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Monday
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PARLIAMENTARY DEBATES
(HANSARD)

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OFFICIAL REPORT

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Abbreviation	Party/Group
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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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THE
PARLIAMENTARY DEBATES
(HANSARD)

IN THE SECOND SESSION OF THE FIFTY-SIXTH PARLIAMENT OF THE
UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND
COMMENCING ON THE EIGHTEENTH DAY OF MAY IN THE
SIXTY-FOURTH YEAR OF THE REIGN OF

HER MAJESTY QUEEN ELIZABETH II

FIFTH SERIES

VOLUME DCCLXXIV

SECOND VOLUME OF SESSION 2016-17

House of Lords

Monday 11 July 2016

2.30 pm

Prayers—read by the Lord Bishop of London.

Civil Service Fast Stream
Question

2.37 pm

Asked by Lord Naseby

To ask Her Majesty's Government whether they plan to make socioeconomic diversity reflecting the nation the primary criterion for future recruitment into the Civil Service Fast Stream.

The Parliamentary Secretary, Cabinet Office (Lord Bridges of Headley) (Con): My Lords, we have no plans to make socioeconomic diversity part of the Civil Service Fast Stream selection criteria. Selection must always be based strictly on merit, which is why we anonymise applications. Any data collected will be done on a voluntary basis and used anonymously to help improve overall recruitment efforts. Diversity data would not form the basis of any individual recruitment decision.

Lord Naseby (Con): Is my noble friend aware that his Answer is enormously welcome? Is it not true that, as far as gender equality is concerned, 54% of the fast stream are now female and therefore that dimension has been addressed? Is there not still an overriding need for the fast stream for our country to recruit young men and women, without discrimination, who have leadership qualities to take our great Civil Service forward?

Lord Bridges of Headley: I entirely agree with my noble friend. It is obviously a good day to be discussing how we appoint leaders. There is more to be done, as my noble friend rightly says, on various aspects of

improving diversity, but it is crucial that we abide by the principles of Civil Service recruitment as set out in the Constitutional Reform and Governance Act 2010, namely that selection must be on merit on the basis of fair and open competition.

Lord Wright of Richmond (CB): My Lords, in a debate on recruitment and assessment services in March 1996, I detailed the needs of the Diplomatic Service for public servants with, "a high degree of loyalty, integrity, impartiality, stability of character, intelligence and linguistic aptitude".—[*Official Report*, 8/3/1996; col. 558.]

Does the Minister agree that all these qualities are still of primary importance?

Lord Bridges of Headley: I entirely agree with the noble Lord. He obviously speaks with a great deal of experience. As the nephew of a diplomat, I am somewhat biased but I completely agree. On his final point about language skills, more needs to be done, as always. We need to make sure that we are getting the best diplomats who are not just aware of the culture of the countries to which they are posted, but are also able to speak the language. I am delighted that the Foreign Office language centre reopened in 2013 and is doing much to address this.

Lord Watts (Lab): My Lords, will the Minister explain the purpose of collecting these data if we do not do anything with them?

Lord Bridges of Headley: First, let us see what the data say; then, if they say that there are talents in pockets of society who are not applying and we think should be applying, we will redouble our efforts to ensure we get more applications from those groups.

Lord Razzall (LD): My Lords, I am fascinated by the noble Lord's reply regarding the language school. Many of your Lordships will know young people who would be perfectly competent civil servants but who have failed to be admitted to the fast stream because of their inability to pass a maths exam. Is it not time that the Government looked at that?

Lord Bridges of Headley: I am sure that is the case and that we need to redouble our efforts to improve standards in maths right across the board.

Baroness Berridge (Con): My Lords, the Select Committee on Social Mobility found that many companies, particularly accountancy firms, have reverted to the model of recruiting at graduate level but also recruiting at 18 and sending everybody through to the same professional outcome. Will the Minister confirm that the apprenticeships available in the Civil Service also enable people to be in the fast stream from 18 and to go right to the top of the Civil Service from that basis, so that we do not miss the best talent that has not gone to university?

Lord Bridges of Headley: My noble friend makes an extremely good point. Apprenticeships will be key. The high-level apprenticeship talent programme aims to bring in 750 people this year, and around 18% of highers come from lower socioeconomic backgrounds. I will write to her specifically on the point about the fast stream.

Baroness Hayter of Kentish Town (Lab): Will the Minister ensure that the Cabinet Office team being put together under Oliver Robbins in the new European Union unit will be gender-balanced and representative of all our nations and regions, as well as of the population, to ensure that the interests of the whole country are central to the preparation for the Brexit negotiations?

Lord Bridges of Headley: The noble Baroness makes a good point. As the head of the Civil Service has pointed out, we are determined to make sure that we get the brightest and best to negotiate and advise on an outcome that represents the views of our entire society. I am unable to go beyond that at this precise juncture.

Lord Forsyth of Drumlean (Con): My Lords, will my noble friend confirm that the Government's policy is to maintain a United Kingdom Civil Service and ensure that civil servants from the devolved Administrations are exposed to Whitehall and vice versa?

Lord Bridges of Headley: Indeed, I can confirm that, and my noble friend makes a good point about ensuring that civil servants from Scotland are exposed to Whitehall.

Lord Anderson of Swansea (Lab): My Lords, I joined the foreign service in 1960 as a working-class boy from the University of Wales. There were only two women and no one from the ethnic minorities at that time. Does the noble Lord agree that our schools, because of the collapse of language teaching, are often unable to provide sufficient language competence and we need to look carefully at language potential? Such matters should never trump merit and competence.

Lord Bridges of Headley: I entirely agree with the noble Lord. We have come a long way but there is always more to be done. I concur with him about language skills.

Lord Singh of Wimbledon (CB): My Lords, does the Minister agree that, as well as having competence in language skills, it is important to know about religious literacy because of the different places to which people are posted?

Lord Bridges of Headley: That is absolutely right and is key. As noble Lords said earlier, we need to ensure that diplomats have a grasp of culture, not just language.

Lord Foulkes of Cumnock (Lab): My Lords—

Baroness Hussein-Ece (LD): My Lords—

The Lord Privy Seal (Baroness Stowell of Beeston) (Con): My Lords, several Members from the Labour Benches have asked questions and we have not had anyone from the Lib Dems for a while.

Baroness Hussein-Ece: My Lords, is the noble Lord aware that last week evidence emerged that staff employed in the Civil Service from black and minority ethnic communities are sometimes paid significantly less than their white counterparts? Will he assure the House that this is not the case? If he does not have the reply now, will he undertake to look into the matter and write to me?

Lord Bridges of Headley: I absolutely undertake to look into it. I do not have a reply on that specific case at the moment.

Lord Foulkes of Cumnock: My Lords, as a member of the Official Opposition party, I ask the Minister whether he is receiving the same reports as me that morale in the Civil Service is plummeting because of the suggestion that all the best and the brightest should have the futile task over the next few years of extricating us from the European Union instead of improving our education, housing and transport and all the other important things that need doing. How will this affect recruitment to the fast stream?

Lord Bridges of Headley: I am sorry; I do not agree with what the noble Lord has said. I am interested that he is part of the Official Opposition; I wonder which is the unofficial opposition. All I would say to him is that we need to ensure we get the very best to undertake this task. However, at the same time, as he rightly says, we need to ensure that we continue to attract, and retain, the best right across the board.

Record Copies of Acts of Parliament *Question*

2.45 pm

Asked by Lord Lexden

To ask Her Majesty's Government what discussions have taken place to implement the undertaking given by the Paymaster General to provide funding for public Acts of Parliament to continue to be printed on vellum, following the House of Commons resolution on 20 April.

The Parliamentary Secretary, Cabinet Office (Lord Bridges of Headley) (Con): My Lords, this is a matter for Parliament. Following the debate in the other place, the Commons Administration Committee is discussing the issue this very afternoon. We will consider the next steps when it has concluded its deliberations.

Lord Lexden (Con): I congratulate the Government on offering assistance to help preserve this very long and deeply cherished tradition, which has great practical importance since vellum lasts so much longer than paper. Should we not be particularly conscious of the strength of feeling that has been exhibited in the other place in favour of retaining vellum, especially in view of the resolution passed by both Houses of Parliament in 1849 that there should be no change without the express consent of both of them?

Lord Bridges of Headley: I am very delighted to be discussing this pressing issue today because there is not much else going on. I respect what my noble friend has to say but I gently repeat that the recording of Acts of Parliament is a matter for the two Houses. We very much hope that a way forward can be found to continue the use of vellum. If that is not the wish of this House, a way will have to be found, but, as I say, we await the outcome of the committee's meeting this afternoon.

Lord Hunt of Kings Heath (Lab): My Lords, I cannot really believe that that is the Government's position. This House, through our committees, has decided to phase out the use of vellum. To reintroduce it would be hugely expensive and a complete waste of time. I hope the Government are not reversing their position on this.

Lord Bridges of Headley: I gently say again that this is a matter for both Houses. It is a matter for the committee of this House and the committee of the other House to come to some agreement on. I am delighted, though, that the Labour Party is now looking to save money; this is a great turn up for the books. As I say, this is not a matter for government. We have made an offer but it is up to the Houses to decide.

Lord Cormack (Con): My Lords, may I, for once, cross swords with the noble Lord, Lord Hunt? Will my noble friend take very carefully into account what the other place has so very sensibly decided? Should this not have a united parliamentary response, whereby we acknowledge the supremacy of the elected House?

Lord Bridges of Headley: As I say, that is very much the position. The position is as I have just said, and we have to await the outcome of the committee this afternoon.

Lord Faulkner of Worcester (Lab): Does the Minister think that the letter from the noble Lord, Lord Cormack, in the *Times* deserves to be printed on vellum and preserved for posterity?

Lord Bridges of Headley: That is a very interesting point.

Lord Kinnock (Lab): My Lords, as regards vellum being returned by the will of the elected House, regardless of how appropriate that would be in the 21st century, could not the Government possibly save money, and ensure the security of the supply of vellum, by turning over the green opposite to goats?

Lord Bridges of Headley: That is an interesting suggestion. We shall have to wait and see what the outcome of the committee is this afternoon.

Rail Franchises *Question*

2.48 pm

Asked by Baroness Randerson

To ask Her Majesty's Government what is their policy for determining when a rail franchise has failed to provide the service required and should therefore be terminated.

The Parliamentary Under-Secretary of State, Department for Transport and Home Office (Lord Ahmad of Wimbledon) (Con): My Lords, the Secretary of State for Transport has statutory powers under the Railways Act 1993 and contractual powers under the franchise agreement to penalise train operators for contravention of obligations. These powers are more fully set out in the Department for Transport's published enforcement policy.

Baroness Randerson (LD): I am sure the Minister will not be surprised to hear that I wish to ask about Southern trains, which has failed to provide anything approaching the service stipulated in its franchise. Now it has cut services by 15%, and quite understandably the passengers are on strike today, yet the best the Government can muster is today's long overdue but very limp statement by Claire Perry. Enough is enough. When will the Government finally step up to their responsibilities and take over this franchise? Will the Government consider devolving power over commuter services such as this one, in a structure similar to the successful London Overground?

Lord Ahmad of Wimbledon: My Lords, it does not surprise me that the noble Baroness has raised this issue, which has come up in this House recently and I have responded from the Dispatch Box. I agree with the sentiments expressed by the noble Baroness and other noble Lords: the current operation is unsatisfactory. As many noble Lords will know, the new timetable started operating this morning, reflecting a target of getting 85% of services running. As I said only last week, part of the issue is that the force majeure clause has been invoked, which does not mean that the franchise can be put on the premise that the noble Baroness suggests.

Lord Rosser (Lab): My Lords, last Wednesday, the Minister said that where Southern Rail, "can provide evidence that cancellations are due to official or unofficial industrial action, it can claim force majeure". This is what it has done in respect of the current level of performance and the reduction in the number of services it operates. Does this definition of force majeure

[LORD ROSSER]

mean than long-suffering commuters can expect no compensation and the company can expect no penalties? The Minister also said last Wednesday that the Government were,

"in regular contact with the company".—[*Official Report*, 6/7/16; col. 2011.]

How many times have the Government also met the organisations representing the employees, to find out what they have to say about the cause of the present poor service and cancellations, in order that the Government hear both sides of the story, at first hand, before coming to a conclusion on whether official or unofficial industrial action is the sole cause of the problem and whether responsibility for any such action rests solely at the door of one party?

Lord Ahmad of Wimbledon: As I said previously, the Government's position is very clear. We want both parties to come to the negotiating table and find a resolution for long-suffering commuters. It is very clear what has happened. I do not accept the noble Lord's point about not meeting. We meet regularly with all people concerned, and we have implored them to take action to ensure that we get a more effective service. As to the way forward, I think it right that we allow the two parties to come together at the negotiating table. The Government will play their part in ensuring an effective service for Southern commuters who, as I have said, have suffered for far too long.

Lord Lucas (Con): My Lords, does my noble friend agree that it ought, at least, to be the object of a rail franchise that the day-to-day experience of the travelling public should get better over the long term? What would he say about a franchisee which, from its first moment in possession of a railway, has set out to do the exact opposite? Is there no way to set it on a right course?

Lord Ahmad of Wimbledon: There are various procedures open to the Government if the contract fails in its objectives. As I have already indicated, I take on board what my noble friend has said on the issue in respect of which the franchisee is claiming force majeure, which is part of the franchise. I assure him that the Government are looking at this very closely. There are various enforcement policy options available to the Secretary of State and we continue to monitor the position very carefully to ensure that we see an improvement in service. Prior to the early part of this year, we saw service levels rise to 83%. The noble Lord picked out the issue of industrial action and I talked about high levels of sickness leave. These have seen performance go from 83% to about 63% since May.

Lord Christopher (Lab): My Lords, as a passenger on this railway line, I believe that the Government are dissembling. The contract which has been drawn up is quite unique and provides an incentive to the railway company not to run trains if it can avoid it. Under the contract, you collect the money from the tickets and pay a substantial fee to Southern to provide the trains.

I suspect that you are seeking to buy time in order that Transport for London can take this over in a year or two's time.

Lord Ahmad of Wimbledon: My Lords, I do not agree with the noble Lord. He may well be aware that DfT has effective enforcement procedures; indeed, an enforcement advisory panel was set up specifically to review possible contraventions of franchise agreements. Perhaps we have hope, in the sense that the official who leads that panel is a gentleman called Andy Murray.

Baroness McIntosh of Pickering (Con): My Lords, can my noble friend explain to the House what emphasis is placed on price in awarding the franchise, as opposed to the quality of the service and the ability to deliver on that service?

Lord Ahmad of Wimbledon: With any contract awarded there is a specific procedure, and the issue of price is looked at along with the other factors that my noble friend has raised. Any franchise that is awarded has that central point—the ability to deliver. I have made it clear that the Government feel very strongly that the current unsatisfactory levels of service on that line have to be improved. There are other investments and some improvements such as new rolling stock, but that is not good enough: we need to see more improvements.

Lord Stoneham of Droxford (LD): My Lords, is not one of the major problems of franchising that it is difficult to get long-term commitment to investment and training, particularly at the end of a franchise agreement? Do not the problems of the current Southern franchise derive from the exit from the previous franchise, when investment and training were lacking?

Lord Ahmad of Wimbledon: On the current franchise, the noble Lord is aware that there have been issues of training and staff turnover, and Southern and its parent company has recruited new drivers, for example. On the current dispute over the new, driver-operated trains, I assure all noble Lords that at no time has it been said that there will be any redundancies. At no time has any person been told that their job is under threat. The issue of training is part and parcel of the new offer with regard to the new driver-operated trains that are being introduced.

Baroness Farrington of Ribblesdale (Lab): My Lords, the Minister did not answer the question of my noble friend Lord Rosser, which was how many meetings have there been between the Government and the trade unions, and when.

Lord Ahmad of Wimbledon: If the noble Baroness reflects on *Hansard*, I made it clear that the Government's job is as a facilitator. We made it clear to both parties that they should have arbitration between them and find a resolution. The franchise is awarded to them. It is for them to come together around the table and find a resolution to this long-standing dispute.

Lord Lexden (Con): With commuters losing their jobs as a result of this appalling dispute, has any assessment been made of the number of lost jobs?

Lord Ahmad of Wimbledon: I cannot answer my noble friend's specific question but I am sure that he is aware of the issue of compensation, raised by the noble Lord, Lord Rosser. I believe that my right honourable friend the Prime Minister made it clear last week that there will be additional compensation, which the Government are looking at, made available to those long-suffering commuters.

Lord Snape (Lab): Is the Minister not aware that the problem behind the situation with this franchise and others is the Government's determination to bring about driver-only operation of trains? That, combined with the de-staffing of stations and of the railway industry in general, is not the proper way forward as far as passengers are concerned. If they were consulted, like the trade unions, that is exactly what they would tell him.

Lord Ahmad of Wimbledon: The issue of driver-operated trains has not meant, as I have said, any reduction in staff. The role of what were conductors in training supervisors means greater focus on delivering customer service. There is an issue with sickness that is contributing to the challenge and to the problems we have. The current sickness rates operating on that franchise are not just higher; they are much higher than average.

Baroness Symons of Vernham Dean (Lab): On the question raised by the noble Lord, Lord Lexden, is the Minister saying that there is the possibility of compensation for those who have lost their jobs because of frequently arriving late at work or not arriving at all as a result of this dispute? Can he be specific on that point?

Lord Ahmad of Wimbledon: I can be specific. As I said, I do not know the number of people who have fallen victim in the way that the noble Baroness and indeed my noble friend have suggested. I did make the point that additional compensation is being looked at for those commuters who have suffered. Individual cases have been put forward and they will continue to be monitored, but my right honourable friend the Prime Minister has highlighted in his statements that we are looking at additional compensation. But to be clear, on the issue of loss of jobs et cetera vis-à-vis compensation, I do not know what the situation is. Obviously, every case will be looked at on its merits.

Lord Shutt of Greetland (LD): My Lords, if ultimately there is a requirement for the Government to directly operate this franchise, is there a shadow body within government ready and available to take that up?

Lord Ahmad of Wimbledon: The policy that I referred to in my original Answer includes details of how the department can take a step-by-step approach to ensure that any enforcement action is, in the first instance,

proportionate to the contravention, and explains the enforcement tools and options available to the Secretary of State in any circumstances that may subsequently arise.

Volunteering: Young People

Question

3 pm

Asked by Lord O'Shaughnessy

To ask Her Majesty's Government what steps they are taking to promote long-term, full-time volunteering among young people.

Baroness Evans of Bowes Park (Con): The Government are committed to ensuring that young people from all backgrounds have the opportunity to engage in meaningful social action, creating a lifelong habit and developing skills for work. We support Step Up To Serve's #iwill campaign, which is backed by a wide coalition of organisations offering a range of opportunities, including full-time volunteering. The Cabinet Office's pledge to the #iwill campaign is to continue to invest in social action and to share evidence and best practice.

Lord O'Shaughnessy (Con): I thank my noble friend the Minister for her reply. The National Citizen Service has been one of the Government's most notable successes, offering tens of thousands of young people the opportunity to take part in meaningful social action projects around the UK. With a new Prime Minister possibly only days away, can my noble friend reassure the House that the Government's commitment to the NCS programme remains undimmed and that the Bill we were promised in the Queen's Speech will come before Parliament soon?

Baroness Evans of Bowes Park: I can certainly say that the Government remain committed to the National Citizen Service and to introducing a Bill which will give the NCS permanence, ensure the independence of the trust and improve its accountability to Parliament, and, importantly, create a duty on schools and local authorities to promote the National Citizen Service so that more young people can have access to it.

Lord Patel of Bradford (Lab): My Lords, until very recently, I was the chairman of Bradford Teaching Hospitals NHS Foundation Trust. We had more than 5,000 staff delivering a high-quality service in these challenging times but we could not have delivered those services without the 500-plus volunteers who came in day in, day out. Many of those volunteers have been there for 20, 30 or even 40 years. But what we were increasingly missing were young people coming into the system to help—and possibly develop careers in the NHS. Could the Government come together with NHS England and Public Health England to provide some resources to encourage young people to take up some of these volunteering posts, which are very much needed in the NHS today?

Baroness Evans of Bowes Park: We certainly want to encourage volunteering across a whole range of sectors. The Step Up To Serve #iwill campaign, which I mentioned earlier, aims to increase by 50% the

[BARONESS EVANS OF BOWES PARK]

number of 10 to 20 year-olds taking part in youth social action by 2020. I also assure the noble Lord that through the National Citizen Service a lot of groups are indeed working with the health service. For instance, a group built a sensory awareness garden in a Weymouth care home; in Merseyside a group raised funds for awareness of the Huntington's Disease Association; and in Reading a group devised and ran a disability awareness campaign. There is a link-up with the health service through a number of campaigns that are going on, and we would like to see that continue.

The Lord Bishop of London: My Lords, bearing in mind the more than 1 million young people—ethnically very diverse and from every part of the country—in Church of England schools, will the Minister authorise a direct conversation with the national society about the virtues of volunteering, with a view to joint action, a joint strategy and disseminating good practice?

Baroness Evans of Bowes Park: First, I wish the right reverend Prelate a happy birthday. Certainly, the Government are very keen to work with as many partners as possible. We are doing this through the Step Up To Serve #iwill campaign. We are working with organisations such as City Year UK, vInspired and Volunteering Matters, and we would be happy to work with any organisation that would like to help us deliver this really important social agenda.

Baroness Garden of Frognal (LD): In order to get the most from volunteering, it is essential that employers and educational institutions recognise the skills and experience that young people acquire through high-quality social action. I wonder what consideration the Government have given to creating a legal status for voluntary service years similar to that in the United States, in order to support volunteering schemes such as those run by City Year UK, which the Minister has just mentioned.

Baroness Evans of Bowes Park: We are very committed to ensuring that young people in particular undertake social action because we know the impact it can have. For instance, 90% of National Citizen Service participants felt more positive about people from different backgrounds; seven in 10 felt more confident about getting a job; 80% have learned something new about themselves; and 90% felt the NCS had helped them develop key skills for the future. It is obviously extremely important both personally but also to the local communities that these young people live in. Of course, a number of organisations that I have mentioned already offer a year in volunteering, so that option is available to young people if they wish to take it up.

Lord Vinson (Con): Will the Minister look into the effect of CRB checks on volunteering? She will be aware that CRB checks are largely illusory and very often ineffective, because they check people with records but not with tendencies. The complexity of the CRB system is preventing a great many people volunteering. Queues of people want to join the Boy Scouts and Girl

Guides and the lack of volunteers through the hold-up of CRB checks is having a very deleterious effect, quite unnecessarily, on the whole volunteering area. Will the Minister look into this with a view to speeding up the process?

Baroness Evans of Bowes Park: We are very keen to try to address any barriers that we find in relation to volunteering. That and many other issues raised by organisations are on our radar so that we can make sure that organisations that want to take on volunteers, those who rely on volunteers and young people themselves can access this important area.

Baroness Wheeler (Lab): My Lords, we would welcome a Bill placing the National Citizen Service on a voluntary footing, but does the Minister acknowledge that the NCS needs to be properly funded and that the Bill should also include support for the work of both local authority services and key charities such as vInspired, which recruit and work with young people to help them translate their volunteering hours into job skills, employment and training?

Baroness Evans of Bowes Park: I agree that this is an area that needs funding, which is why we have committed over £1 billion to expand the National Citizen Service programme to cover 60% of all 16 and 17 year-olds by 2021. What is most important is that all young people can access it, which is why, as a result of Government backing, it costs £50 or less to participate in NCS, but support and bursaries are available to those who cannot afford to pay, so that we can ensure that all young people are able to access the National Citizen Service.

Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2016

Motion to Approve

3.07 pm

Moved by Baroness Evans of Bowes Park

That the draft Order laid before the House on 26 May be approved.

Considered in Grand Committee on 5 July.

Motion agreed.

Electoral Registration Pilot Scheme (England) Order 2016

Motion to Approve

3.07 pm

Moved by Baroness Chisholm of Owlpen

That the draft Order laid before the House on 6 June be approved.

Considered in Grand Committee on 5 July.

Motion agreed.

Investigatory Powers Bill

Committee (1st Day)

3.08 pm

Relevant documents: Pre-legislative scrutiny by the Joint Committee on the Draft Investigatory Powers Bill, Session 2015-16, 1st Report from the Joint Committee on Human Rights, 2nd Report from the Delegated Powers Committee, 3rd Report from the Constitution Committee

Amendment 1

Moved by **Lord Paddick**

1: Before Clause 1, insert the following new Clause—

“Tests for the intrusion of privacy

In making decisions and taking actions under this Act a public authority must have regard to the following—

- (a) the rule of law,
- (b) necessity,
- (c) proportionality,
- (d) the need for restraint,
- (e) the need for effective oversight,
- (f) recognition of necessary secrecy,
- (g) the principle of minimal secrecy,
- (h) the need for transparency,
- (i) legislative clarity, and
- (j) multilateral collaboration.”

Lord Paddick (LD): My Lords, my noble friend Lady Hamwee and I have put our names to Amendments 1 and 2. Parliament’s Intelligence and Security Committee have said that privacy should be at the heart of the Bill. Although the Government have made some attempt to put an overriding privacy clause at the beginning of the Bill, we feel that that does not go far enough. The noble and learned Lord, Lord Keen of Elie—in a letter to the noble Lord, Lord Rooker, dated 8 July—spells out the importance of the 10 tests for the intrusion of privacy which the RUSI panel that looked into investigatory powers came up with. Amendment 1 attempts to put those 10 tests for the intrusion of privacy in the Bill.

Although one might consider some of the principles to be obvious, such as “rule of law”, “necessity” and “proportionality”, there are other important elements of the 10 tests—in particular, “restraint”, as it should never become routine for the state to intrude on the lives of its citizens; “transparency”, as it must be evident how the law applies to the citizen if the rule of law is to be upheld; and “multilateral collaboration”, as government policy on intrusion should be capable of being harmonised with that of like-minded open and democratic Governments.

In the letter to which I have referred from the noble and learned Lord, the Government set out what I consider to be a rather optimistic view of how the Bill complies with the 10 tests. We will see, over the course of Committee, how we on these Benches do not share the noble and learned Lord’s optimism about how the Bill actually complies with them. As I said just now, we believe that the privacy aspects of the Bill need to

be enhanced, in particular to increase the regard that people have to the Human Rights Act in implementing the Bill.

Section 46 of the Counter-Terrorism and Security Act 2015 provides for a Privacy and Civil Liberties Board. This is already in legislation—it just has not been enacted by the Government—and we believe that it could also strengthen the privacy elements. We support the additional safeguards for confidential journalistic sources and material. We are concerned about how wide so-called targeted interception warrants can be, going beyond simply named individuals to organisations and even groups of organisations.

We are also concerned about the whole issue of the so-called double lock. Why, in non-contentious law enforcement cases, does there need to be any involvement by the Secretary of State at all? Why is there inconsistency between intelligence services’ equipment interference warrants, where there is a double lock, and law enforcement equipment interference warrants, where the Secretary of State is not involved at all, despite equipment interference being more intrusive than interception? We are concerned about how judicial review principles, which judicial commissioners are supposed to apply to decisions of the Secretary of State, can apply if only one side of the argument is present, because the applicant for the warrant puts forward the case for the issuing of the warrant and there is nobody arguing against it.

There is judicial authorisation of interception warrants in all “Five Eyes” countries and international co-operation—as I have just indicated from the 10 principles—is extremely and increasingly important. To ensure that there is co-operation between the UK and other countries, particularly the United States, proper judicial authorisation, not simply judicial review, should be an important part of the Bill.

3.15 pm

We support the additional safeguards to protect clients’ consultation with their lawyers. We are concerned about how warrants can be modified—in some cases significantly—without reauthorisation. In some cases, even the person who originally applied for the warrant can alter the warrant themselves. I remember, as a young constable, being a guide for the special patrol group, and we went to execute a drugs warrant in a terraced house in a row of squats. When the only thing of interest we found in the premises that we raided was a six-foot metal penguin, the officers simply changed the address on the warrant to the house next door, and then raided that one. Such alteration of warrants appears, potentially, to be allowed under this Bill.

We are concerned about the interception of communication in psychiatric hospital situations, and we need to explore the possibility of admitting intercept evidence in court, while recognising the importance of making sure that secret methods of interception are kept secret. We also need to explore the possibility of whether, in certain circumstances, the product of interception might be given in evidence.

We do not believe that the current legal ban on the Secretary of State’s admitting the existence of a warrant, let alone being held to account for authorising it,

[LORD PADDICK]

should present a blanket excuse for not being able to address Parliament on a particular warrant if she feels it necessary. One argument for having Secretaries of State authorising interception warrants is that Ministers can be held to account by Parliament, whereas judges cannot, and yet it is—under the terms of the Bill—an offence for the Secretary of State even to admit that a warrant is in existence, let alone what the content of that warrant is. We question the degree of accountability there can be in those circumstances.

For a whole range of reasons, we oppose the collection of internet connection records and their examination by law enforcement. We believe that the operational cases that the Government have published are unconvincing and that the considerable intrusion into privacy is disproportionate to the benefits to law enforcement. We believe that internet connection records are not necessary in the case of serious crime or in the case of terrorism because the security forces can help law enforcement. Those forces—MI5, MI6 and GCHQ—say that they do not require internet connection records because they can acquire the information by other means. The collection of data by internet connection records can also be easily avoided. The likely result is that serious criminals—for example, those involved in child sexual exploitation—will easily be able to avoid their internet connection records coming into the hands of law enforcement and only the data of innocent individuals and minor criminals will be collected.

Although there is some debate over what the real costs are going to be to internet service providers, it is likely to be considerable. In his summing up of the debate on Second Reading, the noble and learned Lord, Lord Keen, said that he did not know where our estimate of a billion pounds had come from, but when we come to the discussion, we will go into detail about how we arrive at that figure. As I said on Second Reading, the creation and retention of internet connection records will create vast quantities of highly sensitive personal—

Lord Brown of Eaton-under-Heywood (CB): My Lords, I am grateful to the noble Lord for giving way. I ask whether I have completely lost the plot here. I thought this was the first group of amendments, Amendments 1, 2 and 3. I do not understand why we are ranging over the entire Bill.

Lord Paddick: My Lords, what I am trying to demonstrate here is to counter what the noble and learned Lord, Lord Keen, said in his letter, that the Bill complied with the 10 tests put forward by RUSI. I am simply indicating where we feel that the Bill is deficient.

Moving on, we share others' concerns that the technical capability notices and national security notices, only enforceable against UK companies, could make British products and systems more vulnerable to illegal hacking. There could be a considerable competitive disadvantage to UK companies as a result.

We are concerned about the operation of the filter. As I said at Second Reading, it creates a virtual database, and the noble and learned Lord in his summing up—

Lord West of Spithead (Lab): My Lords, I share the view of the noble and learned Lord. I am a simple sailor, and I am totally confused now as to exactly what the noble Lord is trying to do. Are we trying to insert an amendment, or are we having another Second Reading? The noble Lord is continually saying, "As I said at Second Reading", but we do not do Second Reading a second time.

Lord Campbell-Savours (Lab): Unless you are a Liberal Democrat.

Lord Paddick: My Lords, I am trying to demonstrate—and in many cases, obviously, not succeeding—why the 10 tests as set out in the report are necessary, and how the Bill fails to meet those 10 tests.

As I was saying, on the filter, the noble and learned Lord, Lord Keen, in his summing up said that it did not create a database. I said in my Second Reading speech that it creates a virtual database. No doubt, we can discuss that issue when we come to it.

Overall, we feel that having the 10 tests as part of the Bill is an important safeguard for the privacy of individuals, and would place limitations on what the Government can do. I beg to move.

Lord Janvrin (CB): I speak to Amendment 3, in my name, and note my interest as a member of the Intelligence and Security Committee. A lot of the points made by the committee have already been taken on board by the Government following discussions and scrutiny in another place.

In the committee's report on the draft Bill, we recommended that privacy protections should form the backbone of the legislation around which the exceptional powers are then built. This is absolutely crucial to the whole purpose of the Bill. Following scrutiny in another place, the Bill introduced in this House now has in Clause 2 provisions on "General duties in relation to privacy". I hope that your Lordships welcome the inclusion of the new clause, which crucially includes the requirement that intrusive powers should be used only when the information being sought cannot be obtained by other less intrusive means.

However, the Bill still lacks a clear statement at the beginning about the right to privacy. This is the purpose of the amendment in this group in my name. We propose inserting a new subsection at the very start of the Bill, which places an individual's right to privacy at the forefront of the legislation. I note that this amendment is similar to Amendment 2 in the name of the noble Lord, Lord Paddick, and the noble Baroness, Lady Hamwee, which attempts to achieve something similar, although I suggest that the amendment in my name is the more straightforward of the two options before us.

Finally, I think that this short but necessary amendment is compatible with the more detailed provisions already existing in Clauses 1 and 2.

Lord Strasburger (LD): My Lords, it is a good idea to remind ourselves at times like these that we live in a democracy, and part of what defines a democracy is that our Government do not rule us and we are not

their subjects; they govern on our behalf, and with our consent. So when our Government ask us to hand over prodigious quantities of our information that reveal in detail how we live our private lives, we must take great care.

We all have something to fear from these surveillance powers, for none of us can guarantee the benevolence of future Governments. The surveillance programmes run by our Government now go far beyond anything George Orwell imagined. The more personal data are dredged up and stored, the more the risk of misuse. Now that most of us carry smartphones, government agencies and the police have unprecedented access to location information about where we are 24 hours a day, seven days a week. They can also get their hands on all the information on our phones and computers: our contacts, our diaries, our emails, our web browsing, our social networking and everything we do on the internet. Their access to our lives has expanded massively in the past 10 years. In addition, there are myriad new databases that create digital dossiers about our lives which are held by private companies and public bodies, including our banks and our doctors, and the Government have access to all of them.

In short, far from going dark, as is often claimed, the police and security services are enjoying a golden age of surveillance. If government agencies were offered the choice of current capabilities or pre-internet capabilities, they would overwhelmingly prefer their surveillance abilities today. Listen to the words of Wolfgang Schmidt, who was a lieutenant-colonel in the Stasi in Berlin. When he first learned of the extent of surveillance currently carried out on their populations by the British and American Governments, Schmidt thought carefully and then said:

“You know, for us, this would have been a dream come true”.

Some proponents of bulk surveillance tell us, “You have nothing to fear, if you have nothing to hide”. It has been said that the original maker of that claim was Joseph Goebbels. Many people’s response is simply, “I don’t have anything to hide, but I don’t have anything I feel like showing you either, and the way I live my life is none of the state’s business”.

I fully support the amendments in this group. They seek to give effect to the Intelligence and Security Committee’s—

Lord Ashton of Hyde (Con): My Lords, I am grateful to the noble Lord for giving way. We have a great number of amendments to deal with today. I respectfully ask the noble Lord to address the amendments.

Lord Strasburger: That is exactly what I was just doing.

I fully support the amendments in this group. They seek to give effect to the Intelligence and Security Committee’s demand that privacy protections should form the backbone of the legislation around which these surveillance powers are built as exceptions to the privacy norm.

Clause 2 was the Government’s answer to the ISC’s demand, but it is incomplete and insufficient and needs to be seriously beefed up. The amendments in this group give full effect to the ISC’s reasonable

requirement that privacy should be the backbone of the Bill by, among other things, incorporating the 10 tests devised by the Royal United Services Institute review. I commend these amendments to the House.

Lord Brown of Eaton-under-Heywood: I, for my part, am entirely content with Amendment 3 in the name of the noble Lord, Lord Janvrin. I marginally prefer it to Amendment 2. It may be doubted whether either is strictly necessary, but let us have the simpler one. With the greatest respect, I regard Amendment 1 as entirely superfluous. It unnecessarily overcomplicates things and in large part it overlaps with other provisions in the legislation. It just is not a good idea. It is all very well to treat this legislation with some element of scepticism, but, please, not cynicism. That is the way this is approached in that context.

Baroness Buscombe (Con): My Lords, following on from what the noble and learned Lord, Lord Brown of Eaton-under-Heywood, said, I think that, in respect of Amendment 1, it is necessary to stand back and remember and recognise that this has got to be practical. If a public authority were presented with a list including, “the rule of law”, “necessity”, “proportionality”, “the need for restraint”, “the need for effective oversight” and statements such as “multilateral collaboration”, it would probably end up being terrified and do nothing. As the noble and learned Lord, Lord Brown, said, this is all dealt with in the Bill. It is entirely otiose.

3.30 pm

Lord Rooker (Lab): My Lords, I thank the Minister for the response to my request at Second Reading for a view about each of the 10 tests. I am quite happy to accept these. What I resent is the fact that someone can stand up in our free Parliament and equate the present status of this country with the Stasi, where there was no rule of law, no independent judges, no independent commissioners and no free parliament. Let us have a reasonably decent debate about this.

Lord Carlile of Berriew (LD): My Lords, if I may just follow on from what the noble Lord, Lord Rooker, has said, my view, having studied these issues for a very large number of years now, is that the Bill as drafted provides ample protections against invasions of privacy. Indeed, they have that kind of specificity that the courts readily understand. I am not opposed to the amendment proposed by the noble Lord, Lord Janvrin, but I respectfully say to my noble friends that the other amendments in this group, Amendments 1 and 2, add absolutely nothing of substance. I join with the noble Lord, Lord Rooker, in saying that I regard it as outrageous to equate our situation today with *Nineteen Eighty-Four*. The idea that we have a “Room 101” in this country and cameras in every bedroom—which is what it says in *Nineteen Eighty-Four*—is completely misleading. My charitable view is that it demonstrates that my noble friend has never read *Nineteen Eighty-Four*.

I say to all Members of this House, including my noble friends—forgive me for taking up time, but maybe the beginning is the time to say it—let us get

[LORD CARLILE OF BERRIEW]

this Committee stage done as quickly as we possibly can and not spend our time on large numbers of otiose amendments.

The Minister of State, Ministry of Defence (Earl Howe) (Con): My Lords, the Committee will recall that privacy protections were quite rightly a significant topic of debate as the Investigatory Powers Bill passed through the other place. To make clear the duties in relation to privacy and the associated protections and safeguards, the Government introduced a new overarching privacy clause, Clause 2, and made amendments to Clause 1. Those clauses impose statutory duties on public authorities in relation to privacy and, as drafted, already clearly underscore the right to privacy and provide the necessary balance between that right and the powers necessary to keep us safe.

Amendment 1, moved by the noble Lord, Lord Paddick, seeks to add a new clause which would list the 10 tests proposed by the Independent Surveillance Review panel, convened by the Royal United Services Institute, or RUSI. At Second Reading in your Lordships' House, the noble Lord, Lord Rooker, asked whether the Bill complies with those tests. My noble and learned friend Lord Keen confirmed that it does and undertook to set out precisely how it satisfies the RUSI tests. He then duly wrote to the noble Lord and has placed copies of the correspondence in the Library. Accordingly, and in particular in the light of the noble Lord's helpful comments a minute ago, I hope noble Lords will accept that the Bill does indeed satisfy those tests. I recognise the desire of the noble Lord, Lord Paddick, to set the scene, as it were, for our forthcoming Committee debates, and while I agree with the principle and spirit of the proposed new clause, I do not consider that it adds anything to what the Bill already contains. I am confident that the Bill as it stands meets each test.

On the amendments proposed to Clause 1, it is worth re-emphasising that Clause 1 provides an overview of the Bill and sets out the duties relating to privacy and the robust protections applied to the use of investigatory powers. This provides the context for the revised Bill and the accompanying codes of practice, which make clear the strong privacy safeguards that apply to the use of the powers contained in the Bill. The Bill ensures that the security and intelligence agencies and law enforcement continue to have the powers they need to keep us safe—and no more. Amendment 2 is therefore not required; Clause 1 provides a suitable and sufficient overview of the Bill and the privacy protections, so the proposed new text is not merited.

I listened with care to the noble Lord, Lord Strasburger. The Government and law enforcement are clear about the value and importance of accessing internet connection records, in particular, to prevent and detect crime and keep the public safe. I did not hear the noble Lord refer to that imperative, although it has been recognised during the passage of the Bill, including by noble Lords at Second Reading. The Joint Committee that scrutinised the Bill considered this issue in detail and concluded that,

“on balance, there is a case for Internet Connection Records as an important tool for law enforcement”.

On Amendment 3, I begin by thanking again the Intelligence and Security Committee for its diligent and valuable contributions to the Bill. We very much welcome its ongoing input to this debate. As I am sure the Committee will be aware, in its report on the draft Bill published last year, the Intelligence and Security Committee of Parliament called for the inclusion in the Bill of an overarching clause dealing with privacy protections. That call was echoed by the Opposition and the Scottish National Party in Public Bill Committee. Following those discussions, the Government introduced the new comprehensive overarching privacy clause in the Bill, which was widely welcomed on Report in the other place.

I agree fully with the spirit of the ISC's amendment but do not consider that it is needed. The new overarching privacy clause and amendments made to Clause 1 not only achieve what the ISC's amendment seeks to achieve but go much further; rather than signalling the importance of privacy, the amended Part 1 now creates a statutory obligation to have regard to the public interest in privacy. The privacy clause serves to make clear what was always the case: privacy is at the heart of this vital piece of legislation. Therefore, with great respect to the noble Lord, Lord Janvrin, I cannot see that his amendment, well-intentioned as it is, adds value to what is already in the text.

I hope these remarks are helpful and that, while doubtless the noble Lord, Lord Paddick, will reserve the right to return to individual issues, he will nevertheless be content to withdraw his amendments at this stage.

Lord Campbell of Pittenweem (LD): My Lords, before my noble friend responds, having heard the discussion across the Chamber, I am satisfied by the explanation offered by the noble Earl. For this reason, respectfully, to be overspecific about principles that support the whole concept of privacy runs the risk of *inclusio unius est exclusio alterius*: that is, by being too specific, you prevent the opportunity to look at wider considerations. That may be rather a technical view to take at this stage but it also underlines the points that have been made already about the general thrust of this legislation, which has innovated to an extent that would not have been thought possible even five years ago.

Lord Paddick: My Lords, I am very grateful for the comments from noble Lords from around the Chamber, and particularly to the Minister. As we go through the Bill, we will, at each power, indicate how we believe the provisions do not match the 10 tests in the way the noble and learned Lord set out in his letter. However, we can leave that until we reach those sections of the Bill. The noble and learned Lord, Lord Brown of Eaton-under-Heywood, indicated that, of the three amendments, Amendment 3 in the name of the noble Lord, Lord Janvrin, would be the best to include. If it was necessary, we would be very happy to support Amendment 3.

If I may, I will speak—with some trepidation—in defence of my noble friend Lord Strasburger. There are people in the UK who have the sorts of concerns that he has articulated and it is very important that, during our discussions in the House, we seek every

opportunity to reassure people who hold those views, however outlandish some Members of the Committee might consider them. At this stage, however, I beg leave to withdraw the amendment.

Amendment 1 withdrawn.

Clause 1: Overview of Act

Amendments 2 and 3 not moved.

Amendment 4

Moved by Lord Keen of Elie

4: Clause 1, page 2, line 11, leave out “misfeasance” and insert “misconduct”

The Advocate-General for Scotland (Lord Keen of Elie) (Con): My Lords, I shall speak first to the government amendment. Clause 1 refers to those offences found elsewhere in the law that provide protections for privacy or safeguards against the misuse of these powers. This amendment simply corrects a minor error in the drafting; the Bill currently refers to the,

“common law offence of misfeasance in public office”.

That offence is more correctly referred to as misconduct in public office. This amendment simply reflects the usual name for the offence in common law, and will prevent confusion with the distinct civil cause of action, which is usually referred to as misfeasance in public office.

Lord Janvrin: I rise to speak to Amendment 15 in this group, again on behalf of the Intelligence and Security Committee. It is crucial when this House is being asked to approve intrusive powers for the state that we all have a clear understanding as to how any misuse of those powers will be dealt with. These are exceptional powers, capable of revealing the most sensitive and detailed information about private lives. The Bill already includes offences related to the unauthorised interception and misuse of communications data, and there are other relevant offences mentioned in other legislation relating to data protection or computer misuse, for example. However, the Intelligence and Security Committee has concluded that these offences, scattered across numerous Acts of Parliament as they are, are insufficient and lack clarity. There would, therefore, be considerable benefit in setting out a single offence in one single place in this Bill alongside the intrusive powers we wish to regulate.

Your Lordships will note that we have sought to include wording in this amendment relating to wilful and reckless misuse of intrusive powers. We are not seeking to make minor, accidental mistakes criminal offences; we are focusing on the most egregious abuses of investigatory powers. There have been arguments that the creation of a new overarching offence for misuse of powers would add confusion in the law, duplicate existing offences and create a “chilling effect” for those using these powers in the agencies. Neither of these arguments is particularly compelling.

First, far from adding to confusion in legislation, it is self-evident that putting a single offence for misuse in one place should simplify legislation in this area, as

it avoids the need to look for offences scattered throughout the legislative corpus and the common law. Potential duplicate offences can be dealt with easily, as has already been done in Clause 231, which amends the Wireless Telegraphy Act. The clause effectively says that an offence under the Wireless Telegraphy Act which is also an offence under the Investigatory Powers Bill should be dealt with preferentially under the Investigatory Powers Bill.

Secondly, the argument that an overarching offence would have a “chilling effect” on agency staff seems exaggerated. If a certain action constitutes a criminal offence anyway, it seems highly unlikely that an agency staff member would act differently depending on where and when the legislation appeared. If agency staff are engaging in activities that are on the edge of lawfulness, it is quite right that they should be given grounds to pause for thought, at least to the extent that they take internal legal advice if they wish to continue their work. The amendment would therefore be a simplification of the law and provide suitable penalties for serious transgressions.

3.45 pm

Lord Strasburger: My Lords, Amendment 17 in my name would provide for a statutory public interest defence for the offence set out in Clause 3. Clause 3 effectively reproduces the RIPA Section 1 criminal offence of phone hacking, of which the Prime Minister’s director of communications, Andy Coulson—among others—was convicted when he was editor of the *News of the World*.

I invite the House to support the amendment in this group proposed by the noble Baroness, Lady Hollins, which provides access to justice for victims of phone hacking and incentivises the adoption of the Leveson reforms which the Government have stalled on. But there is another matter which must be considered and which my amendment addresses—the absence of a statutory public interest defence for voicemail interception or any other type of breach of Clause 3.

Let us consider a situation where suspected serious wrongdoing is being investigated by a journalist or NGO and that journalist or NGO has no faith that the police will adequately investigate the matter; for example, a case of police corruption or, more practically, a case where the police have failed to investigate a case such as that of Jimmy Savile. In such circumstances, if the journalist or NGO intercepted voicemail messages which showed the corruption or illegality, and then exposed it, that person should have a defence that he or she can rely on.

Amendment 17 provides for this. The CPS can of course choose not to prosecute under the public interest arm of the “threshold test for prosecutors”, but that is not good enough. Prosecutors make their decisions on the public interest element after reviewing a file of evidence produced for them by the police and after an investigation which addresses the separate question of whether there is enough evidence to pass the first, evidential arm of the threshold test. Such a police investigation could last for months, if not years, and will involve interviews under caution, search warrants and perhaps arrest. That is a real disincentive to investigative journalism.

[LORD STRASBURGER]

If there is a statutory public interest defence, the police will be able to see at an early stage that however much evidence they gather to prove that the act took place, or indeed even in the case of an admission, they will not be able to defeat the defence if the facts are clearly made out and their investigations will be curtailed. The benefit of a public interest defence therefore is not so much that it will allow investigators in the public interest to be acquitted at trial, or even that the CPS will choose not to prosecute on the evidential arm before even having to consider the public interest, but that the police will abandon investigations where the public defence is clearly made out in the facts. That will have the benefit of removing the chilling effect of potential police investigations and possible prosecution from investigative journalists who we rely on on these occasions to root out wrongdoing. Perhaps I may invite the Minister to engage in a constructive discussion about whether a narrow but valuable defence can be crafted. After all, noble Lords will be aware that there is a statutory public interest defence in Section 55 of the Data Protection Act, a provision that in Clause 1 of this Bill the Government are relying on as adequately protecting our privacy.

The investigative journalist Nick Davies of the *Guardian* exposed the hacking scandal. Had he had to intercept voicemail messages between Andy Coulson and one of the several convicted news editors who served under him in order to bring the story to our attention, that would have been in the public interest. It would not have been right that in the absence of a public interest defence which the police knew was valid, he had been arrested and questioned by the very police force whose failures he uncovered. That is why this amendment is so important and I commend it to your Lordships.

Lord Paddick: My Lords, my noble friend Lady Hamwee and I have Amendments 16, 20, 21, 22 and 84 in this group.

Amendment 16 concerns the offence of unlawful interception, but in the Bill as drafted that applies only to public telecommunications systems, private telecommunications systems and public postal services. It does not apply to private postal services. Examples of those could be the postal services used by the legal profession such as Legal Post and DX. Can the Minister inform the Committee why private postal services are not included in that provision?

Amendment 20 relates to the provision that,

“Conduct which has lawful authority for the purposes of this Act ... is to be treated as lawful for all other purposes”.

Presumably, this provision is to avoid the problem we have had in the past where, while interception or equipment interference was allowed under one piece of legislation, it was an offence under the Computer Misuse Act 1990. Presumably, that is why this provision has been included, but surely it should apply to existing legislation—and it should state that it should apply to existing legislation—not to legislation in the future.

Amendment 21 is again about any other conduct under the Bill being treated,

“as lawful for all purposes”.

Surely this should not be as broad as that. It should be restricted to what is lawful only for the purposes of this Bill.

Amendment 22 concerns the service of monetary penalty notices. Paragraph 4(4)(g) of Schedule 1 allows for an oral hearing before the commissioner, but the amendment would add that the person who applies for and is granted an oral hearing before the commissioner can be legally represented.

Returning to something that I referred to in my opening remarks, Amendment 84 is about restrictions on unauthorised disclosures which as written would prevent the Secretary of State from disclosing the existence and contents of a warrant. The amendment would allow the Secretary of State to disclose the existence and details of a warrant if she felt it was necessary in order for Parliament to carry out its functions. As I mentioned before, I do not see how the argument can be made that the Secretary of State should be involved in the authorising of warrants because she can be held to account, when she is not able, under the terms of the Bill as drafted, even to admit that such a warrant exists.

Baroness Hollins (CB): My Lords, I gave evidence to the Leveson inquiry about the press intrusion suffered by my family and I am going to speak to Amendments 18 and 246 in my name.

In Section 1(3) of the Regulation of Investigatory Powers Act 2000, there was a statutory tort for interception of communications. This has not been recodified in the Bill, presumably because the common law has proven to be a sufficient basis for legal actions against those who hack communications. The effect of subsection (1) in my Amendment 18 is to reinstate that tort. The effect of subsections (2) to (5) in my amendment are then to provide access to justice for victims of phone hacking—the criminal offence recodified in subsection (1). It will enable them to sue, without cost risk to themselves, those newspapers which have invaded their privacy but are refusing to guarantee low-cost arbitration.

I hope that this amendment will encourage the Government to bring into effect law already passed by this House and the House of Commons in Section 40 of the Crime and Courts Act 2013. Amendment 18 replicates Section 40 of that Act in a limited way for claims made by victims of the interception of private communications—phone hacking—because only these claims are in the scope of this Bill. The consequential amendment to Clause 243 would have the effect of automatically commencing the provision immediately after Royal Assent to prevent government non-commencement, as has happened with Section 40. Of course, if the Government commence Section 40 forthwith, this amendment will be withdrawn. If the Government do not, this amendment would have the same effect as that law, at least for victims of phone hacking.

I am very grateful to noble Lords from across the House who are supporting these amendments, and for briefings and drafting assistance from Hacked Off, through which I have been introduced to many other victims of press abuse. I remind noble Lords that Lord Justice Leveson's inquiry found that voluntary newspaper

self-regulation by the Press Complaints Commission had failed appallingly and urged Parliament and the Government to ensure that any new regulator set up by the press would be accredited by an independent recognition panel to assure its independence and effectiveness. The idea was, and Parliament agreed, that the newspapers would have to join such a regulator and not be allowed to set up another version of the PCC. The terms of Section 40 of the Crime and Courts Act were agreed, somewhat reluctantly, by the Government to avoid defeat in both Houses in March 2013.

Section 40 was part of the cross-party agreement which included the royal charter, and was signed by the Prime Minister and the leaders of the Labour and Liberal Democrat parties. As a result of this agreement, the noble Lord, Lord Skidelsky, withdrew his amendment to the Enterprise Bill in March 2013 which would have implemented the Leveson-recommended recognition panel by statute. Ben Bradshaw MP and Simon Hughes MP similarly withdrew their amendments to the Crime and Courts Bill, which would have brought in a stronger and faster version of Section 40.

Section 40 provides protection from court costs in libel, harassment and privacy cases involving newspapers and has three policy aims. The first is to guarantee access to justice for claimants in libel and privacy cases against non-Leveson-regulated newspapers. The second is to protect investigative and public interest journalism at newspapers from court costs and thus from so-called “libel chill”. The third incentivises non-Leveson-regulated newspapers to join a Leveson-style self-regulator which has been accredited as independent and effective.

Section 40 would have to be commenced in the usual way provided in all Bills,

“on a day appointed by the Secretary of State”.

It was agreed, cross-party, that commencement of Section 40 would be well before the exemplary damages provision in Sections 34 to 39. Those sections, on exemplary damages, were to come into effect one year after the royal charter Press Recognition Panel had been set up, which should have been in November last year. This makes Section 40 well overdue. Ministers made multiple explicit commitments on the Floor of both Houses to bring in Section 40—I have a list of 25 such commitments. However, last October the Secretary of State announced at a meeting of newspaper editors, that he was “not minded” to commence the statute. Since then, despite being asked on a number of occasions, the Secretary of State has apparently failed to point to any precedent for such non-commencement of part of an Act of Parliament.

4 pm

The largest part of the press industry has set up the Press Complaints Commission mark 2, called IPSO. By its own admission, it fails to meet the majority of Leveson’s recommendations. There is, however, a Leveson-compliant regulator called Impress, which is seeking recognition by the royal charter-established, independent Press Recognition Panel. Impress is likely to be recognised over the summer. But the absence of Section 40 being brought into effect has severely compromised the ability of Impress to attract members because such members

do not gain the promised costs advantages of joining. The non-commencement of Section 40 means that the three benefits or incentives that I have described will not be available to them. This still means that there will be no access to justice for press abuse victims suing IPSO newspaper members, no cost protection for newspaper members of Impress and no incentive for IPSO members to join Impress or to require IPSO to become accredited.

Non-commencement changes government policy, breaks the cross-party agreement and betrays victims of press abuse. My amendments will not be put to a vote in Committee, but I intend to bring them back on Report unless the Government commence Section 40, as Parliament expected to happen last year. I commend my amendment to the Committee.

Baroness O’Neill of Bengarve (CB): My Lords, I support my noble friend’s amendment. She set out extremely clearly what is at stake and we should remember that at the other end of violations of privacy there are people who have their privacy severely intruded upon. The intruders are not the security services or a public authority but privately owned newspapers.

There is a rumour abroad that in some way Sir Brian Leveson’s recommendations were a challenge, an affront and an abridgment to freedom of the press. That is a mistaken view of the matter. Freedom of the press is not freedom to intrude in other people’s privacy. On the contrary, it is freedom not just within the law—we are talking about changing the law—but where victims have reasonable redress. At present, that is not the case because the heavy costs and risks fall on victims—even a worthy case may fail in the courts—and because, on the other hand, perpetrators have no incentive to apologise or be accurate. There has been a great deal of concern about the extreme inadequacy of the complaints procedures that IPSO has devised. I say that with hesitation because I suspect that they cannot really count as complaints procedures, given that violations are rarely reported adequately and lead to no consequences.

We need this protection for individuals and private lives, and it fits naturally into this Bill.

Lord Lipsey (Lab): My Lords, I support the amendments in the name of the noble Baroness, Lady Hollins. We should remember the agreement signed in 2015 with the full support of Parliament, and its three pillars: there should be a body to regulate complaints against the press that is based on Lord Leveson’s recommendations; it should not be compulsory for the press to sign up to those recommendations, but there should be certain disincentives to not signing up, such as in the treatment of case costs by the courts; and there should be a back-stop in the form of a royal charter for such a body in order to make sure that there was no backsliding.

If we are honest and look at those agreed aims of Parliament, how are we doing? We are doing badly. We have one regulator, Impress, which, as the noble Baroness said, is compliant and marching towards a seal of approval, but has no serious clients. We have another in IPSO, which falls far short—I emphasise “far short”—of the requirements of Leveson. It is dependent

[LORD LIPSEY]

on those who regulate it, with its structure, rules, code, membership and funding all controlled by those it seeks to regulate. It does not provide assured redress for members of the public who have been mistreated, because its arbitration scheme is voluntary. It is confined, like its predecessors, to mediation, not regulation, and its procedures make it hard, if not impossible, to envisage that it would ever impose a big fine on a member. I do not want to impose on the patience of the Committee by going into great detail on any of these. However, I do not blame the chair of IPSO, Alan Moses, who has fought vigorously for a compliant IPSO; I blame the clients.

Having said that, there is still hope. The Government's own Press Recognition Panel has to report to Parliament, perhaps in September, about how things are going, and it is bound to say that they are going nowhere. I invest more hope still in the fact that Sir Joe Pilling, a former head of the Northern Ireland department, has been commissioned by IPSO to look into its workings. We had a good example of the work of former heads of the Northern Ireland department in the report of John Chilcot last week, and I believe that Sir Joe Pilling is another good man who can do a good job.

However, just at this moment when things hang in the balance, the Government have chosen to take their foot off the pedal. It never occurred to Parliament for a single second—I was present during the debates, as were many noble Lords—that the damages sanctions would not be brought into force. To be fair, John Whittingdale has not said that he will not bring them into force, but that he is not currently minded to bring them into force. While that is his position—while it is thought that the organisation will get away without these incentives coming into force—the chances of fundamental change to IPSO that is greatly required are such as to compete adversely with those of a snowball in hell.

The IPSO non-compliant press is basing itself on the argument it has run throughout—that the suggested royal charter is a tool which could lead to parliamentary and political interference with the press. I happen to think that claim is far-fetched, but believes it. However, that is very much a side issue. The central issue is not the royal charter but whether we are to have a Leveson-compliant regulatory body or are we to have IPSO slipping back over time, as its various predecessors did, into complete impotence and ineffectiveness? In the absence of the sanctions envisaged by both Houses and all parties in Parliament, the whole dreadful saga that led to Leveson is destined, in time, to repeat itself, leaving ruined lives in its wake.

Lord Grabiner (Non-Affl): My Lords, I should disclose an interest as having been appointed some years ago now as chairman of the management and standards committee established by News Corp, following the revelation of the phone hacking scandal.

I want to say a few words about Amendment 17 in the name of the noble Lord, Lord Strasburger. I respectfully suggest caution as regards whether such an amendment should be approved by the Committee. In my experience—and I have had quite a lot of it—looking at many of the cases arising out of that

scandal, journalists tend to be not very good at distinguishing between the public interest and matters which they believe will be of interest to the public. There is quite a fundamental distinction, but one which, regrettably, in my experience is not really appreciated by journalists, even the best of them. It may not be a very wise manoeuvre to introduce this defence into the Bill, as it would encourage journalists to hope that they might secure the benefit of that defence and would thereby be justified in conducting essentially voicemail hacking activity. In my view—and experience confirms this—these cases are mostly about trying to get hold of a story, often a sleazy one, which is wholly intrusive into private lives and little or nothing to do with the public interest. I would be inclined to oppose that amendment if it is pursued.

Lord Oates (LD): My Lords, I will not detain the Committee long. I support the amendments in the names of my noble friends Lord Paddick and Lady Hamwee and I will speak briefly to the amendment in the name of the noble Baroness, Lady Hollins.

During the coalition, I was involved in the discussions which led to the royal charter and the other commitments made by all the party leaders and the coalition Government. It is important either that the Government commence the relevant parts of the Act or, as the noble Baroness has indicated, that this amendment should proceed to a Division when the Bill comes back on Report. The Secretary of State's failure to commence the relevant sections of the Act is an utter betrayal of the commitments which were made at the time by all parties, including the Prime Minister. Most importantly, it is an utter betrayal of the many victims of phone hacking and other invasions of privacy who were to be protected by the royal charter and the Act. I hope that the Government will think very carefully about this. Perhaps the Prime Minister, before he leaves office, will stand up and ensure that the commitments which he made personally are implemented.

Baroness Hayter of Kentish Town (Lab): My Lords, I will speak very briefly on Amendment 16, to which I added my name, which has already been dealt with by the noble Lord, Lord Paddick. Should the Government accept the logic of that amendment, they might also want to look at Clause 4(8)(b)(i), which ought also to be amended to include “a private postal service”. Like the noble Lord, Lord Grabiner, I think the amendment in the name of the noble Lord, Lord Strasburger, sounds like a carte blanche for allowing private phone hacking. The noble Lord came up with better words than I could when he spoke about thinking that “public interest” and of “interest to the public” were the same. I would be very alarmed at the idea of allowing phone hacking by private bodies, simply because they thought it might be in the public interest.

The more substantial issue in this group is dealt with in Amendments 18 and 246—I refer to them as the Leveson amendments. The Labour Party has an interest in Amendment 18. Our names are not on it but our former leader, my right honourable friend Ed Miliband, was, along with the current Prime Minister, one of the signatories to the deal which has already been described and which led to amendments being withdrawn in this House and in the Commons. Failing

to implement Parliament's decision on this matter is a shameful disregard for the law on the part of the Government. The Act was passed in good faith and the Government should have implemented it, in accordance with the wishes of this House and the other place. Non-commencement is an unacceptable device to undermine legislation which has been passed.

Amendment 18 seeks gently to encourage the Government to bring into effect the law already passed, and we hope they will agree to do that. I will not rehearse the case that has been made so well already. However, it is remarkable that, as we consider a Bill on investigatory powers that sets out clearly and openly what the state and its agencies can do regarding hacking—the limits, the safeguards and the penalties for exceeding the law—private and unaccountable profit-making bodies such as the press continue to get away with things our spooks rightly would not be able to. The Government should not undermine Parliament by failing to commence Section 40 and we hope that, today, they will show their willingness to act now.

Lord Strasburger: Before the noble Baroness sits down, can I point out that I share entirely her concerns and those of her noble friend about journalists confusing the public interest with the interest of the public? If there were any such amendment along the lines that I suggested, it would have to be drafted so narrowly that that confusion could not exist.

4.15 pm

Lord Keen of Elie: My Lords, I begin with Amendment 15, which raises the issue of creating a new criminal offence. This was initially discussed in the other place at earlier stages of the Bill's passage.

In the other place the Government made it clear that each of the powers in the Bill is already subject to one or more civil penalties or criminal offences for misuse. Part 1 has always contained a number of privacy protections that are central to the Bill, and it now makes clear the existing offences and sanctions that apply in respect of the different powers, such as the offences that relate to the unlawful interception or unlawful obtaining of communications data. In addition to the strict safeguards that are explicit in Part 1 of the Bill, there are a number of other additional offences that exist elsewhere in statute but apply equally to any misuse of the powers.

In response to the concerns raised in the other place and with sympathy for the Intelligence and Security Committee's desire for clarity, the Government listened carefully and tabled amendments that now more explicitly refer to the relevant offences set out in other statutes, such as the Computer Misuse Act 1990, which applies to equipment interference, and the Data Protection Act 1998. These put beyond doubt the penalties that would apply in the event of deliberate wrongdoing by a member of a public authority.

On the basis that there are existing offences that apply to every power in the Bill, the Government are reluctant to introduce a new criminal offence that would lead to confusion, as it would overlap or duplicate those set out elsewhere. Perhaps more simply, it would be unnecessary. The powers in the Bill are varied, each with their own distinct regimes. If we sought, as was

suggested by the noble Lord, Lord Janvrin, to create one offence to fit them all, it would either be too broad and catch too much, or by being too narrow actually miss something and result in a less effective sanction. It could also lead to a lack of legal clarity and potentially hamper the effective enforcement of existing offences. The point is that one size does not always fit all.

There is a further concern. The heads of the three intelligence agencies have written to the Home Secretary and to the ISC outlining their very real concerns about the inadvertent operational impact this proposal may have. The officers working within our intelligence agencies are entirely committed to the mission of keeping the country safe. They are professional and ethical in the way in which they conduct their work. We recognise the concerns raised about potential misuse of investigatory powers, but the creation of a new offence may unnecessarily inhibit agency staff and limit their ability to operate with confidence and at pace against the numerous threats we face.

We do not disagree that intelligence officers who are exercising these most sensitive and intrusive powers should consider their actions carefully before using them, but I have seen no evidence that the dedicated men and women of our security and intelligence agencies give such matters anything less than the most careful consideration. I can quite easily see that Parliament's creating a new offence that appears to be targeted solely and squarely at our intelligence agencies could have a detrimental impact on the confidence, morale and willingness of those persons to carry out the often dangerous yet vital work we ask them to do on our behalf. Moreover, the Government are clear that if anyone in a public authority were to act contrary to their obligations under the Bill, the matter would be taken extremely seriously. The current commissioners already ensure that they investigate and report publicly on the very infrequent cases of errors which involve serious misuse. In appropriate cases disciplinary action may be taken, up to and including dismissal, or civil or criminal liability incurred.

When these points are considered collectively, I hope noble Lords will agree that this puts beyond doubt the severe penalties that would apply in the event of deliberate wrongdoing by a member of a public authority. A new criminal offence is therefore wholly unnecessary and potentially confusing, and would adversely affect the operation of the agencies.

Amendment 16 seeks to extend the criminal offence of unlawful interception to "private" postal services. This is aimed at capturing those services which cater to more specialist clients; for example, companies that provide services to banks or lawyers. The noble Lord, Lord Paddick, referred to DX as an example of such a company. I understand the reason for the amendment and support the principle that the offence should apply to this type of company. However, these companies are already caught by the existing provision. The Bill describes a "public postal service" as one that,

"is offered or provided to the public, or a substantial section of the public".

This includes companies that specialise in providing services to bespoke sectors, such as the legal profession or banks.

[LORD KEEN OF ELIE]

Moving on to Amendment 17, in the name of the noble Lord, Lord Strasburger, Clause 3 sets out the offence of unlawful interception. This is a vital safeguard that relates to one of the most sensitive powers provided for in the Bill. It underpins the protections for privacy that are fundamental to the Bill. I am afraid I cannot accept an amendment which would limit or even undermine that safeguard. The amendment would limit the offence by setting out circumstances in which it would not apply; for example, it provides a public interest defence to the offence. It would not be appropriate to allow someone to intercept the communications of another—without lawful authority—because that person takes the subjective view that it would be in the public interest. I note and agree with the observations of the noble Lord, Lord Grabiner, and the noble Baroness, Lady Hayter, in this regard. It would not be right to reduce this strong safeguard, which exists to protect individuals.

Baroness Hayter of Kentish Town: I should have come in on Amendment 16, but before the Minister moves on, the issue of the private postal service was raised by the Minister's Scottish legal colleagues, who wrote to us. They felt that the definition of "public postal service" did not include DX. I wonder if he will agree to write to me so that the legal position is clarified, since it was good Scottish lawyers who raised the issue.

Lord Keen of Elie: I am obliged to the noble Baroness. It was raised by Scottish colleagues—Scottish colleagues with whom I do not agree—but I am quite happy to undertake to write to her. I should say it was raised by the Scottish Law Society, not the Scottish Bar.

Amendments 18 and 246 were spoken to very clearly by the noble Baronesses, Lady Hollins and Lady O'Neill, and the noble Lords, Lord Lipsey and Lord Oates. While I am quite happy to write on the matter of press regulation and the commencement of Section 40, press regulation is not the purpose of the Bill. I have to make that clear in this context because while I understand the points that are being made, they do not arise directly in the context of these amendments.

Moreover, the relevant amendments are not considered necessary. There is already a criminal offence where unlawful interception takes place on a public or private telecommunications system or a public postal service. There is also a cause of action which applies in a limited set of circumstances, where the criminal offence does not apply. Where there is an allegation that unlawful interception has taken place on behalf of a public authority, a person may seek recourse through the Investigatory Powers Tribunal, which has the power to provide redress, including awarding damages.

Where the conduct relates to an individual who does not belong to a public authority, there are other causes of action which may be applicable. I may have misunderstood the noble Baroness that the tort which currently exists in the Regulation of Investigatory Powers Act 2000—allowing an individual to take action against a person who has the right to control the use or operation of a private telecommunications system and who intercepts a communication on that system—has been added to the Bill by way of Clause 8, and that

happened after the debate on the Bill in the other place. In these circumstances, we are not prepared to accept the amendments.

Turning to Amendments 20 and 21, Clauses 6(2) and 6(3) are important because they provide that where a public authority, or a telecommunications operator, is acting in accordance with a warrant properly obtained under the Bill, or the provisions of Clauses 42 to 50, they can be sure that they are not breaking any other law or required to obtain additional authorisations. This legal certainty is vital for those engaged in the essential work of keeping us safe.

The first amendment seeks to provide that future legislation could make that conduct unlawful for certain purposes. I understand the principle the noble Lords seek to achieve but I do not believe it is necessary. Nothing in the Bill prevents Parliament amending the legislation at a future date to make any of the activity unlawful or provide that some additional authorisation is required.

The second amendment seeks to amend subsection (3). The purpose of this subsection is to make clear that conduct undertaken in accordance with a warrant or which is authorised by any of Clauses 42 to 50 is to be treated as lawful. This is vital in providing companies with reassurance that by complying with a warrant they will not be acting unlawfully in relation to their regulatory obligations or other legislation. The effect of this amendment would be to provide that the conduct is lawful only for the purposes of the Bill. My concern, were we to accept this amendment, would be that we would remove the legal certainty that the companies and agencies rely on to do their job and to keep us safe. We therefore do not accept the amendment.

Amendment 84 relates to exceptions from the duty not to make unauthorised disclosures about warrants. It is absolutely right that the Secretary of State should be accountable to Parliament, even for the most sensitive decisions concerning the most sensitive powers. But when it comes to such matters, which necessarily must remain secret, it is absolutely right that Parliament provides a mechanism for the Secretary of State to be held to account, while at the same time doing nothing to jeopardise national security. That is the very reason for the existence of the Intelligence and Security Committee of Parliament.

To put beyond doubt that the Secretary of State is, and will continue to be, accountable to Parliament through the ISC for decisions relating to warrants, the Government amended Clause 54 and Clause 123 to make clear that the Secretary of State may disclose matters relating to warrants to the ISC. This will allow the ISC to carry out its statutory functions in holding the Government to account, while maintaining our security. It is right for the ISC to carry out this function and it would not be appropriate for disclosure to be made to Parliament as a whole. To do so would breach the long-standing principle of successive Governments to neither confirm nor deny matters relating to intelligence and security and could risk jeopardising our national security. Accordingly, I invite the noble Lords not to press their amendments.

Lord Paddick: Can the Minister clarify whether it is not then an offence for the Secretary of State to disclose the existence or content of a warrant to the ISC? That is not our understanding of the Bill.

Lord Keen of Elie: It may be then that we have to agree to disagree. It is my understanding of the Bill and it is our position that the Secretary of State is entitled to make disclosure to the ISC for the purposes of answering to the ISC in this context.

Amendment 4 agreed.

House resumed.

Article 50

Statement

4.30 pm

The Minister of State, Ministry of Justice (Lord Faulks) (Con): My Lords, I will now repeat a Statement.

“Mr Speaker, the question of how to involve parliamentary discussion around triggering Article 50 has two distinct facets, one legal and the other democratic.

To take the legal considerations first, I am sure everyone will be aware of the debate around whether invoking Article 50 can be done through the royal prerogative, which would not legally require parliamentary approval, or would require an Act of Parliament because it leads, ultimately, to repeal of the European Communities Act 1972.

I will leave the lawyers to their—doubtless—very enjoyable and highly paid disputes, and apart from observing that there are court cases already planned or under way on this issue, so the judge may reach a different view, would simply remark that government lawyers believe it is a royal prerogative issue.

But I hope everyone here will agree that democratic principles should rightly trump legal formalities. The Prime Minister has already said that Parliament will have a role, and it is clearly right that a decision as momentous as this one must be fully debated and discussed in Parliament.

Clearly, the precise format and timing of those debates and discussions will need to be agreed through the normal parliamentary channels. As everyone will understand, I cannot offer any more details today because those discussions have not happened yet. But I will venture a modest prediction in that I strongly doubt they will be confined to a single debate or a single occasion.

There will be many important issues about the timing and the substance of different facets of the negotiations which the Government, the Opposition, the Backbench Business Committee and, I dare say, even you Mr Speaker will feel are important to discussions. But for the details of which topics, on what dates, and the specific wording of the Motions, we shall have to wait and see”.

4.32 pm

Lord Collins of Highbury (Lab): My Lords, I thank the Minister for repeating that Answer to an Urgent Question. Last week, we had two days of debate and a QSD on the referendum outcome in which we sought

to better understand what will happen next. The result of the referendum is of course clear and must be respected, but as we heard in the other place, it is about not if but how the will of the people is delivered. Whatever version of Brexit we eventually end up with, surely Parliament must be totally engaged in the determination.

Last week, the Minister said that it is for the next Prime Minister to decide when to trigger Article 50 and start the formal and legal process of leaving the EU. We now know who, but when will we know how? The question for all noble Lords in this House is about the process of parliamentary engagement before the triggering of Article 50. What is the Minister's estimate for meeting the commitment to consult the devolved powers? It will be a lengthy consultation process, bearing in mind the risks, but will it also involve the wider community, including employers and trade unions? If the principle is that Parliament will be engaged, will the Minister please give us more details about what that precisely means?

Lord Faulks: The noble Lord asks a number of questions, including some that were posed, as he quite rightly said, to my noble friend Lady Anelay last week during the debate. I can of course advance the position somewhat from the answer that she gave last week, in that we know, as the noble Lord said, who the next Prime Minister is—and I understand that she will become the Prime Minister on Wednesday evening. There is at least some progress there, which I am sure will provide some confidence that the process will be decided rather sooner than might have been the position had there been a contested election for the Conservative leadership.

As to his question in respect of the devolved nations, I know that there have already been preliminary discussions with the various parts of the United Kingdom and their representative Assemblies and Parliament. That will continue, and he is quite right that Brexit, however it finally comes into being, should involve all of the United Kingdom and as many parts—and representative parts of the United Kingdom—as possible.

As to the question of Parliament's involvement, I fear I can go no further than my noble friend did. It is the Government's view—as I indicated in the Statement—that the prerogative power does not require parliamentary involvement, but the current Prime Minister made it clear that Parliament will be involved. How and when Parliament will be involved will be a question for the new Prime Minister when she has considered the best way forward.

Baroness Ludford (LD): My Lords, I thank the Minister for his responses. He seemed to make rather a joke of “enjoyable and highly paid” disputes among the lawyers, but surely it is much bigger than that. For a referendum which was fought largely on the issue of parliamentary sovereignty, and on such a major issue as the terms on which this country is supposed to leave the EU, surely it is inconceivable that a decision to trigger Article 50 should not be taken on the basis of a parliamentary decision. After all, Article 50 says that it is up to British constitutional requirements. So this is not about legal formalities; this is fundamentally

[BARONESS LUDFORD]

about democratic principles. We need clarity in a time of huge turbulence. We need to know the evidential basis on which the negotiations will be conducted. We need to know the timing, before and after negotiations, for triggering Article 50. This is about the national interest, not about the convenience of the Conservative Party. I think that we deserve greater respect for Parliament on this decision.

Lord Faulks: There is no lack of respect for Parliament; quite the contrary. As to the comment that I appeared to make a joke, the noble Baroness will appreciate that I was simply reading out the Statement that was in the House of Commons. If noble Lords found it amusing, that was a matter for them, not any intention on my part. As to the question of sovereignty, there is a distinction drawn by the noble Lord, Lord Norton, as the noble Baroness may remember, between parliamentary sovereignty and political sovereignty in the Diceyan sense. The Government took the view that it is plainly desirable that Parliament should be involved. Whether there is a strict requirement in law may be a matter that courts will decide in due course.

Lord Lawson of Blaby (Con): My Lords, I am sure we all wish the present Prime Minister well in the next phase of his interesting career, whatever he may choose that to be. Does my noble friend recall that the present Prime Minister made it absolutely clear that, in his view, Article 50 should be triggered without delay following the referendum result? Surely that is sensible given that delay, and the consequent uncertainty, can only be bad for British business and the British economy. Does he not agree that the same applies to the negotiations themselves? They should not take too long, and they can be speeded up by avoiding the nonsense of seeking some special trade agreement with the European Union, which it is clearly not prepared to give—for reasons I fully understand—although it might string us along. Finally, will he not also agree that the same thing applies to the rest of the paraphernalia of the negotiations, which I have not got time to go into now? We need to concentrate on how we are going to conduct ourselves after the Brexit. That is what is most important.

Lord Faulks: As for the question of speed, of course, once we trigger the Article 50 process, there is a period of two years which follows—

Lord Lawson of Blaby: Not necessarily; up to two years.

Lord Faulks: Up to two years is the maximum, as my noble friend quite rightly says. It will be a matter for those conducting the negotiation as to the appropriate speed, although speed should not be the dominant factor. What should be the dominant factor is the best deal that we can obtain for this country. Simply trying to accelerate the process might, depending on how the negotiations continue, be the enemy of that result. We should leave it to the new Prime Minister and those negotiating with her to obtain the best deal for the United Kingdom.

Lord Morris of Aberavon (Lab): My Lords, in principle, I welcome very much the Minister's statement that political realities trump whatever other legalities. There

is an argument here, and I advanced a certain view on the prerogative in last week's debate on the subject, but I am glad that political realities are now paramount, as they are in the convention of going to war, which was advanced by the late Lord Mayhew and myself as former Attorney-Generals. Indeed, the convention has now been established, in respect of Iraq and Syria, so that matters of such importance can no longer be invoked for the royal prerogative and that the consent of Parliament is required.

Lord Faulks: I noted that the noble and learned Lord made that point during the debate on the EU referendum last week, and of course he is right. I hope that I have reflected what this House and indeed the House of Commons would expect by way of parliamentary involvement. Clearly this House, as well as the House of Commons, has much to offer.

Lord Elystan-Morgan (CB): My Lords, will the Minister be so kind as to confirm that, until such time as Article 50 is triggered, nothing of any legal consequence occurs at all, and it does not lie in the gift of the other 27 members of the European Union to take any action at all to seek to force the British Government into that position?

Lord Faulks: The noble Lord is perfectly correct, as a matter of law. Of course, there will be a question of what is expedient, in terms of the timetable, and whether pressure would be put on the Government. But he is absolutely right on the legal position.

Lord Carlile of Berriew (LD): I thank the noble Lord for being the third Minister now to say very clearly that Parliament will have a role to play in the Article 50 process. Can he confirm that the role that Parliament plays will be a matter for discussion between the usual channels and that we will be able to have a debate on the real merits of what is proposed so that a proper democratic judgment can be made by Parliament on these matters?

Lord Faulks: I cannot, of course, anticipate precisely what the new Prime Minister will decide; if and when she decides on a particular course, I am sure that the way in which parliamentary involvement takes place will include the usual channels.

Prisons: Staff Safety *Statement*

4.42 pm

The Minister of State, Ministry of Justice (Lord Faulks) (Con): My Lords, I now wish to repeat a Statement on prison safety. The Statement is as follows.

"A central duty of the Ministry of Justice is security in our prisons. It is imperative that the dedicated professionals who work in our prisons are kept safe. It is also critical that we safeguard the welfare of those in custody who are in the state's care. It is of profound concern to me that serious assaults against staff in prison have been on the rise recently, particularly in the last 12 months, when there have been 625 incidents.

Those who work in our prisons are idealistic public servants who run the risk of assault and abuse every day but continue in their jobs because they are driven by a noble cause: they want to reform and rehabilitate offenders. Our prisons depend on a network of professionals, including teachers, chaplains, volunteer members of independent monitoring boards and probation officers. But above all our prisons rely on the selfless and courageous work of our prison staff.

I know that members of the Prison Officers' Association want action to be taken to make their work safer. I understand their frustrations and I am determined to help. Violence in prisons has increased over recent years for a number of reasons. The nature of the offenders currently in custody is one factor; younger offenders who have been involved in gang-related activities pose a particular concern. Another factor is the widespread availability of new psychoactive substances, or NPS, synthetically manufactured drugs, which are more difficult to detect than traditional cannabis and opiates. The former Chief Inspector of Prisons has said that new psychoactive substances are now the most serious threat to the safety and security of our jails. NPS consumption and, indeed, violence in prison are also often a consequence of prisoners' boredom, frustration and a lack of faith in the future. All of these factors must be, and are being, faced honestly.

There is no single solution to the problem we face, but we are taking significant steps to reform our prisons. To take account of our changing prison population, more than 2,800 new prison officers have been recruited since January 2015, a net increase of 530. To keep them safer, we are deploying body-worn cameras as additional protection for staff. In May, we outlawed new psychoactive substances and dramatically reduced the opportunities for easy profits to be made from their trade. In June, I allocated an extra £10 million in new funding for prison safety, and the money has gone to the governors of those prisons with the biggest safety challenges.

All these steps will, I believe, help improve safety but there are two more critical points to make. First, I stress that my department's door will be open to staff and their representatives to ensure we work collaboratively together to improve conditions for all in our prisons. Secondly, it is because I have seen for myself how important it is to change our prisons for the better that I have initiated a major reform programme. We will be replacing ageing and ineffective prisons with new establishments designed to foster rehabilitation. We will give governors greater scope to design regimes that encourage purposeful activity and make prisons calmer and more orderly places, and we will ensure that prisoners are more effectively incentivised to turn their lives around. As we press ahead with this reform programme, I am confident we can ensure that our prisons can become what they should always be: safe and secure places of redemption and rehabilitation".

My Lords, that concludes the Statement.

4.47 pm

Lord Beecham (Lab): The Question asked in the House of Commons related to the safety of staff in prisons following walk-outs and protests last week by between 5,000 and 6,000 officers protesting about the

rising tide of violence threatening both staff and prisoners. Assaults on prison officers reached 5,500 last year, an increase of 36%, while last year there were 32,000 incidents of self-harm, up by 74% since 2010, a shockingly high number given that the prison population is around 85,000. There were 100 suicides in 2015-16.

Is it not clear that our prisons are both chronically overcrowded and dangerously understaffed? The Howard League for Penal Reform has chronicled the deteriorating position in a worrying number of prisons. In Lewes, for example, 50% of its 640 inmates were being locked in their cells during the working day, some of them for as much as 23 hours a day. In February, staff at Wetherby young offender institution refused to let 300 prisoners out of their cells for a day because of rising violence. We recently had a Statement on the dreadful conditions in Wandsworth prison in which assurances, albeit of a rather vague character, were given about rectifying the situation revealed in a television programme. The Lord Chancellor talks a good game about improving conditions and replacing old and unsuitable prisons, but then he is the Lord Chancellor who set out on the road to his political Damascus in support of Boris Johnson, only to recant and discover at the very last minute that if Boris was the answer he had been asking the wrong question for weeks.

When will the Lord Chancellor, or whoever succeeds him—I rather hope it might be the noble Lord, Lord Faulks—recognise that the crisis in our prisons cannot sensibly be tackled without a significant reduction in the number of prisoners and a significant increase in the number of properly trained staff with adequate support in relation to issues of mental health? Will he now revisit his decision to spend just £10 million to increase safety, approximating to around all of £125 per head of the prison population, which is not of course, a static number?

Is it not time for another high-powered review of the state of the service, along the lines of the inquiry into Strangeways conducted by the noble and learned Lord, Lord Woolf, 26 years ago, but extended to the entire custodial system?

Lord Faulks: I am grateful to the noble Lord for his thorough criticism and the questions that he raises about the state of our prisons and the safety of staff and indeed of other prisoners. We freely acknowledge that there is a problem and that we have to do something about it. It is not a problem that is easily solved and, as the Statement indicated, there are a number of factors. There is an increase in the number of violent offenders in our prisons. Substantial problems have been caused as a result of the use of psychoactive substances. It is clearly far less than desirable that prisoners should be locked in their cells for long periods and not engaged in purposeful activity. The Secretary of State clearly wants to involve as many people as possible and as many organisations as possible in trying to improve the situation. That was why he invited the BBC into Wormwood Scrubs to see the conditions there.

There has been new funding of £10 million for prison safety, allocated as appropriate, and that will be supplemented by £2.9 million from existing budgets so that a significant number of governors—those facing the greatest challenges—will have an opportunity to

[LORD FAULKS]

improve safety levels. There is also £1.3 billion, which the Secretary of State secured from the Chancellor of the Exchequer, to modernise the prison estate. That will be a long-term project, but one which the Secretary of State is most anxious to help with.

Lord Dholakia (LD): My Lords, our prisons are overcrowded and understaffed, with the result that prisons are now less safe and less secure than ever before. Does the Minister accept that the root cause of the problem, as has just been mentioned, is the unacceptably high level of the prison population? This makes some of our prisons almost unmanageable. Now that Mr Gove has fewer things on his mind, could we have clarity about how he intends to reduce the numbers so that the prisons' objective of rehabilitation is met?

Lord Faulks: The noble Lord, whose interest in these matters is well understood and appreciated by the House, points to the prison population. Of course, the number of people in prison is a result of decisions by judges, passing sentences that they consider appropriate for those particular offences. In my experience, judges do not send an offender to prison unless no other appropriate means of dealing with the offender can be found.

The number of people in prison clearly presents challenges to the staff. But there are other factors, as I have already indicated, which can cause this escalation of violence. We have a widespread strategy under the violence reduction project to deal with this, including the use of body-worn cameras, a violence diagnostic tool and a number of other different efforts to try to identify where pressure points are in terms of violence and how best to combat them.

Viscount Hailsham (Con): My Lords, I again emphasise the importance of meaningful out-of-cell activity and the provision of appropriate courses so that prisoners who are there for indeterminate sentences can satisfy the criteria for their release.

Lord Faulks: My noble friend makes a good point. Indeed, the Secretary of State has placed and will place increasing emphasis on education, as well as courses that enable prisoners to acquire practical skills which will be of particular help outside. We very much welcome the involvement of a number of employers employing prisoners while they are still in prison, which then leads to their employment afterwards. But my noble friend is quite right.

Lord Ramsbotham (CB): My Lords, I refer to one sentence in the Statement on the number of staff being recruited. It says that 2,800 new officers have been recruited and mentions a net increase of 530. I ask the Minister, 530 from what? If it is an increase of only 530, this shows that the number of staff must have been run down disastrously before 2015, because this is a negligible increase.

Lord Faulks: I cannot, from the Dispatch Box, give the noble Lord a detailed account of why people left the Prison Service. Of course, he is right that that indicates that quite a number of them did leave, perhaps

for reasons of retirement or simply a change in their job satisfaction. But I will endeavour to give him a more detailed analysis of those numbers.

Lord Beith (LD): The Minister has recognised that the present numbers are a barrier to the Government achieving the rehabilitation objectives. However, will they not remain high if we continue to regard the length of a prison sentence as the only measure of the seriousness of an offence and until we put sufficient resources into alternative punishments?

Lord Faulks: With great respect to the noble Lord, that is a little unfair. The judges will of course determine the length of the sentence by reference to a whole host of factors: the seriousness of the offence, the history of the offender, and the best way both to protect society but also to rehabilitate. I know that judges always consider alternatives and that sentencing prisoners to prison will only be the last resort; very often judges will say, "I will sentence you to the least possible sentence that I am permitted". Therefore the judges do not, as it were, oversentence.

Baroness Butler-Sloss (CB): My Lords, I happen to know someone who is in prison at the moment, so I will pick up on, as the Minister put it, the frustration of being locked in a cell for 23 hours a day. What will be done about that?

Lord Faulks: Clearly, the prison governor at each prison will have to focus his or her attention on that. As the noble and learned Baroness will know, more autonomy will be given to prison governors, and one of the main objectives of that is to ensure that, so far as possible, prisoners have a greater time out of their cell engaged in purposeful activity or on courses or otherwise, not simply locked up in their cell.

Lord Triesman (Lab): My Lords, some years ago I had the opportunity to serve on the Home Office prison education committee, and I was always impressed by the content and variety of the courses on offer. However, it was said at the time that it was very difficult to get people to the courses because there were too few prison staff to get them there, and because they could not guarantee the security of the teachers, who largely came in from the further education sector, given that the nature of the crimes for which people were imprisoned included more violent crimes. I hope the Minister will forgive me if I say that, although that was many years ago, essentially we are being provided with the same account now. It does not seem that we have moved on enormously. Can he describe some of the initiatives that will reflect the intention to increase the amount of prison education and the rehabilitation that goes with it?

Lord Faulks: The noble Lord is of course right that the challenges are not entirely new and that the logistics of ensuring that prisoners are taken to courses and to facilities where they can obtain education will always be a challenge, particularly with a large prison population. There was a report by Dame Sally Coates into the

education of prisoners. That they should be given education is clearly very much at the heart of the advantage we believe can be obtained by rehabilitation, and it will be up to prison governors in a particular prison to ensure that this happens. They will be judged by the delivery of this education. By giving greater autonomy to prison governors it will be much less easy for them simply to say, "This is all too difficult".

Lord Trefgarne (Con): My Lords, is my noble friend satisfied—

Lord Taylor of Holbeach (Con): My Lords, we should move on to the next Statement.

NATO Warsaw Summit *Statement*

4.58 pm

The Minister of State, Ministry of Defence (Earl Howe) (Con): My Lords, with the leave of the House, I shall now repeat a Statement made earlier today by my right honourable friend the Secretary of State for Defence on the NATO Warsaw summit. The Statement is as follows.

"With permission, Mr Speaker, I would like to make a statement on the NATO summit held in Warsaw last Friday and Saturday. The 2015 strategic defence and security review reaffirmed NATO's position at the heart of UK defence and security. The UK remains a leader within the alliance, with the second largest defence budget after the US and the largest in Europe. The range of challenges the alliance faces, including Daesh, migration and Russian belligerence, meant that this summit was of huge importance for Euro-Atlantic security. The overwhelming message from Warsaw was one of strength and unity. We believe the summit has delivered an alliance that is more capable and projects stability beyond our borders based on institutional adaptation and stronger partnerships, which collectively protect our citizens and defend Europe.

I will address each of these issues briefly. At the Wales summit in 2014, NATO agreed its Readiness Action Plan to ensure that the alliance can respond swiftly and strongly to new challenges. The UK is at the forefront of these efforts: our Typhoons are currently conducting Baltic air policing missions from Estonia; our ships are making a significant contribution to NATO's naval forces; and we will lead NATO's quick-reaction "spearhead force", the Very High Readiness Joint Task Force in 2017, with 3,000 UK ground troops ready to deploy within days.

To demonstrate allies' solidarity, determination, and the ability to act in response to any aggression, Warsaw builds on the Wales commitments by delivering enhanced forward presence in Estonia, Latvia, Lithuania, and Poland, and I am proud that the UK is taking a leading role in this. Canada, Germany, the United States and the UK will each deliver a framework battalion. These will be defensive in nature but combat capable. The UK force will be located in Estonia with two UK companies, a headquarters element and equipment, including armoured vehicles, Javelin anti-tank guided missiles and mortars. Denmark and France have said they will provide troops to the UK battalion.

In addition, we will also deploy a company group to Poland. These actions are in response to actions by Russia; NATO's approach is based on balancing dialogue and strong defence. Dialogue is right where it is in our interests to deliver hard messages, promote transparency, and build understanding to reduce risks of miscalculation.

Credible alliance defence and deterrence depends on NATO's ability to adapt to 21st-century threats through nuclear and conventional forces. The summit recognised the important contribution the UK's independent nuclear deterrent makes to the overall security of the alliance, so I am pleased that the House will have the opportunity to vote to endorse its renewal next Monday. Initiatives on cyber and hybrid warfare, among others, will give the alliance the capabilities it needs to respond quickly and effectively. However, modern capabilities require appropriate funding, and here good progress has been made against the defence investment pledge—a key commitment from Wales. Following this Government's decision to spend 2% of GDP on defence and increase the defence budget in each year of this Parliament, cuts to defence spending across the alliance have halted, with 20 allies now increasing defence spending, and eight committing in national plans to reaching the 2%.

Delivering the best for our country means maximising the talent in our Armed Forces. The Prime Minister has accepted the recommendation of the Chief of the General Staff to open up ground close combat roles to women. NATO's role in preventing conflict and tackling problems at source has become ever more important, as threats to alliance security grow out of instability in fragile or weak states. NATO's Defence Capacity Building Initiative, first announced in Wales, is a powerful tool in projecting stability and the UK continues to provide significant support to Georgia, Iraq, and Jordan. Building on this, allies agreed that NATO will conduct training and capacity-building inside Iraq. In Afghanistan, local forces are taking responsibility for providing security across their country. Our long-term commitment, as part of NATO's Resolute Support Mission, is crucial; in 2017 we will increase our current troop contribution of 450 by 10%, to help build the capacity of the Afghan security institutions.

The summit also reiterated its support for our European partners, including Ukraine and Georgia. I was delighted that Montenegro attended the summit as an observer—a clear sign that NATO's "open door policy" is helping to spread stability. However, the scale of Europe's security challenges means NATO must work with a range of partners to counter them. This summit sent a strong message of NATO's willingness to build strong relationships with other international institutions. I welcome the joint declaration by the NATO Secretary-General and the Presidents of the European Council and the European Commission on NATO-EU co-operation. We continue to support a closer relationship between NATO and the EU to avoid unnecessary duplication.

Our strong message to our allies and partners was that the result of the referendum on EU membership will have no impact on any of the UK's NATO commitments and it remains the cornerstone of our defence policy. The UK will be leaving the EU, but we

[EARL HOWE]

are not reducing our commitment to European security; we are not turning our back on Europe or the rest of the world.

HMS “Mersey” will deploy to the Aegean from late July to continue our support to NATO’s efforts to counter illegal migration in the Aegean. We will also provide a second ship, RFA “Mounts Bay” to the EU’s Operation Sophia in the central Mediterranean. NATO has agreed in principle to provide surveillance and reconnaissance support to this operation. It is a UK priority for NATO to do more against Daesh. NATO AWACS will now support the counter-Daesh coalition. In addition to our own assistance to the GNA, we will consider what NATO can do in Libya; for example, through capacity-building of the Libyan coastguard.

It is our firm view that the Warsaw summit successfully demonstrated that the alliance has the capability, will and intent to respond to the range of threats and issues that it may face. It also showed that Britain is stepping up its leading role in the alliance by deploying more forces to NATO’s eastern borders, to NATO’s support to Afghanistan and in countering illegal migration. With that strong UK leadership, Warsaw will be remembered for the concrete steps that were taken to deliver a strong and unified alliance that remains the cornerstone of European defence and security. I commend this Statement to the House”.

My Lords, that concludes the Statement, but, as it made clear, Motions will be put to the House of Commons on Monday next week. I hope that it is helpful at this point for me to inform your Lordships that the usual channels have agreed to set aside time on Wednesday this week for a debate on a Take Note Motion so that the views of this House can inform the debate in another place on the nuclear deterrent. The speakers list for the debate has already been opened by the Government Whips’ Office.

5.07 pm

Lord Touthig (Lab): I thank the Minister for repeating the Statement on a summit that was of considerable significance. Paragraph 40 of the summit communiqué makes it clear that NATO is determined to show its commitment to our partners in the Baltic states and Poland by establishing an enhanced forward presence to demonstrate unambiguously as part of our overall posture,

“allies’ solidarity, determination, and the ability to act”, by triggering an immediate allied response to aggression.

I was at NATO headquarters at the end of May and found that our partner representatives from the Baltic states and Poland who met me and my colleagues wanted to be reassured of our support. Every desire was expressed by the people whom I met to maintain and encourage the friendliest relations with their neighbour Russia, but there was an underlying nervous tension following the annexation of Crimea and the incursions in Ukraine. They also expressed worries about the potential Russian build-up in and around the enclave of Kaliningrad.

The Warsaw summit agreed that British forces will from next year be part of an enhanced forward presence with 500 troops in Estonia and 150 in Poland. We are also committed to training 4,000 Ukrainian troops by

March next year. There will be consequences as a result of NATO taking this decision and we must be prepared for that.

The summit took place in Warsaw where 25 years ago almost to the day the Warsaw Pact was officially dissolved. The Russians of course will clearly be sensitive, very sensitive indeed, about NATO’s decision. What assessment have the Government made of the expected Russian response? My NATO briefings highlighted the importance of the NATO-Russia Council which was established in 2002 in Rome. Following Russian military intervention in Ukraine, NATO suspended all practical co-operation with Russia and the council ceased to meet, although channels of communication were still maintained. It was agreed only in early April this year to convene a formal meeting of the council and that meeting, the first in two years, took place on 20 April. I understand that the council will meet again in two days’ time, on Wednesday. Can the Minister confirm that NATO’s decision will be discussed at that meeting?

As last weekend’s summit took place, we in Britain were digesting the Chilcot report on the Iraq war, which we will be debating tomorrow. Sir John Chilcot’s report makes much about the process of taking the decision to commit to war in Iraq; paragraph 410 of the Executive Summary states that,

“a cabinet committee or a more structured process might have identified some of the wider implications and risks associated with the deployment of military forces to Iraq”.

Can the noble Earl say whether that did in fact happen before Britain decided to commit troops to this NATO deployment? My noble friend Lady Smith of Basildon, in response to the Chilcot Statement last week, suggested the creation of an ad hoc Cabinet committee to consider matters in such circumstances in the future. Will the Government consider this idea?

Now that we are heading for exit from the European Union, will Britain continue to oppose an idea favoured by some in France and Germany of the creation of a European army? Will we use our leading role in NATO to resist this notion? There is concern in Germany, which I certainly found in my meetings with representatives of other NATO partners, about our decision to withdraw our troops from Germany. Do we still intend to press ahead with this? Can the Minister also say something about the programme of training activity planned for our forces deployed in Estonia and Poland? I am aware of concern at all levels that our deployed forces could be cooped up in a barracks deep in a forest with nothing much to do.

The Statement reaffirms that the Government are accepting advice from the Chief of the General Staff that women are capable of engaging in close combat roles, and we welcome that. NATO’s defence capacity-building role, first enunciated at the Wales summit, continues to provide significant support to Georgia, Iraq and Jordan. The deployment of HMS “Mersey” in July to the Aegean will underpin our support for NATO’s efforts to counter illegal migration. All these decisions are welcome and underline Britain’s continued commitment to NATO as the lasting bulwark of our defence. As the party which helped to create NATO when in government in 1949, we on these Benches are

proud of an organisation which is a defender of our freedoms and way of life, and in an uncertain world a source of security for many around the globe.

Baroness Smith of Newnham (LD): My Lords, noble Lords on these Benches welcome the Statement and I echo some of the words of the noble Lord, Lord Touhig. We welcome the commitments made to the Baltic states and to Poland, but would ask the Government what thought has been given to the situation with Russia and its possible reactions. Clearly the commitment to NATO is welcome, especially at a time of such global and regional geopolitical uncertainties, and therefore the commitment to our colleagues in the Baltic states and Poland, as well as an increased role in countering illegal migration, are both important.

The Statement by the Prime Minister and the communiqué refer to the UK's nuclear deterrent and the fact that the UK's and France's nuclear deterrents have a deterrent role of their own. I do not wish to pre-empt the debate we will have on Wednesday prior to the Motion to be debated next Monday in the other place, but can the noble Earl give us some reassurance regarding defence expenditure? Assuming a decision is taken to approve a successor on Monday, that will be a considerable defence commitment. Both the NATO summit and the Prime Minister's Statement recommit us to spending 2% of GDP on defence, a commitment made at the Wales summit in 2014 and affirmed by the Government after the general election last year. However, if there is a recession, either as a result of the decision taken on 23 June to leave the European Union or the actual fact of Brexit, 2% of a smaller GDP would presumably mean less money going to defence. Has money been set aside and are there contingencies to ensure that, if there were a recession, we would still be able to meet our commitments on F35, the aircraft carriers and a successor, if that decision is taken?

Further to that, while it is clearly welcome that the Government do not envisage any reduction in the UK's commitment to European security in the light of the decision to leave the European Union, how will that commitment be played out? Will it be solely through the multilateral framework of NATO or might the Government consider—I realise that the Minister may not be able to give us an answer pending Wednesday evening—continuing links with the common security and defence policy of the European Union? How far does the UK envisage ongoing links with the EU and how far does it envisage bilateral links, particularly with France but also with the Netherlands? Clearly, the ongoing British commitment to European security is important, but an indication of how we envisage that going forward would be welcome.

Earl Howe: I am grateful to the noble Lord, Lord Touhig, and to the noble Baroness, Lady Smith, for their comments and questions. They both asked about our approach towards Russia and the likely Russian reaction to the communiqué. Our objectives in respect of Russia are clearly to protect UK interests and those of our allies and partners; to uphold the rules-based international order in the face of Russian challenges; to engage with Russia on global security issues and

key areas of shared interests; to promote our values, including the rule of law and human rights; and to build stronger links between the British and Russian people more widely. I commend the communiqué to noble Lords. It sets out very clearly why NATO has felt it necessary to commit to an enhanced forward presence. This is in the face of Russian actions over the past two or three years that fly in the face of the agreements and understandings that we have had with them and that obtain internationally. NATO collectively and the allies individually are clear that the alliance does not seek confrontation and poses no threat to Russia—those are its words—but will not compromise on the principles on which NATO and security in Europe and north America rest.

The NATO-Russia council meeting this Wednesday will discuss a range of issues. Its timing was deliberately set post the summit to continue the dialogue from a position of strength, given the decisions taken at Warsaw.

The noble Lord, Lord Touhig, asked a number of questions in the wake of the Chilcot report, in particular, whether a Cabinet Committee had considered current and proposed NATO deployments. The National Security Council considered the UK's approach to Warsaw and our ongoing commitment to NATO activities. Because the National Security Council is a sub-committee of the Cabinet, it is rather better than an ad hoc committee, because it is a permanent standing committee that, as I explained last week, meets every week and constantly reviews those issues which bear upon the UK's security.

The noble Lord asked about the long-running issue of an EU army. I take this opportunity to emphasise that, while the UK remains a full member of the EU until such time as we leave it, UK forces will not be part of an EU army. In no circumstances could Brussels, in any case, direct deployment of UK forces without the specific agreement of the UK Government. That agreement will not be forthcoming. Defence is entirely a national competence and if an EU army were to be proposed, it would be subject to national veto.

The noble Lord also asked about draw-down of UK forces from Germany. I can confirm that it continues and will continue as planned.

The noble Baroness, Lady Smith, asked about defence expenditure. She is right to say that the 2% commitment relates to the size of our GDP. Were that to diminish, it would have a bearing on our budget but I remind her that aligned with and joined to that 2% commitment was another commitment that the defence budget would increase year by year in real terms by 0.5%. We have committed to spend £178 billion on equipment over the next 10 years, and that commitment stands.

The noble Baroness also asked about the relationship between NATO and the EU in the defence arena. As she would expect, in the medium term we will maintain our existing commitments to common security and defence operations and missions, and consider further requests from the EU. We will continue to lead the EU battlegroup from July to December this year. Whatever happens, the Government remain firmly committed to leading the way in working with the international community to tackle the migration crisis. In fact, the Prime Minister recently announced the deployment of RFA "Mounts Bay" to the central Mediterranean to

[EARL HOWE]

help stem the flow of weapons to terrorists, particularly Daesh, in Libya. This is in addition to HMS “Enterprise”, which is already on task. No one can be in any doubt that we are committed to EU operations or about the strength of that commitment.

I did not answer the noble Lord, Lord Touhig, on what exactly our troops will be doing. First, as regards the proposals for Estonia, our forces are expected to participate in a demanding training and exercise programme alongside Estonian regular reservists and other allied forces based in the region. The deployment will also provide new training opportunities in heavily wooded areas and colder climates. The battalion will be maintained at a high state of readiness so that it is able to react immediately to a crisis or incident. Far from our Armed Forces personnel being confined to barracks, I hope that gives a flavour of the action-oriented agenda facing them.

In Poland, where, as the noble Lord is well aware, building a strong relationship is very much a priority for us, the deployment of the company group will enable UK and Polish forces to train, fight alongside each other, foster a greater understanding of their respective capabilities of the UK and Poland’s and increase interoperability, which the noble Lord will recognise is important. We will also work alongside the forces of other NATO allies in Poland, including the United States, which will provide a NATO-enhanced forward presence framework battalion in Poland. This deployment will also provide capability enhancement opportunities under the UK-US German-led TACET initiative. Many advantages therefore flow from this announcement.

5.24 pm

Lord Howell of Guildford (Con): Does my noble friend accept that this evidence of renewed NATO determination is welcome indeed and has little or nothing to do with our relations under various EU treaties, and whether we are in or out of them? However, does he also accept that in the 21st century, in addition to armaments and deployment build-up, one needs to win not merely the battles but the narrative? In this case the narrative is very much to get home to the Russian people that they would do far better in co-operation with the democracies and global networks which are now shaping our future all over the world than in a constant state of hostility and pointless belligerence. Surely that is the message to get home. I very much welcome the additional comments that these positive points will be put strongly to the Russians in the NATO-Russia Council, and hope they will realise that they could have better leadership and a better life if they follow that latter course.

Earl Howe: My noble friend is absolutely right. The meeting on 13 July this week is the continuation of political dialogue as agreed by NATO Heads of State and Government. At the same time, we are clear that there will be no return to business as usual until Russia again respects international law. Engagement through dialogue is important. It is right that we have that dialogue. It is in our interests to engage on subjects in a hard-headed, clear-sighted way, but that does not

mean a return to the kind of co-operation that existed before Russia’s illegal annexation of the Crimea and the destabilising activity in which it has been engaged in Ukraine.

Lord Kerr of Kinlochard (CB): Given our responsibilities under the Budapest Memorandum, what advice did our representative at the summit give to President Poroshenko of Ukraine? Were there contacts with the Turkish Government in which it became possible to make clear that, despite the insults to Turkey which emerged in the referendum campaign, including from a Ministry of Defence Minister, we still regard it as an extremely valuable ally?

Earl Howe: My Lords, on the latter point, we have most certainly taken every opportunity to reassure Turkey that it is a very valued member of the NATO alliance, and it is important that we continue to do that. NATO has been united in support for Ukraine throughout the crisis period. Meetings of the NATO-Ukraine Commission, most recently at Warsaw, provide political support. Capability and capacity support is delivered through Ukraine’s participation in NATO exercises and through dedicated NATO trust funds, and the UK is co-leading one of these trust funds. We like to think—and I believe it is right to claim—that we have a leading role. We have consistently argued for a strong response to Russia’s actions and continue to be fully supportive of the Normandy format process.

Lord West of Spithead (Lab): My Lords, this conference has been very good news, particularly the nuclear aspects, not least because of Putin’s doctrine of de-escalation—which, extraordinarily, in fact means using nuclear weapons. The Government are to be congratulated on, at long last, agreeing to have a vote in the other place on replacing the four Vanguard class submarines. My question is not to do with money, but I have to say that, although one talks the talk, there is insufficient money in defence. The House of Commons Defence Committee has spotted that. The desperate shortage of money is shown not least in the lack in the number of ships. Should there be an escalation for another reason, none of the ships we are deploying to the Med are capable of looking after themselves, because they are not those types of ships. However, that is not my question. My question relates to Ukraine. It is absolutely right that we are reinforcing the Baltics and Poland—they are part of NATO; that is the right sort of message—but we must not delude ourselves: the Russians are terrified of NATO. We know that they are wrong to be terrified, but that does not mean that that is not their perception. We have sent people into Ukraine. Was there discussion about NATO being involved in Ukraine? If there was, I believe that it would be very destabilising.

Earl Howe: My Lords, there is no question of NATO ground troops being sent to Ukraine. On the other hand, the NATO Council was very clear that there is a role for NATO alliance members to support Ukraine in training in particular, and that is a major commitment of ours. Clearly, we would not wish to do anything that would serve to escalate the tensions that exist in Ukraine. We are encouraging both Ukraine

and Russia to support the Minsk process and adhere to the commitments given at Minsk. Nothing that would escalate the violence that we have seen in eastern Ukraine should be contemplated.

Lord Dannatt (CB): My Lords, may I take the Minister back to the issue of withdrawal from Germany, raised earlier by the noble Lord, Lord Touhig? The principle of forward deployment for practical and demonstrative purposes has been well illustrated by what is going to happen in Estonia and other areas of the Baltic. However, although I have been supportive for many years of withdrawing the Army from Germany, is there not a case for looking again at leaving one of our armoured infantry brigades in the well-found garrison of Paderborn and Sennelager, and saving ourselves the capital expenditure of building a third armoured infantry garrison around Salisbury Plain? This would also demonstrate, in the post-Brexit environment we find ourselves in, that we are willing to remain physically present in Germany with about 2,500 of our troops. I think it is worth looking at again, and I urge the Minister to take that thought back to the Ministry of Defence and think about it again.

Earl Howe: My Lords, I am grateful to the noble Lord. I will gladly do that. In fact, I can tell him that these matters are under continual review, as he would expect. There is undoubtedly a value to the idea of British troops remaining in Germany to a certain level, able to train alongside our German partners. However, I am not in a position at the moment to give him definite news on that front. What I can say, though, is that the bulk of UK forces will be withdrawn as planned. We believe that that is the right thing to do at this juncture, but we do not rule out keeping a contingent in Germany for the kinds of purposes that the noble Lord suggests.

Lord Vinson (Con): My Lords, the noble Lord, Lord West, remarked that our defence expenditure is extremely strapped for cash. In view of this, and the fact that the efforts we are putting into both Finland and Poland are a substantial aid to the economies and welfare of those countries, would it not be sensible that at least part of that expenditure should be debited against our overseas aid bill, which is now running at the enormous sum of 0.7% of GNP?

Earl Howe: My noble friend makes a very creative suggestion about government accounting. I will ensure that his point is logged in the appropriate quarter.

Lord Robathan (Con): My Lords, given the situation with Russia, is my noble friend aware whether relations between Greece and Russia were discussed, particularly given the reports—which I understand to be true—that Greece has recently signed an armaments deal with Russia whereby it will be making Kalashnikovs in one place or another?

Earl Howe: I am afraid I am not aware of discussions specifically relating to the relationship between Greece and Russia. If I am able to find out particulars on that theme, I will gladly write to my noble friend.

Lord Tugendhat (Con): My Lords, the Minister has announced a very important commitment to the Baltic states. Can he assure the House that the Governments of all three of these states are behaving entirely as we would wish in respect of their Russian-speaking citizens and people of Russian nationality living within those states? Can he be sure that they are not giving any justifiable cause or excuse to Mr Putin to act, and that they are behaving in a way that is completely consistent with the principles of the European Union?

Earl Howe: My Lords, there is a delicate balance to be struck here. We do not wish to provoke Russia into responding inappropriately to these deployments. On the other hand, we do ourselves need to react to the actions of Russia, as was laid out at the 2014 Wales summit, which delivered an effective and united response to Russia's illegal annexation of the Crimea and its actions in eastern Ukraine. The measures taken at the summit will, we believe, provide further reassurance and deter Russian aggression. They are proportionate and defensive in nature. In saying those things, I recognise my noble friend's appropriate concern that we ensure that the Baltic states in particular are being measured and reasonable towards the Russian-speaking element of their populations. This move is not designed to provoke those people any more than it is to provoke Russia itself.

Investigatory Powers Bill

Committee (1st Day) (Continued)

5.36 pm

Clause 1, as amended, agreed.

Clause 2: General duties in relation to privacy

Amendment 5

Moved by **Baroness Hamwee**

5: Clause 2, page 2, line 35, leave out from “authority” to end of line 46 and insert “takes any decision or undertakes any action under this Act.”

Baroness Hamwee (LD): My Lords, we come now to the general duties in relation to privacy, which at least two noble Lords have referred to as the backbone of the Bill. I acknowledge, from these Benches, how much progress has been made with this issue and how welcome Clause 2 is. However, that does not deter us from being ambitious to pursue it to what we might see as perfection.

Amendment 5 would provide that any decision or action undertaken under the Act by a public authority should be subject to Clause 2. If it is not to apply, the Government should explain and justify that non-application to the Committee. I appreciate that this clause has a rather different genesis from most of the Bill. I hope it does not sound arrogant—it is certainly not meant to—if I say that it is an exceptionally well and helpfully drafted Bill. It has more definitions in it, more easily found, than any other Bill that I can recall. Most of it is extremely clear, but I have a problem with some of the content and drafting of this clause. This

[BARONESS HAMWEE]

may be because it has come together through a different route, because of the input from debate in the Commons and outside.

If amended by Amendment 5, Clause 2(1) would not be specific about where the duty applies. I ought to give an example, although this might not be a very good one because a telecoms operator is not a public authority. It occurred to me that although an operator would have a duty to comply with a notice, under Clause 62, they should not have to make the assessment in the way the clause requires. Even if that is a bad example, we could be told that Clause 2(3) would apply to that and that it is not relevant. I will come back to that, but one should say so. Clause 63, the next one on from the one that I picked as an example, is about the filter. I struggle to see whether that comes within Clause 2(1)(d). It should. My overall question is whether Clause 2 is as stiff a backbone as it can be.

Amendments 6 and 8 deal with a provision to which the noble Lord, Lord Janvrin, has referred, which is whether what is sought to be achieved could reasonably be done by “other less intrusive means”. My amendments would make that provision stand alone, not subject to the discretionary “have regard to” which introduces Clause 2(2). This is particularly important in connection to privileged communications, and indeed it came up in a meeting with the noble and learned Lord, Lord Keen, on Thursday, which, when we were assured in the context of legally privileged material that if a less intrusive means could be used it would be, was very helpful. This was what made me think about “have regard to”. My noble friend Lord Lester used the term “rubbery” of “have regard to”. In previous incarnations of this reference to “less intrusive means” there has been an absolute rather than a discretionary requirement, so I would be grateful for help on this, about which I feel particularly strongly.

Amendments 7, 10 and 11 are about the hierarchy, if one can say that there is a hierarchy within Clause 2, of which considerations are subject to what. Those taking decisions might welcome having some scope for consideration, but if the clause is circular—there have been times when I have thought that it is—it is our job to straighten it out. Clause 2(2) is subject to Clause 2(3). Clause 2(3)(a) says that the duties apply in so far as,

“they are relevant in the particular context”.

I cannot quite decide if those words are necessary. If a duty is not relevant, does one have to say so? Also, in particular, does “relevant” introduce an element of judgment, which would weaken the application of this?

Clause 2(3)(b) says that the duties “are subject to” particular considerations listed in Clause 2(4). Clause 2(4) takes precedence over Clause 2(2)—or does it? In addition Clause 2(4) suggests that there are considerations that are not listed. Given the importance of this clause I think that this should be addressed. To the extent that noble Lords have managed to follow that—I am not entirely sure that I did throughout—I hope that I have at least demonstrated that we think that there are potential problems in the construction of the clause.

Amendments 9 and 13 would make the Human Rights Act overarching. I might be told that because it falls within Clause 2(3)(b), to which Clause 2(2) is subject, it is not necessary to separate it out. If that is so, it reinforces the arguments that I have just made on the previous clutch of amendments. We might be told that not everything in the legislation is absolute and that certain rights are qualified, but my amendment would not affect that. I am really after clarity and certainty. The Human Rights Act is so important in this context that it should be expressed as applying in its own terms and not be demoted to being a particular consideration.

5.45 pm

Amendment 12 is on “economic well-being”, which has been qualified elsewhere in the Bill to provide that it applies,

“so far as the interests of economic well-being are relevant to the interests of national security”.

I wondered about the significance of there being no such qualification at this point, particularly as the reference to national security is at the top of the tree in Clause 2(4)(a), so it is obviously extremely important—I do not deny the importance of national security. In terms of the drafting of the clause, does it override—meaning reduce or nullify—qualifications elsewhere? I would be grateful for help on that.

Amendment 14 would provide for bringing into force regulations to establish the Privacy and Civil Liberties Board, which was a part of the Counter-Terrorism and Security Act. My noble friend Lord Strasbourg will speak particularly to this.

My points on “less intrusive means” and the Human Rights Act are the most important of a number that I think very important. Other noble Lords will have had more direct experience than I have of hearing or reading words such as “Parliament clearly intended” or “Parliament must have intended”. I do not quite know what we intend on this clause. It has rightly been welcomed for acknowledging the need for safeguards right up front and spelled out clearly. It would be a real shame if we did not get it absolutely right. I beg to move.

Viscount Hailsham (Con): I reinforce what the noble Baroness has said with regard to Clause 2(4). The first line—

“The other considerations, may, in particular, include”—

means in effect that the criteria and considerations set out are open-ended. While the public authority may have regard to any of the considerations set out in Clause 2(4), it can also have regard to any other considerations that it deems fit. That seems a very unsatisfactory state of affairs.

Lord Lester of Herne Hill (LD): My Lords, I put my name to a couple of these amendments and I would like to speak to them. Under our constitutional arrangements, the Human Rights Act is the next best thing that we have to a constitutional guarantee of fundamental rights and freedoms. The Minister has rightly put his name on the front of the Bill, stating that in his opinion it is compatible with the convention rights. I have put my name to these amendments to

seek to make sure that what the Minister has put on the face of the Bill becomes transparently clear in the statute when it is enacted.

Article 8 of the convention, which guarantees the right to personal privacy, indicates that any exception must be provided by law—that is to say, satisfy legal certainty—and by the principle of proportionality, and that any interference must be necessary and no more than necessary to safeguard other compelling public interests. The problem with the Bill as drafted is that it does not go quite far enough to ensure full compliance with the Human Rights Act and with Article 8 of the convention. That is why the amendments in the name of my noble friend Lady Hamwee are needed, in my view. First, it is important not merely to have regard to but to make sure that there is full compliance with the principle of proportionality. That is what these amendments seek. Secondly, without repeating what has already been said, it is very important that the obligations on public authorities—for example, not to use the powers listed in Clause (2)(1)—are no more than what,

“could reasonably be achieved by other less intrusive means”.

That is classic principle-of-proportionality language.

I very much hope that in one way or another the Government will come to accept these amendments or something very similar to them so that we can make sure that lawyers like me are not able to go to court to challenge all of this under the Human Rights Act, but that Parliament gets the statute clear to put beyond doubt the application of the principles of legal certainty and proportionality, which is what these amendments are designed to do.

I will say just a word about Amendment 14, not because I want to make an elaborate statement about it but because, as I said at Second Reading, it is very important that we have a board or commission with the requisite powers. I will come to that in later debates on the Bill.

Lord Strasburger (LD): My Lords, I will speak briefly to Amendment 14. We have already heard at length that, in its report on the Bill, the ISC called for a “backbone” of privacy to be inserted into it. The Home Office’s initial response was to add one word to the next version of the Bill: it inserted “privacy” into the title of Part 1 so that “General protections” became “General privacy protections”—nothing else changed. Later, under some pressure in the Commons, Clause 2 came into being, which goes some way, but not all the way, to inserting the privacy protections that we on this side of the Committee feel are needed.

This episode suggests to me that no one in the Government has a brief to speak up for privacy and civil liberties when legislation is being formulated. Presumably, that is why the Home Secretary included Section 46 in the Counter-Terrorism and Security Act 2015, giving her the power to establish the Privacy and Civil Liberties Board. The only problem is that she has not commenced this power and the vacuum in privacy protection advocacy in government is still there.

Amendment 14 would force the Home Secretary’s hand so that she must get on with it—actually, to be more precise, her successor must get on with it because

she probably has bigger fish to fry as of Wednesday. For now, this is simply a probing amendment. If it were brought back on Report, it would probably need some improvement in terms of the board’s scope and powers. The American version of this, the Privacy and Civil Liberties Oversight Board, has been very successful with a much wider brief. For now, I will be content to hear the Government’s response to the amendment as it stands.

Before I sit down, I will say a couple of words regarding the friendly fire that has been coming from behind me during this debate—rather ungraciously, I might say—from the noble Lord, Lord Carlile. He queried whether I had read *Nineteen Eighty-Four* and knew about its description of CCTV in every bedroom. I have, actually, but I suspect that he has not been doing his reading on security matters because, if he had, he would know about Project Optic Nerve, in which GCHQ intercepted 1 million Yahoo! users’ webcams, which effectively put state cameras into 1 million bedrooms.

Lord Carlile of Berriew (LD): My Lords, I am not going to enter into an argument with my noble friend about the activities of GCHQ, particularly when they have been misdescribed so fully, but I will say one or two things about the merits of the amendments before us, particularly Amendment 6.

I agree with what my noble friend Lord Lester of Herne Hill said about this group of amendments, including Amendment 6, for the reasons he gave. It would be helpful if the noble and learned Lord, Lord Keen, could explain to the Committee the difference between Amendment 6 and the intention of the Government as set out in Clause 2(2)(a). If the intention of the Government is to do what my noble friend Lord Lester described, I respectfully suggest that the adoption of the wording in Amendment 6 would be more useful and more certain and, above all, as my noble friend said, would avoid unnecessary disputes about the meaning of and compliance with Article 8 in the courts.

Unfortunately, I disagree again with my noble friends about Amendment 14. I am not against a Privacy and Civil Liberties Board if the Government wish to create one. Indeed, I would rather support the creation of a board which had an overarching view of privacy and civil liberties. The board that was created in the 2015 Act is most certainly not a Privacy and Civil Liberties Board. It is a board that was intended to have some kind of oversight of interception, surveillance and other matters, and was a construct agreed as a compromise because of the nature of government at that time. I am afraid it is a glass half-full. Therefore, I urge the Government not to adopt that Privacy and Civil Liberties Board.

It is also worth saying that we have come an awfully long way in the protection of the public against unlawful intrusion by the state into their private affairs since the enactment of the Privacy and Civil Liberties Board provision, which has not been brought into force. The safeguards included in this Bill as a result of the work of my successor as independent reviewer, David Anderson, and of the Intelligence and Security Committee and the RUSI panel mean that we have a much fuller raft of protections in the Bill. In my view, they are far more

[LORD CARLILE OF BERRIEW]

beneficial and provide a great deal more than was ever going to be provided by this form of the Privacy and Civil Liberties Board. I respectfully suggest to Ministers that this amendment is entirely unnecessary.

However, I emphasise that there are genuine concerns about potential breaches of privacy and civil liberties. They are concerns about what the public sector can do and they should also be concerns about what the private sector already does. Any of us who subscribe to online groceries, books, music or other similar consumer opportunities on the internet, as I confess I do—I frequently stream music in my car from my mobile phone—probably do not realise how much we have allowed our privacy to be trespassed upon by the so-called privacy policies of large internet service providers. If we are to have a Privacy and Civil Liberties Board, let us do the whole job, not just a bit of it.

Lord Rooker (Lab): My Lords, I will follow up the noble Lord's point about what the public sign up to in the private sector—of course, the private sector has lobbied against part of the Bill because it has a vested commercial interest. If you sign up to PayPal, you have signed up to 36,275 words of terms and conditions. Who reads them? “Hamlet” is 30,066 words. If you sign up to Apple iTunes, you are signing up to 19,972 words of conditions; longer than “Macbeth” at 18,110 words. It goes on: Facebook's has 11,195 words. You tick the box—that is all you do—and give these companies access to your information. These companies would never have been able to start in other societies without the rule of law—we all know that. They can only operate in open, democratic societies. You sign away all kinds of things. We know there was a test at one time when someone changed the terms and conditions to an agreement to give away their firstborn and people ticked the boxes, because they did not read them.

6 pm

I was more concerned during my time on the RUSI surveillance panel. The private sector amassed information, even though there was a legitimacy to it, because people had given it to them. They give the Government information as well—driving licences and everything else—but the fact is that we can regulate and control what the Government do much better than we can regulate and control what the private sector does, which is exactly the point the noble Lord was making.

The Minister of State, Ministry of Defence (Earl Howe) (Con): My Lords, I am grateful to the noble Baroness, Lady Hamwee, for explaining the purpose of this group of amendments. I am particularly glad that Amendment 5 gives us the opportunity to look carefully at the intention of subsection (1) in the privacy clause. Perhaps I could just clarify.

Clause 2(1) lists in some detail the functions that a public authority may discharge under the Bill that may result in an interference with an individual's privacy or impose an obligation on a telecommunications operator. The clause as drafted makes clear that, when taking such a decision, a public authority—including the Secretary of State and the judicial commissioner—must have regard to the principles set out at Clause 2(2).

The effect of the clause is perhaps not far removed from the intention of the amendment, but I would argue that the current drafting has the benefit of providing clarity. I was grateful for the complimentary remarks about the clarity of the drafting of the Bill overall that the noble Baroness was kind enough to make. The drafting of this part of the clause makes clear that the privacy clause bites in every situation in which a public authority takes a decision or action to which privacy considerations are relevant. I hope that those comments will encourage the noble Baroness to withdraw the amendment.

I am sympathetic to the spirit behind Amendments 6 and 8, which seek to prohibit the authorisation of powers in the Bill if less intrusive means are available. I hope I can provide some comfort to the noble Baroness and the noble Lord, Lord Carlile, by directing them towards the statutory codes of practice which we have published in draft alongside the Bill for the Committee to consider. For example, paragraph 4.7 of the draft interception code of practice states:

“No interference with privacy should be considered proportionate if the information which is sought could reasonably be obtained by other less intrusive means”.

The codes will be submitted to Parliament for approval, and a failure to abide by them will be considered a breach by the Investigatory Powers Commissioner. I hope that that reassurance provides enough ammunition for the noble Baroness to withdraw her amendment.

Lord Carlile of Berriew: I do not want to prolong the debate, but does the Minister not think that it might be preferable to put these words in the Bill rather than face the inevitable consequences of legal discussions in the courts as to the role of codes of practice and their enforceability? Putting the words in the Bill at least provides certainty.

Earl Howe: I am grateful to the noble Lord for seeding that thought in my mind and I am glad to take it away and consider it between now and Report.

Amendment 7 also relates to Clause 2, which provides a statutory requirement that public authorities must consider all three of the privacy duties listed in subsection (2). It is not an exclusive list—there are other important principles that public authorities will have regard to—but it does make clear the principles that sit at the heart of this Bill and that underpin the exercise of functions under the Bill. And it is of course the case that the judicial commissioner will look to see whether these principles have been satisfied—when, for example, he or she reviews a Secretary of State's decision to issue a warrant.

The noble Baroness expressed some concern about the phrase “have regard to”. In bringing forward the privacy clause, the Government responded to concerns raised by the Intelligence and Security Committee of Parliament as well as by the Opposition and the Scottish National Party in the other place. The language of “have regard to” is drawn from amendments tabled by the Opposition and the SNP in Committee. It reflects the language of Clause 1 of the Mental Health (Care and Treatment) (Scotland) Act 2003, which was held up by those parties in Committee as an exemplar of

how such a clause might operate. That is the basis on which we have included that particular form of words. In short, while I am sympathetic to the concern raised in this area—

Lord Lester of Herne Hill: I am grateful to the noble Earl. Those precedents do not amount to what is really needed, which is full compliance with Article 8 of the convention and the Human Rights Act. In my opinion—it is no more than my opinion—the words do not satisfy that, whatever the precedents relied on may be in amendments tabled in other Bills. It is no use saying “have regard to”; it is necessary to ensure that what is in A, B and C happens in practice. “Have regard to” is rubbery and illusive and will not pass muster under the Human Rights Act or the convention, in my opinion.

Earl Howe: My Lords, I can do no other than have particular regard to the noble Lord’s advice. I shall gladly reflect on what he has said. It is a rash Minister who does not take account of advice from the noble Lord.

Viscount Hailsham (Con): May I press my noble friend more on this point? With regard to subsection (3), there is a test of relevance. Subject to the test of relevance, it seems to me that, under subsection (4), the public authority can in effect have regard to any consideration it deems fit. Is that correct?

Earl Howe: As I have said, it is not intended to be an exclusive list. There are, of course, factors that may well be relevant and a public authority will wish to have regard to that are not included in the list. We did not intend the list to be exclusive. However, I am grateful to my noble friend and, once again, I will take advice on whether the wording quite fits the intent.

The House has a proud tradition of respect for human rights. The Human Rights Act is referred to in Clauses 1 and 2. It is the Government’s view that those references make it absolutely explicit that the obligations and protections in that Act apply to the exercise of functions under the Bill. While I am sympathetic to the intention behind Amendments 9 and 13 and I listened with care to the noble Lord, Lord Lester, as I always do, I do not think the amendments are necessary. Public bodies are already required to act in accordance with the Human Rights Act 1998. Our position is aligned. The Human Rights Act is not an optional consideration when exercising the investigatory powers in the Bill. The Government consider it unnecessary to restate the position for that reason. Furthermore, we do not want to cast doubt in other places in statute where it is not restated, as that may serve actually to undermine the strong standing of the Act and the rights contained within it.

Turning to Amendment 10, I do not believe there is a divergence in principle here; this is merely a matter of drafting. The clause sets out that a public authority must have regard to certain considerations, and that duty is subject to the need to have regard to other considerations that exist elsewhere in the law. It would be superfluous to state that public authorities must have regard to things that they already must have regard to. For example, a warrant can be issued only

where it is necessary and proportionate, and this is explicit in the relevant parts of the Bill. Equally, the need to comply with the Human Rights Act is encompassed within that Act: it does not need to be restated here. I hope that provides some reassurance and that the noble Baroness will, on that basis, choose not to press this amendment.

On Amendment 11, Clause 2(2) sets out the principles that public authorities must have regard to when exercising certain functions under the Bill. It is not an exhaustive list, and subsection (4) sets out some of the other factors that may be taken into consideration. Again, I emphasise that subsection (4) does not contain an exhaustive list. There will be other principles outside this list that public authorities will need to have regard to, and we should not cast doubt over that, as the amendment would.

My noble friend Lord Hailsham questioned the use of the word “may” as opposed to “must”. The use of “may” in subsection (4) should not be taken to imply that it is optional for public authorities to have regard to the principles listed in that subsection. The law requires, for example, that public authorities must always comply with their obligations under the Human Rights Act.

There are of course some factors listed at subsection (4) that will not be relevant in all circumstances: for example, it may not be meaningful, when modifying a national security warrant, to have regard to the public interest in the prevention of serious crime. But, to be clear, the use of the word “may” does not absolve public authorities from their wider obligations under this Bill or any other legislation.

I turn now to Amendment 12. Economic well-being is of course one of the statutory purposes of the security and intelligence agencies, and the reference to it in Clause 2 is intended to reflect that—nothing more. When powers under the Bill are authorised in the interests of the economic well-being of the United Kingdom, there must be a link to national security. The language at Clause 2 does not alter or undermine that; it simply reflects the statutory purposes of the agencies. As drafted, Clause 2 provides clarity and consistency with existing legislation. Given the specific limitations elsewhere in the Bill, any amendment to Clause 2 along the proposed lines is unnecessary.

Amendment 14 is the final one in this group. Your Lordships’ Committee is in no doubt of the importance of the office of the Independent Reviewer of Terrorism Legislation. David Anderson QC, who has occupied the role since February 2011 and whom both my right honourable friend the Home Secretary and I hold in the highest regard, does an excellent job of reviewing key counterterrorism statutes. His independent oversight and recommendations help us to ensure that our counterterrorism legislation is fair, effective and proportionate, and that it strikes an appropriate balance in the face of the very real and serious threat we face from terrorism.

Following the passage of the Counter-Terrorism and Security Act 2015, the Government undertook a consultation on whether David Anderson would benefit in his role from the support of a privacy and civil liberties oversight board. Having been informed by a

[EARL HOWE]

public consultation on the board's establishment, by David Anderson's own recommendations on this matter and by the need to ensure the best value for public money, the Government decided that they could most effectively support the reviewer in discharging his statutory functions by instead providing him with specialist legal assistance in the form that he recommended in his July 2014 annual report.

6.15 pm

David Anderson therefore announced on 31 March this year the appointment of three specialist advisers to support his work, funded by the Government out of an additional budget provided to him for this purpose. The advisers were personally selected by David Anderson, and each of them works on specific tasks in support of his independent reviewer functions to help increase the range and depth of the work. They have the necessary security clearances to access sensitive material, are entirely independent of government and are highly qualified and distinguished, with the right mix of terrorism law and human rights experience to enable them to provide the specialist support required.

David Anderson has welcomed this approach, which we consider the best way of ensuring that his vital role is properly supported. I was grateful to the noble Lord, Lord Carlile, for what he said in relation to this amendment, which we consider to be unnecessary as its purpose has been achieved by other means. I respectfully invite the noble Baroness not to press it.

Lord Lester of Herne Hill: I promise not to speak again on any amendments until we reach those covering legal professional privilege, as I do not intend to be even more of a human rights bore than I am at the moment. However, before the Minister sits down, since he has the great advantage of not being a lawyer, may I explain why the Government need to think again about the language that is being used currently?

The problem is that any mismatch between the wording of the Bill and the convention or the Human Rights Act would lead, necessarily, to a legal challenge, which would go probably all the way to the Supreme Court. At the end of the day, the court will say that it cannot do much about it, because the Act is clear, but that it will give a declaration of incompatibility. That will then cause the Government of the day to have to decide what to do about the language—whether they amend it or let it go to Strasbourg.

I want to avoid all that. Every time I see something in the Bill that seems to me to be a mismatch—for example the part which suggests that there are other unspecified relevant circumstances, which seems to violate the principle of legal certainty—I think, “Oh dear, this is going to lead to litigation and to a challenge”. I am begging the Government to make absolutely sure that the language of the Bill as it leaves this House cannot be challenged as being a mismatch with the European convention and the Human Rights Act.

The problem with the Human Rights Act is that it allows those challenges, quite rightly, to be made, along with declarations of incompatibility. That is

why I really hope, when the Bill comes to Report, we can have language which, if not identical to these amendments, will achieve that objective.

Earl Howe: My Lords, I am grateful to the noble Lord for expressing his expert opinion so clearly. I can undertake only to study carefully what he has said between now and Report. Clearly, the Bill has been drafted by expert hands, but I am the first to say that there is no monopoly of wisdom on the Government's side, and I am sure we need to take full account of what he said.

Baroness Hamwee: My Lords, one of the things that we are saying is that because the Bill has a mixed heritage, it is perhaps not as clear as it could be and does not have the benefit of the expert work to which my noble friend referred. I am clearly going to have to read very carefully what has been said, but I want to make a few comments now.

First, I am grateful to the noble Viscount, but I do not think what he was saying was quite as the noble Earl put it with regard to the word “may”. We need to come back both to the “may” and the “other considerations” in particular and to the relationship between the subsections. That fact that the list in subsection (4) is not exclusive makes the matter even more difficult.

I obviously do not want to go over all the ground again. With regard to the privacy and civil liberties board, it was of course a construct—a compromise—but my noble friend Lord Strasburger's point about somebody having the responsibility to make sure that privacy and civil liberties are right at the top, immovably in the agendas that the Government may have, is an important one. I, for one, would welcome something more than was in the Act.

I agree that listing where the duty bites does help clarity and transparency, but I had a difficulty in being completely certain that it bites on everything that I think it should; the filter in Clause 63 was my example. If the filter is part of granting, approving—obviously not—or cancelling an authorisation, that is fine, but it should be clear. I am afraid I am not hugely persuaded by a code of practice, since it is not primary legislation. In fact, I think the Minister said that we should have regard to it. If it provides that these matters are absolute, rather than discretionary, then the codes of practice will not be consistent with the primary legislation, and that will be a bad thing.

I come back to whether this clause has been invented here, or wherever it has been invented. I will offer to supply the hot towels for everybody—I might even provide cake—but this is a provision that would benefit from further discussion. I certainly do not offer not to bring it back on Report—I might if we can get to somewhere that satisfies all of those who are clearly concerned before then—but for the moment, I beg leave to withdraw the amendment.

Amendment 5 withdrawn.

Amendments 6 to 13 not moved.

Clause 2 agreed.

Amendments 14 and 15 not moved.

Clause 3: Offence of unlawful interception

Amendments 16 and 17 not moved.

Clause 3 agreed.

Amendment 18 not moved.

Clause 4: Definition of “interception” etc.**Amendment 19**

Moved by Lord Paddick

19: Clause 4, page 4, line 23, leave out “, at a relevant time,”

Lord Paddick (LD): My Lords, my noble friend Lady Hamwee and I have Amendments 19 and 66 in this group. The relevant part of Clause 4 that we are talking about here deals with the definition of “interception”. Clause 4(1)(b) talks about interception being,

“to make any content of the communication available, at a relevant time”.

It is the expression “at a relevant time” that we wish to probe. Clause 4(4) describes “relevant time” as being during transmission, or before or after transmission. For us, that begs the question: what does “relevant time” therefore mean? Why does it have to be stated that “relevant time” is necessary, bearing in mind that it seems to cover every time before, during and after transmission?

I turn to Amendment 66. Clause 42(1) talks about interception being effectively lawful if both,

“the sender and the intended recipient ... have each consented”.

This amendment simply suggests that that consent should perhaps be in writing. I beg to move.

Viscount Hailsham: My Lords, I would like to raise two points, if I may, about Amendment 66. I entirely agree with the suggestion that the consent should be in writing, and I would rather hope that the Minister will give us some reasons why it should not be, because on the face of it, it is an extremely sensible suggestion. As we all know, there is sometimes a certain degree of opaqueness regarding what people have or have not done. Looking at Clause 42, to which Amendment 66 applies, I have some difficulty in understanding the relationship between subsections (1) and (2). I am not sure why subsection (2) is there, given the language contained within subsection (1). Perhaps my noble friend can help us on that.

Baroness Hayter of Kentish Town (Lab): My Lords, I wish to speak briefly to Amendment 68, which is in my name and that of my noble friend Lord Rosser. Clause 45(1)(a) permits interception by a Revenue & Customs officer under Section 105 of the Postal Services Act 2000. That is the provision that contains the power to open postal items, so that is clear enough. However, Clause 45(1)(b) permits interceptions by, again, a Revenue & Customs officer under the same Section 105 “and another enactment”. It is the phrase “and another enactment” that I am not quite clear

about. If Section 105 is sufficient, why add the words “and another enactment”? If it calls on some other law in order to legitimise this activity, should that not be detailed in the clause? Amendment 68 therefore proposes deleting the second arm—the “and another enactment” bit—unless the Minister can make some sense of it for me.

Earl Howe: My Lords, let me turn first to Amendment 19. Clause 4 defines interception. It provides greater clarity in relation to the activity that constitutes interception than is currently the case under the Regulation of Investigatory Powers Act 2000—RIPA—and responds to calls from a number of quarters that such clarity is necessary. “Relevant time” is defined in Clause 4(4) to make clear that the interception offence can be committed at any time while the communication is being transmitted, or while the communication is being stored. Under RIPA, it is an offence to intercept a communication in the course of its transmission by means of a public telecommunications system. There had in the past been some uncertainty as to the scope of the offence; for example, whether a voicemail message stored by a telecommunications system was still in the course of its transmission, and therefore whether to access it without lawful authority would engage the offence of unlawful interception. The revised definition of interception in Clause 4 is intended to make clear that messages stored in or by the telecommunications system are caught within the definition of interception, and therefore cannot be accessed without lawful authority. This puts beyond doubt, for example, that so-called phone hacking constitutes unlawful interception.

If the Bill were amended in the manner suggested, it would, I believe, undermine the strong safeguards that the Bill provides for the protection of private communications. It would cast doubt over whether access to stored communications without lawful authority would engage the criminal offence, and it would be less clear when a public authority required a warrant to intercept communications.

Amendment 66 is not necessary and would be very difficult to implement in practice. Clause 42 simply makes clear that where both parties to a communication have consented to the communication being made available to a third party, this does not constitute unlawful interception. The Bill already requires that consent must be given in such instances for it to be lawful. On the example of a telephone call, plainly it would not be practical to write to an individual seeking their consent before continuing with that call. I hope that the noble Lord will not press that amendment.

I turn to Amendment 68. Clause 45 relates to the power of HM Revenue & Customs to inspect postal items to ensure that contraband or illegal items are not being imported or exported from the country. This clause is vital in countering terrorism and preventing and detecting serious and organised crime. RIPA was amended by the Policing and Crime Act 2009 to put beyond doubt that the protections from interception afforded to postal communications in RIPA did not restrict this vital Revenue & Customs power to check international postal traffic. This clause simply maintains this position. I hope that I have been able to provide some reassurance as to why this provision is necessary.

6.30 pm

Government Amendment 69 is included in this group, as an amendment to Clause 46, which concerns the interception of communications by Ofcom. The clause authorises Ofcom to intercept communications and obtain information about the sender, recipient or intended recipient of a communication for the purpose of granting wireless telegraphy licences, or for the prevention or detection of anything which constitutes interference with wireless telegraphy. This clause brings into the Bill authorisation to undertake action which is currently provided for by the Wireless Telegraphy Act 2006. The amendment that the Government have proposed is minor and technical in nature and simply clarifies that the definition of interception in Clause 46 is the same as the definition in Clause 4.

Viscount Hailsham: Could I press my noble friend a little more on Amendment 66? Of course I understand that there will be circumstances when written consent cannot be made, but there will be many other circumstances when it can be obtained. I note, for example, that it involves the consent of both parties. That suggests that it happens some time before the interception takes place. I should have thought it perfectly possible to have a proviso that the consent should in general be forthcoming and evidenced in writing, but that there should be a disapplication in urgent situations. In dealing with that matter, can my noble friend help me as to why we have subsection (2) as well as subsection (1) of Clause 42?

Earl Howe: My Lords, I am very sorry to have to disagree with my noble friend about the consent in writing, which would be likely to result in completely impractical situations. It is not clear what real advantage would be gained. In any case, most of the time, prior consent in writing would simply not be an option. Taking the example again of a telephone call, it is difficult to see how the normal transaction of business would not be completely impeded if we insisted on this provision.

I shall endeavour to respond to my noble friend about his question on subsections (1) and (2). I do not have a ready interpretation to give him now but, if I can during the proceedings, I shall do so.

Lord Grabiner (Non-Affl): The language is pretty clear. Subsection (1) of Clause 42 suggests that consent of both is required, while subsection (2) refers to the consent of the recipient alone.

Earl Howe: The noble Lord has expressed it very well, and I defer to his excellent interpretation.

Baroness Hayter of Kentish Town: Could the Minister write on the amendment to Clause 45(1)? I was absolutely not suggesting by the amendment that the right would be lost for Customs & Revenue to intervene—it was about whether it needed to be under both Section 105 and, as it says, “that section and another enactment”. It was the clarity of the words “and another enactment” that I was asking about. I would be quite content to have a letter to clarify that point.

Earl Howe: I shall gladly write to the noble Baroness on that point. I can also say, for the benefit of the Committee, that I shall look into the drafting of Clause 45, including the reference to other enactments.

Lord Paddick: My Lords, I am very grateful to those who have contributed to this short debate, and very grateful to the Minister. On Amendment 19, I think that I am right in saying that the issue around phone hacking was on whether a voicemail that had not yet been listened to was still in the course of transmission, whereas a voicemail that had already been listened to was not in the course of transmission. That was a reason that the police gave at one stage for not investigating some of the phone hacking. I find the wording rather curious. I should have thought that it would be sufficient to say that communication included communication stored prior to or following transmission. But I am not a lawyer—I accept that.

I accept what the Minister says on written consent, on Amendment 66, but surely there are other ways in which consent can be explicitly given. For example, if a telephone conversation was being recorded, both parties to that conversation could say on tape, as it were, that they consented to the interception of that conversation. Perhaps we could give that some further consideration. I beg leave to withdraw the amendment.

Amendment 19 withdrawn.

Clause 4 agreed.

Clause 5 agreed.

Clause 6: Definition of “lawful authority”

Amendments 20 and 21 not moved.

Clause 6 agreed.

Clause 7 agreed.

Schedule 1: Monetary penalty notices

Amendment 22 not moved.

Schedule 1 agreed.

Clauses 8 to 12 agreed.

Schedule 2 agreed.

Clause 13: Mandatory use of equipment interference warrants

Amendment 23

Moved by Lord Paddick

23: Clause 13, page 10, line 16, leave out “the intelligence service considers that”

Lord Paddick: My Lords, the amendment is in relation to the mandatory use of equipment interference warrants. The wording of the relevant section says that security services must secure an equipment interference warrant if the “intelligence service considers that” the conduct would constitute an offence under the Computer Misuse Act. Surely, it must be something more than just whether the particular intelligence officer considers that the conduct would constitute an

offence under that Act. Surely, an equipment interference warrant must be obtained because, otherwise, it would constitute an offence, rather than simply if the intelligence service considers that it is.

Amendment 24 makes a similar point about restrictions on the use of Section 93 of the Police Act 1997. In this case it states that a “targeted equipment interference warrant” is required, “if the applicant considers that the conduct would ... constitute”, an offence under the “Computer Misuse Act 1990”. I would argue that exactly the same considerations apply as with Amendment 23. I beg to move.

Earl Howe: My Lords, the amendments in this group seek to change the language used in relation to the equipment interference regime and Computer Misuse Act offences. Clause 13 provides that an equipment interference warrant under the Bill is mandatory if the intelligence service considers that the conduct would constitute a Computer Misuse Act offence and there is a British Islands connection. Similarly, Clause 14 provides that law enforcement agencies will be unable to authorise this type of equipment interference under the Police Act 1997 where the applicant considers that the conduct would constitute an offence under the Computer Misuse Act. This is an important safeguard.

The language in Clauses 13 and 14 reflects the fact that at the point of application the equipment interference agency may not be able to say with complete certainty whether the proposed interference will constitute an offence under the Computer Misuse Act. For example, when an MI5 officer is handed a compact disc by a source, it may not be clear whether the disc belongs to the source who intends the officer to use the disc, in which case the Computer Misuse Act would not be engaged, or whether it is owned by another person who does not intend the officer to access the disc, in which case the Computer Misuse Act would be engaged. In these circumstances, the applicant will need to consider the possibility of an offence occurring, consult legal advisers, where unclear, and seek the appropriate authorisation, if required. The language of the Bill reflects that it may not be certain whether the Computer Misuse Act is engaged. The language in the Bill and the code of practice anticipate that applicants will err on the side of caution.

Finally, and crucially, all equipment interference will be overseen by the new Investigatory Powers Commissioner, ensuring that there is independent and objective analysis of any decision regarding the possibility of conduct constituting an offence under the Computer Misuse Act. I hope that explanation will be helpful to the noble Lord and explains why this language is in the Bill. I therefore invite him to withdraw the amendment.

Lord Paddick: I am very grateful for that explanation. I understand that it may not be certain that something constitutes an offence under the Computer Misuse Act. Where it is an offence under the Computer Misuse Act, does the Bill allow a Security Service agent or law enforcement officer to ignore that provision?

Earl Howe: That cannot happen. Without a valid lawful authority, interference with equipment that is prohibited by the Computer Misuse Act will remain

illegal. If a member of an equipment interference agency considered that no Computer Misuse Act offence would be committed before beginning an operation but later determined that an offence was likely to be committed, they would be required to seek appropriate authorisation.

Lord Paddick: I am very grateful to the Minister. I beg leave to withdraw the amendment.

Amendment 23 withdrawn.

Clause 13 agreed.

Clause 14: Restriction on use of section 93 of the Police Act 1997

Amendment 24 not moved.

Clause 14 agreed.

6.45 pm

Amendment 25

Moved by Viscount Colville of Culross

25: After Clause 14, insert the following new Clause—

“Protection for journalistic sources, materials and activities

- (1) Save in the exceptional circumstances identified in subsection (2), the regimes provided for by Parts 2 to 7 may not be used to access, obtain, record, hold, consider, analyse, disclose or otherwise deal with information, material or data—
 - (a) of, or concerning, the activities relating to journalistic information, or
 - (b) if the purpose of so doing is to obtain information identifying a journalistic source.
- (2) The exceptional circumstances referred to in subsection (1) are—
 - (a) the case is one of great emergency,
 - (b) immediate action is necessary, and
 - (c) the relevant investigatory powers under the regimes provided by Parts 2 to 7 can be used lawfully having regard to those provisions.
- (3) In any case where the regimes provided for by Parts 2 to 7 are disapplied by subsection (1), any person who could otherwise have sought to use one of the investigatory powers specified therein may apply to a judge for an order allowing that person to access, obtain, record, hold, consider, analyse, disclose or otherwise deal with such information, material or data in a way provided for by Parts 2 to 7.
- (4) An application for an order under subsection (3) shall be made on notice to the media organisation affected unless the judge determines that an application without such notice is required in order to avoid prejudice to the investigation.
- (5) Paragraphs 7 to 9 of Schedule 1 to the Police and Criminal Evidence Act 1984 shall apply in relation to the service of a notice of application for an order under subsection (1) as if the application were for an order under Schedule 1 to the Police and Criminal Evidence Act 1984.
- (6) Criminal Procedure Rules may make provision about proceedings under this section where the judge determines that an application without such notice is required.
- (7) A judge may only make an order under subsection (3) if the person making the application has convincingly established that—

- (a) the order is directed towards one or more of the legitimate aims specified in Article 10.2 of the European Convention on Human Rights,
 - (b) there is an overriding public interest necessitating the order,
 - (c) reasonable alternative measures to the order do not exist or have been exhausted, and
 - (d) the order is proportionate to the legitimate aim or aims being pursued.
- (8) The costs of any application under subsection (3) and of anything done or to be done in pursuance of an order as a result of the application is to be at the discretion of the judge."

Viscount Colville of Culross (CB): My Lords, I declare an interest as a producer and director at the BBC.

The protection of sources of journalistic material has been talked about in the other place and in your Lordships' House. Maintaining the trust of these sources is crucial to enabling the important role that is played by the free press in exposing wrongdoing in private and public institutions. That must be in the public interest. There is a difference between the public interest and what the public is interested in.

This Bill curbs the collection of journalistic material in violent and difficult situations, such as riots or demonstrations that turn violent. I very much welcome Clause 2, which covers privacy. That concerns all citizens. This amendment asks for an extra protection for sources of journalistic material and information across the powers of the Bill. It responds to noble Lords' concerns about the difficulty of defining a journalist. In Clause 73, the words "journalistic material" are used. The amendment uses the same concept and refers to:

"Protection for journalistic sources, materials and activities", using the definition of journalistic material set out in PACE. This definition can be used as a basis for decision-making by the carefully trained and very experienced judicial commissioner who is charge of this process. The commissioner will decide what is journalistic material and what is not. I am sure that the public interest—again, rather than what the public are interested in—will be the most important criterion. This would mean that PR communications, which are for commercial benefit rather than public interest, will be excluded. Likewise, it would exclude fundamentalist bloggers who are clearly sending out propaganda whose material could never pass the test of public interest.

I know the Minister is concerned that free speech should flourish and that sources who provide this journalistic material do not feel that they are unnecessarily being surveilled by the authorities using the extraordinary powers available in our digital age. I am grateful to the Government for listening to these concerns, and I welcome the safeguards provided in Clause 73 for the protection of sources of journalistic information in the power of communications data.

Amendment 25, however, aims to extend those protections for sources to the other powers set out in the Bill. I am particularly keen for the power for targeted equipment interference to be covered by a safeguard for sources. This could be material owned by the journalist or the source who is giving the

information. Targeted equipment interference includes the ability to use a mobile phone's microphone as a bug. It could also include looking at a journalist's electronic notebook and at footage shot in the course of a story, which, as a broadcast journalist, worries me a lot.

I note that there are thresholds in the Bill for issuing this kind of warrant, which include national security and serious crime. The definition of serious crime is explained in Clause 235. Paragraph (a) states that it has to be an offence for which someone,

"could reasonably be expected to be sentenced to imprisonment for a term of 3 years or more",

but paragraph (b) states that it is where,

"the conduct involves the use of violence, results in substantial financial gain or is conduct by a large number of persons in pursuit of a common purpose",

I am worried that the definition in paragraph (b) is very wide and represents too low a threshold. It includes any conduct that,

"involves the use of violence",

and,

"conduct by a large number of persons",

and therefore includes the classic case in which the police try to get hold of footage filmed at public demonstrations. Violence is a very wide concept. If serious crime was limited to paragraph (a) or to indictable offences only, there might be a point, but allowing the definition of serious crime to cover any violence by a large number of persons is too low a threshold and would get round the tried and tested means of accessing information through PACE.

I know from experience that journalists are often seen by demonstrators and rioters as extensions of the authorities. This process started abroad, but it is now often seen in this country. As a result, we are seeing journalists targeted for taking footage of riots or violent behaviour. This is a dangerous trend, which we should all try to prevent. In the Dale Farm case, when the police wanted to see footage from Sky News, the judge ruled that the request posed a danger to broadcast journalists. He said:

"If the perception takes hold that such people are working on behalf of the police, or are likely to co-operate with them by supplying such material routinely, life could become very difficult. They might find it more difficult to obtain access to areas where demonstrations are taking place or to work in the vicinity of those who are prone to violence. Moreover, at its most acute, the perception could increase the risk of violence towards cameramen or their equipment".

I ask the Minister to look again at the Bill and to extend the protection for journalistic material across the powers. This provision would ensure that the judicial commissioner would be asked to look at warrants and would have to bear in mind the safeguards needed to protect journalistic sources.

Proposed new subsection (4) asks for notice of a warrant request to be given to the media organisation, unless there are exceptional circumstances, such as a great emergency or when immediate action has to be taken. This is important so that it can explain the dangers involved in exposing the source. I understand that, as the Bill stands, the judicial commissioner, if concerned about the dangers of a warrant being granted

to the journalist and the dangers this might pose to the journalistic source, will have the right to ask for more information. My fear is that they might not have been given all the facts by the people requesting information. It might just be that the person making the request is not even aware of the danger to the journalistic source from exposure to surveillance.

I quite understand the fears of the Government that notification to a media organisation might defeat the whole purpose of the exercise, but PACE covers the physical property of journalistic information and gives a right of notification so that the application can be challenged. PACE, however, dates back to 1984, when the internet was still a glimmer in the eyes of Sir Tim Berners-Lee. We never imagined the presence of digital information in worldwide communications at the press of a button. Mobile phones, computers and the internet are the notepads of the 21st century. The Bill is a wonderful recognition of the changing way in which we communicate, and it covers this. Surely this amendment is an opportunity to update the notification section of PACE to cover the equipment of our age that is used to gather journalistic information.

The amendment suggests that notification should be given through the media organisation. In the vast majority of cases, the application will relate to a newspaper or broadcaster, and a lawyer will be available for the news outlet in either broadcast or print. In-house lawyers regularly receive sensitive information, such as orders from family courts, privacy injunctions and super-injunctions, and are well able to handle sensitive information such as police requests for footage under PACE or the Terrorism Act, or indeed any police request. So I do not think handling such a request will be an issue. If there is a concern about the media organisation or the journalist involved, we should talk about the judicial commissioner being involved and helping make that decision.

I understand that noble Lords are concerned that there could be false claims of journalistic sources, which could be used to prevent a warrant. I suggest that the journalist would have to sign a witness statement that the claim is true; if found not to be, they would have perjured themselves and be subject to the might of the law. Once again, in this issue the judicial commissioner would have an important role to play. They would use their experience and training to decide whether the recipient is noteworthy or not.

The amendment represents very important safeguards for free speech in our country. I know that the Government greatly support this principle. I urge the Minister to consider carefully the changes to the Bill set out in the amendment and I beg to move.

Lord Black of Brentwood (Con): My Lords, I support Amendment 25, moved by the noble Viscount, Lord Colville. I declare my interest as executive director of the Telegraph Media Group and draw attention to my other media interests in the register.

As the noble Viscount has said, the issue of the confidentiality of journalists' sources has been a leitmotiv during the obsequies of the unloved Regulation of Investigatory Powers Act and throughout the passage of this Bill, during extensive pre-legislative scrutiny, in

all its stages in the other place and now here in Committee in your Lordships' House. But we are now nearing the end of it all and so this is probably our last opportunity to get it right. It therefore deserves the closest and most thorough attention.

I doubt that there are many here who need persuading about the importance, in a free society, of the protection of sources. The arguments were most formidably summed up in the case of *Goodwin v United Kingdom* in a famous ruling in the European Court of Human Rights some 20 years ago, which stated:

"Without ... protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected".

The protection of sources is crucial for investigative reporting, whistleblowing and indeed free and unfettered political debate. Without adequate protection, investigative journalism becomes almost impossible, whistleblowers do not come forward to the press and wider media to alert them to issues of public interest, and political debate becomes sterile and bland.

Your Lordships should not underestimate the difficulty already faced by journalists in getting confidential sources to speak on matters of often profound public interest. There has been so much attention given in recent years to the way in which sources have been exposed through surveillance and the misuse of anti-terrorist legislation that it is becoming harder and harder to get sources to come forward. Some even fear for their lives because they could easily become targets themselves if it became known that they had co-operated with a reporter. It is not an overstatement to say that, on occasion, the protection of sources can be a matter of life and death. That is why we must take with the utmost seriousness the passage of any legislation in this House which damages free expression and undermines the protection afforded to confidential sources by opening up the possibility of the state being able to shadow the work of journalists, track what they are up to, identify their sources and see what information they have made available.

I know that the Government are acutely aware of the importance of this issue and have listened with great diligence to the concerns of the media and others. I am very grateful to them for the action that they have already taken to strengthen the Bill in this regard, and the amendments in the other place are a very welcome step in the right direction. Unfortunately, I do not believe that they have yet gone far enough. Yes, there are safeguards, and they are very welcome. But they are not strong enough, and above all they will not work properly, and that is what this amendment is all about.

As I have said, this is a matter of real and urgent concern to the whole of the media—publishers, editors, trade unions, the national and regional press, magazines, broadcast and digital—and there has been unprecedented co-operation among interests which are often competing. The reason for this level of unity is, I am afraid, a profound sense of *déjà vu*. During the passage of RIPA back in 2000, a similar coalition of interests, led by the Newspaper Society, warned that its wide terms and lack of adequate safeguards would inevitably lead

[LORD BLACK OF BRENTWOOD]

to the undermining of confidentiality of sources. The industry warned that the number of organisations which could use RIPA powers should be limited and that the grounds for the use of those powers should be more strictly limited. The industry was repeatedly told that it was crying wolf and that there was no way the Bill could be so abused. On 6 March 2000, Jack Straw, then Home Secretary in the other place, gave a specific guarantee on that subject.

But, of course, we know exactly what happened. We have heard of, and seen, numerous examples where local authorities and the police then subsequently used RIPA powers of surveillance to access phone records to crack down on whistleblowers talking confidentially to the press; and it has often been the local press, who are the guardians of local democracy and accountability, who have been in the firing line. In one case, involving the *Derby Telegraph*, a local authority used RIPA powers to spy on a reporter who had been talking to council employees. In another, deeply disturbing incident, Thames Valley Police used RIPA powers to place a probe inside the car of a source who had been talking to a reporter from the *Milton Keynes Citizen*, Sally Murrer, and, on the back of recordings obtained, arrested the journalist and strip-searched her. In 2012, Cleveland police used RIPA powers to access the phone records of three *Northern Echo* journalists to try to find out the source of its coverage of a Cleveland Police internal report that revealed elements of institutional racism within the police force.

All this—and much more that we may never know about—happened despite protestations from the then Government that this could not possibly happen. The reason for that, as we have seen in countless other cases of legislation involving press freedom and confidentiality of sources, is that the legislation has not been watertight, proper and comprehensive safeguards were not written into the Bill, and it has been too easy for those wanting to access sources to find loopholes through which to crawl. This mistake cannot be allowed to happen again.

It is easy to see where the problem with this Bill arises. As the noble Viscount said, yes, there are safeguards in Clause 73 relating to prior judicial authorisation, and that is welcome, but it is inadequate in a number of respects. For one thing, it governs acquisition of communications data only for the purpose of identifying or confirming the identity of a journalistic source. Crucially, it does not apply to acquisition of data for other purposes. But most importantly, it does not allow for prior notification to the media of an application to use the Bill's powers, and the opportunity for the media to make submissions on whether this will impact on the confidentiality of a source.

It is all very well having judicial safeguards in place, but they will not work unless the judicial commissioner assessing the application has all the relevant information before applying his or her judgment and making an informed decision. After all, how can a judicial commissioner possibly know what they do not know? That is almost Kafkaesque. Without input from the media—and I recognise that there must be exceptions to this where a journalist or media organisation is under suspicion—they could not possibly, for instance,

know how the use of surveillance could actually place the life of a source, or indeed of a journalist, in danger and other such considerations. In those circumstances, the important tests outlined in the Bill cannot be properly applied, and as a result the safeguards simply will not work.

7 pm

The amendment moved by the noble Viscount seals up that significant loophole in a way which will allow the safeguards the Government have rightly put forward to work properly. It is absolutely not an attempt to put journalists and media organisations outside the scope of the Bill. It merely recognises—as other legislation ever since the Police and Criminal Evidence Act 1984 has done—the vital importance of this issue in a free society and imports into the Bill tried and tested statutory safeguards, using well-established and effective legal and procedural methods.

The amendment seems a straightforward, simple and common-sense way of dealing with a complex issue in a Bill which we all recognise is vital for the security of our nation. I suspect that the Government are not quite there yet; I hope they are, as they say, still on a journey and that they may yet see the light on the road to Damascus. I know that they will put up a number of arguments against it. They will say that the safeguards are adequate. But the point I have just made is that, while those are fine on paper, they will not work in practice, and there is a danger that we will have RIPA all over again. Unlike “Independence Day”, that is a sequel we could well do without.

I suspect that the Government will say that the number of cases is likely to be incredibly small—perhaps only a dozen or so a year. One case is bad enough, but more important is the signal it sends to confidential sources that journalists cannot 100% guarantee their security, and that chills free expression and undermines democracy at national and local level.

I suspect that the Government will also say that, if they introduce additional safeguards for journalism, they will have to do so for others. However, free speech and protection of sources is a genuinely special case, which this House has always set on a pedestal. I argue that there can be no good argument of principle against this amendment, which is not just an esoteric matter but a very real and pressing issue. That is why it has the united backing of the media, why all the parliamentary inquiries into the Bill have said that it must be tackled, and why—as the amendment shows—it has the backing of Members from many different parts of the House.

In conclusion, in 2015 the Conservative manifesto—a great document—itself recognised the importance of this issue. It was perhaps the first time a party had ever made a specific commitment to protect journalists and confidential sources, and I take great pride in that. However, it is now time to make good on that commitment. I hope that the Minister, who has, as always, been the soul of kindness and understanding in listening to concerns put to him, will accept this amendment or bring forward proposals on Report which will deal with this issue and protect free speech. As I said earlier, this is the time to get this right, and time is running out.

Lord Stoneham of Droxford (LD): My Lords, I support the noble Viscount, Lord Colville, and the noble Lord, Lord Black, on this amendment. I was unable to speak at Second Reading but I have spent a lifetime in the print media, so I have particular concerns on this matter.

To enable the state to access and shadow every aspect of the work of journalists and media organisations and their sources undermines press freedom, the role of the media in a free society and their ability to hold the powerful to account. I think all noble Lords would accept that that is a major concern. Such powers chill freedom of expression, inhibit sources coming forward in future for fear of potential exposure to the state, and effectively curb the press. As the noble Lord, Lord Black, said, the key issue here is the protection of sources; that is critical to the work of a free press. There is also the aspect that by not providing protection you expose journalists to danger; both reporters and photographers will become targets if it is feared that the police or other state organisations have wide access to their material.

The noble Lord, Lord Black, said in particular that there is strong evidence that the RIPA powers, which we had concerns about when that legislation went through, show the need for extra vigilance. I hope that the Government will address that in their response to this amendment. I was quite surprised to see the statistics on the number of journalists who have been subject to this legislation's powers. We are asking for one particular power, that there should be a right not only for the judicial commissioner to authorise these inquiries but that the media organisation should be informed that those powers are being sought; otherwise, those sources have no idea what the state is up to and no concept of having the power to challenge its interpretation of the public interest. There is clearly a public interest, as regards the media organisation as well, to ensure freedom of the press.

We therefore believe that these well-established legal procedures should be provided in the Bill as safeguards for the protection of journalistic activity, while we recognise that both the courts and the UK Parliament have long recognised the necessity for proper protection of non-confidential and confidential journalistic material and sources. That is why we asked the Government to look very carefully at this stage at the legislation. We welcome the efforts that they have made so far, but in view of what has happened with the use of the RIPA powers and the need for these additional safeguards, we hope that the Minister will respond favourably to the amendment.

Lord Murphy of Torfaen (Lab): My Lords, the Joint Committee on the Bill—four Members other than myself, who chaired the committee, are present this evening—met journalists in evidence sessions. The Society of Editors and the National Union of Journalists met with the committee on 14 December last year, and of course many strong representations were made in writing to the Joint Committee on this very subject. The committee eventually recommended that,

“the Home Office should reconsider the level of protection which the Bill affords to journalistic material and sources”.

We recommended that it should be at least equivalent to that afforded by the Terrorism Act 2000 and by PACE, and that the Home Office should take into account the various aspects of the European Convention on Human Rights which affect this aspect of the Bill. I know that the Joint Committee on Human Rights has also made representations to the Government on this matter.

I support the amendment in the name of the noble Viscount, Lord Colville. His proposed new clause deals with wider protection from state surveillance, not just sources—for example, a politically sensitive investigation—in that it covers areas other than simply communications data; for example, equipment interference, and that orders should be sought from a judge, as with PACE. I congratulate the Government, as in Committee in the other place, Clause 73 was introduced, which made welcome changes to the Bill as it then stood. However, I agree with noble Lords who have already spoken that that is not quite sufficient and more needs to be done.

The issue the Joint Committee had to deal with was how precisely you define a journalist these days. It is very different from when I was a young man. With the advanced technology, what or who is a journalist? PACE defines it in some senses in that it at least refers to “journalistic material”. A journalist is,

“any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication”.

Therefore we can overcome these issues.

All the speakers so far have indicated that we are grateful to the Government for what they have done, but more could be done. I do not say that the precise wording of the proposed new clause in the amendment is the precise answer to where we are going, but Ministers—both here and in the other place—have indicated to me over the last couple of months that the Government are willing to look very carefully at how to ensure that journalists are properly protected under this legislation. It is certain that there should be no lessening of protection from what already exists under PACE. I fear that it is possible that that might be the case, unless we go a little further in protecting both the sources of journalists and their investigations.

I therefore hope that, when the Minister winds up, he will give us some joy and will indicate that, by the time we reach Report, the Government will have reconsidered some of these aspects and we will be able to ensure that this particularly important part of the Bill is dealt with properly.

Lord Paddick: My Lords, my name is to this amendment and I very much support it. As a former police officer, I feel I have to speak on both aspects of this. The noble Lord, Lord Black, spoke clearly and in detail about the need for very specific safeguards because of the experience that we have had with the Regulation of Investigatory Powers Act. Police have clearly not used legislation in the way that Parliament intended it to be used—that is, to establish who confidential journalistic sources are. I also support what the noble Viscount, Lord Colville of Culross, said about the danger to journalists, particularly

[LORD PADDICK]

camera operators in serious, spontaneous public order situations. This is an area where I have some expertise. At the moment there is a balance as experience has shown that media footage has, in certain circumstances, been useful to demonstrators in terms of misuse or excess use of force by police officers. If this were to change, and the demonstrators felt that material gathered by media operators was under the control only of the police, because of inadequate provisions in the Bill, it could tip the balance and journalists would become a target for violence in such situations.

Baroness Jones of Moulsecoomb (GP): My Lords, I support Amendment 25 and declare an interest as the mother of a journalist. I also apologise for not having spoken at Second Reading; I was not able to be here. My only concern with Amendment 25 is that it does not go far enough and there is no “reasonable suspicion” test. We must remember that journalists often uncover some pretty heinous crimes and pretty awful stories. While we often talk about the damage they do and the crimes they commit, they also do some incredibly valuable work for our society, so I think this an extremely important amendment.

Lord Strasburger: My Lords, my name is also to this amendment. I shall not detain the House for very long. There is one aspect of this that I do not think has been mentioned: without protection for the anonymity of whistleblowers, far fewer will come forward and expose themselves to the revenge of their employers or others in powerful positions. There is ample evidence of whistleblowers being severely victimised, so anonymity is essential. Without whistleblowers, wrongdoing and cover-ups in the private and public sectors will go unreported and uncorrected, and that outcome is to the detriment to all of society, particularly those who lack a loud enough voice to be heard when things go wrong.

In recent years we have seen many cases of legislative arbitrage by the police in order to use powers that were never intended for the purpose of discovering journalists’ sources, finding ways to do so with the fewest protections. The “plebgate” scandal was a particularly graphic example, where RIPA was misused to find the source of a story in the *Sun*. Journalist’s phones on the *Sun*’s newsdesk were investigated by the police and their communications data were obtained. Under RIPA this was, of course, completely self-authorised; there were no external checks on what they were doing.

I believe that the Bill actually reduces the protection for journalists’ sources in the case of interception of communications and communications data. It provides no protection at all against the use of other surveillance powers, especially equipment interference. Amendment 25 seeks to rectify these shortfalls; I do not believe it is perfect yet, but it is a good start.

7.15 pm

Baroness Hayter of Kentish Town: My Lords, I shall speak briefly about Amendment 148 in this group, which stands in my name and that of my noble friend

Lord Rosser. It deals with what protections there should be for any journalist’s material collected as a result of any of these powers. In the case of material obtained that falls under normal rules of legal privilege, the Bill lays down the care with which such material should be treated under professional privilege. It is particularly important that the material is secured very safely, should anything from a journalist be held. Similarly for lawyers, material should be secured very safely, and be seen by the fewest number of people possible. Anything that is not subsequently used in the investigation should be destroyed or returned and certainly not kept. That sort of safeguard should cover any journalist’s material, either under the Bill as it stands or as amended under Amendment 25.

The case has been made as to why it is so important to protect journalists’ sources. It encourages people to come forward to give what might be really important information to an independent source, who can then verify and publish it without the source’s identity being known. Sometimes, however, I have sympathy with people’s identity being known, when they are, for example, selling secrets they should not be to newspapers for large amounts of money. I am sorry that the noble Lord, Lord Black, was not here when we dealt with Amendment 18, as a number of newspapers have failed to work to implement Leveson. In discussion of what might constitute a journalist, perhaps anyone who works for a Leveson-compliant organisation, would be a good way of defining them. This might be the encouragement needed to bring that into being.

Guaranteeing anonymity has and always will be vital to the journalists’ profession, for the sake of those who go to them but also, as has just been mentioned, for the safety of journalists, literally hundreds of whom are killed around the world in the course of their duty. There can be little doubt that should some undesirable person or organisation think that a journalist who they have briefed or who has photographed or filmed them might hand that material over to the state, then that journalist becomes at risk. It is also essential that the use of powers that may affect journalists’ sources of information should be thought of being used only when there are exceptional and compelling reasons.

There will be times when journalists’ material gets scooped up, which is when it needs to be protected. More seriously, where journalists are being asked to hand over film or photographs, we share the desire that they should be fully protected, as outlined by the noble Viscount, Lord Colville. We hope that the Government have continued their discussion with the parties involved and we look forward to hearing an update.

Earl Howe: My Lords, this Government have been clear on their continuing commitment to protecting the free press and freedom of expression in this country. In the Commons and at Second Reading, we committed to looking at this issue further and ensuring that the balance of such protections was exactly right. I thank noble Lords for tabling this amendment and giving us the opportunity to continue this important debate. The Government have listened carefully to the debate on these issues so far, and have continued to discuss

them with media organisations. I have met journalists and their representatives for a very informative discussion. This engagement has proved extremely useful all round, not least in resolving misunderstandings about the relevant safeguards provided in existing legislation.

In response, the Government tabled amendments in the House of Commons strengthening the protections in the Bill for journalists' sources. The amendment passed on Report places an extremely strong test in the Bill where a public authority seeks to use communications data to identify or confirm a journalist's source. This means that a judicial commissioner—that is, a serving or former high court judge—must first consider the public interest in protecting a source of journalistic information and then be satisfied that there is another, overriding public interest before approving an application.

In addition, the Government introduced a new overarching privacy clause which makes it explicit that public authorities exercising functions under the Bill must have regard, for instance, to whether what is sought to be achieved by any authorisation may reasonably be achieved by other less intrusive means. It also requires persons exercising functions under the Bill, including authorising police officers and judicial commissioners, to have regard to the public interest in the protection of privacy as well as numerous other principles that underpin the legislation. These amendments clearly spell out in the Bill some of the protections that journalists seek.

Of course, the Bill proceeds from the widely accepted position, endorsed by the Joint Committee on Human Rights, that,

“review by a judge or other independent and impartial decision-making body”,

is the most significant safeguard required to protect the confidentiality of a journalist's source. The Bill introduces that safeguard across all warrants. It specifically provides for judicial approval of any authorisation to acquire communications data for the purpose of identifying or confirming a journalist's source.

Amendment 25 would apply a standard set of protections across the different powers provided for in the Bill. While I commend the intention to strengthen protections, the Government do not consider this blanket approach to be the right one. The powers in the Bill are not the same; they vary both in the material that can be acquired and the level of intrusion that such an acquisition represents. That is why the Bill ensures that additional protections are applied where they are most appropriate, providing for judicial authorisation of the most intrusive powers and mandating the use of less intrusive powers where that is possible. Indeed, journalists have it made clear to me that, uniquely, they consider communications data to be at least as intrusive as content, since they allow a source to be identified. That is exactly why the Government have, also uniquely, provided for judicial authorisation of communications data requests to identify a journalist's source.

This Government agree—indeed they forcefully advocate—that confidential journalistic material and journalists' interaction with their sources must be protected, but that does not mean that a journalist should receive blanket protection from legitimate

investigation simply because of their chosen profession. The Bill ensures that protections are applied where they are required, that those who commit a crime or pose a threat to national security can be investigated, regardless of their chosen profession, and it does so in a way which is compatible with all our ECHR obligations. I should be clear that the Bill already requires any authorisation to relate to a legitimate ECHR Article 10 aim, as part of the amendment demands.

Extending protections to all,

“activities relating to journalistic information”,

as the amendment seeks to do, brings real practical implications which the Government do not consider appropriate. For example, it is clear that the content of an interview conducted in public should not be subject to the same stringent protections as a dossier of private, undisclosed material passed by a source and held in confidence. That would render meaningless those protections which are appropriately applied to confidential journalistic material.

In addition, the amendment would mean that a journalist suspected of committing a crime could be investigated only in an emergency situation where immediate action was necessary and an order to use the powers in the Bill was obtained from a judge—that is, if the crime had already taken place and there was no immediate danger, the powers could not be used to bring that individual to justice, nor could they be used to prove that individual's innocence. I suggest that that is the wrong approach, and that is without considering the question, which even the National Union of Journalists has admitted is extremely difficult, of defining who is and who is not a journalist in the digital age.

Finally, on the question of the key decision-maker in this process, the Bill upholds the important principle of judicial involvement. A number of bodies representing the journalist profession have argued that the only way to prevent the powers in the Bill being misused is to allow a journalist to be involved in the judicial commissioner's decision. The Government do not agree.

Of course, our security and intelligence and law enforcement agencies will in very limited circumstances have a legitimate need to investigate a journalist or their source. Where a journalist is suspected of a crime, it is clearly not appropriate that they should be alerted to the investigation, but there is a fundamental consideration here: these powers are by their very nature covert. Requiring prior notification would undoubtedly undermine the key purpose of the powers, whose use in relation to journalists, we should be clear, is already extremely limited.

Instead, the Bill provides for a robust regime to govern the use of the powers, with a clear role for judicial commissioners in authorising and overseeing their use by public authorities. It also sets out the offences that apply in the event that any of the powers are misused and provides for a world-leading oversight regime, led again by senior and independent judicial figures. The Bill takes a reasoned, balanced approach—the right approach—to protecting the important role of the media in a democratic society. It applies protection where it is needed without unduly hampering our law enforcement and security and intelligence agencies

[EARL HOWE]

when they truly require the use of the powers. It is on that basis that I invite the noble Viscount to withdraw his amendment.

The noble Lord, Lord Strasburger, asked about protection for whistleblowers. The Joint Committee that was convened to scrutinise the draft Bill recommended that it make it clear that members of the intelligence services can raise concerns about the misuse of investigatory powers with the Investigatory Powers Commissioner without being at risk of prosecution for breaching the Official Secrets Act—that was recommendation 61. The Government included Clause 203—now Clause 212—on the Bill's introduction to the House of Commons to give effect to the committee's recommendation. The Bill will allow an individual to provide information on a voluntary basis to the Investigatory Powers Commissioner without that individual committing a criminal offence or incurring civil liability. Of course, any use of these investigatory powers must be for one of the purposes specified in the Bill, such as the prevention or detection of a crime or in the interests of national security. They cannot be used simply to protect any organisation's reputation.

Amendment 148 would apply protections designed to provide the appropriate safeguards for a specific power to entirely different circumstances. "Exceptional and compelling" is a phrase which relates to a very specific set of circumstances: those in which the Secretary of State is satisfied, and the judicial commissioner agrees, that it is necessary to issue a warrant where the intention is to acquire legally privileged communications. Such circumstances will arise only in a very restricted range of cases, such as where there is a threat to life or limb or in the interests of national security and the interception is reasonably regarded as likely to yield intelligence necessary to counter the threat.

The test which the Government introduced into Clause 73 in the other place relates to the acquiring of communications data to identify or confirm a journalist's source. It requires the judicial commissioner to have regard to the public interest in protecting journalists' sources and then to consider, as I explained earlier, that there is another overriding public interest before granting the request. I suggest that that is the appropriate test because it reflects the requirements of freedom of expression under Article 10 of the European Convention on Human Rights.

This amendment also seeks to apply the arrangements provided for in relation to material acquired under an interception warrant to the handling, retention, use and destruction of communications data. While I commend the intention of this element of the amendment, it is unnecessary as equivalent safeguards are already to be found in chapter 11 of the *Draft Communications Data Code of Practice*. This chapter provides significant detail on the handling arrangements for communications data, placing stringent safeguards around how it is held: for instance, restrictions on who may access the data and for what purposes; when the data may be disclosed; and that when it is no longer necessary or proportionate to hold the data, it must be destroyed. These are strong safeguards which provide the appropriate protections for data.

As I noted earlier, the Bill takes what I would contend to be a reasoned and balanced approach—the right approach—to protecting the important role of the media in our society. I hope that, on that basis, the noble Baroness will not press her amendment.

7.30 pm

Lord Strasburger: Perhaps I may ask the Minister three questions. Do the Government have any problems with the way that PACE currently protects journalists' sources? I ask this because many of the criticisms he made of this amendment with respect to potential tipping off would surely also apply to PACE. The second question is this: do the Government feel that this Bill protects the communications data of journalists as well as PACE currently does? Thirdly, what special protections do the Government say the Bill gives journalists with respect to equipment interference?

Earl Howe: My Lords, the Government are clear that the regime provided for in the Bill is not inferior to the provisions of PACE. It requires that applications be made to a court for a production order on notice to the holder of the material. In the case of communications data the whole of the material is a telecommunications provider, not a journalist. We are therefore clear that nothing in the Bill enables the investigatory authorities to circumvent the protections for journalists' sources contained in PACE. Indeed, in 2015 the Interception of Communications Commissioner conducted a detailed investigation into the allegations that public authorities had utilised RIPA to avoid the use of PACE and clearly rejected the claim. The amendments that we have made to the Bill combined with the other safeguards for acquiring communications data mean that the relevant considerations laid out in Schedule 1 to PACE are addressed on the face of the Bill.

Viscount Colville of Culross: My Lords, I thank noble Lords across the Committee for their support for this amendment. I am particularly grateful to the noble Baroness, Lady Hayter, for pointing out the dangers to journalists that are possibly posed by this Bill and how the amendment might be able to ameliorate that situation. I am also grateful to the noble Lord, Lord Murphy, for reminding us of the recommendations of his committee. There was a worry that there was less protection for journalists under the Bill than had existed under PACE. I know that the Minister has answered the point, but obviously there is widespread concern that that is the case.

I ask the Minister to listen to the noble Lord, Lord Paddick, who after all was a senior policeman. He himself pointed out that when it comes to looking at serious crime, particularly the worries over violence in demonstrations, it is all about keeping the balance and making sure that journalists do not become a target for violence and that we protect them. I thank the noble Lord, Lord Strasburger, for pointing out the importance of keeping the anonymity of whistleblowers. Of course the whistleblower Act protects whistleblowers, but only once they have been named. What we are trying to do is to maintain their anonymity.

I thank the Minister for the discussions that we have had in the run-up to the Bill, but I ask him to look once again at the protections in place for journalists

under different powers. I do not think, as he said, that we are asking for blank protections for journalists. We are asking for them to be carefully controlled with different thresholds and controls to exist in different powers. I am also sorry that the Government do not feel the need to notify journalists that a warrant is going to be issued. It would be extremely helpful and it is important in making sure that the process works better.

I hope that the Minister will at least continue discussions with us between now and Report stage about how we can extend the protections for the sources of journalistic material. For the moment, however, I beg leave to withdraw the amendment.

Amendment 25 withdrawn.

House resumed. Committee to begin again not before 8.36 pm.

Caste-based Discrimination

Question for Short Debate

7.36 pm

Asked by Lord Harries of Pentregarth

To ask Her Majesty's Government what steps they are taking to combat caste-based discrimination in the United Kingdom.

Lord Harries of Pentregarth (CB): My Lords, I begin by paying two short tributes. The first is to the late Lord Avebury, who died in February. Eric fought persistently for human rights in all forms, not least against caste-based discrimination. We miss his tenacious refusal to be deflected from this goal. The other person is Dr Ambedkar, the 125th anniversary of whose birth has been celebrated this year. Dr Ambedkar was the architect of the Indian constitution with its fundamental principles of equality and justice and which outlawed caste-related untouchability.

Perhaps I may make two clarifying points. First, what we are concerned about is discrimination in the public sphere. If people have deeply ingrained beliefs about who their children should or should not marry, we may have views about it but the law has no locus. The law is concerned with what happens in public. It exists to ensure that there is no discrimination in the areas of employment, education and the provision of public goods and services. Secondly, we are concerned with caste as a social phenomenon, which has affected all religions from the Indian subcontinent, including Christianity and Islam. Sadly, the noble Lord, Lord Ahmed, has had to withdraw his name from this debate. He was going to speak forcefully about his experience of caste-based discrimination among Muslims of Pakistani origin in Bradford.

The Enterprise and Regulatory Reform Act 2013 amended Section 9(5) of the Equality Act 2010 to provide that the Government,

"must by order ... provide for caste to be an aspect of race".

The word used is "must", with no equivocation or qualification, and what we are talking about is an Act of Parliament passed by both Houses.

In July 2013 the Government introduced a timetable which set out a series of steps, including a public consultation, which was to lead to the implementation of this Act in the summer of 2015. As part of the process Ministers approved a feasibility study to be conducted into if and how it might be possible to estimate the extent of caste-based discrimination in Britain. A consortium conducted the research in the autumn of 2014. The consortium's report was due in November 2014, but it is yet to be published. My first question to the Minister therefore is: why has this research not been published? The question posed by the Government was clear enough. Is it or is it not possible to estimate the extent of caste-based discrimination in the UK? If it is possible, why has this not been carried out? If it is not possible, or if there is a downside to doing so, we need to hear the reason for that. In either case, there is no good reason to stop the process there or to refuse to go into a public consultation. It is not necessary to know the extent of caste-based discrimination in the UK to put into effect the clear decision of both Houses of Parliament. Even if caste-based discrimination in the public sphere were not extensive, it exists and Parliament has made it clear that it should be made illegal.

I took steps myself to interview someone who had experienced discrimination in employment and I found his case entirely convincing. When we have raised these issues in the past, the Government have repeatedly cited the *Tirkey v Chandhok* employment tribunal case as a reason for non-implementation of the legislation so far. In that case the tribunal noted that caste-based discrimination can constitute unlawful race discrimination in certain contexts and that caste should be an aspect of race as defined by Section 9(1) of the Equality Act 2010. However, the judge made it clear that he was dealing only with the facts of that case and was not making any more general point about caste and the law.

As the Equality and Human Rights Commission commented, the tribunal judgment,

"means that not all victims of caste discrimination will find remedy under the existing law. While it is helpful to have an EAT decision that the Act is capable of providing protection against caste discrimination, the judgment results in the position that each case in which caste discrimination is alleged will have to be considered on its own facts. While caste discrimination can be found to constitute unlawful race discrimination under the Act, this will not necessarily be so in all cases. Thus, the legal position remains unclear".

It goes on to urge:

"In our view it is both necessary and desirable for the Government to implement Section 9(5) of the Equality Act 2010, in order to clarify that the Act's prohibition of race discrimination and harassment includes protection against discrimination and harassment based on caste".

I think the Minister, as well as the whole country, would find it quite intolerable if issues of discrimination on the basis of gender, race or religion were left simply to employment tribunals with no statute law to back them up. Why should discrimination on the grounds of caste be regarded as different? It is expensive and difficult for an individual to pursue a case via a tribunal in this way. Why should they be asked to do this when the law is quite clear on race, gender, religion and sexuality? Furthermore, as we know with all the

[LORD HARRIES OF PENTREGARTH]

other protected characteristics—gender, race, religion and sexuality—the law has had a hugely powerful educative effect. It cannot completely change what goes on in people’s minds and we still get instances of sexist, racist or homophobic abuse, but no one would deny that the law has brought about a fundamental change for the good in this area.

I have in my possession a letter from a woman who wrote to me to say:

“My first experiences have been from an early age about being constantly asked what caste I am. I can only explain that it makes me feel like an outcast if you don’t conform to society’s ways of thinking. If you stand up against caste and explain there is no caste you are frowned upon and regarded as you have something to hide and that you’re probably from a so-called lower caste. I have been asked this question about my caste constantly at school, social events, Sikh temple and amongst friends. It’s an evil that is embedded in most Sikhs and no matter what an individual’s understanding of human rights and discrimination, they will still have the burning desire to ask the question and instantly form a negative or positive opinion of that person dependent on one’s caste. My daughter has been asked the same question in a religious education class at her secondary school ... I hope this has given you a little insight as to how caste is a menace in society and people of all walks of life find it acceptable in their minds to enforce this form of discrimination”.

This is despite Sikhism being, in principle, totally opposed to the caste system, as the noble Lord, Lord Singh, has consistently stressed. We are dealing with a social phenomenon which has, sadly, permeated whole religious communities.

If the taunting of that woman’s children had been anti-Semitic or racist, the law would have stood behind attempts by the teachers or the community to outlaw that abuse. At the moment it does not, and it should. This is a matter of deep seriousness to the hundreds of thousands of Dalits in this country, who see their fellow citizens protected from discrimination on other grounds in a way they are not. It is for them and for organisations such as CasteWatch that I urge the Government to do their constitutional duty, as they are being urged to by the Equality and Human Rights Commission. Those who are discriminated against find it totally intolerable that the clear will of both Houses of Parliament is being frustrated in this way and that, as will be stressed by the noble Lord, Lord Cashman, we remain in clear breach of our international obligations on this issue. I beg to move.

7.45 pm

Lord Popat (Con): My Lords, I thank the noble and right reverend Lord, Lord Harries, for introducing this debate. I confess my admiration for his persistence on this matter, however much I disagree with him. I hope it goes without saying that I stand opposed to all forms of discrimination. Having been a victim of violence and prejudice and having been forced out of the country of my birth because of my skin colour, I can sadly say that too much of my life has been shaped by discrimination. Yet I am strongly opposed to the amendment to the Equalities Act 2010 that was brought in during the last Parliament.

At the time it was passed, I was a Government Whip alongside my noble friend the Minister. With that role comes many great privileges, but it also

means that there are occasions when you are unable to speak out on some matters that you care about. Unfortunately, this was one such occasion—I am sorry that I was unable to express a much clearer view on behalf of the vast majority of the British Hindu community. The Government were, at the time, opposed to the amendment to the Equalities Act for wholly sensible reasons. There are a number of difficulties with the amendment: reaching a consensus on the definition of caste; questions over the actual level of caste discrimination in the UK; the question of whether amending the list of criteria to include caste would actually be a help or a hindrance, given recent advances in case law through the Employment Appeal Tribunal. The Government’s position was supported by the elected House of Commons, but a coalition of Liberals, Cross-Benchers and Labour Peers failed to heed the wishes of our elected representatives, with 181 Peers voting for the amendment, and 168 Conservative Peers voting against.

I feel that the amendment to the Equalities Act should be withdrawn for a different reason. I have spoken before in your Lordships’ House about the successes of the British Indian community and my pride at how well integrated the community is: it is a vital part of the nation’s social fabric. In fact, more than half the 1.5 million British Indians were born in the UK. They do not know what caste is or what caste they belong to. One of the advances the British Indian community has made is to embrace the values of this great nation and to leave behind the rigid, outdated and divisive notions of caste. This has been a great advance and differentiates us from almost every state in India. My concern is that, however well intentioned the noble and right reverend Lord, Lord Harries, is in pushing this cause, he is actually bringing to the surface social forces that are almost entirely irrelevant to this country.

I do not believe that those communities who come to the UK should be able to bring their own values and rules. They should make every effort to fit into the society around them. By making caste such a prominent part of our discrimination laws, I fear that we are undermining community cohesion rather than strengthening it. All noble Lords will agree that this matter is hugely divisive. The British Hindu community has felt somewhat persecuted by this caste discrimination campaign. They cannot understand why, when there is so little evidence of caste discrimination, we are pressing ahead with legislation that our elected representatives did not support. It points to a worrying trend; we are so often looking for ways to differentiate ourselves from each other, to find subcategories that we belong to. I fear that this is yet another way of trying to make people different, rather than looking to unite people.

I urge the Government to bring forward legislation to repeal the amendment to the Equality Act 2010. It is extremely difficult, if not impossible, to implement. It is unnecessary, given that there is little hard evidence of caste discrimination. The amendment supports out-of-date notions of caste that belong in a different continent, it was not supported by our elected representatives, and it is divisive and hugely offensive

to most British Hindus. I hope that the Minister will set out a clear path for repeal of the amendment as soon as possible.

7.50 pm

Lord Cashman (Lab): My Lords, I congratulate the noble and right reverend Lord, Lord Harries, on securing this debate, and I pay tribute to the late Lord Avebury.

The aspect of the Government's failure to make caste discrimination unlawful under statute that I find the most worrying is their casual disregard of the United Nations and our international treaty obligations. The 2012 UN Human Rights Council's recommendation could not be clearer. It states:

"Put in practice a national strategy to eliminate discrimination against caste, through the immediate adoption of the Equality Law of 2010 that prohibits such discrimination, in conformity with its international human rights obligations, including", the Committee on the Elimination of Racial Discrimination's,

"General Recommendation 29 and recommendations of the Special Rapporteur on Contemporary Forms of Racism".

The sorely missed late Lord Avebury, who cared so much about protecting the Dalits, and the National Secular Society commissioned an expert legal opinion that confirmed that the UN was correct in asserting that our international human rights obligations require us to legislate on caste. The influential *Equal Opportunities Review* responded to the opinion by stating that,

"there seems no convincing justification for the Government not to agree to bring the prohibition on caste discrimination into force".

The key points from the detailed and carefully referenced opinion include, first, that where discrimination has been identified, states are under,

"a positive obligation to take effective action".

Further, it is stated that,

"criminal laws and other legal provisions prohibiting racial discrimination must also be effectively implemented", and that,

"where a State Party fails ... that State Party violates article 2.1(d) of the Convention".

Further, the violation cannot be justified, either in principle or on the facts, by the necessity of either further evidence-gathering or consultation. Secondly, the obligation in Article 2.1 of the convention is described as being one which applies "without delay". Thirdly, where the adopted laws,

"do not seem to respond fully to the requirements of the Convention", a state party will fail to uphold its obligations.

Therefore, the UK is obliged in international human rights law to legislate for caste discrimination. Its failure to do so since 2002, and certainly since 2010, is a violation of Article 2.1 and Article 6 of the convention. This could hardly be clearer. Your Lordships may be surprised to discover that in 2014 Her Majesty's Government told the UN in the mid-term government report that they intend "to introduce legislation" under the Equality Act and that:

"A public consultation process on the detail of the prospective legislation is expected later in 2014".

Yet by 2015, Caroline Dinenage MP, replying on behalf of the Government Equalities Office to a letter to the Prime Minister, told the National Secular Society that Her Majesty's Government were of the view that,

"we are fully compliant with our international obligations in this area".

She added that she had asked for the legal opinion that I have cited, which the Government have had for three years,

"to be given further consideration".

What is the result of that consideration?

Case law falls far short of the obligations I have cited, even if it were unambiguous. Yet Ms Dinenage and the Minister, the noble Baroness, Lady Williams of Trafford, acknowledge that the *Tirkey* case on which they rely provides only "potential" protection—hence the former's unconvincing reference to seeing, "the development of case-law that provides protection against it as helpful".

In summary, we are obligated to legislate and have told the UN that we will; yet instead of doing so, Her Majesty's Government are asking us to believe that they hope someone will come forward to clarify the case law. That is entirely unacceptable. In conclusion, it is indefensible that the Government have shown so little concern to protect the victimised, and I ask on their behalf that the Government now comply with our international obligations. I also ask for an undertaking for the immediate insertion of caste into the Equality Act, which could be achieved by secondary legislation. I urge the Government to endorse the UN principles and guidelines on combating discrimination based on work and descent, and pay tribute to the outstanding work of the International Dalit Solidarity Network and the strides that it has made, particularly across other parts of the European Union.

7.55 pm

Lord Lester of Herne Hill (LD): My Lords, when I listened to the noble Lord, Lord Papat, it took me back to 1974, when I heard similar arguments against having legislation on sex or race equality.

Over the past year I repeatedly asked Questions for Written Answer by Ministers. I have asked why the 2014 feasibility study on caste discrimination has not yet been published, when the Government plan to consider the case for further consultation on caste discrimination, and for clarification on how *Tirkey v Chandhok* has in the Government's view changed the law on caste discrimination. The answer is always the same and I paraphrase: "We are currently considering what steps to take".

It is more than three years since Parliament placed a duty on the Government to activate Section 9(5) of the Equality Act 2010. It is more than 18 months since the caste feasibility study was completed and it has still not been published. It is also more than 18 months since the *Tirkey* verdict, and 12 months since the finding on the facts in the full liability hearing. Ministers have said that they understand the Employment Appeal Tribunal in *Tirkey* as,

"providing an existing legal remedy for claims of caste-based discrimination".

That view is not sustainable. In *Tirkey*, Mr Justice Langstaff, giving the Employment Appeal Tribunal's judgment, found that "ethnic origins" was a wide and flexible phrase covering questions of descent, and that some of those situations would fall within an acceptable definition of caste. He decided that no separate claim

[LORD LESTER OF HERNE HILL]

for caste discrimination was possible. At paragraph 55, he expressly recognised the limited impact of his judgment. His focus, he explained, was on,

“this particular case, in its particular circumstances”,

and his role was not to “establish more general propositions”. It is clear that the Employment Appeal Tribunal was not setting out a definitive decision in principle on whether discrimination on the ground of caste was within the scope of the Equality Act. At the full hearing in July 2015, Ms Tirkey succeeded in her claims for unfair dismissal, racial harassment and indirect religious discrimination. She was awarded a substantial sum at a subsequent remedy hearing. However, the decision did not indicate, still less establish, that there is an existing legal remedy of caste-based discrimination.

The current state of the law lacks legal certainty. There is no binding and authoritative legal precedent. That legal uncertainty violates the rule of law and the Government’s continuing inaction violates parliamentary sovereignty. The uncertainty could be removed either by expensive and protracted litigation up to the Supreme Court or by the Government performing their statutory duty without further procrastination, thereby respecting parliamentary supremacy and the rule of law. The EHRC supports the need for the Government to do so. The noble Lord, Lord Popat, disagrees with Parliament’s clear command. He is entitled to that view but Parliament is sovereign. I call on the Minister to inform the House unequivocally in her reply whether the Government will now perform the duty cast upon them by Parliament. If not, what is their justification for refusing to do so? It is time to end the continuing failure to give effect to the will of Parliament.

7.59 pm

Baroness Flather (CB): My Lords, I, too, thank, the noble and right reverend Lord, Lord Harries of Pentregarth, for bringing up this issue again. I hope that very soon we will not just thank each other but that things will actually start to happen. There has been talking for a long time but nothing has been done. I am very pleased to see the noble Baroness, Lady Thornton, on the Labour Front Bench, because she was very important in including this measure in the Act. I thank her for her wonderful contribution.

The noble Lord, Lord Popat, says that the vast majority of Hindus do not want caste discrimination to be included in the Act. What else are they going to say? Of course they do not. Why would they want caste discrimination to be part of the Equality Act? They cannot possibly want that. I had a long discussion with one of the policy advisers to the noble Baroness, Lady Williams of Trafford. He said, “We get a lot of evidence from the Hindus but we have not had much from the Dalits”. I do not know about that. However, if you talk to the Hindus in general but not to the Dalits, you will get the evidence vis-a-vis no caste discrimination because you are talking to the people who will be stigmatised by caste discrimination being included in the Act. Naturally, they are not going to say, “Oh, there is caste discrimination”. They are a powerful group of people. There are a lot of Hindu organisations and they have a lot of connections in

Parliament, possibly in the House of Lords as well. We have to be aware that they have quite a lot of pull in this matter.

I was very interested to hear the noble Lord, Lord Popat, say that the young do not know about caste. Well, they know about it when it comes to marriage. We do not care whether they marry this person or that person, and perhaps they do not care, but they know about caste because their parents tell them. They say, “We’d like you to marry someone in your own caste”. Also, at gatherings where a person of a certain caste comes to meet girls or boys, all the girls and the boys in that meeting will be from a certain caste, so that they do not have to worry about which caste they are going to meet as the girls will meet boys from their caste and the boys will meet girls from their caste. Therefore, I think that the young do know about caste. I think that everybody knows about caste.

I grew up with caste in India, not in the UK. I have not experienced any caste-based discrimination, although I have had plenty of gender-based and race-based discrimination. Sometimes it is confusing to know whether the discrimination is due to gender or race or both. In India, when I was a child, we had a Brahmin cook because we are of the merchant caste, and many people would not have eaten in our house if we had not had a Brahmin cook. Therefore, most of us are aware of caste, whether we are living here, or in Africa. Wherever we have gone, we have taken this with us. It is truly a stigma on Hinduism as far as I am concerned.

There are two things which Hinduism needs to look at and get rid of—caste is one and the other is dowry. Girls have a terrible time because of the dowry system. They are killed and aborted because of it. In Punjab now there is an 11% difference as between the numbers of girls and boys. I am not saying that is happening here but we had one case of the abortion of a girl foetus, although that was not proved to be gender-based. We need to be very aware that people who live with certain types of practices do not just give them up because they move from one country to another. It is so much a part of their psyche and so ingrained in their thinking that it is not easy for them to get rid of it, even if logically they think it should be got rid of.

Many reports have been produced on this issue, including two from the Equality and Human Rights Commission. The Labour Government also commissioned a report before they left office. All those reports came out in favour of including caste discrimination in the Equality Act. The time has come for us to face this fact. What is the point of constantly talking about the *Tirkey v Chandhok* case? The judge in that case said quite clearly that it involved specific circumstances, not general circumstances that affected everybody in discrimination cases. There may be discrimination in housing, employment and education, but not all those cases will be affected by the circumstances that applied in *Tirkey v Chandhok*. It is pointless to think like that.

8.04 pm

Lord Deben (Con): My Lords, I, too, congratulate the noble and right reverend Lord, Lord Harries, on initiating this debate. I apologise to the Minister as what I have to say will be fairly tough and is not aimed at her. This issue is personal for me because when we

last debated it I was given undertakings by the Government, as a result of which I urged the House not to pass the amendment. The Government told me that if the amendment was not passed they would take measures, do the research and then introduce the changes. I spoke up for the Government on that occasion. The Government lost the debate and have been told by Parliament that they must, by order, introduce this measure by means of secondary legislation. However, the Government are refusing to do that, having promised me that even if we did not pass the measure they would take action.

I have to say that every part of this debate has been a shame on our democratic system. The Government have to accept that Parliament has spoken. My noble friend Lord Popat proved that because he wants the legislation to be reversed. He knows that the only way in which he can win on his point of view, which I disagree with very deeply, is by having the legislation reversed. The Government cannot argue that because of a partial decision by a tribunal they are excluded from the need to legislate. They have to legislate—that is what the law says. That leads me to believe that the only reason the Government have not legislated is a pretty unacceptable one. It is interesting that people are more enthusiastic about dealing with this when in opposition than was noticeable when they were in government. Both parties must accept that they failed to do in government what in opposition both parties have recognised that they ought to do. Therefore, it seems to me that powerful forces have been employed to inhibit Governments of both parties from taking measures which any ordinary, sensible person should insist they take.

If the Government rely on the tribunal decision, there can be no reason why they should not confirm it by taking the action on which Parliament has insisted. If this tribunal decision is in their minds good enough, why cannot they do what Parliament said? There is nothing wrong in reinforcing that, particularly as its reinforcement would mean that the Government would not be in breach of the United Nations, which they clearly are. However the Minister explains it, there is no doubt that we are not in conformity with that body. Indeed, the Government have admitted that—in replying to the United Nations they said that they were in the course of arranging to be in conformity. Well, they have been in the course of doing so for some time and it still has not resulted in the answers which this House wants.

I say to my noble friend Lord Popat that this House changed the law and it was accepted by the other House. It is no good saying that somehow this issue is different because we agreed it. The fact is that in the end the House of Commons saw that we were right. That is why we are here. If that is not why we are here, why the blazes do we turn up and have these arguments anyway? My noble friend has got to accept that this is what Parliament has decided.

I am happy to see that Mrs May is now leader of the Conservative Party—thank God. In her first statement, she reminded the Conservative Party that her first principle was to ensure that all people had a fair do in life. Can one possibly say that and yet exclude from the fair do in life those who happen to be Dalits? This

is the first chance that a new Government have got to stand up and tell this House that they intend to obey the law. The only alternative is to tell this House that they intend to disobey the law. I do not believe that is a proper position for any Government.

8.11 pm

Lord Desai (Lab): My Lords, I thank the noble and right reverend Lord, Lord Harries, for persisting with this amendment. It has been explained what the law is and what the Government ought to do. So why do they not do it? Obviously, there is a very strong lobby—let us call it the caste Hindu lobby—which is very powerful, prosperous and persistent. They have abandoned me but I know they would love to get me on their side. A lot of false arguments are made. I was asked by somebody: “Why do the Government want to abolish caste?”. Nobody is abolishing caste; caste is a part of the identity of everybody who comes from the Indian subcontinent, which includes Pakistan, Bangladesh, India and Nepal. One does not mind something that is part of people’s identity and the culture that they have grown up with. As the noble Baroness, Lady Flather, explained, there are issues with ritual purity, eating and so on. That is fine: we are not objecting to caste; we are objecting to discrimination based on it. It is not a caste’s internal behaviour, among themselves, that we are interfering with. We are asking questions about the interaction between two people of different castes. When there is evidence that there is discrimination and we cannot find any other reason, like gender, to establish why the discrimination is there, then it has to be because of caste.

The Conservative Party obviously wants to win votes and seats. I do not blame them for that; who does not? However, they have to explain to the people who are objecting that the Government’s programme is a minimal programme of preventing discrimination and bringing our law into line with our UN obligations. They should also say that that is the law in India. They are not passing a law which is un-Indian. They are passing a law which is entirely in coherence with India’s constitution and law. To the extent that the Government are being reluctant to challenge the lobby, they are playing a vote-bank game. They ought to ask themselves whether it is worth however many seats there are to persist with an injustice for which there is evidence and which will give us a bad name in international law. The law having been passed by Parliament, the Government are definitely in breach of their obligations under the law.

Another argument which is made is that there is no discrimination; it is entirely the perception of non-Indian people who see discrimination everywhere. If there is no discrimination, what is the problem with passing the law? If there is no discrimination that is good, but they should pass the law just in case. Then they should try to find evidence and see a report from the appointed research bodies that they tried hard, dug everywhere but found no discrimination. The Government should then say: “Even so, we will go on monitoring this issue because we have an obligation under the law”. We have to say to the lobby: “We love you, but we cannot allow you to do things which are in violation of the law of the land”. It is not only the law of the land; it is

[LORD DESAI]

internationally accepted standards of justice. There is no election until 2020—one hopes—so I advise the Government and people who are worried about elections that they have enough time to convince these lobbies that they are wrong and that they should help the Government comply with the law and fulfil their obligations.

8.15 pm

Baroness Thornton (Lab): My Lords, I congratulate the noble and right reverend Lord, Lord Harries, on bringing this debate to the Floor of the House. There are very few issues which would get me back to the Dispatch Box but this is definitely one of them. This debate feels like *déjà vu* all over again, with many of the same actors: the noble Baroness, Lady Flather, the noble and right reverend Lord, Lord Harries, and the noble Lord, Lord Deben, with whom I completely agree. In fact, I felt that I should stand up and just say: “I agree with Lord Deben”, and sit down again. I will not quite do that. There are also some new and distinguished additions, such as my noble friend Lord Cashman. There is, of course, a different Minister, so maybe there will be a different result to this particular debate.

My noble friend Lady Royall and I were the people who placed this power in the Act in 2010. I feel that we owe an apology. I think that the Government do too, and I would like to apologise to the Dalit community in the UK for having lived with inaction on this issue for so long. We gave the power in 2010 to put forward caste discrimination as a protected characteristic. It is shocking that we have not done so. I commend the Anti Caste Discrimination Alliance for its persistent and excellent briefing—unfortunately, all over again.

Over the past 60 years, there has been, as we know, a gradual and welcome increase in the number of people in the UK from the Indian subcontinent. These communities have of course brought with them their own social habits, norms and religious customs, as outlined by my noble friend Lord Desai. I say to the noble Lord, Lord Popat, that it is never comfortable to have issues of discrimination pointed out. It is always the case, as the noble Lord, Lord Lester, said, that arguments are used about communities and families every time we discuss discrimination by those people who do not want to put anti-discrimination legislation on to the statute book. That happens every time. As a woman, I can tell your Lordships all the arguments that have been used over the years, even in this House, about why women should not be here, why we should not vote, why we should not be able to do this or that or the other. This is not a new argument, but that does not mean that discrimination does not exist.

In 2013, what is now Section 97 of the Enterprise and Regulatory Reform Act was amended so that the Act would provide that the Government must make such an amendment. Yet three years later the Government have still not clarified the Act to provide that caste discrimination is an aspect of race discrimination. In 2013, the United Nations High Commissioner for Human Rights, Navi Pillay, said in a powerful speech in the House of Lords that we needed to act on the “insidious stain” of caste discrimination and urged

the UK not to tarnish its excellent record on human rights by delaying implementation of UK anti-caste-discrimination legislation. She added that there was a need for “strong, swift implementation” of the amended Equality Act 2010 to protect people in the UK from low-caste backgrounds.

We have seen the opposite of strong and swift. “Flabby and slow motion” would better describe the lack of activity since 2013. This lack of activity, as the noble Lord, Lord Deben, and others have said, shows a contempt for Parliament that is really unacceptable. Perhaps I may invite the Minister to speculate on how the Dalit community in the UK and the United Nations might view this lack of action by the UK Government. Since we discussed this matter in 2013 and passed the amendment, from which organisations and stakeholders have the UK Government had subsequent representations to discuss caste-based discrimination in the UK? With which organisations and stakeholders have they had meetings? How do the Government intend to ensure a regular and meaningful dialogue with the stakeholders in the future? Finally, what steps do the Government plan to take to implement this legislation at last?

8.20 pm

The Parliamentary Under-Secretary of State, Department for Communities and Local Government (Baroness Williams of Trafford) (Con): My Lords, I am pleased to answer this Question for Short Debate. I thank the noble and right reverend Lord, Lord Harries, for securing a discussion on what is a very sensitive issue, which is very important to several communities within society. I thank all those who have spoken today for their contributions.

I would like to make it perfectly clear from the outset that this Government, like their Labour and coalition predecessors, completely oppose any discrimination that people may suffer because of caste or for any other reason. We are committed to ensuring that the appropriate level of protection against caste discrimination exists.

However, before I proceed, I, like other noble Lords, pay tribute to the unstinting work of the late Lord Avebury, who did so much to bring the matter of caste discrimination before us here in this place. Among the many causes that he pursued with passion, he had an unswerving conviction to ensure that people in our society were properly protected against caste discrimination. It is therefore with some poignancy that we feel his absence from the debate today, to which he would definitely have contributed.

Listening to noble Lords who have spoken, it is clear that we all want the same thing. We want people to have a decent level of protection against any discrimination that is suffered because of caste. Discrimination on racial grounds is abhorrent and—this applies to caste above all—has no place in modern society. Most of us here today will be well aware of the history of this issue. It is right that where people see injustice they express their concerns and work diligently to ensure that the more vulnerable among us are given due protection. Those concerns have been expressed thoroughly, passionately and cogently, here and in another place.

During discussion on what subsequently became the Equality Act 2010, a debate as to whether the race provisions in that Bill already provided a level of protection against discrimination because of caste first took place. At that time, any such consideration was essentially a matter of conjecture. There was legal doubt about the level of protection that may exist, which is why the power, later converted to a duty, was included in the Act to enable caste to be added as an aspect of race for the purposes of the Act. Since then the legal position has developed. Thanks to the case mentioned by noble Lords, *Tirkey v Chandhok*, anyone who feels that they have been discriminated against because of caste can potentially bring a case of discrimination under the existing protections contained in the Equality Act 2010—namely, the ethnic-origins limb of the race provisions. Justice Langstaff said:

“There may be factual circumstances in which the application of the label ‘caste’ is appropriate, many of which are capable—depending on their facts—of falling within the scope of s 9(1) [of the Equality Act], particularly coming within ‘ethnic origins’, as portraying a group with characteristics determined in part by descent, and of a sufficient quality to be described as ‘ethnic’”.

It is clear from the high level of damages awarded to Ms Tirkey how seriously the court took her case. She was awarded nearly £184,000 in respect of unpaid wages and a further £35,000 for damages to feelings, which we believe to be one of the biggest ever awards for non-pecuniary losses. That award reflected the seriousness of the case.

However, there is no clear and unambiguous definition of caste. There is no unanimous collective agreement as to what it constitutes. That much is clear from listening to academics and stakeholders and from reading the research in this area. It is therefore unclear what relevant factors of caste, if any, would not potentially be captured by the Justice Langstaff ruling. As the Government, we need to consider carefully whether simply putting the word “caste” into the Act would actually change or clarify the legal position. It may well be that the ruling in *Tirkey v Chandhok* already provides the appropriate level of legal protection that is needed against caste discrimination.

At the time of the Langstaff judgment, concerns were expressed by some noble Lords that the judgment could be appealed to, and overturned by, a higher court. That has not happened. However, the Government would certainly be prepared to consider intervening in any case that appeared to pose a legal risk to the precedent that *Tirkey v Chandhok* has established. We are monitoring litigation in the courts and tribunals for any case that would appear to test—or, for that matter, support—the *Tirkey* judgment. However, we are currently unaware of any cases of race discrimination with an alleged caste element coming before the courts since the Langstaff judgment was delivered.

The noble and right reverend Lord, Lord Harries, asked why the research has not been published. The research that the Government commissioned jointly from TNS BRMB and the NIESR was not about determining the extent of any caste discrimination that may be occurring in Great Britain; rather, it was a feasibility study into whether or not such research could be undertaken. The study has not been suppressed

in any way. It also looked at the feasibility of the legislative provision to review the caste duty from 2018, and we are considering the study’s conclusions and recommendations as part of our broader consideration of the caste duty.

My noble friend Lord Popat said that the issue of caste is outdated and talked about reversing the amendment to the Equality Act 2010.

Baroness Flather: It is not outdated. He is not the only Hindu here. I am a Hindu. It is not outdated; it is there all around us.

Baroness Williams of Trafford: He speaks from his own experience.

Baroness Flather: I am speaking from mine. I am speaking from my own point of view.

Baroness Williams of Trafford: I am aware that the noble Baroness speaks from her own point of view. In fact, she made the point that she had not been subject to any caste discrimination in this country.

Baroness Flather: Not personally but I am not a Dalit.

Baroness Williams of Trafford: We probably should not hold up the discussion. The noble and right reverend Lord, Lord Harries, asked why caste is different and said it was more expensive for claimants to pursue a case in this way. I cannot see how the inclusion of the single word “caste” in the Act would reduce the cost of bringing a discrimination case or make any difference to the tribunal fees or other costs, given the precedent set by the judgment in *Tirkey v Chandhok*.

The noble Lord, Lord Cashman, said that the EAT judgment makes it clear that domestic law on race must reflect international law and the International Convention on the Elimination of All Forms of Racial Discrimination. He asked why the Government did not accept this and bring the Equality Act into line with our international obligations by putting caste into it. The Government’s view is that the UK is already fully compliant with our international obligations in this area. That is borne out by the decision reached in the EAT case.

The noble Lords, Lord Cashman and Lord Lester of Herne Hill, said it was unacceptable for the Government to wait for clarification of the case law. We accept that in *Tirkey v Chandhok*, Justice Langstaff was clear that his judgment was fact-specific and not a definite statement that all potential caste cases could be covered by the ethnic origins provision. However, he did not identify any aspects of caste that could not be so covered, and so far neither have we.

Lord Lester of Herne Hill: My Lords, I took only three minutes for my speech and therefore I feel entitled to ask the Minister unequivocally to reply to my question, which she has not done. Am I right in interpreting what she said as being, “No, we do not intend to legislate”?

Baroness Williams of Trafford: I will try to be clear by the time I get to the end what my answer ultimately is. As the noble Lord, Lord Deben, said, we have a new Prime Minister today. He also made the point that the judgment is not binding and could be overturned at the next caste-related case.

Judgments set at the Employment Appeal Tribunal level are binding. The judgment could potentially be overturned by a higher court, but that is the same for all case law decisions, short of the Supreme Court. The precedent set by *Tirkey v Chandhok* has stood since 2014 and we are not aware of any potential challenge to it. If there were such a challenge, as I have said before, the Government would certainly be prepared to consider intervening to ensure that the judgment was upheld.

I finish with the noble Lord, Lord Deben, in saying that the new Government must stand up and obey the law. I agree that this is an issue which the new Administration, led by the new Prime Minister, who herself was Minister for Women and Equalities from 2010 to 2012, will need to consider afresh, and I am sure that they will. I knew this debate would raise feelings on both sides, and it has. It is a complex issue, which is why the Government have been diligently considering the implications of the judgment.

I thank the noble and right reverend Lord for raising this important issue in the Chamber, and all noble Lords for their valuable contributions. I close by repeating what I said earlier. I believe that we all want the same thing, which is to ensure that there is an appropriate level of protection for everyone against the harm of caste discrimination. I know the whole House supports this aim. The real question is how best to achieve that for the benefit of everyone, which is exactly what this Government are currently considering.

8.31 pm

Sitting suspended.

Investigatory Powers Bill

Committee (1st Day) (Continued)

8.36 pm

Amendment 25A

Moved by Lord Rosser

25A: After Clause 14, insert the following new Clause—
“General public reporting

- (1) A person subject to a warrant or notice under Part 2, 3, 4, 5, 6, or 7 of this Act may publish and make publicly available a report including—
 - (a) the number of warrants or notices to which they have been subject;
 - (b) the number of accounts affected; and
 - (c) the number of warrants or notices they have complied with.
- (2) A person may make the disclosure under subsection (1) in relation to any warrants or notices received in the previous 180 days.”

Lord Rosser (Lab): The amendments in this group relate to issues which have been raised by service providers, and are all largely probing amendments to

ascertain the Government’s response for the record. As has already been said, Clause 2 addresses “General duties in relation to privacy” for a public authority—including the relevant judicial authority—in connection with the issuing of warrants and notices, and sets out the considerations to which the public authority must have regard.

Amendment 25A, the first in the group, provides for a new clause after Clause 2, which would allow companies served with a warrant or notice, whether complied with or not, to publish figures in aggregate for warrants and notices received in the previous 180 days. The point of the amendment is to pursue the issue of transparency where there has been engagement between companies and law enforcement and government agencies under the provisions of the Bill. Such transparency would also appear to be a prerequisite for redress, should the way in which the powers in the Bill are being used be called into question.

In America, the USA Freedom Act significantly reforms the transparency of US surveillance laws, and this amendment is based on part of the provisions of that Act. There seems no reason why there should not be the facility for the level of transparency called for in this amendment, which would enable providers to publish statistical data about the number of warrants received and those given effect to. Not only does this amendment give the Government the opportunity to respond to the specific terms of the amendment but it will enable the Government to say what their intentions are for providing a clear framework for transparency under the Bill in the light of the USA Freedom Act.

The Minister made reference in an earlier debate to the letter that had been sent to my noble friend Lord Rooker in relation to the privacy clause. Towards the end of that letter, dealing with the last of the 10 tests to which reference was made in an earlier amendment, the letter said:

“The Bill also provides for the Secretary of State to designate international agreements under which cross-border requests for information can be made. This will ensure in the future that our protections and safeguards for requests for data under the legislation are capable of being harmonised with like-minded open and democratic Governments”.

The letter went on:

“As the Home Secretary made clear during the Bill’s passage in the House of Commons, we are seeking to negotiate a bilateral agreement with the US to this end”.

It would be quite helpful if the Minister was able to say in response what is the likelihood of the bilateral agreement with the United States of America being achieved, and within what kind of timespan.

I shall move on to the other amendments in the group. Amendments 63, 64 and 65 relate to Clauses 39 and 41. Clause 39, on “Implementation of warrants”, provides that the person who has obtained the warrant—that is, the head of the intercepting agency—may require other persons to assist in giving effect to a targeted interception warrant or mutual assistance warrant. Clause 39(4) provides:

“A copy of a warrant may be served under subsection (3) on a person outside the United Kingdom for the purpose of requiring the person to provide such assistance in the form of conduct outside the United Kingdom.”

Amendment 63 amends Clause 39 to exclude the extraterritorial provision in cases where any mutual

assistance arrangement exists between the United Kingdom and the provider's jurisdiction. It also serves to establish international mutual assistance agreements, of the kind recommended by Sir Nigel Sheinwald, the fast-departing Prime Minister's special envoy on intelligence and law enforcement data sharing. It seeks to establish international mutual assistance agreements of the kind that he recommended—as currently under negotiation with the US Government—as the primary route by which UK agencies obtain data from overseas communication service providers. The amendment would continue to enable the imposition of warrants on communication service providers in non-mutual legal assistance countries.

Clause 41, on the “Duty of operators to assist with implementation”, provides that a telecommunications or postal service provider served with a target interception warrant or mutual assistance warrant is required to take steps to give effect to it. This obligation applies whether or not the operator is in the United Kingdom. Subsection (4) ensures that the steps a service provider is required to make must be “reasonably practicable”, and subsection (5) provides that, in considering what is reasonable,

“any requirements or restrictions under the laws of the country”, in which an operator is based must be taken into account.

Amendments 64 and 65 would amend Clause 41 by seeking to establish a reasonableness test for overseas communication service providers. They would also establish international mutual assistance agreements, where they exist, as the primary route to obtain data from these communication service providers. The amendments would also give effect to the Government's commitment that enforcement powers should not be applicable where an overseas communication service provider is acting under the auspices of an international agreement. The amendments to Clause 41 state that a relevant operator is not required to take any steps which it is not reasonably practicable for the relevant operator to take which, for a relevant operator outside the United Kingdom shall include,

“any steps which would cause the operator to act contrary to any laws or restrictions under the law of the country or territory where it has its principal office for the provision of telecommunication services”.

There is a fairly widely held view that the current international legal framework by which UK agencies obtain data from overseas providers needs updating. Sir Nigel Sheinwald recommended that the UK Government engage like-minded Governments to conclude new mutual assistance agreements, which address conflicts of law and provide a sustainable and workable approach for UK agencies to obtain content data from overseas providers. It appears some progress is being made with the US Government towards such an agreement. The Bill currently provides UK agencies with several options to seek data from overseas providers, including mutual legal assistance treaties, the mutual legal assistance convention, international agreements of the kind recommended by Sir Nigel Sheinwald, and service of a UK warrant extraterritorially.

The unilateral assertion of UK jurisdiction overseas risks creating a conflicting world of laws and a difficult and uncertain environment for local staff of overseas

companies in the UK and UK companies abroad. The Bill does not direct agencies as to which power to use under what circumstances, and that is an issue that these amendments seek to address. The new international assistance agreements are additional and complementary to mutual legal assistance treaties but, unlike such treaties, international assistance agreements would permit UK agencies to request data directly from overseas providers, in their home jurisdiction, without application to a local court. These amendments do not seek to push all requests through the existing mutual assistance treaties process.

8.45 pm

Amendment 65 also relates to Clause 41, on the “Duty of operators to assist with implementation”. The purpose of this amendment is to provide added protections against locally based staff being at risk of sanction for decisions that they do not make. International companies do not always store data in the same countries where they have employees. However, employees in countries other than those where data are stored may need access to data in the course of their employment. As such, these individuals may be technically capable of complying with a request for data. One concern for major companies is that local staff are increasingly vulnerable to being held liable to decisions made by their parent company. That can also be used as a very direct way in which to apply pressure to comply with requests even when there may be a conflict of law.

The effect of Amendment 65A is to make it clear that there is a statutory defence of non-compliance with a warrant when the individual concerned is not authorised to provide data by the company legally controlling it. The amendment seeks to provide legal clarity and ensure that the Bill does not set a precedent for local staff to be held accountable in other jurisdictions.

Amendments 82 and 83 in this group relate to Clause 54, on the “Duty not to make unauthorised disclosures”. Subsection (1) of the clause provides that:

“A person to whom this section applies must not make an unauthorised disclosure to another person”.

Amendment 82 would add in the words, “without reasonable excuse”. Amendment 83 would insert a new subsection, stating that,

“it is, in particular, a reasonable excuse if the disclosure is made with the permission of the person issuing the warrant or the person to whom it is issued”.

The amendments would add the reasonable excuse defence to the unauthorised disclosure offence and expressly provide that the defence applies whether permission is given by the person issuing the warrant or the person to whom it is issued.

Other amendments in this group, Amendments 174 and 175, would extend the reasonable excuse defence to the unauthorised disclosure obligation in relation, for example, to equipment interference warrants. On the face of it, there appears to be no reason why there should not be a reasonable excuse defence, particularly covering the specific instances referred to in the amendments in this group, and I await the Government's response.

Clause 55 sets out the meaning of “excepted disclosure”, as referred to in Clause 54(2)(b). The clause deals with the duty not to make unauthorised

[LORD ROSSER]

disclosures and an excepted disclosure cannot be an unauthorised disclosure. Clause 55(7) sets out excepted disclosures under the heading in the Bill, “disclosures of a general nature”.

Amendments 84A and 84B expand the protection offered as an excepted disclosure by removing what could be regarded as the narrowing provision of Clause 55(7)(a) and extending the remaining provision to include warrants as also described in Clause 54(2)(a)(i) and Clause 54(2)(a)(ii). It is not clear why a distinction is drawn between the wording in Clause 54 and Clause 55 in that regard.

Finally, Clause 228 provides further details about national security notices and technical capability notices. The power to issue a technical capability notice has extraterritorial effect under Clause 226(8) and can be enforced against an overseas provider under Clause 228(10). There are a half a dozen or so powers which have extraterritorial effect. Of these, three are enforceable against overseas providers: targeted interception, targeted acquisition of communications data and bulk interception. The Secretary of State is required in all three cases to take into account requirements of the domestic law of the overseas provider and the extent to which it is reasonably practicable for a provider to comply with a notice. Amendments 104 and 105 would require the Secretary of State to apply the same consideration to applications for a technical capability notice and replicate the wording already used in Clause 41(5), which covers the duty of operators to assist with the implementation of warrants. These amendments would also appear to be relevant to Sir Nigel Sheinwald’s recommendation that the Government should engage with the Government concerned where there is a conflict of law rather than risk overseas providers facing an irreconcilable situation.

I think that has addressed all the amendments that I have down in this group. I will listen with interest to the Government’s response. From that response I hope to form a view about whether the amendments I have put down have real weight and merit or whether the Government can provide a satisfactory answer to the concerns behind them. I beg to move.

Lord Paddick (LD): I shall speak briefly to the amendments set out by the noble Lord, Lord Rosser, about co-operation with companies based overseas. A real concern to multinational companies is a conflict of law between the country in which they are based and the UK. That concern has been expressed to us as well. As we go through the Bill, we will see that co-operation between countries is increasingly important. As communication moves from cellular communication to communication using the internet, many of the companies that people use to communicate with each other—Facebook, WhatsApp and other platforms of that sort—are based in the United States. The more warrant authorisation processes are harmonised, the more there can be international agreements between countries and the more success we will have in securing communications data and intercept evidence as a result of people moving from cellular to the online environment. I generally support what the noble Lord, Lord Rosser, said about the importance of resolving these issues and forging as

many agreements as possible with countries, particularly those where these widely used communications platforms are based.

The Advocate-General for Scotland (Lord Keen of Elie) (Con): My Lords, I shall begin by addressing the amendments which relate to the serving of warrants and the giving of notices to overseas telecommunications operators. The first, Amendment 63, appears to remove the ability to serve a warrant outside the United Kingdom when the United Kingdom has entered into an international agreement with the country where that person or company is established. Perhaps that was not the intention. It seems counterintuitive to prohibit the service of a warrant on a person outside the United Kingdom when they are based in a territory with which the United Kingdom has an agreement which expressly provides for the service of warrants overseas. I wonder whether it was intended to do the opposite and provide that a warrant might be served on a person outside the UK only pursuant to a relevant international agreement.

In any event, it is important to remember that, although discussions are ongoing, there is currently no international agreement between the United Kingdom and the United States. As the Home Secretary has previously stated, the UK and United States Governments have begun considering a framework under which US-based communications service providers could disclose data directly to the United Kingdom for serious criminal and counterterrorism investigations in response to a UK order requesting the content of the communications—that is, a warrant. We are eager to press forward with developing an agreement. In response to the observations of the noble Lord, Lord Rosser, I can say that timetabling will depend on changes to the relevant US domestic legislation, a matter to which the United States Attorney-General recently referred. But it is not possible to give a more exact timetable so far as that is concerned.

Taking up the point of the noble Lord, Lord Paddick, of course it would be beneficial to all concerned that we should achieve some form of international agreement with regard to these matters, and it is hoped that the agreement with the United States might provide a template to take this forward. But let us accept that we are at a very early stage.

It is important to be clear that any company complying with warrants under an international agreement will not face enforcement action. I am perfectly content to put that important point on record for the noble Lord, Lord Rosser, who opened by explaining that these were essentially probing amendments, and I appreciate that. However, it is also important to explain that such agreements will not by themselves require a company to comply with a United Kingdom warrant. Even when an international agreement is in place, it remains vital that the Bill continues to exert extraterritoriality in relation to interception warrants. This also provides the legal certainty that some companies have been asking for.

Amendments 64 and 65, made to Clause 41, would set out that it would not be reasonably practicable for an operator outside the United Kingdom to comply with a warrant if that involved acting contrary to any

laws or restrictions in the jurisdiction in which its principal office is located. These amendments are unnecessary because subsection (5) already makes it clear that, in determining whether it is reasonably practicable for a company to comply with a warrant, any requirements or restrictions under the law of the territory in which it is based must be taken into account. I do not want to quote the matter at length, but I will just refer to the relevant provision. In Clause 41(5), the matters to be taken into account include,

“any requirements or restrictions under the law of that country or territory that are relevant to the taking of those steps, and ... the extent to which it is reasonably practicable to give effect to the warrant in a way that does not breach any of those requirements or restrictions”.

Therefore, it appears that this issue is already addressed. Indeed, what is said in the Bill replicates the existing position under the Regulation of Investigatory Powers Act 2000, as amended by the Data Retention and Investigatory Powers Act 2014.

I believe that the intention of Amendment 65A is to provide additional protections for staff employed in the United Kingdom by telecommunications companies whose principal offices are established overseas. Again, this additional language is unnecessary, and I will seek to explain why. In respect of interception warrants, the Government have already amended the Bill in response to concerns from overseas companies to make it clear that a warrant must be served in such a way as to bring the contents of the warrant to the attention of a person who is capable of providing assistance in relation to it. Clearly, an employee based in the United Kingdom who has no access to relevant information would not be such a person, as they would not be capable of providing the assistance required. The concern that enforcement action will be taken against junior local employees is also misplaced, since it is the telecommunications operator, rather than any individual, who is subject to the duty to provide assistance. I also make the point that it would not be in the interests of the relevant agency to serve a warrant or a notice in such a way that meant it could not be complied with quickly and efficiently. But the broader point is that if there is a conflict between United Kingdom law and the internal authorisation processes of an individual company, then of course United Kingdom law must always take primacy.

Amendments 104 and 105 would permit a person not to comply with a technical capability notice if the notice would require the person to act in a way contrary to any law or restriction in their country or territory. This amendment reads across provisions from other parts of the Bill—those relating to interception warrants and targeted communications data requests, as the noble Lord, Lord Rosser, noticed—but it does so inappropriately.

9 pm

Any conflict of law issues will arise in taking steps to give effect to a warrant. It is appropriate that the provisions for taking into account such conflicts are included in the Bill in relation to the provisions which allow a warrant to be enforced against a person outside the United Kingdom. I stress that it is a warrant, not the technical capability notice. The Bill provides that

laws in the jurisdiction in which a company is based must be taken into account when deciding whether to impose an obligation by serving a warrant.

Giving a technical capability notice to an operator simply requires it to maintain a technical capability. Technical capability notices can be used only to impose requirements to provide assistance in relation to warrants or authorisations provided for elsewhere in the Bill. Conflict of law issues are very unlikely to arise in that context because developing and maintaining the capability does not of itself authorise the acquisition of data.

In addition, Clause 226 requires that before giving a technical capability notice to a person, that person must be consulted. In the unlikely event that a conflict of law issue arose in the giving of a notice, this would be revealed during the consultation. The Secretary of State is expressly required by Clause 228 to take into account the technical feasibility, likely cost and any other effect on the person of complying with the notice. Clause 226(4) makes clear that a notice can be served only if it is reasonable to impose an obligation and practicable for the relevant operator to comply. It would of course not be reasonable to impose an obligation that could not lawfully be complied with.

I will address the proposed amendments to Clauses 54 and 123 with respect to reasonable excuse. These amendments would amend the duty not to make an unauthorised disclosure so that it would be permitted if there was a “reasonable excuse”. I hope I can reassure noble Lords that the concerns this amendment seeks to address are already met by the Bill. To begin, I should explain why the Government have a policy of not revealing the existence of a warrant.

If they are to remain effective, the techniques and capabilities available to the agencies must be protected. A disclosure of such details would cause damage to the ability of the authorities to keep us safe. Clauses 54 and 123 set out those people who are required not to make unauthorised disclosures under this Bill. Clauses 55 and 124 provide the limited circumstances where disclosure is already permitted. It cannot be right for the Bill to allow a person to release sensitive information into the public domain and then subsequently argue that they had a “reasonable excuse”. Once the information is released into the public domain—be it with good or bad intentions in mind—it cannot be withdrawn and the consequences cannot be undone.

Of course, it is absolutely right that cases of wrongdoing or impropriety are made public and that justice is done in such instances. That is why we have provided in the Bill for an Investigatory Powers Commissioner, with the power to look into any aspect of the use of these powers and to take such action as he or she sees fit. It is much better that a senior, impartial judge should take a view on what is in the public interest than, say, a junior official or an employee of a telecommunications operator.

Nevertheless, we acknowledge that it is important that such people can raise concerns without fear of prosecution, which is why Clause 212—which we will get to when we consider Part 8—also provides for an information gateway so that whistleblowers can take their concerns directly to the commissioner without fear of sanction under the Bill. Combined, these clauses

[LORD KEEN OF ELIE]

help to maintain an important principle that helps the agencies to protect their techniques and, in turn, to protect us.

Amendment 25A would insert the proposed new clause on public reporting. These amendments would provide for a person who is subject to a warrant or notice to report certain details of the warrants and notices to which they have given effect. Clause 55 already provides for the Secretary of State to make regulations, setting out the information that a postal operator or a telecommunications operator may disclose in relation to the number of interception and equipment interference warrants to which an operator has given effect. The regulations will set out the bands and timeframes within which an operator may publish information about warrants. It is my view that the level of detail required is appropriate for such conditions to be provided for in regulations and not on the face of the Bill.

This amendment would also undermine the prohibition on operators disclosing the existence and contents of bulk communications data acquisition warrants and data retention notices; I cannot support this proposal. These authorities are kept secret because revealing their existence could damage national security and hamper the prevention and detection of crime. Criminals may change how they communicate in order to use a provider that is not subject to a publicly avowed government requirement. That is why we need to be very careful about any exemptions to prohibitions on revealing such sensitive information.

I recognise that there is a careful balance to be struck between protecting sensitive information and the need for transparency regarding the use of investigatory powers, but I consider that this balance is achieved by the provisions set out in this Bill, including those relating to public reporting at Clause 55. The Government will continue to work closely and constructively with the telecommunications operators on this matter, including by consulting them on the content of the draft regulations, in order that we may provide for an approach that works for all concerned. For the reasons I have set out, I invite the noble Lord to withdraw the amendment.

Lord Rosser: I thank the Minister for that comprehensive reply. I will read it carefully in *Hansard* and reflect on what he had to say. I beg leave to withdraw the amendment.

Amendment 25A withdrawn.

Clauses 15 and 16 agreed.

Clause 17: Subject-matter of warrants

Amendment 26

Moved by Lord Paddick

26: Clause 17, page 13, line 31, leave out “or organisation”

Lord Paddick: My Lords, my noble friend Lady Hamwee and I have Amendments 26 to 31 in this group. Under Amendment 31, we have concerns about the breadth of warrants. These warrants are described as targeted interception warrants or targeted examination warrants. Noble Lords will no doubt recall that targeted

examination warrants relate to where a bulk interception has resulted in coming across content that belongs to a UK citizen and, therefore a targeted examination warrant is required in those circumstances. Clause 17(1)(a) provides that a targeted interception warrant or a targeted examination warrant may relate to,

“a particular person or organisation”.

An organisation could cover hundreds, if not thousands, of people. I am indebted to my noble friend Lady Hamwee, who tells me that it could, in fact, relate to the National Trust—I am not sure about horticultural terrorism, but they have more than 1 million members. We are probing whether it is appropriate to have a targeted interception warrant that is targeted at an organisation, particularly when in Clause 17(1)(b), it says that such warrants can only apply to,

“a single set of premises”.

The potential contrast between the number of people who might be affected in terms of an organisation being targeted by a targeted interception warrant but only a single set of premises seems stark.

Similarly, Clause 17(2)(b) says that such a warrant may relate to,

“more than one person or organisation”,

so again it is very broad. The number of people—potentially innocent people—caught up in such a targeted interception could be extremely large.

Amendment 27 relates to Clause 17(2)(a), whereby, “a group of persons who share a common purpose or who carry on, or may carry on, a particular activity”,

can be targeted by an interception warrant. To narrow the potential for this to affect a large number of individuals, the amendment would require each person to be named or identified using a unique identifier. While we accept that with, for example, members of a gang involved in drug dealing, one may not know the names of the individuals concerned, one might from surveillance footage be able to accurately describe the individual whom one wants to target by means of that warrant. A similar argument is suggested by Amendment 29 in relation to Clause 17(2)(b).

Amendment 30 relates to Clause 17(2)(c) and queries the issuing of warrants for “testing or training activities”. While Clause 17(3) defines what such activities are, it does not seem clear to us why it would be necessary to issue a targeted interception warrant to test equipment or train individuals in its use. One would have thought that, if it was a training or testing exercise, it could be done with the consent of whoever is being targeted by the training or testing activities. Amendment 31 therefore suggests that Clause 17(3), in relation to “testing or training activities” be deleted. I beg to move.

Lord Keen of Elie: My Lords, some of these amendments were discussed in the other place. They would remove the ability of the warrant-requesting agencies to apply for a warrant against an organisation; they would require a warrant to name or identify each individual involved in an operation, and they would remove warrants for testing and training activity.

As was set out in the other place, it is important that those responsible for keeping us safe have the powers they need. We consider that the amendments

would undermine those necessary powers, but I appreciate that the noble Lord is advancing essentially probing amendments and I respond in that spirit.

Let me start with the amendment regarding unique identifiers. As was explained in the other place, it is not always possible at the outset of an investigation to know or have identified all the individuals who may be subject to a warrant during that investigation. When a warrant is granted against a kidnap gang, for example, the Secretary of State may not know that there are four members of the gang rather than three. The ability to grant a warrant against the gang to establish its size and to identify co-conspirators is precisely why RIPA provided for so-called “thematic” targeted warrants. They are an invaluable tool in allowing the agencies to investigate complex or fast-moving threats, and it is important that we do not undermine their ability to use that tool.

I reassure the noble Lord, Lord Paddick, that the Bill already provides at Clause 29(8) that the warrant has to specify, for example, the phone numbers to be intercepted. Furthermore, Clause 29(4) provides a safeguard for warrants that relate to a group of persons who share a common purpose or who carry on a particular activity—for example a paedophile network—by requiring that the warrant must name or describe as many of those persons so far as is reasonably practicable. I am afraid that I do not accept the analogy with the National Trust—I do not consider it apposite at all.

It is already the case that the warrant will name or describe particular people whose communications are to be intercepted as they become known over the course of the investigation. This is an important safeguard that will assist the oversight of thematic targeted warrants. It is therefore in these circumstances that I suggest that the amendment is not necessary.

Perhaps I may move on to the amendments that seek to remove the ability to grant a warrant against an organisation. Such a change would be operationally damaging and is, moreover, unnecessary. The Bill and the statutory code of practice impose strict limits on the issue of warrants, including in relation to organisations. Such warrants are not open-ended. Their scope must be sufficiently limited that the Secretary of State can properly assess the necessity and proportionality of the interference. Further, under the Bill a judicial commissioner will need to approve the Secretary of State’s decision. In those circumstances the Bill will not allow for overly broad warrants to be issued.

I turn finally to testing and training warrants. The amendments would remove the ability to apply for a warrant for testing or training purposes. Again, I suggest that that would be damaging operationally and would result in a consequent reduction in safeguards. It is vital that those who are authorised to undertake interception are able to test new equipment and to make sure that those responsible for using that equipment are properly trained in its use. Of course there is an element of systems here in the context of the equipment. While it is possible for some testing of equipment to take place in a controlled environment, it is sometimes necessary to test equipment outside of controlled environments to ensure that it will work in real-life situations. There are therefore strict controls which

govern the handling of material obtained in this way during such tests. However, we believe that it is right that it should be possible to test this equipment in scenarios where it can be checked that it is working effectively and to help ensure that the users are operating it correctly. Without the ability to test equipment, we will increase the risk of mistakes being made where individuals are not able to receive adequate training in the use of equipment.

The warrant application process in these circumstances allows the Secretary of State to understand the potential risk that communications will be intercepted incidentally to the purpose of the testing or training, and to agree the measures to be taken to reduce the chances of communications being accidentally intercepted. There are clear safeguards in place to protect the privacy of citizens. Accordingly, I invite the noble Lord to withdraw his amendment.

9.15 pm

Lord Strasburger (LD): My Lords, I should mention that this subject was covered extensively in the Joint Committee on the Bill. It seems that the noble and learned Lord is suggesting that in order to be able to monitor a gang when we do not know if it is made up of three or four people, the language of the clause should be this open. Perhaps I may quote from some of the evidence that was given to the committee. The clause fails to,

“exclude the possibility that everyone who belongs to a certain trade union, political party or book club; visits a certain shop; attends (or has friends or family members who attend) a certain house of worship; subscribes to a certain publication; participates in a lawful and peaceful demonstration; celebrates or may celebrate a certain religious or national holiday”;

and so on and so forth. All those activities seem, perhaps as an unintended consequence, to be swept up by this provision. Recommendation 38 made by the committee states that,

“the language of the Bill be amended so that targeted interception and targeted equipment interference warrants cannot be used as a way to issue thematic warrants concerning a very large number of people”.

Lord Keen of Elie: A thematic targeted warrant will be granted only in circumstances where the Secretary of State is satisfied that it is necessary and proportionate. None of the examples cited by the noble Lord comes within a hundred miles of that.

Lord Paddick: I am grateful to the noble and learned Lord for his explanation and I am reassured to some extent by, for example, some of the provisions he highlighted in Clause 29(8) and (4). I understand that in fast-moving situations such as a kidnapping it may be necessary to add people to the warrant or to encompass additional individuals who are not specifically named on the warrant. However, I wonder whether some safeguards can still be provided in slower-moving situations, or whether, as in the case where there are provisions for the urgent issuing of warrants, those provisions could be used in these cases.

As for the strict limits on the targeting of organisations, I accept, as I notice the Labour Front Bench also accepts, that these warrants must be necessary and proportionate, and that they provide some safeguards

[LORD PADDICK]

against overreaching in the use of these warrants. I am still puzzled about training and testing warrants. I accept that new equipment and individuals need to be trained in real, live situations, but I am a little concerned about who the individuals and organisations are that might be targeted in these training exercises, bearing in mind that the whole suggestion is that the normal provisions of proportionality and necessity, in terms of suspicions that these individuals are up to no good, would not apply in these situations. Therefore, what is learned? What privacy is being intruded into in the course of these training and testing activities?

My concerns remain about some of those areas, but I am reassured by other things that the noble and learned Lord has said and I beg leave to withdraw the amendment.

Amendment 26 withdrawn.

Amendments 27 to 31 not moved.

Clauses 17 and 18 agreed.

Clause 19: Power of Secretary of State to issue warrants

Amendment 32

Moved by Lord Paddick

32: Clause 19, page 14, line 30, leave out “The Secretary of State” and insert “A Judicial Commissioner”

Lord Paddick: My Lords, my noble friend Lady Hamwee and I have Amendments 32 to 36 in this group. These amendments seek to probe the Government’s position and how far they might be prepared to go in adopting, for example, the recommendations that David Anderson made in his report about removing the Secretary of State from the issuing of targeted interception and examination warrants and replacing the Secretary of State, as the person who decides on these warrants, with a judicial commissioner. The volume of warrants that the Home Secretary, for example, has to sign amounts to as many as 10 a day. We are relieved that she does not now have the additional burden of having to run for leader of the Conservative Party, but one can imagine that to give proper consideration to 10 warrants a day is a significant undertaking, in addition to her other responsibilities.

In non-contentious cases, where there is no political aspect, such as law enforcement warrants, where one is dealing with serious crime—with drug dealers, for example—it is difficult to understand why one would need the Secretary of State to consider these issues. We obviously accept that there may be cases where there is political sensitivity, even in the case of serious crime, and it may be that the Bill can be amended to allow either for the judicial commissioner or even the applicant for the warrant to refer the matter to the Secretary of State in those cases. I also accept that in cases of national security—in cases where the security services, for example, are seeking a warrant, particularly where they may be looking at interception of foreign communications, even foreign diplomatic communications—there is a definite need for the Secretary of State’s involvement. However, as I say, the thrust of

this group of amendments is to explore why the Government insist on the Secretary of State being involved in 75% of the warrants that, for example, the Home Secretary signs when those warrants appear to be non-contentious and not politically sensitive but simply to do with law enforcement and serious crime. I beg to move.

Lord Pannick (CB): I support what the noble Lord, Lord Paddick, has said, and I too would be grateful for an explanation of why it is necessary or appropriate for the Secretary of State to be involved in the issuing of warrants in relation to non-contentious matters. My understanding—and I should be grateful if the Minister can deal with this—is that the Bill will impose those responsibilities on the Secretary of State in relation to basic policing functions, even though, under existing law, the Secretary of State has no role in the issuing of warrants in such circumstances.

Lord Strasburger: My Lords, I spent a lot of time sitting on the Joint Committee, and since then, searching in vain for a cogent reason why the Secretary of State needs to sign off warrants that have no national security or diplomatic import. Why should the Minister spend her valuable time examining and authorising warrants about everyday criminals? We are told that two-thirds or three-quarters—I do not know which; I have heard both figures—of warrants have nothing to do with national security or diplomacy.

The Secretary of State has no role in authorising property search warrants, which arguably are more intrusive, and involve invasion of a person’s home and discovery of information about a far wider range of subjects than a person’s communications. The only reason ever offered is that the Secretary of State is subject to scrutiny by Parliament, whereas a judicial commissioner is not.

When they gave evidence to the Joint Committee I asked two former Ministers who were responsible for authorising warrants how many times they had been held to account by Parliament. Both the noble Lord, Lord Blunkett, former Home Secretary, and Owen Paterson, former Northern Ireland Secretary, said that it had never happened. That was just as well because it is a criminal offence under RIPA for the existence or details of a warrant to be publicly disclosed. Clause 54 of the Bill continues that ban, with a penalty of up to five years in prison. Therefore, the whole notion of parliamentary accountability for Ministers who authorise warrants is a complete myth. It has never happened and the Bill prohibits it.

I expect that the Government will refer to the potential to be held to account by the ISC, but that does not fit the Bill and is not visible to the public. As far as I know—and as far as the noble Lord, Lord Blunkett, knew when he gave evidence—there are no examples of the ISC holding Ministers to account. I should be interested if the Minister can give some examples of when that has happened. I, too, wait with interest to hear the Government’s response to the amendment.

Lord Beith (LD): My Lords, the Secretary of State’s involvement in law enforcement warrants is a historical hangover from when this was the only kind of control

or restraint on police applications that existed prior to this legislation. Perhaps it shows a lack of rethinking the nature of judicial authorisation, such as this Bill provides for, that her involvement—it may well be “him” in the future—should have survived when it does not seem either to have practical purpose or to add significantly to the protections that the legislation will afford against misuse or excessive use of the power.

The Minister of State, Ministry of Defence (Earl Howe) (Con): My Lords, as the noble Lord, Lord Paddick, explained, these amendments seek to place the sole decision on whether to authorise a warrant application with a judicial commissioner. In the Government’s firm view, this would be a mistake. The noble Lord asked why there is a need for the Secretary of State’s involvement at all. Having a judicial commissioner be solely responsible for authorising warrants would remove all democratic accountability for that decision and would effectively remove parliamentary scrutiny from the process. In the scenario that a warrant was incorrectly either refused or approved, then the ability of Parliament to hold an individual to account for that particular decision would be greatly diminished.

9.30 pm

Additionally, the Home Secretary, Foreign Secretary, Defence Secretary and Northern Ireland Secretary are accountable to Parliament for the actions of the security and intelligence agencies and the law enforcement agencies. If Secretaries of State are not able to authorise, or refuse to authorise, intelligence gathering—one of the primary activities of an agency—I simply ask: how can they properly be held to account for the operation of those agencies?

There is another aspect as well. These amendments would also significantly undermine the ability of the Executive to carry out one of their primary duties, which is to uphold national security. If the Executive have no opportunity to offer an opinion on whether a particular intelligence opportunity should be pursued, then how can they properly fulfil their responsibility to keep the public safe from those who would seek to do us harm?

Though the Joint Committee convened to scrutinise the draft Bill, Parliament has already given detailed consideration to the question of who should authorise warrants. That committee heard evidence from judicial commissioners, former Secretaries of State and others. It concluded that the model of authorisation by the Secretary of State, followed by approval by a senior judge, was the right way to preserve democratic accountability and to introduce a new element of judicial independence. And at Second Reading in the other place, there was very strong cross-party support for a government amendment that preserved the double lock and the role of the judicial commissioner, so this is well-trodden ground, I suggest, and it is clear that there is strong support, including from senior members of the judiciary, for the approach set out in the Bill.

The noble Lord, Lord Strasburger, asked whether a Secretary of State has ever been held accountable for a warrant. Protecting the UK and its people is the first duty of government. Secretaries of State are accountable to Parliament for the actions of the intelligence agencies

and law enforcement bodies that they oversee, as I said. The Intelligence and Security Committee of Parliament plays a crucial role in this. Its review of the tragic killing of Lee Rigby is an excellent example of its in-depth investigation of what occurred, and whether it was preventable. That investigation considered the authorisation of sensitive capabilities and, while some of its scrutiny was inevitably held behind closed doors, Ministers were certainly held to account for their decisions. So the approach taken in the Bill offers a balance between the expertise and accountability of a Secretary of State and the independent scrutiny of a judicial commissioner. A judicial commissioner will need to be fully satisfied that the Secretary of State’s decision to authorise a warrant was correct; otherwise, that warrant cannot be issued. This double-lock system is in our view far preferable to a single authorisation system and will give the UK world-class safeguards. I hope that that is a helpful explanation and will encourage the noble Lord to withdraw his amendment.

Lord Strasburger: I think the Minister will have to concede that the notion of democratic accountability is wafer thin because a Minister cannot come to Parliament to explain or defend what is being asked about—any warrant. I would like the Minister to explain to us why the four other partners in the “Five Eyes” network—that is, Australia, Canada, the US and New Zealand—find no need for this democratic accountability.

Earl Howe: Will the noble Lord be kind enough to repeat the last part of his question?

Lord Strasburger: The “Five Eyes” partnership of Australia, New Zealand, Canada, America and the UK has been in existence since the Second World War. The UK is the only one out of those five that feels the need for Secretaries of State or politicians in general to be involved in authorising warrants. I was wondering why the UK has to stand out alone in that way.

Earl Howe: It is really quite difficult for me to answer the noble Lord’s question on the “Five Eyes”: it has to be a question for the other members of that group. The approach we have taken is consonant with our general wish, as a country, to hold Ministers to account for important decisions taken about national security and privacy, rather than to consign those decisions to the court. Nevertheless, we believe there is a role for a judicial commissioner to approve what Ministers do. That double lock is the formula which most people in the other place were comfortable with. That is probably all I can say on that score. I hope that the noble Lord will reflect on the case of Lee Rigby, which is a good example of how a Minister was directly accountable to Parliament, albeit in secret session but nevertheless fully accountable to a committee of Parliament. I am sure there are other examples where that has occurred.

Lord Pannick: Before the Minister sits down, could I test his patience? Will he write to me on the question that I raised, which is whether or not the Bill will expand the scope of the authorisation powers of the Secretary of State to new areas or whether it simply continues the existing scope of those powers? If the

[LORD PANNICK]

Bill does confer an authorisation power on the Secretary of State in relation to a wider scope, could he please explain why?

Earl Howe: I should be happy to write to the noble Lord on that point.

Lord Paddick: I am grateful to the Minister for his explanation. I did say that the amendments were probing ones and suggested that national security and politically sensitive issues—as with the Lee Rigby case, to which he referred—would have to be outside this provision. The fact is that in 2014 the Home Secretary personally authorised 2,345 interception and property warrants and renewals, which is about 10 a day. Even David Anderson was shocked by the number of warrants that the Home Secretary had to personally sign, which was why he came up with his recommendation. As the noble Lord, Lord Pannick, said, our understanding is that the number of warrants which the Secretary of State will have to sign will increase as a consequence of this legislation. David Blunkett, who has written of his time as Home Secretary, said that:

“My whole world was collapsing around me. I was under the most horrendous pressure. I was barely sleeping, and yet I was being asked to sign government warrants in the middle of the night. My physical and emotional health had cracked”.

I am sure that the current Home Secretary is more resilient than the noble Lord, Lord Blunkett, was in those circumstances.

Another issue, which I spoke about in the previous set of amendments, is the importance of international collaboration, particularly with the United States. I reinforce what my noble friend Lord Strasburger said. In America, federal investigative and law enforcement officers are generally required to obtain judicial authorisation for intercepting wire, oral and electronic communications. A court order must be issued by a judge of a US district court, a US court of appeals or a FISA judge. If we are to have these international co-operation agreements, again, as David Anderson pointed out in his report, it is important as far as possible to harmonise between different countries the authorisation levels of the system of authorisation. I will read what the Minister has said in his response and I agree that the amendments as drafted go too far, but this is something that we can hopefully discuss between now and Report. If not, we may have to bring this matter back on Report. At this stage, I beg leave to withdraw my amendment.

Amendment 32 withdrawn.

Amendments 33 to 36 not moved.

Clause 19 agreed.

Clause 20: Grounds on which warrants may be issued by Secretary of State

Amendment 37

Moved by Lord Paddick

37: Clause 20, page 16, line 11, at end insert—

“() A warrant may be considered necessary for the reasons given in subsection (2)(b) or (3) only where there is a reasonable suspicion that a serious criminal offence has been or is likely to be committed.”

Lord Paddick: My Lords, my noble friend Lady Hamwee and I have Amendments 37, 121, 153 and 161 in this group. Basically, these amendments relate to Clause 20, “Grounds on which warrants may be issued by Secretary of State”. We suggest an additional paragraph, where a warrant is issued for the purposes of preventing or detecting a serious crime, or in the interests of the economic well-being of the UK,

“only where there is a reasonable suspicion that a serious criminal offence has been or is likely to be committed”.

I refer to the briefing provided by Liberty, which points out that one of the greatest problems, recurrent in every power in the Bill, is the lack of a reasonable suspicion threshold for surveillance warrants to be authorised for the purposes of preventing and detecting crime. It states that:

“Intrusive powers can be authorised in order to ‘prevent and detect serious crime’, or even (in the case of communications data) to collect tax, prevent disorder, or in the interests of public safety. However, these general purposes are left wide open to broad interpretation and abuse without requiring a threshold of suspicion”.

The briefing says that a requirement of reasonable suspicion, when the purpose to prevent and detect serious crime is invoked, would prevent the potential abusive surveillance of law-abiding citizens that has regrettably been seen in the past.

The threshold of reasonable suspicion has long been an important safeguard for citizens and law enforcers against the risk of arbitrary use of police powers. The necessary and proportionate standard invokes an important assessment of the extent of the intrusion, but it does not, as we read it, require a burden of proof. Perhaps the Minister could explain how or why the “reasonable suspicion” test should not be applied to the various powers covered in our amendments. I beg to move.

Lord Keen of Elie: My Lords, as the noble Lord, Lord Paddick, explained, these amendments seek to provide that certain authorisations can be given only where there is a reasonable suspicion that a serious criminal offence has been, or is likely to be, committed. It is almost like trying to compare apples and oranges. The construct of the Bill is not around reasonable suspicion. It is around necessity and proportionality. They achieve the same goal, but in different ways. These amendments are not necessary and, in the case of communications data, would undermine the ability of law enforcement and other public authorities to catch criminals and to keep the public safe. First, let me assure the Committee that for a warrant to be issued for the prevention or detection of serious crime, a sufficiently compelling case will always be required; a speculative warrant could never be approved under Clause 20. The same is true for authorisations to obtain communications data for the purpose of preventing or detecting crime. So these amendments respond to a concern that, I suggest, is misplaced.

9.45 pm

In relation to the retention of communications data, the effect of these amendments would be even more profound. By requiring that data can be retained—that is, held by a communications service provider—only

where it is suspected that a crime has been committed, the amendment proposes to move the UK from a data retention regime to one of data preservation. Data preservation means that data are retained by a communications service provider only once a suspect becomes known to the police. In many cases, that is simply too late to be of use; for example, 58% of requests for communications data in child abuse investigations are for data that are more than six months old. Under a data preservation model, those data may not be available, and criminals would walk free.

It is for that reason that the UK operates a data retention model, rather than a data preservation model, whereby data are retained by companies and accessed by law enforcement only when it is necessary and proportionate to do so—the relevant test under the Bill. The benefits of such a model over data preservation are stark. In a Europe-wide investigation into online child sexual exploitation, of 371 suspects identified in the UK, 121 arrests or convictions were possible; of 377 suspects in Germany, which does not have data retention, no arrests were made.

In view of the very significant impact that would flow from these amendments, I invite the noble Lord to withdraw Amendment 37.

Lord Pannick: Can the Minister give the Committee a practical example of where it would be necessary and proportionate—the test that he emphasises—to exercise these powers where there is not, to quote the amendment,

“a reasonable suspicion that a serious criminal offence has been or is likely to be committed”?

Lord Keen of Elie: I think the noble Lord helpfully makes my point for me. As I said at the outset, we are dealing with apples and oranges. We achieve the same objective by different routes, but I am obliged.

Lord Pannick: I am sorry to prolong this but I am not agreeing with the noble and learned Lord, I am asking for a practical example of why the Government are not prepared to accept a “reasonable suspicion” test.

Lord Keen of Elie: For example, in the case of a missing person there may be no reasonable suspicion but it may still be necessary and proportionate to grant a warrant in those circumstances. I hope that that is concrete enough.

Lord Paddick: I am very grateful to the Minister. While I accept that there are some cases where the test of reasonable suspicion is not required—he gave the very good example of a missing person—I still wonder why the Government are averse in all circumstances to having a “reasonable suspicion” test. If I understand what he is saying, I accept that it is implicit in the necessity provision of issuing a warrant. At this stage I beg leave to withdraw the amendment.

Amendment 37 withdrawn.

Clause 20 agreed.

Clause 21: Power of Scottish Ministers to issue warrants

Amendment 38

Moved by Earl Howe

38: Clause 21, page 17, line 31, at end insert—

“() The fact that the information which would be obtained under a warrant relates to the activities in the British Islands of a trade union is not, of itself, sufficient to establish that the warrant is necessary on grounds falling within subsection (4).”

Earl Howe: My Lords, in moving Amendment 38, I will speak also to Amendments 117, 118, 120, 155, 157, 162, 163, 165, 166, 203, 220 and 223. I recognise that the Opposition and the Scottish National Party raised concerns about trade union protections in the Public Bill Committee in the other place. I know that it has been suggested that investigatory powers may have been used in the past to interfere with legitimate trade union activity.

Allow me to repeat what was said in the Commons. The agencies have never been interested in investigating legitimate trade union activity. The Security Service Act 1989 and the Intelligence Services Act 1994 limit the activities of the agencies. Both Acts make it explicit that the agencies cannot act to further the interests of any political party. It goes without saying that all the agencies take these duties very seriously.

The Government therefore agreed an opposition amendment on Report in the Commons to what is now Clause 20 of the Bill, making explicit that legitimate trade union activity would never be sufficient grounds of itself for an interception warrant application to be considered necessary.

These amendments read across protections from that amendment to all the relevant provisions in the Bill. It would still permit public authorities to apply for a warrant or authorisation, or issue new or varied data retention notices under Part 4, relating to members or officials of a trade union considered to be a legitimate intelligence target, but it makes explicit that legitimate trade union activity would never be sufficient grounds, of itself, for a warrant, authorisation or notice to be considered necessary. Accordingly, I beg to move.

Lord Pannick: The noble Earl recognises in his amendment that legitimate trade union activities would not of themselves be sufficient to establish the necessity of a warrant. I wonder whether the Government's position is that they also recognise that legitimate trade union activities could not be relevant to the issue of a warrant, because the amendment does not go that far. If the Government do not recognise that, can they give a practical example of where legitimate trade union activities—I emphasise legitimate—could even be relevant to the issue of a warrant?

Earl Howe: I cannot do so and I am not sure that it is necessary for me to do so, because if, as I have explained, legitimate trade union activity is never sufficient grounds of itself for a warrant, the question of relevance does not arise.

Lord Rosser: Unless the noble Lord, Lord Pannick, has driven a coach and horses through these amendments—I shall have to consider carefully what he said—I would like to thank the Government for bringing them forward. As has been said, they incorporate in all the relevant parts of the Bill the change that was made in relation to trade union activity in providing protection for it when the matter was debated in the Commons. We welcome the amendments and the Government honouring the commitment that they gave in the other place.

Amendment 38 agreed.

Clause 21, as amended, agreed.

Clause 22 agreed.

House resumed.

House adjourned at 9.53 pm.

Grand Committee

Monday 11 July 2016

3.30 pm

Children and Social Work Bill [HL]

Committee (4th Day)

Relevant documents: 1st and 2nd Report from the Delegated Powers Committee

The Deputy Chairman of Committees (Lord Bichard):

My Lords, welcome to the Grand Committee. If there is a Division in the Chamber while we are sitting, the Committee will adjourn as soon as the Division Bells are rung and resume after 10 minutes.

Clause 12: Functions of the Panel

Amendment 105

Moved by **Lord Ramsbotham**

105: Clause 12, page 12, line 11, at end insert—

“a “place of detention” means police custody, the prison estate, mental health detention, immigration detention and military detention;”

Lord Ramsbotham (CB): My Lords, I am aware that my noble friend Lady Meacher and others have indicated their intention to oppose the proposition that Clauses 12 and 13, to which my amendments in this group refer, should stand part of the Bill. In advance of that debate, I will offer a brief explanation of what my amendments are designed to ensure.

Amendments 105 and 107 are linked to Amendment 135, which was tabled on Monday by my noble friend Lady Howarth of Breckland, in that they relate to a specific recommendation in the recent UN Rights of the Child report that the United Kingdom should ensure automatic review of child deaths in institutions. Amendment 105 is a description of what is meant by a place of detention, to which Amendment 107 refers. If my amendments are accepted, Amendment 105 should appear in new Section 16B(9), after Amendment 107, which will appear in new Section 16B(8)—to thoroughly confuse the Committee.

Like my earlier Amendment 92A, Amendment 109 is designed to bring existing statutory guidance into primary legislation. Noble Lords will recall the very disturbing footage of the physical and emotional abuse of children in Medway Secure Training Centre broadcast in a BBC “Panorama” programme in January of this year. The Ministry of Justice’s usual response to such allegations is to convene an in-house National Offender Management Service panel, which is not the same as a national Child Safeguarding Practice Review Panel.

During my time as Chief Inspector of Prisons, this was exemplified by the refusal of successive Home Secretaries to allow judicial review of the circumstances leading to the murder in Feltham of a young prisoner, Zahid Mubarek, by a known racist psychopath, until ordered to do so by the Law Lords then sitting in this

House. This resulted in 78 recommendations for future improvement, plus the naming of 28 individuals who had failed in their duty—serious matters that might otherwise have remained hidden. Both incidents show why it is so important that the new arrangement, and this legislation, should include children in places of detention.

Amendment 109A is designed to ensure that concerned individuals and organisations have a channel through which to share significant information. The amendment allows for boundaries for public notification to be set by statutory guidance in order to protect the national panel from inappropriate referrals.

Finally, Amendment 110 clarifies that a regulated setting, in respect of a local authority’s duty to notify the Child Safeguarding Practice Review Panel of a child’s death, includes places of detention, as listed in Amendment 105. I beg to move.

Baroness Walmsley (LD): My Lords, my Amendment 106A is in this group. It was Amendment 108 but for some reason has been retabled. The arrangements for the national review panel appear to omit its opportunity to review cases of serious mistreatment and/or physical injury caused by restraint in youth custody institutions or other kinds of institutions. This amendment makes it clear that these cases should be looked at by the panel because they raise serious issues of national policy and practice. I do not think that it should be restricted to just deaths in custody, as suggested by my noble friend Lord Ramsbotham, although I fully support what he said about that.

The noble Lord, Lord Ramsbotham, referred to the BBC “Panorama” programme about the Medway Secure Training Centre. Reports obtained through Freedom of Information Act requests reveal that children in custody suffered serious physical injuries following restraint on three separate occasions in 2013-14 and on four separate occasions in 2014-15. As the noble Lord, Lord Ramsbotham, mentioned, Ministers will often refer to the National Offender Management Service. But that is not a safeguarding panel. One of 10 recommendations made by Her Majesty’s Inspectorate of Prisons, following its review of the new system of restraint in child custody, urged more effective independent oversight of restraint by local safeguarding children boards and local authorities.

The Government have tabled an amendment to abolish LSCBs, which makes it even more important that this new arrangement of a national panel includes harms to children in custody and other institutions, not just deaths. This matter is of a very serious nature and is not really suitable for review at local level. The children in these institutions are often not located in their home authority, so it is essential that the new national panel looks at these cases—unless, of course, these clauses do not eventually stand part of the Bill, which will be debated later.

Baroness Meacher (CB): My Lords, I must first apologise that I was unable to be present when my opposition to Clause 11 was debated. Unfortunately, I have a serious family health problem which has prevented me from being present or even doing any work on this Bill until today, I have to confess. I will speak briefly to oppose the proposition that Clauses 12 and 13 should

[BARONESS MEACHER]

stand part of the Bill. I assure the Minister that the aim here is not to have the clauses struck out but to provide an opportunity to explore the implications of the two clauses as they are worded and to enable noble Lords to raise any general concerns ahead of Report.

I recognise the need to establish a stronger statutory framework that will introduce greater accountability for the three key agencies involved in safeguarding children—local authorities, the local police and the local health service, as proposed by Alan Wood—though I understand that there are concerns that other services should also be incorporated. However, the single purpose of a new framework, as made clear in new Section 16B(2), is absolutely rightly specified as,

“to ascertain what (if any) lessons can be learned from the case about the way in which local authorities or others should work to safeguard children”.

I hope we can explore how, in drawing out and disseminating the lessons from tragic events, we as a society can avoid increasing the blame culture, which has affected social workers and other public servants so severely in recent years. If we do increase the blame culture, the risk is that good social workers and other public servants will walk away from their jobs, as many public servants have done in recent years; others will simply not take up these professions; and the net result will be that the risks to children will increase rather than diminish. I know that that is absolutely not what the Government want to achieve—but there is a very serious point here, which I hope the Government will take on board.

If a social worker working with a family where a child unfortunately dies or is severely injured does fall short in some way, it is surely a matter for that social worker's managers. It should not be a matter for national politicians and a national panel—whose role, as the Bill makes clear, must be solely to ensure that lessons are learned and disseminated. At a national level, the worst of all this is what happens when the media get involved—and they will get involved: they just do. That can wreck the lives of front-line workers to the point from which, to some degree, they never recover. I really do believe that it is that bad.

The review will of course need to establish whether any failings were a reflection of procedural issues, system failures or a lack of adequate resources. All of that is right and proper, but somehow we need to protect the individuals, not from proper disciplinary action or whatever is appropriate but from this national glare and utter devastation of their lives. If they have made an error, they probably did not intend to. So we have to get this right. It is terribly important that we do and I do not believe that the wording in the Bill achieves that at the moment.

Subsection (4) of new Section 16B inserted into the Children Act 2004 by Clause 12 requires the panel to publish the report on supervised child safeguarding in practice reviews. Alternatively, subsection (5) states:

“If the Panel consider it inappropriate to publish the report, they must publish any information relating to the lessons to be learned from the case”.

Is it really ever necessary or appropriate to publish a whole report on a specific case, which would inevitably involve publishing material about an individual front-line

worker? The only national interest is in the lessons to be learned—the material that would be published under subsection (5). So I would welcome the Minister's view as to whether subsection (4) could be deleted from the Bill. This would focus the minds of members of the panel on their sole role. It would also go some way to reassuring front-line staff that the Government are not aiming to focus national media and political attention on blaming an individual front-line worker. That is the key point that I hope we can think about in relation to these clauses.

My other point is a concern of the Local Government Association that the national panel, as outlined in the Bill, is too closely controlled by the Secretary of State. Again, this risks politicising the serious case review process, and the concern is again for the protection of front-line staff. But it is also very important to ensure that all the lessons are learned from these reviews, so it is absolutely vital that these reviews are seriously and really independent of government control. A review may need to comment on the impact of national policies on safeguarding failures and make recommendations for policy reform as well as procedural changes that are needed.

The Government have tabled Amendment 114, which risks placing too great an emphasis on the actions of individual practitioners in determining the cause of failures. We need to maintain the systems approach that we have had when undertaking these reviews. A focus on an individual's failure in a particular area will have no relevance to the authorities in other parts of the country. Will the Minister look at the wording of Amendment 114 with this concern in mind?

The NSPCC has questioned whether it is right to limit the role of the national review panel to those cases that involve a death or serious injury, as raised by the noble Baroness, Lady Walmsley. With the focus clearly on lessons to be learned, it may be important to include cases involving near misses or areas where a lot of children have suffered some harm. It may help to clarify that in the Bill.

Finally, it seems important to clarify further the dissemination activities that will be required of the panel. Somehow this business of learning the lessons seems to be somewhat skated over. The Bill needs to make absolutely clear how this country will learn from these serious cases. That is what the panel needs to do.

Lord Watson of Invergowrie (Lab): My Lords, we are content to support the amendments in this group that were ably moved and explained by the noble Lord, Lord Ramsbotham, and the noble Baronesses, Lady Walmsley and Lady Meacher. I wish to comment on Amendments 105 and 107. The noble Lord, Lord Ramsbotham, when discussing the rights of the child in this Committee recently urged the Government to ensure the automatic review of child deaths in institutions. The two amendments in the name of the noble Lord, Lord Ramsbotham, would ensure that that continued to happen.

I am sure all noble Lords will have received a six-page letter from the Minister this morning, looking at what we have done on the Bill so far. The last page of the letter refers to the United Nations Convention on the Rights of the Child, on which he seeks to give

reassuring commitments that the Government are indeed moving forward in a number of fields with regard to the rights of children.

3.45 pm

I do not doubt that—although I might be a little mischievous and say that while it is a commitment from the current Government, who knows what will happen by the end of the week? Who indeed knows whether the Ministers will be in their places the next time we meet? That is for others to decide and it is all very interesting.

Noble Lords: Oh!

Lord Watson of Invergowrie: None the less—I understand the laughter from other noble Lords—there are interesting developments on my side of the fence, too. The Committee will forgive me for not commenting on that.

What the Minister said in his letter was reassuring. None the less, the amendments of the noble Lord, Lord Ramsbotham, would ensure an automatic review of child deaths, which obviously is a serious matter that I do not mean to treat lightly at all. Those are the two amendments that I wanted to specify, but all the amendments listed would strengthen the section of the Bill. For that reason, as stated earlier, we are pleased to support them.

As noble Lords will know, my noble friend Lord Hunt is a signatory to the proposal to oppose the question that Clauses 12 and 13 stand part of the Bill, and it is to this that I now wish to speak. We have concerns about the manner in which the functions of the Child Safeguarding Practice Review Panel are to be established. Clause 12(1) states that the Secretary of State shall have power delegated to her to decide what the functions of the panel shall be. The functions are not set out in any detail; the Secretary of State is to be given the right to decide how the functions are to operate. The Delegated Powers and Regulatory Reform Committee stated in its report on the Bill:

“The arrangements made by the Secretary of State will determine more precisely how those functions are to be exercised, and will accordingly play a significant role in shaping what the Panel is required to do and how it is required to do it”.

The committee goes on to say that as a result, it believes that the arrangements made by the Secretary of State should be contained in a statutory instrument subject to the affirmative procedure. So do we, which is why we believe Clause 12 must be strengthened.

We also have objections to the guidance issued by the Secretary of State to the panel, as outlined in new Section 16B(8) in Clause 12. Again, our concerns are shared by the Delegated Powers and Regulatory Reform Committee, which commented that as the guidance clearly must operate hand in glove with the arrangements being made by the Secretary of State in relation to the panel, the guidance, too, should be subject to parliamentary scrutiny, this time by negative resolution.

The same could be said in respect of Clause 13 and the definition of “regulated setting”, relating to the death of a child. “Regulated setting” is not defined in the Bill, which the DPRRC regards as a major failing. The committee says:

“The definition of ‘regulated setting’ is fundamental to determining the scope of a local authority’s duty to provide information about cases”.

within this section of the Bill. That gives the Secretary of State unlimited discretion to determine what falls within the definition, and the committee goes on to say that the delegated power conferred by Section 16C(3) of the Children Act 2004 is inappropriate in providing for the definition of “regulated setting” to be set out in regulation.

More seriously—not least, I suspect, for the Department for Education—the committee proceeds effectively to rubbish the department’s claim that:

“This is a narrow power which will only provide for a list of regulated settings, not raising matters of substance which the House will need to debate”.

The Delegated Powers Committee does not just describe that power as a wide one; it concludes that it is a Henry VIII power, which means that it should be subject to affirmative procedure.

The number of delegated powers contained in the Bill was the subject of some dispute, shall we say, between noble Lords and Ministers at Second Reading. Doubtless we could schedule a separate debate in Committee to resolve just how many there are but, with the exception of the Ministers, every noble Lord who has taken part in debates on the Bill will agree that however many there are, there are too many.

The definition of a Henry VIII clause is of course one that seeks to amend primary legislation by secondary legislation. I cannot resist quoting the comments of the noble and learned Lord, Lord Judge, who spoke strongly against such clauses when he was Lord Chief Justice. He stated:

“You can be sure that when these Henry VIII clauses are introduced they will always be said to be necessary. William Pitt warned us how to treat such a plea with disdain. Necessity is the justification for every infringement of human liberty: it is the argument of tyrants, the creed of slaves”.

That may be just a little strong for this Bill but the message is quite clear. There are more egregious examples elsewhere in the Bill of the abuse of parliamentary procedures through secondary legislation—but, for the reason I have outlined, we believe that the definition of “regulated setting” has to be on the face of the Bill.

As was stated in Committee last week, there are concerns over the establishment of the Child Safeguarding Practice Review Panel, partly because of the fear that it could be used to blame, or perhaps even scapegoat, social workers if a high-profile local case is referred to the new national panel without full knowledge of the local elements of the case. That is why the greatest attention must be given to defining the arrangements and functions of the panel as clearly as possible and, where they cannot be placed on the face of the Bill, to ensuring that there is adequate parliamentary scrutiny of those aspects of the Bill. For these reasons, we do not believe that Clauses 12 and 13 should stand part of the Bill.

Baroness Pinckney (LD): My Lords, I support everything that previous speakers have said about both the amendments and in opposition to Clauses 12 and 13. During our last day in Committee, I made the case that in principle the proposal for the national safeguarding panel failed because it did not take sufficient account

[BARONESS PINNOCK]

of local accountability, local knowledge and local professionals who have a duty to safeguard children in their area. The Wood report, from which a lot of the changes proposed by the Government come, is clear on some of these issues. One factor that it picks out in its analysis of local safeguarding children's boards is that a review by the Local Government Association found,

"dissonance among the partners between the accountability and the authority of an LSCB".

The report goes on to say that,

"the duty to cooperate has not been sufficient in ensuring the coherent and unified voice necessary to ensure multi-agency arrangements are consistently effective".

So from the Wood report we hear that local accountability is one issue that has been raised. The LSCBs are not sufficiently accountable locally, and that has, in part, led to their lack of effectiveness.

The proposals in these clauses move power and accountability, in the most serious cases, from the local to the national level and put it in the hands of the Secretary of State. I think that that places too much power at the national level and not enough locally, and it is also in danger of politicising the whole process, reflecting what the noble Baroness, Lady Meacher, said, with which I totally agree. The lack of elected representation on the current safeguarding boards has resulted in them being ineffective. Currently, the boards consist of professionals and there is no full representation of non-professionals—that is, elected representatives—who are also corporate parents. It seems to me that a lack of challenge from non-professionals, who are corporate parents, has contributed to this lack of effectiveness of the safeguarding boards.

I will make a further comment, which is reflected in the Wood report, about the membership of the local boards and the duty to co-operate. The Government's proposals in later amendments would remove the requirement for some of the professional organisations to be members of the local panels. One of those, the probation service, has in my council area—I draw the Committee's attention to my entry in the register of interests as a local councillor in the Borough of Kirklees—since the fundamental changes to the service not attended the local safeguarding children boards. The later government amendments remove that requirement. It is a big mistake not to require the probation service to attend to discuss safeguarding children.

Clause 12, which lays out the functions of the new national panel, falls far short of what is required. Let us consider what has happened with serious case reviews over the past 30 years—probably and sadly—from the Climbié and Baby P reports to the many, many others that we can all draw to memory. They have all issued recommendations to which everybody has agreed but which no one has implemented effectively. Everyone says, "These are good; we must do that", but they are not implemented.

The big failure in Clause 13, which is why I will oppose it standing part, is that nowhere does it say how learning will be effectively implemented. We can all learn, and social workers across the country will have read the 48—I think—recommendations in the

Baby P report, but implementing them is the difficult bit. The Wood report refers to that and makes a powerful case for thinking in much greater detail not about the learning—the learning has been done—but the implementation. In all these cases, similar recommendations are made about the need to co-operate and the lack of collaboration and communication. We have yet to crack how to put that into effect.

If we are serious about child protection and safeguarding children, one element which must feature is how the recommendations are to be put into effect, monitored and reviewed. If we do not do that, we will never move forward. That is my fundamental reason for supporting the proposition that Clauses 12 and 13 should not stand part of the Bill.

Lord Mackay of Clashfern (Con): My Lords, I strongly support what has just been said. Over the years—it goes back quite a long way—there have been very serious cases of child injury and, sadly, in most of the cases, child deaths. There has been no shortage of inquiries. All sorts of very distinguished people have been asked to inquire into the situation. As the noble Baroness, Lady Meacher, said, there is always a focus on the individual social worker. Managers somehow stand a little back from the situation to let the light shine on the individual. That is a natural protection that management is apt to have and one that we must think about.

I strongly support the view that any number of lessons have been learned, in the sense that reports have told us what was wrong and what should be different. But I know of absolutely no mechanism to make sure that these recommendations are acted on and that something actually happens. We have only to look at some of the earliest reports in relation to this to see that very clear recommendations were made. The report is published, the public and the press comment on it—and then it is forgotten until the next one. Surely if we are to set up a national body of this sort, we should incorporate within it a clear mechanism for bringing the recommendations forward for implementation.

4 pm

I find it difficult to believe that it is a good arrangement for the Secretary of State to retain a power to set out these particular powers in regulation, instead of setting them out in the statutory provisions of the major Bill. It is rather sad that while there has been a good deal of increased regulation, there has been an even bigger increase in so-called statutory guidance. Who prepares those documents? The number of pages of statutory guidance since I ceased to be Lord Chancellor has increased very greatly and I do not believe that it helps people. How many social workers are completely familiar with all the guidance that their social work departments have issued? You have to have it in your head to put it into practice and it is at least possible that the people who write it are thinking mainly of ensuring that all the cases are covered. But they do not have much thought for the poor people who are trying to remember what the guidance said when it comes to facing up to a situation.

I find it very difficult to support a clause setting up a review system which has no mechanism for implementing the results of the review or for setting out its purposes or particular powers in some detail. Leaving it to regulation, and a little extra guidance as well, really is not law; it has become—what shall I say?—less than law. Some people may think that that is better but, unfortunately, that kind of thing only complicates the legal case. If people are anxious to prevent lawyers having more to do, this is not the way forward in that direction.

Lord Warner (Non-Aff): Will the Minister think about a very simple question? If you take powers to bring things up to national level and away from local level, I suggest that you then have an obligation to monitor what happens to the output from that new national body and to account yourself for whether anything has been implemented. Can the Minister explain to the Committee a little more about how that aspect of all this is going to work?

The Parliamentary Under-Secretary of State, Department for Education (Lord Nash) (Con): My Lords, in this group Amendments 105, 107, 108, 109, 109A and 110 concern places of detention, serious child safeguarding cases and serious harm. I am grateful to the noble Lord, Lord Ramsbotham, and the noble Baroness, Baroness Walmsley, for these amendments. I particularly thank the noble Lord, Lord Watson, for his very encouraging opening remarks—but I understand that the new Prime Minister will not be in No. 10 until Wednesday evening, so noble Lords will probably have to put up with us at least until then.

Before I turn to these amendments, I confirm that I would be delighted to convene a meeting to give noble Lords more detail on the Child Safeguarding Practice Review Panel. A meeting was specifically requested at our last Committee session by the noble Lord, Lord Warner, and the noble Baroness, Lady Pinnock, but the invitation obviously extends to all noble Lords.

I will begin with Amendments 105, 107 and 110 concerning places of detention. I had hoped that I had reassured noble Lords about the independence of the Child Safeguarding Practice Review Panel at the end of the last Committee sitting—particularly the noble Lord, Lord Watson, and the noble Baroness, Lady Howarth, who raised these concerns. As I said then, the establishment of a strong, independently operating national panel is essential. Because of its independence, the panel will have the autonomy to use its judgment about the circumstances in which it deems it necessary to carry out a national review, although we intend to provide guidance that will aid its decision-making in this regard. I assure the noble Lord that we will take particular care to reflect on the importance of children held in detention, and to consider carefully the ways in which the guidance for the panel reflects not just the deaths of children, but children who have been abused or neglected.

The existing 2015 statutory guidance, *Working Together to Safeguard Children*, sets out that a serious case review should always be carried out when a child dies in custody, in police custody, on remand or following sentencing in a young offender institution, a secure

training centre or a secure children's home. The same applies where a child dies who was detained under the Mental Health Act. We will want to consider carefully how any new guidance produced for the panel takes this into account, bearing in mind the panel's basic functions of the panel.

On Amendment 109A, I can assure the noble Lord, Lord Ramsbotham, that anyone may notify the panel of serious events in institutional settings, or indeed of such events in any place. Clause 13, as drafted, deals with requirements on local authorities but does not prevent others making direct notifications. In respect of the proposal to add a specific reference to guidance, I assure the noble Lord that Clause 12 already provides for the panel to have regard to any guidance issued by the Secretary of State in respect of its functions, and Clause 13 provides the same in respect of local authorities' duty to notify. We will make it clear that others may notify the panel of events directly.

I now turn to Amendments 108 and 109. Amendment 108 seeks to add to the definition of serious child safeguarding cases by including specific reference to cases where physical injuries or harm are caused by unlawful or abusive restraint in any institutional setting. Amendment 109 seeks to broaden the scope of the definition of serious harm to include both ill treatment and the impairment of physical health. I agree entirely with the premise behind the amendments. However, inevitably, any such definitions cannot be exhaustive and include all circumstances, or cover all settings within which children might suffer injury or harm.

The definition in Clause 12 of serious child safeguarding cases includes reference to children who have been seriously harmed. This is based on the definition set out in the current safeguarding statutory guidance, *Working Together to Safeguard Children*, which was drawn up following consultation last year. The definition of serious harm includes the factors stated in subsection (9). The wording proposed is not intended to cover all scenarios. Great consideration was given to the factors to be included in the definition of both serious child safeguarding cases and serious harm for the purposes of the clause. It will be for the panel to consider each case in line with these definitions to identify serious child safeguarding cases and determine what form of review is required. We expect that to include cases where factors such as those outlined by the noble Lord, Lord Ramsbotham, and the noble Baroness, Lady Walmsley, are a feature.

Clause 12 sets out the functions of the new panel. The panel will identify serious child safeguarding cases in England that raise issues that are complex or of national importance. The purpose of any such review will be to ascertain how practice by local authorities or others to safeguard children can be improved as a result of learning from the cases. I assure the noble Baroness, Lady Meacher, that this is about improvements in practice that can be disseminated nationally, not about the blame or public censure of individuals. Any disciplining of individuals will be done through the usual employment processes where they are working, or with reference to professional bodies, if needed. Reports on serious cases should not name individuals, whether they are professionals, children or family

[LORD NASH]

members. Writing reports in a way that ensures individuals are not named has been a long-standing convention in serious case reviews, and this should continue under the new arrangements. I assure the noble Baroness that the guidance will make this point absolutely clear.

As for her point about Amendment 114, we will come to it in detail in two groups' time.

Baroness Meacher: I am aware that this practice has gone on—you have anonymity, and so on—yet somehow the media or national politicians get the names of the front-line people and their lives are wrecked. Therefore, there needs to be very clear separation of those matters that remain local and do not find their way up to the national panel, national politicians and the rest of it, most particularly the media. I hope that the Minister would be able at least to reflect on that or perhaps give us some reassurance. As for keeping anonymity, the media know jolly well how to find out people's names—they crawl around, as the Minister well knows. We need procedures and practices that make very clear the single objective of the national panel—to learn lessons and disseminate—and that it does not need all the information about an individual. Somehow, a wall needs to be created to safeguard those people, otherwise we will not have front-line staff.

Lord Nash: I will reflect and look into that in more detail. Once it is in the public domain that a particular instance is being investigated, knowing the media, however much you try to protect an individual's identity, I cannot see quite how one can do it—but I will certainly look at it. The noble Baroness raises a very important point which we are aware of.

I should add that the Government have now responded to the Delegated Powers and Regulatory Reform Committee, in answer to some of the points made by the noble Lord, Lord Watson. The response confirmed the Government's intention to bring forward an amendment at a later stage to modify the provisions to ensure that the arrangements to which the clause refers be subject to affirmative parliamentary scrutiny.

Lord Watson of Invergowrie: Has that response been published yet?

Lord Nash: Yes is the answer.

Clause 13 requires local authorities to notify the panel of events in their area where a child has died or suffered serious harm and is known or suspected to have suffered abuse or neglect. The clause will place the process of notifying such events to the panel on a statutory footing for the first time, demonstrating the importance that the Government attach to this process and leaving no room for doubt as to whether to report an incident.

If this part of the process is not made a statutory duty on local authorities, there is a risk that some events may not be notified, thereby reducing the likelihood of events being scrutinised and action taken to reduce the likelihood of such an event taking place in future. The DPRRC also commented on this clause in its report. The Government's response to the report confirms

an intention to look again at the definition of regulated setting, as well as agreeing that any future amendments to the definition should be by the affirmative procedure. We intend to return to this matter at a later stage.

The noble Baroness, Lady Pinnock, asked about the importance of taking into account local issues. The panel will make its decision on the basis of information from local areas. It will include the probation service in the list of relevant agencies. We will come shortly to a set of government amendments that respond directly to Alan Wood's recommendations on local accountability. If I may, I will cover the rest of her points then.

She also asked a very good question, supported by my noble and learned friend Lord Mackay, about how learning will be implemented. Our whole reform to social work and the point of the national panel is to improve implementation. Our new What Works centre for children's social care will have a key role in disseminating learning and making sure that it is acted upon. As under current arrangements, local safeguarding will be expected to report on practice improvements identified through the reviews and on action taken in response.

My noble and learned friend Lord Mackay commented on the guidance. I will not talk about guidance in general, but we have significantly reduced the statutory guidance on child protection in the past five years, and we keep it constantly under review. I hope that the explanation of Clauses 12 and 13 provides reassurance about the Government's intentions, and I therefore urge the noble Lord and the noble Baroness not to press their amendments.

4.15 pm

Baroness Walmsley: For the sake of an accurate record, may I point out that Amendment 108, referred to by the Minister, was retitled as Amendment 106A?

The noble Lord suggested that the national panel would have the discretion to choose whether to investigate situations such as those described in my amendment involving,

"harm caused by unlawful or abusive restraint in any institutional setting".

If we eventually have a national panel, this is exactly the sort of situation they should look into, because it is a matter of national policy and because children in such institutions come from a range of different local authorities. Despite the guidance, very often they are not located in their home authority. My point is that these cases should be investigated by the national panel on all occasions; it should not just be left to its discretion.

Lord Ramsbotham: I am grateful to the Minister for his carefully considered response. I just hope that between now and the next time we meet, there will not be a fourth huge volume of government policy for us to consider during the passage of the Bill. I am sure it is very reassuring to think that the Department for Education is producing all this stuff, but I must say that it would have been helpful to have had it before we began our deliberations, rather than having it fed in during Committee.

When the noble and learned Lord, Lord Mackay, was speaking, I could not help but reflect on my hopes when we introduced the corporate manslaughter legislation. I hoped that it would provide the stick to make certain that the outcomes of such investigations were taken seriously. But nothing has yet happened to bring corporate manslaughter charges against the managers under whom these unnatural deaths have taken place. It is something that is worth considering.

I was going to comment on my noble and learned friend Lord Judge's remarks in the discussion on Clause 15. But, as the noble Lord, Lord Watson, mentioned his comments on the regulation, I will repeat what I said at Second Reading. I quoted the noble Baroness, Lady Smith of Basildon, who, during the debate on the balance of power between the Government and Parliament, said of this Bill that there were,

"more provisions for the Secretary of State to use regulations than there are clauses in the Bill, including on issues that should be considered matters of significant policy".—[*Official Report*, 9/6/16; col. 860.]

I also quoted my noble and learned friend Lord Judge, who, in addition to making some devastating comments about the increasing number of Henry VIII clauses in current legislation, highlighted the number of them in this Bill and asked,

"when are we going to actually achieve something before our ... arrangements disappear into some vague unknown future?"—[*Official Report*, 9/6/16; col. 875.]

I must admit that I am extremely alarmed at the number of them in the Bill, not least because the impact assessment on the Bill states:

"The Bill's contents have been reviewed and ruled out of scope for the regulatory impact assessment exercise".

To my mind, nothing could be more inappropriate because the regulatory impact assessment really needs to be carried out in spades on this Bill, as many noble Lords have said.

I am grateful to the Minister for offering his meeting on the national safeguarding panel, to which I look forward. In the meantime, and until Report, I beg leave to withdraw my amendment.

Amendment 105 withdrawn.

Amendment 106

Moved by Lord Nash

106: Clause 12, page 12, line 13, leave out "on behalf" and insert "under the supervision"

Amendment 106 agreed.

Amendments 106A and 107 not moved.

Amendment 108 had been retabled as Amendment 106A.

Amendment 109 not moved.

Clause 12, as amended, agreed.

Clause 13: Events to be notified to the Panel

Amendments 109A and 110 not moved.

Clause 13 agreed.

Clause 14: Information

Amendment 111

Moved by Lord Nash

111: Clause 14, page 13, line 12, at end insert—

"() The Panel may enforce the duty under subsection (2) against the person or body by making an application to the High Court or the county court for an injunction."

Lord Nash: My Lords, I will speak to this amendment, which enables a request for information by the Child Safeguarding Practice Review Panel to be enforced. It is essential that the panel is able to request information to enable it to perform, or assist it in performing, its functions. This may also include normally privileged information, which is frequently an integral part of what has to be considered as part of the review process. This is already set out in Clause 14.

This amendment enables the panel to apply to the court for an injunction, should a person or body refuse to comply with a request by the panel for information. In the case of normally privileged information, the panel will consider the reasons for that. It may ask the person or body to justify any refusal, but may ultimately compel that information to be provided. As previously discussed, however, this provision would not apply to the judiciary, whose independence is a constitutional matter.

The Wood review highlighted the critical importance of effective and speedy sharing of information and data in relation to protecting and safeguarding children. This clause will underline the importance of sharing relevant information with the panel, backed up with the power of enforcement. I beg to move.

Lord Warner: My Lords, we had a good go over the issue of the judiciary on our last Committee day. The Minister slid very quickly over this particular issue in his remarks—namely, that judges are exempt. Can he pray in aid what the provisions are that stop a review panel looking at the conduct of a judge? We spent a lot of time on the case of Ellie Butler, but that was clearly a case where the practice of the judge could be called into question—not just on the individual circumstances but on the systems issue of whether the judge could actually replace social workers who had been protecting the child for some period and bring into being a new review of the child's circumstances by a set of private social workers, for whom the child was a new client. That is a systems issue; it is not just about the judgment of the judge but about a piece of practice that seems to me to be at least arguable. Why, in that set of circumstances, should the judiciary be exempt from review by this panel?

Lord Nash: I will write to the noble Lord about that.

Lord Hunt of Kings Heath (Lab): My Lords, I have just picked up the debate we had in Grand Committee on 6 July, when the noble Lord, Lord Warner, raised the issue of legal and medical privilege. Then the noble Lord said he did not think that anything needed to be added to the Bill, although he recognised that guidance would need to be given to the panel in respect of the information it requests.

[LORD HUNT OF KINGS HEATH]

I assume that there will now be a considerable time between Committee and Report. I understand that this is a very complex matter. The question of the independence of the judiciary is clearly paramount; equally, my noble friend has made an important point about the need for the panels to obtain relevant information. So, rather than a quick letter, I hope that the Minister will agree to consider this important matter in some depth.

Lord Nash: Yes, I will certainly do that, and on that basis I commend the amendment.

Amendment 111 agreed.

Amendment 112

Moved by Lord Nash

112: Clause 14, page 13, line 17, leave out “on behalf” and insert “under the supervision”

Amendment 112 agreed.

Clause 14, as amended, agreed.

Amendment 113

Moved by Lord Nash

113: After Clause 14, insert the following new Clause—
“Local arrangements for safeguarding and promoting welfare of children

After section 16D of the Children Act 2004 (inserted by section 14 of this Act) insert—

“Safeguarding partners for local authority areas

16E Local arrangements for safeguarding and promoting welfare of children

(1) The safeguarding partners for a local authority area in England must make arrangements for—

- (a) the safeguarding partners, and
- (b) any relevant agencies that they consider appropriate,

to work together in exercising their functions, so far as the functions are exercised for the purpose of safeguarding and promoting the welfare of children in the area.

(2) The arrangements must include arrangements for the safeguarding partners to work together to identify and respond to the needs of children in the area.

(3) In this section—

“relevant agency”, in relation to a local authority area in England, means a person who—

- (a) is specified in regulations made by the Secretary of State, and
- (b) exercises functions in that area in relation to children;

“safeguarding partner”, in relation to a local authority area in England, means—

- (a) the local authority;
- (b) a clinical commissioning group for an area any part of which falls within the local authority area;
- (c) the chief officer of police for a police area any part of which falls within the local authority area.”

Lord Nash: My Lords, I would like to speak at some length to Amendments 113 to 120, and I will include Amendments 133 and 134 as they are related but purely technical amendments.

Amendment 113 is central to the new arrangements. It requires the safeguarding partners, namely the local authority, chief officer of police and clinical commissioning groups to work together, along with the agencies they consider to be appropriate, to make arrangements to exercise their functions to safeguard and promote the welfare of children in the area. These safeguarding partners must also make arrangements to identify and respond to the needs of children in the area.

In May this year, the Government published the Wood review into the role and functions of LSCBs. This review, through extensive consultation, identified the key role of local authorities, police and health services in the safeguarding and welfare of children. The review found that without the agreement and full collaboration of these three bodies, the strategic decisions necessary to underpin effective practice cannot be taken. The new clause gives these key safeguarding partners the flexibility to determine which other relevant agencies they need to work with, and to decide how they can work together most effectively to identify and respond to the needs of children in their local area.

The new clause will allow the Secretary of State to specify in regulations the agencies which exercise functions in relation to children. This will, of course, include relevant agencies such as schools, youth offending and justice agencies and a range of others which exercise functions in relation to the welfare of children. The key change here compared with existing arrangements is that local areas would decide which agencies to involve and in what ways, rather than having a list imposed on them by central government. We intend that statutory guidance will specify that the safeguarding partners will be expected to consult locally before making the arrangements.

Evidence suggests that too many local safeguarding children boards are currently ineffectual and that significant reform is required. The Wood review found that the organisational boundaries between local authorities, police and health services too often act as a barrier to effective multiagency working. This provision would place upon these three key safeguarding partners an equal responsibility to work together. It will enable their vital contributions towards the safeguarding and promotion of the welfare of children to be better co-ordinated and deployed, and reduce the duplication of existing work. It will provide greater flexibility for local areas to arrange their services according to local assessment and agreement.

Amendment 114 sets out the requirement on safeguarding partners within a local authority area to carry out local child safeguarding practice reviews. This proposed new clause links closely to Clauses 11 to 14, which set up the independent Child Safeguarding Practice Review Panel and a system of national reviews, and sets out a requirement for the safeguarding partners to make arrangements for local reviews. Most reviews into serious cases will take place at local level. Safeguarding partners will identify serious child safeguarding cases which raise issues of importance for that area and supervise the review of the cases as they so determine. The primary focus of such reviews will be on how practice by local authorities or other local bodies can

be improved as a result of the case. If the safeguarding partners identify a serious child safeguarding case which they think may raise issues that are complex or of national importance, or where it becomes apparent that a case raises such issues, they will be free to refer it to the Child Safeguarding Practice Review Panel.

4.30 pm

With regard to the panel, I would like to pick up on the concerns raised in Committee last week by the noble Baroness, Lady Pinnock, and the noble Lord, Lord Watson, about the panel removing local responsibility and accountability—the noble Baroness raised it again today. I offer my reassurance that this is not about removing local responsibility for these cases, nor is it about national reviews being more important than local reviews. Some cases that are particularly complex or that raise issues of national importance will benefit from being managed centrally. Where the panel decides to review a case, practice improvement in the context of any local learning will remain a key aim of the review.

I cannot emphasise enough that reviews will not be about blame or public censure of individuals, as I have already said. The safeguarding partners must ensure that reviews are carried out within a satisfactory timescale and are of satisfactory quality. We have already discussed timeliness in relation to the amendment tabled by the noble Lord, Lord Warner. The new system will lead to greater consistency in both the speed and quality of reviews at local as well as national level.

The safeguarding partners must publish reports, unless they consider it inappropriate to do so. As with the current serious case review, there is a presumption that reports commissioned by the safeguarding partners will be published. In exceptional circumstances, for example, where publication of a full report is not in the best interests of the child or family members concerned, the safeguarding partners must publish any information they consider it appropriate to publish.

New Section 16F(6) sets out a list of provisions on which the Secretary of State may make regulations. It includes the criteria to be taken into account by the safeguarding partners in determining which cases raise issues of importance in relation to the area. Paragraph (b) of new Section 16F(6) refers to arrangements regarding the appointment or removal of a reviewer. While such arrangements are yet to be finalised, it is expected that a training and accreditation process will be established to provide a skilled cohort of reviewers. The safeguarding partners will be responsible for selecting the reviewer or reviewers for each case they commission, either from a list provided by the Secretary of State or through other arrangements. If in the course of supervising a review safeguarding partners find that the reviewer is not making satisfactory progress or produces a report that is not of satisfactory quality, it will be the responsibility of the safeguarding partners to address this as appropriate. Regulations may specify when a report should be provided to the Secretary of State or the Child Safeguarding Practice Review Panel or published. In receiving copies of all local reviews, the panel will be in an ideal position both to review the quality and timeliness of reports and the learning that is emerging from them.

New Section 16(6)(d) refers to the procedure for a review, which may include the establishment of terms of reference as suggested at Second Reading by the right reverend Prelate the Bishop of Durham, and any specific methodology which may be used. Consideration may also need to be given to other potentially overlapping reviews which are taking place: for example, a domestic homicide review or safeguarding adult review. The safeguarding partners may also wish to consider, as suggested by my noble friend Lord Suri at Second Reading, whether cases that involve institutional abuse should be referred to the independent inquiry into child sexual abuse led by Dame Lowell Goddard. Finally, paragraph (e) of new Section 16F(6) allows regulations to make provision about the form and content of the reports.

Amendment 115 requires the safeguarding partners to publish details of the multiagency working arrangements, which must include arrangements for robust scrutiny by an independent person. Research, including the extensive consultation carried out as part of the recent Wood review, has found weaknesses in the existing system around the accountability and authority of LSCBs. This new clause addresses both of those issues, by strengthening the accountability of the safeguarding partners and relevant agencies and by requiring them to comply with the arrangements. Safeguarding partners and relevant agencies must act in accordance with the arrangements which they have, by agreement, set up. The strengthened co-operation and collaboration of these agencies will enable improved assurances that the arrangements for joint working are effective.

Accountability, independent scrutiny and public confidence are critical factors in effective multiagency work to improve the outcomes for children and young people. Requiring the safeguarding partners to make public their arrangements for the multiagency working set out in Amendments 113 and 114, and the independent scrutiny of their work, will significantly strengthen the accountability for that work. Accountability will be further strengthened by requiring the safeguarding partners to report at least annually on the work resulting from the arrangements, and the effectiveness of the multiagency arrangements in practice.

The requirement for independent scrutiny allows for stronger provisions than those currently in existence for LSCBs while allowing a greater degree of local flexibility than is permitted by the current system of independent chairs. In addition, this clause contains a delegated power to make provision for enforcement if there are no other appropriate means of enforcement powers to be filled in regulations. The Secretary of State has statutory enforcement powers against local authorities and maintained schools, and is likely to be able to enforce other requirements through contractual or grant conditions. Indeed, local authorities may be able to enforce some requirements through contractual or grant-funding relationships with agencies with which they work.

Amendment 116 enables the partners to request information in pursuance of their statutory functions. It also enables the partners to enforce compliance with such a request through the courts. I emphasise, as

[LORD NASH]

discussed previously, that this provision does not apply to the judiciary whose independence is a constitutional matter. It is essential that the safeguarding partners can request information to enable or assist them in performing their functions. This may also include normally privileged information.

Subsection (3) of new Section 16H inserted by Amendment 116 provides for the application of court orders where necessary. This clause creates a new power for the relevant person or body to share information. This is likely to be sensitive information so that under data protection law it should not normally be shared unless the relevant person is under a legal requirement to do so. This creates the legal requirement to help satisfy data protection requirements. The information transfer, however, still needs to be justified under the Data Protection Act and those dealing with the information are still bound by data protection requirements as to how they deal with the information.

The Wood review highlighted the critical importance of effective and speedy sharing of information and data in relation to protecting and safeguarding children. We also know that failure to share information all too often features as a key factor in serious case reviews. This clause will underline the importance of sharing relevant information, backed up with the power of enforcement.

Amendment 117 enables the safeguarding partners and relevant agencies to make payments to support the joint working arrangements which they are establishing. Part of the decision-making processes that partners will make in respect of their functions under Amendments 113 and 114 will be to determine what funding they require to support their functions and to agree how the funding needs will be met. This will be similar to the way in which local safeguarding children boards currently operate. The provision also allows relevant agencies to contribute to a fund out of which payments may be made or to make payments directly if they should wish to do so. This clause does not require any partner or agency to contribute funding. It is a purely permissive provision.

It is important to allow partners freedom to make decisions on finance. This is part of their freedom to make decisions on how they organise themselves and operate in their local area. As at present with LSCBs, the Government will not fund these arrangements directly. The permissive provisions in this clause would allow payments to be made to reviewers or to an independent person. The provision to enable payments to be made to an independent person simply clarifies that such payments may be made. In addition, it may be necessary for staff, goods, services, accommodation or other resources to be made available to any person for the purposes connected with the arrangements, and for this to be funded by the partners. This clause allows for this to take place.

Amendment 118 sets out that, in a local authority area, under these arrangements, such an area can include more than one local authority, clinical commissioning group or chief officer of police as safeguarding partners. This provision is part of the more flexible statutory framework for multiagency working that we have been discussing. This amendment

allows for two or more local authorities to agree that their areas are to be treated as a single area for the purposes of these arrangements.

The Wood review noted that organisational boundaries can get in the way of multiagency operational working. It is of course true that the geographical boundaries of local authorities, police authorities and clinical commissioning groups are often very different. The local authority boundary will be the basis for arrangements but local areas may determine what is best for their area, taking into account the three key safeguarding partners' considerations. Where more than one local authority is involved in these safeguarding arrangements, the amendment enables those authorities to delegate the safeguarding partner functions under these new provisions to one authority.

Subsections (4) and (5) of new Section 16J apply to clinical commissioning groups and chief officers of police respectively in a similar way. Their boundaries may be very different, and even where only a single local authority is involved, this may nevertheless encompass more than one of the other safeguarding partners. These practical provisions enable streamlined arrangements to operate where the safeguarding partners concerned have formed a view as to what works best for their area.

This new section does not change the responsibilities specific to each safeguarding partner to exercise their functions with regard to the safeguarding and welfare of children. Nor does it remove the responsibility of each local authority, chief constable and CCG to comply with the new safeguarding provisions. Instead, it enables the safeguarding partner functions to be carried out in the most streamlined way.

Amendment 119 requires safeguarding partners and relevant agencies for a local authority area in England to have regard to any guidance given by the Secretary of State in connection with their functions. This may include guidance about the circumstances in which it may be appropriate for a serious child safeguarding case to be reviewed locally and for matters to be taken into account by safeguarding partners in deciding whether a review is making satisfactory progress and whether a report is of satisfactory quality. I believe that safeguarding partners will find guidance on these points helpful in aiding their decision-making.

Amendment 120 is purely technical and sets out the interpretation of key terms. Amendments 133 and 134 are also purely technical and are required for the purposes of updating the relevant clauses to reflect the abolition of LSCBs in relation to the power to innovate in Clauses 15 to 19. Specifically, whereas a local authority had been required to consult its LSCB partners before requesting a power to innovate, it is now required to consult its safeguarding partners and the relevant agencies. I beg to move.

Baroness Pinnock: I thank the Minister for his very detailed explanation of these amendments, which are aimed at putting in place new arrangements for local safeguarding children boards. I have a number of questions and would be grateful if the Minister could respond to them so that I can fully understand and appreciate the implications of what is being proposed.

First, I thank him for his assurance about local accountability. However, one element is not specifically referred to in the detail that he gave about the composition of the new panels, and that is whether the panel could include local elected representatives. I referred to this in a previous discussion and raise it again because the safeguarding boards currently consist of professionals—for example, social workers, the police, health service workers and members of the probation service—but no non-professional, on the basis of local knowledge, can challenge what goes on. Such a challenge from a non-professional standing up for local people is very important in terms of safeguarding, even more so as local elected representatives have a duty as corporate parents and they are judged on how they fulfil that role. I think that the addition of non-professionals would enhance the status of the panel. It would be not just a collection of professionals taking responsibility but a collection of professionals plus some local representation saying, “This is not good enough. What are you going to do?”. They could do that if they were effective local representatives, and I would like to hear what the Minister has to say on that.

I turn to my second query. I totally understand the proposals for greater flexibility in composition and geographic areas, and so on. In principle I do not have a problem with that because the Wood report says, and my own experience tells me, that the current arrangements can become a bit bureaucratic—a case of going through the motions, rather than dealing with the issues. For me that is not an issue but, from what I heard the Minister say, under the new arrangements there will be three statutory representatives—from the police, the health service and local authorities—and they will consult on what other representation there should be, which is welcome. My query concerns whether any additional members from those organisations would be required to attend or whether they would just be asked to attend.

4.45 pm

I gave the example, from my local experience, of where even on existing boards the probation service is supposed to attend but fails to do so on 80% of occasions. That leads me to be concerned about flexibility over membership. However, as I said earlier, I respect the reasoning and understand the proposals for greater flexibility.

There is a third area that I am interested in understanding a bit better. In speaking to Amendment 115, the Minister said that the proposal to publish an annual report of the workings of the new panel would enable scrutiny of safeguarding. I have never regarded publishing a report as enabling scrutiny; it just enables the publishing of a report. Scrutiny is about questioning and challenging. Local authorities currently have local scrutiny arrangements, and I wonder whether they could be charged with scrutinising the annual report and responding to it in an open and robust way. There would then be what I would regard as scrutiny.

I have a fourth point. I am sorry that there are so many but several changes are being proposed. The proposal for different geographical areas to work together is not itself a problem. However, I am not sure whether these arrangements are designed to support the

institutions—that is what I thought I heard. There is overlapping of CCGs and police across local authority boundaries, and so there is no coterminosity. It sounded as though we might be making these changes to aid the institutions rather than improve safeguarding. I can understand how changing geographical areas so that senior police officers have to attend only one meeting instead of two will be better from their point of view, but will it improve safeguarding? Unless the local authority area is taken as the fundamental area, a lot of cracks will be created into which serious issues may fall.

I turn to my last point. Again, I apologise for there being so many but this concerns a big change. Can the Minister point me to where there will be learning from the reviews that these new panels undertake? I understand how they will come up with recommendations but I am not clear about how we will be sure that they are effectively implemented. Unless we do that, we are not going to improve the protection and safeguarding of children, which I know is at the heart of what the Minister and the Committee are trying to achieve with the Bill.

Lord Hunt of Kings Heath: My Lords, that was an interesting contribution by the noble Baroness, Lady Pinnock. I particularly wish to pick up the issue of challenge. Whether or not it is right for local authorities to be members of these bodies is one thing, but I have no doubt that the issue of challenge is a very important one. I would like to hear from the Minister about how we ensure that that takes place.

First, on the issue of bringing these together in areas larger than one single local authority, like the noble Baroness, Lady Pinnock, I consider that if this is a sensible approach to deal with some of the current boundary issues, that is fine. However, if there were an underlying view within the department that we had too many and it wanted them to be reduced in large numbers—central government departments often believe that—then I would worry. Ideally, we want one local authority to be seen to be responsible, rather than a number of them. The whole argument for bringing in these new arrangements, particularly in relation to Amendment 113, is to streamline the process so that there is much clearer accountability. I hope that we are not going to lose that straightforward accountability because we think we need to make it much easier for chief constables to be able to discharge their responsibility.

My second point is this. I have no objection to the formulation of safeguarding partners and their ability to invite any other relevant agencies that they consider appropriate. I took the point made by the noble Baroness in an earlier debate about the boards of probation officers. However, I ask the Minister: when those are set up, could his department actually monitor who the safeguarding partners designate as relevant agencies so that we can at least keep track nationally of what is happening? If we found that the probation services were not really part of any of these bodies at local level, I would begin to worry.

Thirdly, I have a question on Amendment 119, which mentions guidance. Will the Minister explain the status of that guidance—is it advisory or is it statutory?

Lord Warner: My Lords, could I ask a number of questions, particularly in relation to Amendment 116, on information? Before doing so, I will leave the noble Lord with a thought about my experience of local safeguarding boards in Birmingham, when I was the Children's Commissioner there. A common feature of that board, which covers a very big area—I suspect it is a common feature of many other of those boards—was that often there was no consistency in who turned up for the meetings between the different agencies. There is a moving cast of characters turning up at these boards on behalf of particular agencies. Unless we can ensure greater consistency, we will not make those boards more effective.

On Amendment 116, I am not sure whether the Minister knows that some of us have been involved for a very long time—it seems as though it is since Adam and Eve—in trying to get the public agencies to accept a common identifier for children. If we want information to flow smoothly and quickly between agencies for children, particularly those who are at risk and in the child protection system, we need to listen to some of the people who have been working on this, such as Sir Cyril Chantler, an eminent paediatrician often used by the Government to undertake inquiries, to progress that. If you talk to paediatricians who have been involved in this area, the common villain of the piece—I use the term loosely—is the Department for Education, which simply will not accept that the NHS identifier is the best one to use because all children have one. Will the Minister take this back to his department and have another go? If he wants information to flow smoothly in child protection cases between the agencies, let us move towards using the NHS number as a common identifier. I assure him that that will get the information moving much faster through all the agencies concerned.

Baroness Tyler of Enfield (LD): I shall add one more question to those posed by this very important set of amendments about how to improve local arrangements and have more effective multiagency safeguarding. I can think of nothing more important than that this works.

When I looked again at Alan Wood's very interesting report, I saw two sentences that so far have not been picked up in this debate. They read:

"I would also add that national government departments do not do enough to model effective partnership working between themselves for local agencies. The join up demanded of local partners is not particularly evident at national level".

For the new arrangements to work, and it is critical that they do, it is vital that government departments are modelling more effective collaboration in the area of safeguarding. I would be grateful to the Minister if, when he responds, he could tell us what steps government departments are taking nationally to model this behaviour.

Lord Nash: My Lords, I am grateful for this debate. On the points raised by the noble Baroness, Lady Pinnock, local arrangements may include elected representatives but this is a matter for local determination. On her second point, Amendment 113 gives the safeguarding partners flexibility to determine who the other relevant agencies are but, having determined that, those relevant agencies have to co-operate.

On the publication of annual reports, my answer says that this enables public scrutiny as it is transparent. As for the point made by the noble Lord, Lord Hunt, about how local areas organise themselves—the noble Baroness also asked about flexibility on the areas to align operational reach—I can confirm that the local authority area will be the key area and accountability will be to the local authority. It is designed to ensure flexibility within that structure but, to answer the noble Lord's point, there is no hidden agenda. We are concerned here purely with the matter of improving child safeguarding.

The noble Baroness asked about monitoring progress and reviews. I already covered some of that in my answers about the What Works centre for children's social care. The duty remains for local arrangements to report on their practice and action taken in response. The second question asked by the noble Lord, Lord Hunt, was who the safeguarding partner will designate as a relevant agency so that it can keep track of what is going on. I will certainly look at that. His third question was about Amendment 119 and whether the guidance will be statutory. It will.

The noble Lord, Lord Warner, made a point about Amendment 116 and a common identifier and whether we could not use the NHS identifier. Obviously, we want this to work well. That is an entirely new point to me; I will take it back and look at it in some detail.

5 pm

Lord Hunt of Kings Heath: My Lords, as we are in Committee I say to the Minister that the latest report of the Delegated Powers and Regulatory Reform Committee has miraculously reached me and that it comments on his Amendments 113 and 115. It refers to two instances where the committee considers that the delegated power conferred in the amendments is inappropriate. I do not expect him to respond today, clearly, but I hope that between now and Report he will give that some attention.

Lord Nash: We are considering that report and we will respond in due course. On the point made by the noble Baroness, Lady Tyler, about national government departments modelling effective collaboration, we are indeed taking considerable steps to work together effectively, in particular with the Home Office and the Department of Health. In view of what I have said, I hope noble Lords will support the amendment.

Baroness Pinnock: In response to my question about local elected representation, the Minister said that that ability was currently there. Yes it is, but as observer status. If there is to be an opportunity to challenge it, the membership of that board needs to be on the same level. An observer status puts the individual in a much lesser category of importance on that body. In order to have elected challenge on the panel, they ought to be full members of the board.

Lord Nash: I am sure the noble Baroness will be delighted to hear that whereas at the moment they have observer status on LSCBs, under the new arrangements they can be full members.

Baroness Pinnock: I totally welcome that and thank the Minister for his response.

Amendment 113 agreed.

Amendments 114 to 120

Moved by Lord Nash

114: After Clause 14, insert the following new Clause—

“Local child safeguarding practice reviews

After section 16E of the Children Act 2004 (inserted by section (*Local arrangements for safeguarding and promoting welfare of children*) of this Act) insert—

“16F Local child safeguarding practice reviews

- (1) The safeguarding partners for a local authority area in England must make arrangements in accordance with this section—
 - (a) to identify serious child safeguarding cases which raise issues of importance in relation to the area, and
 - (b) for those cases to be reviewed under the supervision of the safeguarding partners, where they consider it appropriate.
- (2) The purpose of a review under subsection (1)(b) is to ascertain what (if any) lessons can be learned from the case about the way in which persons in the area should work to safeguard and promote the welfare of children.
- (3) Where a case is reviewed under the supervision of the safeguarding partners, they must—
 - (a) ensure that the reviewer provides a report on the outcome of the review;
 - (b) ensure—
 - (i) that the reviewer makes satisfactory progress, and
 - (ii) that the report is of satisfactory quality;
 - (c) provide the report to the Secretary of State and the Child Safeguarding Practice Review Panel.
- (4) The safeguarding partners must publish the report, unless they consider it inappropriate to do so.
- (5) If the safeguarding partners consider it inappropriate to publish the report, they must publish any information relating to the lessons to be learned from the case that they consider it appropriate to publish.
- (6) The Secretary of State may by regulations make provision about—
 - (a) criteria to be taken into account by the safeguarding partners in determining whether serious child safeguarding cases raise issues of importance in relation to the area;
 - (b) the appointment or removal of a reviewer by the safeguarding partners, including provision for a reviewer to be appointed by the safeguarding partners from a list provided by the Secretary of State;
 - (c) the time when a report is to be provided to the Secretary of State or the Child Safeguarding Practice Review Panel, or published;
 - (d) the procedure for a review;
 - (e) the form and content of a report.
- (7) In this section “reviewer” means any one or more persons appointed to review a case under the supervision of the safeguarding partners for a local authority area.”

115: After Clause 14, insert the following new Clause—

“Further provision about arrangements

After section 16F of the Children Act 2004 (inserted by section (*Local child safeguarding practice reviews*) of this Act) insert—

“16G Further provision about arrangements

- (1) This section applies in relation to arrangements made under section 16E or 16F by the safeguarding partners for a local authority area in England.
- (2) The safeguarding partners must publish the arrangements.
- (3) The arrangements must include arrangements for scrutiny by an independent person of the effectiveness of the arrangements.
- (4) The safeguarding partners and relevant agencies for the local authority area must act in accordance with the arrangements.
- (5) Subsection (6) applies where a person is specified in regulations under section 16E(3) for the purposes of the definition of “relevant agency”.
- (6) The regulations may make provision for the enforcement against the person of the duty imposed by subsection (4), if the Secretary of State considers that there would otherwise be no appropriate means of enforcing that duty against the person.
- (7) At least once in every 12 month period, the safeguarding partners must prepare and publish a report on—
 - (a) what the safeguarding partners and relevant agencies for the local authority area have done as a result of the arrangements, and
 - (b) how effective the arrangements have been in practice.”

116: After Clause 14, insert the following new Clause—

“Information

After section 16G of the Children Act 2004 (inserted by section (*Further provision about arrangements*) of this Act) insert—

“16H Information

- (1) Any of the safeguarding partners for a local authority area in England may, for the purpose of enabling or assisting the performance of functions conferred by section 16E or 16F, request a person or body to provide information specified in the request to—
 - (a) the safeguarding partner or any other safeguarding partner for the area,
 - (b) any of the relevant agencies for the area,
 - (c) a reviewer, or
 - (d) another person or body specified in the request.
- (2) The person or body to whom a request under this section is made must comply with the request.
- (3) The safeguarding partner that made the request may enforce the duty under subsection (2) against the person or body by making an application to the High Court or the county court for an injunction.
- (4) The information may be used by the person or body to whom it is provided only for the purpose mentioned in subsection (1).”

117: After Clause 14, insert the following new Clause—

“Funding

After section 16H of the Children Act 2004 (inserted by section (*Information*) of this Act) insert—

“16I Funding

- (1) The safeguarding partners for a local authority area in England may make payments towards expenditure incurred in connection with arrangements under section 16E or 16F—

- (a) by making payments directly, or
- (b) by contributing to a fund out of which the payments may be made.
- (2) The payments that may be made include payments of remuneration, allowances or expenses to a reviewer or an independent person.
- (3) The safeguarding partners for a local authority area in England may provide staff, goods, services, accommodation or other resources to any person for purposes connected with arrangements under section 16E or 16F.
- (4) Relevant agencies for a local authority area in England may make payments towards expenditure incurred in connection with arrangements under section 16E—
- (a) by making payments directly, or
- (b) by contributing to a fund out of which the payments may be made.
- (5) In this section an “independent person” means an independent person mentioned in section 16G(3).”

118: After Clause 14, insert the following new Clause—

“Combining safeguarding partner areas and delegating functions

After section 16I of the Children Act 2004 (inserted by section (*Funding*) of this Act) insert—

“16J Combining safeguarding partner areas and delegating functions

- (1) The safeguarding partners for two or more local authority areas in England may agree that their areas are to be treated as a single area for the purposes of sections 16E to 16I and subsections (3) to (5) of this section.
- (2) References in sections 16E to 16I and in subsections (3) to (5) of this section to a local authority area are to be read in accordance with any agreement under subsection (1).
- (3) Where a local authority is a safeguarding partner for the same local authority area as another local authority (as a result of an agreement under subsection (1)), the authorities may arrange for one of them to carry out functions under sections 16E to 16I on behalf of the other.
- (4) Where a clinical commissioning group is a safeguarding partner for the same local authority area as another clinical commissioning group, the groups may arrange for one of them to carry out functions under sections 16E to 16I on behalf of the other.
- (5) Where a chief officer of police is a safeguarding partner for the same area as another chief officer of police, the officers may arrange for one of them to carry out functions under sections 16E to 16I on behalf of the other.”

119: After Clause 14, insert the following new Clause—

“Guidance by Secretary of State

After section 16J of the Children Act 2004 (inserted by section (*Combining safeguarding partner areas and delegating functions*) of this Act) insert—

“16K Guidance by Secretary of State

- (1) The safeguarding partners and relevant agencies for a local authority area in England must have regard to any guidance given by the Secretary of State in connection with functions conferred on them by sections 16E to 16J.
- (2) Guidance given by the Secretary of State in connection with functions conferred by section 16F may include guidance about—
- (a) circumstances in which it may be appropriate for a serious child safeguarding case to be reviewed;

- (b) matters to be taken into account in deciding whether a review is making satisfactory progress or whether a report is of satisfactory quality.”

120: After Clause 14, insert the following new Clause—

“Interpretation

After section 16K of the Children Act 2004 (inserted by section (*Guidance by Secretary of State*) of this Act) insert—

“16L Interpretation of sections 16E to 16K

In sections 16E to 16K—

- “reviewer” has the meaning given by section 16F(7);
- “safeguarding partner”, in relation to a local authority area, has the meaning given by section 16E(3);
- “serious child safeguarding cases” has the meaning given by section 16B(9);
- “relevant agency”, in relation to a local authority area, has the meaning given by section 16E(3).”

Amendments 114 to 120 agreed.

Amendment 121

Moved by Baroness Evans of Bowes Park

121: After Clause 14, insert the following new Clause—

“Child death reviews

After section 16L of the Children Act 2004 (inserted by section (*Interpretation*) of this Act) insert—

“Child death review partners for local authority areas

16M Child death reviews

- (1) The child death review partners for a local authority area in England must make arrangements—
- (a) for the review of each death of a child normally resident in the area;
- (b) for the analysis of information about such deaths generally.
- (2) The purposes of a review or analysis under subsection (1) are—
- (a) to identify any matters relating to the death, or the deaths generally, that are relevant to the welfare of children in the area or to public health and safety, and
- (b) to consider whether it would be appropriate for anyone to take action in relation to any matters identified.
- (3) Where the child death review partners consider that it would be appropriate for a person to take action as mentioned in subsection (2)(b), they must inform that person.
- (4) The child death review partners for a local authority area in England must, at such intervals as they consider appropriate, prepare and publish a report on—
- (a) what they have done as a result of the arrangements under this section, and
- (b) how effective the arrangements have been in practice.”

Baroness Evans of Bowes Park (Con): My Lords, I shall speak to Amendments 121 to 125, regarding child death reviews in the multiagency local safeguarding arrangements. These proposed new clauses require the child death review partners—the local authority and clinical commissioning groups in a local authority area—to carry out a review of each death of a child normally resident in the area. They will be required to analyse the information obtained from child death

reviews to identify issues that are relevant to the welfare of children in the area or to public health and safety and, in doing so, to consider whether it would be appropriate for anyone to take action in relation to any matters identified.

Amendment 122 will enable the child death review partners to request information and enforce compliance from any person or body in pursuance of their functions. Amendment 123 will allow child death review partners to agree to make payments to support the joint working arrangements which they are establishing for the reviews. Amendment 124 will allow the child death review partner areas to be made up of more than one local authority area, where there is more than one local authority or clinical commissioning group. This proposed new clause will allow the relevant child death review partner to delegate the review functions to one local authority or one clinical commissioning group. This is a practical provision, which enables the child death review partners to utilise more streamlined arrangements in a manner which they consider would work best for their area. These proposed new clauses do not change the individual existing responsibilities of each partner to exercise their functions with regard to child death reviews.

Amendment 125 will require child death review partners to have regard to any statutory guidance issued by the Secretary of State in regard to their functions. I believe that the partners will find guidance of this sort helpful in aiding their decision-making.

The death of any child is a tragedy, whether it is as a result of a health condition, an accident or abuse and neglect. Parents and the professionals who support them through this extremely difficult time will want full details of what happened in their case and to know whether anything could have been done to prevent this death happening. England was the first country in the world to put in place arrangements that provide comprehensive understanding of the causes of child deaths, and we need to build on the knowledge that we have gained so far. Collating and analysing information locally and sharing between areas are vital steps to help us to understand why children die.

In May this year the Government published the Wood review into the role and functions of local safeguarding children boards and child death overview panels. The review found that over 80% of child deaths have medical or public health causations, but the gathering of data on child deaths and the analysis of them is incomplete and inconsistent. As a result there is a gap in our knowledge, and professions are not sufficiently extracting learning from the data that are available in order to reduce the number of child deaths each year.

These new clauses bring the two key child death review partners together and place upon them equal responsibility to work together. They will enable health partners to continue to support the analysis of information on health-related child deaths at local and national level. Hospitals of course routinely analyse the data on child deaths. Local authorities need to be partners to ensure that factors relating to public health and safeguarding are similarly identified. This will also allow local authorities to promote learning and dissemination within their local area. For these reasons,

the Government believe it is imperative that child death reviews remain on a statutory footing to secure the best outcomes for all children. I beg to move.

Baroness Hughes of Stretford (Lab): My Lords, I have a question about these clauses, which are generally welcome. The more information we have about child death comprehensively, the easier it will be to take any necessary action. As I read the clauses, however, although I may have missed something, I cannot see what the review partners will be required to publish. Subsection (4) in new Clause 16M of the Children Act 2004 in Amendment 121 says they must,

“prepare and publish a report on ... what”,

the partners,

“have done as a result of the arrangements ... and how effective the arrangements”—

which I take to be partnership—“have been”. However, I can see nothing in here about the kind of analysis that the Minister was just referring to—the kinds of deaths that have occurred, for what purposes, the demographic and other characteristics of the children and so on. Could she enlighten us about what will be required in terms of general access to the information that has been collected here?

Lord Hunt of Kings Heath: My Lords, I would like to add another point. Here we are talking about child death review partners, and in the previous debate we were talking about safeguarding partners. I wonder if this is a concept that might be used with regard to the earlier part of the Bill relating to corporate parenting. The Minister will know that we had amendments to Clauses 1 and 2 around corporate parenting, the argument being that in order to discharge corporate parenting roles properly the local authority needs the support of core partners in the local area, including the health service and other agencies. I think we have all agreed that nothing should be done to dissipate the role of the corporate parent by, if you like, detracting from the local authority's responsibility. However, I wonder if the concept of safeguarding partners and death review partners is an approach that we might consider. I realise that this is not the point to discuss corporate parenting, but it is an interesting concept that we might think about when we return to the subject.

Baroness Evans of Bowes Park: I thank noble Lords for their interventions. Perhaps I can take away the comments from the noble Lord, Lord Hunt. In answer to the noble Baroness, Lady Hughes, the child death review partners will be required to publish information on what more local authorities and CCGs can do to prevent deaths, including analysis and data. I am happy to come back to her with some further information following this discussion.

Amendment 121 agreed.

Amendments 122 to 125

Moved by Lord Nash

122: After Clause 14, insert the following new Clause—

“Information

After section 16M of the Children Act 2004 (inserted by section (Child death reviews) of this Act) insert—

“16N Information

- (1) Any of the child death review partners for a local authority area in England may, for the purpose of enabling or assisting the performance of functions conferred by section 16M, request a person or body to provide information specified in the request to—
 - (a) the child death review partner or any other child death review partner for the area, or
 - (b) another person or body.
- (2) The person or body to whom a request under this section is made must comply with the request.
- (3) The child death review partner that made the request may enforce the duty under subsection (2) against the person or body by making an application to the High Court or the county court for an injunction.
- (4) The information may be used by the person or body to whom it is provided only for the purpose mentioned in subsection (1).”

123: After Clause 14, insert the following new Clause—

“Funding

After section 16N of the Children Act 2004 (inserted by section (Information) of this Act) insert—

“16O Funding

- (1) The child death review partners for a local authority area in England may make payments towards expenditure incurred in connection with arrangements under section 16M—
 - (a) by making payments directly, or
 - (b) by contributing to a fund out of which payments may be made.
- (2) The child death review partners for a local authority area in England may provide staff, goods, services, accommodation or other resources to any person for purposes connected with arrangements under section 16M.”

124: After Clause 14, insert the following new Clause—

“Combining child death review partner areas and delegating functions

After section 16O of the Children Act 2004 (inserted by section (Funding) of this Act) insert—

“16P Combining child death review partner areas and delegating functions

- (1) The child death review partners for two or more local authority areas in England may agree that their areas are to be treated as a single area for the purposes of sections 16M to 16O and subsections (3) and (4) of this section.
- (2) References in sections 16M to 16O and in subsections (3) and (4) of this section to a local authority area are to be read in accordance with any agreement under subsection (1).
- (3) Where a local authority is a child death review partner for the same local authority area as another local authority (as a result of an agreement under subsection (1)), the authorities may arrange for one of them to carry out functions under sections 16M to 16O on behalf of the other.
- (4) Where a clinical commissioning group is a child death review partner for the same local authority area as another clinical commissioning group, the groups may arrange for one of them to carry out functions under sections 16M to 16O on behalf of the other.”

125: After Clause 14, insert the following new Clause—

“Guidance and interpretation

After section 16P of the Children Act 2004 (inserted by section (Combining child death review partner areas and delegating functions) of this Act) insert—

“16Q Guidance and interpretation

- (1) The child death review partners for a local authority area in England must have regard to any guidance given by the Secretary of State in connection with functions conferred on them by sections 16M to 16P.
- (2) In this section and sections 16M to 16P “child death review partners”, in relation to a local authority area in England, means—
 - (a) the local authority;
 - (b) any clinical commissioning group for an area any part of which falls within the local authority area.”

Amendments 122 to 125 agreed.

Amendment 126

Moved by Lord Nash

126: After Clause 14, insert the following new Clause—

“Abolition of Local Safeguarding Children Boards

- (1) Omit sections 13 to 16 of the Children Act 2004 (Local Safeguarding Children Boards).
- (2) In Schedule 1 to the Local Authority Social Services Act 1970 (social services functions of local authorities), in the entry relating to the Children Act 2004—
 - (a) for “13 to 16” substitute “16A to 16Q”;
 - (b) omit “targets for”;
 - (c) omit “, and to Local Safeguarding Children Boards”.”

Lord Nash: This new clause is purely technical, but fulfils some important functions. Subsection (1) means that the existing provision for LSCBs, as set out in Sections 13 to 16 of the Children Act 2004, will be repealed. Local authorities will no longer be required to establish LSCBs. Instead, they will work with chief constables and clinical commissioning groups to set out Working Together arrangements, as specified in amendments to the Bill that we have previously discussed.

Subsection (2) amends the Local Authority Social Services Act 1970 to redefine social services functions by removing the reference to LSCBs and including provisions in relation to joint working arrangements in child death reviews that are the subject of amendments to the Bill. Where the term “social services functions” is used in legislation in respect of local authorities, the arrangements which these amendments provide for will be included. This is consistent with existing provisions for local authority functions relating to LSCBs.

An example of the importance of this provision is the Secretary of State’s intervention powers where local authorities are failing properly to fulfil any of their social services functions. The amendment means that should local authorities fail to fulfil their functions as set out in Sections 16A to 16Q of the revised Children Act 2004, the Secretary of State will be able to issue a suitable statutory direction. I should stress that this provision relates only to local authority functions. It does not cover any failures by clinical commissioning groups or chief constables in these arrangements. Existing provisions for intervention—sitting elsewhere—already cover other such failures. I beg to move.

Lord Watson of Invergowrie: My Lords, the Minister said that this is a technical amendment. Yes, it is, but the introduction of the Child Safeguarding Practice

Review Panel will see the disappearance of local accountability for the most serious child abuse. The current process has an independent chair appointed by a national panel of experts, who are themselves independent. That means that local knowledge is retained, because representations can be made by those who are involved with the child and indeed the family, and, importantly, those who have an understanding of local characteristics. If the local safeguarding children boards are scrapped, how can the Minister reassure us that the local input will not be lost?

Baroness Bakewell of Hardington Mandeville: I will also speak to Amendment 126. I believe the relationship between what is currently the local safeguarding board and the national one is very clearly understood, with clear roles and responsibilities for each. My county council's view, from experience, is that safeguarding absolutely must be owned by the local agencies that are responsible on the ground for improving safeguarding. The national safeguarding panel should therefore have a role in understanding local issues. I am concerned that, if the intention is to centralise at the national level, the national panel might not have the capacity or the local knowledge and experience to review and intervene in a timely way. I agree entirely with the comments made by the noble Lord, Lord Watson.

Lord Nash: On the points that have just been made, I thought we had discussed them at considerable length two groups ago. In answer to the noble Baroness, Lady Pinnock, I said that the panel is perfectly free to have elected representatives on it, as distinct from the current situation with LSCBs. They would not have to be co-opted, but can be full members of the panel. We have also made it clear, as we have discussed in some detail, that the panel can involve relevant agencies as it sees fit. As the whole point is to improve the analysis of what happens at local level, I feel that we have covered this issue. If the noble Lord or the noble Baroness thinks that we have not done so, I am happy to write to them with more details.

Amendment 126 agreed.

5.15 pm

Amendment 127

Moved by Lord Wills

127: After Clause 14, insert the following new Clause—

“Whistleblowing arrangement in relation to looked after children and children at risk

The Secretary of State shall issue a code of practice on whistleblowing arrangements which can be taken into account by courts and tribunals when the issue of whistleblowing arises in public bodies providing social services and children's services, and local authorities, in relation to looked after children and children at risk.”

Lord Wills: My Lords, as I said at Second Reading, the Bill is missing a crucial opportunity to introduce protections for the young people whom it is designed to support. These amendments would provide that opportunity. The importance of whistleblowing in exposing malpractice and wrongdoing and in improving the delivery of public services has been recognised by successive Governments for the past 20 years or so.

The previous Labour Government brought in the Public Interest Disclosure Act and this Government have done more, insisting that they want to protect whistleblowers further. The current Prime Minister, for example, said:

“We will always back whistleblowers when they challenge poor standards, particularly in large organisations”.—[*Official Report*, Commons, 26/2/14; col. 257.]

When he announced new plans for the takeover of poorly performing children's services last year, he highlighted that one of the “sharper triggers” for this, “could include complaints from whistle-blowers”.

But whistleblowers in local authorities still lack some crucial protections that will encourage them to make such disclosures in the public interest. These gaps in protection not only discourage individual cases of whistleblowing and damage individual whistleblowers, they inhibit the creation of an effective culture in organisations that encourages transparency. Over and over again we have seen the consequences—repeated failures in the National Health Service, police wrongdoing after the Hillsborough disaster, and the scandal of MPs' expenses when the fees office was well aware of the scams that went on but never blew the whistle.

Large organisations that serve the public in both the public and private sectors are powerful institutions, often driven by a potent internal culture. Every case of whistleblowing challenges the powerful vested interests which so often run such organisations. As I have often said in debates on these issues, too often after a scandal has been revealed, abuses have been tackled and the guilty punished, and after all the fine words about whistleblowing have been spoken, it is all too easy for those dominant interests to revert to carrying on much as they did before. The powerful never like being challenged.

These amendments would provide extra protection for those working in public bodies providing social services or children's services, and local authorities, in relation to looked-after children, children at risk and social workers in two ways. First, they would require the Secretary of State to issue a code of practice on whistleblowing arrangements that can be taken into account by courts and tribunals when the issue of whistleblowing arises. Secondly, they would provide protection against employment blacklisting of whistleblowers.

Amendments 127 and 137 would embed a code of practice into statute so that it would be taken into account by courts and tribunals. This was a key recommendation of the whistleblowing commission set up by the whistleblowing charity Public Concern at Work, chaired by the former Appeal Court judge Sir Anthony Hooper and whose members included the noble Lord, Lord Burns. The commission drafted a 15-point code of practice providing practical guidance to employers, workers and their representatives, and set out guidance for raising, handling, training and reviewing whistleblowing in the workplace. This could act as a model for these amendments. A statutory code of conduct sends out to all organisations a powerful signal about the importance that Parliament attaches to providing adequate protections for whistleblowers to help drive necessary cultural change within organisations to encourage responsible whistleblowing.

[LORD WILLS]

Amendments 128 and 138 would provide improved protection for whistleblowers who are job applicants. This is a critical gap in protection for whistleblowers. Unlike in other areas of discrimination law, job applicants are not considered workers under the Public Interest Disclosure Act, which provides protection where a worker secures a position and is then victimised, forced out or dismissed if the employer becomes aware of an instance of whistleblowing in a previous job role. If an individual is labelled a whistleblower, it can be very difficult for them to get work because they can find themselves blacklisted—not through a formal, centralised database but informally. The amendment would plug the loophole identified in the case of *BP plc v Elstone* where the Court of Appeal stated that the situation was created because the drafting of the Public Interest Disclosure Act had not considered the situation of a job applicant being victimised by raising concerns in a previous job.

Following the Francis report into the Mid Staffordshire NHS Trust, the Government finally recognised this anomaly and introduced new protections for whistleblowing job applicants—but they covered only the NHS. There is no logical reason why such protections should be so restricted. Actionable offences of sex and race discrimination are not restricted to the NHS, so why should discrimination against whistleblowers be?

The amendment addresses this anomaly for those working in public bodies, providing social services and children's services, and local authorities, in relation to look-after children, children at risk and social workers. If the Bill is to realise its welcome objectives, it needs to encourage a culture of transparency among all those charged with delivering them. The amendments would help to do so, and I hope that the Minister will feel able to accept them.

The Earl of Listowel (CB): My Lords, this of course brings back memories of the home for adults with learning disabilities that was so well documented on the “Panorama” programme a while ago. While I support the principles that the noble Lord has just laid out, I would point out that many people working in this area nowadays will be working for private businesses. Most children's homes are in private hands and many foster care agencies are now private, so in that sector there may be well laid-out regulations regarding whistleblowers. Perhaps the Minister could write to us, or have further conversations, to reassure me, at least, that there are whistleblowing protections for those working in the private sector with vulnerable children.

Baroness Wheeler (Lab): My Lords, we are very pleased to support this group of amendments, to which my noble friend Lord Watson has added his name. My noble friend Lord Wills has made a strong case for seizing the opportunity under the Bill of extending the whistleblowing arrangements and protections currently applicable in the NHS to those working in public bodies providing social services and children's services, and local authorities, in respect of looked-after children and children at risk of harm, and well as to social workers. The Francis report into the Mid Staffordshire NHS Trust was the trigger for enhancing important whistleblowing protections in

the NHS, and it is right that we now have similar effective arrangements covering the provision of vital social services.

Under Amendments 127 and 137, which would bring in new clauses after Clauses 14 and 26, the Secretary of State would be required to issue a code of practice on whistleblowing arrangements that could be taken into account by courts and tribunals when whistleblowing arises in public bodies providing social services and employing registered social workers. My noble friend rightly refers to the whistleblowing commission's code of practice for employers, workers and trade unions, published by the charity Public Concern at Work, which could provide the model or framework for the proposed code. It would also underline that protection for whistleblowers is a statutory requirement with parliamentary enforcement. The commission's recommendation was that the code should be “rooted in statute”, and we support that.

Current protections offered to staff who challenge poor standards of care, both those covering widespread systemic failure and those involving day-to-day concerns about unsafe or poor practice, are certainly inadequate for those making disclosures in the public interest. The joint Community Care/UNISON workplace zone on whistleblowing underlines that many social workers and care professionals are too afraid to blow the whistle on poor practice. Their regular surveys of social workers give detailed accounts of staff trying to report their concerns, only to come up against bullying colleagues, managers with what they refer to as “selective hearing” and processes that protect the organisation over its staff—the pervasive and powerful organisational culture that my noble friend has identified as operating in workplaces, particularly in large-scale institutions where you have to be very brave and persistent to raise concerns.

The CQC's quick guide to whistleblowing and the Ofsted reports on whistleblowing about safeguarding in local authority children's services would give little comfort and reassurances to potential whistleblowers regarding their future security and career. Ofsted has no regulatory powers to investigate whistleblowing complaints but can use them as a trigger to bring forward inspections of council services. The CQC guide outlines clearly the procedures to take but its preface stresses to the staff member raising the issue:

“We don't have any powers to protect you from action taken against you by your employer”.

The proposed code of practice on whistleblowing arrangements, with the enforcement of the Secretary of State providing guidance that can be taken into account by courts and tribunals, would help to provide reassurance to potential whistleblowers and provide practical guidance to both employers and staff.

Amendments 128 and 138 specifically address the discrimination that whistleblowers who have made a protected disclosure under the Employment Rights Act 1996 in their previous employment can face when applying for a job. The current exclusion of job applicants not considered workers under the Public Interest Disclosure Act can result in whistleblowers being blacklisted and finding it virtually impossible ever to get work again. As noble Lords have stressed, this situation should not be allowed to continue.

One of the key provisions of whistleblowing policies is the requirement for employers to provide assurance to the worker that he or she will not suffer detriment for having raised a concern—in other words, to make every effort to provide protection to whistleblowers who feel they may be vulnerable. These amendments would help to address the current gaps in providing the protection that whistleblowers urgently need and deserve.

Baroness Pinnock: My Lords, I shall not repeat what many other noble Lords have said about whistleblowing, but confirm that we on this side totally support what has been said and the amendments that have been tabled.

Baroness Evans of Bowes Park: I am grateful to the noble Lord, Lord Wills, for these amendments and to noble Lords for their contributions. I assure noble Lords that whistleblowing is an important issue and one that we are taking very seriously. Every child deserves to be safe, and those organisations entrusted to protect our children must work as effectively as possible to achieve that.

Registered social workers work with some of the most vulnerable people in our society, supporting children, adults and their families, often at the most difficult times in their lives. It is important that registered social workers and other employees work in a culture of openness, where they feel confident to speak out when they are concerned about the practices of their employing organisation. They should be able to raise concerns free from fear and victimisation, as the noble Baroness said, with processes and procedures that encourage, support and protect employees when they do so. Disclosures can help to improve the services provided to children, adults and families and safeguard the vulnerable from abuse and neglect.

With regard to Amendments 127 and 137, I agree with the principle that there are clear expectations on local authorities and other public bodies on whistleblowing issues related to child protection and social work. We have a framework of employment protections for whistleblowers and I agree that it is important that employers should act in accordance with that. The coalition Government reviewed the statutory framework in relation to whistleblowing in 2014, following the report of the whistleblowing commission, as the noble Lord said, and the Government's call for evidence on the matter. The Government concluded that the right balance was to be struck by guidance and a non-statutory code of practice, rather than a statutory code of practice recommended by the commission. The Government published that guidance and statutory code in March 2015.

I am afraid to say to the noble Lord that we are not persuaded of the need to reopen this question in the context of the Bill. If the noble Lord has concerns about the practices specifically of local authorities and public bodies that provide children's services and employ social workers, we would be happy to consider them. There may be more that we can do, for example, to draw our guidance to the attention of those bodies and ensure their compliance with it.

In relation to the question asked by the noble Earl, Lord Listowel, we confirm that whistleblowing protections in the Employment Rights Act apply to all employers, both private and public.

On Amendments 128 and 138, I share the noble Lord's concern that those who make a protected disclosure under the Employment Rights Act should not suffer adverse treatment in their current employment or their future career. I understand that some workers have been concerned that whistleblowing may lead to them being placed on some form of informal blacklist that will prevent them getting other employment in the sector. We would be extremely interested in any evidence of that happening and would be very concerned if it was found to be the case.

As the noble Lord and the noble Baroness, Lady Wheeler, mentioned, provision has already been made to protect job seekers in the National Health Service from such discrimination, following the report into whistleblowing in the NHS undertaken by Sir Robert Francis QC, *Freedom to Speak Up*.

I believe that the Department of Health will shortly be consulting on the necessary secondary legislation. We will be interested to see the issues raised during that consultation. Together with any examples of whistleblowers who have suffered in this way in children's services, this will inform our consideration of any case for future change. I have asked Department for Education officials to work with colleagues from the Department for Business, Innovation and Skills and the Department of Health, and to contact the noble Lord to discuss further the issues arising from these four amendments.

Although I understand that some of my response will not be welcomed by the noble Lord, Lord Wills, I hope he sees that we are taking action and will take further action, and therefore feels able to withdraw his amendment.

5.30 pm

Lord Wills: My Lords, I am very grateful to everyone who has taken part in this short debate and for the support I have had from all sides of the Committee. I am also very grateful to the noble Baroness. As she suspected, I am not particularly happy with the response; nevertheless, there were a few little glimmers of light, for which I am truly grateful.

I am baffled by the Government's continued resistance to these points. I understand that it is not just a matter for the Department for Education; I have raised this issue on other occasions in relation to other departments. For some reason, the Government are digging in on this matter and I really do not understand why. I do not understand their resistance to a statutory code of conduct. As I said, it is important that it is placed in the Bill because that would send a very powerful signal to all these organisations that Parliament takes this issue very seriously. Guidance is all very well but, as we know, all too often in many spheres of public life it goes by the wayside in the face of all the other pressures on public organisations. A statutory code of conduct is qualitatively different and, frankly, I do not understand why the Government continue to resist it.

[LORD WILLS]

Nor do I understand why they are taking so long to rectify the anomaly in protecting job applicants. This was raised in previous debates and the Government dug in very resolutely, in the way that the noble Baroness has done, until the Francis report arrived. When that report said that many of the tragedies that took place in Mid Staffordshire NHS Trust could have been prevented if there had been a proper culture of whistleblowing, the Government immediately switched round and provided protection for NHS workers. I know that the noble Baroness is doing her best with the briefing that she has been given; nevertheless, she has still not produced any good reason why workers in the NHS should be protected, yet workers in equally sensitive and equally important areas of public service—all the areas covered by the Bill—are not. The signal that the Government are sending out, and I cannot understand why they want to go on doing so, is that somehow these matters are less important than the matters covered by the NHS. Clearly, that is not the case.

When the noble Baroness calls for evidence, almost by definition it will come only after a tragedy such as happened in Mid Staffordshire has occurred. I ask the question that I have asked other Ministers: do they really want to be on the record as denying an opportunity to put right this anomaly, only for some distinguished person at a public inquiry following a terrible tragedy—sadly, there almost certainly will be such a tragedy at some point in the future—to look at it all and say, “If only there had been a culture to encourage whistleblowing and transparency, we might have prevented some of these terrible circumstances”? Why do Ministers still resolutely turn their face against this?

The glimmers of light that the noble Baroness has produced today are a tiny, tiny step forward from the previous response that I have had from Ministers, so I am grateful for her commitment to continue to look at this issue. However, I urge her and all Ministers to take this more seriously and not to wait for another disaster and then to be forced into taking action, just as the Francis report forced the Government to take action after the Mid Staffordshire incident. Having said all that, I may try again in the future but, in the meantime, I beg leave to withdraw the amendment.

Amendment 127 withdrawn.

Amendment 128 not moved.

Clause 15: Power to test different ways of working

Amendment 129

Moved by Lord Watson of Invergowrie

129: Clause 15, page 13, line 21, after “outcomes” insert “for children and young people”

Lord Watson of Invergowrie: My Lords, I shall speak to Amendments 129 and 132 in my name and that of my noble friend Lord Hunt. I am also a signatory to Amendment 131 in the name of my noble friend Lord Wills, but I shall have less to say on that.

As regards the third and fourth subsections in Amendment 131, the huge controversy surrounding Clause 15 and the Government’s intention to enable local authorities to be exempted from providing local child protection and other children’s services requires a firmer base than a local authority simply approaching the Secretary of State to seek permission to do so. Some form of independent oversight is necessary to assuage the widespread concern among charities and other organisations prominent in the sector, not to mention local authorities themselves, as to the possible effects of Clause 15. It is essential that, as advocated in Amendment 132, a local authority is not exempt from corporate parenting principles—a subject on which we talked at length in previous sittings—just because it has been exempted from some of its statutory responsibilities. An assurance from the Minister on this point, even if he does not accept the amendment, would be valuable.

The Government have not made a case as to why Clause 15 is necessary. The Minister needs to explain to noble Lords precisely what problem this proposal is designed to address. As to the underlying premises of Clause 15, frankly, who knows? Suggestions have been put forward by several people and organisations. They vary from requirements in primary and secondary legislation blocking the delivery of effective children’s services to the suggestion that it might make it more attractive for private companies to get involved in the delivery of social work services.

No evidence has been published by the Government to support the notion that legislation is an impediment. Indeed, their *Putting Children First* strategy published last week, refers to creating,

“a controlled environment in which we could enable local authorities to test deregulatory approaches that are not currently possible, before taking a decision to make substantial changes to existing legislation that would apply across the board.”

However, the document does not set out the deregulatory approaches, which cannot be tested presently, and a box insert in the report quotes Professor Eileen Munro referring to “unnecessary legal rules”, although, again, they are not specified.

Is it the case that all legislative duties in respect of children’s social care are potentially problematic? I think not, because the Government’s Red Tape Challenge concluded in 2014 that only five regulations needed to be scrapped, three of which were already redundant, and 14 separate regulations were actually improved as a consequence of that consultation. Despite that, the breadth of legislation that can be exempted by Clause 15 is extraordinarily wide. I need do no more than refer noble Lords to Clause 19.

Are the problems in children’s social care so serious that the Secretary of State and her officials require a fast-track process to repeal or change legislation? That is what appears to be the case from the way in which the Bill is framed, because Clause 15 marks a major break with the ordinary legislative process where Ministers publish Green Papers, identify policy problems and potential solutions, expert organisations and individuals respond, White Papers are issued and legislation is then introduced to Parliament. In the Bill, only Ofsted’s chief inspector and the Children’s Commissioner need to be consulted. When legislative changes are proposed

by the Minister or by an individual sent into a local authority as part of a ministerial intervention, there is no duty to consult the local authority.

That is relevant because the Government's ambition was stated in *Putting Children First* as being that,

"over a third of ... local authorities will either be delivering their children's services through a new model or be actively working towards a different model",

by 2020. We see the shape that the Government want to achieve in four years' time, but the route to get there is what concerns many people, not least noble Lords on this side of the Committee.

At Second Reading, the Minister referred to the need for innovation. As I said, we on these Benches are certainly not opposed to that concept. We support innovation if it improves outcomes for children and standards in local authorities, but innovation can and does take place effectively within local authorities. Indeed, several have already developed and successfully piloted innovative approaches within children's services while meeting their statutory responsibilities.

The Minister will no doubt be aware of this but, while Leeds is probably the most frequently mentioned, I can also cite Cambridgeshire, Durham, Hampshire, Lincolnshire and the London boroughs of Hammersmith and Fulham, Islington, Kensington and Chelsea, Kingston, Richmond, and Westminster. Each of those local authorities already has the necessary freedom to innovate to improve front-line children's social services by developing new systems of delivering social care and piloting new ways of working with families. They have all been able to do so without the need for new legislation, so again I invite the Minister to demonstrate why, when all the innovation that I have just listed is already possible, the provision is necessary. Indeed, Ofsted's latest annual report on social care includes several positive case studies and comments. In the best local authorities, leaders have developed ambitious and innovative approaches to practice that are firmly grounded in sound research, confirming again that innovation is possible. I am sure that the Minister will say, "Yes, well, that's just some local authorities. Some are performing poorly or could even be described as failing". That could well be the case, but it does not mean that we need a sledgehammer to crack a nut when many local authorities are able to do what the authorities I have mentioned are already doing. There are real concerns about where this could lead.

I shall go into this in a little more detail. At Second Reading the Minister outlined three areas where he foresaw different ways of working. These were: relaxing the assessment process for children's placements with family and friends; the removal of independent review officers from low-risk children in care; and disbanding adoption and fostering panels. The third of these is by far the most controversial, with noble Lords receiving many emails outlining why it is a foolhardy and potentially even dangerous step. Indeed, statutory guidance on adoption states that adoption and fostering panels,

"play an important quality assurance role, providing objectivity and having the ability to challenge practice which is felt not to be in the interests of children".

In 2012 the Government consulted on reducing the membership of adoption and fostering panels, claiming

that too many members cause delay. However, the proposal was overwhelmingly rejected and in May 2013 the Government concluded:

"We will not introduce a maximum number of adoption or fostering panel members or restrict the number of non-panel members attending an adoption or fostering panel meeting".

So why the change now? The Minister's announcement of the removal of the panels altogether goes well beyond even the September 2012 proposals, which, as I said, were strongly rejected. The majority of respondents to that consultation were involved directly in adoption and fostering service, and knew from personal experience the important role that the adoption and fostering panels play. Indeed CoramBAAF, an organisation at the forefront of adoption and fostering, and indeed in training people in those sectors, has said that this is the worst possible move that it could have imagined the Government to have made.

I will not comment at this stage on the other potential areas for exemption, but it is strange that others seem now to be emerging. I quote removing looked-after status from children remanded in custody; removing the duty to review a child's care when he or she is in a stable placement; and the relaxation of children's homes' planning rules. When I say that they have emerged, that is not to say that they were announced by the Government or by anyone on their behalf; they emerged at the recent conference of the Association of Directors of Children's Services. Those are the sorts of areas where these senior people in the field anticipate that some of those services may be exempted. That is a serious matter. If the Minister is able to respond to that, it would be helpful, although I understand that he has not had much notice.

As was discussed in Committee last week when considering Clause 9, removing the burden of requirements to meet statutory obligations enshrined in children's social care legislation enables local authorities to incentivise private and not-for-profit providers to bid for parts of the children's social care pathways. The danger outlined by a number of people, and one that we echo, is that this further threatens the extent to which children's social care can be fragmented into multiple pathways and perhaps diverse provision, threatening the provision of those services that really are best delivered in a joined-up manner to make them as effective as they can be.

Both at Second Reading and last week in Committee I asked the Minister whether he had made an assessment of the risk to children in allowing local authorities exemptions from some key duties in keeping children safe. I did not get a response. I hope it will be third time lucky and that he will be able to give me an answer to that important question, because I am not the only one who is asking it. It has been widely asked by those who have contacted noble Lords.

As it stands, the Bill's proposals in Clause 15 are too wide-ranging, without adequate safeguards to protect children and young people if plans to outsource services go wrong. For that reason, it is our intention to return to this issue on Report when the House will have the opportunity to express its opinion if it wishes to do so. It is not appropriate for Clauses 15 and 18 to stand part of the Bill unless and until the Government can

[LORD WATSON OF INVERGOWRIE]

offer persuasive evidence of their necessity and significantly improve on their transparency and safeguards. I beg to move.

5.45 pm

Lord Warner: I will speak to Amendment 130 in my name and that of the noble Baroness, Lady Walmsley. I will also speak to the proposed deletion of Clause 15 from the Bill. Rather unusually, I would prefer that Clause 15 were removed from the Bill altogether than that the Government accept the amendment in my name and that of the noble Baroness.

Given the widespread concern outside this House that the noble Lord, Lord Watson, has already mentioned, we need to understand much better than we do at the moment why the Government are so keen to have this sweeping power in Clause 15. I find the underlying premises of Clause 15 extremely strange—even more so than when I spoke about the clause at Second Reading. First, the clause seems to presuppose that in some way legislation is blocking the delivery of good quality children's services. There was an opportunity to explain these alleged blockages in the Minister's latest document, *Putting Children First* but, on a quick read, I cannot see that that opportunity was taken except for some rather generalised remarks about testing "deregulatory approaches" and a quote from Professor Eileen Munro about "unnecessary legal rules". But my understanding is that in her review of child protection, Professor Munro was not arguing for changes in primary or even secondary legislation, but for amendments to statutory guidance. Will the Minister clarify what the primary and secondary legislation blockages are, preferably in writing to all members of the Committee before Report?

To compound the confusion, I understand that the Government have already used existing statutory power to amend statutory guidance following the Munro review by issuing directions to particular local authorities. Ofsted's annual report shows local authorities adopting innovative practice without the need for changes in legislation. Moreover, as the noble Lord, Lord Watson, mentioned, the Government's very own Red Tape Challenge, as it was called in 2014, seems to have revealed very little to remove for children's services. Again, will the Minister clarify that, preferably in writing? So far, the Government have produced no evidence that primary or secondary legislation is impeding innovation in children's services. They already have plenty of scope for amending statutory guidance or issuing directions to particular local authorities without the wide-ranging power to repeal or modify children's social care requirements in Clause 15 that would last, I understand, for at least six years.

One is entitled to be a little suspicious about what the Government are really up to with Clause 15. Of course, I am the sort of chap who takes for granted that Ministers are well intentioned when they bring measures before your Lordships' House, but could it be that what lies behind this provision is a short-cut way of outsourcing whole chunks of services? Ofsted seems to be claiming that up to 25% of children's services are inadequate. Rather than working with some external turnaround capacity to improve matters,

is there a new-found enthusiasm within DfE for trying to get quicker results by removing legislative impediments to outsourcing?

Personally, I have no particular objections to outsourcing if that can be shown to have a beneficial effect for children after trialling. I have been trying to probe what the DfE is up to with the transfer of children's services to trusts. On the answers that I have received, this is clearly an expensive process, it can be very time-consuming, accountability can become extremely blurred and at present there is no body of evidence to support it as a general remedy for failure. Moreover, the DfE has still to publish the report that it commissioned in 2014 from LaingBuisson into developing capacity and diversity in the provision of children's services. I know from my involvement in that work that it did not suggest that creating a market in children's services would be easy.

I turn briefly to Amendment 130, which would require the Secretary of State to set up an independent review panel to consider whether any exemptions or modifications under Clause 15(2) are likely adversely to affect the legislative safeguards or rights of children approved by Parliament and to consider the published advice of such a panel before acting. I consider this the least that we should do if the Government persist in proceeding with Clause 15. To sum up, we need much more transparency and clarification from the Minister on why the Government need Clause 15 and why they cannot use their existing powers of direction and statutory guidance to secure their espoused innovation objectives.

Baroness Walmsley: My Lords, I support the noble Lord, Lord Warner, in arguing for this amendment. If these clauses eventually remain in the Bill, which is in considerable doubt, although I will leave it to my colleagues to argue that case, it is vital that children's rights and entitlements are not diminished in the process. These clauses, to my mind, fundamentally undermine rights that have been enshrined in children's social care legislation following intensive debate in Parliament. They are to be removed at our peril. However, given that some local authorities have seen an 82% increase in the number of children in need between 2010 and 2015, at the same time as local authority budgets have continued to decrease, there is a danger that these new powers might be seen as a way to save money. However, undermining children's basic rights should not be the penalty for innovation. Many local authorities have vastly improved the service that they give to vulnerable children by trying new things without seeking any exemptions from the children's rights.

The noble Lord, Lord Warner, mentioned Professor Eileen Munro. He is quite right that she never suggested that we needed to repeal primary or secondary legislation; she just asked for less onerous guidance. Innovation has been done effectively through waiving statutory guidance in some authorities. Importantly, outcomes have been monitored and reported on and it is from such reports that lessons are learned. That is the way forward.

I question the necessity for this part of the Bill. In particular, I want to ensure that the Secretary of State can be assured by independent experts that the benefits

to children's rights will be greater than the risks. The key word here is independent because, according to the Bill, the only people who have to be consulted are the Chief Inspector of Schools and the Children's Commissioner. I point out that both of them will already have been appointed by the Secretary of State. Although I have every respect for the current incumbents of those offices, we need more independence than that. That is why I support this amendment. Innovation should be encouraged within a framework of fundamental rights and entitlements within the law.

The Earl of Listowel: My Lords, before speaking to my amendment in this group I make clear that I support those noble Lords who call for the clause to be removed from the Bill. This is not the time to erode the rights of vulnerable children. As the noble Baroness, Lady Walmsley, said, we are facing a period of austerity. The Chancellor of the Exchequer has just removed his target to pay down the deficit by 2020 but we should certainly not think that that is the end of austerity; we can expect it to extend for many years to come. Unfortunately, that means that local authorities will continue to have severe downward pressure on their budgets, so I share the noble Baroness's concern that whatever the good intentions of this clause, it might result in cutbacks on protections for children in order to save money.

The purpose of my Amendment 131A is, where a local authority has been exempted, to enable a child, his advocate or a professional to ask for the exemption to be released for that child. For instance, if the responsibility for putting in place an independent reviewing officer was removed, a child could, if he decided to do so, call for an IRO to be instated. The Minister referred to the role of IROs at Second Reading.

I draw your Lordships' attention to research by the National Children's Bureau. It has found that the area in which the IRO service has been seen to make the biggest difference is in ensuring timely reviews of the care plan. Nationally, the survey found that that was where IROs were perceived to have made the greatest difference, with 91% of IRO managers, 82% of IROs and 72% of directors of children's services strongly agreeing that, since 2011, IROs have contributed to the timeliness of reviews. Another area in which IROs are seen to have had an impact is in ensuring that the care planning process remains firmly focused on the child and that the child's wishes and feelings are taken into account. Nationally, the survey found that 90% of IRO managers, 72% of IROs and 73% of directors of children's services strongly agreed that, since 2011, IROs had ensured that children's wishes and feelings were recorded and taken into account.

Amendment 131B would ensure that there is excellent parliamentary scrutiny should Clause 15 continue to be in the Bill. Major voices from the children's sector have been clear that innovation is necessary to ensure, in the face of increasing risks and challenges, that the sector can learn and improve. Like many, I share the concern of all the major children's charities that the right safeguards should be in place to ensure that innovation is overseen properly and delivers for children and families without disruption to their lives. Such scrutiny is essential and should not be overridden.

Local authorities should not be exempted from laws that have been developed and scrutinised with care and attention by both Houses without a comparable amount of parliamentary oversight of the potential impact of any exemptions. That is what the amendment seeks to achieve.

The amendment would ensure that only laws subject to the negative resolution procedure in their formation could be overridden by the same process. Whether in the process of seeking to innovate to improve services for children or otherwise, it is not appropriate or democratic that regulations introduced through a debate and vote in Parliament should be exempted without such a process. Our job is to hold the Government to account, and we should not be prevented doing so. It is imperative that our powers to scrutinise the safeguards needed to protect children from the impact of any exemptions are not disrupted by the desire to innovate to improve outcomes for children.

Lord Ramsbotham: My Lords, I return briefly to Clause 15, which is a classic example of regulation too far. I agree with everything that has been said so far. It is inappropriate and ought to be struck out of the Bill. Only two things are needed. One is the minimum list of tasks that must be done with children. If anything, the Secretary of State should seek to improve the list and to improve delivery if there is any failure to deliver what must be done, rather than remove any task. Secondly, as has come up over and over again, we are looking for consistency in delivery and to avoid the postcode lottery in the treatment of children all over the country. If there is a minimum list and machinery for looking at that, we will find, as many noble Lords have said, that individual local authorities will encourage improvement in the way those minimum requirements are operated. The way to improve things is by changing single practice somewhere to common practice everywhere, not by regulation. Therefore, I hope very much that, if not before then certainly on Report, this clause will be struck out.

6 pm

Baroness Bakewell of Hardington Mandeville: My Lords, I shall speak against Clause 15 and support the arguments of the noble Lords, Lord Watson, Lord Warner and Lord Ramsbotham. Clause 15 allows local authorities to be exempted from certain legal requirements and regulations and to test different ways of working. It is important, however, that they do not dilute accountabilities, fragment responsibilities and create a two-tier system of quality and standards. All vulnerable children deserve the same level of care.

Clause 15(3) says:

"The Secretary of State may make regulations under this section relating to a local authority in England only if asked to do so by that authority".

My view is that it should not simply be at the whim of a local authority and that certain tests should need to be fulfilled to justify it, not least that the exemption should promote better outcomes and more efficient working. It should be clear that inadequate local authorities cannot be exempted from regulations that are crucial for upholding quality standards across the country. Clause 15(4) says:

[BARONESS BAKEWELL OF HARDINGTON MANDEVILLE]

“Regulations under this section may be made in relation to one or more local authorities in England”.

I seek assurance that the Secretary of State will not use the power under this clause to apply a request from one local authority seeking freedom under subsection (3) to apply it to more than one local authority under subsection (4).

In addition, I believe that statutory social work is best placed within local government, where there are established frameworks for oversight and monitoring. These clauses should not challenge the ultimate legal responsibility of local authorities to safeguard children. We need to avoid greater fragmentation of provision, any blurring and dilution of accountabilities, and any increased risk arising from more multiple hand-offs between disparate organisations. The experience of the NHS is salutary in this context: it is now imposing middle-tier planning arrangements to secure more effective joint working in a fragmented sector.

I am concerned that this clause could create an inconsistent national arena for the delivery of statutory social work duties, which could lead to confusion and a greater divide of practice. For children’s social work to run well, it has to uphold partnerships with a broad range of agencies: schools, police, health services—commissioners and providers—and the local voluntary sector. Local councils are best placed to perform that function.

I note that Scotland has required independent fostering arrangements to be not for profit; that approach could be explored in England. Recent research from Corporate Watch shows that in 2014-15, eight commercial fostering agencies made around £41 million profit between them from providing fostering placements to local authorities, at a time when local authorities have had to make significant budget reductions. Surely that profit could have been used to protect looked-after children.

Lord Wills: My Lords, I will not delay the Minister’s response very long. I want to say a few words in support of Amendment 131, to which I have added my name.

I recognise that there is widespread unease about Clause 15. All the noble Lords who have spoken so far have reflected that. The Minister will be aware that there is unease outside your Lordships’ House as well. I recognise that innovation can be crucial to the improvement of public services and I suspect, although I hope to be proved wrong, that the Government will not be unduly swayed by all the compelling arguments that we have heard against the clause. That is why Amendment 131 is important. Innovation, as other noble Lords have said, should not be at the expense of appropriate safeguards for those whom it is designed to help. Although I understand the Government’s intention—to promote new ways of working—as we have heard over and over again, as currently drafted the Bill does not offer adequate protections for those young people against failures in innovation. Amendment 131 aims to help to do so by placing a duty on the Secretary of State to,

“consult children in care, those representing children in care, and care leavers in their area before making a decision to grant an exemption or make modifications under subsection (2)”.

Innovation may be positive from the perspective of the local authority but it will not necessarily be positive from that of the young people affected by it. Children in care and care leavers have been let down by the system for so long that they have earned the right to have their views heard about changes to it. If any changes are to be successful, it is crucial that they are heard. These young people know better than anyone how the system works for them. That is one good reason why Article 12 of the UN Convention on the Rights of the Child stipulates that, when adults make decisions affecting children, children have the right for their opinions to be taken into account.

The amendment also provides for new, independent scrutiny arrangements and a duty on both the local authority and the Secretary of State to consult children in care and care leavers when a local authority applies for an exemption from the requirements of social care legislation. At Second Reading, the Minister was reassuring about scrutiny arrangements, but I ask him to consider carefully the merits of a new, independent body. Existing organisations all come with their existing viewpoints, cultures and histories—in other words, they come with baggage. The proposed change in Clause 15 is potentially so radical and could have such a dramatic effect on the lives of young people, who already face such huge challenges, that I believe it is important that any organisation scrutinising such arrangements should be dedicated to doing so. It should be able to adopt fresh perspectives and develop specific expertise, which a new scrutiny organisation will be able to do in a way that existing organisations may well not. From his response at Second Reading, I suspect that the Minister is not minded to do this but I hope that he is open to persuasion on that point.

Lord Mackay of Clashfern: My Lords, I want to ask a very specific question. Could an exemption of the kind envisaged in the amendment of the noble Earl, Lord Listowel, occur under Clause 15?

Baroness Pincock: My Lords, I concur with all the concerns that have been expressed so far about Clause 15. It is not that any of us are against innovation per se, but we are concerned about the proposed non-limits to the innovation.

At the heart of this clause is a dichotomy. On the one hand, children’s social work is probably the most regulated of all public services and has the most legislation surrounding its practice. On the other hand, if we take the clause at face value, it appears to allow any innovation within those regulations to be set aside. I asked civil servants what the criteria are for innovative practice, what the boundaries for it are and whether anything is off the table. The answer was that there are to be no limits. I found that quite disturbing. It is not as though we are dealing with anything mechanical here; we are dealing with the most troubled and vulnerable children in our society, who deserve our protection. What we need to try to achieve is set out in the *Putting Children First* report, which offers a blend of innovation and protection that works.

I have not yet understood how, on the one hand, Leeds City Council, which has been referred to in earlier debate on the Bill, has been enabled to innovate without difficulty—I know that it has been allowed to

set aside some regulations, without the need for this clause, and has been successful in doing so—yet on the other, Doncaster Council, which sadly have a long history of inadequate children's services, has not achieved much improvement despite all the efforts that have been put into it. The answer is that it is not so much legislation and regulation that is the problem, but having the support of key professionals—making sure that we have highly trained, effective and good leaders in social care, who can make a difference. That is what the report, on which I guess that many of the clauses in the Bill are based, says. Can the Minister tell us: is anything off the table as regards innovation, or is protection of children coming first?

Lord Nash: My Lords, I will speak to Amendments 129, 130, 131, 131A, 131B and 132, in this group regarding the power to test new ways of working. I thank noble Lords for tabling these amendments to the clause, providing me with an opportunity to explain its purpose and operation in more detail. In short, this is purely to improve the provision of services to children.

Before I go into detail, I would like to return quickly to our discussion about profit of last week. I could not help reflecting that I might be the only noble Lord present who has spent most of his life, until recently, proudly in pursuit of profit. That fact may itself raise wider issues, but I say again that we have no intention of revisiting the settled position on profit-making in children's social care or of using Clause 15 to circumvent that position. I gave that assurance at Second Reading and do so again now. The policy paper *Putting Children First*, published last week, makes the same commitment and the Minister for Children and Families reiterated the point in his speech to the Association of Directors of Children's Services last week. I hope that that makes things absolutely clear.

At the heart of this power to test new ways of working is the intention to achieve better outcomes for children and young people. This unwavering focus is at the very core of the department's agenda to drive innovation and improvement. More significantly, the push to remove procedural barriers to better ways of working is in direct response to what local authorities are telling us young people are saying to them. They want things done differently.

The Government's £200 million children's social care innovation programme has enabled local authorities to develop and test new ways of working, but in some aspects of provision this has reached the limits of what is possible under current children's social care legislation. This power responds to the sector's appetite to go further by allowing it greater flexibility to support young people in the most effective way. A number of noble Lords referred to examples of good innovation, some of which have been pointed out by Ofsted. They referred particularly to Leeds, one of our partner in practice local authorities, which has told us that it is proud of the innovation it has achieved so far within the current framework—but it is also keen to go further for children and families in its area. It cannot do that without this provision.

This power is about creating a safe mechanism to test new ways of working to improve outcomes for children.

Lord Hunt of Kings Heath: My Lords, I am no expert in this area, but I still have not got hold of an example of what the provision is that stops innovation taking place. Is it about reporting and bureaucracy, or is it to do with an actual statutory responsibility? I am unclear about that. The Minister must be aware that, at this rate, he has no chance of getting this through the House of Lords as it stands. It is a question of what he wants to convince the Committee and then the House at some point. Is it about allowing local authorities to do the right thing with fewer bureaucratic controls, or is it saying that one can actually stand down part of the core legislation? That is what I am unclear about.

6.15 pm

Baroness Walmsley: Before the Minister replies, would he reflect on the fact that those of us who came to the meeting last Thursday were given what the noble Lord, Lord Hunt, is asking for—three examples of where local authorities would have liked exemptions—and that we were not convinced by any of them? In every case, we could think of another way in which that difficulty could have been got around by a creative local authority in order to produce better outcomes for children, and of course there is no other excuse for doing it. We really were not convinced.

Lord Warner: I really must help to reinforce this message to the Minister, because from what he has said so far he does not seem to get it. What we need, in writing, are the primary and secondary legislation blockages that are stopping innovation and why in those cases you cannot use the Secretary of State's power of direction or an amendment to the statutory guidance. That is the issue, and he has not come anywhere near tackling that proposition.

Lord Nash: I heard the noble Lord the first time. I have not got very far but if I am allowed to continue I shall get to it. This power is about creating a safe mechanism to test new ways of working to improve outcomes for children. It creates a controlled, time-limited space to test new ideas. It is not about eroding children's rights or removing the basic duties of local authorities to safeguard children. The power is not about questioning the fundamentals of what local authorities need to do, but about exploring how things could be done better.

I will try some more illustrations. I do not suppose they will get me very far but since I have more to say, perhaps people could bear with me. I shall illustrate this point with two examples. First, it is felt that on some occasions applying the full gamut of care-leaver regulations associated with children on remand, who automatically become looked-after when in custody, is not always the best option for those children. Local authorities are interested in developing a service that better responds to their needs, informed by the young person, which, where a local authority can make a professional decision, would ensure better and informed choices without an unwanted service automatically being triggered by legislation. A real-life example of that was given to us by one of our partner in practice local authorities. In this instance, the young person was returning to live with their grandmother. Applying the burdens and processes associated with looked-after

[LORD NASH]

children placements unnecessarily overcomplicated matters for both the authority and, most importantly, the young person and their family.

Secondly, as I highlighted at Second Reading, there is a widespread view that adoption and fostering panels do not always add value, and can often delay the process of approving prospective carers. These panels are only advisory, with the ultimate decision resting with the local authority. Local authorities explain that they think they could get to the same decision quicker without the panel in some circumstances. The freedom likely to be requested would be to remove the requirement always to have the panel in place for all cases, and for the agency decision-maker, who currently makes the decision, to continue to exercise their professional judgment. In straightforward cases, the decision would be made quicker to allow the best solution to be progressed faster so that children get the support they need. I heard what the noble Lord, Lord Watson, said about the concerns that Coram has in this respect, and we will be very happy to talk to Coram about its concerns in some detail.

I will speak to other examples as I go through my response to the amendments. In turn, the department will look to evaluate the use of the power so that we understand the impact, where there is a case for permanent changes to the legislative framework—changes that would of course come back for further scrutiny to this House.

I turn to Amendment 129, clarifying the purpose of this power to innovate. I agree that a focus on improved outcomes for children and young people is key. However, the drafting of the clauses already makes clear that the power is focused on outcomes for children and young people. Clause 15(1) refers to children's social care legislation. The Children Act 1989 and its associated legislation is designed with the outcomes for children and young people at its core. By referencing children's social care legislation explicitly, it is clear that the clause is directed at outcomes for children and young people.

On Amendments 130 and 131, I agree that the Bill should not lead to any changes that adversely affect the rights of children or lead to the withdrawal of support or services that they depend on. The whole point of these clauses is to allow local authorities to do things better. We do not propose to put an independent review panel in place. However, there will be a variety of safeguards in place to ensure that the power is not misused and that all applications are subject to very robust consideration before they are approved.

In particular, I draw noble Lords' attention to the requirements both on the local authority to consult its safeguarding partners and relevant agencies and on the Secretary of State to consult Her Majesty's Chief Inspector of Education, Children's Services and Skills and the Children's Commissioner. Of course, representing the views of children and young people is a key part of the Children's Commissioner's role, and Ofsted will also need to consider its functions of promoting the best interests of children when consulted on the use of the power. It is also important to note that any changes to primary legislation will be debated in both Houses, which in many ways constitutes the independent reviewing

process that these amendments seek. In answer to the point on consultation with children in care and their representatives made by the noble Lord, Lord Wills, I agree that the voice of the child should be recognised when requested freedoms are being considered.

While I am not proposing to accept the amendment, I would like to provide reassurance that children are at the core of this provision. In most cases, we would expect local authorities to have consulted children affected by any change and in fact many of the possible changes that local authorities have discussed with us originate from requests from children, as I have already said. For example, in the case of independent reviewing officers, children have fed back to our partner in practice authorities that they do not like additional people who they do not know to be present at their case reviews discussing intimate information. More specifically, in the case of North Yorkshire, just over 400 children and young people are looked after. The vast majority are very settled and achieving well. Older young people in this position tell the authority that they find regular formal reviews unsettling and that they would like to be treated like their non-looked-after peers. There is then a much smaller number, on average 20, who are not currently settled and require regular in-depth reviews. This is one area in which a request for use of the power to innovate may well be made to make more effective use of the experienced cohort of independent officers.

The noble Lord, Lord Watson, talked about the risk assessment of exemptions. I agree that it is vital that we consider this carefully before any exemptions are agreed. We will need to do that, looking at the merits of each application from the local authority, when bringing forward regulations under Clause 15. Noble Lords may know that in responding to the DPRRC report I committed to bring forward an amendment to ensure that all regulations will be accompanied by a report setting out anticipated benefits and the protections to be put in place by local authorities to mitigate risks. That, combined with the other safeguards that we have in place, means that risk will be assessed and managed.

The noble Baroness, Lady Bakewell, raised a point about how local authorities would be chosen. I would expect any local authority that wants to apply for an exemption to demonstrate strong leadership and either strong performance or a clear trajectory of improvement consistent with the approach that it wants to test. Ultimately, the Secretary of State will not take forward any requests if she has concerns about the local authority's ability to implement the change safely or to learn from the testing and share its insights with the wider sector. That is why I anticipate that the first application will be from our partner in practice authorities—a group of 11 of the best-performing children's services in the country.

The noble Lord, Lord Warner, and the noble Baroness, Lady Walmsley, raised points about Professor Eileen Munro and what she wanted. She said:

"I welcome the introduction of the power to innovate set out in the Children and Social Work Bill. This is a critical part of the journey set out in my independent review of child protection towards a child welfare system that reflects the complexity and diversity of children's needs".

I am delighted that so many noble Lords have referred to excellent examples of innovation by various local authorities, but of course just because some innovation is taking place without changes to legislation does not mean that others will be able to innovate without making such changes. Of the examples that we have been discussing with local authorities, all need exemptions from secondary and in some cases primary legislation. I will write to the noble Lord, Lord Warner, setting out what primary and secondary legislation blockages are in place before Report.

To answer the noble Baroness, Lady Pinnock, there are no limits to what can be requested; the Secretary of State is concerned about the impact on children, and if she thinks it is appropriate, it will proceed.

However, in view of noble Lords' concerns and suspicions about our motivation, the best way forward—in addition to writing to the noble Lord, Lord Warner, and sharing that letter with all Peers—is to have what I suggested. I hope that all noble Lords who are interested will come to a meeting with a number of local authorities and individuals where they can explain in detail why they need this power, and noble Lords who feel that they can achieve the same objective without using it can talk about that. We can have a detailed, granular discussion about specific examples, rather than a high-level discussion, which is always, in my view, rather dangerous. I commit to organising that, and I hope that all noble Lords will attend.

Lord Hunt of Kings Heath: My Lords, before the noble Lord sits down—I thank him for his response—is not the requirement really to have a meeting with parliamentary counsel to see how Clause 15(2) can be redrafted in such a way that it is clear that the kind of change that the noble Lord wishes to make is essentially small-scale and minor? The problem is that, although he has made that commitment from the Dispatch Box, none the less, this is such a huge power. It is not the issues, it is the way it is drafted. Surely there must be a different way to draft a power that allows for certain discretion in the circumstances he describes without seeming to exempt the whole of social care legislation. I suggest that parliamentary counsel might have a role to play.

Lord Nash: I think it would be much better to make that analysis when we have had the sort of meeting I am talking about and we have more visibility on particular examples.

Amendment 121A, tabled by the noble Earl, deals with support and safeguards where the power is used. I briefly return to my previous point that the power is about creating a controlled mechanism for testing, strengthening and improving the current system. It is not about removing basic rights that are essential to improving outcomes.

I give another example to illustrate the use of the power. Local authorities tell us that a carer who is either a family member or friend is often thought to be the best placement option for a child in care, but the requirement that they become an approved foster carer after a 16-week grace period can be difficult to achieve, especially where family and friends have no real desire to be local authority-approved foster carers generally.

We discussed in Committee last week the important role that grandparents can play. This is exactly the sort of area where use of the power could make better use of the strengths they bring.

Exemption from this requirement could mean local authorities being able to place a child with the person to whom they have the greatest attachment. There could still be an option for the carer to become an approved foster carer if they wish, but the exemption would give flexibility for the carer and a better chance of achieving the most suitable option for the child being selected.

Returning to the amendment, requiring a local authority to reinstate existing processes and procedures upon individual request would considerably weaken a local authority's ability to assess the effect of the power. As outlined in my example above, however, there is nothing to stop a local authority offering this level of service if it was in the best interest of the child. Let me reassure noble Lords that exemptions will be granted only for a time-limited period because the local authority and the Secretary of State are persuaded the new approach holds out the likelihood that the child or children can be better served in a different way.

In order to test and evaluate exemptions properly, I feel it is right that local authorities should not be subject to an infinite range of requirements in respect of different children, but can use their professional judgment in response to the child's request. I remind noble Lords that if regulations made under the power are not found to have had the desired effect, they can be revoked swiftly using the negative resolution procedure. In addition, authorities are and will be subject to the usual Ofsted inspections and will be monitored via the department to evaluate and create an evidence base of what works.

I recognise that Amendment 131B reflects the recommendations of the DPRRC. I am happy to say that in my response to the Committee last week I signalled my intention to make amendments to achieve the same effect. In view of that, I hope that the noble Lord will feel reassured enough not to press his amendment at this time and will support our amendment at Report.

Finally, I turn to Amendment 132 and the interaction between this power and the corporate parenting principles. There are numerous broad, overarching duties on local authorities in children's social care legislation in different Acts of Parliament. The corporate parenting principles are an example of such an overarching duty. Our conversations with local authorities have not been focused on these overarching duties. They want to focus on how they could change the way of working to allow their children's social care staff to focus more on children and families themselves, not on changing their overall objectives. Specifically to exclude an overarching duty such as corporate parenting would beg the question as to why it had been singled out. Excluding some but not others could give rise to the same question. Equally, excluding all overarching duties from the many pieces of primary legislation in the area of children's social care would make the clause unnecessarily complex.

6.30 pm

Having said that, a request from a local authority for exemption from the corporate parenting principles would seem likely to run counter to the core purpose of the power—securing better outcomes—in any case. We are therefore of the strong view that the better course is to introduce a simple power that is readily understandable by all local authorities.

In answer to my noble and learned friend Lord Mackay, technically we could modify arrangements to be conditional in a way similar to that suggested by Amendment 131A but we believe that there will be some practical difficulties with that, which I would be happy to talk to him about further. I will write to the noble Lord, Lord Warner, and if we have a meeting as soon as we can arrange it with a number of local authorities, we can discuss these matters in much more detail. That would be the best way forward, and in view of the above, I hope that noble Lords will feel able to withdraw or not press their amendments.

Lord Ramsbotham: My Lords, I welcome the thought of a meeting but I would be grateful if the Minister could ensure that somebody from the youth custody arena attends it. I was extremely alarmed when he rather dismissed the example of the legal safeguard that could be lifted, of removing the looked-after status from children remanded in custody. That is very often the first time that they have had any stability in their lives and it would be tragic if it was removed.

The Earl of Listowel: My Lords, I am grateful to the Minister for his reply and for the offer of a meeting, which I am sure will be very helpful for me. I should have said in my earlier contribution that I am the patron of the National Association of Independent Reviewing Officers, so I have an interest and some experience there. I hear what he says about independent reviewing officers; in my mind, there is certainly a question about tying up so many experienced social workers in one capacity. But one of the concerns is that when a child is in a long-term placement, it may go very well but things can suddenly go wrong. One of the chief concerns that often come up when children need advocates is that while they are in a long-term stable placement, a local authority may suddenly have decided that it is too expensive so they are moved on. There is particular concern that a child may be in a stable placement for a long time and he or she may suddenly need the expertise and professional capacity of an independent reviewing officer. However, I see that there is another side to that.

Lord Watson of Invergowrie: My Lords, I thank the Minister for his response but after almost an hour of debate, we have made little progress. I think it was my noble friend Lord Hunt who said that the Minister does not seem to get the opposition to Clause 15. It is not just from these noble Lords but across different parties and the Cross-Benchers as well, who have expressed very strong views as they did in respect of Clause 9 last week. Many of the same sentiments have been repeated here today. There is deep-seated resentment and opposition to this and it will not go away through the amendments in this group just being withdrawn or not moved today.

A lot of noble Lords asked the Minister to give us some rationale as to what is driving this and the purpose behind it. The only specific thing I was able to note down in what he said was that it was to improve the provision of services to children. I think that everyone in the Room—noble Lords, the officials of the House or the department, and even the visitors in the public seats—would throw their hands up at that suggestion. The noble Lord, Lord Ramsbotham, encapsulated it when he said that introducing best practice is the way to improve things, not regulation. I urge the Minister to bear that fundamental point in mind.

I welcome the fact that we are to have a meeting and that the Minister will also speak to CoramBAAF. That is important but there are a number of organisations, and if he has not already done so, I think that some of the adoption and fostering agencies would like to meet him because, as I said, there is deep-seated opposition to this.

I do not want to rehearse the arguments and will not do so but I need to say to the Minister that, unless something in Clause 15 changes, he will be riding for a fall on Report. I hope that he will bring forward some sort of meaningful amendment that takes the sting out of some of the arguments that have been advanced over the last hour. They are very strongly felt and there is no political point-scoring here at all. If the Minister wants to make progress with this aspect of the Bill, we need to see something different when we discuss these issues in the Chamber in some weeks' time.

The response to the amendments is nothing other than disappointing but, for now, I beg leave to withdraw the amendment. I mean it when I say that I look forward to returning to this subject on Report.

Amendment 129 withdrawn.

Amendment 130

Tabled by Lord Warner

130: Clause 15, page 13, line 28, at end insert—

“() Before making any exemptions or modifications under subsection (2), the Secretary of State must consider the published advice of an independent review panel established to consider whether any such exemptions or modifications are likely adversely to affect legislative safeguards or rights of children approved by Parliament.”

Lord Warner: I do not intend to move this amendment but I want to reinforce a point that has been made already. I look forward to seeing the Minister's letter but it is not just a question of satisfying me and Members of this Committee. The letter had better be pretty convincing to many people outside, including the Association of Directors of Children's Services, because the issue is not whether you can make some changes; as the noble Lord, Lord Hunt, said, it is the proportionality of the scope of the amendment that is called into question.

Amendment 130 not moved.

Amendments 131 to 132 not moved.

Clause 15 agreed.

*Amendment 132A**Moved by The Earl of Listowel*

132A: After Clause 15, insert the following new Clause—

“Annual report on the impact of exemption on children and families

- (1) In relation to each local authority exempted from a requirement imposed by children’s social care legislation by regulations made under section 15(2), the Secretary of State must report annually on the impact of the exemption on children in that area.
- (2) In considering the impact on children for the purposes of subsection (1), the Secretary of State must take into account the effect of the exemption on—
 - (a) safeguarding of the children;
 - (b) the health and well-being of the children; and
 - (c) the children’s access to support and services.”

The Earl of Listowel: My Lords, I shall speak also to Amendments 133A and 133B. The first of these would ensure transparency and adequate information about any innovation. The second is about open and transparent consultation. I hope that they both meet the requirement of the noble Lord, Lord Watson, for much more reassurance before we move forward with this clause.

The heading of the new clause proposed in Amendment 132A is: “Annual report on the impact of exemption on children and families”. Therefore, the amendment seeks to ensure that there is an annual report and that we know the impact of the exemptions.

Earlier in Grand Committee there was a short discussion about social work practices. We heard evidence of how they are working, which was helpful for us in thinking about these matters. Several years ago, Hackney had a programme called Reclaiming Social Work. It reduced the number of children coming into care by more than a third in three years and was a model for setting up social work teams with a consultant social worker. Isabelle Trowler, the current chief social worker, and Steve Goodman, a senior social worker in Hackney, led in this model. It was well evidenced and there was plenty of information about how it worked. Professor Eileen Munro highlighted this experience in her report, many local authorities have copied the model and it is becoming more widespread.

If we really want to make a difference for children, when we innovate we need to be sure that we have evidence and measure what is happening so that we can be confident of what works and what does not. We can then expand that to other areas. Amendment 132A would ensure that there was a gathering of evidence, and it is a probing amendment to achieve that.

Through Amendments 133A and 133B in my name, I seek to ensure open and transparent consultation in this process. I welcome the Government’s proposal in the Bill to commit to consult the Children’s Commissioner, Her Majesty’s Chief Inspector of Education, Children’s Services and Skills and any other person who the Secretary of State considers appropriate.

I am worried, however, that such an important decision to exempt a local authority from children’s

social care legislation should be left to a consultation process defined by the Secretary of State. Instead, I share the view of the Children’s Society and other major children’s charities that the consultation process should be open to all, with a particular focus on residents of the local area, and that it should run for the same length of time as a standard government consultation. I agree with Members who have tabled amendments explicitly to include the voices of children and their families in the consultation, and I believe that the wording of an open consultation would include young people. The consultation should be open to all.

We want, as I am sure the Government do, to encourage the many interest groups such as children’s charities that, although perhaps not directly affected by innovation, have valuable expertise on safeguarding children to voice their support or concerns through a formal process. I support the importance of making sure, as part of the consultation, that children’s and families’ voices are taken into account, and that the consultation process is carried out in an active and accessible way so that they can respond on these important issues.

Equally, it is important that the consultation process does not take place behind closed doors, and that the Secretary of State should place her response to the consultation on the record. This important accountability measure will allow interested Members of Parliament to see what evidence swayed the Secretary of State’s decision and to hold her to account on it. That is vital following the initial three-year period, when the impact of the changes on children will be assessed and the expertise in the initial consultation responses will be drawn on to assess the longer-lasting impact of statutory exemptions.

I believe that the safeguards in my three amendments will make sure that innovation can happen in a controlled way to protect children while recognising the desire to test different approaches. At the heart of the amendments is the desire to support innovation, while also showing an important level of parliamentary scrutiny and public consultation before making decisions to exempt any local authority from its statutory responsibility to children in their local area. I beg to move.

Baroness Howe of Idlicote (CB): My Lords, I support my noble friend Lord Listowel’s Amendment 132A and his other amendments in this group. One does not need to look very far to understand why the Government are so keen to promote innovation, about which we have already heard a lot this afternoon. At present, 43 of the 87 local authority children’s services have been judged by Ofsted to be failing or inadequate. Clearly, this is highly undesirable, and we can and must do much more to ensure that the services we offer for vulnerable children are the best they can possibly be. I none the less support my noble friend’s Amendment 132A and his other amendments because I am concerned that the Bill fails to put in place rigorous and robust mechanisms to ensure that the well-being of children is not inadvertently affected by the exemption of local authorities from crucial clauses in children’s social care legislation.

[BARONESS HOWE OF IDLICOTE]

In recent years, local authorities have developed some highly innovative approaches to children's social services in areas such as Trafford. Trafford has maintained a good and an outstanding rating for the past five years, and its approach, particularly towards care leavers, has been commended by the Government. This in many ways represents the best practice that could be encouraged by the comprehensive and strengthened set of corporate parenting principles we have the opportunity to create in this very Bill. Trafford is widely considered a success story for innovation in local authorities, but this has all been achieved without the need to repeal the safeguards afforded to children through the Children Acts 1989 and 2004. I am still struggling to see where these key pieces of legislation are hampering innovation, and I would welcome it if the Minister gave examples of the benefit that the Government believe will derive from such a provision.

6.45 pm

Lord Watson of Invergowrie: My Lords, I will speak to Amendment 133ZA in this group, in my name and that of my noble friend Lord Hunt of Kings Heath. Clause 17 outlines the consultation process that local authorities and the Secretary of State must undertake before an authority makes an application to exempt or modify legislation in order to test a different way of working. This is a probing amendment to explore how a requirement could be placed on a local authority to consider how such an application could affect the needs of children with special educational needs and disabilities, in addition to consulting local safeguarding boards.

There are concerns that legislation meeting the definition of children's social care legislation in Clause 19 which can be subject to exemption or modification includes any legislation specified in Schedule 1 to the Local Authority Social Services Act 1970 that relates to those under 18. As drafted, this covers more than 40 pieces of legislation mentioned in that schedule. The Bill could therefore allow exemption or modification of a wide range of social care support that children with SEND currently rely on. Indeed, those with SEND constitute the vast majority of children in need as defined under Section 17 of the Children Act. This group is disproportionately likely to be impacted by exemptions or modifications to children's social care legislation. However, there is no mechanism explicitly to consider the impact on this group of changes to legislation.

Section 3 of the Children and Families Act 2014 will also be impacted by the Bill, with implications for those receiving social care and health provision as part of an education, health and care plan. Much of this impact could be unintended or unforeseen without specific measures being taken to identify them proactively. There is also the issue of a postcode lottery and creating parallel systems by granting some areas exemptions from the general law. So there is a real need for local authorities to conduct a review of the potential effect of different ways of working on the authority's ability to meet the needs of children with SEND. It would be helpful if the Minister could give

an assurance that some groups will not be prioritised over others if a local authority were to be exempted from some elements of the current provision.

Baroness Evans of Bowes Park: My Lords, Amendments 132A, 133A, 133B and 133ZA would amend the consultation, application and reporting requirements that already support the proposed power to test new ways of working. I should say from the outset that our response to the Delegated Powers and Regulatory Reform Committee, which was mentioned earlier and which evidently noble Lords have not seen, proposed putting forward a government amendment which provides for the laying of a statement every time the power is used in Parliament, with any regulations made, explaining how any change is expected to meet the purpose of the power—better outcomes for children and young people—and the protection that a local authority making an application to use the power intends to put in place. I hope that this move will address many of the concerns raised by noble Lords. We certainly believe that such statements will help the House if and when it comes to scrutinise any orders under Clause 15. None the less, I will say a few further words on consultation and reporting.

Clause 17 sets out proportionate expectations of consultation for both the local authority and the Secretary of State. For the local authority, this would mean consultation with health agencies, the police and others; for the Secretary of State, it would mean the Children's Commissioner and Ofsted. The Secretary of State may also consult such others as she considers appropriate in each individual case. I am confident that, according to the freedom requested, the appropriate persons or bodies will be consulted to ensure that the right decision is made and that, where appropriate, the needs of children with special educational needs will of course be taken into account. But each decision needs to be made on a case-by-case basis; we are not persuaded that standardised, formal consultation would be appropriate. However, we would expect the statements that I have already described to deal with the outcomes of consultation. Of course, the reports would be made available to the public, as would the orders made—which I feel addresses the question of making public any changes made under Clause 15.

Finally I will say something about the annual report that is proposed. We entirely agree that tracking and capturing the progress of exemptions should take place. This will be crucial in coming to a view on whether lasting changes should be made to children's social care legislation. We will be evaluating the use of the power, and noble Lords will note the requirement to report on how far changes have achieved their purpose if the initial testing period is to be extended. If it is not extended then of course things will revert to the previous position. This seems to be a way to achieve the same objectives in a more proportionate way than an annual review.

I also make the point, as highlighted by the noble Baroness, Lady Howe, that Ofsted will inspect and report in the normal way, providing another valuable source of public information. I hope that on the basis of our proposal to bring forward amendments, noble Lords will not press theirs.

The Earl of Listowel: My Lords, I thank the Minister for her reply and my noble friends for their support for my amendments in this group and in the debate that we have just had. I am particularly pleased to hear of the Statement that is coming forward from the Government; that sounds like a helpful proposal. I am somewhat reassured to be reminded that the Children's Commissioner will be consulted; she does extraordinarily good work in listening to the voice of young people in care, and I am sure her contribution will be very important. I will look at what the Minister has said. In the meantime, I beg leave to withdraw the amendment.

Amendment 132A withdrawn.

Clause 16 agreed.

Clause 17: Consultation

Amendment 133

Moved by Lord Nash

133: Clause 17, page 14, line 20, leave out “its Local Safeguarding Children Board partners” and insert “the other safeguarding partners and relevant agencies in relation to its area”

Amendment 133 agreed.

Amendments 133ZA to 133B not moved.

Clause 17, as amended, agreed.

Clause 18 agreed.

Clause 19: Interpretation of sections 15 to 18

Amendment 134

Moved by Lord Nash

134: Clause 19, page 15, leave out lines 42 to 44 and insert—
 ““relevant agency”, in relation to a local authority area, has the meaning given by section 16E(3) of the Children Act 2004;
 “safeguarding partner”, in relation to a local authority area, has the meaning given by section 16E(3) of the Children Act 2004;”

Amendment 134 agreed.

Clause 19, as amended, agreed.

Amendment 135 not moved.

Amendment 135A

Moved by Lord Dubs

135A: After Clause 19, insert the following new Clause—
 “National action plan for the welfare of unaccompanied children

- (1) The Secretary of State must, in consultation with the Local Government Association, the Association of Directors of Children's Services and the Children's Commissioner for England, publish a national action plan for the welfare of unaccompanied children.
- (2) The national action plan for the welfare of unaccompanied children must set out the steps the Secretary of State will take to ensure that local authorities are able to safeguard and promote the welfare of relevant children within their area and in particular to ensure that relevant children have adequate access to—
 - (a) legal advice;
 - (b) mental health and other healthcare provision;

- (c) appropriate accommodation, including foster care provision and semi-independent accommodation;
- (d) social work support;
- (e) the education system;
- (f) English language education;
- (g) any other services necessary to meet the needs of relevant children.

(3) The national action plan for the welfare of unaccompanied children must set out the process by which information about children to be included in the scheme provided for under section 67 of the Immigration Act 2016 (unaccompanied refugee children: relocation and support), is to be communicated to local authorities, including details about—

- (a) age;
- (b) any known medical needs;
- (c) any accommodation preferences expressed by children;
- (d) linguistic competencies and requirements;
- (e) any known special educational needs;
- (f) any other available information necessary to allow local authorities to meet the needs of relevant children.

(4) The national action plan for the welfare of unaccompanied children must describe the additional infrastructure that will be put in place to ensure that the welfare of relevant children is protected during and after transfers under section 69 of the Immigration Act 2016 (transfer of responsibility for relevant children), including details about—

- (a) funding to be provided to Regional Strategic Migration Partnerships;
- (b) plans to draw on the expertise of service providers; and
- (c) any other plans to ensure that appropriate expertise and training is available to relevant authorities.

(5) In this section—

“local authority” means a local authority within the meaning of the Children Act 1989 (see section 105(1) of that Act);

“relevant child” means—

- (a) a person under the age of 18 who is unaccompanied and has made a protection claim which has not been determined,
- (b) a person under the age of 18 who is unaccompanied and who requires leave to enter or remain in the United Kingdom but does not have it, or
- (c) a person under the age of 18 who is unaccompanied and who has been granted humanitarian protection, refugee status, discretionary leave or limited leave to remain in the UK as an unaccompanied asylum seeking child.

“service provider” means an organisation providing basic services to relevant children including legal advice.”

Lord Dubs (Lab): My Lords, this amendment is concerned with the well-being of unaccompanied children whether they have come as refugees straight from Syria and other parts of the region or from parts of Europe, as was determined by an amendment that passed this House and the House of Commons under the Immigration Act.

These are clearly sensitive children who have been through trauma. We know they may have been subject to trafficking; they may have been victims of crime:

[LORD DUBS]

they may have suffered sexual violence; they may have been lured into debt slavery—all sorts of things may have happened to them. Some may still be in danger, which is why there is an urgency to bringing them over to this country. Clearly, though, everyone is agreed that they are vulnerable and that they need help and support.

I have had discussions with the Local Government Association about this, and quite understandably the LGA would like to have some assurances about longer-term funding arrangements for councils that are looking after unaccompanied children. Subsection (1) would require the Secretary of State to consult organisations representing local authorities and providers of children's services, as well as the Children's Commissioner, before publishing a national action plan for the welfare of unaccompanied children. That is a rather grand title but I think we know what it means.

Subsection (2) includes a non-exhaustive list of the kind of vital services that children must be able to access wherever they are placed in the country. For example, they will need specialist immigration legal advice to help them know where they stand. They may need special educational needs support. They may have been particularly traumatised by the experiences through which they have gone and those that I described. It is important that they have active health service support. They may have suffered the trauma of war, separation from family members for months or even years, they may have had long journeys in perilous and unsanitary conditions. All of those are important, as is education. Many of these children will not have had an education for some time and it is important that we try to get as many of them as possible to this country by September in order that they can benefit from the beginning of the school year.

I should say that not all of them are traumatised. I was talking to a young man from Syria who had spent a year travelling from the region before he got to Britain. I met him on the green outside. In a chat with him he said his main ambition was to go into politics, so all is not yet lost. Perhaps he did not know enough about our politics; perhaps when he learns a bit more he may think a different career is more important. Those services are crucial and it is important that the national action plan for unaccompanied children takes them into account.

In certain local authorities, Kent in particular, a large number of unaccompanied children are getting help and Kent County Council is clearly having difficulties. I think there is a scheme already but it could be improved to help children who are transferred between local authority areas, mainly to ensure that there is an evenness of pressure and demand on local authorities. The Government have recently announced an enhancement in the funding to be made available, but local authorities are understandably concerned about longer-term provision. If they have money for only one year, they need to know what will happen afterwards.

There is great willingness on the part of local authorities—I have met some. They are willing and anxious to help; they want to be able to get on with it on the basis that they know where they are and can manage to deal with it. For example, there are greater

difficulties in London, where housing costs are higher than in other parts of the country, but even in London, the local authorities I have met are willing to step up to the mark and provide accommodation for people, whether under the vulnerable persons scheme or to look for foster parents who are appropriate for their needs. Of course, foster parents will have to be monitored carefully, as are all foster parents. That is all part of the extra responsibility that falls on local authorities.

The amendment is clear: it is intended to provide the right level of support and ensure that everything is handled as well as it can be for the sake of very vulnerable children. I know that the expression “national action plan” sounds a bit pompous—I could not think of a better one—but I think we understand what it means and I hope that the Government will accept it.

I should add that I am due to meet the Immigration Minister tomorrow. I had hoped that that would have happened before now, because then I might have been able to modify what I have said; but I am doing so prior to the meeting with him. I had discussions with the Home Secretary and the Immigration Minister some time ago, and he assured me that the Government would enter into the letter and spirit of the amendment. That is positive, so I look forward to a good outcome from my meeting with him tomorrow. I beg to move.

Lord Ramsbotham: My Lords, I support the noble Lord, Lord Dubs, in his amendment and confirm that the issue of sharing children around the United Kingdom has been raised many times because social services near the ports of entry were becoming swamped and these children were being deployed right across the country, which led to inconsistency in their treatment—some people putting them in bed and breakfasts, some looking after them properly.

I raised the issue of unaccompanied asylum-seeking children at Second Reading. I am glad that the Minister has arranged for the meeting with Mr Brokenshire because, among other things, there is a tension between the Immigration Act and the Bill over when such children cease to qualify for support. The Immigration Act makes it clear that that is at age 18, whereas the Bill seeks to extend the support until 21 or 25.

Another clause in the Immigration Act, which I mentioned at Second Reading, states that if an unaccompanied asylum-seeking child wishes to appeal against deportation following the failure of his appeal, he now has to go back to the country of origin even though he may have been born in this country before he can make the appeal. That is denying him all the rights that he has earned during his time in this country. We must remember that two-thirds of these children are actually in foster care now, quite apart from the numbers in care. I am glad that the noble Lord has raised this amendment and I hope that, whether revised or not, it will appear in the final Bill. I am sure that the noble Lord will wish to attend the meeting with Mr Brokenshire and the Minister on this very issue.

7 pm

Baroness Pincock: I am very pleased that the noble Lord, Lord Dubs, has tabled the amendment and again raised the issue that the noble Lord, Lord Ramsbotham, and I referred to at Second Reading.

At that time I referred to the investigation by the EU Sub-Committee on Home Affairs into unaccompanied migrant children. It raises some important issues that reflect on what the noble Lord, Lord Dubs, has tabled in his amendment. One or two examples from the report expand on the issues raised. Evidence from Kent social services states:

“There have been issues in respect of the apparently competing demands of the immigration legislation and the childcare legislation in respect of over-18’s”.

That was the fundamental issue that I raised at Second Reading. We are in danger of creating a two-tier approach to care leavers. We quite rightly say that care leavers who are born in this country will receive support until the age of 21 or 25, but unaccompanied minors who have been through the most awful and traumatic experiences are suddenly deemed at 18 to be able to act as adults. Further evidence summarises the problem facing unaccompanied migrant children approaching 18. The report states:

“Those children who are given temporary leave on the basis that they are children are suffering terribly in their protection needs and, as has been identified for many years, their leaving care provisions. We recognise how much children need help in that transition to adulthood. For most of us in this country, we do not suddenly feel and behave like adults when we turn 18”.

We had evidence of the potential consequences of unaccompanied minors, as they approach 18, not given leave to remain but not wishing to return to the troubled area of the world from which they came. One of the consequences is:

“The severe delays experienced by some unaccompanied migrant children in their asylum claims and in accessing services may compound their lack of trust of state authorities. In such circumstances, smugglers and traffickers may come to be regarded by children in some cases as a preferable source of support—“by choice, through desperation, or through exploitation and abuse””. That is the evidence that I have referred to. I do not think anyone in the Committee, which has now spent 20 hours or more considering how we can improve care for the most vulnerable children in our society, would want this particular group of young people to be affected in this way. As we approach Report, I hope that the Government can bring forward their own amendments to help to address the issues of unaccompanied minors as they approach care-leaving at 18, to provide them with the support they desperately need and confidence that they are not going to continue to be returned to the war-troubled areas of the world whence they came.

Baroness Howarth of Breckland (CB): My Lords, I apologise for not being here sooner, but I was the last person standing to chair the All-Party Parliamentary Group for Children this afternoon. That is where I have been, and it is always revealing. I support the amendment because I have raised this issue on a number of occasions. I hope the Minister will look at this, though he knows well that I do not like long amendments; lists in Bills are not helpful.

I cannot understand why, from the moment when the child is identified as an unaccompanied minor in a school, we do not start not only to stabilise the child’s status but to look at their mental health issues. We know of the trauma they have been through. I know that mental health services are poor across the country—we have heard that repeatedly—but these

children have very particular needs. I am appalled when I learn that often schools do not even know the status of these children. I have met a number of youngsters who realise their immigration status only when they are about to go to university and discover that they cannot. Instead, they spend a year on appeal, appealing being deported to countries about which they know nothing. One young man I met had been here from the age of six. He had been in a foster home and suddenly discovered that this was his status.

I am sure that that is not the way this Government wish to treat children. These children happen to be in this situation only by chance. There might be another child next door who happened to have come in to the country, or be part of a family, on a very different basis. We must treat these children equally.

I am not against returning children home when that is the appropriate answer. We know that there have been very successful programmes of returning children to their country of origin with the right support and understanding; but we have to start sooner than we are starting now, get the position of the child right, make continuous assessment and not leave it until their 18th birthday, when it becomes a crisis.

Lord Judd: My Lords, I strongly support my noble friend. His experience and commitment in this sphere are well known in this House. I wish his talks with the Minister more success tomorrow. It seems essential that the Government take what my noble friend proposes very seriously. Others have stressed, and I underline it, that the trauma through which these youngsters have been is almost indescribable. It is more than distressing; it is deplorable. They need to be helped to build future lives. An action plan of this kind will help, and it is very important. Yet no action plan will be better than the culture of those who are operating it. From that standpoint, all of us in politics have a responsibility to set the tone for what is expected. We have a duty of care and responsibility to these children. We say that in our post-EU future we want to be prominent members of the international community. There is no better way that we could establish a reputation to help us in that future than by becoming leaders in answering this challenge, and the commitment with which it is answered.

In our vocabulary, in the speeches of Ministers and opposition spokesmen and all the rest, it is therefore terribly important to bring home that if we mean anything at all when we talk about our civilisation, our values and so on, this responsibility to children must be there. For those who are to operate any scheme, it is terribly important that what the children need is stability of relationships and a feeling that there are genuine, reliable friends looking after them—not just a system but real friends on whose shoulders they can lean and cry from time to time, and from whom they can get reliable counselling and advice on the way forward. What they need is human relationships in their future. This framework will therefore have to be filled by the culture which we and all others are generating about responsibility.

The Earl of Listowel: My Lords, I, too, thank the noble Lord, Lord Dubs, for tabling this amendment. I join in supporting, as have all noble Lords, what he

[THE EARL OF LISTOWEL]

proposes: a national action plan for the welfare of unaccompanied children. I have to reflect for one moment that the current changes, with the separation of the UK from the European Union, must limit to some extent the important international activity that can reach out to countries such as Ethiopia in the Horn of Africa, and support them to promote stability. The EU is less able to do that without us and we are less able to do it without the EU, so more of these children may come to this country in future because of the decision that was recently taken. I regret that.

I was grateful to the Minister for what he said in his letter on the Committee stage, which I received this morning. In it, he talked about Section 10 of the Children Act 2004. At that time, we very much regretted that that Act did not include a duty on the Immigration Service to promote outcomes for vulnerable children. It does for various other services, as the letter lays out, but I hope we can look at including in the Bill a duty on the Immigration Service to work with local authorities to promote outcomes for these children. Perhaps they should train social workers, for instance, to understand immigration issues and ensure that children get the right advice early on. In the past, there was a champion for children within the Immigration Service. In anticipation of our meeting tomorrow, can the Minister tell us who that champion is currently and what he is doing to promote children's welfare? I support this amendment and I look forward to the Minister's response to it.

Lord Storey (LD): My Lords, I have taught three unaccompanied children at my school—obviously this was before the conflict in Syria—and we were making it up as we went along. There was no clear plan of what to do or what support there was. The three boys, as they were, were literally processed in Liverpool and arrived at our school. There was then a time lag while we and the foster parents to whom they eventually went tried to find someone to help with the language and with any other issues that they had. That is why the amendment in the name of the noble Lord, Lord Dubs, is so important. I could not dissent from a single word of it and, had this provision been available when those three boys came to my school, it would have helped tremendously.

Since then, of course, the unaccompanied children coming to this country have been traumatised by conflict and war. The noble Lord, Lord Judd, is absolutely right that what they need above anything else is stability in their lives. I agree with my noble friend Lady Pinnock: if the Government are not happy with the wording of the amendment, can they for goodness' sake please come forward with amendments that will deal with this matter? There is the issue of when these young people reach the age of 18. We have grappled with that in a number of debates on various occasions. I found it heartbreaking when one of the unaccompanied children was nearing his 18th birthday and was going to be returned—to Mongolia, as it happened. Given that we as a country have now agreed to accept an additional 20,000 children, I hope that a national plan is in place for them.

7.15 pm

Lord Watson of Invergowrie: My Lords, I, too, thank my noble friend Lord Dubs for bringing forward this amendment. The standard of debate has been high and I do not want to add too much more to it. The experience of my noble friend Lord Dubs in this matter—most recently on the Immigration Bill—is well documented and hugely appreciated. When unaccompanied children come to this country, however they arrive here, and try to fend for themselves, it is fraught with all sorts of dangers. The noble Lord, Lord Storey, has just talked about children at school but many of these children never reach school because they are kept in an environment where they are exploited; they are not educated or made into good citizens. The noble Baroness, Lady Pinnock, made a point about a two-tier society, and that should resonate with us.

My noble friend Lord Judd, in talking about the action plan, spoke of setting the tone, but I would put that tone into a wider setting. One or two noble Lords referred to the events of a couple of weeks ago which were described as—it is a description that I would subscribe to—pulling up the drawbridge on the world to some extent, and that is the way it is viewed. Britain's reputation has plummeted and has been matched only, it would seem, by the value of the pound in the last two or three weeks. We need to look at positive ways of showing that that is not all we are about.

I was profoundly depressed to read a report at lunchtime by a man called Mark Hamilton, who leads for the National Police Chiefs' Council. He was reporting on an unprecedented spike in hate crime in the country within the last three weeks, directly related to the vote on 23 June. If we have an opportunity to show that we can do different and more positive things and that, despite the impression we have given, we are outward looking and welcoming as a country, then small measures can build into larger things. I think that this amendment is one of those acorns that may grow into something much more substantial.

I wish my noble friend Lord Dubs well in his meeting with Mr Brokenshire. I hope that the Minister will go to that meeting as well so that a way can be found of accommodating this amendment. It is important not just for the framework of this Bill and not just for the individuals concerned but potentially for the way that we are perceived as we approach difficult situations and respond to tragedies in other parts of the world. For that reason, I very much hope that a positive outcome for the amendment will be found, because it certainly deserves it.

Lord Nash: My Lords, I am grateful to the noble Lord, Lord Dubs, for his amendment. I recognise that it seeks to safeguard and promote the welfare of this vulnerable group, and I assure him that I appreciate the sentiment and good will behind it. I also appreciate the strength of feeling in this Committee about the plight of unaccompanied minors who seek refuge in the UK, as illustrated by the contributions to the debate by other noble Lords, and I share those feelings.

The amendment seeks to ensure clarity on the action that will be taken and the support that will be offered to local authorities looking after unaccompanied

children. Under the Children Act 1989, unaccompanied children become looked-after children once they have been accommodated for 24 hours. They will then have their welfare promoted in the same way as any other looked-after child. I emphasise that their country of origin and the circumstances under which they arrived in the UK will have no bearing on the support that these children are entitled to.

The number of unaccompanied asylum-seeking children has risen significantly in recent years. In 2015 we saw a 56% increase in the number of unaccompanied children claiming asylum in the UK. However, as noble Lords have pointed out, until now the majority of unaccompanied asylum-seeking children have been cared for by a handful of local authorities. This has placed a considerable strain on their children's social care services, which sometimes has been to the detriment of local children for whom the local authority has corporate parental responsibility. That is why the Government on 1 July launched a new voluntary transfer scheme that encourages all local authorities to participate in the care and support of unaccompanied asylum-seeking children who arrive in the UK.

The National Transfer Scheme was created after extensive consultation with the Local Government Association, the Association of Directors of Children's Services and individual local authorities. The scheme is based on the principle that no local authority should be expected to care for more unaccompanied children than its services are able to provide for—whether asylum-seeking children, as the majority will be, or unaccompanied refugee children brought to the UK through our resettlement scheme.

The noble Lord, Lord Dubs, raised the point about funding. To support the National Transfer Scheme the Government have increased the amount of funding that they will provide to local authorities caring for unaccompanied asylum-seeking children. Annual support for each child aged under 16 has risen from £35,000 to £42,000, and each unaccompanied asylum-seeking child aged 16 or 17 will attract £33,000 per annum. This represents a 20% and 28% increase in funding respectively.

Because we are increasing the number of local authorities that look after unaccompanied children, these children will be better able to access services such as mental health and other healthcare services, and local authorities will have more capacity to deliver excellent social work support and care. Local authorities will also be able to prepare themselves and commission the new services that are required, such as appropriate accommodation.

The National Transfer Scheme includes a rigorous administrative process by which the Home Office and the local authority in which the child first presents are able to collect information about each child and then ensure that the local authority receiving the child receives all that information. The scheme seeks to build on existing regional structures and use the regional strategic migration partnerships to co-ordinate regional hubs and enable the regional pooling of knowledge and resource.

A central administrative hub based in the Home Office will work with the regional hubs to ensure a nationally co-ordinated but regionally implemented

scheme. Funding that might be provided to the regional hubs via the regional strategic migration partnerships is currently under review, while each region is considering its own data, process and resource requirements. The Home Office will consider any proposals for regional structures to underpin the scheme. Service providers are being encouraged to contact the regional hubs to share their expertise. We know that some regions are already discussing how to pool resources and share expertise.

In addition, two training initiatives are under way. I can announce today that the Department for Education will commission an organisation to deliver training for the foster carers and support workers of unaccompanied asylum-seeking children who are at risk of going missing from care due to being onward-trafficked. That is a new provision. In collaboration with the Department for Education, the Home Office has already said that it will commission a training programme for the existing independent advocates, who are provided for in statute. This will improve their awareness and understanding of the specific needs of trafficked children and how to support them.

Noble Lords will appreciate that a great deal is happening in this area to promote better support, and the details are laid out in the scheme. While the support and care of unaccompanied asylum-seeking children is undoubtedly an important issue, I do not believe that a published national action plan for their welfare is required, given all that is happening under the National Transfer Scheme.

The noble Earl, Lord Listowel, asked about the Children's Champion. The Office of the Children's Champion will remain in the Home Office to ensure that all children's safeguarding issues are addressed and attended to. In addition, the Children's Commissioner in the Department for Education speaks on behalf of this group of children.

The noble Lord, Lord Judd, asked about asylum applications. It is always open to a person to make an application for asylum. There is no age barrier and as soon as an asylum application is lodged, it will always be considered.

The Government remain committed to ensuring that Parliament is kept informed about these issues. No one should be in any doubt of our commitment to bring vulnerable refugee children from Europe to the UK, as underpinned by the Immigration Act 2016. Unaccompanied refugee children with family connections to the UK continue to arrive from France and other European countries. We are also in active discussions with the UNHCR, UNICEF, NGOs and the Italian, Greek and French Governments to strengthen and speed up the mechanisms to identify, assess and transfer to the UK children who meet the criteria where it is in their best interests. This is in addition to the support for unaccompanied asylum-seeking children who arrive from Europe without any assistance. Last year, there were over 3,000 claims for asylum in the UK from unaccompanied children.

I will reflect on the points that noble Lords have made and that will no doubt be discussed in the meetings with Mr Brokenshire. I hope that the noble Lord, Lord Dubs, will feel reassured enough to withdraw the amendment.

Lord Dubs: I am grateful to the Minister. I want to read what he has said, because he has given us quite a lot of information. I hope I am right in thinking that, although he does not like the idea of a national action plan, the Government are by and large giving effect to the elements within it. We may not call it a national action plan but, if the work is being done, then so much the better. I repeat that I want to read his speech because he has said quite a lot and I want to think about it. I am very grateful to all noble Lords who have contributed to this debate and given unanimous support for such action. I am also grateful to Liberty and other organisations, which were very helpful to me as I prepared for this debate by providing background information and so on.

I want to say two things. First, I went to Calais some time ago and saw for myself what at least some unaccompanied child refugees are going through and have gone through. I saw that from meeting some of them. In fact, I sent the Home Office their details in case they met the criteria for the scheme under the amendment to the Immigration Bill. I have seen that for myself.

Secondly, I believe there is a lot of public support for a positive approach to unaccompanied child refugees. That is evidenced by the mass of emails I have had, almost all of which are in favour of it. My general feeling from going to local areas and speaking at meetings is that there seems to be a lot of support for it. It is quite a popular issue. If handled properly and

well, we will find that these young people go on to make a positive contribution to the future of this country.

Lord Judd: Does my noble friend agree that all we have said in debating his amendment would be much more optimistic if we could see some hard evidence of accelerated progress in the rate at which this country accepts unaccompanied children into its programme?

Lord Dubs: I agree entirely with my noble friend. That is why I have said that if as many children as possible could come to Britain in time for the beginning of the school term, they would not lose another school year—many of them have lost one or two school years in the course of their journeys, being in refugee camps and so on. So I am not saying all in the garden is lovely; I was trying to be nice to the Minister.

I will make one last comment. I mentioned that I am having a meeting with the Immigration Minister tomorrow. I am not sure whether I should have said that, but I cannot see any reason why I should not have done so. I thought it was only fair to say that that was under way. Had this debate taken place after my meeting with him, I might have fed into it some of what I had learned. I beg leave to withdraw the amendment.

Amendment 135A withdrawn.

Committee adjourned at 7.28 pm.