvoy (Lab):** My Lords, I can understand where my noble friend Lord Faulkner is coming from. Along with the details that have been announced there is the extra factor of security, and I would have thought that that would justify a sympathetic approach from the Government. However, I cannot get away from the reality that devolution is devolution, and for us to try to lay down the conduct of the Scottish Government in relation to the British Transport Police, much as we would like to go up against this proposal of devolution, is wrong. I know where he is coming from and I sympathise with him. He has put a terrific case but, fortunately or unfortunately, it falters on the issue of devolution.

Amendment 43 is in the name of myself and the noble and learned Lord, Lord Davidson. What we are trying to do is influence not only the UK Government but the Scottish Government. The amendment would provide for the establishment of a joint board that would examine the transfer, implementation and operation of the devolution of the British Transport Police. I understand that the full integration of the BTP into Scotland would take around three years. During those three years there are bound to be issues that arise, possibly security in particular. In this amendment, the joint board, or whatever it would be called, would report back to the Scottish and UK Governments. It would not interfere or try to influence what the Scottish Government were doing except in the way of good advice, so the principle of devolution would be protected. I do not like to use the expression "holding feet to the fire"; it smacks of violence and I am dead set against violence.

The amendment would establish a joint board to oversee this specific aspect of the devolution settlement, with the requirement to report back to the UK and Scottish Parliaments about the transfer, implementation and operation of proceedings, with particular reference to security issues. It is a response to the wide-ranging

debate that we had in Committee, which attracted considerable attention and participation from across the House, about the devolution of the BTP.

I make it very clear, as we have done all through these proceedings, that the amendment is not intended to delay, postpone or in any way alter the timetable of the devolution of the BTP. In keeping with the nature of devolution, once these powers have been devolved, it is up to the Scottish Parliament to determine the future of the BTP. I am honestly making it plain that we have no intention of forcing a vote on that. We are not into gesture politics.

**Lord Wallace of Tankerness:** The whole thing is a gesture.

**Lord McAvoy:** However, let me deal with those who are. Earlier, the noble and learned Lord, Lord Wallace of Tankerness, shared with the House a conversation that he alleges he had with the Labour Whips' Office. I do not know whether it is true, but in my 23 years in the House of Commons conversations with the usual channels and with Whips were sacrosanct. But seeing as how the noble and learned Lord has seen fit to venture into this territory, I shall share, in further defence of our strategy of trying to influence not only the UK Government but the Scottish Government, a statement from the noble and learned Lord to myself at the Bar, which I would not normally share, in which he indicated that the Liberals were going to use the vote on the Crown Estate for election leaflets in the islands. So here we are—the Scotland Bill is reduced to a political gambit for cheap political point-scoring. [*Laughter.*] The noble Lords may laugh and scoff, but they are the only ones who are doing so. Therefore we are taking the honourable position of trying to influence, not just engaging in gesture politics and staging votes for cheap political points, and we hope that we have influenced the Government—we will see what their response is—and the Scottish Government as well.

**Lord Forsyth of Drumlean:** My Lords, I will briefly speak to Amendments 41 and 42. I thank the noble Lord, Lord Faulkner of Worcester, for having tabled these amendments and for putting the case so eloquently. We had quite a wide-ranging discussion in Committee and I am very disappointed indeed that the Government have not come forward with proposals—a number of constructive options were suggested.

I have been trying to think of two words to explain the conduct of the Official Opposition over the Bill, and "kowtow" would sum it up. They are utterly terrified to say anything that could be interpreted in any way as not being in line with the Smith proposals or as doing anything that might upset the Scottish Government, which is very disappointing, particularly in the context of this issue.

As the noble Lord, Lord Faulkner, pointed out, the British Transport Police has for nearly two centuries served our country extremely well. It is a while since I was Secretary of State but I remember the important role it had in ensuring that we were able to cope not just with terrorism but with drug traffickers and other criminals who use the transport network. It is a highly

[LORD FORSYTH OF DRUMLEAN]

specialised area and it is an act of utter vandalism to break up the British Transport Police in the way that is being proposed.

It is a particularly stupid of the Government to go along with the idea that the British Transport Police should be fragmented and the Scottish element of it included in Police Scotland which, I am sad to say, is in Scotland regarded as something of a joke and a disaster. Prior to the Scottish Government making the changes we had independent police forces operating extremely effectively throughout Scotland. The advocates of devolution decided to take power away from those police forces and centralise them into Police Scotland, and the results have been disastrous as regards communications and operational failures. I place responsibility for this not on the individual members of the police force but on the Scottish Government, who have created this chaos. Both the notion that we should break up the British Transport Police and hand it over to an organisation which has just sacked its chief constable and appointed a new one to sort out its problems, and the amendments which have been put forward by the Labour Party tonight which suggest that we set up a quango to help deal with the problems of implementation and administration, are just breathtaking in the scale of their irresponsibility.

We have no reason to interfere with the operations of the British Transport Police, so what offends the Scottish Government about it? The noble Lord, Lord Faulkner, put his finger on it: it could be the B word—the fact that it is called “British”—which offends. However, this is not a Scottish issue but a United Kingdom issue. It is about the security of the United Kingdom as a whole. I very much hope that the Minister will think again about the options which have been put forward in the amendments tabled by the noble Lord, Lord Faulkner, about how we can maintain a British force.

**The Earl of Kinnoull (CB):** My Lords, the noble Lord is developing a very interesting point. I wonder whether, in doing so, he would like to refer to the no-detriment principle—principle number 5, of which I can hand him a copy now—and whether or not this offends that principle of the white sacred document, the Smith commission report.

**Lord Forsyth of Drumlean:** Indeed, I am familiar with the no-detriment principle, which is that policy changes on either side of the border should not have a negative impact on either country, and this is a classic example. So it is actually against the Smith commission proposals and, as the noble Lord, Lord Faulkner, pointed out, it is perfectly possible to maintain the integrity of the British Transport Police and meet the requirements of the Smith commission.

Can this be the same Government who are busy arguing that it is necessary for us to maintain our relationship with the European Union in order to maintain our security because of the importance of being able to share cross-border information et cetera? That same Government are now arguing and supporting

a proposal that we should break up within our country a police force that operates cross-border. What is going to happen when the train gets to the border? Do the British Transport Police get off the train and somebody from Police Scotland gets on the train? How are they going to share information? What will the cost of all this be?

We have already had a glimpse of what might be in the fiscal framework: £200 million will be given to the Scottish Government to administer the welfare proposals that are being administered in large part in Scotland at present. That is money that would have been far better spent on welfare and not on bureaucracy. And here we are again. I always use the old cliché, “If it’s not broken, don’t fix it”. This is an organisation that has, as far as I am aware, served the public on the Glasgow Subway and throughout the rail network system. It is a specialist area, with the force operating on trains in dangerous circumstances using an experienced cohort with an esprit de corps. No one I have seen in the British Transport Police or among anyone with experience in this area supports what is being put forward. It is being put forward in order to kowtow to this obsession with trying to put a kilt on everything. It seems to me that the Government would do well to consider the amendments that have been put forward by the noble Lord, Lord Faulkner, think again and come back at Third Reading with something that looks to protect the interests and security of the people on both sides of the border.

I listened to the noble Lord, Lord McAvoy. He said that, basically, this is all very difficult and, although we would like to do something, we cannot offend against the principles of the Scottish Government being able to decide these matters. I say to my noble friend the Minister in all seriousness: if there is an incident as a result of this change which would not have occurred otherwise, Ministers will find themselves suffering extreme criticism, and deservedly so. I hope that my noble friend will think again on this and come back with an amendment at a later stage that preserves the integrity of this important force.

**Lord Empey (UUP):** My Lords, I would like to speak to Amendments 41 and 42, and then move to Amendment 44 standing in my name. First, I thank the Minister and his staff for facilitating meetings and discussions, and, indeed, the representatives from the Department for Transport for making themselves available. I would also like to commend the contribution from the noble Lord, Lord Faulkner, which was a tour de force of the situation that is in front of us.

When I tabled an amendment in Committee I never thought for one moment that the ripples would go out as they have—it seemed to strike a chord with people. We are fixing a problem that does not exist. The force’s figures and its success rate are all moving in the right direction. I have heard no criticism of the service delivery and am completely unaware of any proposal that would enhance the service. I have no doubt that officials, working with the Scottish Government, could come up with mechanisms to make the situation work. That is what civil servants do. My experience is that if Ministers ask them to do something, they do their best to deliver it, so something could be put together.

11 pm

Having served on a police authority for 10 years at a time of transition, I make it very clear that if we go ahead and abolish this organisation in Scotland, it will not be free of risk and cost. To start with, the staff contracts are with the British Transport Police. Some of the staff may be offered the opportunity to transfer to Police Scotland, even within a division of transport police, and some may wish to stay with the parent organisation, but, just as happened with the transition from the Royal Ulster Constabulary to the Police Service of Northern Ireland, a lot of expertise will be lost. That is inevitable, and it will take many, many years to re-establish.

I have no doubt that there are people in Police Scotland who can be trained to do this job—those who care to transfer from the British Transport Police to Police Scotland or a division thereof. I have no doubt that you can always pull something together to make it work but there will be a period of years in which the service is not as effective as it is at the moment. If there were something wrong with the present system, I do not think that anybody here would have an issue with what is proposed. However, there is nothing wrong with it. This is pure, unadulterated politics. Having worked with nationalism for many years, I know that this is about sawing off another branch—removing any connection. It is ideological; it does not matter whether it is right or wrong. This is an ideological imperative, and I can tell noble Lords that acceding to it for no good reason will not bring any benefit whatever to the United Kingdom.

The noble Earl, Lord Kinnoull, raised a point about the no-detriment policy. I believe that the Smith commission has overreached itself because this will affect the rest of Great Britain. Maintaining security on the island is an integrated process and, because the network stretches across the border, inevitably the security on one side of the border is affected by the security on the other. Why weaken it?

Earlier today I was accused of being cynical, although perhaps fewer people will accuse me of that at this time of night, but the fact is that we have seen this type of thing before. These amendments, including Amendment 44 in my name, offer a menu of options. I do not believe that the British Transport Police should be touched at all. However, where policing powers are devolved to Scotland, the Scottish Parliament has a perfectly legitimate interest. Railway policing involves a geographical area with large tracts of land, properties and stations. Therefore, it has a perfectly legitimate interest in that, and rightly so.

I said in Committee that we had an issue with accepting the National Crime Agency in Northern Ireland. The nationalists at Stormont blocked the proposal to give the powers of a constable to an officer of the National Crime Agency and that delayed its implementation by three years. However, we found a solution, and a solution is expressed in Amendment 44. If this amendment were agreed to, it would do no injury whatever to the Smith proposals because it proposes an additional, not a replacement, process. It is done in that way because, if you give institutional and immediate expression to the legitimate interest of

the Scottish Government and the Scottish Parliament in a policing issue, perhaps when they get involved in it and see it in operation they will conclude that there is no point in further proceeding to smash something that is not broken. It does not replace the proposal in the Bill but is additional to it. It also has the advantage that it could be introduced immediately without doing any injury at all to the Smith proposals.

However, the Government have to realise that this is a two-way street. There is a genuine English-Welsh issue to be considered. If you vandalise, as has been said, the British Transport Police, you will create a vulnerability for a period of time which will expose the rest of us to risk. That is not rocket science. I have no doubt that the two Governments can work together, make proposals and find processes. However, an extra link will be added to the chain in dealing with terrorists, people traffickers or whatever it happens to be. It goes in the very opposite direction of what happened in Scotland, where Police Scotland pulled together different forces in order to reduce the links. It has not worked yet but it might eventually. We are going in the opposite direction and adding to the links.

I believe that the Government should consider some of these amendments. I think that they should listen, as the noble Lord, Lord Faulkner, said, to the professional advice that has been given. We all know that this is politics. It is nothing to do with the delivery of the service. Today we saw an example of the constitutional chaos that we have inflicted upon ourselves throughout the United Kingdom over the past few years with this completely disjointed constitutional change and reform. Instead of a coherent process in which we know where we are going and we go to it, this is patchwork-quilt stuff with bits bolted on here and bits bolted on there. How many Bills have passed through this House in the past three years—Northern Ireland Bills, Welsh Bills, Scottish Bills? Now, by a Standing Order, the constitution of the United Kingdom is being torn up at the other end of the corridor and the status of MPs from the regions is being totally changed, and yet there has hardly been even a decent discussion about it. This is another example of it.

We have an opportunity here. We have given the Government some perfectly reasonable and sensible options because we understand the position that Ministers are in. It is not their fault—it is a circumstance that arose in a week of panic before the referendum in 2014. Things were said for the right reasons albeit, looking back, they were unwise. However, the implementation has got mixed up in this interparty rivalry in Scotland and this sort of obsession with not offending the SNP—which is a one-way street if ever I saw one. I have to respect that it has a mandate. I respect the fact that the powers of policing have been devolved. I also respect the fact that that can be institutionally recognised without damaging and destroying a service that works perfectly well.

I hope the Minister and the Government will reflect on those points before Third Reading and realise that there are options. There are genuine concerns, but there are also options for resolving them. I commend Amendment 44 to the House.

**The Earl of Kinnoull:** My Lords, I am grateful to the noble Lords, Lord Faulkner and Lord Empey, for speaking to these amendments—which, as I said in Committee, are most important. I am also grateful to the Minister for organising the drop-in yesterday. I regret that I turned up 27 minutes late, as I was detained on other business of the House, so I was only able to get a debrief—a very interesting debrief—from the noble and learned Lord, Lord Mackay, and the noble Lord, Lord Empey.

I approach this matter from the point of view of the citizen, as I have done before. I think that the citizen is interested in security. They are interested in not having their daughter thumped on a train, and in drug smugglers not getting through. They are interested in terrorists being arrested. Our two holy documents—the white Smith agreement and the green Bill—as ever, need to be a good guide. This is another instance where they are in conflict. The noble Lord, Lord Forsyth, has been eloquently telling us about the no-detriment principle now for three months. I know that he knows it, but I thought that it should be read out. The agreement should,

“not cause detriment to the UK as a whole nor to any of its constituent parts”.

That is one of the core principles of the negotiations. Coming as it does at the start of the Smith commission report means that it has extra power. It is even more powerful than the many paragraphs that follow. Of course, paragraph 67 says very curtly:

“The functions of the British Transport Police in Scotland will be a devolved matter”.

Those two paragraphs—I stress again the no-detriment principle, which has been so much the core of what we have been talking about for three months—are at odds with what is in the sacred green document, and that needs to be resolved. It is something this House needs to work hard to resolve. It is not resolved at the moment. I certainly agree that it needs to be resolved for Third Reading.

To repeat what I said in Committee, I note that the British Transport Police has separate duties, separate skills, separate powers and separate staff, who are trained and motivated differently. They have different skills and lives. It has a totally different structure. Its IT systems are completely different and plugged into some of the most sensitive IT systems in the United Kingdom—to which the standard Police Scotland constable does not have access. In short, they are an elite. They are after passenger safety and suppressing terrorism, and they get a seven-figure sum every year just for dealing with their part of combating terrorism.

Police Scotland, as the noble Lord, Lord Forsyth, so eloquently said, is a very troubled organisation. I have had just two Police Scotland officers in my home in the past six months—one from Dundee and the other from Perth. The particular matters that they came to talk to me about took 30 seconds, but I spent probably an hour with them listening to the awful difficulties they are dealing with as morale has collapsed and management appears to be on the floor. To be transferring into chaos at this time of terror alert—let us remind ourselves how big the terror alert is—one of the functions that is trying to keep us safe is pretty

irresponsible. The Scottish Government might be nationalists, but they are a pretty responsible bunch of people. Neither they nor the UK Government should really be contemplating that. Of course, with all the differences in staff, training and IT duties, it would be very difficult.

I would very much like to hear from the Minister why the no-detriment principle is not the trump card, and why the collection of very well thought through and interesting amendments that make up this group could not be put in place. They would be consistent with the Smith commission agreement; they would certainly be consistent with the no-detriment principle. The core, surely, of both the UK Government and the Scottish Government is the security and safety of the citizen with whom I started this short speech. There is an overwhelming case for the Government introducing something at Third Reading, and I look forward to hearing a little about what that might be.

**Lord Wallace of Tankerness:** My Lords, paragraph 67 of the Smith commission report states:

“The functions of the British Transport Police in Scotland will be a devolved matter”.

That is a simple and straightforward sentence, but what lies behind it is actually very profound. My concern is that what is being proposed by the Government does not safeguard the functions of the British Transport Police if they are devolved. I respect and generally support the way it is being done in terms of exceptions to the general reservation under Part 2 of Schedule 5 to the Scotland Act 1998, but what we have heard is that the Scottish Government intend to put the British Transport Police under the ambit of Police Scotland.

I will not go into the woes of Police Scotland with the noble Lord, Lord Forsyth, and the noble Earl, Lord Kinnoull, who have both mentioned them, but even at its best one can readily imagine that once the BTP comes under the auspices of Police Scotland, if you are the chief constable and you have problems and challenges with regard to resources, you might well think, “Well, why do we have a specific police presence in Waverley station? Surely it can be covered by the police we have got who would otherwise be monitoring Princes Street?”. It would not be proper for politicians to interfere in the operational decisions of the chief constable. For operational reasons the functions of the British Transport Police under a different guise could be whittled away bit by bit.

**Lord Forsyth of Drumlean:** Of course there is also the complicating factor that part of the budget of the British Transport Police is actually paid for by the transport operators.

**Lord Wallace of Tankerness:** The noble Lord is absolutely right, and we aired these concerns when this was debated in Committee.

It is interesting to note in the submission made by the British Transport Police Federation to the Scottish Parliament Devolution (Further Powers) Committee that:

“In 2001, the government response to the DfT consultation which led to the BTPA's creation ... stated that: ‘The Government therefore considers that the national railway network is best

protected by a unified police force providing a dedicated, specialist service and able to give proper priority to the policing of the railways”.

The memorandum to the committee of the Scottish Parliament goes on to quote the Transport Select Committee of the other place in 2004, which,

“looked at the reforms to the BTP’s governance arrangements ... It concluded that: ‘The British Transport Police is not a Home Office Force, and nothing we have heard suggests that it should become one. The railways are a specialised environment, with specialised needs, and need a specialised Force’. They continued: ‘The steady reduction of resources allocated to traffic policing leads us to agree with Her Majesty’s Inspectorate of Constabulary that unless there is a national force dedicated to policing the rail network, the task will not be given the priority it needs’”.

Our concern is that if, having devolved and lost control of this area and the Scottish Government exercise the devolved powers that they have to bring it under the direction of Police Scotland, the very concerns that were expressed by the BTPF and others will be borne out. The specialist services which the British Transport Police currently deliver could be lost over time, and therefore what the Smith commission argues is that the functions possibly could no longer be exercised.

Noble Lords have referred to a number of those functions, in particular tackling terrorism on our transport network. One I particularly note is that:

“The British Transport Police has created specialist teams with responsibility for the management of multi-agency support for local and national suicide prevention, mental health interventions and vulnerable persons encounters. An ongoing force-wide operation (Operation Avert) has so far achieved a 30% reduction in suicide attempts compared to the same period the year before”.

These are very profound specialist functions that the British Transport Police provide.

**The Earl of Kinnoull:** I think that we would all be very interested to hear the view of the noble and learned Lord on the quote that I read out about the no-detriment principle.

**Lord Wallace of Tankerness:** My Lords, one of the problems is that the no-detriment principle has so far tended to be looked at primarily in financial terms, but I think that the noble Earl is right that there are other detriments of a qualitative nature which he pointed out to the Minister. We could lose something of value. That would be to the detriment not just of Scotland, but of the whole country.

I share the views of other noble Lords that it is disappointing, despite the many concerns expressed in Committee, that the Government have not come forward with an amendment that would seek to address this. We owe a debt to the noble Lords, Lord Faulkner of Worcester, Lord Empey and Lord Forsyth of Drumlean, and to the noble Earl, Lord Kinnoull, who have sought to try to meet the Smith commission’s recommendation while ensuring that the specific functions of the British Transport Police are preserved.

I have some reservations about Amendment 41, which would be inserted at the end of Clause 42. Clause 42 fits the Smith commission’s arguments—it does devolve, in as much as it makes an exception—but my concern about Amendment 41 is that, having devolved, it seems to take back and would make it a requirement to have an agreement between the British Transport Police Authority and the Scottish Government.

I prefer Amendment 42, which at least says that, if there is to be a police services agreement that applies in Scotland, Scottish Ministers should be involved, and that the oversight arrangements that the noble Lord, Lord Empey, spoke to—he indicated that they were over and above what was proposed—are consistent with the spirit and the letter of the Smith commission proposals, while trying to ensure that this is a practical way to address them.

I hope that when the Minister responds to the debate he will take on board that there are genuine concerns that a simple further exception to the reservations in Schedule 5 will not necessarily guarantee that the functions of the British Transport Police would be safeguarded after the devolution proposals put forward there. I therefore hope that the Minister, even at this late stage, will be prepared to come back and give some further thought as to how the functions can be properly safeguarded.

**Lord Mackay of Clashfern (Con):** My Lords, in my view the words used by the Smith commission on this subject do not imply the break-up of the British Transport Police so far as it operates in Scotland. It says that the functions of the British Transport Police shall be devolved. If the British Transport Police does not exist in Scotland, it will not have any functions that are devolved. That does not seem to make sense.

My second point is that if this provision is to be applied in a sense that the British Transport Police is not to function in Scotland, but would have some kind of associated unit in Police Scotland, there will be no chief constable responsible for operations of transport police in Scotland whose exclusive attention is devoted to transport. The chief constable of Police Scotland has some responsibilities other than transport, whereas the British Transport Police chief constable is devoted entirely to transport—the full attention of the most senior rank there is in the police is available relating to transport only. Transport is sufficiently important to merit the attention of a chief constable.

**Lord Berkeley (Lab):** My Lords, I support my noble friend Lord Faulkner’s Amendments 41 and 42. I certainly will not repeat the excellent speeches made in support of these and the other amendments this evening. I will emphasise one or two things: first, how different policing the railways is nowadays. The noble and learned Lord, Lord Wallace, mentioned Waverley station, which brings me to crowd control of, for example, football crowds. The British Transport Police has an enormous and excellent reputation in ensuring safety of passengers on the Underground and ways into the Underground, and has ways of keeping them safe on the platforms themselves so that the train does not run into them and they do not get pushed on to the track. There is, sadly, the ongoing issue of terrorism and people trying to do nasty things to the trains, which can be very dangerous. There was an incident last Friday in Belgium where somebody put some concrete blocks on the track of a high-speed line. Luckily, the train did not derail, but that can happen anywhere. Again, having the local police going along and dealing with that might be all right, but there is a good chance

[LORD BERKELEY]

that it would not be all right. We have to ensure that this specialism is retained and preserved in whatever happens.

My noble friend Lord McAvoy seemed to be saying that we should give the Scots everything they want in this legislation. That is an argument I do not have particular views on, except on the railways. If we want to give them British Transport Police separated from the rest of the UK, why not give them the railway completely? Why not give them Network Rail? There is nothing in the Bill that says Network Rail is going to be owned in Scotland, or separated from the UK. It probably does not particularly matter who owns the railway, but there is the matter of timetabling.

I spent many years in various discussions across Europe trying to encourage passenger and freight trains to move across frontiers without stopping for hours, minutes or sometimes days because the timetable is not co-ordinated. Of course, that could happen here if the Government give the responsibility to Scotland for having a separate timetable. I am sure it would not happen, because we are not that stupid, but it seems to me that if we are going to keep the railways as an integrated whole, and not make all the Virgin trains stop at Carlisle for everybody to get out and get on to a different train, why separate the police?

The other issue of which we ought perhaps to remind ourselves, also mentioned by the noble Lord, Lord Forsyth, and the noble and learned Lord, Lord Wallace, is the question of who pays. We all know that Network Rail at the moment pays 50% of the cost of the British Transport Police and the train operators, passenger and freight, pay the other 50%—I declare an interest as chairman of the Rail Freight Group. If I were a train operator in Scotland and I found that the BTP did not exist there and any policing on the railways was being done by the local bobby, I would say to myself, and to the politicians, “Why do I, operating a train in Scotland, have to pay for policing the railway, such as it is, but if I operate a bus, a car or a lorry in Scotland, I do not have to pay?”. And I would not pay, because it is very out of balance between road and rail—I would probably get nothing for it either.

At some stage, someone is going to have to work out who is going to pay for the policing in Scotland that will no longer be done by the BTP. There is absolutely no reason why the rail passenger or freight customer should have to pay for whatever policing they get and the main competitor, which is road, should not have to pay. Maybe the Minister already has an answer to that.

**Lord Forsyth of Drumlean:** Surely, under the no-detriment principle, what was previously being paid by the transport operators to cover Scotland would need to be provided by the Scottish Government in a cheque to the British Transport Police south of the border.

**Lord Berkeley:** I entirely agree with the noble Lord: that is the way it should be done. The operators in England do complain, occasionally, about what they get for their money—the British Transport Police probably

spends half its budget in London, because London is very important, with the Underground. The fact remains that they all accept this, but they do expect to get the specialist knowledge, albeit sometimes in support of the local police, who may get there first. They know that the BTP is there to provide the specialist knowledge and make sure that everything they do is done safely. I feel very strongly about this and I hope that the Minister will give us some comfort. If not, we will have to see what happens.

11.30 pm

**Lord Dunlop:** I particularly thank the noble Lord, Lord Faulkner. He always speaks on railway matters with such authority. I thank noble Lords for the other informed and authoritative contributions we have heard during this debate.

I think one thing is clear: all sides of the House are agreed that the British Transport Police does an excellent job of policing our railways. That is not in doubt. However, the issue this evening is whether this House will agree to devolve to the Scottish Parliament the functions of the British Transport Police in Scotland. As has already been said, the Smith agreement says:

“The functions of the British Transport Police in Scotland will be a devolved matter”.

The functions of the British Transport Police in Scotland are the policing of the railways in Scotland. The Smith Commission also stated in paragraph 19:

“Where the agreement provides that powers or competence in relation to a matter will be devolved, this is intended to mean a transfer of full legislative competence to the Scottish Parliament along with that of the associated executive competence to the Scottish Government”.

Clauses 42 and 43 devolve legislative competence in relation to railway policing in Scotland and designate the British Transport Police bodies as cross-border public authorities. This is devolution. It has been argued tonight that this aspect of the Smith agreement could be implemented in a different way by retaining the BTP as a single body but making it jointly accountable to Scottish Ministers and the Scottish Parliament. There is nothing in this Bill to prevent that outcome being achieved. The Bill does not dissolve the BTP. It does not mandate that the BTP should no longer operate in Scotland. It does not prescribe a model by which policing of the railways in Scotland should be carried out in future.

What the Bill does do is ensure that the BTP continues to operate in Scotland as now, unless and until the Scottish Parliament decides to pursue an alternative approach, and it ensures that Scottish Ministers are consulted on appointments to the BTP bodies. It will be for the Holyrood parties to set out in advance of the elections what their approach to the BTP in Scotland will be. The Scottish Conservative manifesto for the Holyrood elections will contain a clear commitment to retain a single nationwide British Transport Police—not absorbed into Police Scotland—but a BTP made more accountable to Scottish Ministers and the Scottish Parliament.

**Lord Forsyth of Drumlean:** I very much hope that the Scottish Conservatives will win more seats at the election but I am not anticipating them becoming the Government of Scotland. My noble friend must know

that Scottish Ministers have made it clear that they intend to break up British Transport Police if they have the power to do so, and to amalgamate it into Police Scotland. Therefore, is it not a little disingenuous to imply that what the Bill provides will not threaten the integrity of the British Transport Police? It will indeed.

**Lord Dunlop:** I can assure my noble friend that I will not turn myself into Mystic Meg tonight and make a prediction about the Scottish elections. I am making a broader point because I think the real point is that embracing devolution means trusting the Scottish Parliament to act responsibly with the powers it is given, and respecting the ability of people in Scotland to hold its representatives to account. I fear that for this House to decline to support this provision would send out a clear message to Scotland that we do not trust its Parliament and the ability of people in Scotland to hold it to account. Should the Scottish Government and Scottish Parliament press ahead to legislate for, and implement, a different model for policing the railways in Scotland, and to integrate the functions of the BTP with Police Scotland, I believe it is reasonable to expect the two Governments, working together, to be able to put in place the necessary arrangements to ensure that the service remains as effective as it is today, that the transition is seamless and protects the interests of people on both sides of the border, and that there is no detriment.

Counterterrorism has been specifically referred to. I want to address that directly. The BTP currently undertakes counterterrorism policing of the railway. This includes a range of operational measures and deployments designed to mitigate and manage the terrorist threat. General policing is already devolved and arrangements already exist between Police Scotland, the BTP and Home Office police forces to ensure the effective delivery and co-ordination of policing, and we would clearly expect these to continue under any new model. The Scottish Government already work with a range of partners, including the United Kingdom Government, Police Scotland and the British Transport Police, to ensure that Scotland is protected from a range of threats, including terrorism. There are well-established national procedures in place for policing across regional and functional boundaries, and these will certainly continue to apply.

Going back to what I was saying about ensuring that the service remains as effective as it is today, that is what has happened with every act of devolution since the Scottish Parliament was set up in 1998. Officials are meeting regularly and both Governments are committed to working constructively and effectively on the detailed arrangements needed to enable the transfer of functions to take place. A senior-level joint programme board to lead and oversee the work to integrate the BTP in Scotland into Police Scotland, should the Scottish Government decide to press forward after the election in May, has been established by the two Governments and includes representatives of the two police authorities. The terms of reference for the joint programme board will be formalised following the Scotland Bill receiving Royal Assent, and I will be happy to share these with noble Lords. Once the

Scottish Government have finalised their plans for the future model of railway policing, I will be happy to update the House on implementation plans. Before this, the Scottish Government have made clear their intention to engage with key partners and staff representatives to ensure that the specialist railway policing skills and expertise of British Transport Police officers and staff in Scotland are maintained.

I hope noble Lords will not press their amendments and will allow this provision to proceed. Of course, I will reflect on the discussions that have taken place but I cannot undertake to commit to any amendments.

**Lord Empey:** If I understood the Minister correctly, does he seriously believe that even after efforts have been made to fix something that is not broken, the service provided subsequent to the Scottish Parliament taking over this function is going to be better than the service that is provided now? I accept that civil servants, working together, will patch something up. They are good at that and they will do their job to the best of their ability but nobody can say that the service will be better. The problem is ensuring that it is even as good and that will take years because of the personnel movements, the skill loss—people will have to be retrained. This is all totally nugatory work, for no good purpose to the people of these islands.

Let us call a spade a spade. This is a political thing through and through. There is no other dimension to it. The Minister may have given no undertaking but he has at least agreed to reflect on this. We ought to at least take that into account. This will not produce a better service than we have. What we are trying to do is prop up and secure something close to what we already have.

**Lord Dunlop:** I will repeat what I said: it is entirely possible to put in place the necessary arrangements to ensure that the service remains as effective as it is today.

**Lord Faulkner of Worcester:** My Lords, this has been an extraordinary debate. The hour approaches midnight and we have been debating the British Transport Police in Scotland for more than an hour, with an extraordinary range of very well-informed, powerful speeches on these amendments. I thank everybody who has taken part in the debate.

Obviously, there is not time to go through each of the speeches but the most important point the noble Lord, Lord Forsyth, made was that this is a United Kingdom issue, not just a Scottish issue. The noble Earl, Lord Kinnoull, talked about the no-detriment principle. I do not think that we got an answer on that from the Minister. The noble Earl also asked for a commitment to some form of government amendment at Third Reading; we were told that that will not be offered.

I should thank the noble Lord, Lord Empey, for bringing this issue up in the first place in Committee because it was not spotted in the other place when the Bill went through there. It was his tabling of the amendment in Committee that allowed us all to realise what was actually being proposed for transport policing in Scotland. His point is that this is an attempt to fix a

[LORD FAULKNER OF WORCESTER]

problem which does not exist and that there is nothing wrong with the operation of transport policing at the moment. To make these changes is free of neither risk nor cost.

The noble and learned Lord, Lord Wallace, talked about the functions not being properly safeguarded and the possibility of security being diminished. The noble and learned Lord, Lord Mackay, made a very important point about what the Smith commission said on the subject, which is not consistent with what is being proposed in the Bill. My noble friend Lord Berkeley, using his great experience from the railways, talked about the specialism of the British Transport Police.

I would like to be able to say that the Minister came some way towards meeting all these very important points but I honestly do not think that he did. If we allow the Bill to go through in its present form, and do not make our voices clear tonight that we are very unhappy with what is to happen not just in Scotland but to transport policing throughout the United Kingdom as a result of this change, we will regret that. With great reluctance at this very late hour, I therefore beg leave to test the opinion of the House.

11.41 pm

*Division on Amendment 41*

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**The Deputy Speaker:** My Lords, as it appears that fewer than 30 Lords have voted, in accordance with Standing Order No. 57, I declare the Question not decided, and the further proceedings on the Bill stand adjourned.

*Consideration on Report adjourned.*

*House adjourned at 11.52 pm.*



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