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PARLIAMENTARY DEBATES
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HOUSE OF LORDS
OFFICIAL REPORT

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

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House of Lords

Wednesday 13 July 2016

3 pm

Prayers—read by the Lord Bishop of London.

Universal Credit: Rent Arrears
Question

3.07 pm

Asked by ***Lord McKenzie of Luton***

To ask Her Majesty's Government how they will address the causes of the increase in the number of council tenants in receipt of Universal Credit who are in rent arrears.

The Minister of State, Department for Work and Pensions (Lord Freud) (Con): I appreciate the concern with this. The reality is that there are a lot of factors at play and universal credit is not the sole issue. Many people are coming into universal credit with pre-existing arrears. Safeguards are in place for claimants, including advances, budgeting support and alternative payment arrangement. Research shows that over time claimants successfully reduce their arrears. I have commissioned work from the department to help understand the true level and causes of these arrears.

Lord McKenzie of Luton (Lab): I thank the Minister for his reply. He will be aware of the survey conducted by the National Federation of ALMOs and ARCH which details the shocking build-up of rent arrears by council tenants. Of those covered by the survey, 79% in receipt of universal credit were in arrears and only half of those previously had been in arrears. Despite what the noble Lord says, it seems that the rollout of universal credit is causing a build-up of debt among social tenants, creating financial hardship and reportedly driving some into the arms of loan sharks. That is not surprising, given the long processing times and the recently introduced imposition of a further seven-day waiting period before the benefit can kick in—an imposition opposed by the Social Security Advisory Committee. As the rollout of universal credit is to widen, does the Minister agree that these arrangements have to be reviewed urgently, from the point of view of both landlords and tenants, and the seven-day waiting period scrapped?

Lord Freud: The best evidence I have got at the moment is a gateway review, which shows that a rather high figure—48%—of the singles on UC have got arrears, but, interestingly, half of them were pre-existing arrears. That compares with 31%—so it is higher—but the interesting thing is how quickly it comes down. In the second wave—that is, three months later—it comes right down to very close to the JSA figure. There is a lot of complexity here; it is not straightforward at all. I am looking at it with some urgency.

Earl Cathcart (Con): My Lords, during the passage of the recent welfare Act the Government were warned by several noble Lords from around the Chamber that, if they did not allow tenants to choose to have the rental part of their universal credit paid direct to their landlords, then rent arrears would increase. As the noble Lord, Lord McKenzie, has just said, arrears are increasing dramatically, but at the time the Government said no. Why can universal credit be paid directly to mortgage lenders for mortgage interest but tenants cannot choose to have the payment made directly to their landlords?

Lord Freud: What we are aiming to do with universal credit—and there is evidence of success in this—is to get people to take control of their own lives. It is much more difficult for people to switch to going into work if their rental situation is locked up in a dependency situation. We are aiming to free people from that so that they can move into work. There are good signs that we are being successful in getting people into work.

Lord Kirkwood of Kirkhope (LD): My Lords, the Minister's announcement that he is undertaking a review is very welcome, but will he include the evidence that the noble Lord, Lord McKenzie, has just put forward about the increasing incidence of rent arrears? We need to make sure that this is merely a short-term spike and not a long-term trend. In the course of his researches, will he look into why the safety net measures built into the design of universal credit, to which he referred, appear to be failing in this instance? This is important. By a country mile, this is the biggest change programme that Her Majesty's Government are bringing forward. It is mission-critical for the United Kingdom, particularly after Brexit, and it is important that we get it right.

Lord Freud: I absolutely accept that we need to get it right. I am spending quite a lot of time with the ALMOs. I have had a couple of meetings with Eamon McGoldrick and John Bibby to discuss their findings. It is complicated. The essential fact is that landlords like their money paid in advance and all benefits systems pay in arrears, so we do not know how much of this is what the ALMOs call book arrears and how much is real arrears. We need to get to the bottom of that and we need to get to the bottom of what are the processing and payment systems issues. We need to understand what the existing arrears are. They are much higher than we expected—50%—and that is a frightening fact. We may be looking at a group going into UC which is unusual because it is moving up and down, and we need to understand and quantify those factors.

Baroness Meacher (CB): My Lords, I am grateful to the Minister for commissioning some work on the level of debt, but in view of the impact of rent arrears and other debts on mental and physical health, will the Minister commission a review of the cumulative impact of the benefit cuts since 2010 on the mental and physical health of claimants? If the Minister is moving on to other pastures, perhaps he could leave a note for his successor to commission such a review.

Lord Freud: I congratulate the noble Baroness on her timing with that question. I will not answer it. I am not in a position, however, to commission major research on mental health today.

Baroness Sherlock (Lab): My Lords, exactly a year ago today this House voted for a Motion in my name, urging the Government to delay the enactment of the Universal Credit (Waiting Days) (Amendment) Regulations until UC was rolled out. The Government ignored that, enacted the regulations and, as a result, 79% of people are now in arrears, because when you make a claim for UC, you wait six weeks to get any money and now the first week is missed completely, without any payment at all. On that day, the Minister refused to make a statement but he said that,

"I will come back to the House at the appropriate time".—[*Official Report*, 13/7/15; col. 438.]

A year down the road, does he feel that that time has now arrived, and what is he going to do about it?

Lord Freud: I have said to the House that I am looking at this, and I hope that later this year we will have some data. I urge the House not to expect too much certainty on this. This is quite a complicated situation—there is a lot happening under this—and I am hopeful that I will be able to explain some of this to noble Lords to their satisfaction.

Recycling: Wales

Question

3.15 pm

Asked by ***Baroness Jones of Whitchurch***

To ask Her Majesty's Government what lessons they have learned from the success of the Welsh Government in increasing recycling rates, and whether they plan to adopt similar strategies in England.

Lord Gardiner of Kimble (Con): My Lords, all parts of the UK have had success in improving recycling rates. We believe that local authorities are best placed to manage their waste and recycling, but we can all learn from each other's successes and do more to increase recycling. My ministerial colleague Rory Stewart has commissioned WRAP to look at how we in England can best improve our performance through having more consistency in services, and this work is well advanced.

Baroness Jones of Whitchurch (Lab): I thank the Minister for that reply. He will know that the Wales recycling rates are now nearly 60%, whereas the England rates have been stuck on 45% and, according to the latest figures, are now actually going into reverse. The difference is that the Wales Government have shown leadership by setting targets for individual local authorities, streamlining recycling bins and collection frequencies, and setting statutory requirements for food waste collection. Is it not about time that the UK Government in England got a grip on their poor record, stopped dithering and implemented a proper plan to deliver at least a 50% target based on the lessons they could learn from Wales?

Lord Gardiner of Kimble: My Lords, as I said in my earlier reply, we certainly want to look at best practice. That is precisely why my ministerial colleague is looking at this with WRAP and local authorities. We need to advance all parts of the United Kingdom. There are some very good examples of local authorities in all parts of the kingdom. For instance, the Vale of White Horse now sends 65.6% of household waste for reuse, recycling and composting. Many local authorities are working hard at this, and I well understand that we want to look at all parts of the kingdom where it is working well.

Baroness Gardner of Parkes (Con): Is the Minister aware—I am sure he is not—that some years ago I asked whether guidance could be given so that everyone set out the same things to be recycled? At that time, the answer from the Government—I cannot remember which Government—was no, they did not want to tell people what to do. My daughter has been chairman of the West London Waste Authority; she has finished now, so I am not declaring an official interest. It has come out very clearly that those four boroughs—two Labour and two Conservative boroughs all working together—are recycling different things. It all gets collected together in the end, goes down the Thames somewhere and is then re-sorted. Certain things cost the earth to take out of recycling, and it would be so much more effective and valuable if they were not put in. Again, is it not time that the Government looked at the idea of giving people a model list? One of the big problems is that boroughs cannot change a contract until it has finished.

Lord Gardiner of Kimble: I am sure your Lordships agree with the thrust of what my noble friend is saying, which is that we all need to recycle very much more. That is precisely why we are working with local authorities and WRAP. We want to promote best practice and get as many local authorities as possible to join together so that we get the result we all want.

Baroness Parminter (LD): My Lords, it is not just the Welsh we are lagging behind. The Scottish have recently published a circular economy strategy, which sets a target for a reduction in food waste of a third by 2025. Do the Government have plans to develop a strategy to allow England to capitalise on the economic and environmental benefits of moving towards a more circular economy?

Lord Gardiner of Kimble: My Lords, I never like trading figures, but my figures tell me that Scotland is at 41%, whereas England is at 44.9%. In fact, what we all, and certainly this Government, want is to improve. I have spoken about the circular economy many times. It is an essential part of the economy that we all need to work towards, because it is in all our interests.

Lord Rooker (Lab): Can I give the Minister another example of a success from Wales? In the United Kingdom at present, Wales is the safest place to eat out—by a mile—simply because the Welsh Government went for mandatory display of food hygiene rating scores on

the doors. Every single local authority in England has joined the scheme, and there is therefore no need for a delay in England. It does not cost anything whatever in public expenditure, and people are entitled to have the information. We want to make eating out in England as safe as in Wales because we know what the scores are for hygiene in the kitchens.

Lord Gardiner of Kimble: My Lords, I will certainly reflect on that and take it away. All I can say is that it is very important that all of us who go out eat the best British produce, whether it is Welsh lamb, British cheeses or whatever. The noble Lord has made a very important point.

Baroness Finlay of Llandaff (CB): My Lords, as a proud Welsh resident who is used to recycling, I commend the system in Wales to the Government. Apart from pushing up recycling rates, having proper food containers for food recycling has decreased the amount of rubbish falling out of torn bin bags that have been opened by foxes or birds, and decreased the amount of food-type rubbish and therefore controlled vermin across our cities.

Lord Gardiner of Kimble: My Lords, I am very happy to endorse what the noble Baroness has said. My brief tells me that Denbighshire and Pembrokeshire have recycling rates of over 65%. These are the sorts of figures that we want to see all across the country. There are local authorities in England that have figures in excess of that, but we want to make sure that this is a common percentage.

Lord Sherbourne of Didsbury (Con): What more can be done to encourage the worst-performing councils to learn from the best practice of the best-performing councils?

Lord Gardiner of Kimble: My Lords, I agree with my noble friend; we need to ensure that. One of the great features that we are now seeing is the partnerships created by local authorities. In Kent, Surrey, Greater Manchester and Somerset, partnerships of local authorities are working together, bringing a common standard, consistency and higher recycling rates. In Parliament, we have a target of recycling 75% of our waste. We are up to 63% now—we were at 47% in 2008-09—but we have more to do.

Lord Hain (Lab): My Lords, will the Minister accept that Wales is leading the way not only on recycling and food hygiene—and on the football field—but in many other areas, particularly in integrated social care, which this Government are shamefully neglecting in England? That is because we have an effective Welsh Labour Government in Wales to resist the destructive policies of this Government.

Lord Gardiner of Kimble: I am sure the noble Lord knows that I am not going to agree with much of what he has said. The whole basis of the success of this country is a strong economy. You cannot do any of the things that we all want to do unless you have a sound economy.

Orgreave: Inquiry

Question

3.23 pm

Asked by ***Lord Balfe***

To ask Her Majesty's Government whether they have yet decided whether there will be an inquiry into police actions during the Orgreave miners clash.

The Advocate-General for Scotland (Lord Keen of Elie) (Con): My Lords, the Home Secretary has been considering a submission from campaigners on the need for an inquiry into the events at Orgreave. The IPCC is working with the CPS to assess whether material related to the policing of Orgreave is relevant to the Hillsborough criminal investigations, and decisions have yet to be made on whether any criminal proceedings will be brought as a result. The Government's position will be announced to Parliament after this.

Lord Balfe (Con): My Lords, I thank the Minister for his response. These incidents go back to 1984, and we have had answers from the Government which have not taken us very far forward on a number of occasions. On 5 February, in another place, it was said that the government position would be announced "in due course"; on 12 May, it was "in the near future"; and on 6 June we were back to "in due course". On 13 June, the Home Secretary was,

"looking at it at the moment".—[*Official Report*, Commons, 13/6/16; col. 1429.]

We are dealing here with a police force which has, shall we say, not come out too well from the Hillsborough disaster. Clearly there are questions that need to be looked at. Could the Minister urge whoever is the new Home Secretary—this is one job we know will change—to look at this urgently with a view to giving some relief to the many families involved?

Lord Keen of Elie: There is, of course, a desire to respond to this as soon as possible, but perhaps I could put it into context. Following the conclusion of the inquests on 26 April, the IPCC commissioned a barrister to go through some 10,000 documents that had been provided by South Yorkshire Police in the context of the Orgreave investigation. The IPCC told Home Office officials that if it announced any action to set up an inquiry or other investigation relating to Orgreave, it would have an impact on the Hillsborough investigation. It is for that reason that the decision will be taken only once that part has been concluded.

Lord Morgan (Lab): My Lords—

Lord Rosser (Lab): My Lords, could the Minister just confirm that media reports have revealed the previously redacted sections of the Independent Police Complaints Commission report from June of last year, which exposed striking similarities between the personnel and alleged practices of South Yorkshire Police at Orgreave and at Hillsborough? Could he also confirm that in May the interim chief constable of South Yorkshire Police said:

"The Hillsborough Inquests have brought into sharp focus the need to confront the past. I would therefore welcome an independent assessment of Orgreave, accepting that the way in which this is delivered is a matter for the Home Secretary"?

[Lord Rosser]
Could the Minister also confirm that in a letter to the Home Secretary last month, several MPs called for a public inquiry and said that,

"trust will never truly be restored until we find out the entire truth about Orgreave … and the wider policing of the miners' strike",

including the allegations of police mistreatment of striking miners? We support the call for an inquiry, the case for which is now overwhelming. Why, as the noble Lord, Lord Balfe, asked, is it taking so long for the Government to come to the same conclusion?

Lord Keen of Elie: It is not a case of the Government delaying coming to a conclusion. As I indicated in an earlier answer, the IPCC has specifically pointed out that a decision on an inquiry at this stage could cross over into further investigations into potential criminal prosecutions. With regard to the disclosure of the unredacted report by a newspaper on 4 May 2016, the entire unredacted report was not disclosed. However, that which was disclosed did show a number of senior officers acting in common in regard to Orgreave and Hillsborough; that is correct. As regards the observations that have been made by the temporary chief constable and the MPs, I agree that those observations were made.

Lord Paddick (LD): My Lords, does the noble and learned Lord agree that an investigation similar to that conducted by the Hillsborough Independent Panel might be the way forward?

Lord Keen of Elie: My Lords, that will be a matter for the new Home Secretary.

Viscount Hailsham (Con): My Lords, may I reinforce the caution shown by my noble and learned friend? While it may be the case that individual police officers were guilty of misconduct or overreaction, the primary responsibility for what happened rests on the leaders of the mining community, who brought very large numbers of people to the site and were prepared to use force and threats of force in order to implement policies that were as much political as industrial. Had they succeeded, that would have subverted the principles of democratic government.

Lord Keen of Elie: I think the factual circumstances of the incident at Orgreave are well known, and I would not seek to elaborate upon them.

Lord Blair of Boughton (CB): My Lords—

Lord Morgan: My Lords—

Noble Lords: Morgan.

Lord Morgan: Thank you, my Lords. I am very grateful, from the Back Benches, to be allowed to speak—a rare privilege. Is it not the case that the police have far too often escaped inquiry into their handling of the labour movement? This goes back a long time—back to the time when the Public Order Act was used against unemployed workers but not against fascists. Has this not been made much worse by the operation of the so-called Freedom of Information Act? I say "so-called" because it has been used in a very obstructive way. I would be grateful for a comment.

Lord Keen of Elie: I cannot accept that there has been an excessive move by the police in regard to these matters.

Lord Clark of Windermere (Lab): My Lords, it is with regret that I heard the comment from the other side of the House blaming the miners' leaders. I represented a mining community in the other House and I was very proud to do so. I was very active during the strike in 1984, and I must say that I saw police violence as well. I feel that there ought to be a general inquiry about the policing of the miners' strike—because it is one of the reasons for the disenchantment with politics that we saw three weeks ago in the Brexit vote.

Lord Keen of Elie: I am not going to anticipate a decision that will be made by the future Home Secretary, but I would observe that, following the incident at Orgreave, 51 pickets and 72 policemen were injured.

South Sudan

Question

3.29 pm

Asked by ***Baroness Kinnock of Holyhead***

To ask Her Majesty's Government what assessment they have made of the resurgence of violence in South Sudan.

The Earl of Courtown (Con): My Lords, we condemn the fighting that has broken out in Juba between President Kiir and First Vice-President Machar's forces. Attacks on UN bases and the deaths of two UN peacekeepers are completely unacceptable. We are working with the region and our UN Security Council partners to stabilise the situation, and support yesterday's statement by regional Foreign Ministers demanding an end to the crisis. Recent ceasefire statements by both parties must be fully respected.

Baroness Kinnock of Holyhead (Lab): My Lords, the eruption of the most terrible violence in South Sudan threatens to bring the return of civil war. Ban Ki-moon has rightly said that the fighting is,

"a new betrayal of the people",

of that country.

What action has been taken to ensure the safety of the 170,000 civilians, including many women and children, who are desperately seeking refuge in UN bases in southern Sudan? Will the Minister assure the House that the UK will strive to secure an immediate UN Security Council arms embargo, which could—among other effects—ground the South Sudan attack helicopters, which are lethal when deployed against civilians?

The Earl of Courtown: My Lords, the noble Baroness mentioned the large number of IDPs in the camps within the UN sites, which is where UNMISS must focus. That includes investigating instances of human rights violations and abuses, assisting delivery of aid and supporting the peace agreement. In addition, UNMISS is already allowed to use all necessary force

to protect civilians. We are working to ensure that it does just that and are looking at options to strengthen it further. We will be putting further pressure on the UN Security Council for the measures that the noble Baroness mentioned.

Lord Robathan (Con): My Lords, I reported on Sudan some years ago. It was before independence and the regime in Khartoum was the problem, forcing the civil war and brutally repressing the southern Sudanese. Is there any evidence of the regime in Khartoum continuing to stir up trouble in South Sudan?

The Earl of Courtown: My Lords, I thank my noble friend for that question. I am not aware of any influence from outside southern Sudan at present. The whole issue is that President Kiir and First Vice-President Machar are the ultimate decision-makers and they are accountable for their forces' actions.

Lord Chidgey (LD): The President of the Security Council has already supported UNMISS and expressed its readiness to enhance the mission. He has stressed the need for UNMISS to,

"make full use of its authority to use all necessary means to protect civilians".

What action are the Government taking in support of keeping Juba airport open as a critical lifeline for humanitarian and relief workers, given potential wholesale evacuation? How are the Government responding to Ban Ki-moon's call for an immediate arms embargo and sanctioning of leaders for blocking the peace deal?

The Earl of Courtown: My Lords, the noble Lord, Lord Chidgey, makes some good points, but, as I said to the noble Baroness, we and other countries on the UN Security Council are putting on pressure to have a complete arms embargo. He will also be aware that the mandate for UNMISS is up for renewal in July, and we will be looking carefully at how it can be engaged and, perhaps, altered in some way.

The Archbishop of Canterbury: My Lords, I have been in South Sudan twice in the past two years and in Kenya a week ago. Is the Minister encouraging the Government of Kenya to use the powers they have in their area, as most of the leaders of South Sudan have their families, farms and education of their children in Kenya, to encourage them to observe their ceasefire? What are Her Majesty's Government doing to support the work of the peace and reconciliation commission led by the Anglican Archbishop of South Sudan and Sudan?

The Earl of Courtown: My Lords, our primary objective is to engage with regional leaders to bring an end to the crisis. My honourable friend the Minister for Africa, Mr Duddridge, spoke to the Ethiopian Foreign Minister—an important player in the area—on Monday, and encouraged the region to press the parties to end the crisis. The United Kingdom attended the conference in Kenya earlier this week on 11 July and encouraged the regional players to take firm action. But we will take careful note of what the most reverend Primate said and I will discuss it further with colleagues.

Baroness Cox (CB): My Lords, does the Minister agree that this very tragic conflict must be seen in the context of the legacy of the previous war inflicted by the Government in Khartoum, in which 2 million people died, 4 million were displaced, tens of thousands of women and children were abducted into slavery and massive infrastructure was destroyed, with Khartoum's widely reported continuing policies of destabilisation of South Sudan? Does he therefore agree that it is immensely important to invest now in positive developments in those areas not affected by conflict, such as education, healthcare, reconciliation and agriculture, in order to give those amazingly resilient people, whom I recently visited, some hope and some positive foundations for a post-conflict future?

The Earl of Courtown: The noble Baroness, Lady Cox, is quite right. We have to ensure that the implementation of the original peace agreement is taken forward and the troika have a lot to add to this. It must not be ignored, in particular the peace agreement's reform pillars of demilitarising South Sudan, injecting transparency of public finances, and pursuing justice and reconciliation.

Lord Collins of Highbury (Lab): Returning to the point made by the most reverend Primate, the key players are the African nations themselves—the condemnation by the African Union is extremely welcome—but they appear ineffectual in these circumstances. Can the noble Lord tell us more about the direct contact with neighbouring countries—not only Kenya but Uganda—and what influence they can have in this really dangerous situation?

The Earl of Courtown: The noble Lord is quite correct that the way to go forward is by engaging with other countries in the region particularly through IGAD. Other countries in the region can have a strong influence on South Sudan. That is the way forward.

Water and Sewerage Undertakers (Exit from Non-household Retail Market) Regulations 2016

Motion to Approve

3.37 pm

Moved by ***Lord Gardiner of Kimble***

That the draft Regulations laid before the House on 26 May be approved. Considered in Grand Committee on 5 July.

Motion agreed.

Investigatory Powers Bill

Committee (2nd Day)

3.38 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

Clause 23: Approval of warrants by Judicial Commissioners

Amendment 39

Moved by ***Baroness Hamwee***

39: Clause 23, page 18, line 28, leave out "review the person's conclusions as to" and insert "determine"

Baroness Hamwee (LD): My Lords, on behalf of my noble friend Lord Paddick and myself, as well as moving Amendment 39, I shall also speak to our other amendments in the group: Amendments 40, 41, 42, 43, 61, 97, 98, 99, 165A, 167 and 168A. We will not—at any rate today—be opposing the question that Clause 23 stand part of the Bill. I hope that the Minister got that message. We seem to have gone backwards and forwards on that.

I turn to the approval or disapproval of warrants by the judicial commissioner. My first amendment deals with the term "review". This is related to, but not the same as, the judicial review principles. In Clause 39, I struggle to see that "review" is the correct term. In itself, "review" suggests consideration leading to a critique, but if you read a little further you find the terms "approval" and "refusal to approve" almost throughout. Maybe "determine", which is the term we use in our amendment, is not the right term either and other terminology should be substituted, but we think it should be more than "review", which seems a rather low-level approach for what is actually provided by the Bill.

We added Amendment 165A to the group. I am not suggesting that noble Lords should keep turning to the different clauses; the same points apply throughout, although no doubt there are other points that we have missed. Amendment 165A refers to Clause 100, where there is a point about the consistency of using "determine".

Under Amendments 40, 42 and 168A, the judicial commissioner would be required to consider the reasons for the decision given by the decision-maker. We argue that they should not be bound by the decision-maker's assessment of the facts.

There has been much discussion about judicial review principles. I accept that the approach to judicial review has evolved over the years. I know some of our resident lawyers are satisfied with the use of the term in the Bill, but others are not. It cannot be appropriate to include in legislation a term that has caused so much debate and given rise to such different advice as to what the term actually means. If what is meant is only process then we should say so, although I do not think Ministers are arguing that in relation to whether a decision-maker has addressed his mind to the issue. If it is intended—as it seems to me, reading the whole context for this—that the reasons for the decision are examined, we should say so; we should not leave room for doubt.

On Amendments 39 and 42, which are about interception warrants, similar points apply. On Amendments 97 to 99, which relate to the clauses that we shall come on to which deal with the approval of national security notices and technical capability notices, I accept that there may be different considerations there but, given that one of those considerations is the decision is that of the Secretary of State, again our amendments about determination, reasons and so on would apply. I accept that what we have said is probably not as tidy as it might be. On Amendment 167, which relates to equipment interference, we again suggest "determining" rather than "reviewing" the conclusions.

The Law Society and the Bar Council argued in their evidence to the pre-legislative Joint Committee that the references to judicial review should be removed from the legislation for clarity. I was quite pleased when I came across that only this morning after we had tabled the amendment; it is quite nice to feel that we are not completely out on a limb. I understand that the director of national security in the Office for Security and Counter-Terrorism said in relation to the judicial authorisation of warrants:

> "The specifics here are that two things will be critical: first, that they decide in the first place that the action is rational and lawful; and, secondly, that it is necessary and proportionate. Those are exactly the same tests as the ones the Secretary of State will be looking at".

That leads me again to the view that removing judicial review would help avoid confusion.

3.45 pm

Amendments 43 and 61 are quite different. For the purposes of the relevant provisions, we say that the "days" provided by the Bill should not be working days. Clauses 24 and 36 are about urgent cases, and to us urgent cases require urgency all round. I do not believe that nine to five with weekends off is the way in which the judges operate. Clause 24 is about warrants issued without prior approval. There is a reference to the judicial commissioner, who has a period within which to take and notify the decision. I have two questions which I hope I adequately conveyed to the Bill team. First, in the clause as it stands, how long is,

> "the period ending with the third working day"?

Does it end with the beginning of the third day, so that it might be two days, or with the end of the third day, so that it might be three days? Or there could be effectively an extra day on each if the warrant were issued early in the day. This may be a detail too far, but I think the Minister will understand why I should like to bottom this out. Also, if we confine ourselves to working days, we may actually be talking about five days if a weekend intervenes, or six if there is a public holiday, or perhaps even seven at Christmas or Easter, if those are added into the mix. Clause 36 is about modifications, which are the subject of a longer group where a similar point about working days arises.

So we are back to both substance and definition here. I hope that the Minister can help the Committee. I beg to move.

Viscount Hailsham (Con): My Lords, I will confine myself to Amendments 39 to 42. I have a great deal of sympathy for the thinking that lies behind these amendments. To my mind, this is one of the most important parts of this part of the Bill, because judicial oversight seems to me to be absolutely essential if there is to be public confidence in the working of the Act, should this Bill be enacted.

My own feeling is that the provisions do not go far enough. It is a long time since I have had to study or discuss judicial review and I am cautious about doing so in the presence of many lawyers more distinguished than me, but my recollection, broadly speaking, is that the judicial commissioner will examine whether the powers have been exercised intra vires and not unreasonably. I am bound to say that I want to go beyond that. I should like to see some review of the merits—more particularly, addressing whether the issue of the warrant is properly supported by the material advanced in support of its issue and whether it is truly within the scope of the statutory criteria. I do not think this is provided for by the Bill as presently drafted. I am not saying that the amendments put forward solve the problem, but they are heading in the right direction. I would welcome any movement from my own Front Bench which may address this point.

I want to make one other small point about judicial review. I have already owned up that my recollection of judicial review is pretty faint, but I know that it develops a lot. There is not always a unanimity of view as to what the principles are because they develop and you get divided judgments, even from the Supreme Court. The principles of judicial review change as time goes on. It makes it very difficult to know whether the statutory requirement, as provided in this Bill, is satisfied.

Lord Brown of Eaton-under-Heywood (CB): My Lords, I confess to taking a rather different view of this. This is a question of judicial oversight; it is not in principle judicial initial decision-making. I am perhaps a little out of date, although I have been at pains to keep up to date with developments, and as the noble Baroness and the noble Viscount have already recognised, there have been significant developments. This is not just about process; it is not what used to be called Wednesbury review, or perversity or irrationality. Nowadays it has developed into an appropriately flexible standard of oversight. Even without the explicit requirements to look at the necessity, the proportionality and the requirements of the human right to privacy, as there are here, there is in the modern concept of judicial review an ample opportunity.

In recent cases—I am looking at the *Judicial Review* publication of March of this year, so it is fairly up to date—the noble and learned Lord, Lord Mance, in one of these recent cases such as Kennedy, Pham, and so forth, said that it was,

"improbable that the nature, strictness or outcome of such a review would differ according to whether it was conducted under domestic principles or",

the EU law principle of proportionality. Therefore, even without the explicit requirement to look at proportionality, as there is in respect of all these oversight obligations, there is here an appropriate degree of flexibility.

You want an element of flexibility—you want the judge plainly to be able to take account of the nature of the underlying decision he is reviewing and of the extent to which there has been an invasion of privacy, against which this judicial oversight is designed to protect the citizen. This matter has been thrashed out; if you read the two days of debate in the other place, you see that there was some appropriate degree of give. However, I respectfully suggest that the oversight as now provided for is, if not more than adequate, certainly adequate.

Lord Carlile of Berriew (LD): My Lords, we first have to decide what we want. Do we want judicial decision-making on these warrants and similar provisions, or the judges to review the legality of ministerial decisions? In my view, as a matter of constitutional principle, we do not want the judges to make the primary decisions but to review the legality of those decisions. I agree entirely with the noble and learned Lord, Lord Brown of Eaton-under-Heywood, in this regard.

For the nerds among us, there is a regular publication called the *Administrative Court Digest*—the AC digest—which I read with enthusiasm every time I receive it. It is extremely interesting, because it demonstrates that judicial review is not some kind of dry, legalistic test of precise processes followed by government and government officials but a wide-ranging test of legality. If the factual decisions that have been reached are so wrong that they should properly be regarded as unlawful, they are judicially reviewed as unlawful.

Viscount Hailsham: They have to be very wrong before such a conclusion can be arrived at.

Lord Carlile of Berriew: With great respect to a respected lawyer, that is not correct. If the decision is disproportionate, these days it is subject to judicial review. If the noble Viscount would perhaps take his weekend to read through the AC digest, he would find that in example after example, relating to every department of state. I am therefore content with what is offered by the Government, and so, importantly, is David Anderson, the current Independent Reviewer of Terrorism Legislation. I hope that we will proceed fairly quickly beyond this issue.

Lord Tebbit (Con): My Lords, I will say just a few brief words. I am not a lawyer but I have held executive authority as a Minister over a number of years. I do not think a judicial review ever found against me, but in those years life was very much simpler. There were three classic tests: was my action, or that of any other authority, ultra vires; was it so unreasonable that no reasonable-minded man could have taken it; or was it contrary to law? I knew where I was.

From what I have heard today, that beautiful simplicity has gone. Now I would have to guess at what might be in the minds of the lawyers who would review my decision and conclude that theirs would have been rather better. But then the lawyers would back away. They do not have to take responsibility for their decision; that is left to the Executive and it is not quite fair. Why should the Executive be landed with the statement, "You were wrong—get on with it", when, by all normal standards of common sense, their decision was perfectly reasonable? We are more and more getting into the territory where judges take decisions that should be taken by Executives and I do not like that.

Lord Phillips of Worth Matravers (CB): My Lords, that is precisely what this amendment is seeking to do.

Lord Strasburger (LD): My Lords, I rise to speak to Amendment 41, which seeks to remove the requirement for a judicial commissioner to apply judicial review principles when approving warrants. I do so with some trepidation as I am only the second noble Lord who is not a lawyer to venture into this very dangerous territory, but I will have a go. We heard a lot about this subject on the Joint Committee on the Bill and a large amount of both written and oral evidence was presented to us. I have reviewed it all again in preparation for today and would like to make the following points.

Surely applying any rules at all to how a person is to make a decision must have the effect of constraining how that person makes their decision. As such, constraining the judicial commissioner to judicial review rules must reduce their contribution to the decision compared to that of the Secretary of State, who has no such rules or constraints to limit how she makes her decision. If we retain the judicial review principle for the judicial commissioner, we no longer have a true double lock; we have a 1.5, or 1.4 lock, or whatever. If we want a true double lock—the phrase the Government keep using—whereby both the Secretary of State and the judicial commissioner consider the application in identical ways, as we on these Benches believe is the ideal, then we cannot constrain one of the decision-makers to special rules, whether those of judicial review or otherwise.

Several witnesses to the Joint Committee pointed out a major flaw in the case for judicial review rules to apply. Normally during a judicial review, both parties are present and have the opportunity to make their case for and against the decision being sought. In the case of a warrant application, only one party is present and the judicial commissioner has to imagine what objections the person who is the subject of the warrant might offer, so it is not possible to truly apply judicial review rules. In his oral evidence on this aspect, Matthew Ryder QC said that,

"normally in judicial review, there is an element of an adversarial process. In other words, the judge is assessing it with somebody making representations in relation to the other side. There will be no adversarial process built into this, the way it stands at the moment. You will have a judicial review, but no one putting forward the argument to the judge in a different situation. Now, that is not unheard of; you have that in other situations, but not in … a judicial review situation".

So far, no proponent of judicial review rules has explained why the judicial commissioner should be limited in his or her consideration of the warrant application, so perhaps one or more noble Lords will do so during this debate. The Home Secretary suggested in her oral evidence, somewhat counterintuitively, that being constrained would give the judicial commissioner more flexibility, when the opposite would seem to be the case. I will listen with interest to the debate on this amendment. In the meantime, I commend it to the House.

4 pm

Lord Rooker (Lab): My Lords, listening to the debate as a non-lawyer, I get the impression it is being argued that the legal contribution is supposed to be equal to the ministerial contribution. I reject that utterly. It is the Minister's job to take the decision. That is where the accountability is at the end of the day—back to Parliament. They are not equal partners in this. The introduction of a judicial role to provide oversight or to ask, "Did you really mean that?" or, "Are you sure you've got this quite right?" is not the same as giving equal partnership in the making of decisions; that is not what is intended. Yet the whole thrust of what I have been listening to today is about making them equal. I hope the Government will firmly reject that.

Lord Lester of Herne Hill (LD): My Lords, I had not intended to speak until I had listened to the debate, especially what was said by the noble Lord, Lord Tebbit. During the 50-odd years that I have been at the Bar, one the great developments has been that of public law. When I began at the Bar, there was virtually no judicial interference in or control of ministerial decisions. One of the great developments brought about by judges and judges alone has been the notion that, although Ministers take decisions, they must do so in accordance with the rule of law. Judges are extremely careful to make sure that they do not decide the merits of cases that should be decided by Ministers, but they also say that, although Ministers take decisions, they must do so in accordance with the principles of legal certainty, reasonableness and proportionality. Over the years, a partnership has developed between the judicial branch of government and Ministers and Parliament. I agree with my noble friend Lord Carlile that the principles of judicial review are sufficiently flexible and practical to provide adequate safeguards against abuse. I do not believe that judges in any way usurp the functions of the Executive, nor do I believe that they should. I know of no case in which our judges have done so. For those reasons, I hope I have reassured at least the noble Lord, Lord Tebbit, that there is no undue usurpation of the role of Governments or Ministers, nor is any intended.

Lord Murphy of Torfaen (Lab): The whole purpose of this legislation, whether we agree with it or not, is that there should be a double lock. When I was signing warrants for intercept, it was left to me entirely as Secretary of State. There was no involvement of the judiciary or anybody else, other than the security services providing you with a great deal of information on why you should take a particular decision. The principle behind the Bill is that a judge should look at and review the decision of the Secretary of State. The argument both in the Joint Committee and in the other place has been about whether the judge should take into account necessity and proportionality—which would have been taken into account by the Secretary of State in taking the decision in the first place—in the same way as the Secretary of State, or whether they should look at it simply through the eyes of a judge.

One of the most interesting sessions of the Joint Committee was in the Committee Room upstairs where we interviewed a judge from New Zealand—it was 5.10 am when the judge very happily came to address the committee. That is obviously a very different sort of country. With a couple of million people, they obviously do not have the same number of warrants to deal with as we do in this country. It seemed, however,

from what the New Zealand judge was saying, that there was a happy relationship between him and the appropriate government Minister in New Zealand, in that when they looked at a warrant, they did so with the same eyes.

The noble Lord, Lord Carlile, is saying that if you take into account modern judicial review principles, you also take into account proportionality and necessity. But that has to be made clear. I understand that the Government made some changes in the other place with regard to this matter, but the precise role of the judge needs to be made clear. Does he or she look at a warrant simply as a judge or as a human being, and is it in the same way as the Secretary of State does?

The Advocate-General for Scotland (Lord Keen of Elie) (Con): My Lords, I begin with some of the observations made in your Lordships' House regarding judicial oversight. On the observations of the noble Lord, Lord Strasburger, I have a double lock on my front door. The two locks work differently but they are equally effective. That really is the point of the double lock in the context of this legislation: the locks do indeed work differently but they are equally effective at the end of the day. I would adopt the observation of the noble and learned Lord, Lord Brown of Eaton-under-Heywood, that judicial oversight as it has developed provides us with a flexible standard of oversight, which in many senses is wide-ranging, as has been observed. But, of course, it is judicial oversight, and that is what we have to emphasise.

Turning to a point raised by the noble Baroness, Lady Hamwee, on working days a week, we consider that the present provision is appropriate. As to the calculation of the working day, the third working day will be calculated from the day after the warrant is issued. For example, if a warrant is issued on a Monday, it must be authorised by the commissioner by the close of Thursday. So it is the date of issue plus three working days.

Amendments 39 to 42, 165A, 167 and 168A would significantly change the so-called double-lock safeguard, such that the judicial commissioner would be taking their own decision rather than reviewing the Secretary of State's conclusions as to whether the warrant is necessary and proportionate. The Committee will appreciate that the issue of authorisation has been a central feature in the debate on the Bill. Perhaps I might just give a brief potted history of its development.

The three reviews that shaped the draft Bill—by David Anderson QC, the Intelligence and Security Committee of Parliament and the Royal United Services Institute surveillance panel—made different recommendations in respect of authorisation. One called for full Secretary of State authorisation and the other two called for a hybrid judicial/executive model. It is noteworthy that none of them called for full judicial authorisation for all warrants. The Joint Committee that undertook pre-legislative scrutiny of the draft Bill supported the double-lock approach set out in the Bill, including the use of the well-established principles of judicial review. 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, while linking the judicial commissioner's scrutiny to the new privacy clause, to put beyond doubt, if it needed to be, that the judicial commissioner would need to apply a sufficient degree of care to ensure that he or she had complied with duties imposed by the new protection of privacy clause in Part 1 of the Bill. So we are on well-trodden ground, and it is clear that there is strong support—including from senior members of the judiciary—for the approach set out in the Bill.

These amendments would confuse the distinct roles of the Executive and the judiciary and undermine democratic accountability—a point touched on by the noble Lord, Lord Rooker. It is surely right that a Secretary of State, who is accountable to Parliament and ultimately to the public, should be making the decision as to whether a warrant for the most intrusive powers is necessary and proportionate. Equally, it is entirely appropriate that a judicial commissioner should be carefully reviewing that decision. While the commissioner's role is to review the original decision, your Lordships should be clear that this is a robust safeguard. Also, the judicial commissioners will have held or will be holding high judicial office and will be familiar with the principles of judicial review.

As amended in the other place, Clause 23 makes it clear that the commissioners' review must involve careful consideration and ultimately if the Investigatory Powers Commissioner does not approve the decision to issue the warrant, it cannot come into force. The amendments I have referred to would also require the judicial commissioner to consider the reasons given for the decision to issue the warrant. The amendment is based on a misunderstanding of how warrants operate. The Secretary of State will receive a detailed application setting out the necessity and proportionality considerations. If they agree, they will issue the warrant. They do not have to give reasons for the decision beyond confirming that they personally consider that the warrant is necessary and proportionate. The judicial commissioner will review the decision of the Secretary of State based on the evidence provided to the Secretary of State in the application. If the commissioner thinks that the evidence in the application is not a sufficient basis for the decision that has been made, the commissioner will refuse to approve the decision. We would submit that it is in these circumstances that the double-lock mechanism is appropriate in this context, and accordingly I invite the noble Baroness to withdraw the amendment.

On Amendments 16 and 19, I have already touched on the reference to removing the term "working days". Our position is that that is an appropriate way forward with these provisions, and I again invite the noble Baroness not to press these amendments.

Amendments 97 to 99 would significantly alter the double-lock safeguard for notices, such that the judicial commissioner would be taking their own decision rather than reviewing the conclusions of the Secretary of State as to whether the notice under Part 9 of the Bill is necessary and proportionate. The amendments would accordingly also remove the requirement for the judicial commissioner to apply the same principles as would be applied by a court in an application for

[Lord Keen of Elie]
judicial review. As discussed during scrutiny by this House of similar clauses in Part 2 of the Bill, these amendments would confuse the distinct roles of the Executive and the judiciary, as I mentioned earlier. It is right that a Secretary of State, who is accountable to Parliament and ultimately the public, should make the decision whether it is necessary and proportionate to impose obligations on operators through the giving of a notice. Equally, it is entirely appropriate that a judicial commissioner should be carefully reviewing that decision. As I stated previously, the commissioner's role is to review the original decision, and your Lordships should be clear that this is a robust safeguard.

One of the amendments would also require the judicial commissioner to consider the reasons given for the decision to give a notice, and again as I indicated before, this amendment appears to be based on a misunderstanding of the process of giving a notice because the reasons are not provided. In other words, under the Bill there is no need to give written reasons over and above those set out in the application itself. Again, in that context I would invite the noble Baroness not to press the amendments.

Baroness Hamwee: My Lords, I am grateful to all those who have taken part in the debate either to support or oppose me, and of course one is used to one's friends being behind one sometimes. Perhaps I should make a disclaimer. Many years ago the noble Lord, Lord Rooker, when he was at the Dispatch Box was being a bit disparaging—that might be the term—about lawyers and, when I protested, said to me, "Not you. You're not a lawyer". Solicitors are excluded for this purpose.

I turn first to "working day". The noble and learned Lord has said in effect that he disagrees with me, but I am not sure on what basis. Clause 24, where the term first comes up, deals with urgent cases, so it seems counterintuitive that one might have an extended period for dealing with an urgent case rather than one that is as tightly drawn as possible. Can the noble and learned Lord offer the Committee more as to the Government's reasoning on this?

Lord Keen of Elie: Originally, the period was five working days and, after due consideration, it has been reduced to three. That is considered to be an appropriate period in the context of these provisions. But the Government have reviewed the measure and, as I said, that amendment has already been made.

4.15 pm

Baroness Hamwee: Turning to judicial review, determination, refusal to approve and so on, the debate has made my point that we need greater clarity than is provided in these provisions. I agree with my noble friend Lord Carlile—the Committee may be relieved to hear that there is some agreement—at least to the extent that we should know what we want, and we do not yet have clarity in the Bill. A number of noble Lords are clear about what they want, but the Bill is not clear as to what the job is. Clause 23(4), the same clause that provides for a review, states:

"Where a Judicial Commissioner … refuses to approve".

That suggests something more than we have been hearing about and does not suggest a double lock. I heard what the noble Lord, Lord Murphy, said, and we now have references in Clause 23(1) to necessity and proportionality. However, in assessing those matters, the judicial commissioner must apply the principles of judicial review. I may not be a lawyer in the terms of the noble Lord, Lord Rooker, but I find that this has a degree of circularity and confusion.

In his evidence to the Public Bill Committee, the noble and learned Lord, Lord Judge, said:

"I myself do not think that judicial review is a sufficient indication of those matters".—[*Official Report*, Commons Public Bill Committee, 24/3/16; col. 68.]

Although I will not seek to pursue the matter today, we may well wish to return to it.

Lord Keen of Elie: I should correct a reference I made. I referred in the context of the working days to Amendments 16 and 19, which must have puzzled the noble Baroness. That was my internal numbering and I was, of course, referring to Amendments 43 and 61. I apologise for that.

Baroness Hamwee: My Lords, I was so confused that I did not even bother to check the references. I beg leave to withdraw the amendment.

Amendment 39 withdrawn.

Amendments 40 to 42 not moved.

Clause 23 agreed.

Clause 24: Approval of warrants issued in urgent cases

Amendment 43 not moved.

Clause 24 agreed.

Clause 25 agreed.

Clause 26: Members of Parliament etc.

Amendment 43A

Moved by ***Baroness Jones of Moulsecoomb***

43A: Clause 26, page 20, line 23, leave out "Secretary of State" and insert "Judicial Commissioner"

Baroness Jones of Moulsecoomb (GP): The amendment is about applications to intercept being made by a judicial commissioner, not the Secretary of State via the Prime Minister. Amendment 43B sets out some additional requirements to be taken into account.

The debate has been fascinating because there has been a lot of use of words such as "reasonable", "proportionate" and even "democratic accountability". We all probably draw the lines on those matters at different places, and I certainly do so. My amendments speak to the area that has been covered by the Wilson doctrine of 1966 on parliamentarians' correspondence and communications. The doctrine was explored by the two Green parliamentarians, Caroline Lucas in the other place and myself in your Lordships' House, at the Investigatory Powers Tribunal. After successive Prime Ministers—even recently—have declared that the Wilson doctrine was still in force, we in fact found

at the IPT that it applied only to targeted, not incidental, interceptions. The doctrine therefore has proved to be fairly worthless.

For me, the surveillance of parliamentarians is a constitutional issue, because it is our job to hold the Executive to account, without interference and without inhibition. In addition, of course, constituents have a right to privacy, which is not acknowledged enough at times. It goes without saying that criminals have to be caught. People always raise the issue of what happens if we have a parliamentarian who is a paedophile; of course, I would seek to see that criminal found and removed. The Joint Committee on Human Rights said that the current drafting,

"does not eliminate the risk of a partisan motivation, whether real or apparent"—

that is if a Government Member does it—and it fails to supply,

"a safeguard commensurate with the importance of the public interest at stake".

As I have explained in your Lordships' House several times, I was targeted by the police and put on their domestic extremist database. I feel that, if somebody like me can be targeted as a domestic extremist—I was an elected politician at the time and was actually sitting on the Metropolitan Police Authority, overseeing the police—then I am very nervous about where such authorisation comes from. I would argue that there are simply not enough safeguards for unhindered scrutiny of the Executive by parliamentarians, which is obviously vital for any democracy.

We heard today the Prime Minster—now the previous Prime Minister—saying in his valedictory speech that he saluted the robustness of our challenging of our leaders here in Britain. This whole Bill puts that at risk; it does not allow us to do our job properly without the risk of interference. I hope that the Minister will not try to reassure me by telling me that the Government are in listening mode, because that is exactly what I am frightened of. I beg to move.

Lord Beith (LD): My Lords, my Amendment 44 in this group might appear to want to resurrect the Wilson doctrine but it is really only to give it a decent burial. The Constitution Committee, of which I am a member, said in its report published on Monday that,

"the surveillance of parliamentarians is a significant constitutional issue",

and that the committee,

"would welcome clarification from the Government of its current understanding of the Wilson Doctrine".

The amendment allows for that and allows us to consider whether the procedures in the Bill make a better job of dealing with the difficult issue of whether communications of an elected member of a legislature should be intercepted and, if so, on what authority.

While it existed, the Wilson doctrine had merit in that it produced a higher threshold, mainly the involvement of the Prime Minister, and that in so far as it was observed—I have reason to believe that it often was observed in practice and that this was recognised to be a different situation to other interceptions—it played that useful role. However, it was riddled with failings. All it did, if your Lordships read it, was to set out the policy of a particular Government at a particular time. What it of course set out was not that the communications of parliamentarians would never be intercepted but that the Government's policy at the time was not to do so and the Prime Minister would come before the House at a time of his choosing—presumably at a time when it would no longer be damaging to the investigation—and advise the House that the policy had been changed. It was a very odd doctrine; the Prime Minister could come to the House and say, "We've changed the policy but we're going to change it back now because that inquiry has been dealt with". It is one of the inherent inconsistencies in the doctrine.

It was never clear whether the doctrine bound any subsequent Government either not to intercept MPs' communication or to come to the House at a time of their choosing to reveal that the policy had been changed. It raises a fascinating issue since, so far as I can see, no Prime Minister has ever come to the House and said what situation we were in—or are in, until this legislation is passed—under that doctrine. It clearly was not fit for purpose. We therefore have to ask ourselves whether the procedures in the Bill that essentially try to do the same thing—that is, to involve the Prime Minister and raise it to a higher level within the Executive—are a sufficient extra safeguard for the constituents and whistleblowers who will communicate with their MPs or with legislators. They may be doing so because they are aware of some evil going on within the very organisation that might seek to intercept their communications. We have to have some regard to this.

The Joint Committee on Human Rights recommended that the Speaker of the House of Commons and, by analogy, Speakers of other legislatures should have a role in this. Although I am attracted by the intention, I find it slightly difficult because of the position it would put the Speaker in. The analogy is drawn with the procedures which were recommended following the serving of a search warrant in the House of Commons in the Damian Green case. It was felt that if in future the Speaker was consulted before a search warrant would be executed on parliamentary premises, then it was an appropriate precedent.

There is trouble with that precedent. If a search takes place on the premises it does not remain secret for very long. It becomes pretty obvious that it has taken place. If an interception was taking place, then the Speaker might be in possession of the knowledge that MP X's communications are being intercepted for a considerable period, during which he has to have normal dealings with that Member of Parliament, call that Member of Parliament in debate and so on. That strikes me as a rather difficult position in which to put the Speaker of the House of Commons, the Lord Speaker in this House or a Speaker in any other legislature.

Incidentally, the involvement of other legislatures in the provisions in the Bill is an advance on the Wilson doctrine which applied only, as far as I am aware, to the House of Commons. I find myself before this House having to rely on the Bill as it stands and the prime ministerial involvement as being a significantly higher threshold. As one has always been worried

[LORD BEITH]
about the supremacy of the Executive in this activity, I cannot be entirely content with that except for the fact that we are building in a process of judicial oversight, which I have advocated for many years and I am delighted to find in the Bill, and have been discussing what the conditions for that oversight are.

I would not want us to get into the position which, as I understand it, would arise from the amendment moved by the noble Baroness because I do not want a judicial authority appearing to be the initiator of an interception. That seems to me to get the role completely wrong. A law and order organisation or national security organisation has to be the initiator and the Secretary of State one of the routes through which it goes on its way to be authorised. The procedure under the Bill would also involve the Prime Minister in this process. I probably have to be content with that unless someone comes up with something better or someone convinces me that the Joint Committee's recommendation does not have the disadvantage that I mentioned. Of course, I do not have the slightest intention of pursuing Amendment 44 and attempting to write into the Bill the provisions of the obsolete Wilson doctrine but it is perhaps worth reminding ourselves of it.

Lord Paddick (LD): My Lords, my noble friend Lady Hamwee and I have Amendments 45, 85A and 85B in this group. While I share the concerns of the noble Baroness, Lady Jones of Moulsecoomb, regarding the potential for partisan action in these circumstances, I would have thought if there was ever a need for political accountability in terms of who is going to be targeted by a warrant of this kind, it is where a parliamentarian is being targeted. I can see the tension and the dilemma in that.

The Bill states in Clause 26(2) that additional safeguards for Members of Parliament include the fact that:

"The Secretary of State may not issue the warrant without the approval of the Prime Minister".

Our Amendment 45 suggests that where the warrant relates to a Member of the Scottish Parliament, it should not be issued without the approval of the First Minister of Scotland, as the most appropriate person to give such approval. Perhaps the Minister can explain why it should be the Prime Minister in every case.

4.30 pm

Amendments 85A and 85B concern a separate issue arising out of the comments of the Delegated Powers and Regulatory Reform Committee on the Bill. The reasoning behind these amendments is more complex. I commence this explanation with some hesitation because I am not quite sure I understand it either, but I will give it a go. The committee's *2nd Report of Session 2016-17*, published on 8 July 2016, questions the power given in Clause 242(2) to the Secretary of State to,

"by regulations make such provision as the Secretary of State considers appropriate".

Under Clause 242(3), this power may be exercised by amending or otherwise modifying provisions of primary or subordinate legislation, including future enactments.

Of course, past enactments may have to be amended to ensure that they fit with the provisions of this Bill but future legislation should be capable of taking those provisions into account. The Government's explanation that other enactments currently going through Parliament,

"touch upon the powers and public authorities covered by this Bill",

partly explains the need but does not justify a power to use subordinate legislation to amend future enactments whenever they are made. The Government's explanation that because the power is limited to provisions appropriate in consequence of the Act,

"the power is effectively time limited",

does not seem to hold water, at least not as far as the committee is concerned. Whatever the Government think the clause might be in practice restricted to, as drafted it appears to allow that at any point in the future the Secretary of State could decide that a future enactment needs to be altered to fit with the Act. The committee concludes:

"we take the view that the powers conferred by clause 242(2) and (3) are inappropriate to the extent that they permit amendment of future enactments passed or made after the current Session".

Perhaps the Minister can convince the House on these issues since the Government appear to have failed to convince the Delegated Powers Committee.

Lord Murphy of Torfaen: My Lords, this part of the Bill concerning Members of Parliament is a hugely important and grave issue, but I think it is probably about right now. As the House and the Minister will know, when the legislation went through the other place, there was a change. Instead of the Prime Minister being informed about a Member of Parliament or of this House having a warrant against them, now the Prime Minister must approve such a warrant. I think that is absolutely right.

There are a couple of points worth making. I agree with the noble Lord, Lord Beith, that the idea of the Speaker of the House of Commons being involved is a very difficult precedent to set, not only because it puts a great burden on the Speaker but because this part of the Bill refers not just to the British Parliament—both this House and the other place—but to the Welsh Assembly, the Northern Ireland Assembly, the Scottish Parliament and, for the time being at least, the European Parliament. If the Speaker was to be involved, surely it would be necessary for the Presiding Officers of those parliaments and assemblies also to be. Frankly, that is something that they would not particularly welcome.

With regard to the point made about the First Minister of Scotland, that same argument applies. If you say that the First Minister of Scotland ought to be involved, surely the First Minister of Wales would have to be involved and, presumably, the First and Deputy First Ministers of Northern Ireland as well—not to mention, for the time being, the President of the European Parliament. I am not sure that would work. Nevertheless, it is important that such matters are raised.

Finally, is the Wilson doctrine obsolete as a consequence of the legislation? Will it be replaced by what is now in the Bill, or does the Wilson doctrine still stand in the sense that it has always referred to a change of policy, rather than to individual people—

Members of the House of Commons or whoever—who might be subject to interception? I would be grateful to the Minister if he said, when he responds, whether the Wilson doctrine is now finally dead and buried.

Lord Rosser (Lab): Perhaps I may make a brief comment about Amendments 85A and 85B in the names of the noble Lord, Lord Paddick, and the noble Baroness, Lady Hamwee. We, too, want to hear the Government's response to the views expressed by the Delegated Powers and Regulatory Reform Committee. I will not go over those views, since the noble Lord, Lord Paddick, has already set them out. In brief, the first is the fact that paragraph 33 of Schedule 8 includes a power to amend the provisions of Schedule 8 itself. The committee said that it needed "a very convincing explanation" of why that was necessary; otherwise, it would find the power inappropriate. The other, as the noble Lord said, concerns the fact that the powers conferred by paragraph 33 of Schedule 8 include a power to amend future enactments whenever passed or made. The committee commented that it felt that such powers were inappropriate. In view of the comments made by the committee, we, like the noble Lord, wish to hear the Government's response to the committee's points.

Lord Keen of Elie: I will begin with that last point on Amendments 85A and 85B. The Government believe that the power is necessary for the reasons outlined by the noble Lord, Lord Paddick, but we are conscious of the terms of the report made by the Delegated Powers Committee. We are still reflecting on those comments and intend to respond in due course. I hope that that will give some satisfaction to the noble Lord. The matter is still under consideration and no final view has been arrived at.

I now turn back to the matter raised by the noble Baroness, Lady Jones. By way of background, your Lordships will be aware that, last November, the Prime Minister announced additional protections for the communications of Members of Parliament and Members of other legislatures, including the Scottish Parliament and the assemblies. Clause 26 sets out the requirement for the Prime Minister to approve the Secretary of State's decision to issue a warrant to acquire communications sent by a Member of Parliament or intended for a Member of Parliament. Again, I use the term "Member of Parliament" to embrace Members of the other legislative assemblies referred to by the noble Lord, Lord Murphy.

Amendment 43A would remove the role of the Secretary of State from the warrant authorisation process where the Wilson doctrine is engaged—I will come on to the Wilson doctrine in a moment—which would in fact reduce the safeguards for parliamentarians. In line with the commitment given by the Prime Minister last November, the Bill provides a triple lock where warrants concern a parliamentarian's communications: they must be authorised by the Secretary of State, agreed by the Prime Minister and authorised by a judicial commissioner.

I will not rehearse again the arguments for the double lock at this point, but it is important to remember that it was endorsed by the Joint Committee of Parliament that scrutinised the draft Bill and that, following amendments made in the other place, it enjoyed cross-party support. The triple lock for parliamentarians simply adds an extra layer of checks to this important process. It is difficult to see what possible benefit would accrue from removing one of those checks—that is, the Secretary of State—which would also serve to undermine the accountability of the Secretary of State to Parliament for the activities of the agencies that the Secretary of State oversees. In view of that, I respectfully invite the noble Baroness to withdraw her amendment.

Amendment 45 would provide a role for the First Minister of Scotland in approving warrants to acquire communications sent by or intended for a Member of the Scottish Parliament. However, we do not consider that it would be appropriate for the First Minister to have a role in approving a decision taken by the Secretary of State on what is a reserved matter.

As to the operation of serious crime warrants, which the noble Lord, Lord Paddick, might have had in mind, particularly in Scotland, it is of course for Scottish Ministers to determine what additional safeguards they wish to provide in relation to parliamentarians. That is a devolved matter within their competence, and the same may in due course apply in the context of the Welsh Assembly—or, indeed, any other assembly that is set up.

The effect of Amendment 44 would be to provide for the Prime Minister to inform the relevant legislature that such a warrant or warrants has or have been issued—a point raised by the noble Lord, Lord Beith. Noble Lords will be aware that the Wilson doctrine, as it is termed, followed from a statement made by the then Prime Minister that, as a general policy, there would be no tapping of MPs' telephones—but that, if there was a need to make a change to this general policy, the Prime Minister would, at a time of his choosing and when the national security situation allowed, make a Statement in the House. That is what is encompassed within the Wilson doctrine.

In a Written Ministerial Statement last November, the Prime Minister again confirmed that the Wilson doctrine continued to apply. He went on to explain the Government's position on the Wilson doctrine and how it would apply in the 21st century. In his Statement, the Prime Minister was clear that the Wilson doctrine does not place an absolute bar on the interception of parliamentarians' communications and confirmed that he would be consulted should there ever be a requirement to target a parliamentarian under a warrant issued by a Secretary of State. As has been noted, particularly as a result of the changes in the other place, the Bill now goes further by providing that the Prime Minister must provide explicit authorisation for a warrant to target a parliamentarian's communications.

I understand that every Administration since 1966 has confirmed that the Wilson doctrine remains in place. This Government have done so on numerous occasions in Parliament. The doctrine includes the Prime Minister's commitment to inform the relevant legislature, at a time of his choosing and when national security allows, should there ever be a change to the general policy. There has been cross-party agreement on this issue for more than 50 years. In view of the

[Lord Keen of Elie]
Prime Minister's statement, and the stringent safeguards in the Bill, which go further in statute than was previously provided for, no further statutory provision is considered necessary.

Lord Beith: Does that not make for a very limited interpretation of the Wilson doctrine? For the Prime Minister to have to come and make a Statement to the House, it would have to be, "It is now the Government's policy to intercept the communications of MPs generally, or widely, and this represents a change in policy". That is the only way I can understand the doctrine working in the way that the Minister described.

Lord Keen of Elie: I concur with the observation of the noble Lord. It would have to be a change to the general policy that prompted a Statement to Parliament. It is not the use of the statutory powers that will ever prompt a Statement to Parliament. Indeed, if a parliamentary Statement were required in those circumstances, it would essentially undermine the purpose of these investigatory powers.

Baroness Jones of Moulsecoomb: Still on the Wilson doctrine, we heard from the Investigatory Powers Tribunal that the Government could not guarantee that parliamentarians' communications would not be intercepted. They simply could not do it, because the intelligence services cannot remove our addresses and phone numbers from their bulk interception. So it is quite possible that parliamentarians' communications are intercepted on a regular basis by accident. It is only when they are targeted that the process with the warrants kicks in. That was the ruling from the tribunal.

Lord Keen of Elie: I concur that there may be instances in which parliamentarians' communications are not targeted but where a parliamentary communication is disclosed incidentally to investigations of third parties. However, one cannot plan for that or provide for a warrant for that in advance. It is a consequence, sometimes, of actions against third parties.

May I move on to Schedule 8 and the subject of combined warrants, which I touched on before? I confirm what I said at the outset: that this issue is still under consideration. I hope that, taking that into account, the noble Lord will consider it appropriate not to press his amendments.

4.45 pm

I now turn to the government amendments in this group. Schedule 8 provides for combined warrants, and Amendment 85 provides that the privacy duties in Clause 2 apply when interception or equipment interference warrants are issued as part of a combined warrant. The privacy duties in Clause 2 require public authorities to have regard to whether what is sought to be achieved could be achieved by other, less intrusive means; the public interest in the integrity and security of telecommunications systems; and other aspects of the public interest in the protection of privacy. It is surely right that these vital safeguards apply when warrants are issued as part of a combined warrant, as well as in respect of other warrants.

Amendments 100, 101, 168, 169, 195, 196, 205, 206, 211, 212, 224 and 225—with which your Lordships will be familiar—fulfil a commitment that the Government made in the other place to make clear the considerations that must be applied by the judicial commissioners when they are deciding whether to approve a person's decision to issue a warrant under the Bill. I recollect that the noble Lord, Lord Rosser, wanted to be reassured that those commitments would be adhered to, and that is the purpose of the amendments.

These amendments will bring the targeted and bulk equipment interference, bulk acquisition and bulk personal dataset regimes into line with the updated provisions currently set out in Part 2 of the Bill. This will mean that before approving a decision to issue an equipment interference warrant, a judicial commissioner will consider the issuing authorities' conclusions with a sufficient degree of care to ensure that they comply with the duties imposed by the new privacy clause, Clause 2. These amendments will strengthen the double-lock authorisation process introduced by the Bill, contributing to a truly world-leading authorisation and oversight regime.

Amendments 50 to 52, 170 to 172, 199, 200, 209, 210, 215 to 217 and 229 to 231 reflect equivalent amendments that we have already discussed in relation to Part 2. They respond to concerns voiced by the Intelligence and Security Committee that the Bill should prohibit a targeted interception warrant being renewed very early in its period of validity. The amendments make it clear that a warrant cannot be renewed more than 30 days before it is due to expire. While we do not foresee any circumstance where a very early renewal application such as that feared by the ISC would be approved by the Secretary of State or judicial commissioner, there is no harm in ensuring on the face of the Bill that such an eventuality cannot take place.

Lord Rooker: Can I ask the Minister a question before he finishes? I did not want to interrupt what he was saying about the government amendments, but in reading Amendment 226, do I take it that the judicial commissioner gets involved only after the Prime Minister has given approval? It is not clear, but I am just assuming that has to be the case, so that the Prime Minister has also had oversight of the decision, rather than the Prime Minister coming in after the judicial commissioner has agreed, say, the Home Secretary's decision.

Lord Keen of Elie: The noble Lord is, I believe, entirely correct. The sequence will be that the Secretary of State will approve the warrant, the matter will be brought to the attention of the Prime Minister, who will then address it, and only after that will it go to the judicial commissioner, who will then apply his review process to the determination that has been made.

Lord Lester of Herne Hill: My Lords, I wonder whether, just for the sake of completeness, I could get an assurance about this. On the first day in Committee the noble Earl, Lord Howe, with his customary courtesy, moderation and generosity, said that the Government would think again about Clause 2 and what I had said about its compatibility with the convention. I fully

understand the Government's reasons for the amendments now in this group, but they are of course parasitic on what is now in Clause 2, so I very much hope that Clause 2 will be improved before the Bill goes much further.

Lord Keen of Elie: I note the noble Lord's observations. I cannot elaborate on the observations made by the noble Earl in response to his question, nor can I necessarily meet the manner in which he responded to him.

Baroness Jones of Moulsecoomb: I thank all noble Lords who have commented on my amendments, and the Minister for his answers. When we debate here, we often forget what it looks like to outsiders. I am naturally extremely law-abiding—I stop at red lights, I do not drop litter—but I am also highly suspicious of authority. As far as I can represent a constituency outside, I represent people who are suspicious of politicians. They are probably also suspicious of lawyers, but possibly not quite as much. When we have politicians signing off on other politicians, we must accept that it will not look that good to some people. You might argue that those highly suspicious people are not the people who put us here, which is of course quite right, but at the same time, we must be aware of what it looks like for our reputation. I accept that the amendment is not particularly popular, so I beg leave to withdraw it.

Amendment 43A withdrawn.

Amendments 43B to 45 not moved.

Clause 26 agreed.

Clause 27: Items subject to legal privilege

Amendment 46

Moved by ***Lord Pannick***

46: Clause 27, page 21, line 6, after "items" insert "presumptively"

Lord Pannick (CB): My Lords, the amendments in this group are in my name and those of the noble Lord, Lord Lester of Herne Hill, and the noble and learned Lord, Lord Mackay of Clashfern. Most but not all of them are also in the name of the noble Baroness, Lady Hayter of Kentish Town. All the amendments concern legal professional privilege—LPP. I hope they do not make the noble Baroness, Lady Jones, or anyone outside the House more suspicious of lawyers. They are probing amendments and designed to encourage the Government to think further on this important subject. They have the support of the Bar Council, the Law Society and various other public interest groups.

I had a very helpful meeting with the noble and learned Lord, Lord Keen, and I understand—I hope that he will be able to confirm this when he replies—that the Government recognise that the Bill needs improvement in this area and that they intend to bring forward amendments on Report. I summarise what I understand to be recognised on all sides. First, I understand the Government and everybody else to accept that LPP—the right of the client to seek and obtain legal advice in confidence—is fundamental to the rule of law. Secondly, everybody recognises that LPP does not apply to the extent that the client is using the discussion with the lawyer as a means to advance a criminal purpose. On Second Reading, I gave the example of the client seeking advice on the best place to hide the loot so the police will not find it; or there is the example mentioned to me by the noble Lord, Lord Carlile of Berriew—what if the client asks the lawyer to pass on a message to a third party which, unknown to the lawyer, tips off that third party? This is the iniquity exception—LPP does not apply. Thirdly, I think we all recognise that the authorities should be able to listen in to the discussions between clients and lawyers if there is good reason to suspect that the iniquity exception applies. Any such access should be under control by the judicial commissioner, and there should be a strict test: are there exceptional and compelling reasons to authorise such access? I do not think any of that is in dispute, but the Minister will say if it is.

Much more difficult—and this is the thrust of these probing amendments—is the question of whether the authorities should be able to listen in to clients' discussions with lawyers when there is no reason to think that the iniquity exception applies but the authorities have a reason to think that the perfectly proper discussions may reveal some fact which enables the authorities to prevent a terrorist outrage, or identify a person who has previously committed such an atrocity. For example, the client may say to the lawyer during the confidential discussions that on a particular date, at a particular time, the client was at a particular place, which may tip off the authorities and help them to identify a terrorist cell; or the client tells the lawyer, during perfectly proper discussions, that he is innocent of the serious charge because the person who did it was X, and he names X. The authorities may be alerted therefore to X, and follow this up.

These amendments are designed primarily to question whether the authorities should be allowed to listen in to perfectly proper legal confidential discussions where there is no reason to suspect iniquity but—exceptionally, it is said—the authorities may have a reason to want to listen in because they will learn something vital. The Committee would be very much assisted if the Minister could confirm whether I have correctly identified the issue of principle that we will need to resolve on Report.

The Committee would also be very greatly assisted if the Minister could give the Committee some factual information relevant to whether the authorities should have these contentious powers. In particular, can the Minister say whether the authorities can point to any occasions in the past—of course, I am not asking for details of what the occasions were, but whether there were occasions in principle—when the authorities have listened in, as they have the powers to at the moment under the Regulation of Investigatory Powers Act, to perfectly proper legal advice and because of that obtained information which enabled or assisted them to prevent a terrorist outrage or identify a culprit, or other helpful information of that sort? Can the Minister say whether the authorities can point to any occasions in the past where they believed that if only they had listened in to perfectly proper legal advice they would or might have learned something of value in this respect?

[LORD PANNICK]

I ask for that sort of information because I suspect, although I do not know, that we are being asked to approve an investigatory power over legally privileged discussions which is of purely theoretical value to the authorities—theoretical in the sense that it is exceptionally unlikely that it will ever be used or be of any value. Yet the existence of such a power in the Bill will do enormous damage to the rule of law, because if there is such a power then no lawyer will be able to assure a client that legal advice is confidential. The lawyer would have to say to the client, "It's possible that the authorities are listening in even though these are perfectly proper confidential legal discussions". The concern then is that the clients will not speak frankly to their lawyers and proper legal advice cannot be given. Those are real detriments. I look forward to hearing the Minister's response on these points. I beg to move.

5 pm

Lord Carlile of Berriew (LD): My Lords, I support the noble Lord, Lord Pannick, in these amendments. I agree with him entirely that LPP is a very important right that is key to the application of the rule of law.

It seems to me that there are two iniquities that form a legitimate target for the interception of communications between lawyers and their clients. The first is where the lawyer is committing a criminal act, which already removes LPP in any event; it does not need any additional provision to declare that.

The second more difficult iniquity, which was adverted to by the noble Lord, is where the lawyer is the innocent instrument of a criminal act. I know that your Lordships' House does not like anecdotes, particularly not from Members who are lawyers, but may I be permitted a very brief one, which was referred to by the noble Lord, to whom I told it in the car park a couple of nights ago? I defended a man who was arrested, properly, for stealing quite a large amount of explosive from a quarry store somewhere near Blaenau Ffestiniog in north Wales. He had quite an experienced solicitor from Dolgellau who later spent many years as a distinguished Member of another place. He was the duty solicitor who went to see the suspect in the police station—this was before computers. The suspect wrote out a message, which looked perfectly innocent, and asked him to pass it to the suspect's girlfriend. The solicitor went back to his office, telephoned the girlfriend and passed on the message.

At 2 am the following morning the Metropolitan Police arrived at the suspect's flat in the East End of London to raid it and take away all evidential material that they could find. There was not much. The carpets, rugs and wall hangings had been removed, as had every cup, saucer, knife and fork. The place had been deep cleaned, complete with disinfectant, and there was no evidence to be found. It is a good example, and a real one, of the way in which a solicitor acting innocently was an instrument of iniquity. It was valuable to the defendant because there was an issue about why he was stealing explosives, and really he could say what he wished when it came to his guilty plea for stealing the explosives because there was no contrary evidence. So it is obvious that, within clear limits, that iniquity should be dealt with.

I turn to the contentious powers, the third category dealt with by the noble Lord, Lord Pannick. I say to your Lordships, particularly to the Minister, that this raises difficult ethical issues for lawyers. Lawyers are entitled to know the answers to these ethical problems if the interception of communications between lawyers and their clients is to be permitted when the first two categories do not apply. I happen to have an office that overlooks a convenient garden square, which has a number of comfortable benches in it—a very attractive place to have a consultation with one's client on a sunny summer morning or afternoon. However, will I be acting properly as a lawyer if I say to my client, "I think we should go out and have our consultation on the bench out there. There's a risk that what we discuss while sitting in this very pleasant office will be intercepted, since they can do that and we have no idea whether or not they're going to, so let's take the safe course and go and sit on the park bench"? Is that an ethical approach from a lawyer or not? We are entitled to know how the profession should conduct itself.

I would go further than that ethical dilemma. What we are talking about is a balancing exercise. There may be a very small number of cases in which the answer to the question from the noble Lord, Lord Pannick, would be, "Yes, we did obtain some material which was of some use in a case or two over the years", but, on balance, that will arise extremely rarely. Listening to communications between lawyers and their clients—a thankless task, almost by definition—is most unlikely on many occasions to reveal evidence useful to the authorities. Of course, they have many other ways of obtaining evidence.

I urge the Government to be extremely cautious about this. I urge them to listen not only to the considered views of the noble Lord, but to the carefully prepared and briefed views of the various organisations which have been referred to, including the Bar Council and the Law Society, and not to introduce a third type of non-existent iniquity just for the sake of convenience on the odd occasion that might arise.

Lord Lester of Herne Hill: My Lords, I can be remarkably brief—for a barrister. The answer to the question from the noble Lord, Lord Pannick, was given by Mr Justice Felix Frankfurter in a famous phrase in a case many years ago where he said that one should not burn the house down to roast the pig. As the Bill stands, this is exactly the problem. Taking a power of this breadth risks burning the house down to roast the pig.

I do not have the ethical problem referred to by the noble Lord, Lord Carlile of Berriew. Of course he should go and sit in the park in order to prevent the Orwellian nightmare of being snooped upon. That is perfectly ethical, but it would be outrageous if we, as members of the legal profession in Scotland, Northern Ireland, Wales or England, had to take that kind of precaution because of the hypothetical chilling effect of thinking that we were under surveillance.

I do not think it is necessary to take this power and I look forward to listening to the hypothetical or real examples that might be given to seek to justify where we now are. I thoroughly support this Bill, so I hope that the Government will give way on this because at the moment they are in an unattractive position.

Viscount Hailsham: My Lords, I want to address Amendment 48 in a few words. I find myself uncomfortably caught between the issues raised by the Bill as drafted and Amendment 48. I agree very much with the criticism of the Bill that has been articulated by the three noble Lords who have already spoken. The test in the Bill as drafted is subjective, very wide and likely to have some of the undesirable consequences identified by the noble Lords. I also think that the amendment is, curiously, too narrow. As I interpret it, it requires compelling evidence of a criminal purpose.

A long time ago, when I was in the Home Office, I had responsibility for one of the prevention of terrorism Bills which was going through the House of Commons. One of the issues we had to consider in Committee was very similar to the point made by the noble Lord, Lord Carlile. What happens when a lawyer receives, through the legal process of discovery, information which is capable of supporting terrorism? We decided as a matter of principle that that information would not be disclosed to the defending lawyer because of the risk of transmission to the client, who might use it for the purposes of terrorism.

I am therefore concerned that while the Bill as drafted is too broad, the amendment is too narrow. It does not capture the situation when an innocent communicator can communicate to a client, who may be a terrorist, information which that person can use for an act of terrorism. I am glad to hear that this is a probing amendment, which has been accurately advanced, and that the Government are minded to be responsive to the anxieties expressed. I hope that the Minister will keep in mind my own anxiety, that while Amendment 48 has a great deal of merit, it is too narrow, while the Bill as drafted is too broad.

Baroness Hayter of Kentish Town (Lab): My Lords, I will not dare to try to better the arguments already made in this debate but will only emphasise two things with regard to the amendments to which I have added my name.

The first, which has already been mentioned by the noble Lord, Lord Pannick, is that this so-called privilege is of the utmost importance to clients—the description always sounds as if it is your privilege rather than ours. I speak as the former chair of the Legal Services Consumer Panel, where we represented the interests of those who—often in times of trouble—need the help and advice of a lawyer.

We know that very many people who could do with legal assistance do not go, partly because they do not know that they need it, partly because they do not know how to get it, partly due to cost, but also because it is all a bit too intimidating. It often falls to the lawyer to reassure them not just about the particular case, but that what passes between them will be absolutely confidential and—for example, in the case of a domestic break-up or a child's custody—will never be revealed to their former partner or others involved, including agencies of the state.

Therefore, this confidential relationship is key to people getting good advice and advocacy and a fair hearing, as well as being key, as we have already heard, to the role of our lawyers and the rule of law. However, we also understand that there will be occasions when some details of this relationship might be caught by powers included in the Bill. We look for some assurance that the maintenance of clients' confidence is absolutely understood, and that any such occasions will be as limited as we have heard, and only after proper due process.

We look forward to hearing in the Minister's response the Government's current thinking and perhaps some indication of what they will be willing to bring forward on Report.

Lord Mackay of Clashfern (Con): My Lords, I put my name to these amendments. I am grateful to the noble Lord, Lord Pannick, for the clear exposition he has given of the reasons for them, and I have listened to the anecdotal evidence provided by the noble Lord, Lord Carlile.

I think we are all agreed that proper legal professional privilege is vital to the rule of law. It is not a privilege of the legal profession but of the client, as the noble Baroness said. However, the illustrations show that some other factor may be buried in proper legal confidentiality. The example of information being passed on innocently is one such. It was not part of the legal professional privilege conversation but an adjunct to it—"Please pass this on to my girlfriend". Another possible illustration, which I have discussed with the Minister, is that the location of the client might be mentioned incidentally. Where he happens to be is not crucial to the advice he gets or the information he gives in order to get it, which is, of course, the real reason the conversation is protected.

5.15 pm

For example, suppose the client indicates where he is and there is no other way of finding that out because if there is, the security services are bound to use it. If he discloses in the course of the conversation where he is at the time in question, and that has nothing whatever to do with the advice he is seeking or the information he is given about the nature of the matter between him and the solicitor, which is covered by legal professional privilege, it may be vital to the security services to know that. The consequence of not knowing where he is may be to lose the opportunity to prevent a disaster, because if they know that they may be able to take sufficiently quick action to prevent it. It seems highly likely that in most cases this kind of information will be possible to ascertain without this problem but that may not always be the case—I am not sure.

The fact is that this might be very unusual, and not many people would think it wise to burn down a house for the purpose of roasting a pig—unless they wanted the house to come down anyway. But although it happens seldom it could be a vital factor in preventing a huge disaster. I hope that the Government, with all the resources of their learned parliamentary counsel, will draft a provision which incorporates the iniquity situation as well as that of the non-iniquity of a lawyer who is unwittingly used to further some aspect of what the person consulting him wants, as in the example given. It will also be important where, for example, the location from which the conversation is taking place is vital to instant action on the part of the security services to avert disaster.

Lord Phillips of Worth Matravers: My Lords, the example given by the noble and learned Lord, Lord Mackay, demonstrates why Amendment 48 is too narrow. If a villain were to seek advice on his will it would not be a criminal purpose but it might none the less be justifiable to listen to the conversation in the hope of finding out where he was.

Baroness Hamwee: My Lords, from our Front Bench I support these amendments, although I take the point about the innocent conduit—if I can put it that way—which becomes more intriguing as one thinks about it. The noble and learned Lord, Lord Mackay of Clashfern, said that if the security services could use another means they would do so. I want to bring into the mix a point that I made when we debated Clause 2, which is that that requirement is not absolute: they would have to have regard to other means and whether those could reasonably achieve the end. This exercised me in a conversation with the Minister and continues to do so, so it is right to bring it into the mix.

Lord Beecham (Lab): My Lords, a range of subjects appears to be covered both by the amendments and by today's debate. I think we are all looking forward to the noble and learned Lord's response to the issues of principle, which it is clear are very much in your Lordships' minds. I draw particular attention to the report of the Joint Committee on Human Rights, which went so far as to say that,

"we do not see the need for a power to target lawyer-client communications",

and that the amendment it sought would remove that provision from the Bill because it was deemed unnecessary in view of the iniquity exception. It would be interesting to hear the Minister's reaction to that, but much of what we have heard today has been about the detailed workings of the Bill.

One of the main substantive issues is the position of the judicial commissioner in whatever processes ultimately result—that seems to me the critical aspect on which we would welcome some guidance from the Minister on the Government's intentions. If it is still deemed necessary in some form or other to deal with the problem, as the Government see it, of legal privilege, there must surely be at least the safeguard that the decision should be made by a judicial commissioner rather than by a civil servant or Minister of the Crown. That measure of independence and of judicial experience seems fundamental to any acceptable proposal to move along the lines that the Government seek to pursue. Again, it would be helpful if the Minister were in a position today to clarify whether, whatever other details might be subject to debate, that important principle is one that the Government accept.

Lord Brown of Eaton-under-Heywood: I was not intending to say anything this afternoon, let alone on this amendment, but following what the noble and learned Lord, Lord Mackay, and the noble Lord, Lord Beecham, have said, it occurs to me that if one widens out the provision that is the subject of Amendment 48 to introduce some essentially non-legal consideration, one would have to make it subject also, as routinely across this legislation, to ministerial approval. They must be answerable for that non-legal aspect. I therefore suggest that this might be a situation in which one should have two primary decision-makers, not therefore judicial oversight but judicial primary decision-making on the legal aspect—such as whether it is in truth a legal professional privileges situation and whether, in so far as criminal purpose is relied on, that is satisfied. However, in so far as the wider terrorism situation is being addressed, the justification for all that should initially be put at the ministerial door as well.

Lord Keen of Elie: My Lords, the Government recognise the importance of legal professional privilege—the client's privilege—in the context of the rule of law. This is perhaps one of the most important issues that we will consider in the context of the Bill.

The noble Lord, Lord Pannick, outlined the operation of legal professional privilege and explained what is sometimes termed the iniquity exception. He went on to identify what he considered to be the issue of principle that we are concerned with in the context of the amendment and invited me to indicate whether I agreed with his outline of privilege—the iniquity exception—and the principle with which we are concerned. I am happy to concur and accept his clear exposition of the position in that regard. So I shall not elaborate on what is legal professional privilege or the iniquity exception, except to this extent. What is termed the iniquity exception arises where the client is using the conversation with the lawyer in furtherance of a criminal purpose, whether or not the lawyer is a witting party to that. If the lawyer is unwittingly used as a tool or a conduit, the iniquity exception would apply in those circumstances as well; with that, we have no difficulty.

However, there are further circumstances in which the iniquity exception would not necessarily obtain, and when a very important piece of intelligence might become available if the communication was considered by the relevant authorities. I go back to a scenario that I shared with number of noble Lords when we discussed this in recent days. An agency may have intelligence to suggest that an individual is about to carry out a terrorist attack. It knows that he is in contact or about to be in contact with a legal adviser, and it has reason to believe that that contact with the legal adviser might reveal information that could assist in averting the terrorist attack. The example is where the client might refer to his whereabouts. He might say, "I'm in Paris", or "I'm going to be in Paris tomorrow", or "I'm in London", or "I'm going to be in London tomorrow". It is that piece of intelligence in the course of the privileged communication that is critical. I know that some commentators—and, indeed, the Bar Council—have suggested that that would fall within the iniquity exception; it does not. Indeed, if we try to stretch the iniquity exception, we damage the concept of legal professional privilege, so we must be very careful about how we approach this.

So there is that exceptional situation—and it must be exceptional before any warrant could be contemplated—in which intelligence gleaned from such a conversation would be of critical importance. I stress the word "intelligence" because on occasion it is very easy to refer to this as evidence. Such intelligence

would never be admissible in a court of law, so let us be careful about that. We are talking about intelligence as such, not evidence.

The noble Lord, Lord Pannick, suggested that this would be such an unusual event that to approve the power would be to approve a power of purely theoretical value. With great respect to the noble Lord, the fact that something is highly unusual or highly exceptional does not render the power theoretical. The power may not have been employed in the past and it may not be employed in the foreseeable future; that does not render the power theoretical. The occasion may arise, in the face of a terrible terrorist threat, in which such intelligence can be made available to the appropriate agencies. If we bring down a guillotine, LPP will be denied to them. So the power is not theoretical.

The noble Lord, Lord Carlile, made the very good point: we are really dealing here with the question of balance. Should we intrude upon what we see as legal professional privilege—that fundamentally important concept—for the sake of a highly exceptional case in which such intelligence could be critical? There is an element of balance there.

Lord Pannick: My Lords—

Lord Keen of Elie: If I might continue for a moment, reference was made to the potentially chilling effect—I am not sure about the chilling effect of burning down a house to roast a pig—that this would have on lawyer-client relationships. Indeed, the noble Lord, Lord Pannick, spoke of the enormous damage to the rule of law, with no lawyer able to say that his legal advice was confidential. With great respect, this power has been available to the relevant agencies since 2000. The safeguards that we wish to place in the Bill have been contained in codes of conduct since 2003. Can the noble Lord, Lord Pannick, give me a concrete example of enormous damage to the rule of law since 2000 because of that existing power? Can he give me a concrete example of a lawyer saying to his client, "I can't give you confidential legal advice because of this exceptional power", which has existed now for 16 years? I am not aware of any such examples, I have to confess. The noble Lord wanted to intervene, so I shall give way at this point.

5.30 pm

Lord Pannick: I take the noble and learned Lord's point that "theoretical" is perhaps the wrong word to use and that "speculative" may be more appropriate. I wonder whether he could answer the question I posed earlier. Given that these powers have been available since 2000, can he tell the Committee whether the authorities have ever used them or whether we are talking in abstract terms about something that may have been required in the past? If it has not been used in the past 16 years, it is speculative.

Baroness Hamwee: My Lords, before the Minister responds to that, it seems that he would be in a better position to answer the question than the noble Lord, Lord Pannick, because I cannot see how he could give an example without someone having breached client confidentiality along the way.

Lord Keen of Elie: Let me say this: the matter is not speculative and it is not theoretical, as the noble Lord concedes. I am not aware of any example of this having happened in the past 16 years, but that does not render it speculative. The point is that the example that can be given—the example I gave—is one that could arise in the future. The question then is whether the agencies should have a means to secure that vital intelligence or face a complete brick wall. In this context, we would simply say this. In response to the point made by the noble Lord, Lord Pannick, over the past 16 years, there is no evidence of damage to the rule of law and no evidence of any intrusion on the ability of lawyers to say that their legal advice is confidential because it is appreciated that this is a wholly exceptional power.

Lord Lester of Herne Hill: If we assume that the Committee is with the Minister in saying that a wholly exceptional power that has never been used should now be given new parliamentary authority in this Bill, the next question to ask is: what about the intervention of the noble and learned Lord, Lord Brown of Eaton-under-Heywood? He said that there need to be adequate safeguards against abuse and suggested that the adequate safeguard would be that the judicial commissioner should look at the merits of the matter. Perhaps I may remind the noble and learned Lord of a case in the mid-1970s, Klass and others v Federal Republic of Germany, when the Strasbourg court said of surveillance powers that there must be adequate safeguards against abuse. It would help me to know what the adequate safeguards against abuse really would amount to.

Lord Keen of Elie: I am obliged to the noble Lord and I am coming to the point made by the noble and learned Lord, Lord Brown of Eaton-under-Heywood. I am not entirely unfamiliar with the case of Klass, and I thank the noble Lord for drawing it to our attention. We recognise that if this exceptional power is to be maintained in the Bill as it is in existing legislation, and if the safeguards in the existing code are to be improved, we must address that very clearly. That is why I have had ongoing discussions with the Bar Councils, the Scottish Bar and the Law Societies to try to achieve some consensus on this point. I therefore welcome the amendment because we are still considering the issue and we recognise the need to ensure that such an exceptional power is properly safeguarded. As to the actual means, we have not come to a final conclusion, but I note the suggestion of the noble and learned Lord, Lord Brown, and I am conscious that that might be one approach. However, I cannot commit us to any single approach at this time. I underline expressly that this power would only ever be employed in exceptional circumstances.

I rather think we are circling the same point. Of course the Government recognise the concerns that people have with regard to legal professional privilege. We understand the critical nature of that privilege and that any intrusion on it calls into question its effectiveness in the context of the rule of law. I go back to the point made by the noble Lord, Lord Carlile, that a balance must be struck here, but if there is a balance, there has to be something on each side. The question now is what we can put in place on our side.

Lord Carlile of Berriew: My Lords—

Lord Keen of Elie: Perhaps I may finish before the noble Lord intervenes. That is why we will keep this under consideration for the purposes of Report stage.

Lord Carlile of Berriew: What the Minister has said is welcome, because we do not want to vote on this on Report but to try to find consensus on an important issue. In addition to considering the proposition of the noble and learned Lord, Lord Brown, I ask the Minister to try at least to provide the Committee with some qualitative evidence without breaching national security. I respectfully suggest that it might be worth talking to his friends in the Northern Ireland Office, who have enormous experience of this kind of issue. If it emerges that, even in that department, this kind of exceptional power has not had to be used for any useful purpose in the past 20 or so years, it will be real evidence that it is not required.

Lord Keen of Elie: I note what the noble Lord says and welcome the suggestion that we speak to the Northern Ireland Office to see what its experience has been over the past 16 years and take that into account. However, at this stage, without further elaboration, and appreciating that the Committee understands the issue of principle that we are concerned with, I invite the noble Lord to withdraw the amendment.

Lord Thomas of Gresford (LD): I have listened with puzzlement. I know that anecdotes do not go down terribly well, but some years ago I was playing rugby for the northern circuit of the Bar against the Irish Bar. I became friendly with an American spectator and talked with him; I think that I introduced him to the Chief Justice of Ireland that evening at dinner in the King's Inns. However, the following Wednesday half a page was written about the American, who was on the run from the United States for spying. Everything comes into that, including surveillance. I thought no more about it for a fortnight until the phone rang, and it was him. He said, "I want your advice". I said, "Where are you?". He said, "I'm in Paris". I said, "What do you want to know?". "He said, "Which countries don't extradite to the United States?". I could not conceivably breach legal professional privilege by telling your Lordships what my advice was, but would that merit a warrant for interception of the telephone call to me at my home from somebody in Paris in such circumstances?

Lord Keen of Elie: There might be circumstances in which the relevant individual was intent upon a terrorist outrage in Paris, and if the fact that he was going to communicate with the noble Lord was known to the authorities, they might consider that piece of intelligence to be absolutely critical to preventing that terrorist atrocity. In those circumstances, it is possible that the information could be obtained.

Lord Thomas of Gresford: But not the fact that he was proposing to escape charges of spying by going to another country. Was there something iniquitous about our conversation?

Lord Grabiner (Non-Afl): There probably was because no solicitor was engaged. So privilege was not attracted at all.

Lord Keen of Elie: The noble Lord makes a good point, and it may be that the noble Lord, Lord Thomas, wishes to refer himself to the Bar Standards Board. However, I understand that the rules have changed since then.

Lord Thomas of Gresford: The first thing I did was to instruct a solicitor to go and see him.

Lord Mackay of Clashfern: One possible approach would be to consider what is meant by legal professional privilege. It is a privilege of the account that the client gives to the solicitor of the facts on which the client wishes to be advised, and the advice that the solicitor gives in return to that application. A statement of where, for example, the client is at that particular time is not part of either of those. Therefore, that is not, strictly speaking, covered by legal professional privilege at all. This is a way of looking at this matter that is slightly differently from trying to make conditions on legal professional privilege.

Lord Pannick: I thank all noble Lords who have contributed to this debate, particularly those who have provided anecdotes as to their previous experience. I also thank the noble and learned Lord, Lord Keen, because I think the whole Committee recognises that he and the Government are striving to find the right answers to what are undoubtedly very difficult problems. There is a balance between maintaining legal professional privilege and ensuring the security of this country.

I start from the same place as the Minister: legal professional privilege is absolutely fundamental to the rule of law; there is no dispute about that. It seems to me, therefore, that there has to be a compelling justification for allowing intrusion by the authorities into matters that are genuinely covered—not iniquity—by legal professional privilege. The Minister has been very frank: in the past 16 years, there has been no experience of the ability to intrude into genuine legal discussions being of any value to the security forces. I therefore wonder whether it is necessary to have such a power. Its existence, particularly if we were to enshrine it in this Bill, would have—it does have—a damaging effect on clients' confidence that they are speaking to their lawyers in genuine confidence.

The example the Minister gives—it is a real example, at least in principle—is that the authorities may learn the location of the client, which may tip them off and enable them to prevent a terrorist outrage. It seems to me that that is not part of the privileged material but incidental to it. An acceptable way forward may be that the authorities would have to show and satisfy the judicial commissioner—and maybe the Secretary of State as well—that there is compelling and exceptional evidence of a real threat to life, such that they should be able to listen in so as to obtain this incidental material, and that the authorities would be obliged immediately to dispose of, not retain, any information that is not incidental to legal advice but is the actual legal advice. I remain doubtful but I will wait to see what the Government bring forward at Report stage.

No doubt we will return to the subject—we will have to discuss it again—but this has been a helpful debate. I am grateful to noble Lords and I beg leave to withdraw the amendment.

Amendment 46 withdrawn.

Amendments 47 to 49 not moved.

Clause 27 agreed.

Clauses 28 to 30 agreed.

Clause 31: Renewal of warrants

Amendments 50 to 52

Moved by ***Earl Howe***

50: Clause 31, page 24, line 11, leave out "before the end of the relevant" and insert "during the renewal"

51: Clause 31, page 24, line 34, at end insert—

"( ) "The renewal period" means—

(a) in the case of an urgent warrant which has not been renewed, the relevant period;

(b) in any other case, the period of 30 days ending with the day at the end of which the warrant would otherwise cease to have effect."

52: Clause 31, page 24, line 46, at end insert—

""urgent warrant" is to be read in accordance with subsection (3) of that section."

Amendments 50 to 52 agreed.

Clause 31, as amended, agreed.

Clause 32: Modification of warrants

Amendment 53

Moved by ***Baroness Hamwee***

53: Clause 32, page 25, line 5, at end insert—

"( ) Any modification to a warrant must be authorised by a Judicial Commissioner."

Baroness Hamwee: My Lords, in this group, Amendments 53, 54, 55, 56, 57, 60 and 62, and the Clause 33 stand part debate, are in my name and that of my noble friend Lord Paddick; the Government have Amendment 59, which looks to be an innocent drafting amendment—I hope it is as innocent as my reading of it.

These amendments take us to the modification of warrants. We believe that modification is such a serious action that the judicial commissioner should be involved, which the first amendment deals with; "modification" perhaps gives the wrong impression as to what is sought.

5.45 pm

Amendment 54 would reduce the scope of minor modifications. I am not entirely convinced by my own drafting but let me give an example of the issues we are concerned about. A warrant may refer to "No. 125 Acacia Avenue" but someone looking at it says, "No, clearly that should have been '25' because there is no No. 125". That is not necessarily the conclusion to reach, particularly if there actually is a No. 125. I am not going to give anecdotes, so I refer noble Lords to my noble friend's reference to a penguin on Monday. What it boils down to is that it cannot always be clear if there has been an error in typing up a warrant or an error in identifying the premises.

Amendment 57 questions who can make minor modifications. Clause 33(2)(d) and (e) would allow,

"the person to whom the warrant is addressed,"

or someone else senior within the same authority to make the modification. I am really quite worried about that. You receive a warrant and think, "That can't be right so I'll correct it," or "modify" it in the terms of the Bill. Is that really an appropriate way to proceed?

Amendment 60 would restrict modifications signed on behalf of the Secretary of State or Scottish Ministers to cases of urgency. It seems to me that the originator should normally sign them.

Amendment 62, which is a little different, would provide a specific time limit for ratification; at the moment, it is open-ended. Our amendment would provide that the judicial commissioner should give ex post facto authorisation within a specific time. We have said 48 hours, which may be too much; the Joint Committee said that urgent warrants should be reviewed within 24 hours. The Intelligence and Security Committee recommended review—this is without prejudice to the points that I made on the earlier group—within 48 hours.

If we are to have a warrant system that is subject to any sort of oversight, it should test whether individuals or individual premises ought to be the subject of surveillance. It is not a minor modification to subject an individual or a set of premises to interception powers: it is actually the entire purpose of the system, and is fundamental to the whole operation. Allowing the state to add an intercept without prior judicial authorisation seems to us to undermine the whole scheme and to circumvent the most basic safeguard provided by the Bill. I beg to move.

Lord Rosser: I will make just one very brief point. These amendments on modifications relate to an area where the system could—and I use the word "could", not "will" or "would"—be abused, in the sense of a significant modification being made to a warrant perhaps not having to go through the kind of process one would have to go through with the initial warrant. I hope the Minister might respond in a rather wider context than the specifics of the amendments and set out why the Government believe, as far as the Bill is concerned, that the modification process cannot be used to achieve a major change in a warrant without having to go through the proper procedures of getting judicial authorisation. To some extent, I think that what lies at the heart of this issue on modifications is wanting an assurance, which can be given really only by spelling out the process that would prevent the system being abused in this way.

Lord Keen of Elie: Perhaps I might begin with that last point. The whole structure of the Bill involves checks and balances. At the end of the day the Investigatory Powers Commissioner will carry out auditing and oversight functions to ensure that the requirements

[Lord Keen of Elie]
in respect of warrants and their modification have been adhered to. Therefore, it is a question of looking at the overall structure and functioning of the warranty system under the Bill. It is not spelled out in any one particular clause. I just make that observation at this stage.

Amendments 53, 55, 56 and 57 seek to provide that all modifications to a warrant must be authorised by a judicial commissioner. In our view, that is neither necessary nor appropriate. Clause 32 creates a carefully constructed regime, differentiating between major modifications and minor modifications. A major modification is one which adds or varies the name or description of a person, organisation or set of premises to which the warrant relates. A modification which adds or varies a factor identifying the communications described in the warrant will be a minor modification; for example, a minor modification might be adding a new telephone number for a known target. In addition, a modification that removes something from a warrant, and so reduces the conduct authorised by it, is a minor modification. The Bill makes this sensible distinction between major and minor modifications. In neither case is the judicial commissioner required to authorise the modification because the requirement to modify warrants to keep them up to date is first and foremost a safeguard.

I will explain how major modifications will operate under the legislation. The Bill provides for major modifications to be made only to so-called thematic targeted warrants. Current statute, such as the Regulation of Investigatory Powers Act 2000, allows for the issue of such warrants. They may be granted against, for example, the members of a kidnap gang. Thematic targeted warrants are invaluable in complex or fast-moving investigations. The Bill serves to put them on a clearer footing and to strengthen the safeguards that apply to them.

These warrants cannot be open-ended. Their scope must be sufficiently defined for the Secretary of State to be able meaningfully to assess whether the action is necessary and proportionate—the relevant statutory test. The Bill introduces a new safeguard, requiring the warrant to be modified to include names or descriptions of the subjects of the warrant, as far as it is reasonably practicable to do so, as the investigation progresses. This will assist the Secretary of State and the judicial commissioner in overseeing the warrant. There would be no benefit in having a commissioner authorise a modification that is being made in the first place only to inform his own oversight of the warrant. It would introduce unnecessary bureaucracy and the Bill already makes it clear that major modifications that engage the Wilson doctrine or legal privilege will be subject to the full double lock.

In our view, providing a role for the judicial commissioner in authorising a minor modification is even more superfluous. A minor modification caters for those circumstances where the subject of a warrant changes his phone or starts using a different email address. Those under investigation regularly change their phones or use different communications services in a bid to evade detection. The speed and volume of modifications of this nature are such that a role for the judicial commissioner in authorising the modification would cause the operational agility of the system to slow almost to a halt. This would inevitably have an impact on the ability of our law enforcement and security and intelligence agencies to perform their core function of protecting the public.

Clause 33 provides clear definitions of what constitutes a senior position in a public authority—that is, the authority that can deal with modifications—and an example is someone at the level of brigadier in the Ministry of Defence. We believe it is entirely appropriate that a person holding such a position is able to make a minor modification; for example, to determine that a new means of communication, such as a telephone number, being used by the person under investigation should be added to the warrant. Of course, we recognise the importance of ensuring the process for making modifications is as rigorous as it can be. That is why the Bill was amended in the other place to apply the necessity and proportionality test to minor modifications, as well as major modifications. Accordingly, I invite the noble Baroness to withdraw Amendment 53.

Amendment 54 would limit the circumstances in which a minor modification may be made to an interception warrant. It would have the effect that the only modifications that could be considered minor would be ones that either remove something from a warrant or correct an error in the description of a factor. We suggest that the amendment is unnecessary and would undermine the effective operation of the modification process. It would mean, for example, that where the subject of a warrant bought a new mobile phone, simply adding the mobile phone number to the warrant would be a major modification. The Bill would then require that this modification be made by the Secretary of State, or a senior official acting on their behalf, and notified to a judicial commissioner, even though the Secretary of State has already made the decision that it is necessary and proportionate for the communications of the individual to be intercepted, and the judicial commissioner has already approved that decision.

We recognise the importance of ensuring that the process for making modifications is rigorous. That is why we have amended the Bill following consideration in the other place such that there must be a consideration of necessity and proportionality for minor modifications, not just major modifications, as I mentioned before. We amended the Bill to ensure that the judicial commissioner is notified of a major modification to a warrant, as well as the Secretary of State, so that they have an ongoing visibility as to the extent of the activity authorised by the warrant. In conclusion, the process for making minor modifications is already sufficiently stringent, the amendment is unnecessary, and it would undermine the efficient operation of the warranty and modifications process. I invite the noble Baroness not to move Amendment 54.

Amendment 60 relates to where a major modification is being made when the protections for the communications of a parliamentarian or items subject to legal professional privilege apply. The amendment seeks to provide that, even where it is not reasonably practicable for the Secretary of State to sign the modification instrument, the instrument may be signed

by a senior official only if it is being made urgently. This amendment is unnecessary and is, I believe, based on a misunderstanding of what Clause 34 provides for.

Clause 34 enables an instrument making a major modification where Sections 26 and 27 apply—in relation to parliamentarians and items subject to LPP—to be signed by a senior official where it is not reasonably practicable for the Secretary of State to sign it; for example, when the Secretary of State is out of the country, working in their constituency or otherwise unavailable. But the modification must still be personally and expressly authorised by the Secretary of State before the senior official can sign the instrument. The senior official is signing on behalf of and to acknowledge the Secretary of State's authorisation. That is why we suggest that Amendment 60 may be unnecessary.

It may be appreciated that there will be instances when the Secretary of State is simply not physically able to sign a modification instrument. The purpose of Clauses 34(8) and (9) is to make explicit provision for this and to make it clear that a modification made in such circumstances—where the Secretary of State has approved but is not available—is not an urgent modification. That underlines the point I was seeking to make earlier, that there will always have been authorisation by the Secretary of State. Against that background, I invite the noble Baroness not to move Amendment 60.

6 pm

Amendment 62 would require a judicial commissioner to be notified within 48 hours of a major modification being made in urgent cases. The Government amended this clause in the other place to require urgent major modifications to be notified to a judicial commissioner and the Secretary of State—or, in the case of a warrant issued by Scottish Ministers, a member of the Scottish Government—as soon as is reasonably practicable. This will ensure that the Secretary of State and the judicial commissioner will have prompt visibility of urgent major modifications. We do not believe it is either necessary or helpful to impose a 48-hour limit on this notification provision. It is not necessary because, as I say, the Bill already requires this to be done as quickly as reasonably practicable. In practice, that will nearly always be within two working days, but bank holiday weekends or other issues may arise that mean the proposed time limit of 48 hours cannot sensibly be applied.

Our other concern about the amendment is that it unnecessarily increases the risk of compliance failure. The warrantry process will have been made far more robust and resource intensive as a result of the Bill. We are not opposed to such an amendment if it provides real value and does not impede operational agility, but this amendment would provide no substantive additional protection and would simply add to the bureaucratic burden on the system. I again invite the noble Baroness not to move this amendment.

Finally, government Amendment 59 is a minor and technical amendment to Clause 34, which covers further provisions about modifications. Subsection (7)(a) refers to the "warrant as modified", where it should refer to the "modification". The amendment makes it clear that the judicial commissioner's role in relation to the decision to modify a warrant, where Clauses 26 and 27 apply, relates specifically to the modification being made. This is consistent with the other modifications in the Bill. I support the amendment on behalf of the Government.

Baroness Hamwee: My Lords, I have no problem with the government amendment, if one accepts the whole premise of the thing.

On the timescale, I always think it is much easier to ensure there is real, rigorous observation of a timescale if a specific one is spelled out, rather than,

"as soon as reasonably practicable",

because one can come up with all sorts of reasons why something is not practicable. I note that the noble and learned Lord again mentioned bank holidays; he knows our view about their application.

From listening to his explanation, I wonder whether some of the difficulties arise from what "description" means in Clause 32(2)(a). That is perhaps also a factor in Clause 32(2)(b). I must say I am not clear whether one is dealing with a description of an address when one asks whether it is "No. 25" or "No. 125" or, taking that a bit further, when it should have been not "Acacia Avenue" but "Hawthorn Avenue". Will the Minister—if not at this stage, perhaps subsequently—explain what "description" means, with examples? It seems to me to be a term capable of different interpretations by different people.

I do not think there will be an answer—even though an emissary has been sent—so I think I had better withdraw my amendment. I beg leave to withdraw the amendment.

Amendment 53 withdrawn.

Amendment 54 not moved.

Clause 32 agreed.

Clause 33: Persons who may make modifications

Amendments 55 to 57 not moved.

Clause 33 agreed.

Clause 34: Further provision about modifications

Amendment 58 not moved.

Amendment 59

Moved by ***Earl Howe***

59: Clause 34, page 27, line 32, leave out "warrant as modified" and insert "modification"

Amendment 59 agreed.

Amendment 60 not moved.

Clause 34, as amended, agreed.

Clause 35 agreed.

Clause 36: Approval of major modifications made in urgent cases

Amendments 61 and 62 not moved.

Clause 36 agreed.

Clauses 37 and 38 agreed.

Clause 39: Implementation of warrants

Amendment 63 not moved.

Clause 39 agreed.

Clause 40 agreed.

Clause 41: Duty of operators to assist with implementation

Amendments 64 to 65A not moved.

Clause 41 agreed.

Clause 42: Interception with the consent of the sender or recipient

Amendments 66 and 67 not moved.

Clause 42 agreed.

Clauses 43 and 44 agreed.

Clause 45: Postal services: interception for enforcement purposes

Amendment 68 not moved.

Clause 45 agreed.

Clause 46: Interception by OFCOM in connection with wireless telegraphy

Amendment 69

Moved by ***Earl Howe***

69: Clause 46, page 36, line 1, at end insert "by means of a telecommunication system"

Amendment 69 agreed.

Clause 46, as amended, agreed.

Clause 47: Interception in prisons

Amendment 70 not moved.

Clause 47 agreed.

Clause 48: Interception in psychiatric hospitals etc.

Debate on whether Clause 48 should stand part of the Bill.

Baroness Hamwee: My noble friend Lord Paddick and I want to explore a little the provisions on interception in certain institutions, as these clauses are headed. It was suggested in the Commons Public Bill Committee that questioning them was tilting at windmills. I think some justification should be put on the record for these provisions, and certainly for those relating to psychiatric hospitals and immigration detention centres. I do not want to appear to suggest that there is no duty of care or a lesser duty of care in prisons, but I can see greater arguments for a more intrusive regime in prisons.

Clause 48 applies to high-security psychiatric services. Under Section 4 of the 2006 Act, which is referred to in the clause, these are for persons,

"liable to be detained under the Mental Health Act 1983",

and requiring,

"treatment under conditions of high security on account of their dangerous, violent or criminal propensities".

I stress the "or" and that it is "propensities", not necessarily actions. In many cases this may be in the interests of the patient's health or safety and not, as I understand it, simply a response to criminal activity where there has been a prosecution.

Clause 49 is about immigration detention facilities. Although we have done so, I will not spend time now on the fact that prisons are still used for immigration detention. We have had considerable debate about immigration detention recently in the context of what is now the Immigration Act, and it is accepted, I hope, that we are talking about administrative detention, not imprisonment with a view to removal, or even an acknowledgement that detainees should be removed. We discussed the large number of detainees who move into the community. There is a lot to be said—a lot was said and probably more could have been said—about the conditions in immigration detention centres. Exposure to the risk of having communications intercepted needs justification on the record, not least because of the febrile atmosphere at the moment around immigration, with immigrants too often cast as bad people. That is why we are concerned about the two clauses standing part.

I am very grateful to the Public Bill Office, which spent a lot of time helping me draft Amendments 71 and 72, which relate to tracing what are "relevant rules" for the purpose of Clause 49. Instead of trying to take the Committee through the rather complicated drafting of Amendment 72, I will just make the overall point, which is that there should be transparency: it should be clear in the regulations, which we are saying should be affirmative, that the rules apply for the purposes of interception provisions.

That, in a nutshell, is what I am driving at in that amendment. I do not wish to insult the Public Bill Office, which as I say was splendid, and the buck stops with me if this is not the way to do it, but I would like to be assured that the relevant rules have been made—I think we are talking about existing rules—for the interception provisions. As I say, this is a point about transparency, or clarity, and one it is probably quite difficult to discuss across the Chamber, but I would like to be assured that some way will be found to achieve that end. To go back to the overall point, that is why we are objecting to the clauses—for the purpose of this debate at any rate.

6.15 pm

The Minister of State, Ministry of Defence (Earl Howe) (Con): My Lords, Clause 48 maintains the position set out in RIPA that interception is lawful in certain circumstances in psychiatric hospitals. The clause sets out that interception is lawful if it takes place in any hospital premises where high-security psychiatric services are provided and is conducted in pursuance of, and in accordance with, any relevant direction given to the body providing those services at those premises.

While the clause provides that the interception is lawful, it is the relevant direction under the National Health Service Act 2006, the National Health Service (Wales) Act 2006, the National Health Service (Scotland) Act 1978, or the Mental Health (Care and Treatment) (Scotland) Act 2003, that sets out how and when the interception may be conducted—that is not a function of this Bill.

Clause 49 provides that certain interception carried out in relation to immigration detention facilities is lawful. The Immigration and Asylum Act 1999 contains powers for the Secretary of State to make rules for the management of immigration detention facilities, and Clause 49 provides that interception carried out in accordance with those rules will be lawful. At present, rules have been made only in respect of immigration removal centres—the Detention Centre Rules 2001. The interception of communications in relation to immigration removal centres, in line with the statutory rules, is purely for the purposes of maintaining the security of those centres or the safety of other persons, including detainees. It is right that officers should be able, for example, to intercept attempts to send controlled drugs or other contraband material into particularly sensitive and secure environments.

Contrary to speculative claims, this power can never be used to determine the outcome of any person's asylum claim. Again, the precise circumstances in which interception may take place in immigration detention facilities are not a matter for the Bill. To be clear, the purpose of this clause is not to determine rules relating to the management of immigration detention facilities. The purpose of the clause is simply to make clear that conduct authorised and regulated under existing legislation—specifically, the Immigration and Asylum Act 1999—would be lawful.

Rules made under the 1999 Act about the regulation and management of detention facilities are subject to negative resolution, as specified in the Act and as agreed by Parliament. Such rules in relation to interception would be based on the clearly legitimate purposes already contained in the Detention Centre Rules 2001. The interception of communications in relation to immigration removal centres, in line with the statutory rules, is purely for the purposes of maintaining the security of those centres or the safety of other persons, including detainees, as I explained.

I hope the noble Baroness will accept that the amendments are unnecessary and that the clauses should stand part of the Bill.

Baroness Hamwee: My Lords, I have found it difficult throughout the Bill to accept that something is necessary just because it is in RIPA or is currently in effect. I am afraid I gave up chasing through the references in Clause 48—I thought my iPad was going to give out on me if I asked www.legislation.gov.uk any more questions on Sunday morning. I should have pursued this, and for that I apologise to the Committee. I think I am reassured by the explanations I have. I will go away and read the record, but I am grateful to the noble Earl.

Clause 48 agreed.

Clause 49: Interception in immigration detention facilities

Amendments 71 and 72 not moved.

Clause 49 agreed.

Clause 50: Interception in accordance with overseas requests

Amendment 73

Moved by ***Earl Howe***

73: Clause 50, page 38, line 9, leave out "C" and insert "D"

Earl Howe: My Lords, in moving Amendment 73, I will speak also to Amendments 74, 75 and 76. I can be brief. These amendments add further conditions to Clause 50, which provides for circumstances in which a telecommunications operator may intercept communications in response to a valid overseas request. The additional conditions clarify that the Secretary of State must designate those international agreements to which this clause applies and require that the interception must be for the purpose of obtaining information about communications of people known, or believed to be, outside the United Kingdom. I beg to move.

Amendment 73 agreed.

Amendments 74 to 76

Moved by ***Earl Howe***

74: Clause 50, page 38, line 18, at end insert "and which is designated as a relevant international agreement by regulations made by the Secretary of State"

75: Clause 50, page 38, line 18, at end insert—

"( ) Condition C is that the interception is carried out for the purpose of obtaining information about the communications of an individual—

(a) who is outside the United Kingdom, or

(b) who each of the following persons believes is outside the United Kingdom—

(i) the person making the request;

(ii) the person carrying out the interception."

76: Clause 50, page 38, line 19, leave out "C" and insert "D"

Amendments 74 to 76 agreed.

Amendment 77 not moved.

Clause 50, as amended, agreed.

Clause 51: Safeguards relating to retention and disclosure of material

Amendments 78 to 80 not moved.

Clause 51 agreed.

Clauses 52 and 53 agreed.

Amendment 81

Moved by ***Baroness Hamwee***

81: After Clause 53, insert the following new Clause—

"Evidence

(1) The Secretary of State may make regulations enabling material obtained by interception by lawful authority to be put forward as evidence in court proceedings.

(2) Regulations may not be made under subsection (1) unless the Secretary of State has consulted such persons as the Secretary of State considers appropriate.

(3) Consultation must, in particular, address mechanisms relating to the disclosure of information on proceedings and their general conduct."

Baroness Hamwee: In moving Amendment 81, I shall also speak to Amendment 239. I am not proposing, now, a facile change in the rules of evidence—but given the subject matter of the Bill, it might be a little odd not to explore the issue of intercept as evidence a little. Amendment 81 contains an enabling clause; enabling clauses go a bit against the grain, but for this purpose I think one is appropriate. It would require consultation and the affirmative resolution—but this is a probing amendment.

I know about the concerns that intercept as evidence would be massively expensive, because of the entirely proper rules of disclosure of evidence to the defence and the prosecution. Intercepted phone calls would not just be monitored for intelligence, with rough notes made and conversations only partially transcribed; this would mean a huge amount of transcription, and maybe translation as well, plus storage and indexation. Disclosure could, I accept, have operational implications, through disclosing techniques and the capacity of the agencies.

On the other hand, intercept evidence could significantly influence the outcome of a trial, but at the moment is simply unused. Lord Lloyd of Berwick said:

"We know who the terrorists are, but we exclude the only evidence which has any chance of getting them convicted". —[*Official Report,* 19/6/00; cols 109-10,]

So we spend a lot of resources on spying on those implicated in organised crime and terrorism, but we cannot prosecute them or prevent further crime. Other common law countries use such evidence. I am aware that their legal systems are said to be "less demanding", but does that not suggest that we should not abandon the idea?

The right to a fair trial raises the issue of all evidence being available to both prosecution and defence. The prosecution has the advantage of being aware of evidence but not using it, and that puts the defence at a disadvantage. Further, I understand that a ban applies only to interceptions in the UK. Recordings and transcripts of intercepted calls made in other countries are used, for instance in prosecutions for drug trafficking. Nor is there a bar on introducing evidence of phone calls made from prisons. I believe that the Ian Huntley Soham case featured such evidence. One can also use a recording from a hidden bug as evidence, but one cannot use interception as evidence.

It is argued that our system of public interest immunity could be applied to protect the details of investigative techniques—the subject of the concern that I raised a moment ago. The Privy Council's review on that issue, which reported in 2008, concluded that it would be possible to provide for use as evidence by developing a "robust legal model" with public interest immunity as the basis, which would be human rights compliant. I appreciate that that review was the seventh report to Ministers in 13 years, so this matter has not gone unexamined.

However, we are now in a position whereby our criminal justice system cannot accommodate what will often be the best evidence in a case, so cases that should be prosecuted may not be. Given advances in technology—and those no doubt to come—it must be right to keep the issue on the agenda, which is what the amendment seeks to do. I beg to move.

Lord Strasburger: My Lords, I have a question for the Government. Am I correct in believing that evidence derived from equipment interference is permitted to be used in court? If so, could not equipment interference lead to an equally large and costly process of evidence-gathering? Why is there a difference between the two sources of evidence?

Lord Keen of Elie: My Lords, the Government are, of course, committed to securing the maximum number of convictions in terrorism and serious crime cases. The experience of other countries is that the use of evidence gathered through interception may help to achieve that. For that reason, the Government have considered whether there is a practical way to allow the use of intercept as evidence in criminal proceedings.

The issue of whether intercept material can be used as evidence has been considered in great depth no less than eight times since 1993. Each of those reviews—published by Conservative, Labour and coalition Governments—has concluded that the current prohibition which does not allow intercept material to be used as evidence should remain in place. This is the position maintained in statute since 1985, and provided for in the Bill at Clause 53.

The most recent review, in 2014, was overseen by an advisory group of privy counsellors from all parties, including my noble friend Lord Howard of Lympne and the noble Lord, Lord Beith, who is no longer in his place. That review went further than any previous review by considering the costs and benefits of a regime for the use of intercept as evidence, even if that meant considerable operational upheaval for the intercepting agencies. The review found that the substantial costs and risks of introducing the use of intercept material as evidence in court would outweigh the uncertain benefits.

When the conclusions of the latest review were published in December 2014, the Home Secretary undertook to keep the issue under review and to revisit

it should circumstances change. But there has been no significant change since that time. We appreciate that the amendment is intended to provide for a change of circumstances to be reflected in secondary legislation. However, we consider that such a significant change as introducing intercept as evidence would be appropriate for primary legislation rather than regulations, even those subject to the affirmative procedure.

Finally, on the point raised a moment ago, it is the case that material derived from equipment interference is used in evidence. That has, historically, always been the case, and there is no need to move away from that established position. I invite the noble Baroness to withdraw her amendment.

Lord Strasburger: I thank the noble and learned Lord for his reply, but my question was: why is it in one case suitable to use the evidence in court, but in the other not?

Lord Keen of Elie: Because it has been established as a matter of evidential law over many years that it can be admitted. Therefore, adequate provision is in place for its admission as evidence.

Baroness Hamwee: I am not sure that my noble friend will feel that he has had further enlightenment, but I have to say that I agree with pretty much everything the noble and learned Lord said. The one thing he said which I could not really have known is that circumstances have not changed—I think that was his term. The amendment is by no means ideal, but we have taken only nine minutes on it, which in the context of the Bill is but a blink of an eye, and it was right to put on record our concern that the issue should not be lost sight of. I beg leave to withdraw the amendment.

Amendment 81 withdrawn.

Schedule 3 agreed.

Clause 54: Duty not to make unauthorised disclosures

Amendments 82 to 84 not moved.

Clause 54 agreed.

Clause 55: Section 54: meaning of "excepted disclosure"

Amendments 84A and 84B not moved.

Clause 55 agreed.

Clauses 56 and 57 agreed.

Clause 221 agreed.

Schedule 8: Combination of warrants and authorisations

Amendment 85

Moved by ***Earl Howe***

85: Schedule 8, page 231, line 20, at end insert—

"( ) the duties imposed by section 2 (general duties in relation to privacy);"

Amendment 85 agreed.

Amendments 85A and 85B not moved.

Schedule 8, as amended, agreed.

6.30 pm

Clause 222: Payments towards certain compliance costs

Amendment 86

Moved by ***Baroness Hamwee***

86: Clause 222, page 172, line 4, leave out "an appropriate contribution in respect of such" and insert "payment of all"

Baroness Hamwee: My Lords, my noble friend Lord Paddick and I have Amendments 86 to 88, 244 and 245 in this group, which takes us to the provision for payment towards compliance costs. Under Clause 222(1):

"The Secretary of State must ensure that arrangements are in force for securing that telecommunications operators and postal operators receive an appropriate contribution in respect of such of their relevant costs as the Secretary of State considers appropriate".

As I read that, I wonder why it needs to be "an appropriate contribution" and such as the Secretary of State "considers appropriate" of their relevant costs. That is belt, braces and some other form of security.

Amendments 86 to 88 taken together provide for cover for all the operators' costs, but those costs should be assessed objectively, and I feel quite strongly that the arrangements should be in place before the operational parts of the Bill are in force. The audit provision—the subject of the amendment of the noble Lord, Lord Rosser, and the noble Baroness, Lady Hayter—would remain, as is right.

I feel strongly about this because however much good will there is on both sides, if you do not get an agreement in place before you get on with the next stage of the operation, there is always the danger that you will not satisfy the parties. It is important not to leave the matter open.

There has been a lot of discussion of the quantum. The Minister in the Public Bill Committee said that 100% of the compliance cost will be met by the Government. He clarified that the estimated costing of £174 million—which illustrates why it is important to get the Bill right—

"is not a cap, but an estimate".—[*Official Report*, Commons, Investigatory Powers Bill Committee, 3/5/16; col. 632.]

The Science and Technology Committee, reporting on the Bill, recommended:

"The Government should reconsider its reluctance for including in the Bill an explicit commitment that Government will pay the full costs incurred by compliance".

It is a short point regarding an awful lot of money and potential exposure for the operators, so we are concerned to get the matter pinned down. I beg to move.

Baroness Hayter of Kentish Town: My Lords, as was mentioned, Amendment 89 stands in my name and that of my noble friend Lord Rosser. Clause 222(6) contains what is to me the unusual phrase:

"Different levels of contribution may apply for different cases or descriptions of case but the appropriate contribution must never be nil".

"Must never be nil" is a slightly strange phrase, especially given that someone who, until a few hours ago, was the Home Secretary but is now the Prime Minister said on Second Reading:

"I reiterate … that … 100% of the compliance costs will be met by the Government".

She was asked to provide a long-term commitment for that and said,

"we are clear about that in the Bill … it is not possible for one Government to bind the hands of any future Government in such areas, but we have been clear about that issue".—[*Official Report*, Commons, 15/3/16; col. 821.]

However, being clear about the contribution which must never be nil is not what I call clarity.

Amendment 89 simply takes the then Home Secretary's words as used in Parliament that the Government would meet 100% of the compliance costs, with full cost recovery for communication service providers, which, after all, have to implement the legislation. It is important to write it into the Bill to ensure that the financial impact of the legislation is transparent, not hidden, and to give forward confidence to those companies, whose activity in this country is already a little wobbly thanks to Brexit, that they will not at some point be hit by unexpected and unavoidable costs.

As was mentioned, Amendment 89 also allows for a proper audit to ensure that operators do not provide unduly high costings. Obviously, they can make no profit from these procedures because they are a departure from normal business, but they need those costs to be met. Cost recovery could be significant, but the Bill does not seem to put any limit on it at present. We will depend on the good will of these companies to make the Bill effective. We should not charge them for their willingness as well.

Earl Howe: My Lords, this amendment seeks to ensure that communications service providers are fully reimbursed for their costs in connection with complying with obligations under this Bill, and that arrangements for doing so are in place before the provisions in the Bill come into force. It is, of course, important to recognise that service providers must not be unduly disadvantaged financially for complying with obligations placed upon them. Indeed, the Government have a long history of working with service providers on these matters. We have been absolutely clear that we are committed to cost recovery. I want to reaffirm to the Committee a point that my right honourable friend the Security Minister made very clear in the other place: this Government will reimburse 100% of reasonable costs incurred by communications service providers in relation to the acquisition and retention of communications data. This includes both capital and operational costs, including the costs associated with the retention of internet connection records. I hope that that assurance is helpful.

The key question that this Committee needs to consider is whether it is appropriate for the Government of today to tie the hands of future Governments on this issue. I wonder whether, on reflection, the noble Baroness thinks it right to press for that. That does not mean that we take our commitment lightly or that future Governments will necessarily change course. Indeed, I suggest that it is unlikely ever to be the case; for example, the current policy has not changed since the passage of the Regulation of Investigatory Powers Act 2000 and so has survived Governments of three different colours or combinations of colours.

This Government have been absolutely clear that we practised cost recovery and we have been consistent in our policy for a very long time. Indeed, this Bill adds additional safeguards requiring a data retention notice to set out the level of contribution that applies. This ensures that the provider must be consulted on any changes to the cost model and also means that the provider would be able to seek a review of any variation to the notice which affected the level of contribution. The Government already have arrangements in place for ensuring that providers receive appropriate contribution for their relevant costs without delay, so the amendment that seeks to ensure that they are in place before the provisions come into force is, I suggest, unnecessary. Accordingly, I invite the noble Baroness to withdraw her amendment.

Baroness Hamwee: My Lords, I wrote down a number of phrases, including "not unduly disadvantaged". In the light of the absolute, clear commitment to full cost recovery, I wonder whether "unduly" is the right term. I also wrote down "100% of reasonable costs" that ought to be covered by the audit provision. The noble Earl has just referred to an appropriate contribution for relevant costs. I am sure he will understand where I am going with these terms.

The noble Earl asks whether it is appropriate to tie the hands of future Governments. I would say that in this instance it is appropriate, because a future Government can bring forward future legislation and that would be the way to do it—not to seek to resile from what everyone regards as a very important commitment given, but where there is a detraction from it in the terminology of Clause 222. I do not know whether the noble Earl is in a position to make a comment about "unduly" now. I suspect he is not. It is a rather unfair question from me.

Earl Howe: We are clear that it is important to ensure that communications service providers are neither advantaged nor disadvantaged by obligations imposed under the Bill. The Government will maintain, therefore, their long-standing policy of making a reasonable contribution to costs, but it is unthinkable that the Government would seek to place any unreasonable financial burdens on a company simply for complying with a warrant. So we are talking about reasonable costs. That is surely right. It is not appropriate for the taxpayer to subsidise unreasonable costs, but as I have said, we have made a commitment to reimburse 100% of reasonable costs incurred by the communications service providers, and that includes both capital and operational costs.

6.45 pm

Baroness Hamwee: It occurs to me that a happier term might have been "proper costs". I am certainly not arguing that the CSPs should make a profit out of this, nor that they should feel that they have got a credit card which they can max out just because they are not particularly bothered. That is not the thrust of the amendments. I have made our point as firmly as I can. The noble Earl will understand from what I am saying that I remain somewhat concerned, but this may be a matter for later. I beg leave to withdraw the amendment.

Amendment 86 withdrawn.

Amendments 87 to 89 not moved.

Clause 222 agreed.

Clauses 223 and 224 agreed.

Clause 225: National security notices

Amendment 90

Moved by ***Earl Howe***

90: Clause 225, page 174, line 6, leave out "this Act." and insert "any of the following enactments—

(a) this Act;

(b) the Intelligence Services Act 1994;

(c) the Regulation of Investigatory Powers Act 2000;

(d) the Regulation of Investigatory Powers (Scotland) Act 2000 (2000 asp 11)."

Earl Howe: My Lords, I shall also speak to the other government amendments in this group. These amendments seek to make minor changes to the notice-giving provisions in Part 9 of the Bill. Clause 225 provides for the Secretary of State to give a notice to a telecommunications operator in the United Kingdom requiring it to take steps in the interests of national security. Such a power is a critical tool in protecting our national security.

The power can only be exercised if the Secretary of State is satisfied that the steps required by a notice are necessary in the interests of national security and proportionate to what is sought to be achieved. The Government amended the Bill in the other place to provide for the application of the double-lock authorisation process to national security notices. This means that a national security notice could not be given unless a judicial commissioner had approved it.

This will replace the existing power in Section 94 of the Telecommunications Act 1984 which has been used for a range of purposes, including for the acquisition of communications data in bulk. This is now provided for in Part 6 of the Bill. Section 94 of the Telecommunications Act will be repealed. The power provided for by this clause will be used for a much narrower set of purposes than Section 94, but those purposes are nevertheless critical to our national security. The type of support that may be required from communication service providers includes the provision of services or facilities which would assist the intelligence agencies to carry out their functions more securely, or in dealing with an emergency as defined in the Civil Contingencies Act 2004.

A national security notice cannot be used for the primary purpose of obtaining communications or data. Clause 225(4) provides that a national security notice may not require the taking of any steps the main purpose of which is to do something for which a warrant or authorisation is required under the Bill. This amendment makes it clear that it is also the case that a notice may not require the taking of any steps the main purpose of which is to do something for which a warrant or authorisation is required under legislation which authorises the use of investigatory powers.

Amendment 90 lists the other statutes that provide for agencies to obtain data covertly—namely, the Regulation of Investigatory Powers Act 2000, the Regulation of Investigatory Powers (Scotland) Act 2000 and the Intelligence Services Act 1994. The amendment puts it beyond doubt that a national security notice cannot be used to circumvent the need to obtain a warrant or authorisation provided for in the Bill or in other relevant statutes.

I turn to Clause 226, which provides for the Secretary of State to give a technical capability notice to a telecommunications or postal operator requiring the operator to maintain permanent technical capabilities. The power builds on the current power in the Regulation of Investigatory Powers Act 2000 where a company can be obligated to maintain a permanent interception capability. The purpose of maintaining a technical capability is to ensure that, when a warrant is served, companies can give effect to it securely and quickly. The provision is particularly important when law enforcement or the security and intelligence agencies need to work at pace to identify and counter the actions of those who pose an immediate threat to the UK.

Subsection (7) of that clause provides for a technical capability notice to specify the period within which the steps set out in the notice are to be taken by the relevant operator. In practice, it will often be the case that a notice will require the creation of new technical systems. The time taken to design and construct such a system, including developing new pieces of technical hardware and implementing appropriate security measures, may lead to different elements of the notice taking effect at different times.

Government Amendments 94 and 95 propose a minor change to subsection (7) of the clause to make it clear that, where appropriate, a notice will permit different steps required in the notice to be taken at different times. The amendment will provide clarity to operators and ensure that the Bill reflects what needs to happen in practice. The Government propose a further minor amendment to the notice-giving provisions, this time to Clause 229, which provides for the Secretary of State to vary or revoke technical capability notices and national security notices.

Amendment 106 reads across provisions in Clause 228 that provide for the primacy of national security notices over aspects of the Communications Act 2003. The amendment does not change the effect of the provision but would make explicit that, when a national security notice is varied under Clause 229, the obligations in the notice as varied continue to have primacy over obligations imposed by Part 1, or Chapter 1 of Part 2, of the Communications Act 2003. The amendment replicates a provision previously provided for in the Telecommunications Act 1984, as amended by the Communications Act 2003, and removes any ambiguity about how the obligations set out in a national security notice as varied relate to those provided for in relevant parts of the Communications Act 2003.

Lastly, the Government propose Amendments 107, 110, and 111 to Clause 230. This clause makes provision for a person to request a review of the requirements imposed on them in a technical capability notice, or a national security notice. A person may refer the whole or any part of a notice to the Secretary of State for review after a notice is given or varied. The Government amended the Bill in the other place to provide for the double lock to be applied to the giving of notices. This

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means that a judicial commissioner must approve the Secretary of State's decision to give a notice. The amendments that we are now considering would revise the review process to reflect this new role.

The proposed revised process is as follows: before reaching a decision on the outcome of the review, the Secretary of State must consult a judicial commissioner and the technical advisory board. The technical advisory board, a group of experts drawn from telecommunications operators and the intercepting agencies, will be required to advise on the technical feasibility of the requirements set out in a notice and the costs. The judicial commissioner will consider the requirements imposed by the notice on proportionality grounds.

As was previously the case, the judicial commissioner and the technical advisory board will be required to provide an opportunity for the person to whom the notice has been given and the Secretary of State to present evidence or make representations. The conclusions of the judicial commissioner and the board will be reported to the person and the Secretary of State. After considering these conclusions, the Secretary of State may decide to confirm the effect of the notice, vary the notice or withdraw it. Where the Secretary of State decides to confirm the effect of a notice or vary a notice, the Investigatory Powers Commissioner must approve the decision. Until the commissioner has approved the review decision, there is no requirement for the person who has referred the notice to comply with the specific obligations under review.

These amendments will strengthen the review process and will properly reflect the role of a judicial commissioner in approving the decision to give a notice. I hope the Committee will feel able to accept these amendments, and I beg to move.

Lord Paddick: My Lords, my noble friend Lady Hamwee and I have three amendments in this group. As a means of probing concerns about both national security notices and technical capability notices, we are suggesting that Clauses 225 and 226 stand part of the Bill, but we propose, in Amendment 92, that the provision in Clause 226(5)(c),

"obligations relating to the removal by a relevant operator of electronic protection applied by or on behalf of that operator to any communications or data",

be deleted. These provisions are some of the most concerning for communications companies and the technology sector in the UK as they appear to provide open-ended and unconstrained powers, although I accept that the amendments that the Government have put forward today, as outlined by the Minister, provide significantly more oversight than was originally suggested in the Bill.

National security notices can require a communications provider in the UK,

"to carry out any conduct, including the provision of services or facilities, for the purpose of"—

this is in Clause 225(3)(a)(i)—

"facilitating anything done by an intelligence service under any enactment other than this Act".

So the power is not limited to facilitating the use of powers under the Bill but any other legislation as well. The power is to do anything that the national security notice requires.

Technical capability notices enable the Government to require communications operators to comply with any "applicable obligations" specified in the notice, and the recipient must not only comply but must not disclose that they have been served with the notice, seemingly including, under Clause 226(5)(c), to remove encryption. However necessary or proportionate such notices may be—and I accept that, with the double lock now in place, that will be tested—there could be a suspicion that UK communications companies and the UK technology sector are subject to such notices, undermining customer confidence in the security of the network or device that they are using.

Although such a notice may be served to persons outside the UK, and may require things to be done outside the UK, such notices are not legally enforceable outside the UK. As well as undermining public confidence in the security of UK networks and technology, such notices have the potential to act as a competitive disadvantage to UK technology businesses. Instead of the power to force a company to remove encryption from a whole service or technology, alternative and more targeted powers should be used instead.

7 pm

Lord Strasburger: My Lords, I am speaking to Amendments 92, 102 and 103 in my name. These amendments address aspects of two extremely strong powers granted to Ministers by the Bill which are tucked away at the back in Clauses 225 and 226. As we have heard, they are about national security notices and technical capability notices. Although they are not listed as powers under the Bill, they are, in fact, very strong, broad powers.

The national security notices permit, with some caveats, the Secretary of State to instruct the telecommunications operator to do whatever she considers necessary in the interests of national security. Technical capability notices enable, with some caveats, the Secretary of State to instruct an operator to develop or maintain a capability to assist the authorities. Both types of notice must be kept secret by the recipient, if the Secretary of State so wishes. In a recent amendment, the Government added the need for a judicial commissioner to approve both types of notice. This is a welcome step forward, as is the forthcoming repeal of Section 94 of the Telecommunications Act 1984, which has been used in the past to create new powers.

These three amendments address one particular capability specified in Clause 226(5)(c)—the removal of electronic protection. All the experts who gave evidence to the Joint Committee, and with whom I have discussed this matter since, agree that the phrase "removal of electronic protection" must include decryption of encrypted information and/or weakening of encryption in some way. They are deeply alarmed about it.

Encryption is a vital feature of all the financial, commercial and personal activity on the internet. The Government have confirmed on several occasions, including in answer to Questions in this House, that any weakening of our back-door access to encryption would threaten the entire operation of large parts of the digital economy. Once the integrity of cryptosecurity has been compromised for one set of users—in this

case the Government—that weakness is available for everyone, including hackers, criminals, terrorists and hostile Governments, to exploit. Furthermore, as my noble friend Lord Paddick has said, UK plc has many successful businesses operating in the field of encryption products. They are very concerned that their clients will shun their products if they suspect that the Government have secretly weakened the security that these products offer. Unless this risk is eliminated from the Bill, they may have to take their companies abroad to avoid their products being tainted by the perceived risk of government damage to the security integrity of their products.

At the end of Second Reading in this House, the Minister, the noble and learned Lord, Lord Keen, stated:

"The provisions of the Bill do not weaken encryption or threaten it. We do not seek what have sometimes been erroneously termed "back doors" into encrypted material. I would seek to dispel any such suggestion".—[*Official Report*, 27/6/16; col. 1461.]

These amendments simply seek to give force to that clear assurance by deleting the reference to "removal of electronic protection" and explicitly prohibiting the use of national security notices and technical capability notices for the purpose of "removal of electronic protection". I commend them to the Committee.

Baroness Hayter of Kentish Town: My Lords, Amendment 93 stands in my name and that of my noble friend Lord Rosser and is on the same issue of encryption. Encryption is fundamental to keeping the whole of the digital economy safe and secure. It is widely used by business, government and consumers to protect sensitive and confidential information and as a building block in the advanced security technology which has been described.

The undermining of encryption would not simply mean that the communications of criminals could be read more easily; it would risk creating a major vulnerability in the security infrastructure, which could be exploited by various malicious actors, be they criminal gangs or rogue states. So it is important for this economy and for all the financial and other businesses that depend on it that the foundations of encryption technology remain absolutely firm.

There will be times when state security undoubtedly needs access to encrypted information for a specific investigation. This is not the problem. The problem is whether the Government would ever require a company to engineer such access, enforcing the company to create a model which, if then followed by other nations with perhaps less security than ours, would lead to a lowering of standards. We welcome the statement by the Government that they do not require industry to build back doors into their encrypted products. The Bill as it stands is perhaps not as clear as the commitments the Government have made.

Clause 226 risks making encryption intrinsically weaker if a company could be asked to build the ability to break the encryption. Amendment 93 seeks to address that. We hope the Government will understand that, when the request is made, they should not ask a company to develop a new way of breaking encryption that is not already within its ability. At the moment, the clause implies that, where companies that did not have the ability to remove the protection were issued with a notice, they would be required to build that capability so as to adhere to the notice. That is worrying the companies because of the general undermining of encryption. End-to-end encryption is essential to protect sensitive personal, commercial and security information. I think the Government share our concern that we should maintain that.

The thrust of Amendment 93 makes it explicit that a company would be required to remove the electronic protection only where it had the current capacity to do so and that it should not have to engineer it. We hope it will be accepted by the Government.

Lord Harris of Haringey (Lab): My Lords, first, I should draw attention to my interests in the register on policing and counterterrorism matters. Secondly, I should make clear that my starting point on the Bill is that it is important that the developing gaps in access to communications data are addressed to protect the nation against all sorts of threats.

In any set of counterterrorism or counterespionage measures, or whatever else it might be, you have to look at the balance and weigh the benefit to the nation in protecting its citizens by having those powers against the potential downside or consequences of exercising them.

When we come to the question contained in this group of amendments—essentially about enabling or requiring companies to break the apparent encryption—we have to look carefully at the potential downsides presented by this. The first downside, or danger, is that by enabling this to happen—by creating the mechanism and requiring companies, as my noble friend Lady Hayter said, to make new arrangements so that encryption can be broken—you create a back-door mechanism. This would be available not just to the forces of good—those who are trying to protect all our security—but to cybercriminals and those who would do us ill. Therefore you need to weigh clearly what you are trying to do against whether you are creating something that will make it easier for criminals and those who would do us harm.

The second element is the extent to which what we do in this country sets a precedent that will be seized in other countries, whose interests may not be the same as ours or as positive as ours towards their citizenry. If we create that precedent, what is to prevent Governments in other countries saying that they want the same powers and therefore doing the same? That test has to be applied to quite a number of the measures in the Bill. As I say, my starting point is that I want the state to be able to fill the gap in its access to communications data that is emerging and opening up. However, I want to hear from the Government a clear explanation of why in this set of cases the benefits outweigh the potential disbenefits.

Earl Howe: My Lords, a number of amendments here separately seek to remove the encryption provisions from Part 9 or propose modifications to them.

I will begin with Amendments 92, 102 and 103, which propose removing the encryption provisions from Clauses 226 and 228. If these are anything other than probing amendments, I have to say that they are irresponsible proposals, which would remove the

[Earl Howe]
Government's ability to give a technical capability notice to telecommunications operators requiring them to remove encryption from the communications of criminals, terrorists and foreign spies. This is a vital power, without which the ability of the police and intelligence agencies to intercept communications in an intelligible form would be considerably diluted.

Let me be clear: the Government recognise the importance of encryption. Encryption keeps people's personal data and intellectual property secure and ensures safe online commerce. The Government work closely with industry and businesses to improve their cybersecurity. However, law enforcement and the intelligence agencies must retain the ability to require telecommunications operators to remove encryption in limited circumstances—subject to strong controls and safeguards—to address the increasing technical sophistication of those who would seek to do us harm.

Encryption is now almost ubiquitous and is the default setting for most IT products and online services. If we do not provide for access to encrypted communications when it is necessary and proportionate to do so, we must simply accept that there can be areas online beyond the reach of the law, where criminals can go about their business unimpeded and without the risk of detection. That cannot be right.

These provisions simply maintain the current legal position in relation to encryption and go no further. They retain the ability of law enforcement and the security and intelligence agencies to require companies to remove encryption that they have applied, or that has been applied on their behalf, in tightly prescribed circumstances. It would not—and under the Bill could not—be used to ask companies to do anything that it is not reasonably practicable for them to do.

The safeguards that apply to the use of these provisions have been strengthened during the Bill's passage through Parliament. First, the "double-lock" authorisation process now applies to the giving of notices, which means that a judicial commissioner must approve the Secretary of State's decision to give a notice. The Secretary of State must also consult the relevant operator before a notice is given. The draft codes of practice, which were published alongside the introduction of the Bill, make clear that should the telecommunications operator have concerns about the reasonableness, cost or technical feasibility of any requirements to be set out in the notice—which includes any obligations relating to the removal of encryption—it should raise them during the consultation process. Furthermore, the new privacy clause in the Bill requires that regard be given by the Secretary of State to the public interest in the integrity and security of telecommunications systems when deciding whether to give a technical capability notice.

7.15 pm

Finally, a telecommunications operator who is given a technical capability notice may refer any aspect of the notice, including obligations relating to the removal of encryption, back to the Secretary of State for a review. In undertaking such a review, the Secretary of State must consult the Technical Advisory Board—a non-departmental public body that includes representatives from industry—about the technical and financial requirements of the notice, as well as a judicial commissioner about its proportionality. Should the Secretary of State decide to confirm the effect of the notice, the Investigatory Powers Commissioner must approve this decision. All these safeguards combined ensure that an obligation to remove encryption under Part 9 will be subject to very strict controls and may be imposed only where it is reasonably practicable for the relevant operator to comply with that obligation.

I also make absolutely clear that the Bill's provisions on encryption do not provide for a national security notice to be used to require the removal of encryption. The encryption provisions in Part 9 relate to technical capability notices only. The Bill was amended in the other place to make this clear.

For all the reasons I have outlined, these amendments are unnecessary and undermine the important principle that there should be no guaranteed safe spaces online for terrorists and criminals to communicate.

Lord Paddick: Can the Minister comment on the fact that increasingly, encryption is end-to-end, and can he say whether national security notices and technical capability notices would be of any use in circumstances where people were using end-to-end encryption? Can he also comment on a suggestion that instead of these notices, targeted equipment interference would be more useful in that it could deal with the problem of end-to-end encryption?

Earl Howe: Certainly, targeted equipment interference is, if you like, the next step should interception not be possible for any reason. However, I will answer the noble Lord's first question, on end-to-end encrypted services. We start from the position that we do not think that companies should provide safe spaces to criminals to communicate. They should maintain the ability, when presented with an authorisation under UK law, to access those communications. We will work with industry to ensure that, with clear oversight and the legal framework I have in part alluded to, the police and intelligence agencies can access the content of terrorists' and criminals' communications when a warrant has been approved in the usual way.

We will of course consider what steps are reasonably practicable for an individual telecommunications operator, taking account of a range of factors, including technical feasibility and likely cost. We recognise that what is reasonably practicable for one telecommunications operator may not be for another, so any decision will have regard to the particular circumstances of the case. However, I cannot go into our relationships with individual companies, as the noble Lord will understand. It is important to understand that the Bill does not ban encryption or do anything to limit the use of fully encrypted services.

Lord Strasburger: I thank the Minister for giving way. I think this is the first time I have heard the Government admit that the phrase "removal of electronic protection" does in fact refer to encryption.

I want to emphasise—and anybody in the cryptography industry will spell this out—that you cannot have it both ways. Either encryption is secure, or it is not; it cannot be insecure for a small group of users and secure for everybody else. Once encryption is weakened,

it is weakened for everyone and once this is done at the request of the Government, it is available to all the people I listed earlier who would do us harm. I would also point out that there are a myriad of encryption products available outside the UK—ISIS has its own set, and I have seen the manual. There are any number of ways that people who want to use encryption for malign purposes can acquire it and use it in a way that UK companies cannot break.

Lastly, when I was at GCHQ, it seemed fairly relaxed about the threat of encryption because it is very confident that it can use the other means we have referred to, such as equipment interference, to get the unencrypted data it wants. But the main point, which the Government really do have to take on board, is that encryption is either strong or it is not. It cannot be partially strong—that is, strong for most and weak for the Government.

Earl Howe: I shall of course reflect on those points, which I was already aware of. It is important to emphasise that any encryption arrangements that a communications service provider has not itself applied, or had applied on its behalf, would almost inevitably fall outside these provisions because it would not be reasonably practicable for the company to de-encrypt. Many of the biggest companies in the world rely on strong encryption to provide safe and secure communications and e-commerce, but nevertheless retain the ability to access the contents of their users' communications for their own business purposes—and, indeed, those companies' reputations rest on their ability to protect their users' data. In many cases, we are not asking companies to do something that they would not do in the normal course of their business, but I note what the noble Lord has said.

Amendment 93 deals with the subject of end-to-end encryption more specifically. This matter was discussed in detail in another place, so I will reiterate what was said there to explain why this is not an appropriate amendment. I have already outlined the strict safeguards that will apply. This amendment is not necessary because the Bill makes absolutely clear that a telecommunications operator would not be obligated to remove encryption where it is not reasonably practicable for it to do so. It is important to highlight that the amendment would in many cases prevent our law enforcement and security and intelligence agencies from being able to work constructively with telecommunications operators as technology develops to ensure that they can access the content of terrorists' and criminals' communications. Depending on the individual company and circumstances of the case, it may be entirely sensible for the Government to work with them to determine whether it would be reasonably practicable to take steps to develop and maintain a technical capability to remove encryption that has been applied to communications or data. But the amendment would signpost to terrorists and criminals that there are communications services they can use to communicate with each other unimpeded and which the authorities will never be able to access. That cannot be right.

Amendments 108 and 109 propose changes to Clause 230, which provides for a telecommunications or postal operator to request a review by the Secretary of State of the obligations imposed on it by a technical capability notice or a national security notice. The Secretary of State must seek the views of the Technical Advisory Board—a group of experts drawn from the telecommunications operators and the intercepting agencies—and the Investigatory Powers Commissioner before deciding the review.

Amendment 109 seeks to insert the double-lock authorisation process into that review. I contend that this is unnecessary. The Government have an amendment which provides that the Secretary of State must initially consult the judicial commissioner on proportionality, and that the Secretary of State's decision following the review must be approved by the Investigatory Powers Commissioner. As I have explained, if after consulting the commissioner and the Technical Advisory Board, the Secretary of State decides to confirm the effect of a notice or vary it, the Investigatory Powers Commissioner must approve that decision, so the amendment is not required.

Amendment 108 seeks to require the Technical Advisory Board to consider the consequences for others likely to be affected by obligations imposed by a notice. This proposal was first raised in the other place and, following discussion, considered to be unnecessary. I will briefly explain why. First, the Technical Advisory Board has a very specific role to play in advising the Secretary of State on cost and technical grounds. This role is reflected in its membership. Board members are drawn from the telecommunications industry and those persons entitled to apply for warrants and authorisations under the Bill. These experts are well placed to consider the technical requirements and the specific financial consequences of the notice. If they consider it appropriate, they may look beyond cost and technical feasibility, but those factors are rightly their focus.

The responsibility for considering the broader effect of the notice on the operator to whom it has been given sits with the judicial commissioner, and it is right that the commissioner has this role. As part of any review into the obligations set out in a notice, the commissioner must report on their proportionality. This would include an assessment of its consequences, both for the person seeking the review and for anyone else affected by it. Furthermore, the clause requires the commissioner to seek out the views of the person who has received the notice. The person will have an opportunity to raise any concerns regarding the effect of the notice with the commissioner for consideration, and the commissioner must report his or her conclusions to the person and the Secretary of State. In my view, and as concluded following discussion in the other place, the Investigatory Powers Commissioner is rightly placed to carefully assess proportionality as a whole. The amended wording would introduce unnecessary duplication and ambiguity over what the board and Investigatory Powers Commissioner are each considering.

Finally, allow me to turn to another part of the Bill. I welcome the intent of Amendment 129, which seeks to clarify the scope of the restrictions on the acquisition of internet connection records. The clarity that noble Lords intend to create with this amendment is already provided in the code of practice, and I hope I can reassure noble Lords that there are good reasons why this definition should not appear in the Bill. The Bill

[Earl Howe]
already contains definitions of "telecommunications service" and "communication" which make very clear that a communication can include messages between individuals, between individuals and machines, and between machines. This maintains the existing position in RIPA, and it is absolutely right that the powers and, indeed, safeguards in this Bill apply to all forms of communication.

Taken in its broadest sense an "internet communications service" is simply a telecommunications service that involves communication over the internet and it should rightly include all forms of internet communication. But in the context of internet connection records the term is used to mean services that facilitate communications between two or more individuals, like email or social networking websites. An "internet service", by contrast, is any other communication service a person could connect to over the internet, including person to machine communications, such as a person accessing a website. This distinction is made clear in the code of practice, which is the appropriate place for it because the definition has a different meaning in other contexts in the Bill.

I hope that noble Lords will be reassured that the definition is contained in the code of practice. We are concerned that defining "internet communications service" on the face of the Bill in the way proposed could cast doubt on the scope of the Bill in so far as it applies to internet communication services more generally. For all the reasons that I have set out, I ask noble Lords not to press their amendments.

7.30 pm

Lord Harris of Haringey: My Lords, can the Minister clarify for me—I am sure that other noble Lords have got to the point precisely—that the requirements that the Bill seeks to create will apply only where a service provider has offered a service which most people might assume is secure and encrypted but has built in an existing arrangement which allows it to access it? Would it apply only in those circumstances? If that is not the case, perhaps the Minister could explain in what other circumstances it might apply. Can he further tell us whether there is an expectation in the Bill that, where a service provider is developing a new service, it must ensure that it has the facility to access what the user would assume are encrypted data?

Earl Howe: The answer to both questions is that it depends on what is reasonably practicable for the communications service provider. The power will apply usually to encryption that the provider has applied or has been applied on its behalf. If there are other circumstances where it would apply, I will take advice and write to the noble Lord, but we come back to what is reasonably practicable for the company. It is why the Government maintain a dialogue with communications service providers to ascertain what is practicable and what is not, and what would be cost effective and what would not be. However, broadly speaking, the noble Lord was right.

Lord Harris of Haringey: I am sorry to press the point, but I need to understand it. I understand the Minister's answer in respect of the requirement applying where it is reasonably practicable because the encryption arrangement has been applied by the service provider, but is he saying that there is an expectation that in building new services a service provider should create something where it is technically possible for it to undermine that encryption? If so, that would raise a very different point which is important to clarify. Is the service provider required to make it technically practicable in future services as it develops them for this to be allowed?

Earl Howe: It might be, but it might not be. Again, it depends on what is reasonably practicable in the particular circumstances. Those circumstances might vary from provider to provider and from situation to situation, so it is not possible for me to generalise about this, but I will take further advice and write to the noble Lord about it.

Baroness Hayter of Kentish Town: My Lords, the Minister spoke about what is possible and reasonable, but the point of our Amendment 93 is that a notice may not impose the requirement to build a facility that would break end-to-end encryption. We may need to return to this on Report, but it would perhaps be useful to have a discussion between now and then about imposing the requirement to build capacity to break end-to-end encryption.

Lord Strasburger: I fear that the Minister is taking himself down a long cul-de-sac here, because the implication of what he is saying is that no one may develop end-to-end encryption. One feature of end-to-end encryption is that the provider cannot break it; encryption is private between the users at both ends. He seems to be implying that providers can use only encryption which can be broken and therefore cannot be end to end, so the next version of the Apple iPhone would in theory become illegal. I think that there is quite a lot of work to be done on this.

Earl Howe: I was certainly not implying that the Government wished to ban end-to-end encryption; in fact, we do not seek to ban any kind of encryption. However, there will be circumstances where it is reasonably practicable for a company to build in a facility to de-encrypt the contents of communication. It is not possible to generalise in this situation. I am advised that the Apple case to which the noble Lord referred could not occur in this country in the same way.

Lord Harris of Haringey: Is the Minister therefore saying the Government's expectation is that service providers will in future ensure that it is reasonably practicable for them to access those communications? If that is the case, I think that he is raising a whole new group of issues.

Earl Howe: The Bill is clear that any attempt to obtain communications data must be necessary and proportionate, or it will not be permitted. It is crucial that the Bill provides a robust, legal framework which means that the law is consistently applied correctly. That is why we are introducing the double lock involving judges signing off warrants for the most intrusive powers, which means that the Secretary of State's decisions, other than in the most urgent cases, will be

independently scrutinised before warrants can be issued. I come back to the central point here, which relates to encryption: we do not think that companies should provide safe spaces to terrorists and other criminals in which to communicate. They should maintain the ability when presented with an authorisation under UK law to access those communications.

Amendment 90 agreed.

Amendment 91

Moved by ***Earl Howe***

91: Clause 225, page 174, line 10, after "230" insert "and (Approval of notices following review under section 230)"

Amendment 91 agreed.

Clause 225, as amended, agreed.

Clause 226: Technical capability notices

Amendments 92 and 93 not moved.

The Lord Speaker (Baroness D'Souza): My Lords, there is mistake in Amendment 94. It should read:

"Page 175, line 22, after 'notice' insert '—

(a)'"

Amendments 94 to 96

Moved by ***Earl Howe***

94: Clause 226, page 175, line 22, after "notice" insert "—

(a) "

95: Clause 226, page 175, line 24, at end insert ", and

( ) may specify different periods in relation to different steps."

96: Clause 226, page 175, line 28, after "230" insert "and (Approval of notices following review under section 230)"

Amendments 94 to 96 agreed.

Clause 226, as amended, agreed.

Clause 227: Approval of notices by Judicial Commissioners

Amendments 97 to 99 not moved.

Amendments 100 and 101

Moved by ***Earl Howe***

100: Clause 227, page 175, line 40, after "must" insert "—

(a) "

101: Clause 227, page 175, line 41, at end insert ", and

( ) consider the matters referred to in subsection (2) with a sufficient degree of care as to ensure that the Judicial Commissioner complies with the duties imposed by section 2 (general duties in relation to privacy)."

Amendments 100 and 101 agreed.

Clause 227, as amended, agreed.

Clause 228: Further provision about notices under section 225 or 226

Amendments 102 to 105 not moved.

Clause 228 agreed.

Clause 229: Variation and revocation of notices

Amendment 106

Moved by ***Earl Howe***

106: Clause 229, page 177, line 40, leave out "(11)" and insert "(12)"

Amendment 106 agreed.

Clause 229, as amended, agreed.

Clause 230: Review by the Secretary of State

Amendment 107

Moved by ***Earl Howe***

107: Clause 230, page 178, line 13, leave out "the Investigatory Powers" and insert "a Judicial"

Amendment 107 agreed.

Amendments 108 and 109 not moved.

Amendment 110

Moved by ***Earl Howe***

110: Clause 230, page 178, line 29, at end insert—

"( ) But the Secretary of State may vary the notice, or give a notice under subsection (9)(b) confirming its effect, only if the Secretary of State's decision to do so has been approved by the Investigatory Powers Commissioner."

Amendment 110 agreed.

Clause 230, as amended, agreed.

After Clause 230

Amendment 111

Moved by ***Earl Howe***

111: After Clause 230, insert the following new Clause—

"Approval of notices following review under section 230

(1) In this section "relevant notice" means—

(a) a national security notice under section 225, or

(b) a technical capability notice under section 226.

(2) In deciding whether to approve a decision to vary a relevant notice as mentioned in section 230(9)(a), or to give a notice under section 230(9)(b) confirming the effect of a relevant notice, the Investigatory Powers Commissioner must review the Secretary of State's conclusions as to the following matters—

(a) whether the relevant notice as varied or confirmed is necessary as mentioned in section 225(1)(a) or (as the case may be) section 226(1)(a), and

(b) whether the conduct required by the relevant notice, as varied or confirmed, is proportionate to what is sought to be achieved by that conduct.

(3) In doing so, the Investigatory Powers Commissioner must—

(a) apply the same principles as would be applied by a court on an application for judicial review, and

(b) consider the matters referred to in subsection (2) with a sufficient degree of care as to ensure that the Investigatory Powers Commissioner complies with the duties imposed by section 2(general duties in relation to privacy).

(4) Where the Investigatory Powers Commissioner refuses to approve a decision to vary a relevant notice as mentioned in section 230(9)(a), or to give a notice under

section 230(9)(b) confirming the effect of a relevant notice, the Investigatory Powers Commissioner must give the Secretary of State written reasons for the refusal."

Amendment 111 agreed.

Clause 231 agreed.

Amendments 112 to 114 not moved.

House resumed.

Defence: Continuous At-Sea Deterrent

Motion to Take Note

7.42 pm

Moved by ***Earl Howe***

That this House takes note of the Government's assessment in the 2015 National Security Strategy and Strategic Defence and Security Review that the United Kingdom's continuous at sea nuclear deterrent should be maintained.

The Minister of State, Ministry of Defence (Earl Howe) (Con): My Lords, a Motion on the UK's independent minimum credible nuclear deterrent will be debated in the other place on Monday next week, and in particular the Government's commitment to build four new ballistic missile submarines to maintain the UK's continuous at-sea deterrent posture. Given the overwhelming importance of the matter at hand and its pivotal implications for the future security and prosperity of this country, time has been set aside for us to consider the issues at stake and to help inform the forthcoming debate.

I do not need to remind your Lordships that the first duty of any Government is to safeguard their people against external aggression, a task that grows in complexity and scale along with the palpable threats that inform it. In the words of the 2015 *Strategic Defence and Security Review:*

"Defence and protection start with deterrence, which has long been, and remains, at the heart of the UK's national security policy".

Deterrence means convincing potential aggressors that the benefits of attacking are far outweighed by the consequences. Decades of careful foreign and defence policy, formulated in concert with our allies, have ensured that our deterrence arsenal is well stocked, ranging from the soft-power tools of diplomacy and economic policy on the one hand to the hard power of our Armed Forces on the other.

At the extreme end of this arsenal is, of course, continuous at-sea deterrence—or CASD—the UK's minimum credible and assured nuclear deterrent that is the ultimate guarantor of our national security and way of life. We have maintained CASD successfully and unceasingly for nearly 50 years to deter nuclear attack, nuclear blackmail and extreme threats that cannot be countered by any other means. Our nuclear deterrent kept us and our NATO allies safe for the duration of the Cold War and it continues to do so in this post-Cold War era. That is why this Government are committed to building four new ballistic missile submarines to replace our ageing Vanguard fleet—a commitment that we stated prominently in the manifesto on which we were elected last year. It is a commitment that must be acted upon now if we are to replace our current fleet on time and without a break in our CASD posture. It is a commitment that no responsible Government should, or indeed could, rescind, for three compelling reasons. First, we live in an increasingly dangerous and uncertain world. We cannot rule out the future possibility of extreme threats to the UK emerging. Therefore, CASD remains as relevant as ever. Secondly, we take our responsibilities to the British people and to our allies seriously. Thirdly, in an unstable nuclear world, we must be realistic when it comes to the goal of disarmament. So the reasons are relevance, responsibility and realism; let me take each in turn.

First, I will speak to relevance. Despite being a by-product of the Second World War and a defining facet of the Cold War, the nuclear deterrent is no relic of the past. Yes, the world has changed. The Soviet Union no longer exists, new global power dynamics have evolved and technology has changed the way we fight wars, but the nuclear threat has remained throughout. In fact, if anything, it has become more dangerous as the international situation has become increasingly fragmented and less predictable. The facts speak for themselves. Today, there are an estimated 17,000 nuclear weapons around the world, a figure that could well rise. North Korea is particularly worrying. It has stated a clear intent to develop and deploy nuclear weapons. This year, it has conducted a fourth nuclear test, a space launch that used ballistic missile technology, and several ballistic missile launches. It is attempting to develop a submarine launch capability for nuclear weapons, and claims to be testing components for a future intercontinental ballistic missile capability.

Nuclear aspirants aside, the threat from established nuclear states remains clear and present. As I speak, a resurgent Russia is in the midst of upgrading its nuclear forces, including commissioning a new class of nuclear-armed submarine. At the same time, it has increased the frequency of its snap nuclear exercises, and there has been a notable escalation in its official rhetoric about the use of nuclear weapons—most recently, threatening to base nuclear forces in Kaliningrad and Crimea.

This is the briefest of glimpses at our national threat assessment. However, the decision to replace our Vanguard fleet rests not on the here and now but on what the world could look like in the 2030s, 2040s, 2050s and beyond, when the Successor fleet would be in operation. Given the parlous state of world affairs now, can we say with any certainty that the nuclear threat will disappear within that time or that no new threat will emerge? Of course we cannot. Given our inability to predict some of the world's most seismic events in recent decades—the end of the Cold War, the rise of Daesh and Russia's annexation of Crimea—is it fair to say that, within reason, anything could happen? Of course it is.

It is our duty, not only to current generations but to ones not yet born, to act now to retain our strategic nuclear deterrent beyond the life of the current system and so preserve the ultimate safeguard of our national security. Let me be unequivocal here: nothing less than our current CASD posture will do. Those who seek to

dilute our deterrent by proposing a different, cheaper or diminished posture are no better than those who seek to scrap Trident altogether. We estimate four new submarines would cost £31 billion spread over 35 years and have set a contingency of £10 billion, a prudent estimate based on past experience of large, complex projects. On average, that amounts to 20 pence in every £100 the Government spend, for a system that will provide a capability through to the 2060s. I believe that this is a price worth paying to keep our country safe.

From 2020, all the Royal Navy's operational submarines will be based at Faslane. HM Naval Base Clyde is one of the largest employment sites in Scotland and will sustain around 8,200 military and civilian jobs by 2022. Furthermore, the specialist skills required in this industry—in engineering, software development and design—will keep our nation at the cutting edge of technological advancement for many years to come. If the decision were taken to discontinue the programme, not only would we lose the ultimate guarantee of our security and sovereignty, but local economies would be crippled and key skills lost, while our chances of regaining those skills and capabilities would be dealt a mortal blow.

But this is about far more than national self-interest: it is about our international responsibility, because if we failed to renew our strategic nuclear deterrent, we would be gambling with not only our own future but the future security of our NATO allies. NATO is a nuclear alliance that is the cornerstone of our defence, one that has arguably become all the more load-bearing in the wake of Brexit. Along with those of the US and France, our nuclear forces are a key facet of NATO's commitment to collective defence, providing a robust nuclear umbrella under which many non-nuclear nations shelter. Our contribution massively enhances the alliance's overall deterrent effect by providing added agility and resilience and by complicating the calculations of potential adversaries. To renege on our commitment while expecting the US and France to continue protecting us would be a dereliction of duty that would diminish our integrity in the eyes of our allies, diminish NATO's credibility in the eyes of the world, and embolden our adversaries.

That leads me to my final point, which is about the need for a good dose of realpolitik when it comes to considering how a decision not to renew our deterrent would be received by our adversaries. All sides of this debate share an ambition to see a world in which nuclear weapons states feel able to relinquish their weapons. The UK is committed to working towards multilateral disarmament under the Non-Proliferation Treaty. In fact, we have done more than most to fulfil our obligations. Since the height of the Cold War, we have reduced our nuclear forces by well over half, and we remain committed to reducing our stockpile of nuclear weapons to no more than 180 warheads by the mid-2020s, approximately 1% of the declared global total. But despite our honourable intent, have others had a change of heart? Quite the opposite. Instead, we have an increasingly recalcitrant Russia and North Korea and the threat of state-sponsored nuclear terrorism.

We all want to see a world where nuclear weapons are no longer necessary, but unilateral disarmament by the UK is not a route to achieving that. It would only weaken our ability to bring about lasting change. The only viable alternative is to work multilaterally to create a safer and more stable world in which states with nuclear weapons have the confidence to relinquish them. It sounds almost as Utopian as unilateral disarmament, but it can be done. Just look at the success achieved by the US and the former Soviet Union under the Strategic Arms Reduction Treaty, which reduced both parties' deployed strategic warheads from about 12,000 to some 6,000 in total. Look at the recent deal with Iran—encouraging evidence of what we can achieve through diplomatic negotiations.

So, despite the very real threats that we face, there is cause for hope, and we should find further grounds for hope in our collective will—in this Chamber, in this country and among our allies—to create a world in which nuclear weapons are no longer necessary. But it is imperative that we go about achieving this in a measured, intelligent and cohesive way that does not leave us, our allies and future generations fatally exposed in a world fraught with danger. Let us make no mistake. We stand at this moment at a critical juncture. One path leads to uncertainty, vulnerability and powerlessness on an unstable and volatile world stage, while the other will lead us to a place where we can continue to shape our own future and have a positive stake in global affairs. To me, as a part of the Government entrusted with defending our realm, there is no real choice here, just an imperative. We must replace our Vanguard class submarines. No responsible Government would or could do otherwise.

7.54 pm

Lord Tunnicliffe (Lab): My Lords, I thank the Minister for introducing the debate and I extend my sympathies to him for having an employer that requires him to work such an excessively long day. The hour is late so I will try to make my contribution as brief as possible, but before I move on to my main point, I have a question for the Minister: why now? Why is this vote to be taken next Monday? I do not resile in any way from the commitment made and passed by the Labour Party in the past to hold a vote at around this time; that is, at about the point of what we would have once called the main gateway. But the actual date is next week. We have to make a decision based on no Green Paper, no White Paper and the fact that the Defence Select Committee has not addressed the issue recently. There are no obvious programme milestones. The only thing the Government have produced before the noble Earl's speech is a document published on 24 March this year which is grossly superficial. It does not set out any costs or lay out seriously the programme.

I am particularly sorry for the new Prime Minister. It is probably only tonight that she will be getting the detailed secret information that only she and certain high-ranking officials are privy to about this issue, yet for political reasons on Monday she will have to support this decision wholeheartedly. I also believe that there is a Chilcot dimension to this. There is a new question around how decisions about going to war are made. I recognise that we cannot know the detail, but we need assurances that those points have been taken into account. Finally, I hope that the Government can give us some indication of the ongoing scrutiny of this

[Lord Tunnicliffe]
project. The partnership of Her Majesty's Government and BAE Systems does not have a very good record in delivering submarines—and indeed not a very good record in delivering many things. We need to look at the whole issue of value for money and I believe that Parliament should be involved.

The purpose of this debate is not to come to a conclusion as such; there will be no vote at the end and we cannot divide on the matter. It is really to allow many wise and experienced people in the Chamber to get their views out in the open and available to Members at the other end so that they can take account of them in their debate. I have to say that my contribution will add little to that since it contains very little advocacy, but it is appropriate that I set out in a little detail at this point the Labour Party's position because other noble Lords may want to refer to it.

The 2015 Labour Party election manifesto contained on page 78 the following paragraph:

"Labour remains committed to a minimum, credible, independent nuclear capability, delivered through a Continuous At-Sea Deterrent. We will actively work to increase momentum on global multilateral disarmament efforts and negotiations, and look at further reductions in global stockpiles and the numbers of weapons".

Sadly, we did not win that election and therefore not unreasonably there was a review of our policies. It took place through an organisation known as the National Policy Forum, which produced a report. Page 69 contains the following:

"The manifesto outlined Labour's commitment to a minimum, credible, independent nuclear capability, delivered through a Continuous At-Sea Deterrent. It also stated the Party's commitment to actively work to increase momentum on global multilateral disarmament efforts and negotiations, and look at further reductions in global stockpiles and the numbers of weapons".

That document went to our party conference and was seized upon by the conference arrangements committee, where there was an effort to have a separate vote on the Trident renewal issue. The attempt was roundly defeated, and received less than 1% support from the trade unions and only a little more than 7% support from constituency Labour parties. Subsequently, there was an affirmative vote to accept the *National Policy Forum Report 2015* which contained the paragraph that I have just quoted.

Given that only our conference can change policy, the Labour Party is committed to the maintenance of a continuous at-sea deterrent. However, it is clear that our leader Jeremy Corbyn does not necessarily personally hold that view firmly. He is strongly opposed to weapons of mass destruction and a long-time supporter of the Campaign for Nuclear Disarmament. He is opposed to the replacement of Britain's Trident nuclear weapons system and supports the creation of a defence diversification agency to assist the transfer of jobs and skills to the civilian sector. It is not that Members do not know of that position but I felt it reasonable to set it out.

Accordingly, he initiated, as party leaders do, a review of our defence policy. I am informed that that review has not reached a conclusion on the deterrent, has not been published and, so far, has not gone to our conference. In parallel with that process, the Labour Back-Bench defence committee in the other place has conducted a comprehensive review of deterrent policy, held many meetings, consulted a wide variety of experts and witnesses and has concluded:

"The report therefore concludes that there has been no substantial change in the circumstances surrounding the deterrent since the 2015 Labour election manifesto and its annual conference later that year reaffirmed the party's commitment to replace the UK Vanguard submarine fleet. Renewal by completing the current programme to build four successor submarines to maintain continuous at-sea deterrence continues to offer the maximum security and value for money. Other options either compromise UK security or add to cost. Many alternatives do both. The recommendation of this report is that Labour maintains its existing policy of supporting renewal in the upcoming vote".

I hope that I have presented a fair overview of the Labour position. I reiterate that Labour supports the maintenance of a continuous at-sea nuclear deterrent. Later this evening, my noble friend Lord Touhig will make the case for that position with his usual passion and vigour.

8.03 pm

Baroness Falkner of Margravine (LD): My Lords, I should declare that I am a member of the Joint Committee on the National Security Strategy. I reassure the noble Lord, Lord Tunnicliffe, that I take comfort from the fact that the debate on replacing Vanguard has been going on since 2006, when his Government were in power. As for the Liberal Democrats, our thinking about Trident has been an almost continuous feature of Lib Dem angst for the 25 years in which I have been involved in the party's policy dimension. Perhaps because I am an outlier in that debate, I am not involved in it any longer. However, let me set out my thoughts.

It was because of our appreciation that the political and security environment as well as technology were changing apace that on joining the coalition one of our red lines was that the country should have an independent analysis of the merits of the proposal to renew the Trident submarines. The result was the *Trident Alternatives Review*, which was the first to be undertaken in this country in the 60-year history of the UK being a nuclear power. It is to the credit of the coalition that its conclusions were made public so that the country at large could appreciate the reasoning behind the conclusions. The main objective of TAR was to assess the viability of different options open to the UK beyond like-for-like replacement of the Vanguard-Trident system, and particularly to look at credible alternatives. TAR concluded, as I think we all agree across this House, that to use nuclear weapons will be a failure of the entire edifice on which our policy of nuclear deterrence rests. The review said that nuclear weapons are,

"a political tool of last resort rather than a war fighting capability".

Effectively this reiterated that the UK ruled out the actual use of a weapon unless as a final resort under existential threat, and uses its nuclear capability as a deterrent to potential aggressors in a limited fashion, as the noble Earl, Lord Howe, set out.

However, I do not see an independent nuclear deterrent solely as part of our own national security architecture. We also use it to fulfil our international obligations. TAR states that,

"the UK's deterrent is made available to NATO as a contribution to the Alliance's collective deterrence".

That is even more relevant in the week after the 60th anniversary of founding of the Warsaw Pact. This is relevant in that the brave new world of hope for an absence of war has not come to pass. NATO has had to deploy along its eastern frontier again, and faces challenges that we did not contemplate when it established its open-door policy of accepting into membership all those states that were ready. In a world where NATO, in my view, has extended its Article 5 collective defence umbrella too far and fast, it is we, alongside France and the US, who carry the most credible deterrence capability through being nuclear weapons states.

I turn to the arguments for continuous at-sea deterrence, CASD, or the proposal for a like-for-like replacement. TAR looked at alternative systems and alternative postures—continuous at-sea deterrence or reduced levels of patrol. CASD, in order for the UK's nuclear deterrent to be credible, is the form that we have had all these years. However, credibility is the foundational pillar on which deterrence strategy rests, whether nuclear or non-nuclear. To retain credibility you need to consider five things: readiness, reach, resolve, survivability and destructive power. Alternative systems and alternative postures are interlinked because the former affects the latter. When looking at postures, the criterion for credibility was important. The current CASD posture is capable of delivering high readiness and reach, in the sense that submarines can patrol very far from UK shores. These capabilities demonstrate our resolve. The successor submarines' ability to be detected only when they launch a weapon means that they would survive an attack and be able to attack again. The Trident warhead was deemed to have sufficient destructive power. All five criteria known to adversaries fulfilled the whole point of deterrence, and it is accepted widely that these capabilities would not be duplicated in the short term by other powers, particularly not by those there is so much talk about which are deemed to be rogue states.

However, I am aware that even in the short space of time since 2013, the political and technological environment has changed. In political terms, we have a more belligerent posture adopted by traditional nuclear weapon states. On the other hand, we know that growing numbers of our citizens are concerned about the threats of the use of force and nuclear proliferation. We also have technological advances such as more advanced ballistic missile defences and antisubmarine warfare. I therefore accept that missile defence shields, cyberwarfare and stealth systems inter alia could potentially render successor systems and missiles redundant. I also accept that in time we may have to move beyond reliance on a single delivery system.

I would have wanted also to consider the arguments about costs because they are very much part of the political debate but time does not permit that and I need to conclude. Suffice it to say that an in-service running cost of around 6% of the annual defence budget, or of 0.13% of total government spending, may be a significant sum but it should be seen as a worthwhile insurance policy. For those reasons I have to say that I am for the Motion.

8.09 pm

The Lord Bishop of Chester: My Lords, the issue before the other place is the procurement of four new submarines, but it is not unreasonable at this time to contribute to our ongoing reflection on why we have a nuclear deterrent at all. It is often said that countries and armies tend to prepare to fight the war that was fought 50 or more years ago without noticing how the world has changed, not least technology. Indeed, our recollection of the Battle of the Somme—when infantry charged machine guns—brings that rather vividly to mind.

A lot has changed in this respect since the Cold War in the 1950s and 1960s, when our thinking on nuclear deterrence was first shaped. One of my questions is whether our own thinking is moving on with the changed context from those now rather far off days. An empire has gone and the UK is no longer the international player that it once was, even if we do continue to punch above our weight in geopolitical terms. NATO has developed into surely the most significant mutual defence pact in history. Communism has essentially disappeared and, whatever one makes of Russia—which Churchill, of course, famously called, "a riddle wrapped in a mystery inside an enigma"—
the threat that it poses is surely very different from what went before. For all the criticism that is made of President Putin, I personally do not recognise the same level or type of threat from him as from Stalin and Kruschev, but I recognise that some people take different views. I also recognise that the invasion—or the annexing—of Crimea was illegal, but it did have the support of 98% of the population, as I understand it.

The threats that the world faces have mutated in the face of the culture war between fundamentalist strands of Islam, with their rejection of all that western civilisation represents, and the ever more ubiquitous presence of the symbols of the western world on the global stage—so terrorism has become global. Perhaps, God forbid, the forces of terrorism will one day acquire a nuclear capacity of some sort but, if they do, I am not sure that submarine-based nuclear missiles, however sophisticated, will be much of a counter threat.

The extraordinary rise of cybercrime and cyberthreats can be predicted only to become an ever greater—probably much greater—threat in the years and decades to come. The digital revolution will also support ever more effective shields against ballistic missiles, as we are already seeing. Perhaps sophisticated surveillance will come to pose greater threats against submarines if major states in confrontation continue to adopt an explicit policy based on mutually assured destruction. I can never quite get away from the fact that the first letters of those words spell "mad". The rules of the game are of course much less certain today compared with the assumptions that were more easily made in the 1950s and 1960s. Is it still possible to envisage the circumstances in which this country would unilaterally send one of our Trident missiles on its way to a real target? It is certainly more possible today to wonder whether this is still credible.

The Christian churches in this country, in their official policies and pronouncements, present something of a consensus against the proposed renewal of Trident

[The Lord Bishop of Chester]
submarines. No doubt individual Christians take a variety of views across the whole spectrum—of course they do. In the Church of England's case, in 1983 there was a report, *The Church and the Bomb*, in which it toyed with the hope that the UK might in fact unilaterally renounce its nuclear deterrent, but the Church rowed back from that and has never adopted that position, recognising that it was not equipped to reach such a conclusion in such a complex, political set of circumstances as surrounds this debate.

Clearly today the UK is set upon ordering a new generation of submarines equipped with nuclear missiles, which will renew this country's nuclear deterrent until 2060 or beyond. I simply express the hope that, during that period, ever greater efforts will be made to reduce the threat to our world from nuclear bombs and that we will continue to keep under review why we are making such significant decisions, which will have an impact into such a far-distant future—a future that will change in ways we cannot anticipate today. Nuclear weapons cannot be uninvented, I fully accept that, but our continued and very expensive possession of an independent deterrent will need a justification that, I believe, will need to be kept under continual review.

One line of political justification from successive Governments, from Attlee and Bevan down to the Blair years in particular, has been that the possession of deliverable nuclear weapons, however useless they might be in military practice, helps to keep us at the top table in global politics. I noted that in the Minister's introductory speech, very little was made of that argument; I think he hinted at it at one point. But my question is whether that argument really has a future for us. Can the Minister confirm to what extent it is still a major factor in the thinking of the current Government that, in some sense, possessing our independent deterrent keeps us at the top table in political terms?

8.16 pm

Lord King of Bridgwater (Con): I very much agree with the closing comments of the right reverend Prelate that this enormous programme, which is of great significance for our country, should certainly be kept under continuous review. It has been the feature of the years of our deterrent and the changes made progressively over that time. I feel a certain nostalgia. I did the roll-out of one of the Vanguard submarines at Barrow-in-Furness and it is rather worrying to think that, if that is getting a bit too old and needs replacement, that might go for me as well.

If I were not here tonight I would be at the Sir Michael Quinlan memorial lecture, which is taking place this evening in the Foreign Office. There are many here in the Chamber tonight who knew him well. He was with me at the Ministry of Defence as an outstanding Permanent Secretary, but he was also known as the high priest of nuclear deterrence and was indeed credited, I believe, with writing out for Margaret Thatcher the moral case for nuclear weapons when she was looking for some reinforcement while under attack from—I observe the right reverend Prelate—certain Church leaders at the time. Michael Quinlan, as a keen Jesuit Catholic, produced the moral case for nuclear deterrence.

I was pleased to see that Michael Fallon, when speaking to the Policy Exchange a couple of months ago, quoted Michael Quinlan. He described him as the "great nuclear theorist" and former Ministry of Defence Permanent Secretary. Michael said:

> "No safer system … is yet in view … To tear down the present structure, imperfect but effective, before a better one is firmly within our grasp, would be an immensely dangerous and irresponsible act".

I would certainly like to get rid of nuclear weapons. I do not enjoy the idea that we have to have the nuclear deterrent and the continuous at-sea deterrence, with the cost that it represents. Yes, one can make the argument that, spread over the totality of government expenditure, it is not a huge sum, but it is still by any standards a large sum of money. Michael Quinlan made it clear that he was not in favour of the nuclear deterrent at any price, but he said—this echoes the right reverend Prelate—that we should stop and think at each stage about the justification and whether changes would be appropriate.

I am very conscious of something that the right reverend Prelate has just been talking about: whether we have a safer world. The Minister, engaged in his marathon tonight of the Investigatory Powers Bill and this debate, made this point very clearly indeed. We never saw the end of the Cold War coming. We never saw the Arab spring. We never saw the rise of Daesh. We never saw the extent of the danger of the proliferation of nuclear materials around the world with the break-up of the Soviet Union—the nuclear materials stored in Kazakhstan and in Ukraine—and the fact that now, terrorists are seeking any way they can to get hold of nuclear material. This is now a very much more dangerous world. My noble friend the Minister referred to a more assertive Russia. If it intends to base nuclear weapons in Kaliningrad and the Crimea, that is a significant and worrying development. The number of failed states in the world at the moment represents a danger. The situation has changed a lot just in the past 10 years.

The programme we are looking at will not put something in place for the next five, seven, 10 years: we are talking about how far we can see ahead. The system we are talking about will give coverage and deterrence for the next 30 to 40 years. It is a long-term commitment. It is our ultimate insurance policy. Of course, it has happened at a rather interesting time with the recent Brexit. If we said that we were not going on with the deterrent, it would be extremely damaging to confidence in NATO, as my noble friend has said.

Some people think we could rely on the Americans to defend us. It is not unhelpful to the debate that we have a Republican candidate for the presidency who, if we had aggressors—perhaps the Russians overasserting themselves—and he was president, it would be very difficult to decide whether he would be prepared in certain circumstances to come to our assistance. That is only an illustration—I am sure he would—but it is an uncertainty we face.

Obviously, I would like to see every possible effort being made to reduce the number of nuclear weapons, as we have been doing continuously. There are other former Defence Secretaries here today and they will

know that during their time in office, we were always looking to reduce the number of warheads. I am interested to see that only last year there was a further reduction from 48 to 40 warheads in each submarine. It certainly was progress going on in my time, and that has continued.

It is very relevant that we are having this debate today, so soon after the anniversary of the launch of the Battle of the Somme. One looks at the misery of two world wars, and the ultimate and total tragedy that affected so many places. We had those two great convulsions, and have gone 70 years without another. I was Secretary of State when the Berlin Wall came down. We had very interesting exchanges at that time. I talked to my Soviet opposite number and to some of the Soviet, and then Russian, generals, and there was no doubt that there were times when they thought they might advance and do a good bit of unification of Germany on their own. They knew that they could easily do it with conventional forces, but at the back of their minds was the ultimate risk of the nuclear deterrent. It is against that background, without any enjoyment of nuclear weapons or happiness at the cost, that I have no doubt that this is the right course to adopt: that we must continue with our policy of deterrence. It has been effective, kept the peace and avoided yet another world war. We, as a responsible nation, have a duty to continue to play our part.

8.24 pm

Lord West of Spithead (Lab): My Lords, for almost four years, from 2002 to 2006, I was responsible directly to the Prime Minister for the safety, security and operational capability of the deterrent, so I know it intimately. As the noble Earl said, since 1968 the Royal Navy has maintained at least one ballistic missile submarine continuously undetected on patrol at sea 24 hours a day, every day of every year. It is a remarkable achievement that deserves the nation's praise.

We are discussing today the replacement of our four Vanguard-class submarines to enable the Trident missile system to continue to provide continuous at-sea deterrence for the next few decades. The first decision is whether we wish to remain a nuclear weapon state or to opt for unilateral nuclear disarmament. If we decide we should maintain a deterrent, what is the most cost-effective weapons system?

We are in a highly dangerous and chaotic world that is becoming even more unstable. Indeed, it is the most unstable I have known in my 50 years on the active list of the Royal Navy. Our record as human beings in circumstances of intense competition has not been good, and I believe that keeping our armour bright, particularly those elements which provide assurance of our ultimate survival, is crucial. Many doubters seem unwilling to acknowledge the unforeseen shocks caused by imbalance of population and resources and the actions of opportunistic, possibly desperate, regimes. We seem pretty bad at predicting what will happen tomorrow. Indeed, who could have predicted 30 minutes ago that Boris would be our Foreign Secretary? So no one can predict whether in the next 50 years there may be nations prepared to use nuclear weapons. What is certain is that their use is unlikely if that use means self-destruction. It would be foolhardy for any British Government of whatever hue to make us vulnerable to nuclear blackmail by giving up the power to retaliate.

Unilateralists often ask why, in that case, countries such as Germany, Canada, Australia and Japan do not need the deterrent. That fact has no bearing on our decision. The reasons are historical, such as the cost of starting from scratch, alliances, and satisfaction with others' nuclear umbrella. Suffice it to say that all permanent members of the Security Council possess nuclear weapons, as do an ever-expanding number of other countries. Opponents also state that it will not stop terrorists. Of course it will not. It is not meant to and no such claim has ever been made for it.

As a number of noble Lords have said, we have led the world in reducing the number of nuclear weapons systems—we have only one, unlike any of the other permanent members of the Security Council—and the number of warheads. Has that reduction had any discernible impact, particularly on those states we would hope to discourage from owning nuclear weapons or expanding their number? No, it has not. We would certainly not be part of any negotiations on multilateral arms reductions—which all of us want—should we cease being a nuclear weapon state.

I have no doubt that we should remain a nuclear power. Unilateral disarmament would endanger our nation and our people and it is not what most UK citizens want. But what system should we use? Study after study has shown conclusively that the cheapest, most cost-effective option is to maintain the present Trident ballistic missile system. This necessitates the replacement of the Vanguard-class submarines. As the noble Baroness, Lady Falkner, said, the last study was the Trident alternative review, which was instigated by the Lib Dems. Much to the surprise of many of those who instigated it, it concluded that we should replace the Trident submarines. Every study has always said that. Having looked at other options in detail, it is quite clear—and I have been involved with three previous such studies—that none of them is as cheap or practical as their supporters claim, certainly not cruise missiles; I could give you a 100 reasons why not to go down that route.

Let us face it, none of our nuclear submarines has ever been counter-detected. They are so quiet and undetectable, one of them bumped into a French one without knowing it, and the French one did not know what it had bumped into. The very invulnerability of the submarine to detection now and in the future, notwithstanding claims to the contrary by unqualified people with no knowledge of the oceans or anti-submarine warfare, and the assuredness of warhead delivery, make it the ultimate post-strike system. We need a post-strike system. I could go into that for hours but I will not.

There has been considerable debate about the need for a submarine to be permanently deployed—this is what CASD is: continuous at-sea deterrence—and hence the need for four submarines. There is no doubt that such a deployment makes the force invulnerable to pre-emptive strike. We live in a world where the enemy has an option and people do nasty things—we forget that. It also avoids the risk of escalating a crisis by sailing a submarine in times of tension, which

[Lord West of Spithead]
makes that submarine more vulnerable. When one adds the efficiency and readiness of the crew by being deployed, it is hardly surprising that study after study has shown the need for continuous at-sea deterrence.

Another concern expressed by detractors is that the system is not truly independent. In 2009, as Security Minister, I was asked by the Prime Minister to conduct a detailed and comprehensive investigation. I can assure the House and the nation that it is totally independent of the US. Although cheaper than most alternative options, the replacement of four Vanguard-class submarines is expensive. All defence systems are expensive. The cost has already been mentioned: 0.13% of GDP for our ultimate insurance policy. This seems pretty reasonable when one thinks of what one pays for one's car and house as a percentage of one's income. The cries from a few military figures that dropping the deterrent will release funds for conventional forces is totally delusional. I have spent many years in Whitehall and clearly those involved do not understand the Whitehall jungle.

I have little doubt that those who are attacking the Trident capability—in the context of cyberattack and drones—are actually closet unilateralists. They ought to be honest about this, because there is no doubt that Trident is the best system to go for if we wish to remain in the game. If they want to be unilateralists, that is perfectly respectable but they should say that and not try to do it through the back door.

An additional point—not a driving factor but I think it is quite important for the nation—is that the replacement of the submarines will ensure that 12,000-plus engineers, scientists and designers are directly employed for the next 25 years, plus a number of ancillary occupations. What does worry me is the seeming delay in setting up the new delivery authority that the Government have referred to. When will it be stood up? Have the US Government been consulted? Will it require primary legislation? Have the Government identified the man who should be responsible directly to the Prime Minister for delivering this complex programme, which is so crucial to the security of our nation? We need one man who is responsible for it to the Prime Minister to make things happen, because you can chop off his head if he gets it wrong. These things are a matter of urgency. Our Vanguard-class submarines are already going to be extremely old when replaced.

The case for maintaining our minimum credible deterrent by replacing the ageing Vanguard-class submarines with Successor is compelling, and there is no doubt that if we wish to remain a nuclear power, the replacement of the V-class is the only sensible option. For the safety and security of our people and our nation, we should remain a nuclear power. It is unsurprising that that is the Labour Party's manifesto commitment and Labour policy—and that is what it is.

8.33 pm

Lord Ramsbotham (CB): My Lords, as time is short, I do not propose to say anything about the possession and deployment of Trident, which in the current party-political scene seems something of a given anyway. I have always been, and remain, a multilateralist but admit to having been influenced in my thinking by something that my late boss, Field Marshal Lord Carver, said during the discussions about the possible improvement of Polaris by Chevaline in 1972: "There are two definitions of the word affordable—can you afford something or can you afford to give up what you have got to give up in order to afford it?".

I note that this debate is a precursor to the vote on Monday in the other place on the like-for-like renewal of the full fleet of four nuclear submarines, described in the 2015 SDSR as,

"vital to our national security … needed, in order to give assurance that at least one will always be at sea, undetected, on a Continuous At Sea Deterrent patrol",

and,

"a national endeavour … one of the largest government investment programmes, equivalent in scale to Crossrail or High Speed 2".

The SDSR maintained that the estimated cost of £31 billion, plus a contingency of £10 billion, could be found from the guaranteed 2% of GDP. But all that has changed in the past two weeks, because following the Brexit vote the value of the pound has dropped dramatically, which will lead inevitably to a drop in GDP, and has led already to doubts being raised about the affordability of High Speed 2.

That brings me on to two questionable assertions in the 24 March MoD policy paper, *UK Nuclear Deterrence: What You Need to Know*, which was mentioned by the noble Lord, Lord Tunnicliffe. The first is:

"The UK has policies and capabilities to deal with the wide range of threats we currently face or might face in the future".

The second is:

"The investment required to maintain our deterrent will not come at the expense of the conventional capabilities our armed forces need".

Two of the main planks of the Leave campaign during the referendum were that we would regain control over our borders and, therefore, independence—whatever that means. Really? With three Border Force vessels and the limited number of Royal Navy surface ships to which the noble Lord, Lord West, continually draws the attention of the House? I must admit that I wondered who was deluding whom when I heard the Minister announce on Monday that we were sending two companies to Estonia and one to Poland. How on earth can anyone know what threats demanding a lesser response than a weapon system capable of taking out Moscow we may face in the future?

If lack of sufficient financial resources, based on 2% of GDP at the time that the SDSR was written, has already limited the strength of our conventional forces, as has been pointed out many times by my noble and gallant friend Lord Craig and others, how can anyone be certain that a reduced GDP will not require even further limitation if full fleet replacement is the Government's order of the day?

That brings me to governance. Starting at the bottom end, as it were, I have lost count of the number of times noble Lords have, in recent years, complained about the lack of proper impact assessments accompanying legislation. With the notable exception of the Canadian Governor of the Bank of England, no one appears to have done any contingency planning on the referendum,

or bothered to research just how deeply our pipes and plumbing are buried into Europe in a multiplicity of subjects. Last week came Chilcot, with its devastating exposure of the deliberate disregard of the norms of governance during the Iraq war. Now, the other place is expected to make a decision that will affect the nation's military capabilities, both conventional and nuclear, without the benefit of any known assessment of what the financial impact of Brexit will be.

I acknowledge all the responsibilities on government that were so clearly enunciated by the Minister, but I find the speed of all this both breathtaking and bewildering. Where is the proof that this decision needs to be taken on Monday, bearing in mind the continuing uncertainty over the date by which the submarines need to be replaced and the spiralling costs of doing so? Meanwhile, we are faced with a number of threats to our security, now and in the future, for which we require conventional capabilities that we do not currently possess, and the availability of which is bound to be affected if the defence budget is expected to meet the cost of like-for-like replacement.

Because the retention of the nuclear deterrent is a political decision, I should like to ask the incoming Prime Minister two questions through the Minister before Monday's debate. First, will she consider removing the cost of the deterrent from the defence budget, so that the 2% of GDP can be spent on maintaining viable conventional forces? Secondly, how certain is she that we can afford to give up so much of our required conventional capability to afford like-for-like replacement of our current nuclear deterrent fleet?

8.39 pm

Lord Arbuthnot of Edrom (Con): While I reach the same conclusion as the noble Lord, Lord West of Spithead, I am afraid I do so without any of his certainty and with none of his panache, for which I must apologise, because I share the concerns expressed by the noble Lord, Lord Ramsbotham. I must begin by paying tribute to the Minister for his stamina—he is clearly a young man—and I should draw the attention of the House to my interests, as set out in the register, particularly in relation to Thales and Babcock.

I agree with the noble Lord, Lord West of Spithead, on one point—on many points, in fact—about the achievement of the Atomic Weapons Establishment and our Armed Forces in maintaining a continuous at-sea deterrent for so many decades. However, outside this House, people are protesting and demanding an absence of nuclear weapons in the world. That is something that we will of course be able to reach only gradually, if we can reach it at all, but a step along that road would be a valuable one to take.

I hope the Minister will say more about the cost of Trident, because £31 billion plus £10 billion in contingency is quite a lot more than it was suggested in 2007 the cost would be. CND's estimate of the cost as £200 billion is something I discount, but I suspect the cost will go up as the years pass.

There is one expression I would like the House to reconsider, which is describing the nuclear deterrent as an insurance policy. The point of a nuclear deterrent is that if they bomb us, we will bomb them. That is unlike any insurance policy I have ever come across. If someone burns down my house, I do not go and burn down theirs. This nuclear deterrent is rather more like a booby trap: if they bomb us, something very nasty will go off in their back yard. It relies on the principle of retaliation. In law—long ago, I used to practise law—retaliation, as such, is illegal. I suppose that once we get to the point of nuclear exchange, the question of what is and is not legal will become of little interest in people's minds.

I hope that one point that has not yet been mentioned in this debate will be taken into account, which is that we propose to base the nuclear weapons we have for the foreseeable future—for decades—in Scotland. As I understand it, only one—maybe two—of the Members of Parliament coming from Scotland would support this nuclear deterrent. That will have to be handled with great sensitivity in the years ahead, otherwise we will run the risk of weakening the ties of the union, which have already been damaged severely by the Brexit vote.

Despite all these points against nuclear deterrence, there is one that trumps every other argument—I hope that is the last time I use that word in this House—which is Roosevelt's comment:

"Speak softly and carry a big stick".

That is what, at the end of the day, discourages war. Strength discourages war, and I therefore have come down in favour of the Government's proposal. With considerable reluctance, I have come to the view that we should keep the nuclear deterrent we have. It must be a deterrent that works, which means four boats.

Clearly, it will not work against all the threats that we face—of course it will not. The right reverend Prelate the Bishop of Chester was right to say that it has no consequence in relation to terrorism, but it was not intended to. It is also true that our cyber vulnerabilities pose existential threats to the western way of life. This is a matter of opinion, but in my view our nuclear deterrent has helped—only helped—to keep the peace over many decades. I do not think now, when the world is incredibly unstable, is the time for an experiment in unilateralism.

8.46 pm

Lord Robertson of Port Ellen (Lab): My Lords, first, I declare an indirect interest, as recorded in the register of interests.

The Government have had six years to prepare for this debate and for the vote that will take place in the Commons on Monday. This is one of the most important decisions that will be taken by our generation of politicians. The continuation of the nuclear deterrent is fundamental—fundamental—to the safety of this nation and to our contribution to the strength of NATO and the Atlantic alliance, and the security umbrella that creates. It is therefore a scandal and a disgrace that we in the upper House of this Parliament are being given three hours for this debate—six minutes per Member—at two days' notice to consider whether the United Kingdom is to go ahead with the Trident nuclear deterrent.

It is of course widely known, especially by those of us who were charged with some responsibility for it, that the deterrent exists not as a military weapon but

[Lord Robertson of Port Ellen]
as a political one, whose very purpose is for it never to be used in anger. It is there to deter aggression against this country and our allies and to counter nuclear blackmail that would threaten Britain's essential interests and those of our allies. It is committed to NATO and, along with the French and American deterrents, plays a crucial and successful part in the defence of the alliance. In the ludicrously limited time that we have, I intend to make three points.

First, as other noble Lords have said, we cannot possibly foresee the threats and challenges to our security that will emerge over the next 40 years when Trident will be in service. As has been said, we find it remarkably difficult to predict what will happen day by day just now. Just look at what has happened, and taken us by surprise, over my political life: the invasion of the Falklands, the invasion of Kuwait, the collapse of the Berlin Wall and the end of communism in Europe, 9/11 and the Arab spring. Those are just a few instances to prove that unexpected events can trigger very serious consequences. It would be recklessly optimistic to abandon our deterrent on a very rosy view of what we think we face at the moment. It would do a grave disservice to generations to come, as yet unborn.

Secondly, we need to face the serious fact that if we abandon the building of the four new submarines, there is no going back. If the security environment were to change and become even more malign than it is today, it would be simply impossible to recreate the deterrent, with all its infrastructure. The decision next Monday, therefore, is crucial.

Thirdly, there is no cheap and cheerful alternative to continuous at-sea deterrence; there are no half measures in nuclear deterrence. Continuous at-sea deterrence is an absolute. Our submarines are invisible, invulnerable and undetectable. The 2013 *Trident Alternatives Review*, already referred to, which was insisted on by the Liberal Democrat part of the coalition Government and reported to the Liberal Democrat Chief Secretary, clearly said:

"The highest level of assurance the UK can attain with a single deterrent system is provided by SSBN submarines operating a continuous at sea deterrence posture".

That was not the only report. The following year, the British American Security Information Council—BASIC, an organisation opposed to Trident renewal—set up its own commission. It concluded:

"The Trident SSBN … system meets the criteria of credibility, scale, survivability, reach and readiness".

It also said that successive British Governments,

"have not considered it prudent to disarm the UK's nuclear arsenal given the nuclear danger that could yet resurface, and given the limited benefit to reducing global nuclear dangers that such a step would have. We agree".

I started my life in politics as a young man carrying a banner that said "Ban the Bomb"—and was eventually to become Secretary of State for Defence, in charge of the nuclear deterrent. As Defence Secretary I conducted a defence review, which abandoned all our tactical nuclear weapons, reduced significantly our arsenal of warheads and missiles for submarines, lowered the system's operational readiness and made new inroads into the transparency of the whole system. In my "Ban the Bomb" days I believed that such a move would start a benign response worldwide. No such luck. Others are inventing, acquiring, modernising and accumulating nuclear weapons all the time. That is precisely why we need to go ahead with the four new submarines.

8.52 pm

Lord Lee of Trafford (LD): My Lords, having appointed Boris Johnson as Foreign Secretary and confirmed the continuation in office of Michael Fallon as Defence Secretary, our new Prime Minister moves on to the awesome responsibility of having to write the four letters to the commanders of our Vanguard submarines, with certain instructions. The UK has had a continuous at-sea deterrent for nearly 50 years, since 1969. Like others, I personally have found this issue agonisingly difficult. It is difficult to imagine the circumstances in which we would press the nuclear button. If we were not already a nuclear power, I am sure we would not vote to become one today.

But we are a nuclear power, albeit possessing less than 1% of the world's 17,000 nuclear weapons. We cannot disinvent nuclear technology. Like it or not, behaving like an ostrich is not an option. Like the noble Lord, Lord Robertson, I do not believe that the UK giving up nuclear capability or ambitions would influence others. Some of us hoped that, perhaps in the medium to longer term, we might have been able to reach an accommodation with the French in terms of shared capability. But sadly, post Brexit, that prospect is probably even more remote.

Over the years my party has looked for some middle way—a compromise position and, we hoped, a cheaper position. A three-boat fleet has been suggested, or arming our submarines only at a time of increased international tension. I have to say that, however good their intentions, both options are wholly unrealistic. We live in a very dangerous and unpredictable world with some very dangerous and ruthless leaders. As has been said, who can possibly foretell what lies ahead over the next 40 years?

On issues such as Trident, one has to transcend party politics. We in this House have to speak and act in the national interest for this and future generations. In my view, costs are secondary considerations, and 6% of the defence budget is not unreasonable for what is obviously the ultimate deterrent. On balance, and desperately hoping that we never have to use this horrific weaponry, I support the Government's position to maintain a four-boat, continuous at-sea capability through the successor programme.

8.55 pm

Baroness Buscombe (Con): My Lords, I am pleased to have this opportunity to support the Government tonight. There is no doubt in my mind that we are doing the right thing to future-proof the protection of our nation and underpin our commitment to NATO. As a member of the Joint Committee on the National Security Strategy, I confirm its full support for the deterrent element of SDSR 2015. It is right that the SDSR makes clear that we are committed to maintaining the minimum amount of destructive power needed to deter an aggressor, to stress the need to avoid vulnerability, and to keep our nuclear posture under constant review in the light of the international security environment and the actions of potential adversaries.

My noble friend Lord Arbuthnot of Edrom referred to those now demonstrating outside against nuclear weapons. It is crucial that we explain clearly and often why this deterrent is critical. We must communicate our purpose. We cannot presume that each generation will grow up accepting the why without explanation and understanding of what Trident really means and the potential consequences of compromising our commitment to a continuous-at-sea deterrent patrol.

We parliamentarians have the enormous advantage of understanding what Trident means in practice through our access to the Armed Forces. Just a few weeks ago, I had the privilege of visiting Her Majesty's Naval Base Clyde and, in particular, Faslane, where I spent time on board one of our Vanguard-class submarines, the youngest and recently refuelled HMS "Vengeance". In addition, I was allowed unusual access to the high-security establishment the Royal Naval Armaments Depot Coulport, so I have the clear advantage of witnessing for myself what we have been doing quietly with extraordinary rigour and care, supported by the Royal Marines, since 1969.

In March this year, I was lucky enough to spend several days in the company of 45 Commando in the Arctic Circle learning about the extraordinary training and exercises undertaken by both our Armed Forces and those of our NATO allies, including the US Marines, also on exercise in the far north of Norway, in recognition of our now very fragile relationship with Russia.

As my right honourable friend David Cameron said in another place only a few days ago, we are not seeking confrontation with Russia, we are working to prevent it. Our nuclear deterrent is at the heart of that prevent strategy in what is—as my noble friend said—an increasingly dangerous world.

There is always the question of cost, and the *Trident Alternatives Review*, referred to this evening, undertaken at the request of the Liberal Democrats and published in July 2013, is instructive. The review confirmed that possible alternatives to its successor would, as outlined by my noble friend, actually prove more expensive than what is now proposed. Following publication of the review, I note that my right honourable friend Liam Fox reminded the Liberal Democrats in another place—at the time, they were keen to end CASD and procure one fewer successor submarines on the basis that it would make a saving of £4 billion—that this so-called saving was equivalent to two weeks' spending on the NHS or six days of what we spend on public sector pensions and welfare.

Concerns remain, of course, regarding the defence budget. The recently published House of Commons Defence Committee report *Shifting the Goalposts?—Defence Expenditure and the 2% Pledge*, the second report of Session 2015-16, confirms the real pressures on the defence budget. I suggest that another goalpost be reviewed. In this regard, I was rather taken by a question asked by noble friend Lord Vinson in response to the Statement on the NATO Warsaw summit on 11 July, when he said that our defence budget was strapped for cash while we are simultaneously giving substantial aid to support the economies and welfare of countries, such as Poland and Finland.

In essence, I ask my noble friend the Minister, whether it is not now time to seriously and sensibly revisit the current DfID target of 0.7% of gross national income—particularly in the light of the short-to-medium term fragility of our economy post-Brexit—and transfer some of that budget to defence? It may be more important than the target. Should we not question our priorities? I know where mine firmly lie and that is with our defence capability and the welfare of our Armed Forces. Aid is of course very important. However, it should be supplementary to what our previous Prime Minister, during his resignation speech only three hours go, called the "spirit of service" of our Armed Forces in their endeavours to keep our nation safe.

9.01 pm

Lord Sterling of Plaistow (Con): My Lords, my interests are declared in the register. I start by saying how much one appreciates the approach of and opening address by my noble friend the Minister. At the end of last year the noble Earl kindly arranged an important briefing at the Ministry of Defence. The noble Lord, Lord Hennessy, asked for a specific briefing on key aspects of the Astute and Vanguard submarine programmes. All present strongly told the Minister, the honourable Philip Dunne, that it was highly desirable for Parliament to formally give the go-ahead in February, time being of the essence. We are now in July.

Today, Air Chief Marshal Sir Stuart Peach took over the key role of Chief of the Defence Staff. It is of great importance, following Brexit and the Chilcot report, that the Ministry of Defence, the CDS and his chiefs have total clarity with regard to their role and responsibilities in the decision-making process when considering the use of military power. Trident is a crucial part of this country's defence capability and, of course, our NATO role. As the ultimate deterrent it is so devastating in its power that one hopes it never has to be used. But it is there.

In the light of recent defence reviews—in 2010 and 2014—have we really given our service chiefs the tools to carry out the key responsibility of both defending the realm and, when necessary, intervening globally when it proves essential? In the main, this would be in our NATO role. In the defence debate following the Queen's Speech in late 2014, I commented on her words, "We must re-engage globally". Without doubt, in the previous five years the international community perceived us as having disengaged. We were encouraged by the 2% commitment and the clarity of an agreed programme for all three services, but I and many others in this House and the other place have expressed deep concern that not only is the 2% already slipping back, but there is still further hollowing out taking place in all three services. The money vitally needed to truly deliver the programme will really start to flow only in two or three years. Indeed, the weakening of sterling must not be used as an excuse to delay our key purchases from the United States—that is, the F35s and the P8s. I would appreciate it if the Minister would consider supporting that observation and the comment, which I shall come to, that we should increase the 2% to 3%.

[Lord Sterling of Plaistow]

Now is the time to build the infrastructure and, most importantly, to get the right personnel in place to meet the full programme. As I said, we will not reach true capability until 2030 and, on the Trident front, the 2040s. Only a small number of workhorse frigates are likely to be in service in the early 2020s. The admiral, the noble Lord, Lord West, who, if I may, I will also describe as a friend, has often reminded this House about the need to have those frigates in place in the 2020s.

Recent history has surely taught us that we cannot hope that events will wait for us. That would be a most foolhardy and dangerous strategy. In last week's referendum debate, I strongly supported Sir Christopher Meyer's view, expressed at a very recent meeting of the Foreign Affairs Committee, that our defence commitment should be increased from 2% to 3%, properly ring-fenced, with cash to be released immediately. We should seriously consider—as the noble Baroness, Lady Buscombe, has already referred to—repealing the law enshrining the 0.7% for the Department for International Development's budget. Of course it must continue its vital work in helping refugees in unexpected disasters, and in many cases our armed services and DfID work together. However, part of its present £13 billion to £16 billion a year could then be used to enhance both the defence budget and that of the foreign service.

I reiterate: moving forward once again to have a real global responsibility for protecting the free movement of world trade will require a considerable enhancement of our hard-power capability, particularly that of the Royal Navy, which has had this responsibility for nearly 400 years. Further cutbacks would really confirm to the world at large our being Little Englanders. I suggest that when we are negotiating with Brussels, it will be an unspoken plus that this strength will always be available, when necessary, to help our European friends.

From yesterday's Chilcot debate it was clear that much has been learned, but my deep concern is that these findings will affect the manner in which decisions are made as to when and where our military capability will be used. Will the House of Commons always demand the right to have the final word? One is increasingly told that military action should be the last resort. I suggest that sometimes the very rapid deployment that only the military can deliver can be the best option and in itself be the very deterrent to prevent conflict. Indeed, if in future there will be an interminable debate in Parliament, particularly if Mr Corbyn continues to lead the Opposition, we must rapidly resolve the decision process that clearly identifies the authority of the commander-in-chief and Parliament. As a matter of interest, the United States is in exactly the same position.

The aspects regarding the use of the deterrent, and the background to the need for it, has been put much more ably than I could by the noble Lord, Lord West, and the noble Lord, Lord Robertson. However, I suggest that if we had this problem of identifying who was to make the decision, it would certainly be a comfort to know that one of our ballistic Vanguard submarines was at sea night and day with, if I may say so, some of the most elite crews in the whole of our military service.

We should very much consider what all this will do for us from the point of view of sovereign areas. It is absolutely necessary to have the economic benefits of the leading-edge technologies in this country. One example of what is needed is a definite, long-term energy policy, which we do not have. We must also have a long-term strategy for warship development in this country. This can only enhance the leading-edge technologies.

It is interesting to note that democracies take a long time to agree politically on their strategic needs. Other than in time of war, the delivery of such strategies is often heavily delayed by being throttled by budgetary considerations. It is worth noting that both Russia and China's delivery capabilities are clearly superior.

I want to return to a point made by the noble Lord, Lord Ramsbotham. Until 2010, the capital cost of our nuclear deterrent was carried by the Treasury. It was put on the Ministry of Defence's account only some five or six years ago. That was the thinking going back over nearly 40 years. It is an aspect that should be taken strongly into account.

During the five years I spent on the Joint Committee on the National Security Strategy, we came to the view that it was a necessary institution which still had to decide the most effective way to operate. I believe that the right combination of brain power, under our National Security Adviser, Sir Mark Lyall Grant, should be more than able to deal with many of the concerns aired in this House. The National Security Council was key in deciding that this country must have the Trident replacement programme.

Many Peers on all sides of this House are highly supportive of the dedication of our Armed Forces. I hope they would agree that the Commonwealth in general, our allies in NATO and, in particular, our many friends in Europe and internationally, welcome such action by the United Kingdom. For us to continue as a permanent member of the Security Council is of key importance. I strongly support the Motion in the name of my noble friend Lord Howe.

9.12 pm

Lord Judd (Lab): My Lords, back in the mid-1970s, when we had such people in government, I was the Minister responsible for the Navy. I should like to take the opportunity of this debate to put on record how, even then, in the much earlier years of nuclear submarines, I formed the highest respect for the professionalism and dedication of those who were manning those submarines. When we remember the ensuing years, we owe those people a great tribute.

The noble Lord, Lord King, reminded us that we have just been commemorating the Battle of the Somme. We have also just been remembering Hiroshima and what it meant in terms of human destruction and suffering. At that time, those who took their challenges seriously—as with the challenges of 1945—saw for the first time the evidence of the concentration camps in Europe. That is why they dedicated themselves to building institutions which would enable us to have a world in which those things could never happen again. The United Nations was one, NATO was another—look what it has achieved on our own doorstep over all

those years—and there were others as well. A few years later, we began to realise that if we were to have a peaceful world, we would need to take our contribution to that world seriously, which is why we began to build into our system of government overseas development as a priority. The Government deserve congratulations on the way they have pursued that with rigour and determination.

I admire President Obama for many things, but one of them is that he keeps reminding us that we must not stop dreaming of a world without nuclear weapons. In this kind of debate I always worry a little that we are settling almost as an end in itself for a way of managing the realities of the situation we have rather than saying, "How can we still, in spite of all the difficulties, keep striving for a different kind of world?". Historians 100 or 200 years hence may have a lot to say about a time when we settled for saying that the only way we could keep existing with any self-assurance was by mutual threat of mutual annihilation. That is not a very satisfactory comment on the advance of human society. However, that is the case, and we have to live with the reality that the United States has been a great partner with us in our enterprises, but Russia is there—and in a form we would prefer it were not—as is North Korea. China is becoming increasingly powerful, and there are others.

We cannot push these things away—they are there. Therefore, in the future that confronts us we have to have a means by which it becomes unthinkable for Governments of other countries to consider deploying nuclear weapons because of the consequences for them. I am not happy about that—I am extremely unhappy that we have to settle for this situation, but that is the reality of the situation which confronts us.

Finally, I am glad that one of the things that has been raised in this debate—would that it had not been necessary to do so—is the issue of terrorism. That is another reality with which we will have to live for a long time. We have to be absolutely certain that with our defence system and defence budget we produce systems that are relevant to the threat of terrorism. I am concerned in this situation in which such a high proportion of the defence budget is spent on the renewal of the deterrent when we know—Chilcot said it—that our forces are overstretched and are not properly equipped in the real situations which we meet every day. The issue of renewing our deterrent therefore raises immense questions about how far we are properly financing the rest of the defence budget. However, it also means that we have to be very certain that the deterrent in the form in which we are pursuing it will be the most effective protection in the years ahead.

That is why my noble friend Lord Robertson was absolutely right: it is disgraceful that we are having this debate late in the evening, with six minutes—I am afraid that I am already on seven—to speak on an issue which the Minister himself thinks is profoundly important. There are masses of implications involved in this decision. We should have had a White Paper and proper evidence put before us. How far have the Government really thought through the dangers for our nuclear maritime defence future, because a lot of serious people are questioning whether it will be quite as secure and immune as it should be? Those arguments may well be being answered but not with proper information made available as well as evidence of the Government's consideration. It really is disgraceful that we are having this debate in this form tonight.

9.20 pm

Baroness Wilcox (Con): My Lords, I thank my noble friend Lord Howe for moving that this House takes note of the Government's assessment in the *National Security Strategy and Strategic Defence and Security Review 2015* that the United Kingdom's continuous at-sea nuclear deterrent should be maintained. I agree 100% and I support the Government in this.

We must build the replacements we need. It is a pity that we only have a BAE yard to construct them in—no competition there, and we all know what that means: up go the costs. I urge a rethink of the alternatives. We should not find ourselves with one place and one company to do this work but ask what they are, especially when Mr Putin in Russia is constructing at least eight new ballistic missile submarines—and everything else he fancies at the same time.

We are vulnerable as an island people and our ports are essential to us. I come from a port—Plymouth—and now live in London, which has another port. I was the deputy chairman of the Port of London Authority for seven years, so ports are what I want to stress. I urge the Minister to consider their safety and vigilance.

Ninety-five per cent of everything that enters or leaves the United Kingdom does so by sea, including most of our food. We could not feed ourselves during the last war when we were 44 million people; we are now 65 million and growing—our ports are our lifelines. We are totally dependent upon imports of oil and gas, 36% of which come into one port, Milford Haven—unprotected. It is therefore essential to keep the sea lanes to the UK open and that also means protecting the approaches to our ports. Our submarine nuclear deterrent is essential as Russia rearms. The puzzle for it, I hope, will to never be sure whether we are going to use the things that we are agreeing to put into action.

Our new aircraft carriers will provide a very visible influence but we, as an island nation, cannot rely on them alone to protect our sea lanes and ports. I believe that the Navy has to have a balanced fleet. We will need more patrol boats to patrol our fishing areas after Brexit—Ireland needs eight and Norway needs 16; I do not know how many we will need but I noticed today that the French are already squealing that all the fish are in our waters and want to know what to do about that. Four to five patrol boats are being built already but the current plan is to decommission four when the new ones arrive. That is not the way to protect our fishing fleets. One of those boats is permanently based in the Falklands because we do not have enough destroyers and frigates to deploy something more powerful and deterring to that area.

We are an island nation surrounded by the sea and if we do not control it we will be lost. Just look at the problems around the world requiring sea power for their resolution: the problem in the South China Sea is an example of where a lack of sea power has made the Philippines vulnerable to Chinese expansion. These are things which we must consider further.

[Baroness Wilcox]

I want to finish by quoting some words of ex-Prime Minister David Cameron at the NATO summit in Warsaw in July. He said that,

"this summit has underlined one very important message—that while Britain may be leaving the European Union, we are not withdrawing from the world, nor are we turning our back on Europe or on European security … We will continue to be an outward-looking nation that stands up for our values around the world—the only major country in the world to spend 2% of our GDP on defence, as promised, and 0.7% of our GDP on overseas aid, as promised. Only Britain, amongst the major countries, has kept those 2 vital pledges. And they massively enhance our standing and our ability to get things done in the world and our ability to keep people safe at home … We are a country that is willing to deploy its troops to reassure our Eastern partners or to help countries further away defeat terrorists … A country with the ultimate deterrent. And above all, a proud, strong United Kingdom that will keep working with our allies to advance the security of our nation and people for generations to come".

9.26 pm

Lord Hutton of Furness (Lab): My Lords, I draw your Lordships' attention to the interests that I have declared in the *Register of Lords' Interests*. I act in the UK as an adviser to Lockheed Martin.

I agreed with every word and sentiment in what the Minister said. His speech could have been made by any Defence Minister any time during the past 50 years—in fact, it almost certainly has been—but he was absolutely right in the arguments that he put forward.

Nuclear weapons are terrifying and terrible weapons, but they have served a moral purpose, which is to deter nuclear aggression—these unique threats to the UK and our allies that cannot be controlled by any other means. The nuclear deterrent has been a moral weapons system.

One issue that the other place will face next week is simply this: is there an alternative? Is there a better way of guaranteeing UK security during the next 50 or 60 years? There are some who argue for unilateralism. I do not subscribe to that view, and I suspect that very few people in this House do. It would be an irresponsible act which compromised UK national security and that of our friends and allies around the world. It would deprive the UK of leverage and locus in any bilateral and multilateral process. It would be a complete abdication of our international responsibilities.

The question then is: are there some other alternatives to Trident that might fulfil a similar role and do it as well and as credibly? I pay tribute to the last coalition Government and to the work of the Liberal Democrat Ministers in persuading the Government to conduct the alternatives to Trident review. If anyone really wants to find an answer to some of these complicated issues of whether there is a better or cheaper way to maintain the vital national security interest of the United Kingdom, they must read that review. Unpalatable reading though it might be to some, there is absolutely no doubt about the fundamental conclusions: that a four-boat successor programme is the cheapest, most credible way to maintain our national security and that all the other options—whether they are free-fall bombs to be fired or launched from fast jets or include the use of cruise missiles, be they subsonic or supersonic—carry considerable downsides. First, they will be a less credible deterrent; secondly, and strangely, they will be significantly more expensive, because the real cost driver is the development of a new warhead to tip any new delivery system. Certainly, if it is a cruise missile system that advocates are putting forward, we know that we would certainly need more submarines and there would be a significant cost. There is no better way of securing Britain's long-term national defence interests than by renewing the Vanguard submarine. So I say unequivocally that that is the right thing to do and I hope that Members in the other place reach a similar conclusion.

I want to finish with three points. First, my noble friend Lord West and others referred to the extraordinary service that the crews of the ballistic submarines have rendered in the past 50 years. My noble friend said that we should express our praise for them; I think that we should do more than that. This weapons system is uniquely complicated. I remember when I was on board one of the submarines being told by the skipper, when I asked him how on earth he kept this level of professionalism going, "Sir, when we leave port, we are at war. That is the only way we can do it". I think that makes this aspect of service in the Armed Forces quite unique and special. I hope there is a way, despite all the bureaucracy and the rules, that those men who have served and operated these submarines for 50 years get special treatment. I would like to see a special medal awarded for service in these ballistic submarines. It is long overdue and it would be a service that we could render to those great men.

Secondly, it will be very important that Ministers do more to address the concerns that have been raised about the vulnerability or detectability of the Successor boats. Many of your Lordships speaking in this debate have already addressed this point. I really believe there is more that Ministers should be doing to address the concerns raised. I share the view that those who advocate this may be concealing other motives; I do not really want to get into that. But anyone who looks at the scientific and technical literature will know immediately that there are no parallels to be drawn between unmanned aerial vehicles and the development of those sorts of drones and unmanned underwater vehicles. The two operate in completely different technical and scientific backgrounds. For example, electromagnetic waves cannot operate underwater—they can penetrate only a few inches at best—there are massive problems about powering those systems so that they can deploy sonar buoys and other devices; and there is a huge problem about communications. There is no immediate risk, I think, to our Vanguard submarines now or in the future, but a lot of people think there is, and that should be addressed.

Finally, I want to ask the Minister one question. We would all like to live in a world free of nuclear weapons; let us be quite clear. The process for achieving that looks difficult. There is one thing that the Government could do. Because this is still a live issue, I would like to know what concrete and practical steps the Minister is intending to take to the new Government now to make sure that the Comprehensive Nuclear Test-Ban Treaty becomes a legal instrument and takes legal effect. At the moment, there is a de facto moratorium on the testing of nuclear weapons, but can anyone

imagine the shock waves that would be created—literally—if one of the superpowers were to actually detonate a test weapon? This would be the end of most of the legal framework that we are familiar with and which gives us some encouragement that we might be heading in the right direction over the longer term. So what are the Government going to do to address the fact that, despite all these years since the treaty came into operation, it has still not taken any legal effect?

9.32 pm

Lord Harries of Pentregarth (CB): My Lords, during the 1980s in particular, I wrote, lectured and spoke extensively in support of a policy of nuclear deterrence—helped hugely, as so many were, by the late, lamented Sir Michael Quinlan, whose memorial lecture I, like others, should have attended this evening. I tried to think through traditional jus in bello criteria in relation to the special characteristic of nuclear weapons in the context of the Cold War. With much spiritual fear and moral trembling, I argued that a policy of deterrence was compatible with Christian conscience. But hearing the noble Lord, Lord Robertson, refer to nuclear weapons as a political weapon, I have to remind myself that he knows much better than I do that they remain weapons, and for deterrence to be credible the enemy must think there are occasions when they could be used, which means that we actually have to have a targeting policy that is rational, credible and operates within ethical boundaries. We should remind ourselves that we are talking about weapons which might have to be used, and I was prepared to defend that. But we need to ask rigorously whether what was necessary at that time is still the case, or whether the modern context is so different that we really need to rethink the whole issue of Trident.

First, of course, at that time we were faced with the Soviet Union, a ruthless totalitarian state, but one organised as a state with a government and a recognisable command and control system. The main enemy now, as we know, is not a state: it is a variety of terrorist organisations which can overtake territory—as they did in Afghanistan—and the entity known as Daesh, but which, for the most part, operate clandestinely. Their objective is to arouse terror among people hostile to their purpose with random explosives and suicide bombs. They operate in cells, not for the most part in states as such.

The nature of the adversary and the methods used are totally different from the situation during the Cold War. The adversary then, however ruthless, was rational, and that is why deterrence worked. For the first time in human history it could not conceivably have been in the interests of either side to have had a direct confrontation, and since both sides were capable of rational calculation, they knew that, and we had a nuclear stalemate. The enemy today is not interested in rational calculation. Terrorist cells faced with the threat of nuclear weapons would have a bunker mentality. They would not be deterred from what they were planning by anything that we might threaten. So we have to ask whether the continual possession of Trident is really serving any rational purpose in the particular circumstances of our time, where the main threat comes from terrorist groups.

There arises the question of whether we still have an assured second strike capability, the long-stop of our nuclear policy. With the rapid development of cyber warfare and other technologies, it is not realistic to think that submarines can remain in the ocean undetected for ever. The noble Lord, Lord West, has assured the House both this evening and on many other occasions that when at sea, our nuclear submarines cannot be detected by any developments in cyber warfare. I am simply not so sanguine that some new other technology will not be discovered that can render them vulnerable. I do not believe that they can remain invulnerable for ever. Whatever their command and control system, it is in principle open to being discovered and degraded by advancing technologies. The noble Lord, Lord West, knows the bottom of the ocean a great deal better than I do, but I suggest to him that the whole of history and development of modern science goes against what he says. Nothing stands still, and I predict that within a decade or two, technological developments will render nuclear weapons obsolete—if not worse.

It is true that we live in a notoriously uncertain and unpredictable world in which malignant forces will continue to operate. It is, as a number of noble Lords have emphasised, an extremely dangerous world. A resurgent Russia has modernised its nuclear weapons. Perhaps that does support the case for retaining a deterrent of some kind as part of a NATO strategy for the time being, but we know that the present life of our nuclear fleet has some 18 years still to go. We have been assured a number of times in the debate that all the reports show that no alternative is cheaper or better, but I am sorry that we have not heard more about this. Last night I was speaking to one of our leading thinkers, who said that we could keep some kind of deterrent going for the foreseeable future at a much lower cost.

The main thrust of my argument is that in a world where the principal threat comes from terrorist cells and will continue to do so for the foreseeable future, and in which advances in cyber and other technologies could rapidly make nuclear weapons obsolete, we need to think beyond the deterrence which worked so well in the Cold War. If, for now, we do need to retain some kind of deterrence capability, we need to explore other alternatives even more thoroughly than we have so far. As the noble Lord, Lord Ramsbotham, emphasised—the point was taken up by other noble Lords—we need a strong and highly resourced conventional force. I do not believe, with due respect to the noble Baroness, Lady Buscombe, and the noble Lord, Lord Sterling of Plaistow, that that should come from some kind of diversion of our foreign aid budget. We need a strong, capable and well-resourced capacity to meet the kind of threats present in the modern world. I also believe that many more resources should be put into cyber and counter-cyber warfare and cutting-edge modern technologies.

One of the real worries at a time like this is our being too complacent about Trident acting as a kind of insurance policy for ever; it will not. It is absolutely certain that it cannot, because the world moves on and we need think beyond that to whatever may be necessary for the immediately foreseeable future.

9.40 pm

Baroness Goldie (Con): My Lords, renewal of our nuclear deterrent is perhaps the most significant defence procurement decision required of the Government. It is right that an issue that incites such depth of feeling on both sides of the argument should be fully discussed.

As some noble Lords will know, I live in Renfrewshire, which borders the Clyde, and I was educated at Greenock Academy on the Firth of Clyde. My father served in the First World War as a Glasgow Highlander. I grew up in the aftermath of the Second World War when the ravages of that conflict were all too obvious in Greenock, a town that was heavily bombed. I was 11 when the submarine tender USS "Proteus" arrived in Holy Loch on the Clyde in 1961—that presence concluding in 1992. In the early 1960s, Faslane on the Gare Loch on the Clyde became home to the United Kingdom nuclear deterrent. I live less than 30 miles away from the Faslane base.

This background is to explain that from my earliest years I have been aware of the consequences of war and have lived most of my life not just in the shadow but as a neighbour of our nuclear deterrent. Some might regard that as a disturbing environment. I view it with a mixture of pragmatism and stoicism. It is there because it needs to be there and I would feel much less secure if it were not there. I shall expand that argument in a moment.

Let me say by way of preface that I do not support the deterrent with joy and jubilation. Rather, I support it with reluctance and accept it as a necessity. Nor do I criticise opponents of the deterrent as weak, confused or ambivalent. This a sombre and grave issue that requires serious reflection. I believe that the peace that we all want is not made more likely by one-sided disarmament. Indeed history repeatedly informs us that such vulnerability is the catalyst for heightened danger and, arguably, a greater probability of conflict. More than 1,500 years ago the Latin writer Vegetius Renatus wrote:

"Igitur qui desiderat pacem, praeparet bellum"—

"If you want peace, prepare for war". That encapsulates what a deterrent is. The evidence is that for more than 60 years the deterrent at Faslane has been effective. That is why we must retain it. The alternative is too dangerous.

However, it also imposes—as others have said—a continuing requirement on the United Kingdom, along with our international partners, to constantly review and reassess capacity and need. It reaffirms the importance of multilateral disarmament. That is not some illusory objective. As numerous contributors have said, the non-proliferation treaties with international resolve have resulted in the major powers, of which the UK is one, reducing nuclear stockpiles and discouraging other states such as Iran from developing a capability.

However, we cannot ignore the nuclear capability that aggressive and, in some cases, undemocratic and totalitarian regimes are developing in secret. We do not know what their intentions are. We are a long way from achieving the transparency we need about such regimes. None the less, a proactive attempt to engage with them must continue; but without a deterrent, such global and diplomatic endeavours will be prejudiced. One negotiates from a position of strength, not weakness. That is why we must currently retain our UK deterrent.

That is a difficult proposition for unilateralists to accept and I understand that. I deeply respect the long-held and profound views of those who advocate unilateralism but disagree with their analysis and conclusion. However, their arguments deserve examination and I shall try to address some of their main objections. First, they say we should lead by example and that if we cast aside our nuclear capability, other countries will do the same—if we disarm, the rest will disarm. I disagree and repeatedly history has refuted such a proposition. Secondly, it is asserted that Trident is so lethal and potentially so destructive that it can never be used. To that I say that a deterrent does not have to be used to be effective. It has to exist and there has to be a willingness in the most extreme circumstances to use it. These two factors in tandem create the element of deterrence. Deterrence by its very nature is difficult to prove; we are asked to prove a negative. All I can do is point to the absence of nuclear conflict over the last 65 years.

Some who oppose renewal of our deterrent do so on grounds of cost. They may concede the argument for having it but believe that the costs are so significant that they are not justifiable. My problem with that position is that it seems to imply acceptance of a partial defence capability. When we are talking about the defence of the realm, national security and the country's safety in an increasingly dangerous, turbulent and unpredictable world, I think that it is a deeply flawed argument. You either have a defence capability that keeps you safe and can influence at the global level or you do not. You cannot have a sort of defence capability.

In conclusion, I support the Government's commitment to renew our nuclear deterrent. I share my noble friend Lord King's view of that deterrent: it is an awesome and arguably awful capability but I believe that, in current times, there is no safe alternative.

9.45 pm

Lord Triesman (Lab): My Lords, I support the statement made on 9 July and the proposal in tonight's Motion. I support the view that four submarines will make a key contribution to the alliance upon which our security architecture relies. The Minister has put the issues very effectively, though I share my noble friend Lord Robertson's anxiety that we are coming to a critical discussion perhaps without the seriousness that it merits—a three-hour debate, late in the evening, with 23 of us present on an issue of this kind and no opportunity in this House of course to vote to show our consent to the proposition that the Government are making.

I hope that the Leader of the Opposition in the Commons will support this position although, candidly, I am not holding my breath. My noble friend Lord Tunnicliffe did a really remarkable job of trying to explain our labyrinthine positions but I think that it is fair to say that the party's policy is surprisingly clear. It is and must remain that we support a wholly effective nuclear deterrent. We know in any case that the people

of the United Kingdom will not trust their Government to leaders who will not adequately protect them. I also associate myself with the expressions of appreciation to those who have protected us and who should be properly acknowledged.

Nuclear deterrence remains a necessity. It is not just because the world is more volatile but because threats emerge with grater rapidity. There are not the pauses that allowed lengthy deliberations as messages historically moved by hand over distance. Communications and weaponry are built around immediacy, so it is critical in advance that everyone understands and reduces the risk of paying the price for what would never be a victory. This balance, however daunting, is struck by the prospect of mutually assured destruction. It can be understood instantly, and obviously has been in recent history.

I see no evidence of restraint on the part of those who observed our own weapons reductions. In a world where proliferation is the more dominant possibility than multilateralism, and unless and until we can manage to swing the pendulum in a different direction, we must make our decisions realistically. All recent government studies—Labour studies, coalition studies—reach the same conclusion. Of course, some—perhaps all—threats by terrorists and non-state actors are not affected by this balance directly. The statement also carried some information about conventional forces, although I sincerely doubt that there is anything like adequate provision being made, as the noble Lord, Lord Ramsbotham, so eloquently put it. In a non-partisan way, I hope that the Minister will recognise that there is a concern for our wider security; it is not a party-political point at all. Trident is not an alternative to conventional capabilities; we need them both. Plainly, the need for planning for the whole is important, as is the need for a contingency plan in relation to Scotland.

I believe that the statement on Trident also provides a continuing rationale for the United Kingdom's permanent membership of the Security Council with veto powers. We may have decided to weaken drastically our global standing. Whether any noble Lord agrees or disagrees with that observation, I hope we can all agree that we should try to remain influential, as advocates of our values in the international community. That point was raised and questioned by the right reverend Prelate the Bishop of Chester. In my experience, when seeking agreements on matters that seem a long way from nuclear deterrents, such as on Darfur or on the border between Eritrea and Ethiopia, our standing in the world community was significant, even on those occasions when we did not succeed. The Security Council and UNGA's key mission has been to maintain peace and, despite the grim history of mass death in industrial-scale wars—the Somme has already quite properly been mentioned—it has dampened the risks that are run between the major powers. The cost of this insurance—I know that the noble Lord, Lord Arbuthnot, did not like the word—is prudent. It is a policy that my noble friend Lord West rightly describes as cost effective and militarily effective and my noble friend Lord Hutton is right to ask whether there is a better option.

I conclude with a different point. Current relations with Russia are poor and becoming worse. Given the lateness of the hour it is quite inappropriate to start discussing that in detail or apportioning blame, but I want to start with the facts. Relations are in bad shape. Whatever the developments in hostile armaments, whether nuclear or cyber, it cannot be sensible to have only this kind of relationship with Russia. Too few politicians or their officials know each other well. Too few people in education, health or civil society have any adequate contacts or links. Some channels of communication will not work and at the moment some work poorly. This is not a plea for business as usual because I recognise that that is not possible, but having no channels is still worse. Of course, some discussions have been resumed. My hope is that we can find ways in which there are wider groups in our populations who can engage with each other without enmity to discuss health or university exchanges or those things that bind people of good will together around values that can and should be shared. I hope the Minister will agree that this does not damage our defence architecture.

9.52 pm

Baroness Smith of Newnham (LD): My Lords, I am going to wind up for the Liberal Democrats and will probably give the only—dare I say it—authentic and official Liberal Democrat position on continuous at-sea deterrence. I will say in advance that I am speaking as briefed according to our party policy. I speak as vice-chair of our Federal Policy Committee and as the person who has the dubious distinction of chairing our last defence working group. We produced an excellent defence policy paper, most of which I would be very happy to advocate to your Lordships. The bit that achieved most publicity and notoriety at the time was our policy on the nuclear deterrent. I am tasked this evening with advocating that again, so I think I will be the only Member of your Lordships' House this evening not saying that I support the Government.

I will say in advance that, while I am speaking officially in terms of the party line, my own view is very much as a multilateralist. Certainly, anything that I am saying should not be taken as suggesting in any way that I am advocating a unilateralist position, nor indeed that my party is advocating a unilateralist position. I will explain shortly because I can see quizzical faces.

There have been suggestions from various Members of your Lordships' House that this is a snap decision, and it has been asked why we are making it now. We are not making a snap decision this evening. We have been talking about this for at least 10 years. The Liberal Democrats are now on, I think, our fourth review of what we think our policy should be. Back in 2006-07, the policy review was led by the late Lord Roper and the person responsible for drafting the then policy was the late Lord Garden, both of whom reviewed and took this issue extremely seriously. I was on that working group. At the time, a decade ago, we were reviewing whether it made sense to have an independent nuclear deterrent. The words of Sir Michael Quinlan, which have been mentioned by various noble Lords this evening, were important. Was it still the appropriate measure to have after the end of the Cold War, in a world where the threats seemed to be changing and the threat of Russia was perhaps less significant than it had been?

[Baroness Smith of Newnham]

Clearly, the situation now is very different. Russia now poses a threat, and the only nuclear threat that seems to have abated in the past decade is that of Iran. The geopolitical situation a decade on is such that those of us who had questioned whether a nuclear deterrent that arose during the Cold War was still appropriate in the 21st century have begun to change our minds.

The position that my party took in 2007 was to say very clearly that the decision on a replacement for Trident did not need to be taken then. The main-gate decision did not need to be taken until the 2010-15 Parliament. For reasons that we do not need to rehearse now, that decision was not taken until 2016. The Liberal Democrat position is that we believe we should retain a nuclear capability. We believe the threats are such that the United Kingdom and her European allies need to have a nuclear deterrent, but we do not believe in like-for-like replacement. The noble Lord, Lord West of Spithead, might suggest that we are closet unilateralists.

The party's position was debated at great length over the years and agreed in 2013: that we believed in retaining a nuclear deterrent but we were not persuaded that it was essential to keep a four-boat solution. While I understand that that is not going to work—were we to have a vote this evening, I would be in a minority, possibly of two, because I note that my Chief Whip has appeared and would support this line as well. But the position that the Liberal Democrats took, after a prolonged debate, eschewed the unilateralist perspective that many in my party, like the leader of the Labour Party—his position was outlined earlier by the noble Lord, Lord Tunnicliffe—would have preferred.

My party was willing to accept the retention of nuclear weapons and the replacement of Trident, but not like-for-like replacement, on the understanding that we would seek to take a step down the nuclear ladder, and that giving up nuclear weapons in a unilateralist way—saying simply, "We no longer wish to retain nuclear weapons"—would not give us any leverage in non-proliferation discussions. Keeping a seat at the table was important, and having a non-like-for-like replacement would at least ensure that we were still building submarines, retaining the skills that, as we have heard, are so important for our economy but also for the country's nuclear capability. Therefore, while moving away from continuous at-sea deterrence might strike some of your Lordships as leaving us vulnerable, it would also mean that we have not lost such capability and that we keep many options open, in a way that a step to unilateralism would not. The official Liberal Democrat position is that we do not support the like-for-like replacement of Trident but we do support the retention of nuclear capabilities and believe that stepping down the nuclear ladder would pave the way for further discussions on non-proliferation.

I will conclude with two questions for the Minister. First, in light of questions about non-proliferation, can he explain how the Government intend to contribute further to non-proliferation discussions once a decision on the four-boat solution is voted on next Monday? We have five-yearly reviews of the non-proliferation treaty. They tend to coincide with general election years, which perhaps has meant that the United Kingdom has not played as significant a role in the discussions as it might have. What scope might there be in 2020 for a key British role—

Lord Judd: I thank the noble Baroness for giving way during a short debate. I am very interested in what she is saying. She has been very candid about the Liberal Democrats' position—in favour of retaining a nuclear capability, but not supporting this particular move. In what form would they retain a nuclear capability?

Baroness Smith of Newnham: I am most grateful for the opportunity to clarify the non-continuous at-sea deterrence policy. It was outlined clearly in 2013 during the debate following the Trident alternatives review. We will have fewer than four boats, which is understood to be two or three boats. Since the Trident alternatives review did not explore a two-boat solution, I believe that must mean a three-boat solution, but, technically, our policy is for fewer than four boats. Not having a continuous at-sea deterrent means that the boats can be in or out of operation according to a timetable decided by whoever runs our defence policy at the time.

My final point goes back to the issue of costs. On Monday, after the Minister repeated the then Prime Minister's Statement following the NATO summit, I asked a question about defence expenditure and some of the issues raised by the noble Lord, Lord Ramsbotham, and other Members this evening. My understanding, from reading the report of the Joint Committee on the National Security Strategy, is that it shares the concern I raised on Monday. It was outlined on Monday—this was repeated by the noble Lord—that there has been a 0.5% increase in real terms in defence expenditure, but that was predicated on a budgetary forecast made before the decision to leave the European Union, which may mean that the defence budget is smaller than initially assumed. In that case, will the Minister reflect on what the implications are for the defence budget of taking this decision and ensuring that our defence capabilities are secure?

10.02 pm

Lord Touhig (Lab): My Lords, we have had a richly informed but short debate. I am sure all Members who have taken part would have wanted more time, and I have no doubt that the Minister will, like me, bring that to the attention of the usual channels on both sides.

In August 1945, the Labour Prime Minister, Clement Attlee, set up a Cabinet committee to examine the feasibility of Britain acquiring the atomic bomb. When, in October 1946, the Americans ended their nuclear co-operation, the Foreign Secretary, Ernest Bevin, said:

"We've got to have this thing over here, whatever it costs … we've got to have the bloody Union Jack flying on top of it."

In 1947, the final decision was taken to go ahead. In one sense, therefore, the Labour Party, on behalf of the British people, has ownership of the policy to have an independent nuclear deterrent. Our commitment to this policy remains steadfast today, despite some twists and turns over the past 70 years.

Maintaining Britain's nuclear deterrent is the policy of the Labour Party, as my noble friend Lord Tunnicliffe said at the start of the debate. It was a Labour Government who, in December 2006, published a White Paper. Noble Lords will remember those things called Green Papers and White Papers, and perhaps the Government will take note, because they would be of great value. The White Paper was on reviewing our nuclear deterrent. It set out the conclusions of a series of studies into whether Britain should still have a nuclear deterrent, and if the answer was yes, how that nuclear deterrent could best be provided.

The White Paper concluded that, while there was no nation with both the capability and intent to threaten the independence of the UK, we could not dismiss the possibility that a major nuclear threat might emerge. Having considered options for different ways of providing a nuclear deterrent, it finally concluded that the most effective system was a further class of submarine carrying ballistic missiles. In March 2007, the House of Commons voted 409 to 161 to endorse the conclusions of the White Paper. Work started immediately on assessing the different options, to determine how best to set up an affordable ballistic missile submarine capable of providing a credible deterrent capability well into the second half of the century. This culminated in a successful initial business case, and in April 2011 the Treasury approved the initial gate decision, which was announced to Parliament the following month.

Ernest Bevin said that we had to have the nuclear deterrent no matter what the cost. Many people would say that that was then, and that the cost now runs to tens of billions of pounds. But what is the cost of not having the deterrent? The true cost of conflict cannot be measured in money; it is measured in lives lost. Some 60 million people were killed in the Second World War—perhaps three times the number who lost their lives in the First World War, and most of them civilians. The plain fact is that resisting tyranny never comes cheap. If the possession of a nuclear deterrent helps keep the peace and saves lives, for me that is the better measure of the true cost.

I accept that many others will argue that the possession of nuclear weapons is morally wrong, and even if they could be justified on moral grounds, the scale of destruction that would be unleashed if they were used is too appalling to contemplate. But over the last seven decades, Britain's foreign and defence policy has sought to prevent a nuclear holocaust by leaving an enemy in no doubt that the cost of aggression would be a price too much for it to bear also. Like it or not, in today's world, in order to deter we have also to threaten.

I have heard people argue that we should scrap the nuclear deterrent. They say we should put our trust in human goodness and the determination of humanity to survive, no matter the challenges. But the key word here is trust. Recently, I read a very interesting paper written by Professor Nigel Biggar entitled *Living with Trident*. In it, he comments on a Church of Scotland report in 2009 which exhorted people to "trust in God" instead of placing people in a position "of fear or threat". He writes:

"It may be true—as I believe it is—that we should always trust God. But it really doesn't follow that we should always trust Vladimir Putin or Islamic State".

He was right on this. My friend and colleague Kevan Jones MP, in a paper entitled *Trident Myths and Facts*, states, "Definitions of deterrence vary" but quotes a very good definition put forward by the prominent scholar and political scientist, Kenneth Waltz, that,

"nuclear weapons dissuade states from going to war more surely than conventional weapons do".

On Monday, we considered the Statement following the NATO summit in Warsaw, where it was agreed that we will deploy troops in Estonia and Poland. NATO is another example of the Labour Party's commitment to the defence of our country, as it was set up in 1949 with the help of the then Labour Government. We also considered on Monday the probable Russian response, and it will be interesting to see whether this was considered at today's NATO-Russia Council meeting. Although we must be—and want to be—sensitive to the Russian point of view, we must make it clear that we will support our NATO partners in that region.

What do we know of Russia's nuclear programme? We know that Russia will continue to maintain a robust and capable arsenal of strategic and non-strategic weapons for the foreseeable future. We know that, to support this policy, the Russian Government are making strong investments in their nuclear weapons programmes. We also know that priorities for their strategic nuclear forces include force modernisation and command and control facilities upgrades.

I said on Monday that on these Benches we are proud of NATO, an organisation which is the defender of our freedoms and way of life, and in an uncertain world a source of security for many around the globe. Britain's nuclear deterrence is a key to NATO's strategy. That strategy is deterrence, based on the appropriate mix of nuclear and conventional weapons. NATO is committed to arms control, disarmament and non-proliferation, but as long as nuclear weapons exist, it will maintain itself as a nuclear alliance. This was reaffirmed at the Wales NATO summit in 2014. The Nuclear Planning Group provides the forum for consultation on NATO's nuclear deterrence. The United Kingdom's nuclear deterrent supports collective security through NATO for the Euro-Atlantic area.

As outlined in the 2006 White Paper, nuclear deterrence plays an important part in NATO's overall defensive strategy, and the UK's nuclear forces make a substantial contribution. If the UK were to unilaterally disarm but wished to remain a member of NATO, it would still need to accept that nuclear weapons are integrated into the whole of NATO's force structure.

Britain, throughout its history, has always punched above its weight in the world, and most often for good. We have continued that role in NATO. If we ceased to possess a nuclear deterrent, our ability to influence the United States and others would greatly diminish—and the knock-on effect would greatly reduce NATO's ability to defend. Therefore the United Kingdom would still be covered by the overall NATO nuclear umbrella, and would have to remain in the decision-making processes relating to the deployment of nuclear weapons.

In the more than seven decades since the world first came to terms with nuclear weapons after the end of the last war there has been no direct military conflict

[Lord Touhig]
between the major powers, and no state covered by another state's nuclear umbrella has been the target of a major state attack. I am the first to admit that it is impossible to prove that this situation has arisen because of nuclear deterrence. But it is also impossible to prove otherwise.

I have not yet reached my threescore years and ten, but I am not far short of it. And unlike my parents' generation, which saw two world wars and the deaths of untold millions of people, all my life I have lived in a country where I am free and safe. I want that for my children and my grandchildren too—to live in freedom and safety. I believe that the possession of a nuclear deterrent has helped keep this country safe for the last seven decades, and I believe it will keep it safe in the future.

10.11 pm

Earl Howe: My Lords, my confident expectation for this evening was for a constructive and illuminating debate, and I have not been disappointed. No doubt all of us could have wished for a somewhat longer time to devote to this crucial matter, but I am extremely grateful for the invaluable insights and expertise that your Lordships have brought to bear on it. I hope that the wide support for the Government's policy voiced this evening will inform and assist our right honourable and honourable friends as they prepare for their own debate in five days' time.

I should like to address some of the highly pertinent questions and observations raised by noble Lords who have spoken. I begin with the question posed by the noble Lords, Lord Tunnicliffe and Lord Ramsbotham: why are we having this debate now? There are some simple realities which we must confront. The Vanguard fleet is due to leave service in the early 2030s, and the successor submarines are highly complex vessels, which take 20 years or so to design and build. It is important, too, to recognise that industry needs certainty for the investment that it needs to make both in construction and in skilled workers. It has the assurance from the Government of a clear policy, but at this juncture in the successor programme, it is right that it knows that Parliament as a whole is behind this programme.

In 2007 Parliament voted to maintain our strategic nuclear deterrent beyond the life of the existing system. Last year Parliament voted twice to retain our deterrent, and the issue will be debated again next week. It is important that we keep reminding ourselves that this is not a judgment about short-term threats, but about the threats we may face over generations to come. It is right that Parliament has the opportunity to vote on such an important issue. It is important, too, for the Government to have the backing of Parliament in pursuing the policy on which we were elected to office.

The noble Lord, Lord Tunnicliffe, asked about the need for ongoing scrutiny of the programme as it goes forward. The 2015 SDSR concluded that a step change was required in the performance of the defence nuclear enterprise to deliver the successor submarine programme on time and on budget. We are currently engaged in intensive negotiations with industry about how best to contract on both Astute and successor to deliver the necessary performance improvements. It would not be appropriate for me to comment further while those negotiations are ongoing.

In addition, we have established a new Director General Nuclear post and supporting organisation to create a single and accountable focus within the Ministry of Defence for all aspects of the defence nuclear enterprise. In parallel, in answer to the noble Lord, Lord West of Spithead, the MoD also plans to create a new organisation for the procurement and in-service support of all nuclear submarines, including the successor programme. This organisation will have a specific focus on delivery, with the authority and freedom to recruit and retain the best people to manage the technical challenges and industrial base. Options for the new organisation continue to be developed and assessed.

Furthermore, as regards the Director General Nuclear, we expect to make a permanent appointment by the end of the year, but to maintain momentum at what is a critical point in the successor programme, Ian Forber, a civil servant with extensive experience of nuclear-related issues, has been appointed as acting DG Nuclear. The need for primary legislation will be considered as part of the continuing development and assessment of options for the new organisation.

My noble friend Lord Sterling, in his thoughtful and wide-ranging speech for which I thank him, spoke about the defence budget and the 2% commitment. The Government have made two defence spending commitments: to increase the budget in real terms in each year of this decade and to meet the NATO 2% commitment. Obviously, the first commitment means that defence spending will increase irrespective of what happens to GDP. I hope that reassures the noble Baroness, Lady Smith of Newnham.

My noble friend Lord Sterling referred to the depreciation of the pound in the context of the defence budget. I can tell him that the department carefully monitors fluctuations in currency markets and takes steps to protect its budget from short-term volatility. Like any responsible large organisation, we take appropriate financial precautions in all our procurement contracts.

The noble Baroness, Lady Falkner of Margravine, and the noble Lord, Lord Hutton, were right to underline that there is no viable alternative to CASD. The *Trident Alternatives Review*, published in 2013, demonstrated that no alternative system is as capable, resilient or cost-effective as the current Trident-based deterrent. It found that submarines were less vulnerable to attack than silos or aircraft and can maintain a continuous posture in a way that air and land-based alternatives cannot. Alternative delivery systems, such as cruise missiles, lack the range of the Trident missile system, meaning that the reach and capability of our deterrent would be reduced.

In that vein, the noble Lords, Lord Robertson and Lord Lee, and my noble friend Lady Buscombe all made a point with which I wholly agree. To those who, like the noble Baroness, Lady Smith, propose saving cash by cutting our fleet from four to three, I contend that that would be a false economy. A continuous at-sea deterrent without the capacity to be continuous

is no good to anyone. It would ultimately undermine the credibility of our deterrent on the international stage, rendering it pointless. Any savings made would be offset by the very real danger of being left in the lurch in the event of unplanned refits or breakdowns and our consequent inability to provide a second-strike capability.

My noble friend Lord King, in his wise and helpful speech, rightly rejected the proposition that the United States protects NATO, so why do we need UK nuclear weapons? What do they add to the alliance? He knows, as do many noble Lords, that the supreme guarantee of the security of the allies is provided by the strategic nuclear forces of the alliance in the round, particularly those of the United States. The independent strategic nuclear forces of the UK and France, which have a deterrent role of their own, contribute to the overall deterrence and security of all allies. Having more than one nuclear power in NATO makes it more difficult for adversaries to predict how the alliance might respond if threatened, so the deterrent effect is stronger.

The right reverend Prelate the Bishop of Chester and the noble and right reverend Lord, Lord Harries of Pentregarth, questioned how nuclear weapons help us to fight terrorism. The noble Lord, Lord West, put it very well. Nuclear weapons by themselves do not deter terrorists, but they were never meant to. We believe that they will, on the other hand, deter states tempted to sponsor terrorist groups by providing the capability to enable them to act as nuclear-armed terrorists as proxy against the UK or our NATO allies.

The UK has a wide range of policies and capabilities to deal with the wide range of threats we currently face—or might face in the future. Our nuclear deterrent is there to deter the most extreme threats to our national security and way of life, which cannot be done by other means. The nuclear deterrent does not deter terrorism any more than a tank or infantry deter nuclear war.

The noble and right reverend Lord, Lord Harries, went on to ask whether the deterrent serves a rational purpose. On that, I align myself with the noble Lord, Lord Touhig, and many other speakers. We cannot be certain what extreme threats we might face in the 2030s, 2040s, 2050s and beyond. Our nuclear deterrent provides the ultimate guarantee of our national security and way of life. Deterrence means convincing any potential aggressor that the benefits of an attack are far outweighed by its consequences. It is in no one's interests to attack another nuclear power with nuclear weapons because of the consequences of its response.

The noble and right reverend Lord, Lord Harries, also raised a practical issue. He asserted that emerging capabilities will one day enable our enemies to locate our submarines or subvert them through cyberwarfare. I can tell him that a great deal of work has been done on that subject. Let me assure him that, despite ongoing and exhaustive monitoring of nascent technologies, there is nothing to suggest that this will be remotely possible in the foreseeable future. If it were remotely possible, we should ask ourselves why both Russia and China are expanding their nuclear submarine fleets.

The noble Lord, Lord Ramsbotham, suggested that the Government should remove the cost of Successor from the mainstream defence budget, accounting for 2% of GDP. I agree with the noble Lords, Lord Triesman and Lord Touhig, about the indivisibility of deterrence. All our forces, including conventional forces, have a powerful deterrent effect. Nuclear weapons, however, pose a unique threat and remain a necessary element of the capability we need to deter threats from others possessing nuclear weapons. It was made clear in the 2006 White Paper that investment required to maintain the nuclear deterrent will not be at the cost of other conventional capabilities. That remains the case today.

My noble friend Lord Arbuthnot on a similar theme asked why CASD was funded by the Ministry of Defence. I say to him that it is right that, as the ultimate defensive and protective capability, the deterrent continues to be funded by the Ministry of Defence. The regular reviews that form SDSRs examine the whole spectrum of threats. The Government, and the Ministry of Defence as part of that, are thus able to take appropriate decisions and allocate funding when required to defend our nation.

My noble friend was right to speak of the political sensitivities of basing the deterrent in Scotland. Her Majesty's Naval Base Clyde is one of the largest employment sites in Scotland, as he knows, with around 6,800 military and civilian jobs now, as well as a wider economic impact on the local economy. The future is very positive. The numbers at HMNB Clyde are set to increase to an estimated 8,200 by 2022. That increasing presence generates economic benefits for communities throughout Scotland—through jobs, contracts and requirements for supporting services and skills. That is the message that we need to get across to our friends and colleagues in Scotland. In the end, the people of Scotland voted to remain part of our United Kingdom in 2014 and they will continue to benefit themselves from the security that our deterrent provides.

The noble Lord, Lord Judd, in his customarily thoughtful speech, spoke about nuclear disarmament. I agree that the only way to achieve global nuclear disarmament is to create the conditions whereby nuclear weapons are no longer necessary. We believe that the nuclear non-proliferation treaty should remain the cornerstone of the international nuclear non-proliferation regime and the essential foundation for the pursuit of nuclear disarmament and for peaceful uses of nuclear energy. All state parties should be pushing for universality of the treaty and for concrete progress across all three of its mutually reinforcing pillars. It is worth reminding ourselves that the NPT process has worked. It has stopped the nuclear arms race, reduced stockpiles and slowed the pace of proliferation.

The noble Baroness, Lady Smith, asked me what we are proposing to do practically with the NPT. Clearly multilateral disarmament will be challenging, but we remain fully committed to a world without nuclear weapons in line with our obligations under Article 6 of the NPT. We firmly believe that the best way to achieve that goal is through gradual multilateral disarmament, negotiated using a step-by-step approach within the framework of the NPT. We remain determined to continue to work with partners across the international community to make progress on this to build trust and confidence to underpin the process. We have put forward

[Earl Howe]
a proposal to create a working group that can identify, elaborate on and make recommendations on effective measures for nuclear disarmament. That proposal remains on the table, and we continue to work with other member states with the aim of reinvigorating the Conference on Disarmament in Geneva.

My noble friend Lady Goldie spoke compellingly on the futility of unilateral disarmament. I agree with every word that she said. Unilateral disarmament would not make the world a safer place. It is naive to imagine that the grand gesture of UK unilateral disarmament would change the calculations of nuclear states or those regimes seeking to acquire nuclear weapons. There is no good reason to think that other nuclear-capable states would follow our example; that has not been our experience to date.

The noble Lord, Lord Hutton, asked specifically about the comprehensive test ban treaty. The UK is a strong supporter of the CTBT and we actively urge states to sign and/or ratify it. The remaining Annex 2 states outside the treaty need to join as soon as possible, and we press for this whenever the opportunity presents itself.

This has been an extraordinarily useful debate, and I apologise to those speakers whom I have not been able to mention. Amid our deliberations, notwithstanding the hesitations expressed by the noble Baroness, Lady Smith, and the noble and right reverend Lord, Lord Harries, there has been a steel core of consensus. Whether one is in favour of or opposed to maintaining this nation's nuclear deterrent, we can all surely agree on the laudable premise that a world without nuclear weapons would be a better one. Utopian dreams aside, though, we have to face facts: we cannot predict the future. As so many speakers have said, nuclear weapons are here—17,000 of them around the world. They present a real and present threat to our national security and, for as long as they continue to do so—as I fear they are likely to—we must maintain our ability to respond in kind. To do otherwise would be a dereliction of this Government's primary duty, the defence of the realm—a duty that we must discharge not just on behalf of the men, women and children living in the UK today, not just on behalf of NATO, but on behalf of countless generations yet to be born.

Motion agreed.

House adjourned at 10.29 pm.

Grand Committee

Wednesday 13 July 2016

Children and Social Work Bill [HL]

Committee (5th Day)

3.45 pm

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

The Deputy Chairman of Committees (Baroness Garden of Frognal) (LD): My Lords, if there is a Division in the Chamber while we are sitting, this Committee will adjourn as soon as the Division Bells are rung and resume after 10 minutes.

Clause 20: Social worker regulations

Amendment 135B

Moved by ***Lord Warner***

135B: Clause 20, leave out Clause 20 and insert the following new Clause—

"Regulation of social workers: General Social Work Council

(1) Her Majesty must by Order in Council set up a body to be known as the General Social Work Council, for the purpose of regulating social workers in England.

(2) The General Social Work Council is to have responsibility for the following matters—

(a) keeping a register of social workers and of people who are undertaking education or training to become social workers;

(b) restrictions on practising social work and using titles related to social work;

(c) professional standards in relation to social work;

(d) education and training for social workers and those training to be social workers;

(e) discipline of social workers and fitness of social workers to practise;

(f) appointing advisers on the regulation of social workers;

(g) the publication and sharing of information relating to the regulation of social workers;

(h) cooperation with other bodies in respect of the regulation of social workers;

(i) the charging of fees in connection with the regulation of social workers;

(j) advising the Secretary of State on the creation of offences related to the regulation of social workers; and

(k) consultation about the regulation of social workers."

Lord Warner (Non-Afl): My Lords, Amendment 135B seeks to replace the existing Clause 20 and much of Part 2 of the Bill with a new clause that establishes a new general social work council as an independent regulator of social workers accountable to Parliament through the Privy Council. This amendment needs to be seen alongside Amendment 135C, which seeks to set up a new social work improvement agency, and will be moved by the noble Lord, Lord Hunt. It is no accident that both these amendments have the same names attached to them. We all start from a totally different position from that of the Government on social work regulation and improvement, as I think was very clear at the briefing meeting on Part 2 held last week. That is why I enlisted the help of the clerks in producing this amendment, and I am very grateful to them for their efforts.

The purpose of Amendment 135B is twofold. First, it would separate the work of regulating social workers from improving their development. Secondly, it would make the regulation of the social work profession independent of Ministers, as is the case with all other health and care professions. Under Part 2, the regulatory and improvement functions are combined. I think this totally misunderstands the function of profession regulators, who are there to protect the public by setting and upholding standards of conduct and competence, controlling entry to the profession and taking action in response to concerns about conduct and competence. Regulators are not there to secure improvement to a profession's training, practice or continuing development. Those functions are for others. The noble Lord, Lord Hunt, and others will say more about this second role when we come to the next amendment. All I would say now is that muddling these two separate roles is highly likely to produce a muddled and less-effective regulator. The former General Social Care Council, before its abolition by the coalition Government, was criticised for having an unclear remit covering both regulatory and improvement functions. A review of the Nursing and Midwifery Council in 2012 by the Professional Standards Authority criticised that council for increasingly seeing,

"its role as supporting the development of nurses and midwives beyond 'fitness to practise' and so had strayed into trying to provide a broader professional leadership role".

Combining regulatory functions with those of professional development distracts people from the main purpose of a regulator, which is to protect the public by upholding standards. With the Bill in its present form, the Government are doing just that. They are repeating the failings of the General Social Care Council, which they abolished, and are not learning the lessons from the regulator oversight work of the Professional Standards Authority. The likely outcome is muddle and delay in the important fitness-to-practise work of a regulator that protects the public from unsatisfactory professionals.

The other major shortcoming of Part 2 of the Bill, as drafted, is that it could well lead to the Secretary of State exercising direct control over social workers. This can only jeopardise their professional independence and lead to a loss of public and judicial confidence in the independence of social workers. They could quickly be seen as agents of the state. This interpretation can most easily be avoided by the new regulatory body being independent of government but accountable to Parliament through the Privy Council. This amendment does just that, and has the added advantage that it avoids removing social workers' regulation from the oversight of the Professional Standards Authority and retains the position it shares with other care professions. This will ensure the effectiveness of the regulation of social workers.

[Lord Warner]

I recognise that the same effect could be achieved by keeping the regulation of social workers under the aegis of the Health and Care Professions Council, which would certainly be a little less disruptive and would avoid the cost of change. However, I can see the merits of the Government providing social workers with their own regulator and that that might enhance the standing of social work. The amendment provides for this. I hope the Government can see the force of the arguments for separating the functions of regulation and improvement, and for separating the governance of the regulator from too close a relationship with the Secretary of State. I hope it will be seen by the Government and the Minister as a reasonable compromise. I beg to move.

The Deputy Chairman of Committees: My Lords, I have to inform the Committee that if Amendment 135B is agreed to, I cannot put the question that Clause 20 stand part of the Bill by reason of pre-emption.

Lord Ramsbotham (CB): My Lords, I added my name to this amendment because I was moved to do so, particularly by the British Association of Social Workers, which wrote saying that:

"We are not opposed to exploring new social work regulation options. We support steps to improve accountability of social workers, enabling them to show increasing specialism and skill. But we are opposed to these proposals that concentrate government control and that contain no incentive for the profession to lead in setting standards and developing its self-governance".

In other words, it is not averse to regulation and it is all in favour of maintaining the independence of that regulator and separating him or her from the governance that is proposed in the Bill.

This is the second time in my life that I have supported an initiative in which my noble friend Lord Warner was involved. When I took over as Chief Inspector of Prisons in 1995, the control of young offenders was entirely in the hands of the Home Office, and it was an absolute disaster. They were treated badly, their conditions were appalling and nobody was taking an interest in the conditions and treatment that they received in the various establishments. Then came the Youth Justice Board—proposed and led by my noble friend—and there was immediate transformation. The merit of this amendment is not only that it has come from someone who clearly knows the profession because of his past experience; it also reflects both the practicalities of regulation that is required and has the support of the whole profession, which the Bill clearly does not.

Baroness Walmsley (LD): My Lords, I have also added my name to this amendment, and to Amendment 135C in the next group, which we will come to in a moment.

I really think the Government have some questions to answer. Why is this new regulator needed? The Minister might answer by saying that having its own regulator would add to the status of social work. That is a perfectly decent answer, but not one that is totally under the thumb of the Secretary of State. Perhaps the Minister could tell us what the cost of creating this new regulator would be. The NSPCC is concerned about the danger of it creating a two-tier system of statutory and non-statutory social workers. I wonder if the noble Lord can answer that. What is the justification for putting regulation and improvement together? That question was very ably outlined by the noble Lord, Lord Warner. Why does this health and care profession have to be under the skirts of the Secretary of State? While I am about it, which Secretary of State are we talking about? The Bill does not say. Perhaps I should ask which woman it will be.

Many of us feel that if social workers were to become directly regulated by the Government, that would further weaken the trust—which is already fragile—between them and Whitehall. As the BASW said in the briefings we have all received, the Bill does nothing to address some of the real problems that affect social workers.

There is a real issue here because we have a significant shift of significant powers. It is a matter of principle. Why should social workers be the only profession in the health and care sector to be regulated by government? Nursing and medicine are not. They are public service professionals using their professional skills and judgment to make vital decisions about vulnerable members of the public. Bringing regulation under government control risks sending a demoralising set of signals to the sector. Loss of independence is likely to be seen as evidence that social work is really not up to it and needs a very close eye kept on it. That seems odd because it is at odds with what Ministers have been saying recently. They have been saying that social workers have been disempowered by command-and-control-type initiatives from central government and should be trusted to exercise their professional judgment and respected as professionals who undertake very complex work. Hear, hear! I agree with that. Why seek this government stranglehold now?

Baroness Pitkeathley (Lab): My Lords, I remind the Committee that I have form in this area as the person who chaired the committee that set up the General Social Care Council, as the first chair of the General Social Care Council and as the chair of the Professional Standards Authority which oversaw the demise of the GSCC and the transfer of regulation to the HCPC. There are, as we know, terrible problems facing social work and social workers at the moment, so to be discussing these structural changes now is rather like rearranging the deckchairs on the "Titanic". That said, I support the idea of getting very much more independence for the regulator of social work. The separation between regulation and improving standards is important. That is a very well-established principle. The Department of Health is promoting that principle as we speak, building on the Professional Standards Authority's paper *Rethinking Regulation*. All this applies to other health regulators, as Ministers well know.

Independence is extremely important. The oversight of the current regulator, the HCPC, by the Professional Standards Authority—I am no longer its chair, but I still declare an interest—is a vital part of assuring not only its independence but its performance by scrutinising its fitness-to-practise cases and referring them to the High Court where it has failed to protect the public. I remind the Committee that the purpose of regulation is to protect the public.

I wonder whether the Minister has considered the disruption element of the Government's proposals. The HCPC has only just finished, this month, dealing with the legacy fitness-to-practise cases it inherited from the General Social Care Council. If a new regulator is set up, it will have to deal with the legacy cases of the HCPC, which will mean two different systems with two different sets of staff and consequent expense. Cost is another area that we all have to be very concerned about with these issues, and I raised it at Second Reading.

4 pm

Baroness Howarth of Breckland (CB): My Lords, we are fiddling while Rome burns. I have spoken this week to a social worker, a director of children's services, an academic and a head of a voluntary organisation, all of whom are in total despair about the state of social care. I know it is the Government's wish to improve that. I am sure that that is where the heart of the Minister in the other place and the heart of the Minister here are. However, I am not sure that they have found the right route forward.

Certainly, the Local Government Association—I declare an interest as a vice-president—feels that there needs to be a balance between greater regulation and encouraging experienced social workers to remain in or return to the profession. I have not yet seen the report from the other place about the movement of social workers but I have read the press report, as I am sure everyone here has. That shows a huge movement. I know that there are vast vacancies and that inexperienced agency workers are taking on these roles with dire consequences.

We know that good social work can transform people's lives and protect children, and I know that that is the aim of the Government. My concern about what the Government are trying to do at the moment is that this will divert resources and energy. We have got to focus both of those directly on the front line of social work so that we do not leave social workers in local authorities, and sometimes in voluntary organisations, taking the responsibility for the failure of the Government and their authorities to get regulation and professional development right.

We have all been concerned because of Ofsted reports. I have been looking closely at the way that Ofsted works, and I support it in many ways. However, it never takes into consideration the amount of resource that an organisation has. We have occasionally had examples of local authorities that are able to produce more on less resources. However, it is only a handful of authorities. A vast number of authorities are struggling and therefore worrying about what they are going to do. This is about making sure that we have a really good regulator who can assess whether the social worker or the structure in which they are working is at fault.

I have looked closely at how those resources are used. The director of social services to whom I spoke this week simply said, "All I am going to do, because I care about my services, is raise the bar on Section 17". So we will have more children with greater difficulties going to a higher level of need, and more children below that bar—but again with a higher level of need —who will not get a service.

Unlike some of my colleagues, I do not feel that I have the answer. We all care desperately about social work as a means of helping families in need and we have to find the right answer. However, it is clear that many people feel that we have not reached that point yet.

Baroness Tyler of Enfield (LD): My Lords, I add my support to the amendments in this group, and I wish to make two points.

First, I endorse the sentiments of the noble Baroness, Lady Howarth, about whether it should be a priority at the moment to put so much time and energy into setting up a new regulator when the profession, and the front line in particular, is so stretched. I was taken with the report that I saw on the BBC this morning about the Commons Education Committee which said that urgent action is needed regarding social workers' case loads. It drew attention to high drop-out rates leading to increased workloads. It said that these problems must be tackled, particularly the endemic retention problems in the profession. These are the issues that are crying out for urgent attention, and that is my first concern about diverting our attention from them.

However, when it comes to the proposals that the Government have set out to bring social worker regulation under government control, I very much share the concerns that have already been voiced about the lack of independence in these proposals, which is extremely problematic. As I said, I support the broad concept of a bespoke registration body for social work and of social work having its own regulator, but a regulator needs to do a delicate balancing act and being government controlled makes that very difficult. It needs to balance the need of the public for accountability, the requirements set, quite legitimately, by government, the interests of the profession and the organisational requirements of employers, and any regulator needs to be independent in carrying out that balancing act.

Therefore, my concerns are the ones that have already been voiced. This proposal has come without any prior consultation or dialogue with the social work sector so far. It has not had an opportunity to feed in. As my noble friend Lady Walmsley said, it would leave social workers in a very different position—unique indeed—among health and social care professionals when we should be doing all we can to enhance the status of the social work profession and put it on an equal footing with other health professions.

I also share my noble friend's view that this proposal will further weaken trust between the profession and Whitehall. In addition, it could well have a negative impact on the extent to which social workers feel real ownership of the very necessary and important improvement initiatives that are around. Indeed, it could also stifle innovation—something that we have discussed very thoroughly. It is very important that we have innovation. Finally, it could well lead to further demoralisation of social workers when, as I said at the beginning, there are currently well-documented problems with recruitment and retention in parts of the workforce. This is simply not the time to go about these reforms.

Baroness Pinnock (LD): My Lords, many noble Lords have already spoken about many of the issues surrounding these proposals, and I want to focus on the key one of independence, to which all speakers so far have referred. I thought it would be worth while reading the policy statement issued in June about regulating social workers. It was quite revealing because it demonstrated that there was uncertainty at the heart of government about which road to take—whether the regulator should be independent or closer to government. Paragraph 48 says:

"In considering what form the new regulator should take we have considered whether a new fully independent regulator should be established",

and the next paragraph goes on to discuss the pros and cons. One argument against it is:

"The establishment of a wholly independent body would inevitably take significant time as leadership and infrastructure are built from scratch and would, we think, be more expensive than the alternatives".

The decision about the independence of the regulation of a profession as important as social work, which from time to time has the duty of challenging the state, should be based on more than simply time and expense.

The statement, in further paragraphs about the body's establishment, continues:

"Government is proposing to establish an executive agency",

which it says will be distinct. Further, it says that:

"Government recognises that professional regulation for many other professionals is organised on a more independent footing",

and therefore propose that it,

"should be kept under review".

To me, that says loud and clear that the Government are undecided. On the one hand, they know that it ought to be independent; but on the other, they want to bring it closer to government. The danger is that we will end up with social work being seen as politicised according to the colour of the Government who are in control. That is a very dangerous path to take. I urge the Government to look through the arguments that were made in their own policy statement and to come down on the side of independence rather than cost and expense.

Lord Hunt of Kings Heath (Lab): My Lords, I very much welcome the briefing that we received from Ministers last week on the questions we are debating. I was also impressed with the vision set out by the noble Lord, Lord Nash, and his ministerial colleagues about the need to achieve a high level of social work, with a heavy emphasis on improving practice. So there is no disagreement with us on the aims that the Government have set out. I applaud them, as they are absolutely right to focus on the quality of social work practice. Our concern is the form that these aims take in the Bill. Not only will it not do the job but, as the noble Baroness, Lady Howarth, and my noble friend Lady Pitkeathley have suggested, it will detract from the real effort that needs to be put into encouraging, supporting and helping social workers to improve what they do.

Noble Baronesses have already raised the Education Select Committee report. What is striking is its reference to a vacancy rate of "17% of the workforce", while the Government's own figures,

"conceded that there were retention concerns, with the average career in social work lasting less than eight years, compared to 16 for a nurse and 25 for a doctor".

This is not the time to be messing around with regulation when it is working in a perfectly satisfactory way at the moment.

There are five concerns about the way that the Bill has been drafted. First, we still do not understand why, within two years, there has been a complete reversal of government policy. Why has there been that reversal? I have yet to hear one proper explanation for why that has happened. Secondly, why was there no proper consultation or discussion with anyone in the field about the changes? Thirdly, why is regulation being confused with improvement? The fourth issue, which is ultimately the most important, is why the Government are setting themselves up as the regulator of a profession, while the fifth is parliamentary. It is about the use of regulations in this Bill, rather than the proper use of primary legislation.

On the reversal of policy, the Care Standards Act 2000 established the General Social Care Council while, in parallel, a College of Social Work was established. I think that none of us would say that those organisations always covered themselves with glory, but, towards the end of its life, it was quite clear that, under its last leadership, the General Social Care Council was pulling its act together. There is no doubt about that at all. I opposed the transfer of social work regulation from that body to the HCPC for the very reasons that the Government now use to justify the change in policy. Paragraph 38 of the policy statement says:

"The system that the HCPC operates is designed to maintain appropriate minimum standards of public safety and initial education, rather than raising standards".

Of course—that is what the HCPC exists to do. The Government were told that when we debated it. They ignored it and went ahead with this proposal. So why this sudden reversal of policy?

4.15 pm

We move to the question of the college. The Government said when the plug was pulled—and it only gave up its life in September of last year, less than a year ago—that the college's demise was due to it failing: it was not attracting enough registrations. Why, nine months later, are they essentially talking about re-establishing, in broad terms, what the college was there to do? They have not yet explained how on earth this new body can be viable if the College of Social Work was not viable nine months ago. The DfE has a reputation for being a department that is not much involved in Whitehall, but it seems to have no memory whatever of what it was seeking to do in this field going back not five or 10 but two or three years ago.

On consultation, I have just one question. The chief inspector of social work for children said at the meeting last week that there had been consultation. We have had a letter—which has already been quoted—under the auspices of the British Association of Social Workers, on behalf of other social work organisations, which says that this proposal was made,

"without any prior proper consultation or dialogue with the social work sector on the content of the Bill".

What discussions did take place, or was it simply an informal phone call from the chief inspector telling BASW what was going to happen?

I move to the issue of why regulation is being confused with improvement. Last week, Ministers were talking about improvement, not regulation. We know that all around the world there is a generally accepted principle that regulation is separate from improvement. The reason is very simple: regulators in general are about maintaining public safety and they are punitive. A punitive body cannot be the same body to which people then open their doors as an improvement regime. It is very simple. Any of us who have been subject, certainly in the health service, to the tender mercies of regulators will know that we approach them very differently from the way in which we would open the door to an improvement agency. It is very different. Different people do the things that need to be done within those respective bodies.

If the noble Lord, Lord Prior, were here he would say, "Ah, but we have created NHS Improvement, which brings together an improvement agency with financial regulation". But any insider knows that NHS Improvement is having the devil of a job to run this—it is having to run two different systems with different sets of staff and Chinese walls between them. That is the very reason you cannot bring improvement together with regulation. The PSA, an excellent body, formerly chaired by my noble friend Lady Pitkeathley, has made it very clear in the briefing we have had that there is a distinct difference, and a need to have a separation between regulatory and improvement activity. I know that this Government seem to have a problem with evidence and experts, preferring to rely on anecdotes as a way to make policy, but when you have an overarching regulator in the health and care field, surely you listen to it when it makes such a clear and unequivocal statement.

Of all the provisions in the Bill, the one I would most like to remove is the one that designates the Secretary of State as the regulator of social workers. Why should that be? First, it is a direct threat to the professional autonomy of a profession. In my view, that should always be resisted. Frankly, I am as concerned about the precedent it sets as I am for the social work profession. If the Government were proposing to take over the direct regulation of doctors we would not be in Grand Committee, we would be in the Chamber and the Government would find themselves up against the most tremendous opposition. We know that social workers do not have that kind of support; it is a vulnerable profession, so we are in Grand Committee and no more than 15 people are debating this issue. But the principle is exactly the same.

Why is it important that regulators should be independent of government when it comes to individual professions? I do not want to overstate or exaggerate, but I had a look at the work of the *British Medical Journal* in 2014, which had a very interesting article on the relationship between totalitarian regimes and the medical profession. This was backed up by a BMA publication going back to 1992. It was a question about why doctors participated in human rights abuses. The BMA concluded that one of the potential reasons for it was the bureaucratisation of the medical role. Of course we do not have a totalitarian Government, but this principle that a Government could regulate doctors is so important that it would be resisted till the cows come home.

My argument is this. I do not think that social workers are any different from doctors. I think that if we were to pass this provision we would be creating an awesome precedent for the regulation of all professionals in the future. Of all the things in this Bill, the one thing I wish to remove is that. We surely must resist it.

I turn, finally, to the use of regulations. I have never seen such a Bill. It was clearly drafted in a hurry, but the use of regulations is wholly unacceptable. The Government claim that that is fine because all they are doing is essentially following the Section 60 process in relation to health regulators. First, however, the Section 60 orders were based in original primary legislation before social care was brought into the compass of this regulatory arrangement. Secondly, we have precedent. The 2000 Act of blessed memory created the General Social Care Council by primary legislation. I see nothing —no argument at all—to suggest that the Government cannot adopt the approach taken there: to set out the general principles in primary legislation, in addition to Schedule 1 to the Act, which set out the establishment of the body.

The Constitution Committee and the Delegated Powers Committee of your Lordships' House have both said that the way in which the Government drafted this Bill in relation to Part 2 is wholly unacceptable. The Government have already responded to the Delegated Powers Committee. Remarkably—because I cannot remember when a Government have so ignored a recommendation from the Delegated Powers Committee —the Government have essentially said that they intend to plough on. The only concession they are giving, as the noble Baroness, Lady Pinnock, said, is that in the long term, they might transfer regulation to a more independent body. That really will not do.

We have time between now and Report. I hope the Government will think again and start to open up a consultation with the sector. They even have time for a very quick White Paper to see how, if they are determined to have an independent regulator, it could be established in primary legislation as a wholly independent body. I hope the Government will recognise that there is extreme unhappiness about the approach they have taken.

The Parliamentary Under-Secretary of State, Department for Education (Lord Nash) (Con): My Lords, I am grateful to all noble Lords who have spoken in this debate: the noble Lords, Lord Warner, Lord Ramsbotham and Lord Hunt, and the noble Baronesses, Lady Walmsley, Lady Tyler, Lady Howarth, Lady Pitkeathley and Lady Pinnock. They have made a number of extremely important points and I want to give them due consideration and attention.

I am also mindful of the comments made earlier today by the Education Select Committee, which were referred to by a number of speakers. Noble Lords have my firm commitment that we will carefully study the recommendations of the committee and consider them as we go forward.

[Lord Nash]

In order to cover all the concerns raised by noble Lords, I propose to speak to Clause 21 and, alongside it, address the amendment tabled by the noble Lords, Lord Warner, Lord Ramsbotham and Lord Hunt, and the noble Baroness, Lady Walmsley, on the establishment of a new independent regulator—the general social work council. I will then speak to Clause 20.

Clause 21 concerns the appointment of a regulator of social workers in England. Before I speak in detail about the clause, I want to address head on issues raised by the DPRRC. The committee raised concerns in its recent report that this legislation does not specify who will act as the regulator, leaving it, instead, to be addressed in secondary legislation. The Government are proposing that Secretaries of State will initially exercise regulatory responsibility for social workers. They will do this in practice by setting up an executive agency to regulate the profession. I will of course set out the arguments in favour of this approach later in this debate.

On the specific issues raised by the DPRRC, I hope I can reassure this Committee by confirming that I have written to the DPRRC to commit that the Government will bring forward amendments to the Bill specifying clearly that in the first instance regulatory responsibility will be exercised by Secretaries of State.

In addition, to address concerns raised during debates on the Bill about the independence of the new regulator, we have proposed a formal review point. The Government have committed to review and consult three years after the regulator is fully operational on whether it should be moved to a more independent footing. To this end, we propose to retain the power in the Bill to transfer regulation to another regulator in the future. It is of course not unprecedented for a regulator to be established through secondary legislation, and that has become quite common practice. Indeed, the current regulator, the HCPC, was itself originally established through an Order in Council.

I now turn to the key issue of why the Government believe that reform of social work regulation is vital. Much has been said here today and throughout the passage of this Bill about the excellent work that social workers do, often in very challenging circumstances. We all know that social work is a complex and challenging profession which has the power to transform lives. Every day social workers deliver critical services for the state, safeguarding vulnerable children and adults with care and support needs. They deal with the most complex and fraught situations that require the highest levels of skill, knowledge and capability.

In recent years a series of high-profile incidents have seen the profession face higher levels of scrutiny and challenge. Through Ofsted inspections and from the serious cases we all know about, such as those involving Daniel Pelka, Hamzah Khan and the children exploited so terribly in Rotherham, we know that excellent social work practice is not found consistently across the country. Although such cases are always complicated, the quality of the workforce and its professional and leadership capability have been common factors in all. That is why the Government have embarked on an ambitious programme of reform, aimed principally at improving the standards of practice and the systems that support all social workers, as well as improving the standing of social work as a profession.

I assure noble Lords that the Government have taken action to support the profession in recent years. To bring vital social work expertise to the heart of government, we appointed two chief social workers. I know that many noble Lords present today have had the opportunity of meeting them on a number of occasions and have been very favourably impressed. Through the chief social workers, the Government have published statements setting out for the first time the essential knowledge and skills that all social workers need.

We have also made significant investment in the training of our new social workers, investing over £700 million in both traditional routes into the profession and fast-track alternatives since 2010. We have funded four new teaching partnerships and will be supporting more, bringing employers and educational providers together. They are developing high-quality training provision and supporting continuous professional development. To support the critical transition from training into practice, we have established the Assessed and Supported Year in Employment.

We are also offering our support to develop practice-focused career pathways. We will achieve this through our proposals to assess and accredit child and family social workers; supporting the development of leadership roles in both adults' and children's services; and supporting specialist areas such as in mental health social work practice. This will reap a dual dividend: supporting ever-better standards of practice but also, crucially, giving social workers clear progression routes which can keep them in the profession and in practice.

4.30 pm

I want to take this opportunity to address the question of social worker retention, an issue raised by the noble Lord, Lord Hunt, and the Education Select Committee. This is of course a complex problem and needs a multifaceted solution.

The quality of the environment in which social workers operate can be a key determining factor in recruitment and retention. This includes: the quality of supervision and wider leadership and management; opportunities for development and career progression; workloads and levels of bureaucracy; and organisational culture. Clearly there is a responsibility on employers here, but government action is also contributing to tackling these issues.

Much of our wider reform agenda seeks to address a number of these points head on. For example, we have evidence that we are attracting people into social work through Frontline and Step Up who would not have considered it a career option previously. Efforts to improve initial training through fast-track programmes and teaching partnerships will lead to more-confident, better-trained social workers who are better able to cope with the demands of front-line practice. In children's services we are supporting better leadership and supervision. Our ambition is that all local authorities will have an accredited practice leader in post by 2020, and we are establishing programmes to develop practice

leaders and supervisors. Learning from the innovation programme, our local authority partners in practice and the What Works centre should all help drive improvements through the system.

Alongside this, regulatory reform can make a contribution. Getting initial education standards right will mean newly qualified social workers have the skills they need to cope with the challenges of the role. The establishment of post-qualification professional standards, with the option to accredit those with this expertise, will mean that social workers have clear career pathways and will help to enhance their status. This can only help retention. I hope noble Lords will agree that this demonstrates a clear commitment from Government to support improvements in the profession.

The reforms that I have just set out depend on a regulatory system sharply focused on high professional standards which recognises that standards need to improve and good practice should be promoted. However, we will not be able to achieve the full benefits of these reforms if we do not also have a high level of ambition for the social work profession. It is our contention that the two are complementary, and both are required if we are to create the world-class social care system, with world-class social workers, that we all aspire to. We believe the current approach to regulating the social work profession cannot deliver this.

The current regulator, the HCPC, oversees a model of regulation that is designed to maintain minimum standards of public safety and initial education across a wide range of diverse professions. This approach works well for most of these professions, many of which have strong professional bodies and have been formally regulated for many years. In terms of the current model of regulation, it surely cannot be right that, as Sir Martin Narey stated in his report:

"So we have a situation where employers cannot be confident about the abilities of newly qualified social workers, in part because of uncertainty about their raw calibre … there are universities and colleges where entry and academic standards appear to be too low and where the preparation of students for children's social work is too often inadequate … HCPC argue that the standards set out clear expectations of a social worker's knowledge and abilities when they start practising. But most of the standards … are general in nature and could be describing almost any professional and, in many instances, non-professional occupation ... the core document, the *Standards of Proficiency*, does not remotely provide adequate guidance to universities about the skills and professional knowledge required of graduate social workers".

Professor David Croisdale-Appleby, in his review on social work education, stated that HCPC standards of education and training and its standards of conduct, performance and ethics are set at a low level of quite generic expectation that would be covered by any higher education institute's own governance regime.

Lord Hunt of Kings Heath: Then why on earth did the Government abolish the GSCC and transfer it to the HCPC when we said at the time that this would happen and had a vote on it? Why do it? We have had no explanation of the change. It was not five or 10 years ago but two years ago.

Lord Nash: I will come to that. In its totality of standards, there is very little which is focused on or particularly salient to social work education. The current regulatory model also does not focus on setting professional standards for post-qualification practice. This sets social work at odds with other professions, such as nursing and midwifery, and the current model sets requirements around continuous professional development which are generic and applicable to all the professions that the HCPC regulates. We believe there is clear scope for improvement, and I am glad that the noble Lord, Lord Hunt, agrees.

Lord Warner: Everything that the Minister said seemed to relate to social workers in the services for which his department is responsible. Is he saying that all these same considerations apply to social workers who work with adults? If he is, let us see the evidence. None of us has seen this evidence, and I have certainly not heard that there are these kinds of concerns about social workers who work with adults in a co-operative and increasingly joined-up way with the NHS.

Lord Nash: In relation to education and training, we are saying that.

Lord Warner: What expertise does the DfE have in relation to the work and performance of social workers working with adults? The Minister has no responsibility for that. His officials have no knowledge or responsibility for this area. Where is the evidence? Does this come from the Department of Health? Where has it come from?

Baroness Walmsley: My Lords, I did not get an answer to my question about which Secretary of State it would be. Strangely enough, although Clause 21 refers to "Secretary of State" in the singular, in his response the Minister talked about Secretaries of State. Will he clarify whether we are talking about the Secretary of State for Education and the Secretary of State for Health in agreement? If so, what will happen if they do not agree?

Lord Watson of Invergowrie (Lab): Today's edition of Written Statements and Answers contains an Answer to a Question that I put down on social work training. It is from the noble Lord, Lord Prior of Brampton. Why is that?

Lord Nash: It is clear that the agency will be supported by the DfE and the DH. Both Secretaries of State will be responsible. If they do not agree, I assume we will put them in a room until we have an agreement. Secretaries of State do not initially agree on a lot of things. In answer to the noble Lord, Lord Hunt, the Department of Health is responsible, just as the DfE is responsible for children's social care. I do not know whether I can say any more at this stage, so I shall go on.

This new regulator will have an absolute focus on raising the quality of social work education, training and practice through setting new and more specific standards. We intend to establish a new executive agency for the regulation of social workers, jointly supported by the DfE and the DH and accountable to the Secretaries of State. I reassure noble Lords that in arriving at this conclusion we considered the merits of

[Lord Nash]
a number of different models. We also considered whether the HCPC could strengthen its regulatory framework to deliver the improvements that we want and to make it more social work specific. It is responsible for 15 other professions, and we believe it would require a fundamental shift in its approach to create the model required for social work. It would be likely to involve additional costs and could impact on its ability to regulate the other professions for which it is responsible. We have therefore concluded that at this time we need a bespoke regulator which can bring an absolute and expert focus to standards in social work education, training and practice that the current system lacks.

I know that many noble Lords, including the noble Lord, Lord Hunt, have questioned this approach, given the Government's wider commitments to regulatory reform of the health and care professions. A number of noble Lords have also highlighted—as the noble Lord, Lord Hunt, has—that the regulation of social workers was moved to the HCPC in 2012. This decision and the decision to close the General Social Care Council were not taken lightly. We believed that it was the right decision at the time, but things do not stand still and, since then, the College of Social Work has also closed, creating a real gap in the representation and professional development of social workers. We have received the independent reports on social work education, which I previously referenced, and have identified continuing concerns about the quality of social work practice in some areas. That is why we think it is right to take a new approach.

However, that does not signal a change in the approach to the regulation of other professions; it is simply about making the right arrangements for social work. The Department of Health remains committed to broader reform of the health and care professions, building on the work of the Law Commission and the Professional Standards Authority in this area. However, it has not yet secured parliamentary time for a proposed public accountabilities Bill to inform wider professional regulation. We are discussing with interested parties how our ambition to simplify and improve the regulatory framework can be taken forward.

The new agency will support improvements across the social work profession by setting higher and more specific standards that go beyond the traditional safety-net approach of many regulations. The agency will set pre and post-qualification standards across practice, education and training, and CPD. It will not be a professional body. We believe this is the right approach for social work. There is no intention to replicate the representative functions of a professional body or membership organisation.

I assure noble Lords that we have, of course, also considered whether an independent regulator should be established. I will set out the key reasons why I believe it is not right to do that at this time. I have already set out the higher level of ambition that we have for our social work workforce: excellent social workers delivering world-class practice. Of course, government has a significant stake in ensuring high-quality social work practice, not least because it delivers vital services for the most vulnerable in the state. There is, however, a notable lack of consensus across the profession as to agreed standards of practice. Various efforts—through independent regulation and the development of the College of Social Work—have, unfortunately, failed to deliver what is needed or to move standards to where they need to be.

There are practical considerations too. Establishing a wholly new independent body will take time, as leadership and infrastructure are built from scratch, and our reform programme is rightly ambitious. The Government have significant resources, and it is right that they bring these to bear to rapidly deliver the reforms that we need. The effective functioning of an independent body requires, we think, a strong professional body. However, the profession has as yet been unable to sustain this, despite the Government investing over £8 million in funding the College of Social Work. I recognise, of course, that many noble Lords have signalled their support for a strong professional body. That was also raised by the Education Select Committee, which the Government also welcome. However, particularly given the recent experience with the College of Social Work, it must be for the profession to develop it.

For the reasons I have outlined, we remain convinced that regulatory reform is needed, but it cannot be addressed simply through the development of a professional body. For those reasons, we believe there is a strong and compelling case for moving the regulation of the profession closer to government at this time. This will allow us to rapidly deliver improvements and to embed a new regulatory system that supports this. I know that this closer relationship is a matter—

Lord Ramsbotham: My Lords, very briefly, what evidence does the Minister have, first, that moving the regulation closer to government can be done more quickly than establishing an independent regulator and, secondly, that it will be more efficient?

Lord Nash: As we have not done it, I cannot produce any evidence. However, given that the profession very recently failed to do it—and it seems to follow that it is unlikely suddenly to be able to get its act together quickly—and given the sense of urgency that we have about improving the quality of social work, we believe that if we put the forces of government behind this, we will be able to do it quickly.

Baroness Howarth of Breckland: I am sorry; I do not understand. Perhaps the Minister can help me. What does that mean? Who will be doing this? Who will ensure that the profession is improving? Who in government will do that? I am sure that it will not be the Secretary of State, so will it be officials—and how much experience do they have—or will there be people in the executive agency who will have experience? It is a serious question because I think it is crucial to know which personnel are going to be responsible for this terribly important task.

4.45 pm

Lord Nash: We will obviously bring in people from the sector, work with them in the establishment, consult them and make sure that we have appropriate professionals to run it.

However, the moves here to what noble Lords feel is greater government involvement are not wholly unprecedented. It is certainly true that regulation for many other professions is organised on a more independent footing. However, it is also true that it is not unprecedented for government to play a closer role in supporting the improvement of the quality of a professional workforce, such as in the case of teaching through the National College for Teaching and Leadership. It is also worth noting that the regulatory arrangements for social work in Scotland, Wales and Northern Ireland all involve a formal relationship with central government, as, of course, did arrangements in respect of the previous regulator, the GSCC.

The regulator will have a clear focus on protecting the health and well-being of the public and promoting greater confidence in the social work profession. It will do this specifically through developing an approach that focuses on practice excellence and on raising standards from initial education through to post-qualification specialism.

The regulator's key functions will include publishing new professional standards aligning with the chief social workers' knowledge and skills statements and setting new, tougher standards for initial qualification. It will also institute a more robust mechanism of testing whether courses meet them and aim to re-accredit providers by 2020. It will also focus on professional standards post-qualification by, for example, setting professional standards for specialist child and family and adult practitioners and accrediting those who achieve them. This will include overseeing the proposed new assessment and accreditation system for child and family social workers. The regulator will set new standards for continuous professional development specific to social work, maintain a single register of social workers and oversee a robust and transparent fitness-to-practise hearings system.

I hope that noble Lords will recognise the scale of our ambition here and agree that these functions will provide for a comprehensive, bespoke regulatory regime. Government, through the structure of an executive agency, will be able to bring its full resources to enable effective and rapid delivery, as I have already said.

I say clearly that the Government recognise that the regulatory framework needs to have operational independence. The exercise of its functions will be fair and transparent. I know that we are due to debate later the need for an improvement agency, and our debates will, no doubt, consider the appropriate role of regulation in raising standards. I will say more on these matters then, if I may. However, let me be clear now that what we propose is a regulatory body which will be focused on the delivery of core regulatory functions. It will not act as an improvement agency, nor will it seek to undertake the functions of a professional or representative body. We make no apology for the fact that in exercising these functions it will be charged with setting and improving standards.

I appreciate that the objective of ensuring public safety through regulation is important, and it will remain so. However, we do not see a clear distinction between public safety and standards. Social work is all about the safety of the most vulnerable in society, and only the highest standards of practice should be acceptable. As I mentioned earlier, the Government have made a public commitment to keep the regulatory arrangements for social workers under review. We will consult the sector after three years to take stock of whether the current arrangements are still fit for purpose. Specifically, we will consider whether the regulation of the profession can then be put on a more independent footing. I intend to bring forward amendments to the Bill to give these commitments statutory force. I hope this will provide some reassurance.

I would also like to touch briefly on the cost. Noble Lords will be rightly interested in the cost of establishing a new regulator, and specifically in whether this will be borne by social workers themselves. I reassure noble Lords that the set-up costs for the new agency will be met by the Government, and we will provide details in the autumn. While social workers will continue to pay a registration fee, we have no plans to raise it. Of course, if fee increases are contemplated in the future, they would be subject to consultation with the sector and registrants at the appropriate time.

I shall now speak to Amendment 135B, tabled by the noble Lord, Lord Warner, and supported by the noble Baroness, Lady Walmsley, on the creation of a new independent regulator for the social work profession in England, the general social work council. First, I warmly welcome the recognition that a new regulator is needed. I note that the intention behind this amendment is to create a new social work-specific regulator. I believe that the regulator we intend to set up will meet this test. It will be bespoke to the profession and, more importantly, it will be created in partnership with the profession.

I also note the range of functions envisaged for the regulator. Again, I hope that I can reassure the Committee that the powers we propose in the Bill and the functions that we propose the new regulator will exercise will deliver the important regulatory functions that noble Lords have specified. While I welcome the intentions of this amendment, I do not agree that establishing a fully independent regulator is the best approach for the profession at this time. I am not seeking to rehearse all the arguments already made nor to set out again the constraints in the current framework. I have addressed these already and would like here to address two further points.

I recognise that concerns have been raised about an executive agency being subject to the political priorities of government at the expense of a professional evidential base. There have also been concerns about Ministers being involved in decisions about the fitness to practise of individual social workers. I say clearly that the Government are committed to promoting evidence-based, professionally-led practice. This is borne out by the reform programmes that we have supported to date. For example, the knowledge and skills statements published by both chief social workers provide, for the first time, clear and concise statements of what social workers need to know. Our investment in teaching partnerships is also bringing employers and educators together. Regulatory reform will allow us to embed this.

The noble Baroness, Lady Tyler, raised the question of consultation. As I already said in answer to the noble Baroness, Lady Walmsley, we are committed to working closely with the sector to develop the details

[LORD NASH]
of these proposals. We intend to establish an expert working group to ensure that our proposals build on what has gone before and that the development of the regulator is managed in partnership with the sector.

I can also assure the Committee that the Government will put in place transparent and robust governance arrangements. We are clear that these can be achieved through the agency model. In summary, the agency's formal governance and accountability arrangements will be set out in a published framework document which will bring absolute transparency and accountability to how the agency is run and decisions are made. The agency's processes and systems will be governed by a set of regulations scrutinised and approved by Parliament. They will also be subject to wide-ranging consultation with the sector and other interested parties. The Secretary of State will be required to consult on any changes to the regulations and standards as a matter of course. In order to ensure that the new standards for social workers have their full confidence, they will be developed in partnership with the sector. The chief social workers will also be closely involved by lending their expertise and knowledge. These standards will also be subject to full consultation with the sector.

Decisions affecting individuals, such as fitness-to-practise outcomes, will be taken by experts on behalf of the regulator. So, too, will decisions about the accreditation of education and training programmes—another key function of a professional regulator. We are clear that these decisions will be taken at arms' length from Ministers.

We have also specifically given the Secretary of State the flexibility to provide in regulations for the appointment of a wide range of expert advisers and committees. This will ensure that the agency has the sectoral expertise and knowledge required to exercise its functions effectively. Alongside this, we have been in conversation with the Professional Standards Authority about how it might undertake an advisory role in respect of the new regulator's functions, particularly in respect of fitness-to-practise arrangements. We will continue to work with the Professional Standards Authority to ensure that we draw on its vital experience and expertise as we further develop the governance and accountability arrangements for the agency.

Before closing, I would like to address Clause 20, which allows the Secretary of State to make regulations to enable the regulation of social workers in England. These regulations will, of course, govern the operations of the new agency. We have published indicative regulations. I hope your Lordships have found them useful and are reassured about our intentions. I recognise the questions raised about the Bill's reliance on secondary legislation. I hope your Lordships will recognise that there is significant precedent for the approach that we have taken.

We have been mindful of work on regulatory reform undertaken by the Law Commission in 2014 which emphasised the need for flexibility—

Lord Hunt of Kings Heath: I just point out to the noble Lord that the Government have essentially rejected the Law Commission's work, so he can hardly pray it in aid. He will know that at the ministerial meeting held last week the noble Lord, Lord Prior, made it abundantly clear that the Government were not proceeding with the report. I think it is a little bit much to pray in aid a report which the Government have decisively said they are not going to go ahead with.

Lord Nash: As I said earlier, the recent report by the DPRRC agreed that it was not inappropriate for the Government to place the regulation of social workers in subordinate legislation, despite the width of powers being conferred. In respect of our ambition to establish a bespoke regulator of social workers, we believe that delegated legislation remains the most appropriate vehicle for a number of reasons. These include the level of operational detail in the establishment and transfer of regulatory arrangements, the need to regularly review matters such as professional standards, and the mechanics of operating a professional register, all of which, in our view, point to the need to make appropriate use of secondary legislation.

In closing, I reiterate that reforms are needed as quickly as possible. I believe that our approach can ensure a new system of regulation for social workers—designed in partnership with the profession—which is transparent and has the flexibility to meet the needs of this vital profession both now and in the future.

I hope that the safeguards and governance arrangements that I have set out, the commitment to wide-ranging consultation with the sector and a clear point of review will provide the necessary reassurance that the proposed model of regulation is fit for purpose. In view of this, I hope that the noble Lord will be able to withdraw his amendment and agree that these clauses should stand part of the Bill.

Lord Warner: My Lords, I listened to the Minister with increasing disbelief and I think that many Members sitting on this side of the Room did as well. I do not really know where to start, other than to say that I am totally unconvinced by his arguments. He and his department simply do not understand the difference between improvement and regulation, and I shall take up one or two points.

He said that fitness-to-practise decisions will be taken by experts on behalf of the regulator. That is what he said. But the regulator takes the decisions—that is why the regulator is set up. It is not some other set of experts but the regulator who takes the decision on fitness to practise, which effectively is often a decision to stop someone's livelihood as a professional. That is why it is very important.

I found some of what the Minister said extraordinarily strange. He is asking us to take it on trust that there will be a set of consultation arrangements with the professions and all these interests if we just give him the powers in the Bill. That is the nub of what he is saying: "It will all be alright on the night because we are good guys and will consult people". I might be more trusting of that if I had seen some evidence that the Minister and his department had consulted all these interests before coming forward with this Bill. In my view, one of the best predictors of future behaviour is past behaviour, and I do not see much sign that evidence has been put to the profession. There might

have been a chat between the chief social worker and a few trustees out there, but to many of us it does not look like much more than that.

I am astonished that the Department for Education, of its own mere motion, is taking responsibility for the regulation and improvement of social workers who work with adults. There is a major machinery-of-government issue and my starting point is to go to the Cabinet Secretary and ask whether proper processes have taken place within government between these two departments. From the evidence I have seen and heard so far, they have not.

5 pm

What the Minister may not realise is that we have a body called Health Education England which has powers, given by this Government, to look at the issue of social work training in relation to working with the NHS. The Minister may not realise what an important part of government policy the integration of adult social care with the NHS is and that work is going on in other bits of government to see whether, in the future, there might need to be people who can work across that adult social care and NHS border. Meanwhile, back at the ranch of DfE, all this is being dealt with by a set of officials who do not have any expertise, if I may say so, in adult social care. The Minister was totally unconvincing when he responded to some of our concerns about this.

I shall not go on any further, other than to say that I am not convinced at all by what the Minister has said, I will definitely be returning to this at Report and, on the present evidence, we will be tabling an amendment and pushing for a vote. In the meantime, I beg leave to withdraw the amendment.

Amendment 135B withdrawn.

Clause 20 agreed.

Amendment 135C

Moved by ***Lord Hunt of Kings Heath***

135C: After Clause 20, insert the following new Clause—

"Social Work Improvement Agency

(1) There shall be a body corporate to be known as the Social Work Improvement Agency (referred to in this Act as "the Agency"), which shall have the functions conferred on it by or under this Act or any other enactment.

(2) It shall be the duty of the Agency to promote in relation to England—

(a) high professional standards for social workers;

(b) high ethical standards for social workers;

(c) high standards in the training of social workers; and

(d) continuing professional training and development for social workers.

(3) The Agency shall, in the exercise of its functions, act—

(a) in accordance with any directions given to it by the appropriate Minister; and

(b) under the general guidance of the appropriate Minister.

(4) Regulations made by statutory instrument may provide for the appointment and financing of the Board of the Agency and for the appointment of staff to the Agency.

(5) Regulations made under this section are subject to the affirmative procedure."

Lord Hunt of Kings Heath: My Lords, I do not intend to repeat the arguments of the previous debate, but I will pick up two things that are relevant to improvement. First, on my noble friend's point about integration, those of us who are mainly health orientated find it quite extraordinary that at a time when health and social care are increasingly being integrated, adult social care regulation is being taken away from a health and care regulatory function and being put under the auspices of the Secretary of State for Education, who clearly has no remit or interest in adult social care.

It is well known that the Department of Health opposed the changes. As happens in the machinery of government, in the end it was forced to give way, but this is clearly a department that knows very little about the world outside education, that makes policy on the hoof and that has made a quick decision to legislate. This is clearly a cut and paste job given to parliamentary counsel at very short notice. We have here the makings of a complete shambles, which we know will end up in tears if allowed to go ahead. Everyone on this side of the House—we have huge experience in this area—knows that this is a shambles, a debacle in the making.

The more I hear the Minister, the more I agree with him on the issue of improving standards. There is no disagreement on the broad principles, it is simply that his department has confused regulation with improvement. It keeps insisting that they can be done together. The noble Lord, Lord Nash, said that the Professional Standards Authority has expertise and experience, and, of course, it does. I take him back to the evidence we received a few days ago about the importance of separating the roles of regulation and improvement. He said that the role of the investigative agency was to set and improve standards. What the PSA says is:

"Regulators are responsible for protecting the public by setting and upholding standards of conduct and competence, controlling entry to the profession and taking action in response to concerns about conduct or competence".

On professional development and improvement, it says:

"Professional bodies, such as Colleges, are generally responsible for improvements to education, training, professional practice and continuing professional development".

The Minister is consistently talking about the latter responsibilities, not about regulation. I have a low-cost solution, which is to focus on the improvement agenda, which we are all behind. I take his point about what happened in the past. I understand the tensions there between a statutory improvement agency and the role of BASW.

I thought that the Education Select Committee's report was helpful in this regard. It set out what it believed should be the functions of a new professional social work body and said that it should:

"Be a 'broad church' that represents a diverse workforce of social workers in a range of settings … Provide high profile leadership and a national voice for the profession which explains what social work is and what social workers do … Make the profession an attractive choice by building a professional identity and culture … Defining the continuing professional development and post-qualifying pathway for all social work … Promote practice excellence … Shape and influence national and local policy and … Build good working relationships with the Government".

[Lord Hunt of Kings Heath]
It is a remarkably good report and I cannot disagree with it.

The report then says:

"We recommend that the Government facilitate the development of a professional body for social work, working in partnership with … (BASW), other social worker representatives and the wider sector".

That seems perfectly sensible. Why do the Government not just do that? We would support it. I have no problems with the Secretary of State having oversight of such a body, so all that the Government need to do is to say that they will leave regulation to the HCPC and get on with the vital job of leadership and improvement. The Minister would have our support and he would not disrupt the profession with these really ludicrous proposals to take a low-cost, well-functioning regulatory system away from the HCPC, which his Government and that department put in place only three or four years ago. I beg to move.

Lord Warner: My Lords, my name is on this amendment, which is probably bad news for the Minister, and I support what the noble Lord, Lord Hunt, said. I want to add a couple of points on setting up a new unit by coming back to the issue of the Department of Health and adult social workers. It needs to be a unit which would deal with both groups of social workers, which means it needs some machinery that represents the interests of both the Department of Health and the Department for Education. I still see no really convincing evidence that it has been thought through in terms of those departments working together on something to benefit the range of social workers—those who work with children and those who work with adults. If we were to go down this path, there would have to be an agency or unit. I do not think one would mind what it is but it would have to be a convincing agency that looked across the spectrum of social work with children and adults.

I also want to pick up on some of the Minister's comments in the discussion on my Amendment 135B. At the end of the day, if the Minister has all this money and wants to get on quickly—he said that he had the money and wants to get on speedily with the job of improving social work—then I would say, having been a Minister in government, that the fastest way to do that, as some of us have done, is to set up some kind of grouping across the piece. It would include the types of social workers for adults and children, and all the outside interests. The Minister could almost do that before the autumn and before we come to this on Report. At a later stage, that could be turned into an executive agency if he wanted to do that. There is nothing to prevent the Government putting in place very quickly indeed something of the kind that the noble Lord, Lord Hunt, suggested if they have the money and the capability. If they have those then they should do it; they do not even have to ask Parliament.

If the Government want to improve some of the training requirements for social workers, they could also have a conversation with the HCPC, which will be looking at education in September. It has committed to that as part of its work programme. I am sure that any regulator in this area would always listen to a government department or the Government of the day and consider the evidence for change.

If the Minister is really in a hurry and wants to take people with him, why does he not use what is available now, get on and have a discussion with the HCPC and set up a unit jointly with the Department of Health to do as much improving and make as many changes as he wants? Why are we all being subjected to, and spending some of the best years of our lives discussing, the shambles that is Part 2 of this Bill? It is a sad waste of parliamentary time and I do not think that it is terribly good for the profession, which is being subjected to a lot of uncertainty when it needs more confidence and more certainty. I hope that, even at this late stage, the Minister can see that there are some merits in the approaches of the two amendments.

Lord Ramsbotham: My Lords, I was attracted to putting my name to Amendments 135B and 135C because of their cleanliness and simplicity, and the fact that they picked up all the points that had been made in the Government's policy statement, *Regulating Social Workers*, which was published last month. There was nothing missing. Furthermore, what the amendments proposed was independent and objective, and therefore they were likely to attract the support of the profession.

I could not help reflecting on two things. One was that when I was Chief Inspector of Prisons, when I inspected a prison that had an under-18 wing the social services were responsible for under-18s at that time, so I took a social services inspector with me. She said that if it had been a secure children's home, it would have been closed because of the lack of facilities. Those facilities were then under the direction of the Home Office, which claimed to be responsible for young people in custody. That has always suggested to me that government should not get close to the delivery of these things.

The second thing, which I admit struck me as strange, was on page 19 of the *Regulating Social Workers* report. One paragraph says:

"Ministers will lead on issues such as setting standards and delivery of responsive improvement programmes to raise the calibre and status of the profession".

The next paragraph says:

"While Ministers retain ultimate responsibility, decisions will be kept at arm's length".

How can you lead at arm's length? It struck me that there was considerable confusion in all this and that therefore the Government can consider the clarity of Amendments 135B and 135C as helping them to deliver what they want. As the noble Lord, Lord Hunt, said, we all want improvement as quickly as possible, and I think that the profession does as well. We appear to be in the mire of confused thinking, which could be avoided by withdrawing from it.

Baroness Walmsley: My Lords, I hope that the Minister sees Amendments 135B and 135C as a helpful attempt to get over problems with the way that the Bill is currently worded. There are two clear issues: one is the muddling together of regulation and improvement and the other is independence.

The Minister made a very decent argument for a new regulator focused solely on social work. Many social workers agree with that. Indeed, that is exactly what Amendment 135B would do, but it would not muddle it with improvement and, of course, the regulator would be independent. I was a little confused by some of the things that the Minister said about independence in the debate on the previous group. He talked about moving the whole thing closer to government but he also talked about operational independence. Those sound like two conflicting things to me. Given that the HCPC is both financially and operationally independent, what it is about the way it has operated its independence that make the Government think that the new body should not be independent?

5.15 pm

Moving to improvement, the noble Lord, Lord Hunt, has put together an amendment to which we have added our names, which gives a clear mandate to a new agency charged with improving standards within social work, improving the profession's status and attracting more people to it. There are probably lessons to be learned from what happened to the College of Social Work, which was set up at a cost of about £5 million. I think that the total funding was about £8 million, but the set-up fees were about £5 million of that. Other professional colleges hold a full range of functions necessary to be both financially stable and credible. However, the College of Social Work suffered from the fact that it was vulnerable from the start because of an ongoing lack of coherence about its core functions.

That is why Amendment 135C, moved by the noble Lord, Lord Hunt, is clear about what the mandate for the new improvement agency would be. That is very important because the confusion to which I have referred had a great impact on the work and sustainability of the College of Social Work. The new professional body must have a clear and explicit mandate and set of functions, and have a sustainable business plan. Noble Lords on this side of the Committee feel that that package would be very helpful to the Government in achieving their objective, which we all agree with, of improving the quality of social work, and doing so fairly quickly if we are to build on what has gone before.

Baroness Pitkeathley: My Lords, one could scarcely fail to notice that when the Minister talked about the very welcome aspects of the things that this new regulator is going to do, they were, as others have said, mostly focused on the improvement of social work. There is no disagreement about this. Everybody wants to improve and support social work. However, the actual functions of a regulator always come very far down the Minister's list when we talk about registration and the fitness to practise of social workers. Fitness to practise involves not being fit to practise and social workers being struck off a register, which is a very important part of what a regulator does.

Any regulatory system for social workers should ensure parity of esteem for the social work profession with that accorded to other public service professions entrusted to undertake high-risk professional tasks. For me, that is an argument for keeping the system within the Department of Health, which regulates many of those other professions. Any regulatory system should also provide stability for social workers. One thing that we have not given social workers in recent years is any form of stability. Some of us here are old enough to remember CCETSW before we had the GSCC, and all the controversy surrounding that. Then we went to the HCPC. That lack of stability has added to the problems of the workforce and the severe current retention problems with which we should all be concerned.

Any regulatory system must also be cost-effective to both central and local government and not be provided for at the expense of resources needed for service delivery, about which my noble friend Lady Howarth—I call her my noble friend—has already talked so eloquently. It must not result in the deterrent of unacceptably high registration fees falling on very poorly paid social workers. I am still not convinced about that. It seems to me that the HCPC already does parity, stability and being cost-effective. We could leave regulation there, along with consulting the HCPC to undertake some improvements, which I am sure it would be willing to do, and with the existing oversight of the Professional Standards Authority and a responsibility to the Privy Council, which is also where the HCPC sits. If we did that, and had a separate improvement agency, which, as the noble Lord, Lord Warner, said, could be set up very quickly, and given the great amount of agreement from everybody in your Lordships' House and across the piece, why does not the Minister at least give that serious consideration over the summer?

Baroness Pinnock: My Lords, the Minister referred earlier to the regulator having a role in fitness to practise. He is absolutely right; that is what a regulator has a duty to do. However, I refer again to the policy statement produced last month by the Department for Education and the Department of Health. It refers to professional standards which will cover four elements: on proficiency, performance, conduct and ethics and, it says:

"Continuing professional training and development".

If I were looking through the eyes of a social worker at what was being set up here, I wonder how happy I would be to have a regulator that was going to establish the standards and have the right to strike me off if my proficiency was not up to scratch in any way, yet was also going to set out my continuous professional development. When we had the meeting with the chief social worker, she said that social workers have a range of ambitions when they go into social work, at one end of which is their role in challenging society and how the Government see society. That is one of the complex and noble reasons why people become interested in and go into social work.

Paragraph 119 of the policy statement relates to CPD. It states:

"The new regulator will set new standards for CPD",

and refers to,

"options on how to ensure compliance … This will include appropriate sanctions for non-compliance".

Here we have a regulator concerned with fitness to practise, as regulators are, while it may impose sanctions for non-compliance with what it has set up for professional

[Baroness Pinnock]
development. That is at the heart of what the noble Lord, Lord Hunt, said earlier when he referred to the medical profession. He spoke about the importance of separating the state and government from what is at the heart of social work, as opposed to regulation.

So what is at the heart of development? Which route should we go down when we train social workers for mental health practice, for instance? Should it be the route that the Government may want, ensuring that more people are taken into secure units, or should the approach be more one of community care? If the regulator has responsibility for both fitness to practise and compliance with its own list of what CPD should include, we are down a very dangerous route, and I am sure the Minister would not want that to happen. CPD needs to be separate. If we have a profession, as we do, continuous professional development must be separated from the regulator. That is at the heart of this amendment, which I support.

Lord Nash: My Lords, in view of what the noble Lord, Lord Warner, said about how we are apparently wasting everybody's time, I will try to be brief, but I shall deal with his first point about the involvement of the DoH. The two departments have been working very closely together and will continue to do so. I have two officials from the DoH here today, and both departments will be involved in the governance.

Amendment 135C seeks to establish a new social work improvement agency under the auspices of the Government which will have responsibility for promoting the highest standards of practice, conduct, education and training and professional development. I understand the intention that this new agency would work in partnership with an independent regulator to raise standards across the social work profession.

As noble Lords will be aware, regulators traditionally have three key roles: first, to set and maintain standards; secondly, to control entry to the profession; and, thirdly, to take action in response to concerns raised about registrants. These functions are distinct from the quality improvement activities commonly carried out by a professional body or college. We understand the concerns that have been raised by the sector and the Professional Standards Authority about conflating regulatory and improvement functions in the one organisation. We agree that the blurring of these functions can lead to conflicting and competing priorities, and can leave regulators open to accusations of marking their own homework.

Let me be clear: we do not intend to set up a regulator that also doubles as an improvement agency, nor are we setting up a professional body. The agency, however, will have a remit that goes beyond simply setting minimum standards for public protection. Just as the GMC standards define good medical practice, so the standards of the new regulator will seek to set out what constitutes good social work practice rather than what is just acceptable. Social work requires an approach that goes beyond the traditional safety net role of professional regulation. Social workers take critical and complex decisions in high-risk environments on a daily basis. Therefore, it is only right that regulation is focused on ensuring that all social workers have the knowledge and expertise to not only be fit to practise but to be able to practise well. We make no apologies about this.

Unfortunately, the social work profession has been unable to sustain a professional body to support the work of a regulator in raising standards. Most other healthcare professionals are supported by strong professional bodies which take an active role in quality improvement, supporting and completing the work of the regulator. The Government have invested significantly —over £8 million, to which the noble Baroness, Lady Walmsley, referred—in the College of Social Work to address this gap. However, the College of Social Work was unable to attract the membership required to make it financially sustainable.

The Government understand that the development of a strong professional body is important to raise the status and standing of the profession in the long term. The Government cannot do this alone. An organisation that can articulate the views and interests of social workers and complement the work of the regulator is needed. However, our recent experience with the failed College of Social Work makes clear that this is for the profession to develop, own and maintain. We are not asking the agency to also perform this role. We are happy to continue to talk to the sector about whether it can establish its own body but, as I say, it must be developed and maintained by the sector.

As I set out previously, to bring about the reforms needed the social work profession needs a bespoke regulator with an absolute focus on raising the quality of social work education, training and practice and setting new and more specific standards. Alongside improvements to the regulatory system we will, of course, continue to invest in supporting the profession. The new agency will have a wider regulatory remit than traditional regulators and will go beyond minimum standards. It will do this through the setting of specific and higher standards.

The reforms that are needed to practice standards cannot be addressed through the development of an improvement agency. To allow us to rapidly deliver improvements and to embed the new regulatory system, the regulator will set new tougher standards for initial qualification, focus on professional standards for post-qualification, set new standards for continuous professional development, maintain a single register of social workers and oversee a fitness-to-practise hearing system, to which the noble Baronesses, Lady Pitkeathley and Lady Pinnock, have referred.

I can assure noble Lords that the Government do not intend to set up an agency with dual and conflicting roles. The new regulator will ensure that all social workers have the knowledge and expertise needed not only to be fit to practise but to be able to practise well. I hope the arguments I have set out will give the noble Lord the confidence to withdraw the amendment.

Lord Warner: Perhaps I may take the Minister back to his opening remarks, which were meant to reassure me because he had a couple of Department of Health officials behind him. However, the Minister is not taking seriously the machinery of government issue.

5.30 pm

I am a member of a committee set up by this House to look at the sustainability of the NHS. We are taking evidence from the Department of Health and the Department for Communities and Local Government about the workforce issues, which straddle adult social care and NHS staff. We are told today, rather blithely if I may say so, that actually what the Government are now trying to move towards is a workforce which is regulated for social workers within the Department for Education, with some involvement—we know not what—from the Department of Health.

The Minister seems quite jovial about this, but it seems extraordinary to me that we are dealing, in one part of government, with social workers as though they are linked to the NHS for adult social care and that their improvement needs to be engineered through that department, but somehow, along the way, they have been slipped into the Department for Education. I have to tell the Minister that this is very unconvincing and rather serious machinery of government. I hereby give him notice that I am going to write to the Cabinet Secretary to ask for some explanations about the machinery of government and how it is working in this area.

Lord Hunt of Kings Heath: That was a very interesting comment. I just do not get it. The noble Lord, Lord Nash, says that the Government do not want to blur the functions between the role of the regulator and the role of the improver, but then he talked about the work of the regulator in raising standards and he also talked about the regulator taking responsibility for continuing professional development. I am afraid that that is a direct blurring of the two roles. That is the problem we have. My impression from the debate is that we may need to focus on the first group, because the Government are clearly determined to have a separate regulator for all social workers. It is a pity, but if that is the case, then the emphasis must be on preventing the Secretary of State having any direct connection with regulation and on raising some very important issues around how such a regulator should be established.

I draw noble Lords' attention to Schedule 1 to the care Act 2000, which sets out very clearly how you can set up an independent regulator. It sets out the appointment of a chair and members, and for the life of me I do not understand why the Government could not produce a Schedule 1 within a couple of weeks—it is all very straightforward. It would establish independence, which is clearly essential and which your Lordships will, I believe, insist upon on Report, and set up an independent regulator, because the Government are clearly determined to do it. I have a big problem, because what they really want is improvement—CPD. We all agree with that but it cannot be done by a regulator. Regulators are there to drum people out of business if they do things which lead to unsafe practice. That is what they are there for; they cannot do the agenda that the Government seem to want them to do. It is a completely different world. However, this has been a good debate and I beg leave to withdraw my amendment.

Amendment 135C withdrawn.

Amendment 136 had been withdrawn from the Marshalled List.

Clause 21 agreed.

Clause 22: Registration

Debate on whether Clause 22 should stand part of the Bill.

Lord Hunt of Kings Heath: My Lords, noble Lords will be reassured to hear that I do not intend to speak to every clause; I just want to raise points on three of them.

The first concerns Clause 22 and the question of fees, and I do not want to repeat what has been said. Obviously, setting up a separate regulator will be more expensive than regulation continuing under the HCPC. I think that the implication of what the noble Lord, Lord Nash, said was that it will be done without increasing fees for social workers. However, is there not a general rule in government about regulators having to be self-financing? We have dealt with various orders on increased fees in relation to health regulators because of the requirement on those regulatory bodies to break even, so is the Minister right in saying that fees will not have to increase? There may be some legislative provision to cover this. Is there not a requirement that a regulator can start with a subsidy from a central government department but, in the end, it has to consume its own smoke? I suspect that the noble Lord will not be able to respond immediately but, on Report, we would like a much more explicit statement about what will happen to fees in the future.

My second point relates to a question about offences raised by the Constitution Committee in relation to Clause 34. The committee says:

"The Clauses to which the offences will relate—Clauses 22 and 23—contain little detail on the face of the Bill but will themselves need to be defined and implemented by regulations … From a constitutional point of view, the creation of criminal offences, whether or not punishable by imprisonment, should be subject to proper and full parliamentary scrutiny. The House may wish carefully to consider how it can appropriately scrutinise the creation of criminal offences which are not only themselves undefined but which will relate to other legislative provisions that are also still to be delineated".

I can imagine that if this Bill ever got to the attention of our legal experts in the House, they would express very great concern about the use of what are basically Henry VIII powers to create new offences. I do not think that it is good enough for this change to be brought about just through regulations.

Thirdly, I want to refer to the Delegated Powers and Regulatory Reform Committee, which says:

"Clause 35(3) allows social worker regulations to include provisions which themselves would confer a further power to make, confirm or approve subordinate legislation. It says nothing explicitly about the person or persons on whom subordinate legislation making powers may be conferred, or about the matters to which the subordinate legislation might relate. We assume the intention is that the subordinate legislation making powers may be conferred on the regulator or a Minister of the Crown, and that they can relate to any matter dealt with in Chapter 1 of Part 2".

[Lord Hunt of Kings Heath]

It goes on to say:

"We were disappointed"—

House of Lords committees express angst by expressing disappointment—

"that the Department failed to provide any explanation for including the subordinate legislation making power in clause 35(3), particularly given its breadth, the lack of any explicit constraints on how it might be used and the absence of any requirement for Parliamentary scrutiny".

I know that the Government have now responded to the Delegated Powers Select Committee but can the noble Lord place on the record their response to this? Obviously, it raises a question about whether this is an appropriate use of secondary legislation.

Baroness Walmsley: I share the concerns of the noble Lord, Lord Hunt, particularly his first point about the fees from social workers. Those of us who speak to the health portfolio will know well that we have had concerns expressed to us, particularly by people who run small care homes, about the CQC fees being increased very considerably recently. The reason for that is the Government's policy that regulators should be self-funding, which is an example of exactly the policy that the noble Lord has just queried. The question that he asked is: does this apply to the new regulator proposed by the Government for social work? If it does, then reassurances that fees will not rise are perhaps a little disingenuous.

Lord Nash: My Lords, perhaps I can respond first to the point made by the noble Lord, Lord Hunt, and the noble Baroness, Lady Walmsley, about fees and self-financing. I will look at that and respond in due course. Secondly, the noble Lord, Lord Hunt, raised a point about offences, while his third point was about Clause 35 and what it is proposed to cover.

So far as offences are concerned, Clause 34 contains a power to create offences covering a number of specified areas. I have been clear throughout the passage of the Bill that any system of regulating professionals must focus on public protection. In order for this to be effective it is essential that the register is accurate, that it is based on current information and that people co-operate with regulatory processes. This clause contains powers to create offences that directly address these issues.

The indicative regulations make provision for three categories of offences that are, of course, subject to consultation. They include offences that relate to: registration and restrictions on practice and protected titles; the provision of evidence; and in connection with providing false or misleading information. These are all important safeguards for public safety that will benefit individuals, employers and the profession as a whole. The indicative regulations provide for offences in relation to matters including: using the title of social worker with intent to deceive when a person is not registered; falsely claiming to be registered with intent to deceive; making a false representation as to qualifications, education or training or anything included or not included in their entry in the register, with intent to deceive; failing to comply with requirements to provide documents or other information to the regulator, or to attend to give evidence when required to do so; or fraudulently procuring or attempting to fraudulently procure the making, amendment, removal or restoration of an entry in the register by providing information or failing to provide information in breach of requirements under the regulations.

The purpose of creating offences under these powers is not to prosecute large numbers of people. I think that is clear from the offences, which set a fairly high bar. Rather, it is to provide for an effective deterrent that helps ensure people co-operate with the regulator and with the processes of regulation.

The noble Lord, Lord Hunt, referred to Clause 35, which provides that the regulations may be used to confer functions on either the regulator or a Minister of the Crown. They could also provide for those responsible to delegate the exercise of functions and decision-making to others, where this is appropriate. The regulations may be used to confer powers to make, confirm or approve subordinate legislation. The intention is that rules will provide for the detail about how the regulator will discharge relevant functions. The indicative regulations provide an illustration of this approach by setting out, for example, that rules will be made regarding the procedural and administrative arrangements for registration and for the operation of the accreditation scheme. I remind the Committee that there are similar powers under the current regime. That is all I propose to say at this stage and I therefore move that these clauses stand part of the Bill.

5.45 pm

Lord Hunt of Kings Heath: Is it the Minister's intention to write about fees?

Lord Nash: I will respond, yes.

Lord Hunt of Kings Heath: We are having only one debate. Is the noble Lord going to write?

Lord Nash: Yes.

Lord Hunt of Kings Heath: I am grateful to the noble Baroness for reminding me of the CQC. I am afraid my memory is going. We debated it only about four weeks ago. The Care Quality Commission hiked fees up hugely because the Government essentially said, "We are not going to sub you any more". They prayed in aid previous legislation and the general rule about government and how regulatory bodies have to be funded. That is why it is obviously an important question.

I take note of the Minister's response on Clause 34, which was very helpful. I understand the point he is making on Clause 35(3). Autonomy in relation to rule-making powers is a point well taken, but the Law Commission report on which the policy is based was concerned with regulated bodies that were independent of government and under the auspices of the Privy Council. That is the difference. It is why, in the end, it is essential to have this new regulator as an independent body established properly in statute by primary legislation. This has been a short but useful exchange.

Clause 22 agreed.

Clauses 23 to 26 agreed.

Amendments 137 and 138 not moved.

Clauses 27 to 47 agreed.

Committee adjourned at 5.48 pm.